

**February 28 - March 1, 1999**  
**National Commission on the Future of DNA Evidence**  
**P R O C E E D I N G S**  
**Meeting IV**  
**Hotel Adolphus**  
**Dallas, Texas**



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## Agenda

SUNDAY, FEBRUARY 28, 1999

- 2:00 - 2:10 [Remarks by the Vice-Chair](#)  
Dr. James Crow  
University of Wisconsin, Department of Genetics
- 2:10 - 2:30 [Update on Commission Business](#)  
Christopher H. Asplen, AUSA  
Executive Director
- 2:30 - 2:50 [Research and Development Working Group Report](#)  
Dr. James Crow, Chair
- 2:50 - 3:10 [Legal Issues Working Group Report](#)  
Professor Michael Smith, Chair
- 3:10 - 3:30 [Discussion](#)
- 3:30 - 4:00 [Post Conviction Issues Working Group Report](#)  
Judge Ronald Reinstein, Chair
- 4:00 - 4:15 Break
- 4:15 - 4:45 [Crime Scene Investigation Working Group Report](#)  
Chief Terrance Gainer, Chair
- 4:45 - 5:15 [Training and Education Issues in Rural Law Enforcement](#)  
Dr. Lee Colwell, Director  
Arkansas Criminal Justice Institute
- 5:15 - 5:45 [Laboratory Funding Working Group Report](#)  
Dr. Paul Ferrara, Chair
- 5:45 - 6:00 Discussion

MONDAY, MARCH 1, 1999

### [Presentations and Discussion on DNA Sample Collection from Arrestees and Suspects](#)

- 9:00 - [The Honorable Frank Weathersbee](#)  
9:45 State's Attorney, Anne Arundel County, Maryland
- 9:45 - [Barry Steinhardt](#)  
10:30 Associate Director, American Civil Liberties Union
- 10:30 - Break

10:45

10:45 - [Mr. Harlan Levy](#)  
11:30 Defense Attorney, New York

11:30 - Working Lunch  
12:15

12:15 - [Commissioner Howard Safir](#)  
1:30 Police Commissioner, New York City Police Department

1:30 - [Commission Discussion](#)  
2:30

2:30 - Break  
2:45

2:45 - [Continued Discussion](#)  
3:30

3:30 - [Public Comment](#)  
4:00

## February 28, 1999 - Appearances

JAMES CROW, Ph.D.  
TERRANCE W. GAINER  
CHRISTOPHER H. ASPLEN  
MICHAEL SMITH  
PAUL B. FERRARA, Ph.D.  
AARON D. KENNARD  
HON. RONALD S. REINSTEIN  
PHILIP REILLY, M.D., J.D.  
NORMAN GAHN  
JOSEPH H. DAVIS, M.D.  
BARRY C. SCHECK  
JAN S. BASHINSKI  
GEORGE W. CLARKE  
DARRELL SANDERS  
JEFFREY E. THOMA  
LISA FORMAN, Ph.D.  
ROBIN WILSON  
LEE COLWELL, Ph.D.  
HARLAN A. LEVY, ESQUIRE  
HOWARD SAFIR  
BARRY STEINHARDT  
HON. FRANK WEATHERSBEE

## Remarks by the Vice-Chair

Dr. James Crow

University of Wisconsin, Department of Genetics

DR. CROW: Well, let's get this meeting underway. If it's not apparent, I'm not Justice Abrahamson. I'm substituting for her, and I'll explain why. It's not hard to explain why.

Shirley -- I can't keep from calling her that, because I knew her when she was a graduate student and her husband was a post-doc in my lab -- she is up for reelection as Chief Justice of the Supreme Court, and I think she has rationally concluded that there are more votes in Wisconsin than there are here and that she'd better stay home and accumulate them, and if it isn't being too partisan, I'd like to announce that I hope she wins.

Welcome to everybody. I'd like to welcome each of you individually, but I don't know all the names, and I want to get the program underway.

Well, that constitutes my introductory remarks, which were allotted 15 minutes, and if everybody else can stay on the schedule that well, this will be a successful meeting.

Chris, it's yours.

## Update on Commission Business

Christopher H. Asplen, AUSA  
Executive Director

MR. ASPLEN: Thank you. I can now bring that progress to a screeching halt. A couple of matters regarding some Commission business but also kind of where we hope to go with this particular meeting today and tomorrow, what our thought was in designing it the way we did, and also some looking towards the future, some plans for the future of the Commission.

First of all, I'd like to take the opportunity to introduce a few folks who are with us, who are in the audience, if you will, the public section.

Kim Herd is the Director of the DNA unit for the American Prosecutors Research Institute, which is the training and education affiliate, if you will, of the National District Attorneys Association. We appreciate her presence here, and input, as we go through this process.

Also, Clay Strange is with us. Clay is a prosecutor in Austin. Clay is the former Director of the DNA unit at APRI and is also a member of the crime scene working group for the Commission.

Mr. Frank Weathersbee is also here. He has come in. He's going to be speaking to us tomorrow and involved in that discussion. He's the State's Attorney from Anne Arundel County, the Annapolis area of Maryland.

I see Dr. Rau there.

Dr. Lee Colwell, you'll be hearing from later on today, is the Director of the Arkansas Criminal Justice Institute and will be speaking to us this afternoon about rural law enforcement issues.

We also have Mr. Ed Koch, who is here from -- as a representative from Mayor Schmoke's office in Baltimore, as Mayor Schmoke could not attend today.

Also, as I understand it, Phil Reilly will be here, albeit it a little bit late. He had a speaking engagement in Bethesda this morning.

And I know that Judge Reinstein is here.

I know that Mr. Scheck is here.

And other folks will be joining us shortly.

So, those introductions having been done, let me go to today's meeting and carry through to tomorrow.

The hope in -- the hope of the staff today is that we use the opportunity to listen to the working group reports and identify the issues that they're handling and to use the Commission to really make sure that the working groups are really traveling down the paths that the Commission wants them to go, if you will, and to use the Commission to provide some guidance to them, see if there are any issues that the Commission would like those working groups to address, and then to hopefully identify other issues and identify some other folks that we should bring into this process.



It's the nature of the structure that we've created here with the Commission and then the working groups that we have to revisit them with the full Commission occasionally and really make sure that the working groups are doing the work of the full Commission.

That being said, the fact that the laboratory funding issues working group report is not listed on the agenda, as I'm sure you all noticed, is not an indication of the extent to which we don't want input on that matter.

It is purely a typographical error on my part, and we will fit a discussion in on where that group is going with Paul today or tomorrow, depending upon how the schedule goes.

We've talked about, at our last meeting, some crucial issues, particularly as they pertain to the collection of database samples at our last meeting in -- we had a meeting at the American Academy of Forensic Sciences, a meeting in Florida. So, we'll talk about that a little bit today, also.

What we really need to do, quite frankly, is -- believe it or not, we're halfway through this process, actually a little bit more than halfway through the process.

The charter for the Commission lists its termination date as this coming September. However, because the Commission took about six months to get up and running, by the time all the paperwork was done, we'll need to extend it to some extent.

I hope that you can all continue through for that extension, and we'll let you know when that has been done, but we really are about halfway through the process, and as such, we need to look towards wrapping the Commission's work up, which is really what we want to do today.

We want to define exactly where it is -- where we'd like to go with the different issues along those lines and wrapping things up.

The material that you've received in your packet of information before the meeting included, aside from the agenda and the biographies of some of the folks who are going to be speaking to us today and tomorrow, you also received a three-page recommendation which is the -- simply the written version of what the Commission approved at the last meeting.

Now, at the last meeting, we had talked about putting it in writing, sending it out to the commissioners, and having you folks send it back with your sign-off on it, but in speaking to Chief Justice Abrahamson about it, we thought that it would be more appropriate to take more time with it and bring it to the group, and our hope is that this language will be suitable to you.

The Chief Justice has gone over it several times, it's been through several different versions, and this is what she thought was appropriate to bring to the group, and as such, we'd like to work towards a resolution of that issue.

If we can get that signed off on today, we can forward it to the Attorney General directly. It will be forwarded to the Attorney General under cover memo by Jeremy Travis from the National Institute of Justice, as this is a National Institute of Justice-administered function.

Also included in your packet of information is the legal issues chapter of the post-conviction recommendations. Again, those recommendations were discussed and voted on at the last meeting, in the absence, however, of that chapter, and we said that we would get that to you.

Again, we thought it important not to do it by mail but to do it in a form where we took some time to discuss it if there were some thoughts on it, but our hope, having gone through and revised that chapter several times, is that will meet with approval, and again, we can get that matter off the Commission's list, if you will.

Let me say this, though. I think the way that that will necessarily have to proceed is that we approve the recommendations as they are and that the appropriate changes have made, also, aside from legal issues, the appropriate changes have been made that were suggested at the last meeting.

I believe that Ms. Wilson has passed out the full copy of the recommendations, all the chapters, you should have those also, to show that we did incorporate the changes that were listed by the different commissioners at the last meeting.

What we probably cannot do is produce the absolute final product and then bring it to the Commission for final approval in that form, for this reason.

Once it goes from the Commission, it then has to go through the editorial channels, the legal channels of NIJ, of the Department of Justice, actually has to go over to main Justice to be approved, and then sent back.

What we would be put in a position of, then, at that point, after it was in final form, was then to come back to the Commission and say, okay, do you approve this, and then, if there were changes to be made, quite frankly, it would be very difficult to do, because we would have to reprint and reapprove, etcetera, etcetera.

So, I think that, when we address that issue, we will ask the Commission to approve the recommendations as they are, with the understanding that NIJ will include an appendix of resources, a glossary of terms, appropriate illustrations, and appropriate, you know, shadow-boxing of different sections and things like that.

Again, it would be impractical for us to get it in its absolute final form and then bring it back to the Commission for approval.

So, we'll seek to do that today, also.

The other thing I'd like to say about this particular meeting is that I had an opportunity, along with Dr. Forman and the Director of the Office of Science and Technology, a couple of weeks ago, to go over to main Justice, to the Department of Justice, and speak to the --Attorney General Reno's chief privacy officer, whose name is John Bentivoglio, and we were there essentially to educate Mr. Bentivoglio on some of the issues, some of the privacy issues that the Commission was considering, and as we talked about it and we talked about the Attorney General's desire to develop policies and such on some of these issues, we were able to say, you know, the Commission is already starting to walk down that road, we already have these particular speakers scheduled for the upcoming meeting, would you like us to expedite

our process in that regard, to which the response was yes, we would, and he went back to the Attorney General, and Attorney General Reno has now specifically requested of the Commission to expedite our discussion on those privacy-related issues and that we resolve -- or that we develop those recommendations by August 1st.

So, what we will need to do, beginning with today's meeting, is identify what issues need to be addressed, how we should address them, and then coordinate the efforts of the working group and the efforts of the Commission as a whole so that we can, in fact, accomplish that goal of providing the Attorney General some guidance on these issues before August 1st.

One of the ideas that we'll talk about a little bit later is the idea of a national symposium.

Now, that could not be done in that time frame, a national symposium on some of the legal issues. We couldn't get a symposium in place of the quality that we'd like before the August 1st deadline. However, needless to say, there are a number of other issues that can be addressed in that forum, and we'll talk a little bit later about that, when Professor Smith discusses the legal issues working group.

Does anyone have any questions at this point?

[No response.]

MR. ASPLEN: That having been said, I am actually a little bit early, so I will turn it back over to Dr. Crow.

## Research and Development Working Group Report

*Dr. James Crow, Chair*

DR. CROW: All right. Well, my privilege, stepping on to the -- in the agenda, is to introduce myself and to give a report on the technology group.

I would like to tell you what we've done, what we're planning to do, and at the end, or even in the middle, have suggestions of other things that we ought to have been doing and have not done or ought to be doing and will do later.

To start off, it's remarkable to me, and I trust to everybody else, how this field has developed.

It was about 14 years ago that Alec Jeffreys first discovered the principle on which we now operate, these repeat units that are so useful, and the FBI got into the act about 10 years ago, and in the years from 1985 to '95, the field was dominated by VNTRs, variable number of tandem repeats, just a very powerful system, as we all have learned.

There are many alleles per locus, and combining four or five or six of these can yield astronomically small or the inverse of astronomically small probabilities.

But there are also features about it that weren't the most desirable.

One was that the number of gradations of sizes of these are too small for the resolving power of most of the units that are -- most of the techniques that are used, and so, it's been necessary to group them into groups and treat the groups as units.

That inevitably introduces statistical complications, and it's worth saying, too, that the statistics that have been used routinely for this are certainly not optimum from a statistical standpoint, although they are much simpler than what would probably be optimum.

In any case, we're moving pretty rapidly away from this, and rather soon, these will be of historical interest rather than current interest.

One other problem is that, as first use, these depended upon radioactive probes, and that had two disadvantages.

One was that it took a very long time. Usually it took a week or so to analyze each locus, and then months could go by before the result was obtained.

It also meant one had to dispose of radioactive byproducts, which is always a nuisance.

The radioactive probes were replaced by chemical tests, to a large extent.

The other defect about this, though, that led to its largely being replaced is that it requires relatively large amounts of DNA, and then, about the middle of the last decade came this wonderful technique of polymerase chain reaction in which it's possible to do essentially what a cell does and multiple a small tiny bit of DNA up into almost any amount that you want, and that means that one can start with

exceedingly small amounts of DNA, pico-gram amounts, nanogram amounts at least, and that the -- furthermore, the units that are being used now, the individual repeat units are considerably smaller.

The total number of them, or the total length, is considerably smaller.

That's required, but the fact that, if you want to use PCR amplification, the molecule can't be too large, but it also means that there are a large number of such loci, almost an unlimited number, and it's simply a matter of taking the time to find new ones and get them adapted to useful work.

Not only can this take up very small amounts of DNA, the DNA doesn't have to be particularly good. By "good," I really mean long and not broken up into pieces.

This means that DNA that's been treated badly for any or all reasons and is broken up into smaller pieces -- it's still useful for this technique or the technique is still useful for it, and there's no binning or bunching required, because each of the alleles is distinct.

There are exceptions, of course, but for all practical purposes, this is true.

So, now, with the -- we're really in the midst of the STR time-scale, and the question for our committee to consider is how long before something still better comes along, and I'll talk about that in just a moment.

Along with STRs, though, there are two others that I want to give particular emphasis to.

One is mitochondrial DNA. It's available for even smaller amounts, the reason being that, whereas with ordinary DNA and the chromosome, there's only one unit or two per cell, in mitochondria there are hundreds, thousands of these particulars in an individual cell, so a very tiny number of cells, in principle even one, might yield enough particles to be analyzed.

They have the advantage and the disadvantage of being transmitted exclusively through the female line. That gives you the advantage of tracing certain kinds of ancestry. It means certain other types are indistinguishable, like two children of the same mother.

Combined with the other systems, though, this can be extremely valuable and has already proven to be so.

Corresponding to mitochondrial DNA and marking the female line of descent, there is the Y chromosome, which follows the male line of descent. For a long time, this is pretty largely unavailable for use. The Y chromosome is mainly inert.

It turns out, though, it has a lot genetically uninteresting but forensically very interesting loci that can be used for this kind of marking purpose.

There are -- the CODIS system now has 13 loci in it, and I'll say just a little bit about the power of the new systems.

If we have just 12 loci, one less than the FBI asks for, the average match probability is about 1 in 700 billion.

It can be smaller or less, but this is the average on the whole, and actually, with the black population, about 1 in 6 trillion, on the average, would match for 12 loci. It's interesting, and perhaps useful at times, that the black population is more variable than either of the other three that we ordinarily have data for.

I want to think about the future, and it's not very far in the future, in which we can, to some extent, avoid one of the most troublesome problems, and that's the necessity to classify people by race in order to do the DNA testing.

The original DNA committee, 1992 committee, developed what they called a ceiling principle just to get around this problem. The principle is roundly criticized, and it didn't succeed in doing what it was supposed to do, but the motive was quite right.

It was to see if one could have a system in which it was no longer to keep -- no longer necessary to keep databases for blacks, whites, hispanics, and orientals, and other possible subgroups, too.

The number of loci is now large enough that the probability of two individuals that are very closely related is still small.

So, one way to look at this problem and a way that the committee's been doing is to say -- is to ask ourselves, can this system distinguish between brothers or sisters or brothers and sisters?

The reason for asking it that way is that the relationship between sibs is really of a different type than any of the other relationships that we ordinarily deal with. Two individuals that are sibs have a chance of one-fourth of being identical in their genetic makeup at any particular locus, and that one-fourth is unrelated to gene frequency, allele frequencies, or anything else. That just comes from the nature of the relationship of sibs.

That's not true of any other close relatives. It's true of double first cousins, but I'm not going to worry about them.

That means, then, we have this one figure of one-fourth which provides a minimum, and then added to that is the smaller quantity that's based on -- that does depend upon the frequencies of the genes in that particular group. I shouldn't say genes, the frequency of the types that we're dealing with in that particular group.

So, that means that, much of the time, the probability of a match between sibs is maybe 25 or 35 percent, or 35 or 40 percent, but the 25 percent is fixed and doesn't depend upon anything else. You don't have to know anything about population structure.

That means that, if we calculate the match for sibs, it's not going to be perfect, because this one-fourth is not the whole picture, but it's a large part of the picture, and that means that the comparison between a calculation made on the black population, the white population, and the hispanic population will be in much closer agreement for sibs than they are for unrelated individuals or other degrees of related individuals.

So, how likely is -- how many loci does it take until we can reasonable expect to distinguish sibs with the same kind of precision that, a few years ago, were used to separate individuals who were unrelated?

With 21 loci, which is not unrealistic nowadays, the probability of -- the average probability, now, of a sib matching in the black population is about 1 in 1.4 billion. For the white population, 1 in about 7/10ths of a billion, and roughly the same amounts for Asian and Hispanic.

So, we can achieve what I'd regard as a major step forward and simplification in this of having to pay less attention to racial subdivisions than has been necessary in the past, and I think that will avoid -- at least avoid some political complications, as well as social and ethical views that necessarily arise in this, but that doesn't mean that the grouping of data by racial and ethnic groups won't still be used, because one issue that's certainly going to come up, is up, has come up, and that is can we do the problem the other way around?

Instead of asking what the probability of a certain genotype is or profile is, given the genetic -- given the racial makeup of the individual, what about the -- looking at the problem the other way around?

Given the DNA profile, what can we say about the person that contributed to that profile?

Well, right now, one could write a likelihood ratio for any particular case and say that this profile is 10 times as likely to have come from a white individual as from a black individual, and perhaps that's useful information at the investigatory stage.

If that racial, instead of being 10 to 1, were 100 to 1, it would be extremely useful.

We certainly have nothing now that corresponds to an absolute identification, but with the -- in the course of the next five or 10 years, which is the period we're supposed to be looking forward to, the likelihood of making a pretty good guess as to the ethnicity of a person that left a DNA sample is here, and I assume that police departments are quite interested in having that particular piece of information.

A little bit about the new techniques.

There are certain -- there are certainly going to be things that are better than anything we have now. They're being developed by all kinds of research programs. They'll be a natural outgrowth of the human genome project, which keeps turning up new loci, and it also turns up new techniques.

We can expect radical changes, but whether -- how rapidly those ought to be instituted is something that I think that calls for some debate and some thought.

There are a number of things, though, that can happen that don't change the essential system but will simply improve it.

More automation is certainly one.

Miniaturization is going on and will continue to go on, and speed.

With miniaturization and speed, one can move toward a time in which one can do much more at the crime scene itself, rather than waiting for laboratory developments later.

Sometime within your lifetime, probably not mine, this might become a practicality.

Some of the techniques that our group has discussed and will write a description of -- the way we planned the report is to write a fairly general report and then with appendices for technical details, technical details regarding each of these particular methods and the statistical procedures, too.

Some of the methods are capillary electrophoresis, which is already here, beginning to be used more widely, various kinds of micro-technologies.

Much of the DNA now depends on sets of four in repeater units.

Pento-nucleotide repeats have the advantage of not having quite so much noise, stutter is what they call it, and maybe they'll be moving more in the direction of these compared with the ones that are now based mainly on four units.

They're SNPs, single-nucleotide probes, which go directly to the DNA sequence. That would, in many ways, be an advance, but it would be a fairly major change in the technology.

So far I've discussed things that depend almost entirely on chemical procedures.

There's also coming, I'm told -- I know very little about this -- mass spectroscopy, which can use physical measurements to get somewhat of the same information. Presumably, it could be done much more rapidly, and I'm sure it's here to -- will come in the future.

And then there are these various kinds of chips that simply miniaturize the process. How soon they will impinge on this system isn't immediately clear, although we're trying to unravel it.

There's sort of a policy question here or maybe economic question, and that is this, that the investment in CODIS is a considerable one, and we don't want to develop those 13 loci and then announce next year that they've been superseded by things that are better, and even if things are better, I don't think we would want to make that kind of a decision.

So, there needs to be a length of time that a standard procedure is used before it's replaced.

These are not necessarily mutually inconsistent possibilities.

The CODIS system could continue for the foreseeable future. More loci can be added or more different kinds of techniques but especially more loci, and then, I think I would foresee, but we'll see if it happens this way, that the CODIS database would be used more for identification than vital evidence on a particular case, for which there will be an abundance of other kinds of tests that can be applied to it.

Another kind of issue that we certainly need to -- and have said a bit about, will be saying something about -- is the -- is going to be DNA evidence from sources other than human.

There are already court cases in which plants have been used and domestic animals and, in some cases, wild animals. I read one about mooses.

These certainly don't easily conform to the kind of standards that we have set for the human population. Nobody has gathered the kind of large databases that we have.



Also, these populations, especially domestic animals, dogs and cats, are complicated by extremely high levels of inbreeding, which means everybody is somewhat related to everybody else.

So, it would really require a more careful kind of attention if we want to do it in the same -- with the same level of rigor that's been applied to the human population.

I think, however, that technology will help with this problem, too, essentially by supplying ways of analyzing enough DNA, enough different loci, that problems like inbreeding and a small database become less important, but how soon that will come is something to be addressed.

I've used my time, but I want to -- a purpose of this -- I told you roughly what we have in mind doing and, to a fair extent, have done. What else should we be doing that I didn't mention?

Yes, Barry.

MR. SCHECK: As I sit here, I can't remember exactly where NRC-2 came out on the issue of mixtures and whether or not, in particular, a statistic or a series of statistics or a series of conditional probabilities ought to be offered to the fact-finder about mixtures.

One issue that appears to be emerging is instances where the prosecution will do a DNA analysis using any of the techniques, particularly, though, I suppose, of greatest concern, STRs, and will then tell the fact-finder the -- this is a mixture of two or more individuals, are contributors to this mixture, and the defendant can't be excluded but offer no statistics whatsoever.

I can't remember how NRC-2 came down on that, and I was wondering if your committee had given any thought to the whole issue of addressing mixtures.

DR. CROW: Well, we're certainly going to address it, and I can tell you what NRC-2 came down on, having written that section. We essentially copied the procedures from Abbot, who really tells you how to make the calculations, and we provided sample calculations in quite a number of simple cases, but that's a long way from exhausting the possibilities.

MR. SCHECK: But the question I had specifically was -- I remember that.

DR. CROW: That's all I remember.

MR. SCHECK: But the issue was that, with respect to NRC-1 and NRC-2, I mean the position has been that you give numbers. It's not a question of not giving numbers at all.

DR. CROW: Yes.

MR. SCHECK: That's an essential point here, because what I'm pointing out is that there is an emerging trend simply not to give numbers, which I thought was an issue that had been resolved long ago but apparently isn't.

DR. CROW: We probably didn't say that explicitly but only by implication.

MR. SCHECK: Yes. I could show you a lot of cases that are proving this.

DR. CROW: This quickly gets complicated, I don't have to tell anybody, and it requires a very skillful probabilist to work these things out.

Some of that's been programmed now, and there are some machines that are cleverer than the average calculator, and I do foresee the purely statistical problems will become more formalized, more automated, and I suppose it's our opinion that we should be as quantitative about this as anything else.

MR. THOMA: Jim, one question about something that you did bring up, as opposed to something you didn't. What time shelf-life are you thinking of? I'm thinking of STRs, for example.

We're still working out some of the kinks with the noise or stutter that you're talking about. What time frame are we looking at as far as a particular technique that would be something we'd want?

DR. CROW: We've talked about it. You're not expecting a definitive answer, and I don't have one, but our time-scale, our instructions, really, have been to look at five years and 10 years.

Actually, we've extended this. We're going to try to see what one can expect in two years, five years, and 10 years, and essentially make guesses about that. So, that's our -- that's the time frame we're thinking about, and everybody in the room knows that we can only guess.

MR. CLARKE: Is the concept of these newer techniques to continue to use STR-type loci?

DR. CROW: Both. There are almost daily improvements in STR techniques, and more automation, newer loci are added that have properties that are better than the existing ones and so on, but some of the other things I mentioned are really different, and they would replace STRs.

MR. CLARKE: Because obviously, as you mentioned -- you mentioned the concern of what would happen with any national database and so on. So, would it become obsolete, or could it be done in conjunction, as you mentioned? It sounds like a logical direction.

DR. CROW: Not only the CODIS database has an interest, but many laboratories, of course, get tooled up to use the technique and don't want to change it capriciously.

So, I think our committee will favor some conservatism in this regard. After all, the STRs are pretty good.

MR. GAHN: When you talked about maybe SNPs coming up in the future, what sort of has concerned me over the years is that it seems like the scientists kind of run where all this is going and law enforcement then just gets behind that and makes their changes.

Speaking of my own preference, I'd rather try an STR case with gel electrophoresis than capillary electrophoresis, but it's the scientists who are going to run this.

What's going to happen when SNPs seem to be -- that's the choice of the scientific community? Won't that be a pretty big change for everyone in law enforcement?

DR. CROW: I think it would, and I was almost going to say the opposite. It seems like the scientific community has not been too successful in moving things as rapidly as it would like to, because there's considerable inertia in the legal system, and it's good.

I think we could just count on developing one new technique after another, and sooner or later, some will come along that are enough better that it will be convincing to the testing laboratories and to the legal community that that replacement ought to take place.

I don't know how to be anymore specific than that. Every week in the New York Times, there's a new article about new technique of some sort or a new miniaturization or a new robot, but I -- well, I'm expressing too many opinions on behalf of the group that hasn't expressed any yet.

MR. ASPLEN: Dr. Crow, the next meeting of the American Judicature Society, which is to be held about a month from now, is addressing -- I think the title of the conference is "Whose Genes Are They?" and one of the discussions that's going to be held is -- revolves around the idea of genetic defenses, if you will, not DNA used to identify perpetrators but, rather, the other side of the coin, and that's can we use DNA to determine genetic issues in an individual that would lead to a defense of some sort?

Has your working group thought about looking into any of those issues, issues aside from the law enforcement application for identification purposes?

DR. CROW: I think it's fair to say we haven't. We've talked almost entirely about the techniques themselves, and maybe we ought to ask about such questions as that.

MR. ASPLEN: I throw it out there as something that the Commission may want to think about.

DR. CROW: I think there's a jurisdictional question here. Our committee claims no expertise in ethics, for example. On the other hand, the Commission as a whole does, and some of these questions that -- maybe are better raised by the technology and answered elsewhere.

MR. SCHECK: Actually, I think that one way to get at that -- because I think, actually, Chris, you're raising a very important point -- is looking at the committee, Dr. Crow, as it's constituted. It might be useful, at your next meeting, or maybe in conjunction, even, with the legal working group, to find some medical geneticists, because I think that the issue is going to arise in the context of those geneticists that are looking at psychiatric conditions that are related to genetic antecedents, and you know, there's quite a bit of that going on, and I think, actually, it does have enormous importance, and not just in the area, incidentally, of raising psychiatric defense to criminal behavior, but I think we have to consider very seriously civil commitments based upon genetic profiling of mental problems.

In particular, I'd point out that the statute approved by the United States Supreme Court in the case of *Hendricks v. Kansas*, which permits sexual predators to be civilly committed indefinitely, has language in it that deals with, quote, "inherent disorders," unquote, which leaves a big opening for genetic proof, and there are -- there is some legislature -- legislation being proposed with respect to sexual offenders in many, many states.

DR. CROW: I'm sorry that Phil Reilly isn't here. He would have quite a bit to say about this. Is he coming?

MR. ASPLEN: He is coming. He had an engagement this morning but will be here.

MR. THOMA: Just to add to what Barry's saying, in California, as a follow up to *Hendricks*, we've got a couple of experts statewide that are testifying for the prosecution for the extension of these cases along

those lines, and DNA has not been part of the playing field, and I think, actually, we should discuss this at an early juncture in the future, when Phil's available.

MS. BASHINSKI: I think, also, given our discussion that we're going to be having about collecting samples on a much broader basis, this really is an issue that will come up and will be very relevant to that discussion.

So, to the extent that these issues are being raised and they're really red herrings, that's one thing. We should identify that, and if there are really valid concerns that this information will soon become available and potentially misused, then we need to factor that into our discussion.

DR. CROW: I certainly don't want us to be blind to possible misuses. I don't want to be paralyzed by fear of misuses either. So, it's tough.

MS. BASHINSKI: Exactly.

JUDGE REINSTEIN: I talked last week to Dr. Mallott from the University of Maryland, David Mallott, and he's been doing a lot of research on pre-disposition. He predicts, in the next year-and-a-half, two years, in conjunction with the human genome project, that they will identify -- I think it's a gene -- it's predisposition toward impulsivity gene.

I know somebody else was doing some work on the novelty-seeking gene, you know, and all this has to do with predisposition of violence.

DR. CROW: It's time to move on to the next subject, but one thing, in my long career, has been seeing oscillations up and down, with an unpredictable period and enormous amplitude, between blaming everything on heredity at one time and nothing on heredity, and I hope we're going to come to some sort of reasonable balance.

I think it's very likely we're going to find genes that have some -- identifiable genes that have some role in impulsivity, but I certainly wouldn't want to call it an impulsivity gene at this stage. It probably acts -- I don't have to say this -- it acts in a complicated way, and I'm not sure that these predictions are -- it's going to be quite a while before they're a sharp as the newspapers would imply.

JUDGE REINSTEIN: What he said was he predicted that it would not be utilized as a defense in the next five years, but maybe 10 years out, that it would be used in mitigation, where the evidence standards are different, and you talked about the environmental factors that would trigger the gene.

You know, you may have it, but if you don't demonstrate alcoholism, maybe if you mix alcohol with that, it will trigger a chemical reaction to, you know, enhance the quality of that gene. I'm not sure.

DR. CROW: You mean that a person might use -- say that I can't help it because my genes dictate it, I had to behave this way, and use that as a defense.

JUDGE REINSTEIN: They call it the my-genes-made-me-do-it defense.

DR. CROW: Right. Well, you know, we went through this 10 or 15 years ago with the XYY syndrome.

Now, that's a very sharply defined trait, and there was a clear correlation between having an extra Y chromosome and ending up in a penal institution, but that says nothing at all about all the causal chains that led onto this.

Let me ask that we move to the next item on the agenda, which is yours.

## Legal Issues Working Group Report

*Professor Michael Smith, Chair*

MR. SMITH: Well, I'm to report on the work of the legal issues working group, which is probably easier for me that I've lost my notes and the report prepared for this moment, because I can rely more heavily on Jeff and others who were there.

Every time I'm in a room with Barry Scheck, of course, a new agenda item emerges for the legal issues working group, and I want to thank you for the constant flow of business.

Let me just try and divide my recollection of my report in the following areas.

One is that we didn't have the legal issues chapter of the post-conviction group's effort at the time we met and got it now, and it seems to me, having cleaned it to see if there's anything we're supposed to do, I suspect not. It seems to me that they've done a pretty good job of all that.

But that aside, we may have to return to some of those issues in our group.

The flip-side of those issues in our minds, I think, has been statute of limitations. That is, a time limits question raised and analyzed in that report has as its flip-side whether or not there ought to be changes in the statute of limitations limiting the prosecution of cases now that the evidence, when it's DNA evidence, has somehow a different feel to it, different quality to it, perhaps in fact a different quality.

We had some heated discussion about this at two meetings so far, and as I recall, at our next meeting, on the 15th of March, we're going to have briefs from Jeff and from Rock Harmon to help us sort out those questions, why we have statutes of limitations, why we would waive them, and how we ought to think about them in this context.

So, I have nothing to report to you on our conclusions in that regard, but we're going to keep working on that one.

I think the more interesting and troubling to our working group topics are the big ones, and they're troubling in their own right but also because we feel that they fall into our jurisdiction, but we're far from certain that legal is the right category in which they fall, privacy being the biggest, and Phil's not here. He wasn't at the meeting in Chicago either, so I'm really anxious to have a meeting with Phil about these matters.

But the privacy questions keep fracturing into subordinate questions of law, and I'm not so sure that we're properly addressing them, because it seems to me that there are really much bigger questions about this not satisfactorily answered by an analysis of the potential legal theories that would be used either to penetrate or protect some zone of privacy interest.

I mean we have been talking about Fourth Amendment law. We have mentioned, though haven't fully analyzed, some of the contract law issues that come into play, particularly when we start looking beyond the law enforcement data bases themselves.

We've discussed but haven't done a systematic exploration, though Jeff is working on one, of the statutory law governing what is essentially a set of privacy interests, and we haven't done anything yet with property law. Whose are they, the samples, the profiles?

But what's probably, I think, bothering us about it is that, at some level, I don't think there's a lot of confidence in the legal issues working group that those are the dimensions on which this is to be resolved, and so, it is with some comfort I got the call from Chris about the possibility of a national symposium on these issues that would take us into realms other than contract, property, statute, and so forth.

Still, let me point to a couple of other topics that we're taking up.

I think an important issue and one that Barry helped us develop a bit at the last meeting we had is, in the investigative use of DNA profiles, what do we anticipate as we listen to Jim's group in the future being possible for investigation, and are there legal or privacy or other value interests that are arising from those possibilities?

The race question, I think, has been reacted to quite differently by different members of our working group as something to be avoided at all costs because of its political difficulty and one that has a direct parallel in the ordinary conduct of investigations when you've got to figure out whether you're looking for a dark or a light person, a man or a woman, a Filipino, right?

Now, it seems to me that we haven't really been rigorous in our consideration of these questions, though Rock has been bringing us back pretty solidly time and again and saying, well, wait a minute, you know, I can do this, right?

There's no law that says I can't do this, and if I want to do it, I'll do it, but I don't want to do it, which is, of course, an interesting posture for a working group member to take, and we're working with Rock on getting to be a little bit more expansive in his views.

So, then there is Barry's issue, which I think we didn't deal with very well, but it's fascinating, about fuzzy searches.

That is, to what extent is it desirable from an investigative point of view, and if it is, are there legal or other issues -- there are -- about conducting searches where you're not looking for a match but looking for approximations that might lead you to others, family members, for example, who would be useful to interview, and that's a topic that's hot, and it's going to be important.

So, we'll look at that, because it will be exciting and fun to do so.

Right alongside those issues are rules about the collection, the use, and the sort of assembling of DNA samples and profiles.

The dragnet questions have been plaguing us recently.

That is, what are the limits, if any, on the uses to be made of DNA samples and profiles derived from them collected in a kind of dragnet operation sort of described to us by the British presenter two meetings ago, and I think that, on the testimony at our last meeting, there's division here in the way the courts are

handling those questions, and they're likely to be important. So, we have to spend more time looking at that.

As to asking, this is a case we haven't really fully explored, but it seems to me we're going to have to. That is, there are lots of DNA samples and tissue samples lying around in this country.

Whose are they? What are the rules governing their use for investigative purposes or for the building of a database of identifiable DNA profiles?

I had an experience last week. I had to go in for some minor surgery at my hospital. In the last meeting of the committee, I had been reassured by somebody who hadn't been in for surgery in a long time, I guess, that the informed consent, the contractual document between my medical provider and me would protect me against their giving over to the police, so I read it very, very carefully, and I summoned in the doctors, and I asked them what they thought it meant, and we all agreed that what it meant was they could do anything with it they damn well please, except that, if I wanted to, I could have my tissue back, thereby preventing it, if they hadn't profiled it already, from giving it to somebody else, and so, those things, it strikes me are both legal, but in a much more fundamental way, they're value issues.

Now, I also have to say, because I think it's a question for the larger group, that I detect, I just detect two sort of contrary impulses about this.

One is an impulse to go very slowly so as not to rile waters that are easily riled by reference to universal DNA databases and all that kind of stuff, but there's another impulse, not quite so obvious but emerging, which is to say, now, wait a minute, right, going slowly is to go all the way without ever noticing where you're going, and maybe what we should be doing is looking much more directly at whether or not some form of universal DNA database is actually coming and, if it's coming, whether or not the Federal Government ought to be doing something to control the way in which it comes, and I think that's really of some discussion, frankly, as a prophylactic as well as an investigative and identification matter.

I worry that this Commission could find itself in the position of reassuring a nation with respect to these matters and, in a funny way, opening it up to greater unnecessary exposure and missing an opportunity, perhaps, for an orderly development of a useful tool.

Okay.

So, that will be on our agenda, and there's a whole bunch of other things in my notes that I will be able to spare you, because I think that's pretty much our agenda, plus what we learn from you that we should be taking on and how we handle the relationship between this working group, which is increasingly feeling the need for a much broader consultation with the nation, and a national symposium of some kind.



## Discussion

DR. CROW: The question you raised about the difference between identifying a suspect by an eyewitness that says that this person was yellow and using a DNA sample that gives a likelihood ratio, the certain number of times more likely to be Oriental than not, in some ways there's no difference in these two things, but yet they're certainly going to be treated differently.

This is open for questions, not only questions but suggestions for further action.

MR. CLARKE: I was going to mention, in the area of looking -- when you're exploring the issue, obviously, of similar profiles, either sibling relationships or others, that actually goes on in fingerprints right now.

While no two people have the same print patterns, there is, at least examiners tell us, a great deal of similarity between siblings.

Now, I don't know how far that extends out to the extended cousins and so on. So, at first blush, when given siblings, examiners frequently take a lot longer to be able to tell the two apart.

MR. SMITH: That's very useful. One of the things I didn't mention but it seems true is that there's a temptation both for the scientists and for the lawyers, when raising these issues, to dispose of them, from time to time, by saying, well, that wouldn't be a sound way of going about an investigation.

It's just so obvious to me that that's not the way that this group can manage those questions. If we constituted ourselves, which we could, as offering advice on what sound investigative practices were, we would have to differently constitute ourselves. We could have an interesting working group about that.

But those are questions that are going to come up, no question about it.

MR. CLARKE: And the continuing aspect of it, with automated searches of fingerprints, when a top candidate comes up, occasionally -- because I don't think it happens very often where the sibling aspect is explored, but usually dealing with siblings and so on, we deal with that more in the factual context than the DNA context, but not exclusively. Sometimes that's the only tool left.

MS. BASHINSKI: We've had several cases where we did point to brothers and, in fact, where that was found to be a useful investigative lead, and it's very reasonable, based on the statistical evaluation that you described, to make that inference.

MR. THOMA: And of course, there is the privacy issue, and we did have a bit of a heated discussion. No matter whether there's the authority to go after it or not, you can worry about that later and figure it out.

MR. ASPLEN: I should have asked you, Jeff, and Barry, both of whom were there, whether there are other things that you think we ought to be reporting out to the full group.

MR. THOMA: If I could real briefly, we kind of divvied up who is going to write which parts of our draft.

I'm going to talk about each state's position regarding DNA evidence, a little bit of our position on lab proficiency and admissibility, but only with regard to weight and following NRC recommendations, as opposed to actual admissibility, availability, through CODIS, to the defense.

Phil Reilly is going to do all else regarding privacy except for access to the database.

I'm going to get to an assignment I'm doing with Ed Imwinklereid regarding prosecution standards, and Barry and I, now that I've got the draft of the post-conviction, we're probably going to make some changes for our legal issues but probably conform pretty much to their draft, and then the ability of the defense to do testing if the prosecution has it, we again had a minority of one, but Professor Imwinklereid and I are going to put one position forward, and I think our minority of one is going to put the other position forward, and we'll have both of those. I think we can bring those out.

We have a meeting, like Michael said, on March 15th, and hopefully we'll make a little more progress in that area, too.

I would like some input from the rest of the Commission -- and I apologize, I didn't talk to Michael about this, but he brought up Dr. Warrett's discussion with us on the dragnet use of the UK and its ramifications in the United States on privacy, and hopefully, perhaps when Phil is here, maybe we can have that during one of the discussions to see what his position or the rest of the Commission's position is on that.

We're getting to where there are certain positions with regard to all arrestees giving DNA evidence and everything, and these are issues, but Michael and I haven't figured out whether that fits within legal issues or we want some direction as to whether it does or not.

DR. CROW: And then we have quite a bit of discussion of this tomorrow.

MR. SCHECK: In terms of fingerprints, I'm very intrigued with what Woody says about fingerprints, and one of the things that perhaps, Chris, the staff could help us with, or someone, is -- you know, the analogy is being drawn, certainly the British adopt it and Commissioner Safir in New York adopts it, and others, legally, I think, are going to push it, and that is treat DNA profiling the same way you treat fingerprints, and there are two points -- first of all, I'm amazed that there's actually, for lack of a better term, fuzzy or low stringency searches in the fingerprint system. I'm amazed to know that really goes on. Does it really?

MR. CLARKE: You mean, for instance, in an automated search? We'll come up with a candidate list, and number one is usually the person who left it. Is that what you mean?

MR. SCHECK: Well, I mean the issue -- to focus it, the issue that we have with the DNA data banks is literally do you program the computers to look for an exact match, or do you look for low stringency match, at which point you begin to investigate the relatives.

Now, rising in the context of a database, that is a distinctly different issue than, as we discussed at the last meeting with Chief Hilliard in the sex abuse case in Chicago, the rape/homicide case in Chicago with those two young children, is that it's very different when you have probable cause to obtain a DNA sample from a suspect and you come up two loci short and you begin looking for his brother.

Those are two completely different issues from the point of view of the Fourth Amendment, as far as I'm concerned, and as we all know, the database issue, programming it for low-stringency searches, was

addressed in NRC-1 very, very forcefully, saying don't do it, and I think is CODIS policy, as Paul has pointed out on a previous occasion.

But I'm wondering about fingerprints. I mean to the extent -- do we really have a data bank of fingerprints of unsolved cases? Is that really actively utilized in many jurisdictions, and do we do these low-stringency searches?

I mean knowing exactly how we treat fingerprints, I think, would help us a little bit, and I'd love to see some data on that.

MS. BASHINSKI: Certainly, in our state, we do have files of unsolved cases which are routinely checked against new people added to the database. The searches are not deliberately low-stringency, but as you know, you get a hit list regardless of whether or not the correct person is in the candidate list.

My experience is a little different. It is true that the fingerprint patterns are similar among sibs, and you can sometimes -- for example, all arches or something like that, which is very unusual, but unless they're identical twins, I think, you know -- I hadn't heard it phrased quite the way you did.

General pattern is what we're talking about, not seven points but not eight.

DR. CROW: If you go to ridge counts, then there really are these correlations.

MS. BASHINSKI: Yes, ridge counts and general patterns but not the minutia on which the identification is based.

With regard to you other point, the cases that I was referring to were not low-stringency searches. They were situations where we searched something, we came up with seven out of eight alleles in a match, quote/unquote, "match." That is suspicious. That's information that's useful.

MR. SCHECK: A second point for Michael, just in terms of trying to put the legal categories on the scientific issues, which I guess is my official lot in life, is that, in terms of looking at all these medical issues that Judge Reinstein was addressing before, and this fellow who has the impulsivity gene, who thinks it's going to come into -- in mitigation, I mean I would see this whole issue, besides the civil commitment, is that, remember, you know, legally, we all know, at sentencing, the standard for admission in sentencing is completely different than at trial and that what's going to be used for mitigation will also be used for enhancement, and there is, under the law now, really nothing that -- you know, I mean, look, the United States Supreme Court has said that an acquittal can be used to enhance the sentence of somebody under the sentencing guidelines and that the threshold for admissibility of evidence is so much lower than anywhere else, you know, you'll be able to -- certainly, a judge is going to say I want to hear everything you've got on the genetic profile of this individual being dangerous, and so, I really do believe -- I don't think we'll ever have enough in the short time frame that we have to produce anything, you know, huge on the medical potential here or the predictions, but I think we have to find the right legal category and point out where it might or might not be coming and what kinds of warnings we should give to the system.

MR. SMITH: So, Barry, is it sort of a combination of pointing to likely directions from which future problems will be coming, sentencing an area where, depending on the progress and direction of the

human genome project and all of that, but that there are worries, limits that need to be identified at the same time, this being an appropriate place to do it, on how people ought to be thinking about that?

MR. SCHECK: Yes.

MR. SMITH: Relevancy isn't the real test of utility here.

MR. SCHECK: Yes. And your very eloquent encapsulation of the two different impulses really comes to bear here, because I think a good argument can be made that, even though we won't have a really good handle on the genetic antecedents of behavior by August or in one year or two years or three years, we may have a better handle on what -- looking directly -- what we can say legally about the potential for this and the dangers. I think we may have a better handle on that.

I'm very encouraged that Dr. Crow thinks that the legal inertia is good. I'd like to throw some more at it in this area.

MR. THOMA: Let me agree with Michael. I think you always give us additional assignments, but to be honest, this is fair, because if we just use PET scan as an example with regard to impulsivity, six or seven years ago they hadn't made the progress that they had with regard to impulsivity or with ADHD or several other aspects that PET scan can now, you know, discriminate or decide between.

MR. SCHECK: And it should be pointed out with PET scans that the first use of PET scans, which in my judgement were extremely questionable scientifically, were done in mitigation in death penalty cases. So, that's where this stuff is going to come in through the back door.

JUDGE REINSTEIN: I think there's actually a case -- and I might have it back at the room, and I'll bring it down later, or tomorrow, and it's out of Delaware regarding this predisposition toward aggressiveness or violence, where it was utilized in mitigation in a death case.

MR. ASPLEN: So, it sounds like, in the event that we do, in fact, hold a national symposium, that this is certainly one area that we should devote a significant amount of time and resource to.

DR. CROW: Are there other comments?

[No response.]

## Post Conviction Issues Working Group Report

*Judge Ronald Reinstein, Chair*

DR. CROW: Let's move on to Judge Reinstein, then.

JUDGE REINSTEIN: Well, you all have the latest draft dated February 15th of the post-conviction DNA testing recommendations for handling the applications.

The latest thing that you have that was different from what we had in Chicago is chapter two, the legal issues that Barry prepared. We went over it with a fine-tooth comb in Phoenix about a month ago.

Professor Berger, Margaret Berger, I think, did some editing in the last couple of weeks, and as Barry told me in an e-mail earlier this week, he thinks that we've got it knocked finally, and I think it's a really good addition to the report.

We've taken the Commission's comments and suggestions and amended the draft report that we tentatively approved at that last meeting in Chicago, contingent upon the preparation of the legal issues chapter, and we're going to be meeting again in Washington, I believe, in about three weeks, March 22nd, thereabouts, and so, at this point, we're seeking the Commission's final approval, but also, we'd like to have some direction as to where the Commission would like to go next, what else you'd like us to do.

Our committee is pretty incredible. I think virtually everybody, other than -- we also have a minority of one, except the minority of one in our committee has never been there, except for one time, and a lot of us would argue whether he was really there that time, as well.

But other than that, virtually every time everybody's been there and the spirit of collaboration and cooperation that we've had has made it really a pleasure to chair the committee, and because of that, Chris, at the last meeting, asked us to sit down and develop a list for your consideration as to other issues that we might delve into.

So, the list had to do with some of the things that Michael was just talking about, as well, regarding statute of limitations.

We started with compensation statute. Illinois, New York, and Wisconsin are three states that have compensation statutes. That's something that we could look into.

We talked from the beginning, I think, in our original charge at our first meeting, when Chris talked to us, whether we should developed model rules of statute, particularly -- that are particular to DNA issues.

Regarding time bars, statute of limitations, we discussed that, I think, two or three Commission meetings ago.

Judge Webster and Jim Wooley had some comments regarding the statute of limitations issues that, you know, we're happy to look into unless it impinges on something that the legal issues committee is doing.

MR. ASPLEN: And if I could just add to that, there are some efforts already underway throughout the United States to address the issue specifically.

I know Florida has, I believe, passed a law regarding the elimination of statute of limitations in certain cases where there's biological evidence in rape cases.

JUDGE REINSTEIN: Another one was evidence retention rules and statutes, particularly DNA evidence for -- both for a defendant's access and also maybe to extend as far as the prosecution also on statute of limitations, say in sex cases, where, right now, there are statute of limitations in many states on sex crimes cases, but with the biological issues, with DNA evidence, that may not be well-founded.

It may be a good idea to eliminate those or extent those.

As far as the retention issues, we talked about lab retention, retention in the lab, retention in police stations, property rooms, the clerk of court offices and the custodian of records and the like.

We talked about wanting to get into legal issues related to post-conviction relief and how to define those, such as what -- between unsolved cases and solved cases, how long things should be retained, how to retain them, the space issues, which is a real issue, I know, in courthouses and in police stations and in laboratories around the country.

Whether you wanted us to get into guidelines for payment for testing -- we discussed payment in the five categories that we developed as to who should pay, and if you wanted us to get into guidelines in regard to that.

We talked about issues regarding indigent representation in post-conviction cases, and we also talked about something that's a kin to what they have in Great Britain, a criminal case review commission, somewhat like a DNA advisory board for post-conviction relief cases, state or local review panels made up prosecutor, defense attorneys, lab personnel, maybe retired judges.

I know, in Great Britain, they have -- and Barry and Dr. Rau, I think, are more familiar with this than I am, but we talked about that early on, in one of our meetings, that they have subpoena power, they have access to the national laboratories in Great Britain, and these are cases when claims of actual innocence are made that this board would take a look at it, rather than go through the formal post-conviction review process.

But we're also concerned and cognizant of the issues, I think, that Norm raised, I think that Jim raised in one of our earlier meetings, that, you know, are we remaking the whole system because of DNA on post-conviction cases?

But it's something that, you know, we just want to see, you know, whether you want us to delve into that.

Canada, evidently, has decided to do the same thing as Great Britain. I think that was reported at the last meeting.

And the last thing we talked about was whether there should be a plan to collect -- really, I don't know whether it was as to our committee to do that but to develop a plan for collection of data on DNA exonerations. These should be tracked, because there's no appellate decisions in a lot of the cases.

Should there be a clearing house, a registry of cases where a finding of actual innocence was made based on DNA post-conviction testing?

Right now, I think the Innocence Project tracks as many as you can, but it's all -- other than the work that you do yourselves, it's all word of mouth, for the most part.

So, those are the things that we came up on a list as to whether the Commission wants us to delve into that now that we've hopefully completed the work on the report.

MR. ASPLEN: If I could just add a quick story to the Judge's --

JUDGE REINSTEIN: The other thing I was going to say, after you finish, Chris, is if Barry wanted to add anything to describe anything regarding the legal issues chapter, but go ahead.

MR. ASPLEN: A quick Commission staff story regarding some of these issues, particularly as pertain to indigent representation.

We've gotten a great example of the two ends of the spectrum, I think.

We have, in the past couple of weeks, received two requests from indigent defendants saying I understand you have these recommendations, could you please send them to me, and actually, they went first to -- I think they went to the Chief Justice's office, who then referred them to us, and our response was to try to track down the appropriate representative agency of that particular individual.

Well, in one state, which was Florida, there was a relatively expeditious process, and it was very easy to identify when and where or who the appropriate people were.

I don't think we've figured out who it is in Texas yet.

MR. SMITH: The appropriate authority for paying? The appropriate authority for petitioning?

MR. ASPLEN: To send these recommendations to.

We called the bar association. We tried to track down -- what we did was we first went to where the inmate's being housed and then tried to find out -- realizing that may not be where the person was convicted but try to figure out where they were convicted and perhaps get a number for the public defender's office where the person was convicted, etcetera, went through the whole thing, and we still don't have an answer to that question, and that's about two weeks.

Now, again, we did that with Florida and zeroed in rather expeditiously on who we needed to contact, but it was an excellent example of the kinds of things that we're talking about, especially the context of indigent representation. Couldn't get anybody to take the recommendation.

So, it's probably going to default to the Innocence Project.

MR. SCHECK: Thursday and Friday, the justice department had a huge conference, actually, in Washington on indigent defense, which did not just bring together Washington, D.C., representatives from the major public defender's offices across the country but also lots of judges, a number of prosecutors, and other people within the criminal justice system, and the theme of this meeting Thursday and Friday was, for lack of a better term -- and I guess it's appropriate now they're giving Elia Kazam an academy award -- collaboration, which was to say that they were looking for instances where public defenders and prosecutors and courts collaborated on certain projects, and one of the things that we

discussed in our meetings, Chris, and you were the first to raise it, actually, in terms of these recommendations is that I think we've really succeeded in putting forward recommendations that, in many ways, are mirror images of each other.

That is to say that what we say for the defense, we say for the prosecution, we say for the -- we have a consistent position, essentially, with minor variations due to the roles that everybody has within the system, but there's the same policy that we advocate for all sides, and these recommendations are not going to be self-executing, and whether it's money to the prosecutors or money to the courts or money to the defense bar or whatever appropriate agencies there are, I mean I really think we should think seriously about coming up with recommendations so that this class of cases, which hopefully won't be around forever, as DNA testing in the future becomes routine on all relevant cases, to the point where we won't be having a group of people that are in jail who we have real reason to believe are innocent, or claim they're innocent, and DNA testing could resolve it, which is the essence of our recommendations, you know, we have a fairly short window of opportunity here, and it probably would make sense to figure out some strategies for funding these recommendations in a serious way across the system, and I know we've had a lot of discussions with that in the working group, and maybe that's something that -- that would be part of the agenda, as much or more as anything else, and you persuaded me of that point better than statutes.

MR. ASPLEN: So, generally speaking, is that the kind of -- the issue of developing a recommendation regarding, let's say, indigent defense resources --

MR. SCHECK: Well, it's more than that.

MR. ASPLEN: Or coordination.

MR. SCHECK: Yes, coordination, because I mean the one thing that we encountered, I think, in our meetings and discussed at greatest length, where these cases come from -- sometimes they come -- the requests come into the prosecutor's office. Now we have requests to the Commission directly. Sometimes they come in to judges.

How are we going to find the evidence? How are we going to -- which cases should we pursue, which ones shouldn't we pursue? Who's going to figure that out expeditiously?

You know, that -- those -- how's that going to be funded in various different jurisdictions, and who's going to pay for the testing?

Those are the nut-crunching questions here, and some recommendations on funding wouldn't hurt.

I mean I'll give you an example.

I was looking at the -- you get in the mail justice department or NIJ grant proposals, and there was one grant proposal -- I'm sure the prosecution had its kind and defense got its kind -- saying funding for teaching people about DNA in the various defender offices, you know, but it was so narrowly tailored that I couldn't figure out a way to stick various Innocence Projects or anything else within it, you know.

I mean there's got to be some funding mechanism to make these work.



MR. ASPLEN: Is that an issue that the Commission would like to see that group work towards, the idea of recommending something in regards to the collaborative effort?

I assume you're talking about something like pilot programs to develop --

MR. SCHECK: Yes. I mean I think that we should -- you know, it's like -- the one thing that occurred to me is that, you know, the prosecutors have a legitimate claim like who's going to spend time dealing with these things, and where does that come out of the budget, and the big objection to testing in what we're calling category one and category two cases is not so much that there shouldn't be money for testing but who's going to pay for it, and each jurisdiction is going to differ.

Is it going to be the lab, come out of the public defender budget, court-appointed lawyer's budget, the judicial budget?

You know, looking at those kinds of questions, making recommendations, and even for where Federal funding could go appropriately and effectively, and how much of it, you know, I think would be useful.

MR. SMITH: It might be useful, but it seems to me it would be very difficult to design a Federal funding program to accomplish a purpose.

MR. SCHECK: You're right.

MR. SMITH: If this group were to try and do that, the first thing we'd do is get all those Federal agencies in here to tell us about their experience. I don't want to hear it.

MR. SCHECK: No.

MR. SMITH: Okay.

MR. SCHECK: I don't mean that.

MR. ASPLEN: One thing we probably should make note of is that APRI have really begun to incorporate this aspect of the training into their standard DNA curriculum. I mean they're really the only national agency that trains prosecutors on DNA, and they train them a number of times a year throughout the whole country, thanks to the work of folks like Kim and Clay, but they have now really incorporated the whole post-conviction process into what was originally established as, you know, from crime scene to jury has now extended beyond that, and I think that that group can certainly look into the bigger issue of those coordinated efforts and what resources might be required for some of that.

JUDGE REINSTEIN: How about compensation or who is going to look at the statute of limitations and time bars? Is that legal issues? Do you want us to do it?

MR. THOMA: We are going to, and Barry and I agreed at our last working group meeting to put it together, but I don't think it's beyond any working group's calling myself. That's just my opinion.

JUDGE REINSTEIN: I guess the issue is whether or not you want to have duplicated efforts or whether you want to break it up and have us look at something, you know, for the Commission.

MR. SMITH: I think you've got -- you have a list of topics there that could be assigned out, most of them to your group, and that would be happy with me. I don't know, though -- it sounds like we ought to -- maybe the three of us -- put our heads together and talk about that.

MR. ASPLEN: The particular issue of compensation for wrongful convictions, as a general issue, is that the kind of thing that the commissioners want this Commission to get involved in?

MR. CLARKE: Which compensation issue?

MR. ASPLEN: I believe the way it's been discussed in that working group is the issue of someone who is wrongfully convicted and has been in jail for 10 years, what is that 10 years worth?

MR. CLARKE: As opposed to compensation for the testing.

MR. ASPLEN: Correct. Compensation for that -- is that something that the commissioners want this group to get involved in?

[No response.]

MR. ASPLEN: Okay.

DR. CROW: We're ahead of schedule, assuming this topic has been taken care of.

Are you satisfied, Judge Reinstein?

JUDGE REINSTEIN: Yes. We're open to doing anything, is the bottom line.

One of the things that we've discussed a couple of times is this issue of should there be a advisory board where you take it out of the courts, because a lot of the stuff doesn't even come to the courts as long as there's the collaboration between the defense and the prosecution, they agree on things, but are there instances where you would want to have this group of representatives of the defense bar, prosecution, laboratory, law enforcement, retired judges to make these determinations?

MR. SMITH: In the first instance. Is there any jurisdiction that's done that or moved towards it?

JUDGE REINSTEIN: Canada.

MR. SMITH: As the first place to go? They don't go to the courts first? They go right there?

MR. CLARKE: Well, it depends on how it's prompted, how it starts.

MR. SCHECK: In Great Britain -- I guess it's now close to two years old -- they have something called the Criminal Case Review Commission that was set up in the wake of the Gilford Four and the Birmingham Six, and for those of you that do it by movies, "In The Name of the Father," and this board does have free access to that same laboratory that's doing all the DNA testing, the forensic science services, and to say that it's constituted -- that its heads are both prosecutors and defense lawyers is a little odd, because in Britain, the same lawyer sometimes -- very frequently takes both sides, but it does have subpoena power, and the way their processes work is that they don't quite have the same elaborate collateral attack system that we do, but once you exhaust final appeal, you go to that Commission, you

present your case, and it sort of functions as a -- the way that -- it's not -- it takes over the function of what used to be called the home office in Great Britain, which would essentially be the equivalent of a state clemency board, if your jurisdiction actually has a state clemency board, which in theory is empowered to look at claims of actual innocence, although I think, when you look at the literature, you'll see most state clemency boards are really not in the business of reviewing convictions for actual innocence, they're more in the business of looking to see whether or not somebody deserves to get clemency on a sentence because they're guilty but they deserve early release for some particular reason.

They don't -- they're not set up to litigate actual innocence claims or even research them. This board is specifically supposed to do that.

It does its review, it makes its findings, it has subpoena power, and then, after it reaches its conclusions, it sends it back to the court, saying, in British terms, this conviction is unsafe in our judgement, do what you will with it, and they have actually also reinvestigated, interestingly, executions, and some of the first things it's done in its first two years of existence is that, in the Hanratty and Bentley cases, they decided that the British had executed two innocent men and made official findings to that effect and sent it back to the courts, where they were, in fact, proved that they had, before they abolished the death penalty, executed innocent people, and we have no such entity in the United States that would take on that assignment.

MR. CLARKE: They operate under one legal jurisdiction, do they not?

MR. SCHECK: It's the United Kingdom. No, I don't think it includes Scotland. In fact, I'm certain of it. Nor Ireland.

JUDGE REINSTEIN: If you have a claim that comes in, let's say, in Eloy, Arizona, a small county, and the prosecutor there and the defense -- public defender there and the judge there -- they don't have a clue.

So, if you had a state-wide advisory board where a defense attorney there, a prosecutor there could say, here, you guys have at it, we've got a lot to do here and we don't have time to look at this, but you guys have all the expertise in the world, and there's this loosely-formed advisory board made up of a prosecutor who deals with this, a defense attorney who deals with it, somebody from the state -- the DNA lab, maybe a retired judge, a law enforcement officer who has some knowledge of DNA, will you take a look at this for us, kind of a loosely-formed board to review it.

Because you know, like in my county, I can see us being able to handle it within the court, but there's a lot of other small counties in our state that -- what happens is they call me or they'll call a prosecutor in Maricopa County or they'll call, you know, a defense attorney, but they won't be able to handle it locally.

So, that's another version of it, you know, loosely drawn.

MR. SMITH: But you see it coming into play before figuring out into what category the claim falls, for example? Would this group decide whether it's a category one or category two claim?

JUDGE REINSTEIN: I think that the local -- whoever -- somebody locally can kind of draft up a synopsis of what the case was about probably in, you know, a page or two and somebody could take a

look at that and just read it, and they could almost set it up so that, on a rotating basis, a member of that board just looks at it and says, well, this is -- there's nothing here, we don't need to look at this.

You know, you have to set up a structure, and I would not want to see a whole bureaucracy being set up, you know, especially for the numbers that you would see in some states. I don't see there being a vast number of cases, for example, in Arizona, but it's something that you could set up in different jurisdictions.

MR. SCHECK: I think that the answer to your question, Michael, is yes, but I think, again, we never envisioned this as something that is necessarily going to be adopted by every state.

MR. SMITH: Exactly. But there's a recommendation that you consider doing this --

MR. SCHECK: A proposed model.

MR. SMITH: Why wouldn't you make it Federal?

MR. SCHECK: I think it actually isn't a bad idea. For example, there are only two states that have these statutes that allow for post-conviction relief through DNA testing without statute of limitations, and if you can't afford it, they pay for it, New York and Illinois.

But New York -- the way we do it is we say, yes, you can have a free test, but the state lab does it, or one of the labs approved by our commission in New York will do the test for you. That's our free test.

Now, one of the issues that we -- if you had like a small commission, if a state decided to do it that way, that had like a prosecutor, a defense representative, a judicial representative, to screen these cases, is one way of executing the mandate, and I'm not proposing this would work everywhere, but the kind of thing that it can do -- and this fits into the lab committee issues -- is it can find the evidence.

One of the problems that Paul and I have had many times in Virginia is I have to call him up and ask him to go look for it, and that's true in many different jurisdictions, and those are essential issues, you know, for lab-funding committees, because not only do you want to find old evidence in cases where somebody is claiming innocence, you want to keep track of your old -- you know, unsolved cases and in all kinds of cases, because it's going to have relevance as we implement data banks.

So, you know, a very rational response by a particular state might be to set up some kind of an entity that, you know, can make these evaluations, and the other thing that came across in our meetings that -- is that the prosecutors were the ones that were telling us we can expeditiously deal with these things better when we have a prosecutor who's knowledgeable about DNA, but it's harder when we don't have -- when you call and you say we want post-conviction testing and you're calling an office where people really aren't as familiar with the technology.

So, that kind of entity, you know, maybe one way to implement these recommendations.

JUDGE REINSTEIN: In many jurisdictions, a judge has to appoint a special master. You know, they do it in the asbestos cases.

So, it's akin to appointing a special master. You appoint a board.

Right now, if I wanted to, I guess I could say, you know -- pick out a prosecutor and a defense attorney and say, here, you guys have at it.

MR. SMITH: Surely this would have happened if there had been more pressure on the courts for more cases to be processed. You'd expect that to happen, but it hasn't happened, I think, in anyplace we know.

It was just sort of cautionary on whether you could have the state board, sort of set it up, have it do good work, having good people involved in it, if the flow isn't big enough.

MR. THOMA: You're missing the vehicle to do it in a lot of states. I think the people that are convicted are more willing to attempt it.

MR. SCHECK: A lot of it is why is it -- yesterday or two days ago in Illinois, probably another case you should all know about, we had our 38th Innocence Project exoneration, the 58th overall, a guy named John Willis, but from the point of view of this Commission it's an important case.

Mr. Willis was convicted, and the testimony against him at trial turned out to be that a serologist said that ABO testing of a piece of toilet paper that the victim had the presence of mind to spit into, knowing that it could eventually identify the perpetrator, had been analyzed by a serologist whose notes reveal a clean ABO exclusion.

However, the testimony at trial said it was inconclusive, for reasons we still don't understand, and the DNA testing just completed in Toronto by Pam Newell exonerated him, he walked out of jail two days ago, after serving many years in jail, but that's one that called the whole lab system into question, but why are all these things happening in Illinois, where they've now had 11 exonerations and 11 executions, many of those from DNA testing.

The only reason it's happening in Illinois is that there's a group of people that are fomenting this kind of activity among people coming forward and making claims.

I think that we also see, since the DOJ report in 1996, where we had 28 post-conviction exonerations, now it's 1999 we have, you know, 58 here and six in Canada, I mean I think that the pace will accelerate.

MR. CLARKE: I'm just wondering, though, with this concept -- and I think it should certainly be explored by the working group, but I wonder if the concept would be such that there would even, frankly, be enough cases for such a group to look at. That's the only thing that really concerns me.

JUDGE REINSTEIN: It doesn't have to be something on an ongoing basis. It's just something that you know exists and you say -- you know, it's like a SWAT team and you say go out and get it.

MR. CLARKE: Absence of legislation, it's just going to be voluntary anyway, and to some extent, that goes on already.

MR. GAHN: But I would endorse doing that only from my own experience in this.

When I get these cases, you can well imagine, when you've got your normal calendar and everything you're doing, there's a tendency to go down at the bottom of the pile, and you don't get to them, but maybe it's 10 years old, the DA who tried the case is gone.

I just got a file that had been -- if we can even find the file. Just locating that evidence -- some of it may be at the crime lab, some with the police, some with the court system. The amount of time that I will spend on one of those cases is just horrendous, especially if you have to get transcripts, because you can't tell from the file who testified, what it was about, just as Barry was talking about, what did the serologist say about this, to make an informed decision on whether this is category one, two, or three.

It's a horrendous amount of time, and it's tough when it falls -- and you get a couple of those, which I have -- it's tough with your normal calendar. So, I endorse looking into this.

DR. CROW: Let's see if we can come to some sort of a resolution of this.

MR. ASPLEN: What I think I'm hearing is that that working group will, in fact, investigate that kind of proposal, a model, if you will, that could be entertained by varying jurisdictions, be they state, local, Federal, etcetera, but to develop a model that would promote that kind of advisory committee approach.

Quite frankly, as I think about it, though, what would be important to attach to any model like that would be recommendations for how that should be disseminated, for example, if it is created, if it is endorsed by the Commission.

I think the appropriate place to send that would be places like the ABA, the AJC, etcetera, because that's - - really what you want to do is implant it in the minds of the judges and the prosecutors and defense attorney more so than on the statewide level, but rather, make it an option for them to create as they will, to see if they can get partners in the proposition to do it, given a model that works. Does that make sense?

DR. CROW: Judge, does that suit your intentions?

JUDGE REINSTEIN: That's fine. We'll talk about it in three weeks.

DR. CROW: We have two alternatives. Why don't we take a break now and come back in 15 or 20 minutes? I want to get one other thing in this afternoon, and that's from Paul Ferrara, but I think we have the space to do it.

[Recess.]

## Crime Scene Investigation Working Group Report

*Chief Terrance Gainer, Chair*

DR. CROW: Let me call on Dr. Gainer.

MR. GAINER: Well, we met in mid-January in Orange County, the subcommittee did.

Five of those members are here with us today, aside from the staff, Jan and Darrell and Lee Colwell and Clay, and it was, I think, either the third or fourth visit and inspection of police evidence collection processes, equipment, training, as well as another look at programs designed to work old or cold or unsolved cases, depending on how you categorize those.

This time we specifically looked at Santa Anna police department in Orange County, and we continued to concentrate on two major issues, I think.

One is training in general as it applies to first responders, investigators, agents or detectives, and crime scene processors, and we also have been concentrating on DNA evidence in unsolved cases, again the unsolved sometimes characterized as cold or old cases, and we particularly focused on some outcomes that we need, I think, affirmation from the counsel on as to whether we're proceeding in the right direction on several items. Let me hit some of those.

In training, I think Lee Colwell will also add a lot to some of the discussions we've had about the overall training opportunities that could be had if more time and energy was put into that.

I think we've concluded, as one might suspect, that with this new technology there just has not been the training of law enforcement anymore so than there probably has been training of public defenders or prosecutors, and we know we need to concentrate on that.

So, we concluded that there was at least three documents that we thought we should produce.

One had to do -- we ended up categorizing it as a 10-page information pamphlet, and I think Chris has nearly drafted that, that will be shared not this weekend, I don't believe, but through the mail with us, and that document would really be entitled something to the effect of what every police officer must know or should know about DNA evidence.

Again, based on the conversations that we've had with many people across the country, we don't think that there's a good firm understanding of DNA absent everybody being able to say DNA is very important, and we thought, if we had a good, handy document that would, again, give you -- a police officer to detective to agent a view of what that is, as well as the command, that would be a good formulation basis, and like I say, Chris and his staff have already roughed that out.

A second document really needs to be focused on the training of evidence collectors, the crime scene processors, and we have been less specific and spent less time so far on this but feel that it might be an area that we would contract out, and my partners can help me, if I've got all this straight, that we would contract out, because clearly some of the things we saw again would indicate that we just need to focus law enforcement personnel on viewing crime scenes and evidence collection differently, and maybe this is an interesting or a time to bring up one of the observations or one of the evidences that was collected

that I think was a surprise to all of us, and many keep bringing it up as a pretty interesting example of something that a lot of us hadn't thought of, even though we've been in the business a long time, and that was -- I believe it was a Santa Anna case, where there was a fired bullet that went through and through the offender, and the fired bullet was processed, and they recovered the DNA from that bullet, and I don't recall the whole story, whether they ultimately connected it up with the suspect or not, but it just caused a lot of us to start thinking about how you handled fired bullets, depending on the nature of the case, that we just hadn't thought about the concept of first handling a fired bullet as containing biological or DNA evidence versus the ballistic evidence.

So, there's been all sorts of ones that have creeped up like that that we really think detectives and crime scene people and cops in general have to think differently about what they're doing.

So, there's an area for an awful lot of serendipity there, and we need to introduce people to those things.

The third document -- and this is probably even less clear, and we are definitely, I think, still struggling with this and it will be the subject of some more conversations at our meetings that are planned in April, June, and in August, and one of those is in, I think, Boulder, Colorado, one in D.C. -- and that is the role of DNA in these unsolved cases, and again, we had quite a bit of conversation about whether we're talking about old cases, cold cases, and what the time frame is that makes one unsolved, old, or cold, and that has -- this whole area has to do with prioritization of cases, you know, what cases do we concentrate and which that we don't.

I mean this is actually the whole area of law enforcement, those who are even thinking about this are struggling with, too, because for instance, in Santa Anna or Orange County -- again, I don't remember which, if it was one city or the whole jurisdiction, must be all of Orange County, where they had some 5,000 homicide cases that went back to 1972, if my memory serves me correctly, that they were struggling with how to work through.

MS. BASHINSKI: Not that many homicides.

MR. GAINER: Homicides and sexual assaults?

MS. BASHINSKI: Right.

MR. GAINER: But at any rate, we had a long discussion over a couple of days at different times about the value of going back to cases from '72 versus putting your time and effort to more recent cases, and then the relevance of old cases versus making sure detectives and others concentrate on current cases, so that perhaps 10 years from now we don't have old cold cases.

So, we did talk with some of the people out there about programs they're using, and I don't think we saw - - or we are unanimous that the program that we saw was the model to prosthetize across the United States.

It was a model, but again, I think a lot of us were uncomfortable with the prioritization. It seemed to be a little bit more hit and miss than there was any concrete approach to it.

We also had quite a bit of conversation about, again very related to this, information on non-suspect cases, just trying to get some sense of how big an issue that is, and we had agreed with some of the



members there to look at the cases from Washington, D.C., Chicago, I think L.A. was one of the ones we talked about, and then, since then, Chris and I and Lisa had met about reaching out to Oakland, California, Detroit, and we have some preliminary information coming in, and we want to develop a white paper that will give us and perhaps the Attorney General a better idea of the extent of work that is not being done that could be done if money was put into this, and some of the preliminary numbers again, if I recall, was Chicago, 2,000 cases a year, of rape kits that have not been processed.

Did you have any other numbers we wanted to share, Lisa?

MR. ASPLEN: It wasn't 2,000 that had not been processed. They get 2,000 a year, and of those, there's only a certain percentage that are, in fact, processed for -- non-suspect cases that are processed, and we're looking into the other, you know, major metropolitan areas to determine what their -- processing to number of cases they have ratio.

MR. SCHECK: How long do they hold them?

MR. ASPLEN: How long do they hold them?

MR. SCHECK: yes.

MR. GAINER: Let me answer that shortly but with a disclaimer first.

One of the things we were concerned about in bringing up this whole issue is to negatively portray people who are trying to be up front about this.

I feel somewhat comfortable about Chicago because I spent so much time there, and the Illinois State Police lab now runs that, and we had talked long ago about how many of these non-suspect rape kits were being processed over the years simply because there was not time to do it, and when we built the Illinois crime lab about three years ago, it seemed to me that they had thousands of these kits that were stored.

Now, whether they were being stored appropriately or not would be a whole another issue, but I also will say, in Washington, D.C., that we have seen we have a number of cases there.

So, as we reach out to these other jurisdictions, on first blush we're going to try to do this to guarantee some anonymity, you know, so that we don't -- so we can get some information and people won't be shy about sharing that, and it really goes to the same vein, Barry, when we hear so much about New York and Illinois, and I hear that now, geez, what's the matter with Illinois that we have so many of these cases, and I think it's -- from my perspective, it's a half-full glass versus a half-empty.

I mean it's a state like New York that says we've got technology, we've had some problems, we can do this better, and they're fronting it off, where as I'm telling you, some other law enforcement officials are talking about that as, see, this is why we don't want to do this, who wants to be, you know, pointed to as that you didn't do your job?

So, again, besides some conversation that we need about this, we need to have some sense from you that the pamphlet of what ever law enforcement officer should know is an appropriate one for us all, and as I listened again to the legal discussion, it certainly strikes me that some of the legal issues you're wrestling with, especially when it comes to the Fourth Amendment that would need to be addressed there, too, as

we've talked about at other meetings, what it is a police officer can seize or not seize or what's your expectation of privacy, of things you throw away.

That's clearly one.

Chris has also indicated there is at least some funds to do some of these things.

That's why we've talked about contracting, and again, when Mike Smith mentioned the speed with which we might do something, we've really approached this that we'd like to do something sooner than later, because things are going on as we speak.

So, that's why we wanted to do some quick, easier pamphlets or training material before we even got into the process of trying to work with various posts, which are the training standards boards of the states, which are terribly cumbersome and slow process, we've found, to try to change training techniques.

I think that summarizes it. If any of my partners who were there would want to add or subtract?

MS. BASHINSKI: I just had a question, because there were a couple of things we talked about in the group, and I didn't know what your progress was on it, that we had suggested or I had suggested looking at some of the grant applications from some of the states which had statistics in them.

I went back and looked at ours and the statistics were very thin, because most agencies don't keep the kind of data we're really looking for in the format that we need it.

Were you successful in pulling anything out of that material?

MR. ASPLEN: We looked at a couple of them, not all of them. We don't have a good grounding in what those numbers are.

MS. BASHINSKI: I did contact Los Angeles, and Los Angeles does not have, I think, real solid numbers, but they have large numbers. They couldn't tell me how many unsolved cases they had, but they could tell me how many kits were sitting in the property room that weren't being worked on.

But Oakland, I think, does have a better handle on that.

MR. ASPLEN: It's a real -- it's been a very, very difficult issue for us to try to determine a way to get our arms around this issue of illuminating the matter of the non-suspect cases not being worked.

I mean we need to find a way for the Commission to look at that issue and come up with some recommendations, if it can.

It is such a fundamentally different and more difficult proposition than what we've done with, say, the database backlog.

You know, that was easy to determine and easy to come up with a solution on.

This is a much more complex issue, and we just haven't found the right mechanism to do that.

If we start to look at jurisdictions and say, well, this city has this number of backlogged cases and this city has this number of backlogged cases, you'll get a lot of newspaper reports, but that's about it. The question is what do we do about it?

I can tell you that generally what we're seeing is that, if they do 25 percent of the non-suspect cases, that's pretty good, that's pretty high for a major metropolitan area in terms of the number of cases they get in.

That turns into tens to hundreds of thousands of cases that aren't getting worked, the non-suspect cases that aren't getting worked.

So, we're looking for real guidance from the Commission as to how to determine the problem, describe it to the Attorney General, and come up with some recommendations.

DR. DAVIS: Chris, lots of times you have to approach these things sort of slowly, in little incremental steps, and you do have a mechanism out there of laboratory accreditation, and I happen to be looking at some for this Washington project that we're on, and one of the questions they ask is the non-suspect cases, etcetera.

I think one of the things you could do is to talk to the people who make up the survey forms and the survey data and sort of get their input into this.

Now, not all labs are surveyed, but at least that's a mechanism to start with, and let them come up with ideas of how to document this, because you get down into the situation of documentation.

Most of your national accrediting agencies, like the Joint Commission of Hospitals, they go to the records. They look at how things are documented or not documented, and if the criteria for accreditation includes proper documentation, at least that's a start, and then you can go on from there.

Jan, maybe you know more about this than I do.

MS. BASHINSKI: Well, they have a survey that they send out every year for statistics, and it's been evolving, because it's very difficult, people don't call cases the same thing, they don't call examinations the same thing, and nobody counts anything the same way, and that survey right now doesn't really get to what you're talking about, because what we really need to find out is really outside of the laboratory.

Many jurisdictions, if a case is unsolved and there's no suspect, the laboratory will be completely unaware that it even exists, and so, the lab has no way to capture that that they don't see and will never see, and that's the real issue here.

The survey as it exists won't help. You could get information about how many of the cases they work on are unsolved, but that doesn't get to the great unknown.

MR. ASPLEN: Dr. Forman, do you know if the current survey being done by -- is it BJA? -- if that's going to -- BJS, I'm sorry -- is that going to law enforcement agencies or just the laboratories.

DR. FORMAN: Only going to the laboratories.

MS. BASHINSKI: And that essentially is the workload survey, which they've been working with NIST to develop into some kind of a consistent way of counting, but I know, in my own agency, I knew that was coming two years ago.

We still don't have all the data being collected in our own lab just for the laboratory work to fill out that survey, much less what exists outside of our control in the police agencies.

DR. FERRARA: I could share with you, some of the BJS survey asks, under processes and procedures, does the laboratory have an accepted policy for DNA case submissions, yes or no? What type of DNA case submissions will you accept? Any criminal case? All known subject cases? Certain known subject cases, etcetera, etcetera.

Is there a priority system for assigning, starting DNA cases? Does your laboratory have a program of looking at inactive, closed, or previously analyzed cases, with a variety of answers.

Now, that survey was supposed to be complete December 15th of '98. We filled out one for each of our four labs, but I don't believe that data is available, because our working group was interested for the same reason.

MS. BASHINSKI: There's no way to look outside the lab.

DR. FERRARA: They have some things with numbers, and even if we had good numbers, that really isn't necessarily a reflection of casework or actual analytical work involved, because the complexity and the number of samples within a case now are really -- what number of samples do you do in a case, etcetera, etcetera.

So, it's an extremely complex problem, and our working groups have a devil of a time getting a handle on this.

MR. SCHECK: It's a very important issue, the nomenclature issue.

Michael has far more experience than anyone, I suppose, in this area, but having spent my time in the dungeon of case weighting systems for courts, public defender's office, prosecutors, how you define a case and how you define workload is absolutely critical, because we won't know how to give people money, funding, we won't know who to fund, because they're doing a job or not doing a job, and it strikes me that, particularly in relationship even to the -- you know, the recommendation on backlogs, etcetera, that one good function this Commission could serve is get together with ASCLAD and other groups, DAB, and come up with some --

MR. SMITH: What is the thing we want?

MR. SCHECK: I'll tell you exactly what I think would be the right data to get, what you would need if you were the Attorney General of the United States to make some good policy decisions.

I'd like to know for each jurisdiction, number one, when you define a case, you know, we're talking about how many suspects, how many samples are requested for analysis within that, because it could be, you know, lots of different controls, etcetera, or how many you did in any particular case.

I'd like to know, for any particular case or set of suspects that the law enforcement is asking, what is your backlog, you know, how long is it from the time that you requested to do an analysis to the time that you get to it, on an average?

Particularly, I would want one set of statistics for incarcerated individuals, another set of statistics for people that are charged but not incarcerated, and then, you know, other kinds of requests or categories.

I mean you can make up these definitions, it's just a question making them uniform, and begin to get statistics on the labs as to -- you know, I mean I agree with Jan, that you know, in terms of non-suspect cases, there's probably no way for the labs to know, that's more of a police department number, and I don't think the labs can necessarily know how many non-suspect cases they're not being asked to analyze, but they certainly should be able to tell us with some specificity what their backlogs are, how many cases they analyze, how many samples, what their turn-around time is.

I'll tell you, Chris, I was just at our New York State meeting this week, and Leslie Beshner was there from Great Britain. They're now down to seven to 14 days turn-around time, seven to 14 days.

MR. GAINER: On non-suspect cases?

MR. SCHECK: On everything. Last month, they had 1,000 hits in one week.

MR. SMITH: I remember Paul, a long time ago at one of these meetings, talking about -- I thought he was talking about the need, maybe the practice of making independent decisions about how many of the samples you test in which cases.

I mean it's partly a prioritizing thing, but it's also partly kind of a judgement and experience thing, and it occurs to me that that's a valuable area in which some advice might be given, because one way in which this can become unmanageable is that nobody is exercising any judgement about what it is that we're actually asking the lab to do.

Now, if we are and the labs can't do it, that's different from we're not and the labs don't know what to do, but they'd look at the same problem from a negative point of view.

MS. BASHINSKI: Typically, what we're doing is discouraging by default submission, because we have such a long turn-around time, everyone understands that, and it isn't until a case reaches a high level of priority within the agency submitting it that it gets the level of attention that it ought to get, and that's the reality.

MR. GAINER: We do talk quite a bit about the fact that we didn't want our detectives to become, in fact, lazy through technology, that you know, you start over-relying on just the use of technology to do some of the basic things that a policeman or detective ought to do, and that is go out and work the case and start to begin to narrow your subjects.

Again, we saw that in our lab system in Illinois when I was involved in it, that if you raise the law enforcement's consciousness about the potential for DNA, then they'll just keep saying let's do everything versus working through it.

MR. GAHN: I think at the last meeting, I told you what we've done in Milwaukee County on this and how the detectives have prioritized cases.

I know that our state crime lab is not going to call in the police agency and say please send us some more work, and if police in Wisconsin find out that, oh, they can do unsolved cases, they'd be more happy just to pack every damn case up they've got and put it at the crime lab.

So, they got together and said, look, we've got to be reasonable about this and get a priority on which cases we're going to send in and look at to be unsolved, and they've had a tremendous amount of success.

I was out at our crime lab last week -- and this might help address some of these questions.

Our Wisconsin state data bank got going May 21st of last year, and only Milwaukee County has submitted to it, no other county.

So, I asked the director of our crime lab what's going to happen when the 71 other counties hear about this, and that's a real problem, a real question, because Milwaukee alone is keeping the state crime lab busy.

Anyway, we will find out soon, because the director of the crime lab and myself are giving what's called an ETM on Friday, which is a network throughout all the counties, and we're basically going to tell everybody that we've had some great success here, and I think we'll find out, but there's going to have to be this prioritizing, and Milwaukee police have really done, as I say, a terrific job.

MR. GAINER: That is the issue, I think, we were struggling with, is how to help law enforcement do their prioritization, and we've seen quite a disparity in that.

Again, as I recall, the Orange County prosecutors, the one who was running this project, seemed to focus on the desire to solve any homicide, and so, we had a lot of conversations about the value of working a 1973 unsolved homicide versus working a 1996 unsolved rape case, and some of us felt that, given recidivism rates, that there might be something more to be said about the more recent case than there is the old one, although, you know, given the parameters, we'd like to solve them all, and again, we had quite divergent views on that.

DR. FERRARA: I think one of the things that we, the Commission, have to realize -- and I think laboratories all over the country, if they aren't already aware of it, I think it's important for them to realize that we are under siege, as it were.

There's a crisis situation brewing with respect to all of the points that we have made. I mean we know the technologies, we know what's capable out there, we know we haven't even scratched the surface of the crime scene material, we haven't scratched the surface of the convicted felon samples.

We try to do things, prioritize cases, prioritize evidence within cases.

We're going to make mistakes. We made one in Virginia, if you want to call it a mistake. Certainly, one law professor at George Washington would characterize it as this, not that that carries a lot of weight, but consider a rape occurs on August 31st of last year, 18-year-old woman, she's raped and stabbed.

It's four weeks before a rape kit from the victim is collected. At that time, the investigator tells our laboratory the victim had previous consensual intercourse 90 minutes before the attack, she doesn't think her attacker ejaculated.

A suspect, somebody the police liked for this case, was apprehended on shoplifting charges in November. Now, we're talking three months later a suspect, per kit, is sent to the laboratory.

Examiner is still working with the investigator. Investigator says this guy is going to come to hearing on these shoplifting charges in two weeks, can you rush this analysis?

Now, communications being what they are, he thinks it's being rushed, the examiner is not rushing it, all things considered he's making a decision, right, wrong, or otherwise.

This doesn't rise to a drop in cases that are going to trial, and to make a long story short, the guy goes for his hearing on the shoplifting charge, the officer is not there, nor is there a prosecutor, he's released.

Eleven days later, he rapes and murders a woman, and if you read the local media or listen to a George Washington law school professor, we're responsible for murder.

Now, here is a 900-case backlog, and Barry, you're right, there's a lot of good data that needs to be collected, and we've been trying to do that, because the number of samples, types of samples, are there suspects, how many suspects, all of this is very valuable for us to try to develop this, but nonetheless, if you have 900 cases -- and I get 2,000 DNA cases in a year, and I have a capacity almost to do 2,000 a year, but a backlog of 900 cases is turning out to an average turn-around time without priority approaching 180 days, and in Virginia, a speedy trial is 150.

We try to do unsolved cases, because you really need to try to do them, but most of our resources are just trying to get the cases that are going to court.

We try to prioritize cases, and you get a court order from a judge to do a DNA analysis on the saliva of a marijuana joint found in a prison with two suspect samples, two prisoners knowns being submitted.

Now, that's a foolish waste of resources, but I'm faced with a court order.

MR. CLARKE: Judicial prioritization.

DR. FERRARA: Judicial prioritization. And you know -- and I think that gets back to our education.

You know, if I could have had the judge or if somebody could have said to the judge what are you thinking about, my folks could have been working that case, probably were working that case when they should have been working that vaginal swab with spermatozoa, despite the fact that, listen to an investigator and all things considered, you're likely to say, well, we're probably going to find the boyfriend's DNA.

The long and the short of it is we found only the suspect's DNA, no foreign profile from a boyfriend, and it caused me -- I mean, you know, as an individual, as professional, you take some responsibility for that, and yet, this is just scratching the surface.

I mean what's going to happen when we start bringing in all the old cases?

MR. GAINER: Well, I think, again, the capacity issue is one that we need to address, too, because Chris was observing, in teaching over at the Metropolitan Police Department Academy, although we have no DNA capacity right now, we are beginning to educate our officers about the potential of this.

So, what you're going to have is now, you know, 3,000 men and women out there trying to figure out where they can dig up the DNA evidence, which only raises their expectations and continues to feed the FBI lab, which continues to get further behind, and even with this primer, if we start mentioning, as we must and should, the various areas from which you have a potential to get this evidence, I mean it raises everybody.

Again, I'll go back to the bullet one. I had never dreamed in the world that I should process a fired bullet that passed through a suspect for DNA, or one of the other ones out there, that a baseball bat or something was used as a bludgeon instrument and that, typically, we would get it and preserve the end with the blood on it.

Well, they -- someone preserved the other end and got the transference of the -- from the sweat of the offender. I mean we just didn't process evidence like that, or think of it. I don't believe we did.

DR. FERRARA: We've been training, and we're getting some of the finest evidence being collected. It's wonderful, on one hand, but we've created in the process -- I mean cigarette butts from crime scenes, often which overlooked and now coming up with probative results.

You hate to discourage it, and you can't not train. It's just capacity.

MR. ASPLEN: I think it was Professor Smith at the last meeting, when we were talking about prioritization and talking about people saying, well, we just can't get ahold of parolees and probationers, you know, and I will characterize your tone as indignant, perhaps, it really was outrage, and I think we may find ourselves in the same position regarding this.

We're talking hundreds of thousands of cases not being solved, and it's a prioritization issue, but it's a volume issue, too. It's a financial proposition that, again, we need to find a way to eliminate.

MR. GAINER: Well, recidivism cases -- maybe we're beating a dead horse. The recidivism issue on the rape cases is one that has troubled many of us for a number of years.

I think there would be outrage in the public's mind if they knew that we had this evidence, and not every one of these kits that's processed is going to deliver us what we need, nor do we necessarily have, as you know, the data banks to compare it to, but if one knows anything about the recidivism of rape and the pattern of rapists, we are missing just an unbelievable opportunity to connect crime to crime, which also leads to the solving of the crime and the prevention of more crimes.

But again, sometimes it seems like we're doing a little bit too much jaw-jacking about it and not enough -- maybe it is time for the Commission to make some positive statements that we need X amount of money laid out from someone to do this because we're putting people at risk.

DR. CROW: Let me interrupt with something. I think we need to hear from Dr. Colwell, and there will be time later on to continue this discussion. So, let me just barge in on this, dictate.



MR. GAINER: Will we come back to the issues we raised?

DR. CROW: Yes.

## Training and Education Issues in Rural Law Enforcement

Dr. Lee Colwell,  
Director, Arkansas Criminal Justice Institute

MR. ASPLEN: By way of introduction, if I could introduce Dr. Colwell, he is a Professor of Criminal Justice and the Director of the Criminal Justice Institute, the National Center for Rural Law Enforcement, which are divisions of the University of Arkansas.

He's a consultant and lecturer, retired in 1985 from the FBI, where he served as Associate Director, the number two position in the Bureau, and let me say this, that the presentation that you're about to see was presented before the working group, the crime scene working group.

However, we thought that the issues that were raised there and the input that Dr. Colwell had were of such value that we wanted to present it to the Commission in its entirety, even though it could have been kind of transferred through the working group, we wanted you to hear from him personally.

So, with that, thank you for being here, Dr. Colwell, twice.

DR. COLWELL: Thank you, Chris.

I must say that it was in less refined form when we presented it at the working group, spontaneous, and I feel like I'm being parachuted in on this lively discussion here, but I have tried to clean it up a little bit and make it more coherent.

I think it important to say several things before we actually get into the substance of the presentation that I prepared, and that is this, that we have been talking about definitions and nomenclature in the last hour or two hours that I've been listening to the discussion, and I think it would be important to note that my part of the presentation today that's captioned training and education, I will talk about a dichotomy between urban and rural policing or law enforcement functions.

I'm not saying that the functions of rural law enforcement are different from the functions of urban in the collection of evidence and the need to follow policy and rules and regulations.

What I am saying is that the functions are implemented in many different ways and levels in a rural area, almost, if you will, in some instances, a different kind of justice system, one that can be characterized sometimes as informal, because everyone knows each other and you have the players often on-site or very close to the situation. I'm talking about judges and coroners and whole host of other things, and I'm speaking today about very small law enforcement agencies.

An agency with 30 or 40 people in a large agency. So, I'm talking about those very, very small law enforcement agencies.

From a demographics standpoint, out of the 17,341 law enforcement agencies, now up over 18,000 with the community policing grants, out of that, if you take out -- exclude everything except municipal and sheriff's offices, municipal police agencies and sheriff's offices, you're down to around 13,000-and-something, and that's the universe that I want to talk about, 13,000-plus law enforcement agencies, including sheriff's offices and municipal law enforcement.

Those two law enforcement entities are responsible for 98 percent of the felony convictions that occur in this country.

Now, a few more statistics.

About one-third of our population live in what is called the rural area, small town or rural counties, and those, if you think of them in terms of political boundaries, they are not likely to change in the coming decade or two decades or three decades or four decades, because in our form of government, a democracy, there's not efficient about representation and who has a police department and who has a county sheriff's office.

For example, in my home state, the county seat -- we have 75 counties in the State of Arkansas. The county seat in each county was determined by how long it took a person to ride on horseback from the furthest reaches of the county to reach the county seat, and that requirement was one day, had to reach the county seat within one day on horseback.

Now, out of the -- we have talked with the FBI, components of the justice department that maintain statistics, we have visited with various entities around the country, and we have spent a lot of time in the United States Department of Agriculture.

We even reviewed congressional reports in, one of them, 1991, where there were 18 states that admitted that they were rural, but if you go around the country, you find rural areas in every state.

So, one-third of the population lives in rural areas. Of the 670-or-so-thousand sworn law enforcement officers, about 260,000 of them perform policing functions in rural areas.

Our definition of rural at the National Center is this: a municipal police agency that serves a population of 25,000 or less and a sheriff's office that serves a population in a county or 50,000 or less.

Now, please understand, I'm generalizing with a lot of these comments, and they don't apply everywhere, but the constituency that we focus on is this 260-so-thousand sworn officers that come from sheriff's offices and come from the very small town rural law enforcement agencies, and often, you will find a chief that goes on patrol all the time as a matter of course and is a working police officer, or a sheriff.

The average size of these departments is about eight people, including the chief.

So, the dynamics in the municipal governments are this: In many states, you have mayors who are elected every two years, and so, in the chief of police position in these small communities, it's like a football coach, they come and go pretty quickly, and then the staffing -- there's a high turnover in staffing.

When you get into the larger cities, you have a more professional environment in the hierarchy in law enforcement, you have a larger tax base, and you have more specialization when it comes to investigation or performing functions of law enforcement.

In the rural areas, you tend to have generalists in all categories.

One other point: I want to touch on some initiatives that we've made on curriculum development for this particular area of law enforcement that I'm speaking about.

We surveyed the 2,300-plus institutions of higher learning in this country and found that there were about 800, a little over 800, 837, I believe, that have courses, academic courses related to law enforcement based on a preliminary review of that.

As we look closer, there's only about 300-and-something who offer some type of an associate or bachelor's degree.

Of that, we came up with about 25 to 30 institutions of higher learning who offer courses in a degree program that is related to the functions of law enforcement.

If you look carefully and as extensively as you'd like, you will find no textbooks on how to be a chief of police or on how to be a sheriff.

We did check with the 50 states and the training academies and other institutions within the states, and we reviewed the task analysis or job performance descriptions that they had performed to identify those functions performed by law enforcement.

We then excluded from that, after review going back past 1990 or older, under the premise that policing is changing a little bit and the organizational structure is changing.

Then we've done about three, maybe four national random survey on the things that concern these people, these officials in these small town rural areas.

They come up with four areas that they believe that they need enhancement of their competencies in, and that is -- one is administrative operations, no surprise there, operations or investigative operations, no surprise there, legal issues, no surprise there, and forensics.

As a result of that, we are in the process of developing a curriculum that we're recommending to institution of higher learning that would incorporate those things that -- those courses that build toward a degree as a liberal arts, so you take the English, the history, and the other traditional courses, but we'll have about -- up to 18 courses that focus on the functions of law enforcement.

Now, out of that, we've also built a -- are building a curriculum on forensics, and at this point, I want to emphasize that our approach to this is not so much an emphasis on training but on education, given the environment and the demographics I mentioned about the characterization of the small departments.

Most of them have as a support a state police or a larger law enforcement agency that they have an informal agreement with where the chief or the sheriff of a not-too-distant law enforcement organization will help the small departments out if they have a crime of violence or a major crime.

Now, one more thing and that is on our national statistics.

If you take the Uniform Crime Report put out by the Department of Justice and the statistics that are managed by the FBI and submitted by voluntary agencies around the country, you will come up with the fact that, in the last six years, there has been a decline in the violent crime rate, but if you're reading that document late at night in order to try to go to sleep and if you haven't gone to sleep with all that statistical data and if you look at the rural areas that I've been talking about, you will find that violent crime in rural areas, the ones I've defined, has increased 53 percent in the last 10 years.

In my home state of Arkansas, it's gone up 84 percent.

I'll proceed with the presentation now, before we run out of time, if I can make this work.

This is just a reiteration of what I've been hearing since I've been working with the working group.

The technologies today, all kinds of samples -- the question is whether or not they've suffered in some way, and the purpose is to confirm or refute statements of suspects, link crimes together, reconstruct events within certain limitations, the potential to look for suspects and link them to the crime scene that will tell us who, if we get the right suspect, but not why, not how, or not when.

These are a reiteration of statistics that are in one of the folders that I gave you, and I won't -- if I can borrow this just a second -- each one of you should have a document that looks like this. Inside, the first page behind that, is about me, very interesting reading, but the second document in there is statistical data that I summarized for you a moment ago, so I won't spend anymore time on this, but this is just a pie-chart breaking those demographics down.

I mentioned that there's been an increase in violent crime in rural areas, there's been an increase in rape specifically, 3.1-percent rise in violent crime in 1997, 10 percent in robberies, 4.6 percent in auto theft.

This is percentages in rate increases. These are all statistics out of the Uniform Crime Report, but they just graphically show -- I'll be glad to stop at any time. I'm going to just run through these to get down to the curriculum.

In 1994 -- since 1994, according to these same statistics -- these are not our statistics, these are U.S. Department of Justice data, the Uniform Crime Report -- rural crime in California has increased faster or at a greater rate in the property crime area than in the urban areas, 22 percent increase in rural areas in the southern part of the United States.

We have focused on education and training. We emphasize the word "education" in our presentations. We are a state-funded entity at the Criminal Justice Institute. It's a university-based system.

We're a campus, stand-alone campus in the state, the only one of its kind in the country, where we combine research, management education and training, technical assistance. We provide free manuals on policies primarily to the rural agencies, because they don't have them.

As the attorneys in the room will note, if you don't have policy manuals, you're not in very good shape if you have a suit that comes up.

Training is not used. There's a defense in the State of Arkansas, because our training doesn't measure up in the risk groups, and the prosecutors don't want to use it as a basis, as a defense. So, we're working in that area.

I say education several times because I view that as attitude-forming, hoping to prepare people how to view or look at a situation.

In Arkansas -- and I'm not banging Arkansas, there's been enough of that in the last year or so, but we have a thing called circle the wagons. We have a crime that occurs, the first responders occur if a --

maybe the emergency teams, medical, if there's a chance the person is still alive, and then the police are there and they circle the wagons.

They all walk around the crime scene, look at it, yes, that's a body, and then they start putting up the perimeters to isolate it.

So, when I say attitude-forming, we're trying in our educational courses to talk to them about the way they perform when they respond to a crime scene.

They don't have any equipment. What they know about technology -- and here I'm talking about these very small agencies throughout the United States. I'm generalizing. There are many, many exceptions. But as a general rule, most of them, their knowledge of technology is something they've seen on tv, usually as a result of a highly visible case.

The integrity of the evidence, we know is a big issue, made a big issue by at least one person in the room, but it goes to the heart of effective professional police work. If you can't trust the integrity of the evidence, it is a poor excuse for going to trial.

DNA evidence has been challenged. It has the potential for contamination, and in that area is where we focus a lot of our attitude-forming presentations.

It's easy to contaminate the crime scene, it's easy to contaminate the presentation, preservation of it, and it's becoming more and more difficult to recognize what is evidence.

I told you about the history for the National Center for Rural Law Enforcement. We operate a simple thing -- it's an internet communications system for these small departments. We pay the lines fees if it's a long-distance call for them to get to the internet.

We have 300 agencies on-line, representing 45 states, 1,100 accounts, and we're about to increase that to over 1,000 agencies in the next month.

How do we get all this information? We've conducted several forums around the country in the last five years, where we bring together anywhere from 175 to 200 sheriffs, chiefs, judges, prosecutors.

We've had mayors present. We've had people from social welfare departments, human services, attend some of our conferences.

Of the needs expressed by these groups each time we have met, they talk about the four things I mentioned. They also talk about the need to enhance their competencies in forensics. Crime scene comes up all the time.

None of them have -- or many of them, a training budget that's \$300 for the whole department, so they can't go anywhere.

They have limited resources. If someone attends a school for one day and you've got a five-person department, it's 20 percent of the staff that's gone for that day, not even talking about shifts, if they have that.

Nationally, we've determined based on these surveys, random samplings, that three days is the most they can afford to be away from the department. That includes travel time.

I talked to you about the development of the curriculum.

In our case, everything is funded by the state. All programs that we present in the forensics area, the legal area, management, both operations and administration, is free of charge.

Many of the courses are accompanied by college credit, and we have textbooks for the courses. We're in the process of building monographs for textbooks where they don't exist.

We give tests. We administer a competency exam at the conclusion of the course, and if they complete that, then they get -- they may get college credit for it.

Nothing new about that. We just put, we believe, a little bit more discipline in the process.

Last year, we put on 24 programs involving 435 officers, which handled 125 agencies in our state. We have 494 municipal governments in the state, 75 counties.

From a percentage standpoint, if you look at the people that attended, out of the 10,000 law enforcement officers we have in the state, we reach .04 1/2 percent.

I mentioned the program is no longer than three days, our strong emphasis on integrity, hands-on experience.

Our forensic anthropologist -- we got her from the medical school, and when we do a crime scene involving homicide or violence, we take either replicas or we take real bones from animals, bury them, and we rent these power stations, gas power stations, if it's raining or whatever it is, and we usually rent a space on someone's property, bury them, and let them go find it.

We don't try to teach them how to do it so much. We show them what happens, and we call them -- we ask them to call someone else who is competent to conduct the search and preserve the evidence if they don't feel competent to do that.

Bio-hazard information, personal protective gear -- we've purchased about 360 cameras, with a year's supply of film, for the departments in the state. Then we had to train them how to operate the cameras. That's just a band-aid approach, nothing long-term about that. It hasn't been institutionalized.

Talk to them about contaminating the evidence. They have nothing, as a general rule, in the way of containers to preserve evidence or personal protective equipment, gloves, and so forth.

Now, to put this on balance, most of the major -- I won't say major crimes -- rural counties have major crimes, but the volume of crimes is in urban areas.

So, we're talking about a group of law enforcement officers who don't have that experience level that you get where you're exposed to crimes of violence on a regular basis.

So, that's why we emphasize education and knowing not necessarily what to do but what not to do in order to lose evidence and damage the crime scene.

The database is available or going to be available, new types of evidence.

I've got the word "clearinghouse" here. We use it as a resource center. I apologize for that. We're not a clearinghouse for information, but we do post on the internet, and we send out information on facts and stories that have occurred.

Talked about increasing types of violent crime.

In the rural areas, you have stronger social bonds.

That concludes the presentation. You've got copies of all the slides in the hand-outs, and you've got wonderful information here about rural law enforcement agencies.

I'd be pleased to try to answer any questions or respond to any comments you might have.

I do appreciate the opportunity to come and talk about what I do in my life, what I do in my second life.

MR. THOMA: I'm constantly amazed. I'm a public defender in a rural environment. I just got appointed a couple of years ago.

You're talking about the diversity of what law enforcement has to do on a daily basis. For example, you may only have one murder case in --

DR. COLWELL: -- five years.

MR. THOMA: -- or longer, and then usually they're working on other cases.

Do you emphasize anything in particular, like the most serious cases, or just something else about that diversity?

DR. COLWELL: If I understand your question, we tailor our responses to a particular sheriff or chief, and we will go as deep into it as he or she wants us to go.

Your statement invites a lot of comments, and I'll try to keep them brief.

My background, I think Chris mentioned, is with the FBI.

The thing that I have been most impressed with is that there's a change going on not just in the major cities of more professional and better-educated people but in the rural communities, even though the salaries are -- some of the starting salaries are \$15,000 a year, but there's this desire, they want to do things better, and they know that they can be -- I had one sheriff tell me here several months ago, he says we're tired of being just good old boys, we want to be something better than that.

So, there's a desire, strong desire to serve, even though they are not -- this is not in any way a criticism. Their competencies are not at the level that you find in the urban departments.

So, what I would suggest to you, if you consider education and training in this particular part of the law enforcement community, that in my view or our view at the Institute and the National Center, the emphasis should be more on how to approach the crime scene rather than how to do it, because if they



preserve the crime scene properly, they can get to people who do it regularly and are more likely to collect all the evidence.

MR. ASPLEN: Given the limitations from a financial standpoint that rural jurisdictions have, funding for training, and the extent to which it's my guess that your program in Arkansas is infinitely more substantial than what most states have in terms of their attention to rural law enforcement, is internet training a viable way to reach rural law enforcement, and if there was the creation of a forensic or a DNA curriculum, that would be a good way to administer it?

DR. COLWELL: Thank you for bringing that up. I've got it in my notes here, but I changed glasses.

We're in the process now of developing an internet program in the management area, because we've reached the point of diminishing returns, where, if you call it, the talking head is very expensive, our mandate in the state is that we provide education and training programs within one hour's drive of every law enforcement agency in the state.

So, we have 11 satellites within the state, but even with all of that, we're only reaching about 18 percent of the law enforcement community, and we do not believe that the legislature is going to increase our budget by another 400 or 500 percent.

So, we are coming close to the delivery of an internet program, CD-ROM, in alliance with a community college or a four-year university, where they come in and, under a structured environment, they have to respond to the computer program, which would be on our server, and they go through a series of things.

So, it will be a learning process at the pace of the student.

It will not be like some of the other law enforcement programs where you can go in and turn on the tv and then go someplace else for an hour-and-a-half and then the video is finished and then you come back and the training officer certifies that you've been through that training.

We are also developing one -- we think that the forensics program is particularly susceptible or conducive to an internet-type program.

We have three distinguished professors emeritus that were working on it with us. Dr. May, who is a forensic anthropologist is developing the program. I've given you, I think, a brief outline of one of those.

We think that's the way to go for this particular constituency, because there's too many of them and you're not going to be able to touch all of them, there's not enough money and not enough experts to go make the presentations.

So, we see a CD-ROM-type program that is monitored by someone, whether it's a community college, and they pass some type of proficiency-level thing of general knowledge about crime scenes.

Of course, when you move into the urban areas, you can get more detailed and more case-specific about what people need to know.

None of my comments have been meant to criticize the rural law enforcement. It's to state a fact and to explore ways to enhance that. There are four states that try to pay attention to us, in my view, California,

Texas, Florida, and Arkansas, and of course, we're the leader. We've got to lead in something, might as well be that.

Thank you very much.

DR. CROW: Well, thank you very much. That was very enlightening.

[Applause.]

## Laboratory Funding Working Group Report

*Dr. Paul Ferrara, Chair*

DR. CROW: Well, there's one of our members that was typographically challenged, Paul Ferrara, and we have a chance to --

DR. FERRARA: Do you want me to do that?

DR. CROW: I am inviting you, urging you, right now.

DR. FERRARA: Very quickly, 10 days ago, the laboratory funding working group met for the first time this year.

As you know, last year, we concentrated on the issue of the costs associated with reducing the crime -- the convicted felon sample backlogs, and we came up with a fairly useful report.

This year, we -- our intention is to turn our attention to the very difficult problem that we've touched on already, and that is what's it going to cost, what is it going to take in order to eliminate the backlog of actual crime scene material, and as we've indicated, this is a major, major difficulty.

In the -- quickly, in the course of our deliberations, we sort of got sidetracked, if you will, on a third form of a backlog which we spent a little time, quite a bit of time talking about, and it goes back to the backlog of owed convicted felon samples and all of the difficulties associated with the collection of samples from various populations that should be taken that are not being taken.

In that particular respect, we developed some recommendations for education and training of -- and coordination of sample collection activities, coordination on a state-wide basis and the need for that, and some recommendations are being developed to suggest even grant funding may be available for education of that particular type.

Getting back to the issue of crime scene samples, as we've all heard today, we have a wide and very broad spectrum of work that we don't even have yet in the laboratory but that we need to look at.

On one hand, we have old cases, old unsolved cases.

We've been kicking around numbers, but we know that there are just those cases, whether they have suspects or not, that are sitting in property rooms and laboratories, with evidence amenable to DNA analysis, probative DNA analysis, that cannot be run.

There is the issue of the cold or unsolved cases. We've been dealing in Virginia with law enforcement agencies who need and want to have these capabilities to look at old, unsolved cases.

To the lesser problem just by sheer number but not to be overlooked are the post-conviction samples, and we have a considerable amount of efforts involved with those kinds of work.

So, the committee talked about some of the very things we talked about earlier in terms of how do we get a statistical handle on what's out there today and what's going to be out there in the future and what tools or instruments are available at our disposal to get some handle on that.

The American Society of Crime Laboratory Directors does a annual laboratory workload summary, and every year, that gets a little bit better refined, a little bit more useful.

We mentioned the BJS study, but the results and compilation of that study are not available to us, and we also anticipate that, even when that report becomes available to us, issues such as how does all of these numbers translate into real work, be established, we know that is going to be -- at best, the best we're going to be able to do is come up with a very approximate estimate of what it's going to take.

Now, we talked about -- in just today's discussion, we talked about plant and animal DNA, mitochondrial DNA.

What's clear -- it was clear to me, I think, and I think to most of in this room, is once we realize that the technology is there and what the technology can use, it's very difficult to decline to use that technology regardless of how minor the crime is.

That was the lecture I got from a judge in a marijuana cigarette case.

So, in dealing with prosecutors, asking them, look, we just want to run this most probative sample, a vaginal swab as opposed to the bed clothing, education with -- of prosecutors and the judiciary with respect to value added for additional samples to be analyzed in the same case, we're finding more and more that -- where we're being required to run every biological material and every blood stain.

A violent crime occurs, there's blood all over the place, the victim was stabbed, there's no evidence that the suspect may have stabbed themselves, the issue is how much of that blood all over do you sample looking for and perhaps finding a foreign profile that may be of probative value?

Without belaboring these points any longer, I'd just like to acknowledge that myself and Cecelia Crouch, Steven Deboda, Barry Fisher, and Woody Clarke -- Lisa and Chris joined us, and Dick, and we spent the better part of eight hours wrestling with some of these issues.

We're going to come up with our best guess as to what it's going to take.

Clearly, the measure of the work -- and Barry touched on it earlier, and he's exactly right -- a case is not a case is not a case.

We know that it's the grossest level of quantitative measurement that we can get our hands on, but clearly, what's going to be more important as we refine this is to look at numbers of items analyzed.

As the technology becomes more standardized in the U.S., we'll be able to develop a little bit better feel for the costs.

Clearly, right now, my examiners are capable of running only about eight cases per month per examiner. Most of the time, I'd say a couple days of that's the DNA and the rest of it is the pre-case analysis, the working with investigators, responding to affidavits, court motions, discovery orders, sitting around in jury rooms for days at a time while -- because the prosecutors perhaps don't have their case ready or just don't care about the situation, of wasting the examiner's time.

There's lot of problems, but we've got to figure a capability of eight to 10 per month per examiner is probably the best guesstimate right now we know that we'll reach, with a steady state, using this fairly standard technology that we have available.

Jan, would you agree that's a ballpark?

MS. BASHINSKI: I'd say that was a really high productivity.

DR. FERRARA: Probably high, yes, and actually, we're striving to get to that eight on a regular basis.

MR. SMITH: But then that suggests that it's not the volume of cases or samples per se but the efficiency of the use being made of your people. That's the problem.

DR. FERRARA: Well, that's a large part of it, Mike. I mean, clearly, if you don't use what limited capabilities you have to their, you know, maximum capacity, then you're losing on something, but yes, we are subject to outside forces.

I mean we can't -- what we tried to do is just continue to build up the capacity, and I think we have to do that nationally, to build up a capacity, so that persons don't go wanting for want of -- for lack of sufficient laboratory capabilities.

This instance with this case in Virginia Beach that I mentioned, I talked to the chief prosecutor and the chief of police in that agency, and we both -- we all agreed that, in effect, the primary cause of that was the backlog issue.

None of the other circumstances would have had any bearing if the laboratory -- a forensic science laboratory anywhere in this country has the capability of picking up a piece of evidence that's delivered to the laboratory from a crime scene within -- there's no reason, within 24, 48 hours, an examination cannot be conducted, a search made of a database or a comparison done to suspect samples, and that information reported back to the investigating officer. That's what the technology -- the capability is there. The capacity needs to get there.

DR. CROW: We have two people wanting to say something.

Judge?

JUDGE REINSTEIN: If you have a law enforcement request or a prosecution request, can labs just say no, we just don't have the capability?

If you can, then the issue is a court order, and you know, you talked before about judicial education, and Chris, I think that you have to get to like the Conference of Chief Justices and to the Metropolitan Judges Conference, which has most of the presiding judges, and the word has to go out by training, you know, and education of those people that you just can't have judges ordering, you know, a DNA test on a joint of marijuana.

I mean you can do that in -- you know, in metropolitan courts.

For example, I can tell our judges, you're not going to do that, because these people have way too many other things to do.

Now, you're going to have an individual judge -- if Barry is representing or Jeff's representing a guy charged with, you know, marijuana possession, says, well, this is exculpatory evidence of my client, I mean at some point in time somebody's got to draw the line, because otherwise you'll never get the work done.

The thing that bothers me the most, though, and Mike talked about it the last time we met and just now again, is what happens -- and I guess we're going to hear this tomorrow maybe from Commissioner Safir - - if a state goes to requiring, like you guys do, a DNA profile on every person who is convicted of a felony, or something people want of every arrestee, and on the owed samples on probationers and parolees, what happens if you actually do that? What impact is that on the labs?

I mean it's a tremendous negative impact, because I would like to be able to order my chief probation officer to pull in every single probationer, 30,000 people -- I probably could have them do it in a period of a couple months, because we can contact ours in our jurisdiction, just because of the ratio of probation officer to probationer, but it would -- I mean it would kill the lab.

DR. FERRARA: But see, as judges are -- as our report sort of indicates, and previous discussions, when it comes to those convicted felon samples, they can be -- because you're running a high volume of samples, you're developing a profile, but you're not doing all of the pre -- the case approach or the evidence examination, isolation, extraction, work on the front end, and all of the analysis, developing the report, the statistics on the back end, those convicted felon samples don't impact my backlog on crime scene material. Mine are out the door in a private laboratory.

It's the crime scene samples that I think really represent the intractable -- an intractable problem in terms of their volume and the complexity of them and how to deal with them. We can't -- well, it would be difficult to contract out, contract that work out in any volume.

JUDGE REINSTEIN: That was why the recommendation for out-sourcing all the convicted --

DR. FERRARA: -- the convicted felons. So, we could spend more time, but that may not always work in any particular jurisdiction.

I guess my point is that, regardless of what your database laws are, the problem with crime scene evidence is going to continue grow, and of course, as we do develop these databases on a statewide national level, the value and need to run those crime scene samples becomes all the more worthwhile and valuable.

MS. BASHINSKI: Paul, I would agree with you for sure that the evidence is a less tractable problem, but I wouldn't trivialize the impact of the type of volume increase you're talking about if you were to be taking samples from every arrested person, because that's orders of magnitude greater than even what you're facing or we're facing now with our data bank laws, and even with out-sourcing, I think that would stress the existing system quite a bit.

DR. CROW: Barry's been trying to speak for quite a while.

MR. SCHECK: Please make sure to tell my police commissioner tomorrow what you're saying, not that he hasn't heard.

Paul, what about gathering data from the private laboratories with respect to how they function in terms of cases?

DR. FERRARA: Particularly in terms of cost per case?

MR. SCHECK: Cost per sample. They have to have good data, because they charge now by sample.

DR. FERRARA: That's right. You're exactly right.

I've talked to a couple of private laboratories for that particular reason. I said how do you go about doing this, and of course, one of the things they said is, when you're charging per sample, that regulates the amount of work you get done.

You find the requests all of the sudden getting pared down voluntarily, typically I think it's 500 to 800 dollars per sample, and then, when they're charging the prosecution per day for testimony while the examiner sits in the witness room for four days or so before he or she gets on the stand, they find that they're very careful on that.

Nonetheless, what they estimate is, on average, approximately \$5,000 just for an average single DNA case that goes to trial and requires testimony.

MR. SCHECK: One of the things that I would suggest in this regard in terms of case-weighting numbers, that we should look at the private labs and see if we can do a survey from them, you know, maybe anonymous, whatever, talking about -- because they have to have these numbers, they're businesses, how many cases they do, per case, how many samples they do per case, how much time is devoted to testifying, and you can begin to look at differentiation of labor, how many people actually go do testifying versus how many actually run the cases, and I think they may be a valuable source, because I think one very important thing that did come out of your committee, looking at ASCLAD, gathering data from the private labs, is coming up with an instrument, a budgeting instrument that, you know, would assist in -- give this to all the public laboratories in terms of how they break out, you know, their costs, the kinds of cases sent, because obviously crime scene cases are going to take more time.

Also, I think it would be very helpful to see what they say about mitochondrial DNA testing, for example, because we know that some of the private labs are doing that now with some frequency, and we know that's the next generation of testing that's going to be required, so it would be good to see what the numbers are on that. Actually, they're offering it fairly cheaply.

So, I would even suggest, Chris, that you bring in somebody who's had experience in doing these kinds of -- NIJ, you have these case-weighting specialists, these time and motion people, you know, who have looked at the judicial things, to look at this.

Second point in this regard, to help devise these instruments and gather these numbers, because it's indispensable to do it now and to do it using a common nomenclature across the country.

The Federal Government is spending all this money in support of state and local laboratories, and we're developing a national CODIS system.

I mean this is actually something where we can implement real good instruments in terms of work that we get -- you know, we would get real numbers if we do it early, and this is still early, because you know, frankly, so little has been done.

The other model that would prevent a lot of these abuses in terms of the judges and the police departments -- I mean I don't think it's out of bounds or thinking out of the box for a second.

Remember, in Great Britain, one of the things that's fascinating to me is that the forensic science service is a public laboratory that contracts out with police agencies, and the police department has to give them money for things that the police department deems to be useful and helpful to them.

So, if it comes out of the police budget, you're not going to see anybody -- or the court budget, right? -- you're not going to see people asking for marijuana cigarettes to be, you know, typed on a high-priority like that, and I still don't understand that example, the defendant should have paid for it, and it's fascinating to look at, you know, how that model is expanded.

Remember, first of all, in the new cases coming in in Great Britain, they found that, unless they got the turn-around time down for certain specific crime categories, it was worthless, because they would do these burglary cases, and if their turn-around time was two months, 70 percent of the cases they were looking at were solved by other means.

Now, you don't know which 70 percent that's going to be and you don't know which guy who commits that burglary is going to go out and commit your next rape-homicide, right, but they had to get the turn-around times low enough for certain crime categories for it to make a difference to their customers, who are the police agencies.

Secondly, take these homicides.

The lady from Great Britain told me on Thursday -- no, on Wednesday -- that, for example, they had a homicide case they turned around within 24 hours, and that became instrumental in catching, you know, the suspect, and those are the kinds of things that, you know, you sort of have to build into the system, and I think that these, frankly, are not lab decisions, these are police and prosecutorial decisions, and it's kind of silly ways, we should make this recommendation, to be talking to ourselves about this.

I mean it is really the prosecutorial and police agencies within the state that have to begin to set these priorities in conjunction with the lab. The lab is the victim, and they're talking a lot of nonsense about -- a lot of demagoguery about crime and what can be done, and not a lot of it is smart, and you know, it's really our place to set them right on what's a smart investment and a smart way to prioritize this technology and silly ones.

MR. CLARKE: Part of that problem, though, is, unlike some of the other models in other countries, we have laboratories in this country run by different people. There's the police laboratories that exist, there's prosecuting agencies' laboratories that exist, there's the independent laboratories that are not part of law enforcement or of a prosecution agency, so we don't have the benefit of that homogenous situation that's in Great Britain and so on. It's much more streamlined in terms of how you deal with it.



We have 50 states. I don't know how many counties we have in this country, but obviously, it's enormous. So, it's a much more multi-jurisdictional situation than it is in some of the other models, unfortunately.

MR. SMITH: We don't have the market, though, to use for rationalizing the distribution of effort towards the objective.

It seems to me -- maybe I'm wrong, but this might be an area in which an ongoing program of research is entirely appropriate, because otherwise, how the hell are agencies like this one, this body, or anybody else going to start trying to make policy about the proper allocation of that effort?

We can't leave it to the political process, right, where one guys gets it, the other guy doesn't, because of the political trades you make, and it sounds to me, from what you're saying, that there isn't a common practice that's sufficiently efficient so that you could identify the units of analysis in cases or homicides or anything else.

There has to be a program of research here, I think.

MR. ASPLEN: It's also a fundamental nature of the relative infancy of the technology and it's utilization that we just don't have the numbers to crunch, and we've talked a lot about looking at the U.K. and what we could learn from that, and I think, at our last meeting, we discussed a proposal to analyze what they've done, but the difficulty to really, you know, apply it to the United States is something I don't think we can get past at this stage.

Now, one way to do it is to look at a couple jurisdictions in the United States, particularly in Florida, where you know, their success rate is so substantial, that we could begin to look at -- really, what we're talking about is the effect of the database on the investigative process and what is the -- what's the cost-benefit analysis of doing what DNA tests in what crimes when.

MR. SANDERS: The more that people understand the capabilities of DNA, they more they demand from us, especially in the small agencies, they more they expect it, and the marijuana cigarette may not be nothing in Chicago, but in a little town in Illinois, it's a major damn case.

You can't lose track of that, and you can't discount it, and you can try to make all the business decisions you want to.

A burglary that happens in my community is the same as a homicide to those people that are victimized, and it's just one of those things.

How you deal with it or how you try to prioritize -- I believe you can't just dismiss this human interest, because I'm telling you, especially in smaller communities, where they have access to me, and they demand -- and they more they know of the capabilities, then they want to know why we're not doing that.

So, I guess all I'm saying is just makes me nervous to hear you guys saying you're going to prioritize and discount this.

I mean it's a business decision, I understand that, but it's also a political decision in that people expect -- and the people of my community expect us to provide every service that we can.

MR. ASPLEN: That's really why we had Dr. Colwell come in, to talk about the rural issue, to talk about the disparity of protection of society by nature of training and resources, etcetera, etcetera.

There is no reason why, in the United States, somebody who lives in a rural jurisdiction should be less protected by the power of the technology than somebody who happens to live in New York, Chicago, whatever. That just shouldn't be that way.

Let me say that David Kaufman has specifically told me that he is more than happy and more than willing to do whatever he can to help us kind of analyze his numbers and to take a look at what they're doing there. He is very eager for us to do that.

So, we'll talk to him about that possibility, again, to get an idea of, you know, what the cost-benefit analysis looks like.

JUDGE REINSTEIN: At one of our meetings, when David Ware was giving a presentation on -- that their biggest clearance rate is on burglaries and car thefts, when you solve a burglary case with the use of DNA, then you get a hit on crime scene on a rape or a murder or whatnot, because that's the precursor.

MR. SCHECK: But you see, let's put aside the question of what your return is on investing in the databases in which kinds of cases.

I was talking about something completely different in terms of the British model, and it's putting the marketplace into this, and it goes to what I guess Mr. Sanders was talking about, and that is, in a state where you have, let's say, one big state-wide laboratory that does a certain amount of DNA testing, well, the rural community has a certain crime budget, and if the way that you do the testing is that that jurisdiction has X amount of money to spend on whatever testing it wants to do, well, it's going to test that burglary, all right, and it's going to have the money to pay for that in the laboratory, and if it wants to get more of it, then it will just put more money into it. That's the way the British operate it.

And other jurisdictions who have budgets of a certain size based on populations of a certain size can pay for others.

MR. ASPLEN: I don't think we're talking about different things, because when I talk about how it changes the investigative process, what we're looking at is how law enforcement allocates its funding.

So, if the cost-benefit analysis works out that it is more financial efficient for me to do the DNA testing first and run against the database than to have my officer go out and spend, you know, 12 hours of overtime working this case when I could get a hit first, that plays into that marketplace.

So, I think we're talking about two components of the same idea.

MR. SMITH: This is pretty familiar, in a way, in the criminal justice system. We just don't recognize this DNA problem as similar to the other ones.

There isn't a judge in the country that doesn't want to demand for the department of corrections a drug-screening program for the offender being sentenced to death, but in almost every state there are 10 to 60 times more drug offenders sent to the department of corrections than they have drug treatment slots.

So, the idea that need would determine the allocation of those slots, for lots of reasons, doesn't make sense.

Now, it seems to me it's a little bit like that. You know, it may be the market is a central mechanism for allocating resources. In the absence of a market, I don't see any alternative but a combination of knowledge development and political process around the allocation.

But we've got to do something -- somebody's got to do something like that.

DR. CROW: It's six o'clock, so we'll declare the meeting adjourned, and we'll meet again tomorrow morning.

[Whereupon, at 6:00 p.m., the meeting was recessed, to reconvene Monday, March 1, 1999.]

## March 1, 1999 - Appearances

JAMES CROW, Ph.D.  
TERRANCE W. GAINER  
CHRISTOPHER H. ASPLEN  
MICHAEL SMITH  
PAUL B. FERRARA, Ph.D.  
AARON D. KENNARD  
HON. RONALD S. REINSTEIN  
PHILIP REILLY, M.D., J.D.  
NORMAN GAHN  
JOSEPH H. DAVIS, M.D.  
BARRY C. SCHECK  
JAN S. BASHINSKI  
GEORGE W. CLARKE  
DARRELL SANDERS  
JEFFREY E. THOMA  
LISA FORMAN, Ph.D.  
ROBIN WILSON  
LEE COLWELL, Ph.D.  
HARLAN A. LEVY, ESQUIRE  
HOWARD SAFIR  
BARRY STEINHARDT  
HON. FRANK WEATHERSBEE  
PROCEEDINGS

## **Presentations and Discussion on DNA Sample Collection from Arrestees and Suspects**

DR. CROW: May we get started, please?

This morning, we're going to have several presentations, and I will ask Chris to introduce the people, since he knows them, and then, after lunch, the Commission will be back again, and there are many issues left over from what we were talking about yesterday still to be discussed, and we will come back to those again after lunch.

I'm glad you're here, Phil, because several of the questions yesterday you would have had something to say about, I can predict with absolute certainty.

MR. ASPLEN: Good morning, folks.

You should have all, by now, received a copy of the USA Today which explains some of the work that we're doing here.

While this group does not need a newspaper headline to emphasize the importance of its work, I think it is at least reflective of the importance of its work, and I think is a good sign of the public interest in what we're doing.

However, let me start off initially by saying that I've heard that the way some of the press is portraying what we're doing assumes that the Attorney General has already decided that this is, in fact, what is to be done, that she's wanting that and we're looking into the legalities of it.

I think it's fair to say that, at least in the conversations that I have had with the Attorney General's staff, that puts the cart before the horse pretty considerably, and we're really in much earlier stages of that whole proposition.

So, we'll make our attempts to kind of straighten out that perception, if you will, as we take calls, as I'm sure we will, in the office over the next couple of days.

Again, we structured today to begin the process of bringing different representatives in to the Commission to talk to us about their particular views and perspectives on some of these issues.

As such, we went out to individual organizations and asked for recommendations as to who they felt would be appropriate to come and talk to the Commission on some of these issues.

Let me say very specifically -- and you'll get rather tired of hearing me say this, however -- every one of these individuals has really expressed to me that, while they may be here on behalf of a particular organization, the National DA's Association or the National Association of Criminal Defense Attorneys, most organizations don't have formal policies on this particular issue, on privacy regarding taking DNA from arrestees and such, and as such, their views are their personal views.

However, they are from the perspective of their particular organization. Their organization, in most cases, do not have formal policies.

If they do, I'm sure that they will illustrate that and explain that. However, I do want to put on the record that these are the personal views, but again from their individual perspectives.

## The Honorable Frank Weathersbee

State's Attorney, Anne Arundel County, Maryland

So, our first speaker this morning is Mr. Frank Weathersbee.

Mr. Weathersbee is the elected State's Attorney in Anne Arundel County, which also houses the capital of Maryland, Annapolis, has been Assistant State's Attorney since 1967, he went on to become Deputy State's Attorney and was appointed State's Attorney in 1988.

He is the Vice President of the State's Attorneys Association in Maryland. He's a former board member of the National District Attorneys Association.

When I called over to NDAA and asked them for a representative, Mr. Weathersbee is the individual that they asked me to contact.

I am familiar with Mr. Weathersbee's office's work by nature of a case that they had a couple of years ago, that I would say that they began a number of years ago, when I was still at APRI, and did some consulting with their attorneys on the Williams case, I believe it was, and that was a case which was extremely hard-fought in the beginning, with some PCR technology.

There was a conviction. It was ultimately overturned on appeal. They went back. They did some more PCR testing and, on top of that, did some mitochondrial testing and ultimately convicted Mr. Williams again.

So, it's fair to say that Mr. Weathersbee is well-acquainted with the power and the advantages of DNA evidence, and his office has shown a real ability to utilize it to its fullest.

So, with that, Mr. Weathersbee, welcome, and we appreciate your comments.

MR. WEATHERSBEE: Thank you very much.

Good morning, all.

I did note something of great interest, though. I am listed as the Maryland State's Attorney, and I know my other 23 State's attorneys in Maryland would be interested to know that I have somehow taken over their jurisdiction, and I also note that you see by my little placard that I am the only one here, including judges, with "Honorable" in front of their name.

So, I want you to remember that as you question me, if indeed you want to do that.

I thought the discussion was really exciting yesterday. I got in here early enough to hear the discussion and then realized that almost all of it was right over my head. As my daughter says -- she's also a prosecutor in Maryland -- it goes whoosh.

But I appreciate it. I talked about SNPs and things like that, and it was interesting to see.

I did think that probably the most interesting point came at the end of the meeting, and I'd like to get in to that after I give my few comments, but I can't pass up the most important piece of evidence or statement that I saw, and it was made by Dr. Colwell of Arkansas, and I just couldn't wait to get a hold of an

Arkansas map, and I didn't do that, I wasn't successful in doing that, but when he said that the county seats were chosen by the ability to ride one day on horseback from any part of the county, I'm thinking, you know, that would tend to lead to round counties, and I wonder what you do with the land in between, and I was laying awake thinking that, and I'm thinking, now maybe that's where Whitewater came from and that's the land that was being developed.

I've got to see an Arkansas map. I thought that was a great piece of evidence.

Well, you didn't want to hear me say that. Actually, you probably did.

I have been a State's Attorney for a long time, since the late 1960s. I've been the State's Attorney for a decade; I've won three elections.

As you know, most prosecutors in the United States are elected. Most prosecutors owe what they do to the people that elect them and no other organization.

That's important, because you're trying to arrive at a policy to deal with how to deal with something on a national basis, and I come here to speak for a group of people, in a way, that do things in different ways, and they have different procedures and different methods of doing things, but they all have the same goal, and that is to see that the right person is convicted, the guilty person is put in jail or punished, not necessarily put in jail but punished.

That's pretty much, with certainly some notable exceptions, pretty much what prosecutors do, and you don't hear much about most of them, and I just am kind of representative of one of those.

The jurisdiction I come from is, I think, 470,000 people now.

It starts in south Baltimore and runs down the Chesapeake Bay to the rural areas of southern Anne Arundel County, in the middle, of course, is Annapolis, and the suburbs of both Washington and Baltimore, so it has a mix of all types, from Dr. Colwell's rural areas to, indeed, the City of Baltimore, which is having its problems.

I guess what I would say that brings me here -- and it's already been mentioned -- State v. Williams was kind of a notable case, but there are many throughout the country that are being handled by prosecutors like myself, and the issues come up as to what are the advantages of DNA and what are the disadvantages of using DNA, and I'll tell you that one of the disadvantages clearly is the cost, and certainly, my office has provided -- has spent -- and I asked my administrative officer to look and find out how much have we spent in the last couple of years on DNA testing for the 10 or 15 or 20 cases that we've used DNA in, and the answer was \$49,000.

That's how much the prosecutor's office, or the people, if you look, in reality, the people of Anne Arundel County have spent, and why did we spend that money?

You are talking about state labs, and the State of Maryland does have a lab, Virginia has a lab. Certainly, every state, to one degree or another, has a lab, but when we started DNA testing, when we had our first case and realized that DNA was a technology that was used in Great Britain and had been brought here by Cellmark Corporation, which is located in Rockville, Maryland, we had a murder case, it had blood that



we felt could be -- was in sufficient amounts that our FLP would do it, we went to the FBI, and they said no, we can't do that.

So, we went to Cellmark, and we've been there ever since, and so, we go to a private lab. This is not a benefit that most prosecutors are going to have, but we still do it.

Some of our cases are done by the state lab, and the reason that most of our cases are not done by the state lab, I think, impacts the discussion that you're here for today, and I'll get to that in a second.

I don't think this will take very long, but I want to run down the advantages.

Clearly, the advantage of DNA, we recognized it to be, and I can't believe that in the future it will be any different than a method of determining the identity of a person, whether it's the defendant who you're trying to convict, or probably even more important, a person that you may suspect but want to eliminate quickly and move on to the right person.

So, it's in exclusion, I think, that prosecutors and police -- and you have the commissioner here to talk about that, but it's in exclusion that I think is really important.

So, whenever we have the opportunity and DNA is available, we always want to look at the suspect that we have and make sure it matches, or he's not or she's not exclude, because if she is or he is and we can move on to try and find the right person.

So, we would do that with fingerprints. I read somewhere -- I think it came from Virginia -- that in 30 percent of the crime scenes, there is DNA or there are things that are left, either semen stains or blood stains or saliva, which can possibly be analyzed. I don't know how accurate that figure is, but from my experience, that sounds like it's correct.

In a number of cases, there are fingerprints, and of course, we use fingerprints, and there are hits on fingerprints and it's now computerized, and you can put a fingerprint into a machine, the computer, and get a readout and a good idea of who the correct person is, you can get a hit.

I think, in the future, DNA will be that way. I can't imagine it wouldn't be. If the technology is there -- and I think Dr. Ferrara indicated yesterday, if the technology is there and it's demonstrated, people are going to want to use it. So, I think that's true.

The disadvantage -- I mentioned it already, the cost. It's very expensive for us. I've given you some indication of what it is. It's expensive for state labs. State labs are backed up.

All we have to do is read the USA Today -- we actually know the results of what we're doing here -- and find that, statewide -- or nationwide, 450,000 samples are backed up in various labs around the country.

So, I don't know how you eliminate that, but certainly, that ought to be one of your tasks and one of your recommendations, and clearly, the bottom line is money. I mean I don't think anybody would doubt that the bottom line is money. If you get enough money, you can develop enough labs.

The time to obtain the evidence in the past was substantial. You'd have to postpone your case if you had a case.

Now that's not quite so true, once you eliminate the backlog. Once you eliminate the backlog, that's not quite so true.

PCR testing -- and STR is a form of PCR testing -- clearly is something that can be done relatively quickly if you're not dealing with backlogs, so that, with a private lab, our use of the private lab, we can get results back within weeks, but we pay for it.

So, with state labs, it's not quite so easy.

Disadvantage is also challenging the evidence in court. It takes time.

Scotland Williams, the case we tried, was mentioned. The Frye -- we call it Frye-Reed hearing in Maryland -- Reed is the Maryland case that interpreted the Supreme Court case of U.S. -- I think it's U.S. v. Frye in 1923, which means that, for any scientific technology or new technology, you've got to establish -- the prosecution has to establish that it is accepted in the community in which it's used, and our Frye test for PCR originally took a week. In the second case, it took almost a week, and for mitochondrial DNA, it took a week.

So, the challenge in court takes a lot of time from your case, and it's something that I think, in the future, will be reduced, because as there are more chemists and as those chemists are recognized in their states, then the opportunity for contesting them and their work will be less.

I would point out a factor, as well. We talk about contested cases, but yet, if you have DNA evidence, the chances of the case being contested is going to be remote.

So, you're going to end up with an awful lot of pleas if you do the DNA testing.

As it is, 80 to 90 percent of every state prosecutor's case -- and state prosecutors prosecute something like 99 percent of all criminal cases. So, every -- 80 to 90 percent of those cases are going to be pleas.

And so, having a good piece of evidence leads to pleas not only from the prosecution's standpoint, from the defense standpoint, as well, and the defense tries to get the best deal for their client, knowing that the chances are that they're going to be convicted.

So, it's important to do those tests even when the challenge may not actually be in court, but you've got to be aware that, if there is a challenge in court, it takes -- it is timely.

In our experience, we find that the contamination, that word -- and you can -- it means lots of things. The thing that it usually means is DNA showing up where you didn't expect it to show up, and really, contamination doesn't change the DNA, it just is there, and you wonder why, and you try and find out, and it affects your results or the results that the lab can give you.

It's always an objection. Certainly, we -- those of us who watched Mr. Scheck in the O.J. Simpson case know how effectively contamination can be brought out, and I was trying Scotland Williams same time O.J. Simpson -- mine didn't take quite as long, but nonetheless, I was trying it, and it was kind of interesting looking at the parallels of a case which, of course, got no notoriety and a case that got tremendous notoriety, and they were pretty much the same.

The arguments that Mr. Scheck and others made in the O.J. Simpson case were the same arguments that the public defender made in Maryland, so -- and I would therefore assume that that is a pretty consistent argument around the country when you're bringing a contested case.

I think the most important point -- and this kind of goes to where you ended yesterday, and I've already mentioned what Dr. Ferrara said, but it's in my notes and I'll say it again.

We cannot -- we literally will not be able to do without DNA in the future. Like a fingerprint, if we could have located it, we better have looked for it. I'm talking about police departments, big or small, Dr. Colwell or New York City, doesn't make any difference. If we could have looked and we didn't look, then that's a challenge to my case in court.

Mr. Scheck and any other defense counsel's going to ask that lab technician, did you look for fingerprints, and if that answer is no, we didn't look for fingerprints, then shame on us, because we're going to have to have an answer for those 12 people who are looking at us to give them an answer, and there isn't a good one and there won't be a good one.

So, if, in the future, we could have looked for DNA, we better have looked, and if we found it, we better have tried to match it.

We better not just take that DNA -- and I disagree with Mr. Scheck yesterday that, well, we can make a determination of what we will and what we won't send to the lab, and maybe he didn't mean it the way I'm saying it, but I don't think we can make that determination. I think, maybe on individual samples, you can say at your lab or the local level, look, let's not send this, this, and this, but we better send the other things, and every time you don't send something to the lab for testing, then it leaves it open for defense to say how come you didn't do that, and we don't want to be in that position.

So, if we could have found it, we better have looked, and if we found it, we better have tried to match it to that defendant.

So, you know, to me, if I were just to say one thing about the future of DNA evidence, that's all I have to say, because that determines -- I mean you can say DNA evidence can't be used, and I suppose you could make a Federal law that says it can't be used at least in Federal cases.

I don't know that you can do that in state cases. So, each state's going to go its own way, and you have a tremendous opportunity here to create some standards for something I think is just so obvious.

You know, it's -- and I mentioned this before. I think I'm doing okay on time. It's hard enough for state prosecutors to convict in a contested case a guilty person. It's really hard to convict an innocent person.

So, the importance of DNA and fingerprint evidence when it exists is to exclude, so we can get on with what it is that we are doing, and that is trying to find the person who's committing the crimes.

I just think -- and you talked a lot yesterday about post-conviction and going back and looking at cases that are in category one, category two -- I have questions about category two, but certainly category one cases, where you could actually -- there is DNA around and you could actually test it and that result would exonerate the defendant.

I don't think there's a prosecutor around would disagree with that, and I don't think that any state's attorney who knew something about DNA and the benefits of DNA would say, well, okay, if we can test this, let's do it and see if we've got the right person.

But I think it ought to work the other way, and I think this gets in to what the Commission is talking about, and that we ought to have the same opportunity to exclude and to include individuals, and to do that, I think the database that is being created, the FBI began creating in 1994, is very, very important.

And then when we talk about, well, what about arrestees versus convicted individuals, the answer, to me, is that, you know, you just -- the bigger the database, the better chance you got, the bigger the database, the better chance you got.

So, if you can get DNA, put it into a computer, and you have a large database, then you have a better chance of a hit, and that's what happens in fingerprints.

We will frequently get hits with the computer system on fingerprints if we find them at the crime scene. You usually don't find them at the crime scene, but if you do, there's an awful good chance you're going to get a hit, and there's an awful good chance that that fingerprint will lead to the conviction of the defendant.

We talk about why take it from arrestees and not convicted defendants, and you know, I think, right now, I don't think we're at the point that you can take it.

Now, the commissioner may disagree when he talks to you, but I don't think we have the capacity in this country -- we certainly don't in Maryland have the capacity to test every DNA sample taken from an arrestee.

So, while I think it's sure to come, I don't think, at this moment, we have that capacity, but I'd bet -- I'm not a betting man, but I'd bet on this that it's going to happen.

In connection with that, I want to just point out one additional thing. The vast, vast majority of serious criminals were arrested for something earlier, and you know, maybe, as a civil libertarian, you don't want to admit that fact, but it's just a fact. It's just a fact.

So that if you've got in your computer the arrests of every individual, you've got a good chance of getting a hit if you find DNA or fingerprints at the scene of a crime, and I just think that's going to come.

The disadvantages -- you know, it's impossible now to my way of thinking, the cost.

The Federal Government has to step up, provide money, get rid of this backlog to establish standards, and I think you're trying to do that, but the money to go into state laboratories so they can get rid of the backlog just seems to me to be paramount.

I can't afford to keep spending the people's money of Anne Arundel County on DNA testing when there is a state laboratory. I just can't -- at some point in time, they're going to realize what I'm doing and say you can't justify that, and they're right, and they're right.

There's a state laboratory, shouldn't cost me a penny. So, I'm going to have a hard time justifying that in the future.

While I can get good results and I can get them quickly, both to eliminate and both to convict, not all prosecutors can do that. I've already said that.

What are the criticisms that I've heard? I looked on the Internet, I looked in the paper today, and people have mentioned it.

Big Brother comes to mind. I don't know where I saw that, but I saw it somewhere. But if it serves a good purpose, so what?

I think it's constitutional, I think it's been held to be constitutional. I think, in the great majority of the states, it will be held to be constitutional.

There's no doubt that seizing fingerprints is a search. It's been held to be constitutional.

We can't do what is done in Great Britain. We can't go around and say we want, from a given town, all their fingerprints.

It's already been decided you can't do that, but certainly, upon the arrest of the defendant, you can take his fingerprints, and that's uniform as far as I know and certainly will be uniform in regard to DNA.

So, I don't think the constitutional issue is there, I'm sorry, but I know that others do, and they can talk to that.

Computer DNA doesn't -- when you put the DNA into the computer in the form of numbers, which this CODIS system apparently does, it doesn't provide any genetic information, it just provides identification, and I think that's important, because I tend to agree that, if you've got a database around and insurance companies can get to that database, that's a serious problem.

But remember, criminal history in every state and criminal history that's kept by the FBI is something which is very restrictive and you can't get to it unless you have a good purpose, and that can, indeed, be the same thing with the samples, and I'll go one step further.

I asked Dr. Portis, who is the head of the Maryland State laboratory, why do you keep the samples around other than the fact that state law says you've got to keep the samples around, and really, his only answer was, well, technology is changing.

So, right now, their laboratory, the Maryland State laboratory, is set up to do RFLP based upon convicted sex offenders.

As you all know, every state in the country has some kind of a database, some more restrictive than others, but it's set up to do RFLP, and clearly, the FBI system is going to deal with STRs, and so, he's re-tooling and needs money to do that, to go back and retest in the PCR format, as opposed to RFLP.

Something that Dr. Crow said yesterday just seems to me so important. You've got to establish something that's going to last for a long period of time. You can't just keep changing and changing every couple of years, and if you do that, we don't need to keep the samples, quite frankly.

I mean it just establishes, in Maryland, by law, and in most states, a probable cause, and if you've got it on the computer and you've established probable cause, that's all you have, so you go take the blood of the defendant and you run his DNA, and we don't use -- you're not going to use the sample that's kept in the computer or the sample that's stored in whatever locked safe you have it stored in to convict the defendant, you're going to use a fresh sample from the defendant, but establishing probable cause is just extremely important.

So, if you wanted to get rid of it after a couple of years, shoot, I don't think that matters, doesn't matter to me, once you have a system that's going to be in place for a substantial period of time.

As far as -- I don't know what the commissioner has in mind. Certainly, citations are used extensively in the state.

In the City of New York, in the City of Baltimore, and other places, citations are charging documents where the defendant isn't booked, therefore his DNA is not taken, his fingerprints aren't taken, so it's a lot quicker.

There are certain crimes that you're not going to have DNA on, certain very minor crimes. I think that's probably good and answers a little bit of what the criticisms are.

Indeed, for a non-guilty defendant, at least in Maryland -- I think most states -- you can expunge the record of the defendant who is found not guilty, and that's a procedure that's well-known, documented, and set up in, I'm going to assume, every state.

MR. GAINER: Mr. Weathersbee, would you mind if we asked a couple of questions, because we're going to be running out of time, if my fellow panelists don't mind.

MR. WEATHERSBEE: Not at all. I'm pretty much done anyway.

MR. GAINER: If I can, one of the ones I was thinking of, in listening to you, concerns your comment about, if we could look for it and haven't, the problems that may lead in our criminal justice system.

Currently now, for instance, in homicide scenes, are the law enforcement authorities in your county actively looking for and processing the scene for DNA?

MR. WEATHERSBEE: Absolutely. I mean the requirement for a good technician in your evidence collection unit, in a good evidence collection unit, that understands DNA, is imperative, and we have one, and we've had one for some time, and every scene, every case in which you would expect you might be able to find DNA, we look for it.

MR. GAINER: So, as a rule, then, do you test or move for testing of every defendant where you find DNA at a scene? Every murder defendant -- are you routinely asking for them to be -- their DNA to be processed?

MR. WEATHERSBEE: You mean if we arrest a defendant for murder and we find DNA at the scene and we're going to compare that DNA or we're going to run it, do we ask for the defendant? Absolutely.

MR. GAINER: Again, maybe this just shows my lack of prosecutorial experience, but if you have recovered DNA from the scene but you're unclear as to whether the defendant had any secretions and you're not necessarily -- part of your case is tying the -- his -- the defendant's DNA with that recovered from the scene, do you still do it as a rule so that, again, in furtherance of your question, where we looked and didn't, that you're going to exclude him?

So, if you've made a conscious -- let me try to rephrase it -- if you've made a conscious decision not perhaps to use DNA in your case, are you still routinely asking from a defendant to get the DNA samples?

MR. WEATHERSBEE: I'm only asking for an order to obtain a defendant's DNA, or a blood sample from the defendant, if I have something to compare it to that was taken from the scene and the defendant is a person that we're looking for, we're looking at.

If there's no DNA involved, I don't ask for blood samples from defendants.

MR. GAINER: Again, maybe this is too self-evident. If there is DNA at the scene, then you always get DNA from the defendant.

MR. WEATHERSBEE: Yes. If we've got DNA we're comparing, we always ask for it. Our lab routinely - - and I was hoping by this time we would have a DNA lab of our own in Anne Arundel County. That didn't work out. It's a personnel problem.

I'm sure it will eventually, but what the lab technicians do is they screen for the stain to make sure the stain is appropriate for testing, and then we send it to Cellmark if we have the defendant. We don't send it to Cellmark if we don't have the defendant.

MR. SMITH: Could I ask the flip-side of that question?

That is, going back to your point about making sure that you look for that kind of evidence, so that you will not be challenged later for not having done so, if you have a plea, you don't need the lab analysis of all the evidence seized at the crime scene, right?

MR. WEATHERSBEE: If I have a plea?

MR. SMITH: Right.

MR. WEATHERSBEE: Well, I don't usually get the plea until after I've done the analysis.

MR. SMITH: You're not able to discuss effectively with defense counsel the early plea without that?

MR. WEATHERSBEE: On occasion.

MR. SMITH: On those occasions, though, presumably you don't need the lab tests of all the evidence submitted from the crime scene.

MR. WEATHERSBEE: You're absolutely right, and we wouldn't do that, but that's a rare case.

MR. GAINER: Has there been any specific training, additional training for either first responders or crime scene processors in the art of detecting or collecting DNA that you know of?

MR. WEATHERSBEE: Yes. They're routinely -- they routinely go to training seminars to deal with the collection of DNA evidence, and we mentioned Williams, there are other cases, but we routinely collect DNA or attempt to collect DNA from items at the scene of a crime.

DR. FERRARA: I'd like to ask a question of Mr. Weathersbee.

In your analysis of the evidence that -- in a particular case that you're going to send to Cellmark, does your state laboratory evaluate the crime scene evidence first and look for the presence of potential biological materials?

MR. WEATHERSBEE: You're talking about the county.

DR. FERRARA: Or the county?

MR. WEATHERSBEE: Yes. Actually, it's your evidence collection unit.

You have a group of evidence collection technicians who are, in Anne Arundel County, quite well trained in the -- how to process a crime scene, not just for DNA but for other things, and they go out and they see if they can find DNA.

You talked about rape kits. I mean that's a pretty obvious thing, but -- I don't think we've ever got to the bullet that went through the person yet, but nonetheless, these are things that only your -- you know, your mind is the only limit.

DR. FERRARA: Have you found it necessary, because of financial considerations, to limit the number of samples that you actually send to the laboratory for DNA analysis?

MR. WEATHERSBEE: Not yet.

DR. FERRARA: So, basically, all the evidence goes to the laboratory.

MR. WEATHERSBEE: Well, now, we don't send the evidence. What we send is -- we've taken the blood -- bloody shirt and you've taken a piece of the bloody shirt, and from that piece of the bloody shirt, you've taken a swab of the blood and put it -- and that's what goes to the lab.

DR. FERRARA: Now, if there's multiple pieces of evidence in a case with that biological material, does all of that -- do you send --

MR. WEATHERSBEE: Not necessarily. I mean the lab technician makes a determination of which are the important pieces of evidence to go.

DR. FERRARA: Now, is that decision made in concert with your office?

MR. WEATHERSBEE: Sometimes. But I think our lab people are pretty good, so we can rely upon them. I'm sure the whole spectrum will follow that, whether the prosecutor is there or not.

DR. CROW: Let me intrude on this for a minute. I'm very concerned that each of the subsequent speakers have time to make their presentations and then leave time at the end for the kind of questions that are going to be addressed to everyone.



So, I think, unless there's violent complaint, I'll thank you very much and move on.

MR. SCHECK: I have one just short followup to what Paul said.

DR. CROW: All right.

MR. SCHECK: You said you spent only \$49,000 at Cellmark and that the state lab is doing RFLP. That \$49,000 figure -- how many cases in over how many years?

MR. WEATHERSBEE: I'm talking about in two years, and my guess is it's 15.

MR. SCHECK: How about the testimony?

MR. WEATHERSBEE: Well, a lot of it. That's where the cost is. I mean the cost of testimony gets expensive.

Now, we're lucky, because Cellmark is close by, you can put your witnesses on call. If you're trying to have them come from Los Angeles, well, it's hard to put them on call, so I mean that takes a little time. So, we can keep the cost down a little.

DR. CROW: Well, thank you very much, Mr. Weathersbee.

MR. WEATHERSBEE: Thanks.

DR. CROW: Very informative. And you'll be staying around, I trust.

MR. WEATHERSBEE: Yes, I'll be right here.

DR. CROW: All right.

## Barry Steinhardt

Associate Director, American Civil Liberties Union

MR. ASPLEN: Our next speaker is Mr. Barry Steinhardt. He is the Associate Director of the ACLU, for the national office of the ACLU, and he's the chair of the ACLU cyber-liberties task force, I guess the other hot topic when it comes to privacy these days, if you will.

Again, we asked Mr. Steinhardt to come and talk to us about privacy and the issue of arrestees.

He has the primary responsibility of the development of organizational policy at the national office, the national office assistance to the organizational development of the ACLU state affiliates, has previously served as the executive director of the ACLU affiliates in Pennsylvania and Vermont, also served as director of the public interest research group, author of various articles in Society Review, USA Today, Net Guide, New York Daily Times, and the Philadelphia Inquirer.

And Mr. Steinhardt, we welcome you, and we appreciate your comments.

MR. STEINHARDT: Thank you, Mr. Asplen.

I was struck earlier with your disclaimer that some of the speakers didn't necessarily speak for the organizations that they were members of.

As you noted in my biography, one of my responsibilities was development of organizational policy.

In the ACLU, we often tell people that if they agree with us 80 percent of the time, they should be members; if they agree with us 51 percent of the time, they should be on the board of directors.

[Laughter.]

MR. STEINHARDT: That notwithstanding, I do speak today for the ACLU and I do reflect the ACLU's perspective.

Let me first thank you for inviting me here today, thank the Commission, and thank Mr. Asplen for inviting me to speak.

I've had the opportunity to read the transcripts of your earlier proceedings, and I was impressed by the seriousness of your inquiry, by the seriousness of the questions that I heard this morning.

From these transcripts -- which, by the way, since it is an interest of mine, I commend you for putting on-line -- I was struck that most of your speakers have shared with you their hopes and aspirations for DNA evidence in the criminal justice system.

Let me suggest, I suppose I'm here today to be the contrarian, and while I will speak to the question of the day, whether or not DNA evidence should be withdrawn from arrestees, I also want to share with you my fears of what I think is the creeping expansion of the use of DNA and of DNA data-banking and the potential abuses that can come from the misuse of that information, and I want to tell you specifically what my fears are based on, and in a sense, I want to challenge the Commission to prove me wrong.

I want to challenge the Commission and the decision-makers who will be reading your reports and who you'll be talking with to demonstrate the lid can be firmly kept on the Pandora's box, which I, for one, do not believe.

Now, let me start with a point that I hope will -- we can all agree on.

Drawing a DNA sample is not the same thing as taking a fingerprint. Fingerprints are two-dimensional representations of the tips of our fingers. They are useful only as a form of identification.

DNA profiling clearly can, as you know better than I do, clearly can be used for identification purposes, but the DNA itself harbors far more than a fingerprint.

Indeed, I think it trivializes DNA testing to refer to it as a genetic fingerprint, and I note that one state court in Massachusetts have already rejected that analogy.

Now, I understand that the CODIS system contains only a limited amount of genetic information that is compiled for identification purposes, but the amount of personal and private data that's contained in DNA specimens that are retained at the state and local level make this seizure extraordinary both in its nature and its scope.

The DNA samples which are being held, generally speaking, locally can provide insights into the most personal family relationships and the most intimate workings of the human body including the likelihood of the occurrence of over 1,000 types of genetic conditions and diseases.

DNA may also reveal private information about the legitimacy of birth, and there are many who will claim that there are genetic markers for aggression, for substance abuse, for mental illness, for criminal tendencies, and even sexual orientation, and because genetic information pertains not only to the individual from whom the sample is drawn but to everyone who shares in that person's bloodlines, it poses a potential threat to the genetic privacy of not only the millions who are to be tested under the current systems but to all their family members, as well.

Now, I think it's worth bearing in mind that there's a long unfortunate history in this country of despicable behavior by government towards people whose genetic composition has been considered, at least at the time, to be abnormal.

In recounting that history and documenting the privacy concerns that it had, the National Research Council report said -- and I quote -- "These privacy concerns are far from abstract. The eugenics movement in this country, which resulted in thousands of involuntary sterilizations, the suggested screenings of violent men for extra Y chromosomes, the sickle-cell screening tests employed to prohibit marriages, and the current privacy concerns over HIV screening underlie the panel's following recommendations. Use of the data bank for other than law enforcement suspect identification purposes should be expressly prohibited and subject the abuser to criminal penalties."

Now, genetic discrimination by the government is not merely an artifact of the distant past.

During the 1970s, for example, the Air Force refused to allow healthy individuals who carried one copy of the sickle-cell gene -- these are primarily, of course, African-Americans -- to engage in flight training even though two copies of the gene are needed for the symptoms of sickle-cell to develop.

This restriction was based on the then-untested and now we know to be incorrect belief that people with a single gene could display symptoms of sickle-cell disease under low oxygen conditions.

Now, the Air Force didn't stop that practice voluntarily. It stopped it because they were sued.

Genetic discrimination by private industry is becoming increasingly commonplace.

A survey that was conducted in 1997 by the American Management Association found that between 6 to 10 percent of responding employers -- there were 6,000 companies in the sample -- used genetic testing for employment purposes.

The Council for Responsible Genetics has documented over 200 cases in which healthy people have been denied insurance or jobs based on genetic predictions.

These cases include a health maintenance organization, which told a pregnant woman whose fetus tested positive for cystic fibrosis that it would pay for an abortion, but if she elected to give birth, it would not cover the infant under the family's medical policy, and a healthy boy in California who took medication that eliminated all the risk associated with his predisposition to a heart disorder, even so his parents' insurance company ruled him to be genetically ineligible for health coverage.

In short, there is a frightening potential for a brave new world -- and that's the literary illusion that I will use today, rather than Big Brother -- where genetic information is routinely collected and its use results in abuse and discrimination.

Now, I am certainly aware that the primary purpose of forensic DNA databases like CODIS is identification and that the profiles which use 13 loci that currently provide no other information, although I personally reject the term DNA, because I think as the human genome project and other studies continue, that those loci may well turn out to contain some other useful genetic information at some point.

But that aside, the question is why am I skeptical that we can hold the line and ward off the brave new world of genetic discrimination?

In general, I'm skeptical because of the long history of database function creep, of databases which are created for one purpose, one discrete purpose, and which despite the initial assurances of their creators, eventually take on new parameters and take on new purposes.

In the 1930s, for example, my parents were promised that the Social Security number would be used only for the discrete purpose of assisting in a newly-established retirement program.

Well, we, of course, all know that, over the past 60 years, Social Security numbers have become virtually a universal identifier which is required by government and private corporations alike.

Similarly, census records that were created for general statistical purposes were used in World War II to round up Japanese-Americans, innocent, loyal Japanese-Americans and to place them in internment camps.

Now, I think we're already beginning to see that function creep in DNA databases. In the very short time that these databases have existed, we've witnessed an ever-widening scope of the target groups from

whom law enforcement collects DNA and rapid-fire proposals to significantly expand the populations to new and even greater numbers of persons.

In less than a decade, we've gone from collecting DNA from convicted sex offenders, on the theory that they are most likely to be recidivists and most likely to leave behind biological evidence, to data banks of all violent offenders to data banks of all felons to juvenile offenders in 29 states and now to proposals to test all arrestees.

There have even been proposals, which I believe Commissioner Safir has endorsed, the proposal made by the Michigan Commission in Genetic Privacy, which I think, at this point, is inaptly named, to permanently preserve blood samples of newborns that have been obtained to detect rare genetic congenital diseases and to store them for law enforcement and research purposes.

In other words, if such proposals are adopted, we will effectively, over time, have a DNA database on everyone.

I'm skeptical, too, because many state statutes which allow -- which provide for DNA testing -- and they do so purportedly because the information is being collected for identification purposes, also allow for a variety of other uses.

For example, the Massachusetts law, which we are challenging in the Landry case, contains an open-ended authorization for any disclosure that may be required as a condition of Federal funding, and it allows for the disclosure of information, including personally identifiable information for, quote, "advancing other humanitarian purposes," unquote.

I'm skeptical because there are proponents of DNA database laws who continue to cling to notions of genetic causes of crime.

In 1996, to return to Massachusetts, the year before the legislature's enactment of its existing law, the Massachusetts legislature authorized a commission to research the biological origins of crime, and that commission focused on genetic causes.

As I say, the report specifically focused in on genetic causes of the criminal behavior. The report foresees a future where, quote, "genetics begin to play a role in the effort to evaluate the causes of crime" and even cited two articles regarding the now-defunct XYY syndrome.

I'm also skeptical because too many holders of DNA data refuse to destroy or return that data after the purported purposes had been satisfied, which suggests to me that they have something in mind.

For example, the Department of Defense has collected 3 million biological samples from service personnel for the stated purpose and single stated purpose of identifying remains or body parts if a soldier is killed in action, killed on duty, but he keeps that information for 50 years, long after virtually every subject, I suspect every subject, has left the military, and it refuses to promulgate regulations which assure that no third parties will have access to those records, and I think it's likely that, once the genetic information is collected and banked, pressures will mount to use it for other purposes, such as the identification of criminal suspects or medical research, and on several occasions, the FBI has already requested access to this data for the purpose of criminal investigations.

Similarly, many state laws do not require the destruction of a DNA record and/or a sample after a conviction has been overturned, or in the case of Louisiana's law that does allow for arrestee testing, in cases where the person subsequently is not convicted of the crime for which he's charged.

Now, I'm also concerned because of the existence of private DNA databases in testing laboratories in government offices that operate outside the relatively strict confines of CODIS, and I'm skeptical when, the other day, I had an opportunity to talk to Professor Scheck and he told me of discussions he had with law enforcement officials who were considering DNA dragnets, neighborhoods and classes of people, and I'm particularly distressed by the trumpeting of the British model, with this expansive testing, and whereas Mr. Weathersbee said earlier, at least in one case, in all the male inhabitants, all the young male inhabitants of an entire village were required to submit to blood or saliva tests.

In short, I think the trend is away from limited-purpose forensic databases. The purpose and target populations are growing, and the trend is ominous.

Compounding this problem is that there are few laws and certainly none at the Federal level which adequately protect genetic discrimination by employers, by insurers, or by medical care providers.

More and more DNA is being collected, and with the advances in genetic research, that DNA is more and more telling, and more and more discrimination and misuse will occur.

Now, let me turn to this question specifically of DNA testing of arrestees.

Not surprisingly, we are against it, but you probably could have guessed that.

Aside from supporting my suspicions that we would soon see an -- that we are seeing an ever-widening circle of DNA surveillance, these proposals are fundamentally unfair, they violate the constitution, and even from a law enforcement perspective, they are not practical, at least for the moment.

Now, let me start with what I thought would be obvious. Arrest does not equal guilt, and you shouldn't suffer the consequences of guilt till after you have been convicted.

Now, I say this is obvious, because clearly some political leaders have a different view.

For example, in discussing his proposal to seize cars from those arrested for drunk driving, Commissioner Safir's boss, Mayor Rudolph Guiliani of New York, took a page from what I think is the Alice in Wonderland school of jurisprudence, which is punishment first, trial later.

He said, quote, let's say somebody is acquitted and it's one of those acquittals in which the person was guilty but there is just not quite enough evidence beyond a reasonable doubt. That might be a situation in which the car could still be forfeited.

Now, putting aside the mayor's approach, the fact is that many arrests do not result in conviction.

For example, a national survey of the adjudication outcomes for felony defendants in the 75 largest counties in the country revealed that, in felony assault cases, 50 percent of charges were dismissed outright, and in 14 percent, the charges were reduced to a misdemeanor.

A study released by the California State Assembly Commission on the status of African-American male in the early 1990s revealed that 64 percent of the drug arrests of whites, 81 percent of Latinos were not sustainable, and an astonishing 92 percent of the black men arrested by police on drug charges were subsequently released for lack of evidence or inadmissible evidence.

Indeed, I think there is a disturbing element of racial disparity that runs throughout our criminal justice system that can only be compounded by the creation of databases of persons who are arrested but not convicted of crimes.

Racial profiling is a reality in this country. Just this past weekend, the head of the state police in New Jersey was fired by Governor Whitman.

As some of you may know, the New Jersey State Police is under investigation for racial profiling on the state's highways, and the head of the state police was quoted in newspapers suggesting that his officers were going to the right place. After all, minorities were more likely to be involved in drug crimes.

The fact is I don't think it's statistically supportable. What minorities are more likely to be is arrested.

Indeed, one study that we commissioned in the State of Maryland found that, of police stops on a strip on Interstate 95 in Maryland over several months in 1995, found that 73 percent of the cars stopped and searched were driven by African-Americans, while they only made up 14 percent of the people on the interstate.

While the arrest rates were the same for whites and African-Americans, approximately 28 percent in each case, the disproportionate number of stops resulted in a disproportionate number of African-Americans being arrested.

Now, I make no secret of the fact that we oppose DNA data-banking even for convicted felons. We have argued and will continue to argue, in cases like Landry in Massachusetts, that they are intrusive, unreasonable searches made without individualized suspicion, but even if you accept the rulings that DNA data-banking for convicted felons is permissible, either because there is a special need or persons have been convicted of a crime with a high recidivism rate or there is likely to be the presence of biological evidence, like sexual assaults, or that convicted felons have a diminished expectation of privacy, neither of these circumstances apply when we're talking about those who have simply been arrested.

To find otherwise is to equate arrest with guilt and to empower police officers, rather than judges and juries, with the power to provide the state with the evidence that harbors many of the most intimate secrets that we hold and of our blood relatives.

Under the current circumstances of mistrust, it's an especially chilling notion for a New Yorker. I'll leave it there, and I know that Commissioner Safir will want to address the New York situation.

Let's turn to the legal theories for a moment.

Take, for example, the diminished expectation argument in which the post-conviction DNA tests rest. Under this doctrine, the rights of persons who have been convicted become diminished but only to the

extent that they are fundamentally inconsistent with the needs of the regime which has lawfully committed them.

I don't think it can be argued that forcing arrestees to provide blood samples bears any legitimate security concern. There are far easier, less intrusive ways of attesting to identity, even for those in pre-trial detention. There are ample ways to do that

Nor by definition can it ensure compliance with any specified term of post-conviction supervised release. Put simply enough, these people have not been convicted of any crime; they may never be.

The only possible justification is criminal investigation. Seems to me, if law enforcement has a reason to suspect an individual arrestee, that it can and should seek a warrant.

If the special exception doctrine makes any sense in the context of the post-convicted, it's based on the assumption that they have been found to have committed a crime where the recidivist rate is high and the presence of biological evidence is likely.

Arrestees are presumptively innocent. I don't believe that you can justify the forced testing of a person for jaywalking, for taking part in a political demonstration, for shoplifting, etcetera, under those doctrines.

Finally, let me turn to the most practical considerations. Indeed, it's the only consideration that gives me any reason to hope that we will not move further down the road of DNA surveillance.

As I read the literature and study the transcripts of your previous meetings and as I heard Mr. Weathersbee this morning, the single greatest obstacle to implementation of the existing DNA data-banking laws is the large backlog of unprocessed samples.

If I read the literature correctly, there are approximately 350,000 unprocessed samples and only a small minority percentage of samples have, in fact, been processed and put into the CODIS system.

It seems to me, from the law enforcement perspective, it really doesn't make a lot of sense to put the next dollars into collecting and processing samples from persons who have never been convicted of a crime, let alone for a crime of the sort where the DNA evidence is most likely to be probative.

Wouldn't it make more sense to put the resources into processing the samples that you already have and will generate in the future under the existing programs?

In closing, let me suggest that I would love to be proved wrong. I would be more than happy to find out that my fears, fears of my organization, are misplaced and that the civil liberties community is wrong about the likely future.

If the advocates of DNA banking can, in fact, restrict the uses of data, as the National Research Council suggested, to forensic identification, if data banks only cover persons convicted of a small number of relevant crimes, like sexual assault, if testing practices and data security are improved, all to the better. I won't mind being wrong. Pandora's box can be closed.

But the stakes are high and the risks great. Every expansion of data banks and every new use of those data banks increases that risk.



Your commission has an obligation not just to assist law enforcement but to protect the privacy interests of all Americans and see that justice is done for all Americans.

Now, we may not agree on what has come before, but I hope that we will agree that, if the line is not held here, it may never be held at all.

Thank you, and I'll take your questions.

MR. KENNARD: I have a question. Did I understand -- Sheriff Kennard, Salt Lake County Sheriff. Did I understand you to just say that this committee has no responsibility to assist law enforcement?

MR. STEINHARDT: No, I said that it wasn't this committee's sole responsibility. I certainly understand that there is a obligation on the Commission's part to assist law enforcement, but I don't think that's your only obligation.

I think your obligation is, generally speaking, to do justice and to protect the privacy interests of Americans.

DR. REILLY: I think I understand your point on this, but I want to clarify.

Under what circumstances, if any, may a suspect who has been arrested for a violent crime that falls within the definition that you would use, in your mind, in your closing comments, have a blood sample drawn for DNA analysis?

MR. STEINHARDT: Pre-trial, pre-conviction.

DR. REILLY: Upon the issuing of a warrant?

MR. STEINHARDT: We don't have any objection upon the issuance of a warrant, no.

DR. FERRARA: Mr. Steinhardt, I assume you're familiar with the U.S. -- Fourth Circuit U.S. Court of Appeals decision in the case of Jones et. al versus Murray and Ferrara, and that, of course, limited to convicted felons.

What weight -- or how does that decision -- and the U.S. Supreme Court denied cert in that case -- play into some of the legal concerns and arguments against the drawing of convicted felons samples?

MR. STEINHARDT: Well, certainly, that -- with regard to convicted felons, that's good law in the Fourth Circuit. As the law professors here, I'm sure, would be the first to point out, that's where it applies.

DR. FERRARA: Yes.

MR. STEINHARDT: I happen, of course, to think the case was wrongly decided. I think the dissent was correct. But I don't think it applies -- even a reasoning of that case applies to the question of arrestees.

DR. FERRARA: No. I understand.

MR. STEINHARDT: Right.

DR. FERRARA: Thank you.

MS. BASHINSKI: Could I ask you -- you said that laws should be adequately protecting the privacy and the information. What other elements do you think are essential in the law that does adequately protect the database?

MR. STEINHARDT: Well, I think in general -- this is not simply the forensic databases, but in general, the samples should only be drawn with informed consent, they should be closely held, they should only be used for the purposes for which the consent is given, there should be no other uses without informed consent of the individual, and I think we need to have laws that prohibit discrimination in employment, insurance, provision of medical care based on genetic information.

MS. BASHINSKI: Given that there is no consent, because we have convicted offenders, what are the restrictions you would accept, or would you accept that concept at all? What are the restrictions that you think are necessary to keep the data properly controlled?

MR. STEINHARDT: With respect to the existing forensic DNA database, I think that the data should only be collected for identification purposes, I think the samples should be destroyed some reasonable period after the data is collected, because it's, after all, the biological samples that pose the greatest threat to individual privacy rather than the profiles that are done for identification purposes.

I think that the access should be restricted to law enforcement. I don't think that the laws, like Massachusetts law, which makes the data available for humanitarian purposes, research purposes, is a proper use.

Plainly, I think there needs to be better security than exists in some of the data banks, those sorts of things.

MR. ASPLEN: Mr. Steinhardt, one question. Do you think there's anything to be said for the extent to which the DNA database is actually colorblind if we look at it in terms of utilizing it for investigative purposes?

The DNA sample that goes in and searches the database doesn't -- we're not rounding up the usual suspects, if you will. It goes and looks at everybody. It doesn't target a particular race, if you will, and doesn't the technology essentially take the human factor out of it and we don't go out and round up the usual suspects, if you will, based on racial prejudices? Is there anything to be said for that argument?

MR. THOMA: Chris, I think his point was that blacks and other racial groups are arrested in such high numbers as opposed to others and they're tested as against the sample.

MR. STEINHARDT: I understand your point, but that's exactly right. I think if you have an underlying population that's being tested that is disproportionately persons of color, then what you've got is tests that are disproportionately picking out persons of color.

I think that's the problem, and I think you compound that problem when you begin to sample all arrestees, not just those persons convicted.

MR. SMITH: Do you solve that problem if the database is universal?

MR. STEINHARDT: I suppose you solve that problem if the database is universal, but I don't know that that's a solution that I would want, although I do think that it's the ultimate extension of this argument that I'm sure Commissioner Safir will make, that even if only small percentages of people are guilty of some crime, if we have a large enough database, we'll solve every crime.

The ultimate extension of that argument is that we should DNA-sample everybody, everyone should have their DNA in a file. I don't think that's the society we want to live in.

MR. THOMA: Mr. Steinhardt, I appreciate your quote from the 12th chapter of Alice in Wonderland. I think it's the quote by the king -- sentence first, trial afterwards. I'm a big fan.

Let me ask you this question, and it's really rhetorical, but I think Mr. Weathersbee brought up and Commissioner Safir will bring up this point, their question on whether you should take DNA from arrestees should be based upon capacity rather than probable cause or Fourth Amendment concerns, and I guess it would follow, searching all detainees, more contraband would be found, and I think the argument might be that that makes for more detentions and more arrests, because more can be done with it, and I'd like you talk -- speak on that for just a moment, if you would.

MR. STEINHARDT: Well, I think it's certainly true that, if you searched every person walking on the streets, you searched every home, you undoubtedly would find more contraband than you're currently finding, you would find more evidence of criminal behavior than you're currently finding now.

I don't think that's the society that our framers had in mind when they drafted the Fourth Amendment, and I don't think that's the society most of us want.

I would also note that I think that, even in the existing framework, that there is a very troubling aspect to the way in which police officers now do their jobs and conduct routine sorts of searches and that the police unit that was involved in the shooting in New York, which is the shooting where an unarmed man was shot 41 times, not drawing any conclusions about that case in particular, but the same unit essentially stops and frisks four people for every one that they find with contraband that they make an arrest, which means that they're wrong three-quarters of the time, and although they're supposed to be doing those stop-and-frisks on the basis of some reasonable suspicion, I don't think we want a society where we are encouraging police officers to be exercising that kind of authority and that kind of discretion.

I think that, inevitably, they will exercise it improperly.

DR. CROW: There are two people that I noticed who would like to speak. Woody is the first, and then I'll call on you next.

MR. CLARKE: Actually, I'd like to return, if I could, to what Jan brought up about the potential for laws and the laws that you've suggested that should govern any databases, and frankly, it draws on what Michael Smith brought up yesterday about talking literally to his -- I can't remember the context. I think it was a clinical draw of his own blood, and in particular, the informed consent that didn't address it whatsoever.

We know -- and I, coincidentally, have the same question for my own physician about what happens to that blood. I've asked the same question of a couple of clinical diagnosticians about what they do with the blood, and the reality is they do whatever they want to do with it.

So, my question to you is should those same laws apply with equal -- or should there be separate laws to apply with equal force to those settings in which individuals who haven't been arrested for crime now have given samples that could be typed for whatever purpose?

MR. STEINHARDT: What I intended to -- and the answer to the question as I first understood it -- I appreciate the fact that I may not have understood it properly -- was to suggest that I think we need to -- putting aside this question of forensic DNA data banks, that we need to have laws that protect our privacy by requiring concepts like informed consent across the board, and we need to have laws that prohibit discrimination on the basis of genetic information across the board, regardless of who is drawing that sample or where it's being banked or how the information is being developed, but I'm concerned about the civilian uses of DNA as well as the police uses of DNA, law enforcement uses of DNA.

DR. CROW: Phil, you're next on my list of people, the hands that I've seen, in that order.

DR. REILLY: I'll be brief. I'm going to just re-ask the question, because I want to get as clear a picture as I can of your position.

If DNA data-banking for convicted felons can be conducted in ways such that the whole DNA sample is not retained but a digitized version of it is retained, to what extent are your concerns diminished?

Is that the single major concern you have? Because that is the way I heard you. I want to know how big a factor that is in your mind.

MR. STEINHARDT: We are opposed to the creation of DNA data banks even from persons who are convicted of crimes where it's done on a mass basis without individualized suspicion, but we're also aware of the fact that they now exist, now exist in all 50 states.

To the extent to which the biological samples are destroyed and all that's left, therefore, is the genetic identification profile, yes, my concerns are diminished.

Given the current realities, where, in all 50 states we have laws, although in Massachusetts, the law is currently on hold, I am certainly not foolish enough to think that our position is likely -- our ultimate position is likely to be vindicated.

DR. CROW: I had you next.

MR. STEINHARDT: Did that answer the question?

DR. REILLY: Well, it didn't completely answer it, because I wanted to know the magnitude -- if there is a pie that represents your concerns, how big a slice of the pie is that, and you didn't really answer the question. You said it was diminished, but 1 percent, 50 percent, 95 percent?

MR. STEINHARDT: I don't know that I could put a number on it, but certainly, it would significantly diminish.

DR. REILLY: Okay, that's fair enough. "Significant" is a good word for me. I can quote you on that.

MR. GAINER: Mr. Steinhardt, you mentioned, when the Sheriff asked you about what our other obligation might be, and to, I guess, characterize it in general, public safety or the rights of others, somewhere in there you might feel that is also a natural extension of the things we ought to look into?

If that's a good paraphrase of your philosophy, where do you come down on the simple public protection policy that the criminal justice system would look at the recidivism rate of a certain class of criminals which might be very, very high and say, in the interest of public safety, if, for instance, in sex offenders, it's 70, 80 percent, that we ought to have the DNA profile of those individuals in order to run against what is a pretty good bet an offense or offender is going to happen again?

MR. STEINHARDT: Well, I still think that the Fourth Amendment requires individualized suspicion. Individualized suspicion means the specific individual, not the class of individuals to whom that person happens to belong.

Now, I'm certainly aware -- the question was asked before about the Fourth Circuit case -- that there are many courts who have taken the position that that constitutes a special need and that the testing is appropriate.

There's at least one court in Massachusetts which has taken the contrary position, but again, looking in the context of your question, we're going to adhere to a fairly discrete number of crimes where there's a high recidivism rate and where there are frequently biological evidence left behind.

All those things will diminish in some -- I don't know what the proper adjective is there -- my concerns if we can, in fact, hold the line that that kind of DNA profiling for those kinds of crimes.

DR. CROW: Sheriff Kennard.

MR. KENNARD: Yes.

Mr. Steinhardt, getting back to what Jan had mentioned, the fact -- if there were sufficient laws on the books and we were to use these samples and the identification, what concerns would you have if we were to use them simply for identification?

Would that not alleviate your concern for making the same thing on arrestees, allowing law enforcement to use it for just that identification? Would it diminish your concerns?

MR. STEINHARDT: I think that the -- I think, first of all, that we will be disproportionately targeting persons of color when we test all arrestees; that, secondly, it vests too much authority in the hands of police officers to make those arrests; and thirdly, the Constitution doesn't permit it.

Now, do a lot of my ultimate worries about how this data will be used -- are they diminished in some way by the destruction of the biological samples and by strict laws controlling access? Sure. But neither of those things, I think, exist now, and we have to deal with the current realities.

I would suggest, at least, before the Commission consider whether or not it wants to begin to take samples from all arrestees, that you ought to satisfy those concerns before you expand the population of people from whom you're taking samples.

We need to get our house in order before we test more and more people.

MR. KENNARD: Our house in order in regards to what? Are you suggesting that the problem rests with law enforcement?

MR. STEINHARDT: No, I don't think the problem rests exclusively with law enforcement. A lot of the problem rests with the United States Congress and state legislatures, which have not addressed the question of genetic discrimination, which are the bodies which ultimately control these databases, the scope of the databases and their uses.

I didn't mean to single out law enforcement here, but when I use the term "you" there, I meant that government, in general, needs to get its house in order. This commission, as it speaks to government needs to suggest to government in general that the house needs to be brought into order before we even consider whether or not it makes sense to expand the scope of these databases and their use.

DR. CROW: Barry?

MR. SCHECK: I think it would be helpful to us if you could provide some information with respect to genetic discrimination in laws (a) that are already in place, (b) that you think are better than the ones that are already in place, (c) how they could -- you know, looking at it as a package, I mean building on what Dr. Reilly was saying, let's say that the biological sample in databases is destroyed, so that the danger, at least, of being able to seize somebody's DNA for testing for other purposes, as a practical matter, is eliminated.

In addition, what other kinds of packages, you know, could you help us with that would help draw this line so that, when we say we're using it for identification purposes only, we can really guarantee it? I think that would be very useful.

MR. STEINHARDT: I would be happy to do that. I'd be happy to put a package together.

DR. REILLY: In the 105th Congress, there were 15 bills introduced on genetic discrimination. None were enacted. Some are being re-introduced. The general debate is not whether or not there should be laws to protect against genetic discrimination but whether it would be far more preferable to have a general medical privacy bill, and I, for one, want to protect everybody's medical records, not just their genetic records.

Secondly, as we speak, 38 states have enacted laws that prevent the use of predictive genetic information in underwriting health insurance, 38 out of 50.

MR. GAHN: Just to clarify one point, you've spoken about all arrestees and you talked about shoplifters or the necessity of taking a sample from them. Is there a class of arrestees, if there were certain controls, that would be permissible to take a sample from?

MR. STEINHARDT: Not in my view.

MR. GAHN: There's no arrestee at all, under any framework.

MR. STEINHARDT: Well, let me amend that. I think the answer to the earlier question is this, that if you have an arrestee for whom you have probable cause to believe that they were involved in a crime, then it's appropriate to obtain a warrant to take the sample, yes, but I don't think there's a class of arrestees, as opposed to individual arrestees, from whom it's appropriate to draw a sample prior to their conviction.

DR. CROW: I want to stay on schedule. Let me remind you of one thing, though. It's a standard geneticist joke that probably the rest of the world doesn't know, and this is a distinction between junk DNA and trash DNA. Trash is something you throw away. Junk is something you save around because it possibly will have a use sometime, and I take it you're using junk in that sense.

MR. STEINHARDT: Yes, I am, and I appreciate that distinction, and I'm going to use it.

DR. CROW: With that said, I'll close the discussion, and thank you very much, and we'll adjourn for 15 minutes for a coffee break.

[Recess.]

## Mr. Harlan Levy

Defense Attorney, New York

MR. ASPLEN: I'll begin to introduce Mr. Levy while folks are kind of getting their cups of coffee and having a seat.

When I called the National Association of Criminal Defense Lawyers and asked their suggestion as to who I should get to come in and speak to this commission on these issues, one of the top three names that they gave me was Mr. Harlan Levy, and as soon as I heard Mr. Levy's name, I said, well, of course, that would be a wonderful idea.

Mr. Levy was exceedingly helpful to me when I began working at APRI, because it was actually his book that I read, called "And the Blood Cried Out," when I first started there, that gave me a good grounding, I think, in the history of the progression of the application of DNA in the criminal justice system of the United States.

Mr. Levy, however, as Barry noted, was a prosecutor. He has now fully entrenched himself in the defense lawyers community and, as I said, is a representative of the National Association, but again, this is an individual to whom the disclaimer does apply in that he does speak for himself but does have that perspective in mind.

So, again, thank you, Mr. Levy, for being here. We appreciate your time.

MR. LEVY: Mr. Asplen, thanks for having me.

I come here today as a person who's spent a good deal of the last 10 years being an advocate for DNA testing, both professionally, when I was in the District Attorney's office and also in the book that I wrote about DNA testing, and I find myself today in the position of offering some skeptical comments about a proposal that I think has its visionary aspects but that I believe, in many respects, is the wrong proposal at the wrong time.

Let me begin by noting that one of the things that's been most striking about the area of DNA data-banking is the broad consensus that has surrounded it.

We're now at a point where 50 states have laws that required that DNA samples be taken from people who commit serious felonies.

That broad consensus was shattered on December 16, 1998, when Commissioner Safir made his proposal, and if I may share some quotations with you, USA Today said in its editorial pages, "From high on the slippery slopes of truly dreadful law enforcement ideas comes this doozy from New York City Police Commissioner Howard Safir." The New York Times described the proposal as "a threat to personal privacy that is unnecessary for fighting crime," and that hotbed of radicalism, the Indianapolis Star, stated that "to make such a testing part of a routine arrest turns it into an unwarranted exercise of police authority."



In response, Commissioner Safir's boss, Mayor Rudolph Giuliani, described opponents of the Commissioner's plan as captives of, quote, "old left-wing thinking," and the Mayor further said that he would have, quote, "no problem," close quote, with a DNA database of all newborns.

Strangely, in a world where the Soviet Union is now defunct, we've come upon a dialogue that I think has much resonance of the cold war, and Commissioner Safir's own words have fueled that dialogue.

While merely, I think, intending to make his point that DNA data banks will only identify the guilty, he has stated that "the innocent have nothing to fear," a phrase which I think is Orwellian in its resonance.

Still, despite taking an area that had been an area of consensus and turning it into an area of controversy, we have a provocative proposal here, and it comes from a team that has cut crime very dramatically and very commendably in New York City.

Obviously, anything proposed by that team deserves a very close look. So, amidst all this controversy, I've tried to think about how to assess this proposal, and today, there are four areas that I'd like to take you through in thinking about it.

First, I'd like to address how the testing proposed by the Commissioner compares to fingerprints; second, how it's different from fingerprints and the implications of that difference; third, a variety of problems that I see in the Commissioner's proposal; and fourth, my own proposal to this commission for a study that I believe that it could commission which would help to achieve many of the goals of the Commissioner's proposals at less controversy and at less cost.

Let me begin by comparing this to fingerprints. In many respects, taking DNA samples through buckle swabs from a person's mouth would be consistent with existing practice regarding fingerprints. Fingerprints are, after all, routinely taken at the time of arrest.

They are routinely check by law enforcement in an effort to solve unsolved crimes. There is no suggestion that that presents any constitutional violation, nor has there been any suggestion in any case law that I am aware of that it is in any way inconsistent with the presumption of innocence.

One way that DNA testing is different from fingerprints is in terms of the information that is contained in the DNA, and we heard Mr. Steinhardt talk about that at some length this morning. That has been a rallying cry of the civil liberties union.

Realistically, at this point, the principle information that could be of interest in DNA is susceptibility to disease. That is information that is primarily, as I understand it, of interest to employers and to insurance companies.

While there's been much discussion of predisposition to commit crimes, there are currently no genetic findings to that effect.

We heard yesterday about possible findings regarding impulsivity. As someone who, as a lawyer, spent a good deal of time with the DSM in terms of litigation psychiatric issues, there's a wide gulf between speaking of impulsivity and speaking of criminal conduct. It's very wide gulf.

It's possible that the genome project may reveal extraordinary secrets, but it hasn't yet.

One view, obviously, is that what we do to remedy this problem is that we criminalize the use of these data banks for any other purpose, providing that they may only be used for that purpose, and attach the most serious sanctions possible.

Counter to that view, of course, there's the question of how much one trusts government, there's the fact that we're in an era of relative tranquility and that there certainly have been abuses in our history of private information again and again, and there obviously have been periods where there has been much less tranquility in our history.

I guess the question is how do you weigh this concern?

My view, in terms of my own particular preferences and views, is that I don't give it great weight.

Today, I find it hard to see any governmental initiative to analyze DNA for employment purposes or to provide to private employers for insurance purposes, and I think that to decline to take action on this ground is to rely on something that is extremely speculative and then would have to be compounded by a governmental misuse of information.

So, while that is an area that gives many people hesitance, it's not one that particularly gives me pause.

Another distinction between fingerprints and DNA is if we look at the historical use of fingerprints. Fingerprints were initially taken to maintain a record of a person's identity.

As technology developed, at the point when I became an Assistant District Attorney, fingerprints were used primarily to conduct a check of a person's criminal record to assess the extent to which there would be a bail risk.

It's only in the last few years that we've had automated systems to make it possible to search a person's criminal -- to search a person's having committed other crimes through fingerprints.

Still, that is something that is done routinely, without challenge today, and it seems fairly well-settled that that is appropriate.

It's possible to criticize the Safir proposal on the ground that we already have fingerprints. Since we already have fingerprints to identify people and to maintain a personal record of their identity, why do we need DNA?

But I think that would be premised on the idea that all governmental intrusions at the point of arrest must be for the purpose of identification for that particular crime.

I don't think most courts would find that a compelling argument. There's obviously a governmental interest in knowing whether an arrestee has committed other crimes.

Government is permitted to put an arrestee in a line-up to investigate other crimes. Photo arrays are routinely shown of arrestees without any requirement of probable cause or even reasonable suspicion of other criminal conduct.

So, I think that there's, based on that precedent of fingerprints, good reason to think that courts would approve the constitutionality of this plan without too much hesitation, except for one wrinkle, and that's a

wrinkle which I think becomes more clear the more that you look at the governing case involving the taking of blood samples, which is Schmerber.

The Schmerber case talks about the significance of intrusions beneath the body's surface, and it says that the interest in human dignity and privacy forbids any intrusion beneath the body's surface on the mere chance desired evidence might be obtained, and it speaks about the integrity of an individual's person being a cherished value in our society.

We have to remember here that the plan that the Commissioner is proposing does involve the probing of an orifice of the body.

How would the courts weigh these factors in assessing the constitutionality of the proposal? They would do what they generally do in Fourth Amendment cases, which is engage in a balancing test, and the question would be is this more intrusive than fingerprints?

If so, how much more significant is the intrusion? The question would be what would be weighed of how strong the state interest is. The fact that these are arrestees rather than convicts would certainly figure in the analysis on the balancing test.

It may be, I should note, that this concern about the invasion beneath the body's surface may not be present in a few years.

As I understand it -- and I will defer to the forensics people on this, but I understand that there is research going on which would potentially allow DNA to be taken through moisture from the fingerprints, that that is something that is underway, and it could be that, as a technological matter, that this concern will evaporate in several years.

There are a number of other questions that I'd like to raise about the Commissioner's proposal.

I think that probably the greatest concern that we have to focus on is what might be characterized, if one were to be critical, as its grandiosity.

In New York City last year, there were 360,000 arrests. If you look at the New York State experience today with data-banking, New York State has taken DNA samples from 7,000 convicted offenders, and it has analyzed 1,000 of those samples.

The other 6,000 are sitting in laboratories, sitting in refrigerators, sitting in crime labs. So, if you think about overwhelming a system, just think about the magnitude of that distinction and what that would mean for a system that is already overwhelmed.

Another concern that I would raise about this proposal is that it is a mass program, and mass programs are going to be more subject to mistake than smaller, carefully-tailored programs.

I think the one area that the people who have worked on this commission and on prior commissions deserve tremendous credit for is the tremendous emphasis on quality assurance and on quality control.

That's been something that has been of concern to all actors in this whole process, and the question of the extent to which those kind of standards are going to be maintained and to which a system that is of the

magnitude that is proposed will still be a high-quality system is, I think, something that has to be of concern to everybody here.

Beyond that, I think that there's a question of typos.

To what extent, because we have a mass system, because we will have people who are data-entry operators putting numerical values into a system and then premising arrest on retrieval of that data, how many situations are we going to have where people are being called in to account for their whereabouts, to explain their relationship to a crime that they had nothing to do with?

This is something that I think we will see over time with our more limited data banks.

I think we'll get some sense of experience over time of the extent to which this is a risk and the extent to which it's a problem, but it's certainly a potentially Kafka-esque aspect of this proposal, the innocent person being called in to account.

I think that, in this regard, we all know that there is a history of situations where there have been search warrants executed at the wrong premises.

That's been a particular problem in my city, where people will show up and they will be the wrong description and it will be the wrong apartment and people will be terrified for no reason, because people wrote something down wrong.

It's something that may happen here, it's something that I think we need experience with with more limited data banks first.

One other matter that I think is going to strike people immediately about this proposal is why are we placing the time of collection at arrest rather than at conviction?

I know that, from a practical point of view, that the reason that it's being posed at that point is (a) because it's the broadest possible point and (b) because there is a very coercive nature to that time period when a person is first arrested, where they are not represented by a lawyer, where the police essentially own them, and that, I think, animates this.

There is a counter-argument, which is that many people who are guilty, if their DNA is going to be taken at the time of conviction, probably won't return to court, assuming that they're calculating and thinking, if they know that when they return to plead guilty that their DNA will be taken, they very well may make the choice to warrant at that point a law enforcement look at the benefit of their DNA.

But I think that something that has to give us particular pause in this regard is the very large number of arrests that don't result in convictions, and we have to ask, to what extent is it fair to be taking samples from people simply on the basis of an arrest?

I checked in my own state on the statistics, and for both felonies and for misdemeanors, approximately one-third of the people who were arrested finally have non-criminal convictions. The charges are dismissed or they are acquitted.

I mentioned the Schmerber case before. Another aspect of the Commissioner's proposal that gives me some concern is the fact that, under it, the DNA sample would be taken by a police officer.

Schmerber draws the distinction between the taking of a biological sample by a police officer and medical personnel.

It states that there are serious questions if a test is administered by someone who is not a medical person, and I think that you have issues of sanitation, you have issues of roughness, I think you're even going to have issues about the attitudes that the cops have even taking these samples.

I think there's going to be a lot of resistance on the part of police officers to doing this, and we have to ask to what extent it's really what you want. Do you really want a police officer in a station house probing the inside of a person's mouth?

There's the logistical question of redo rates. Again, that's something which the forensics people have more expertise on. As I understand it, the redo rates based on the testimony of David Warrett this summer are such that approximately 10 or 15 percent of the swabs have to be redone.

There is the question of whether expungement actually takes place. The Commissioner's proposal says that there would be expungement in the case that an arrest did not result in conviction. That relies, obviously, on the good faith of the police.

Traditionally, as a legal matter, there is no remedy where there is not expungement. If, for example, a photograph is not expunged and is shown to a victim of another case and the photograph should have been expunged, the principle is that there's no remedy, the evidence can be used.

It is commonplace that photographs are not expunged where they should be.

For example, for robbery cases, typically there are photographs taken in a precinct, as distinguished from the photographs that are taken at central booking, and while central booking will usually, after a time, destroy photographs, usually the photographs in the precinct tend to sit there forever and to be used in further investigation of other robberies, and you also have to ask, in an age of computers, in an age of copying, to what extent, even with the best faith in the world, expungement will take place.

There is the issue of the investigative arrest. This arises in a couple of contexts. It arises in terms of the legitimate investigative arrest.

There is a case, *United States v. Scarpa*, where the police followed around a person 24 hours a day, and then, one day, they found him go over the yellow line on a road and they pulled him over and they searched his car and they found a gun and that was held to be entirely legitimate.

The other risk is the risk of the phony arrest, the risk that we are here giving the police the potential to take DNA sample simply by making an arrest. I think that's something that should give all of us some concern.

There is -- and this is something that obviously will apply to all data-banking and that I think we'll need to see experience on -- there is the problem of identical twins.

All of us who are active in this area know that we have to qualify those statements that we always made about no two people having the same DNA with the statement that that is except for identical twins, and I don't mean to get into far-fetched concepts about people being separated at birth, but it does happen.

We live in an age of fertility drugs, where there are more and more multiple births, and while this is a subsidiary concern, it's certainly a concern.

Obviously, a proposal of this magnitude would be an expensive program. I think all of us have learned that there are many things in life that are expensive but you have to pay for because they're important.

The question here, though, is is this worth paying for, is this worth doing, and I think that that brings us to the largest flaw in this program, which is the question of priorities.

All of us want to be tough when it comes to crime, and we also want to be smart. As a person who's been an advocate for DNA, I would advocate spending millions and millions of more dollars in every state in this country on DNA data-banking.

I think, though, that this is the wrong proposal at the wrong time.

We have a scandal right now in terms of the way that DNA is being used in this country. We have tremendous backlogs in terms of data-banking. We have crimes where the police could be developing leads and patterns where they're not doing it.

We have suspects who are sitting in jail for crimes that they did not commit, and you know, some people are more concerned than others about that, but even if you don't care that much about the suspect who's sitting in jail for a crime that he didn't commit, that means there's someone sitting out there who actually committed the crime, and meanwhile, the leads are growing cold.

So, I think we have something here that is a scandal, something that is outrageous, something that needs to be addressed, and yet, here we have distinct to that a blunderbuss approach.

It's a pretty basic principle. You have to walk before you run, and I think that, when it comes to DNA testing in this country, we're still not walking, we're barely crawling, and I think that our resources have to go to getting ourselves going on that front.

That raises the question, what's the best way to target people who commit serious crimes? What would be most cost-effective? What would be most consistent with our values as a free society?

And I would suggest to you that you could play an invaluable role here.

We all, I believe, accept the premise that the cases where it's most important to do DNA testing are cases of violent crime and cases of sexual violence, and I think that probably many of us would, because of the extent to which DNA comes up in cases involving sexual violence, put the highest priority on those cases.

I would suggest that, as a matter of serious study, we evaluate the prior criminal histories of people who commit those crimes, that you actually do that study.

Are there patterns to the prior crimes committed by people who murder and who commit sex crimes?

It may be that they are burglars. It may be that they are residential burglars, as distinct to commercial burglars. It may be that they are misdemeanor sex offenders. They may be Commissioner Safir's benighted turnstile jumpers.

But I would suggest that, once we've done that study, if the correlations are sufficiently strong, then we might want to consider taking samples at the time of conviction or even possibly at the time of arrest from people who commit those gateway crimes.

DNA data-banking, though, I believe should proceed on a targeted, rational basis. I think that's the best way to stay away from controversies about George Orwell, the best way to move this forward, and the best way to combat crime.

Thank you.

DR. CROW: Thank you, Mr. Levy.

Yes, Judge.

JUDGE REINSTEIN: I don't know who could answer this, but how far are we from being able to take DNA from fingerprints, either moisture or oil, and the other comment, Harlan, is you know, you talked about intrusion into body orifices.

I know that they've got this new device, the laser lancet, where you just put your index finger in, and it's like \$2,800, and I'm sure the costs will go down, that can be placed in law enforcement agencies around the country when people are booked in.

That's not much of an intrusion. That's not into an orifice. You're just sticking your finger into a lancet where they use a laser. There's no blood, even.

MR. LEVY: Tell me more, Judge, about the laser lancet, please.

JUDGE REINSTEIN: All right. We were at a conference in the fall, and they had a demonstration of this little machine. It's about like so, and you just stick your index finger in, and a laser beam comes and it takes your DNA sample, like blood.

DR. FERRARA: Instead of a physical pointed object penetrating the skin, the laser cuts through far enough and deep enough to get a normal blood prick, and that sample could then be placed on a treated blotter card for preservation. That's an alternative to the buckle swab or venous blood sample.

MR. LEVY: I think the implications of that are that technology is going to increasingly solve this problem.

Remember, I'm not saying that I know where the courts are going to come out on this issue in terms of the buckle swabs. I just think that there is -- I think that you've got a question there that may give courts some pause.

My hunch is that most courts would come out and find the Safir proposal constitutional. I think some courts wouldn't. I think that the aspect of intrusion into the body is something that would give many judges pause and that this is a problem that technology is going to solve.

So, as the technology solves that problem, then the constitutional issue, I think, will diminish and perhaps even go away, but we're not there yet.

DR. CROW: Phil.

DR. REILLY: If I could ask a question, I'll begin by saying that I -- proceeding from your comments about Schmerber, I actually think that the future for the argument over intrusion is not physical intrusion but informational intrusion, and I think there remains to be an argument you can make on that.

I think the physical intrusion argument is going to disappear.

Nevertheless, let me ask you this hypothetical.

If some state were to benefit from a large appropriation of funds so that that state could rapidly solve its backlog problem, thus dealing with the prioritization issue, and then decided to focus, because it was fully up to speed on its backlog problem -- then decided to focus on a program that did take DNA from arrestees, would you have less trouble with that program?

MR. LEVY: Much less trouble, and I just am very skeptical about whether we're going to get there, but if we get to that point, if we get to the point where the first priorities are addressed -- I think this is all a matter of prioritization and that the greatest priority has to be on the matters that the crime labs would typically address but aren't addressing in terms of investigating crimes, in terms of running data banks, and in terms of handling cases, in terms of individual cases that need to be analyzed.

But assuming the backlog can be addressed, assuming that the technological issues recede with further developments, and assuming also experience with DNA data-banking that's generally positive in terms of issues like typos, issues of that nature.

I don't see -- this proposal -- it has, on one hand, I think, a sort of a pie-in-the-sky diverting, controversial aspect to it, given where we are now technologically, given where we are now in terms of where the labs are.

I think, at the same time, that it has its visionary aspects in the very long-term, but whether that makes it a good allocation of resources -- I mean, in the long run, we're all dead, as Cain said.

So, in the short-term, is this a good allocation of resources or is it something that's going to rile up the public, scare people, and move us away from what I think is so much the main issue?

I don't understand why the Commissioner isn't standing out there shouting about the backlog in labs. Maybe this is a good way to get people here to hear about the backlogs in the labs.

DR. REILLY: May I have just one quick followup?

DR. CROW: Yes.

DR. REILLY: One of the things that the preceding speaker addressed was the whole DNA issue. I didn't catch much emphasis from you about the retention of whole DNA sample. Can you speak to that?



MR. LEVY: Well, I think it's a tough question. I think that, if you destroy the DNA samples, then you do away with the whole concern about misuse of genetic information.

On the other hand, if you retain them, to the extent that the technology evolves and develops and to the extent that there is a need to refine the technology down the line, then you have it and can use it.

So, it's a call about the extent to which you feel that we've now locked into a system that we're going to stick with for a long time, have to stick with for a long time, because there are proposals that Dr. Crow raised yesterday.

If that's where we are and you can satisfy the civil libertarians by destroying the sample, then let's do it.

MR. KENNARD: Mr. Levy, if I may suggest a couple of things, first of all, I think I can speak for all 3,500 sheriffs in the country, having 28, 29 years of law enforcement myself, we in law enforcement will not be resistant to this.

You suggested that law enforcement is going to be resistant to collecting this. I present to you we will not be resistant in collecting this.

Second of all, you suggested that we should prioritize. Are you suggesting we prioritize so that we can get convictions or that we can even get those who are responsible for the crimes?

The high priority of what you're suggesting, of rapes, murders, sexual assaults, those conviction rates are near the high end anyway. What is it you're suggesting we're going to prioritize, and why would we prioritize them for convictions or identity of the perpetrator?

I guess my question on the priorities -- are you asking for us to prioritize so that we get convictions?

MR. LEVY: Sheriff, when I said prioritize, maybe I didn't make myself clear. The prioritizing that I'm speaking about here is, above all, going to be a priority on the part of the Federal Government and of the states to give you the money that you need to do the job that you want to do, to do the job that the people in the crime labs want to do.

That's what I'm talking about when I talk about priorities.

MR. KENNARD: And if you suggest the priority should be that we eliminate these backlogs, that would have a lot to do with it.

MR. LEVY: I think that eliminating the backlog -- I think that -- from what I hear from the people who I know who are in the DA's office in crime labs, I hear that they're doing tremendous work at developing patterns and solving crimes through development of patterns, work that would never have been dreamed of years ago.

That strikes me as a very high priority, to get those samples analyzed so we can get the information in the hands of people like you to investigate crimes and find people who are out there raping lots of people. I think that's a very high priority.

So, I think that the priority should be on making this work as a tool in your hands, that the funding should be there for the matters that I think will be of the highest priority to you and the other sheriffs in this country.

MR. KENNARD: Thank you.

MR. LEVY: You're welcome.

DR. CROW: Paul?

DR. FERRARA: Harlan, as the forensic science community has centered and standardized upon 13 genetic STR loci, the arguments that I used to have regarding retainage of samples for changing technologies is somewhat muted.

However, we continue to retain the samples in Virginia.

You alluded to a concern about typos, and clearly, when we're dealing with tens and hundreds of thousands of samples, clearly there is an opportunity where humans are involved for an error to occur.

How do we reconcile, however, the ability of retaining the samples for quality assurance purposes when a data bank hit is made to confirm it before that person who has been identified is investigated?

In other words, on one hand, there's the risks of retaining the sample and the benefit of the quality assurance and assuring that a typo in entry did not occur. Which is better?

MR. LEVY: Paul, let me ask you something. In Virginia, do you have an ironclad rule that you do that testing before you share the information with the police investigating the crime? Because my understanding in New York is that that's something that they try to do, but it doesn't always happen, and so --

DR. FERRARA: I don't have an ironclad -- we've struggled with that issue, because on one hand, we try to determine, when a hit is made, if the -- based on the information we have, is the individual still in -- is he in a prison someplace so that he doesn't represent a risk. In that case, we afford the time to do a rerun.

If, on the other hand, that person is, to our knowledge, free, we don't want to waste anymore time in getting the information to the law enforcement agency.

So, there isn't an ironclad rule, but I wanted to point out that there are some advantages and disadvantages to the retainage of the sample.

MR. LEVY: So, if you draw that distinction, the person who is in the prison obviously will be more readily available to take a fresh sample from them pursuant to court order.

So, then they start to address -- that distinction may start to address the concern that you've raised and might be a reason that would then militate against it being necessary to retain the sample.

DR. FERRARA: That's right. I agree.

MS. BASHINSKI: Can I speak to this just one moment?

We have a different policy in California. We will not make any announcement until we've not only rerun the sample, we also run samples that were run contemporaneously with that sample to ensure that there hasn't been any sample mixup, and we feel very strongly, especially when we start having a much larger sample throughput, that we need to have that kind of quality control.

Now, time may tell us if that's an excess of caution. We don't think that it is now, and we would feel very vulnerable if we weren't able to go back and do that quality control step at this point.

DR. CROW: Let me call next on Woody and then on Barry.

MR. CLARKE: Harlan, I want to see if I have your thoughts correctly. You don't have any difficulty with the concept of taking samples from arrestees, it's simply the timing that now is not the time?

MR. LEVY: I have some difficulties, Woody. I think that there are technological issues still. I think that, if we make progression to the point of the kind of technology that Judge Reinstein described, that then some constitutional issues that might present themselves start to recede.

I think that there's something to be said for experience before we expand into a huge new governmental program.

If the logic of the law is experience, let's get that experience first on a more limited basis before we engage on an undertaking that would be unprecedented in its magnitude.

I think that, even though the presumption of innocence does not generally, in the view of the courts, have much constitutional significance in analysis like this, I think that, also, from a public perspective, that there is a ring of this, that it is somehow not fully consistent with the presumption of innocence, that there's something slightly unseemly about it.

So, for that reason, too, I hesitate also, Woody.

MR. CLARKE: So, you do see a distinction between fingerprints and taking a sample of biological material.

MR. LEVY: I see a distinction that I think will recede over time.

MR. CLARKE: All right. Thanks.

DR. CROW: Barry.

MR. SCHECK: When you're talking about backlogs, I think we should all be clear. Let me see if I've got this right.

We have a backlog of, what, 350,000 or however many, of currently-drawn samples that haven't been typed.

We have a million owed samples, estimated, of people that are eligible to have their DNA drawn under existing statutes but are on supervised release or parole, who we can't find, who are in the community, who, as I've been saying for meeting after meeting, should be our highest priority.

Then we have the turn-around time problem that we've discussed, which I also put into the issue of backlogs, correct, and I think Harlan mentioned this, people who are awaiting trial whose DNA has not yet been compared, and the turn-around times are -- we hear from Virginia and California -- are high, much higher, I know, in other jurisdictions.

We also have the backlog, in a sense, of new unsolved cases where we all would agree DNA would be relevant. We have no suspect yet, but it would be very helpful to get those new cases in and type them so we can solve a crime. That's a backlog problem.

We have old unsolved cases, rape kits that have never been typed and, in some jurisdictions, are being destroyed, although I'm glad to say Commissioner Safir has issued a directive that that not be done after five years anymore in New York.

Now Harlan has raised another point that we shouldn't lose sight of in terms of the arrest proposal, and here I'm just talking about practicalities.

There's another turn-around time issue. If you think you've got turn-around time problems now, think about what the turn-around time problem is going to be at the time of arrest, because as Harlan is pointing out, I'm not so concerned about police taking it, because we'll hire doctors or nurses, and we do that right now in our New York data bank to take blood from inmates.

That's not so much an issue, but from the time that you draw the DNA sample from the inmate, let's even assume you do it by a buckle swab or any high-tech fix you want, you still have to process it to look at the unsolved crimes to fulfill the purpose of this proposal. How long is that going to take?

If that takes two weeks, well, I am telling you right now, we have in -- when we train lawyers in New York, be they prosecutors or defense lawyers, I'm sure you'll agree, Harlan, we have the New York Post/Daily News rule, which has to do with the judge is going to think about should I set bail for this person at a level that the individual can make, and you make that decision by saying how's it going to look in the New York Post or the Daily News if this person goes out and commits some other crime? You know, how's that going to look, and then they make the bail decision.

I think you're going to find far more people in pre-trial incarceration for those two weeks awaiting the results.

I mean we don't let people out right now unless we process their fingerprints.

So, there's yet another backlog problem that's of no insubstantial size and nature, and if you begin to calculate how long it takes, how much it costs to keep people in pre-trial detection awaiting these DNA results, you've got a real big number.

MR. KENNARD: Mr. Scheck, let me counter one thing you just stated. We do let people out of jail before we process their fingerprints. That has been part of the problem. We take them, but they're not always processed, and they are released.

MR. SCHECK: Well, in New York, there are certain offenses -- in other words, if we print somebody, we run it in the computer to see if there are any open cases, and we don't let them out of jail until the fingerprints are back.

MR. KENNARD: That fingerprint has been run NCIC and you have got every --

MR. SCHECK: No, just state, and I think most jurisdictions have that policy. So, if we're going to take the DNA, there's going to be some turn-around time, and that's a logistical and an expense issue.

DR. CROW: I don't know whether those are questions or not.

MR. LEVY: I think that fit in the realm of a comment.

MR. SCHECK: It's your idea, Harlan. I liked it.

MR. LEVY: Thank you, Barry. That's a new experience.

[Laughter.]

DR. CROW: One thing has changed, if you look at your schedule, and that is that the representative from the bar association is apparently not coming. So, we have more time than we thought we had, and the suggestion is that we have the lunch a little earlier than is scheduled here and the have the Commissioner speak after we've eaten rather than during it.

MR. ASPLEN: On the original schedule that went out, there was a listing for a representative from the ABA. However, that individual is not here.

When you arrived, we gave you a revised agenda that does not include that person.

However, the space is open, and as such, what we're going to try to do, if we can, is to move lunch up a little bit so that we can actually eat first and then return to our seats and actually begin with Commissioner Safir's remarks at about 12:15 or 12:30, rather than actually eat through his discussion, which was, no offense, part of the original plan.

I'll explain later, it's a funding issue, but we'll take our chances on the, quote/unquote, "requirements of a working lunch," and I'll deal with that when they get back.

DR. CROW: Let me emphasize that questions or comments related to the earlier speakers this morning are in order, too.

Judge.

JUDGE REINSTEIN: No matter what we do regarding the database issue, I like Harlan's suggestion regarding doing a study on patterns of crime, but hasn't that already been done, when David Ware spoke to us regarding burglaries and the drug cases and the like as being precursors to more violent crime?

DR. CROW: Didn't someone say something like that here?

MR. SMITH: We ought to have some independent expertise presented to us. I think it's pretty tricky.

MR. THOMA: I think there's two issues, Judge. I think there's one with regard to the proclivity for recidivism with regard to specific crimes, and I think the second is the type of crimes themselves, that lend themselves to DNA evidence being left, and I think those are priorities -- we've talked about

priorities on this commission, and I greatly appreciate the way that we've done that, and I think that this is an issue that particular lends itself to that.

I think Harlan spoke on this with regard to priorities as well as anybody, and I think those are two aspects that we really need to talk about.

I think Barry's comments with regard to Michael's original suggestion on priorities, when we made the recommendation on the backlog, that that is a very important priority with regard to us, but I think both these aspects are things we need to take into account, because what we end up doing is we've got the intrusion issue, it's there, but the priorities with regard to what backlog that this is going to create far exceeds whatever backlog we've got now, and I think Barry just brought that up, but I think it's on all of our minds.

JUDGE REINSTEIN: I don't mean that any study that's done in Great Britain should be utilized here to compare like in an urban setting here.

I mean the environmental differences between the urban environment in Great Britain, I think maybe are totally different than, say, New York or Chicago or Los Angeles or thereabouts.

At this point, we just have the anecdotal evidence.

MR. SCHECK: I'm against the study that Harlan was proposing.

MR. LEVY: Now I'm on familiar ground.

[Laughter.]

MR. SCHECK: Now it feels more like usual, right?

MR. LEVY: Old times.

MR. SCHECK: Just because, you know, first of all, you can get any criminologist to crunch these numbers in terms of looking at people in the past who have committed homicides or rapes and compare them with their prior crimes, and yes, there's no question -- and New York has really, in some ways, led the way in this -- that you can target criminal activity and you know that certain offenders are going to go out and commit other kinds of crimes.

But what I don't like about it is the policy justification is that the notion of being able to predict on this or that even recidivism, per se, is the constitutional justification for doing these things, I think, is wrong-minded, and not only that, it falls into the very danger that we're worried about.

I don't like the idea of justifying, in terms of constitutional principles or even neutral principles, databases on the grounds that we can begin to identify a certain class of people that tend to have proclivities towards crime, because we know in advance that data of prediction is never going to be that good, but it also feeds into the idea that we're going to go take the DNA and try to find a genetic basis for those kinds of predictions.

So, I think that's really the wrong kind of data to collect and the wrong justification.

MR. LEVY: You're more confident than I am about what the study is going to show before it's done. I think it could be that there are very strong distinct patterns where there are associations with certain crimes and with later crimes that are the crimes we most want to solve. It may not be.

MR. SCHECK: We know there are. That's my point. We know there are, but that doesn't help you predict in any individual case.

MR. SMITH: But Barry, there's two separate questions here.

One is whether or not the degree of distinctions that might be drawn to a further study are sufficient to be of constitutional importance.

The other one is whether or not priority setting within a law enforcement agency might be governed by a better understanding of patterns.

DR. CROW: One thing that's sort of implied by what Barry said -- that is that doing a study in which you ask how many people who have committed serious crimes have committed minor crimes before. It's quite a different question than asking how many people who commit a minor crime will later commit a serious crime, and it's easy to confuse those.

MS. BASHINSKI: Also, we need reasonable data on which to set our priorities. I think we've made a lot of assumptions without cases and data, and we might as well test those assumptions with data.

MR. LEVY: I spoke before I came here this morning with my former colleague, Linda Fairstein, who told me that she and my former boss, District Attorney Morgenthal, both strongly support the Commissioner's proposal, and she also told me that, in the most serious serial rape that they've recently solved in New York City, that the one prior arrest that the defendant had was for a computer-related crime.

So, Barry says that we know what the answers are going to be. I don't think we know what the answers are going to be until we do the study.

MR. SCHECK: That's not what I said. What I said is that this is the wrong data -- it's not going to answer the question you want answered, and we already know that, for reasons that Dr. Crow has already pointed out, and criminology is not even your field. Statistically, we already know that.

There is a lot of data that we need. I mean I thought yesterday we were talking about how the labs can't even count a case for budget purposes. You haven't collected that data, you know, and we talk about a million old samples and we're not too sure about all these various numbers, and yet, I can think of about 12 studies that we've gone over in our last three or four meetings that we really need to decide how much money to spend tomorrow and where to prioritize it.

This study as to finding crimes that are particularly prone to recidivism, that may or may not be helpful in terms of DNA testing, gateway crimes, I mean the example you cite shows that computers are not necessarily going to be a gateway crime to serial rape. I mean I think that one's doomed from the start.

MR. KENNARD: What is the question you suggest we want answered? You've suggested that that is not the question we want answered.

MR. SCHECK: The way we should do it is that we should begin looking at our actual DNA hits and exclusions. We should deal with real empirical data that are coming in from the labs, and we should try to find out -- as the cases come in, we should count them systematically, we should count how much it costs, how many samples you do per case, and you see how many you clear, you know, in different ways. In other words, build empirically from the work that the labs are actually doing right now and expand their capacities to do the work and tie them into the law enforcement that are giving them the cases.

MR. KENNARD: To do that, we have to have a database.

MR. SCHECK: I'm with you on the database.

MR. KENNARD: Again, our priority should be the backlog.

MR. SCHECK: The priority should be the backlog. They should be focusing on the new unsolved cases and how those will lead to other kinds of crime solving and catching the guilty and exonerating the innocent. We have so much money that we need to spend in those areas where at least we have a handle but we have no data, and this study is one of the last one.

DR. DAVIS: Let me comment a little bit about money.

I've been hearing a lot of talk about money here, and a legislator who is faced with the problem of slicing up the money pie is going to ask, well, if we invest this much in the backlog, how much, in the long run, are we going to save, and I think that, somewhere along the line in here, I'd like to see somebody who is a sharpie on business practice or the economics of crime and the economics of solving crime and the economics of preventing crime, what the bottom line in dollars is going to be.

I think that would be a very cogent argument to make for the legislator who has to ultimately come up with the dollar figure.

Now, the legislator is going to do -- or vote -- he's going to vote one way or the other.

It's either going to be on the basis of sound economic principles or it's going to be on the basis of a stampede of political expediency, and I'd rather see it on the basis of sound economics, but I have no feel for what -- if we estimate it costs so much to clean up the backlog, how much, in the long run, do we estimate or do we have the capability of estimating what the dollar value of that will be in the future, and then sort of subtract one from the other and come up with a plus or minus number.

MR. CLARKE: Then again, how do we put an economic rating, so to speak, on victims of crime like we've heard from in Chicago, you know, who had to deal with that situation?

DR. DAVIS: I don't know, but juries -- in the civil lawsuits that I sit there and look at from the outside, or read about in the paper, there apparently are people out there who can come up with all sorts of money numbers.

DR. CROW: Let me call on the Chief next.

MR. GAINER: I just wonder if we could maybe go back to crime scene processing, if you will, because we seem to spending a lot of time on, once we get this sample, what we might do with it, and thinking



from a law enforcement perspective, do you anticipate that there will be a strategy that will hold police accountable for what they fail to find at scenes or look for at scenes?

In other words, it's pretty easy for us all to discuss the easy things -- blood, semen, and saliva -- but more and more we're learning about these other places where we can get these cells, and I think our experience in the law enforcement field and, I suspect, from both prosecutors and defense, is that there are a lot of things we are not yet picking up.

So, I'm wondering if, one day, that we're going to see a photo of a crime scene that would be presented at the trial, and what you would do is pick apart the detective and the evidence technician and said did you sample this, did you sample this, did you pick up that, did you do this, and at the moment, the answer to that would probably be no, and therefore, have we left ourselves open in law enforcement that we failed to exclude the very person that we're trying to convict? Is there going to be a strategy like that?

MR. LEVY: In the debate about the exclusionary rule, one of the ideas that's always been discussed as an alternative to exclusionary rules was that police officers would be fined or penalized in some way for failing to advise a defendant of their constitutional rights.

The general view has been that responding to police officers in that punitive way was something that nobody in the system had any taste for, that it wasn't an appropriate remedy for the violation.

I don't know why you go to the punitive aspect rather than starting with the training aspect and with the problem of resources, with the number of situations to which a crime scene unit responds.

The Commissioner can address this much better than I can, but my understanding is that, in my city, at least, that the crime scene unit only responds in a very limited number of very serious cases.

So, I think that, before you get to questions of sanctions, which, as I understand it, has never particularly been how police departments work, you want to look at questions --

MR. GAINER: Actually, I wasn't thinking about sanctions or discipline of the officer. I was really thinking about the inference of doubt that it would raise if you didn't exhaust what we now know could be limitless possibilities.

Like someone said how close are we to getting DNA evidence from simple fingerprints? Now, that may be further down the line, but there are a lot of things that could be processed at the scene that we hadn't been processing before.

MR. LEVY: I think that that's very much a part of criminal defense and that that's going to be very much the flip-side of DNA investigation. Why wasn't this done?

It's typically done now in cases involving guns, where there is a gun that's recovered and the gun was never fingerprinted, and a prosecutor will have to jump through all sorts of hoops to explain why the police officer didn't have the gun fingerprinted, the fact that the police officer saw the suspect with the gun, testimony by the fingerprint expert to the effect that guns are typically a bad surface for recovering fingerprints.

So, I think that you're going to see the same kind of work done by defense attorneys in terms of what wasn't done at the crime scene. I think that's going to be a very active area of attack.

MR. GAINER: As it is already.

MR. LEVY: As it is already.

MR. GAINER: But generally, it's an active area of attack on obvious things, and I guess what we're picking up more and more is there are lot less obvious things that we are discovering, and as we develop pamphlets and guidance for police officers, I can think of almost limitless things you might pick up at the scene that have some potential of transferring some cell that would reveal --

MR. LEVY: And Chief, I think they should begin with bullets that go through the body.

[Laughter.]

DR. CROW: Let me break in on this to say that lunch is ready, so I suggest we eat, but I want to thank all three of the speakers this morning. It's been a stimulating time, and a pleasure.

[Applause.]

DR. CROW: So, we'll lunch and then reassemble here.

MR. ASPLEN: At the risk of indigestion, I'm going to ask that we kind of expedite the lunch process as much as possible and really try to start at 20 after, no later than 20 after.

[Whereupon, at 11:50 p.m., the meeting recessed, to reconvene this same day, at 12:20 p.m.]

## Commissioner Howard Safir

Police Commissioner, New York City Police Department

MR. ASPLEN: I'll begin the introduction as folks are getting seated, in the interest of time.

I will say that, when we originally had the idea to address this issue at this particular meeting, about two months ago, I called the Director of the International Association of Chiefs of Police, who has always been very helpful in this process, and I told him of our interest in Commissioner Safir's response or discussions on this matter, and he said, well, why don't you call him, and I said, well, okay, and I hung up the phone, and I did call Commissioner Safir, who was busy at the time but called me back 10 minutes later and immediately agreed to come to the Commission today and address this issue, which we do certainly appreciate, as with all our speakers.

People's schedules are exceedingly busy, and we appreciate all their time that they've taken to come and be part of this particular process.

Commissioner Safir was appointed the 39th Police Commissioner of New York by Mayor Guiliani on April 15th of '96. He's a native of The Bronx, a 26-year veteran of law enforcement and served as the city's Fire Commissioner from February '94 to April '96.

You have a rather lengthy biography on him in your introductory packet, and as such, I won't go into that anymore, but I will simply, as with the other guests, thank the Commissioner for his time, and we look forward to his comments.

MR. SAFIR: Thank you. I'm very pleased to have the opportunity to speak to all of you.

Before I get into my remarks, some of which will cover a lot of ground that this Commission knows, because you are the experts and I'm relatively new to the field of DNA, there are some things I wanted to talk about, what my proposal is not.

Mr. Steinhardt mentioned that I had proposed taking DNA samples from newborns and doing research on that information. That is a proposal that I have never made. No one has ever heard me make that, and I don't know where he got it from, but it's certainly not from me.

It is not in any way, shape, or form part of my proposal.

The other thing that few people -- that no one has heard me say is when.

This is not a proposal that I expect will be implemented tomorrow, in six months, or even in a year, but I think it is a proposal that is very important and one that needs to be talked about, debated, and one that this Commission will be very influential in shaping the discussion on.

I believe that the extensive use of DNA evidence will be the most important technological addition to police investigations in the early part of the 20th century.

As you know, I have taken a very aggressive stance concerning the future use of DNA testing. I have called for DNA profiling of all people arrested for fingerprintable offenses in New York City.

Today I would like to take a few minutes to explain to you why I believe such a policy is appropriate. I would also like you to consider in the future calling for such a policy nationally.

You also mentioned that we do not represent organizations.

I am representing the views of New York City and the New York City administration, and I did raise this issue at the recent meeting of the major city chiefs of police and am sending copies of my proposal to all major city chiefs, and it will be one of the agenda items at their meeting in June.

I also intend to raise the same issue at the executive committee of the International Association of Chiefs of Police, of which I am a member, at their next meeting.

As you know, DNA profiling is a relative newcomer to policing. It was first used in 1985 in England with the use of an intelligence screen to help identify a murderer. Its use has grown tremendously since then.

I believe that we should learn from the English system and adopt the relevant parts that apply to U.S. law enforcement.

I note with interest that, in 1906, one of my predecessors, Commissioner McAdoo, sent a sergeant to England to view a new system called fingerprinting and that, in 1908, the NYPD solved its first murder using fingerprints.

The British take DNA samples from nearly everyone who is arrested. To obtain the sample, they use a buckle swab.

The profiles obtained from these samples are placed in a national data bank which has about a half-million samples.

Since April of 1985, the British have linked more than 36,000 suspects to crimes, and in another 6,700 cases, they have linked one crime scene to another.

In one period last month, they linked three suspects to murder, four other suspects to suspicious deaths, and also identified nine possible rapists. Last week alone, they made 667 matches.

While addressing such violent crimes is certainly the stuff news headlines are made of, what I find more exciting is the success the British are having with property crimes.

We in policing have a good track record clearing murders. In New York, for example, we made over 800 homicide arrests last year, even though we had 629 murders.

The clearance rate for forcible rapes, which will improve with DNA testing, is over 50 percent in New York and nationally.

Our property crimes, such as burglary, grand larceny, and auto theft, have a very low clearance rate, about 14 percent nationally, and the reality is that most victims of crimes are not victims of violent crime. Most victims of crime are victims of property crime.

I mentioned we had 629 homicides in New York last year, which was the lowest in 35 years. We also reduced car theft 61 percent and burglary 43 percent, but we still had 44,000 burglaries and 47,000 car thefts.

So, most people who are affected by crime are affected by property crime.

These are the crimes for which I think DNA testing will provide the greatest assistance to the public in the long run.

Of the 36,000 suspects linked to crimes in Britain, over 20,000 were linked to burglaries and almost 5,000 were linked to auto theft.

I met with the British recently, and they told me they were beginning to have great success with getting DNA evidence off of steering wheels and doorknobs, and I think that is very exciting for law enforcement in the future.

This is the type of success we have always hoped for from fingerprints but never achieved. With DNA, we will achieve it.

The English have shown us the incredible potential DNA testing has for policing.

What I think makes the British system so successful -- and it is certainly what I have called for here in the States -- is that their law allows for DNA samples to be taken at the time of arrest, and it allows the samples to be taken from what we would typically call both felony and misdemeanor offenders.

To give you an example of why this is important, in a letter I recently received from the detective superintendent of the Humbercide police, a county in England of about 800,000 people, the superintendent noted that he had just made an arrest of a murderer using DNA technology.

The DNA sample on file that allowed for the identification was from a previous driving while intoxicated arrest.

Those of who have been in policing for most of our lives hardly find this example surprising. We know that those who commit petty crimes often go on to commit major ones. Still, when I speak to the public, it seems that this point, many people do not understand.

Some believe that it is unnecessary to take DNA samples from minor offenders, feeling that such offenses do not warrant it. Yet, I believe, in New York, we have proof, by using the broken windows theory, that most major crimes involve people who have also committed minor offenses.

By taking care of the small stuff, we take care of the larger problems.

Beyond the issue of taking DNA samples for those who commit felonies and misdemeanors, I think it's very important that we taken the samples at the time of arrest. We take fingerprints at the time of arrest, and there is no reason that we should not pass legislation to take DNA samples.

DNA samples will quickly clear the innocent as well as help us identify the guilty.

The value of testing at the time of arrest is important for a couple of reasons.

I should point out, though he's not in the room, that my interest in DNA was first sparked by Professor Scheck, who came to visit me about doing a couple of more limited projects in New York City.

We are doing those limited projects, but I think that, in the long run, we should get to what I'm proposing.

As you know, Barry Scheck and the Innocence Project, through the use of DNA testing, have cleared 59 people in the U.S. and six in the United Kingdom, most who were in jail for murders or rapes.

Based upon this experience, there are undoubtedly other innocent people currently incarcerated for crimes they did not commit. If we are taking samples at the time of arrest, these individuals would have been excluded much earlier in the investigative process.

Second, criminal justice practitioners realize that many who commit crimes are recidivists. One study by the New York State Department of Correctional Services found that close to 50 percent of those released from state custody returned within five years.

Third, financially, there would be a tremendous benefit to moving the point of testing from conviction to arrest. Savings would be realized in every step of the criminal process, including investigation, prosecution, and incarceration.

Finally, by testing at the time of arrest, we also will be able to compare other cases against the arrested person's DNA profile, just as we do with fingerprints now.

Unfortunately, our existing system does not allow this to occur.

CODIS is for convicted offenders only, with about 250,000 DNA profiles. It certainly has had some success. However, I believe it does not go far enough.

With only about 450 matches, our national system pales in comparison to the success the British are having. While the establishment of CODIS is a major step in the right direction, I believe that we need to go much further.

CODIS relies on the submissions provided by the individual states, but as you know, each state has its own laws governing the crimes for which DNA samples may be taken.

In New York, for example, we now only take DNA samples from those convicted of homicides, sex offenses, felony assaults, and some escapes.

We do not, by law, take samples from convicted burglars, even though we are sure this would help us identify other criminal acts committed by them, particularly sexual offenses and pattern burglaries.

What I have proposed in New York is that legislators give us the authority to take samples from all those arrested for fingerprintable offenses, which includes all misdemeanors in our penal law.

In many cases, by doing so, we would have the opportunity to quickly determine if the person arrested was involved in the crime for which they were charged.

We would also be able to determine if the person could be linked to other crimes for which DNA evidence is available.

To give you an example of how this would be more effective, I had my detectives examine 100 forcible rape and sodomy cases to determine how many of those arrested would be in the state's DNA data bank based on New York's existing law.

Only 18 had previous convictions for the crimes that would have made them eligible.

Looking at the same group, however, 75 would have been in the data bank under my proposal. These 75 had been arrested previously for a variety of crimes.

The greatest difficulty faced in enacting the type of law that I support has more to do with dispelling myths and educating people about DNA than with any other factor.

We must convey to the skeptics that are, in fact, adequately balancing the personal privacy rights of defendants and the rights of our citizens to live in a crime-free society.

First, we have to make it clear to people that we are not looking to create some sort of data bank that would come out of George Orwell's 1984 or the recent movie Gataca. As I have stated, we would not require blood samples. We would use a non-invasive process, the use of buccal swabs, as well as taking a look at the laser technology that was discussed before.

Further, I have heard the concern voiced that we will forcibly take samples from those we arrest. I do not instinctively advocate the use of force. Instead, I would recommend that we create a new offense that would make it a crime to refuse to provide a DNA sample.

New York's current law does not address this refusal.

Still, I recognize that some arrested will ultimately refuse to give a DNA sample because they know they have committed a heinous crime for which they may be identified.

In cases where a person refuses, even in the face of another charge for having refused, I favor the court ordering such submission and the person not being released from custody until it is provided.

I also think we must emphasize that DNA profiles on file would not reveal personality characteristics of the person arrested. I'm advised that the 13 genetic markers recently identified by the Federal DNA Advisory Board would not disclose this type of information.

Further, I want to emphasize that we do not want this kind of information. All we would be looking for is profile information that would assist us in determining whether a person was at a particular crime scene.

Still, in order to address people's concerns, I am proposing very strict measures to guard against unauthorized access to data bank information or samples.

I could not, for example, support a data-banking law similar to Alabama's that allows their data bank to be used for educational or medical research.

Part of the new law that I envision would make it a felony to even try to use the DNA sample for anything other than police investigations.

DNA profiles must be used exclusively for law enforcement identification purposes.

Secondly, I think the law has to clearly state that DNA profiles and samples must be destroyed if the suspect is acquitted or not prosecuted. We do not want a database that includes innocent people.

The British, for example, have expunged over 74,000 samples, and I think we should follow their lead.

Third, I believe that we need to work with scientists and other interested parties to establish uniform national criteria for what constitutes a match once the data bank is searched. I am aware that this is a concern to many.

In discussing matches, I also support the practice that, once a data bank hit occurs, a second sample should be obtained from the individual for a direct comparison to the crime scene profile.

Given the weight that is placed on such information, I believe we have to be sure we have the right person before we proceed with a prosecution.

Fourth, I believe we should only use accredited laboratories to perform DNA analysis, whether public or private, and in my proposal, we would be looking at probably out-sourcing intake and using public laboratories for casework.

Whether we are talking about crime scene samples or data bank samples, in using such labs, we need to be assured that vital quality control and quality assurance standards are in place.

In addition, it ensures proficiency testing, peer review, and standardized testing methodologies.

I note that the NYPD has spent \$33 million recently to build a police lab that would comply with ASCLAD accreditation requirements.

I've also spoken to Governor Pataki about creating a statewide agency similar to the Forensic Science Service in England that would be used to do most of the testing for state police agencies.

Fifth, I have also heard concerns voiced that providing the police with the authority to take DNA samples at the time of arrest will lead to investigative arrests -- that is, people being arrested on less than probable cause just to obtain DNA evidence.

Such suggestions are, of course, offensive to the integrity and professionalism of police officers, and I certainly would never allow it to occur. However, institutional safeguards should also be put in place, and at the NYPD, we have developed a variety of quality assurance programs to review such things as how our offices classify crimes. I would propose a similar program to address this concern.

Next, I think that the cost of DNA testing is well worth the investment in the long term. Testing itself is not that expensive, particularly in light of the high cost of crime to victims of society. Once labs are created, which can be done commercially or by the government, testing can be done for about \$50 a sample. That equates, in New York City, to about \$17 million a year if we were to take all 365,000 arrestees.

Last, I think we must emphasize again that DNA testing is not a tool that violates the innocent. It has been used by defense lawyers to free many innocent people in the country from long prison terms and even death row.



Just as we in policing use it to help identify the guilty, we should also use it to quickly eliminate suspects who are innocent.

Now, in addition to asking for your support of my proposal that DNA samples be taken at the time of arrest, there are other things that I believe the Commission can do to assist those of us in law enforcement to promote and enhance the use of DNA technology in fighting crime.

While I think you know that the largest need is a financial one, there are a number of other areas where we can use your assistance.

First, we need assistance in the development of national standards for crime scene investigation and evidence collection.

As the use of DNA evidence continues to grow, we must ensure that such collection is done properly and that our officers receive the best possible training. Clearly, funding will be required for this effort.

We will also require financial and other support so that crime laboratories may keep up with the demands of analyzing crime scene samples.

While data-banking is important, its true potential will not be realized if we are not working on crime scene cases.

We will need to work on new cases as well as old ones to address the current backlog.

In New York City, for example, I have directed my staff to review old unsolved homicides to determine if we have any biological evidence that may be submitted for DNA analysis.

We have also been working with our medical examiner's office to begin to analyze the backlog of 10,000 rape kits that currently sit in freezers in my property clerk's office.

I truly believe we have not yet begun to realize the wealth of information this old evidence contains.

Third, while I appreciate the Federal Government has made a significant financial commitment over the last several years to assist states with their convicted offender data banks, more is still necessary, particularly in analyzing the current backlog of samples.

Fourth, we require the assistance of your commission in developing training programs for DNA analysts. It often takes six months to one year to train an analyst to perform casework.

As the demand for DNA evidence and data banking continue to grow, we will need to have more scientists available to keep up with this demand.

Finally, I believe it is incumbent upon all of us who appreciate the value of this technology to engage in an educational effort both to explain the value of DNA evidence and to address public misconceptions about how law enforcement intends to use information.

I intend to continue to use my position as Police Commissioner of the City of New York to speak out on the need for the Federal Government, the states, at the state level, and certainly localities like New York City to not only continue to do research but to provide the resources necessary first to clear up the

backlog, second to prove the efficacy of DNA evidence by using the information from the backlog, and then, ultimately, to get to the point of my original proposal, which is to take DNA evidence from all arrestees.

I believe that the number one civil right that exists in this country is the right to be free from crime, and I believe that DNA evidence will go a long way to having us provide that to our citizens.

Thank you.

DR. CROW: Thank you. Very clear presentation, and provocative.

MR. SMITH: I'm curious why it would be wise, in your view, not to retain the DNA profile of someone who has been arrested and tested by not convicted.

Why, from your point of view, would it be wise not to retain that?

MR. SAFIR: I think it addresses the concerns of individuals who have not committed a crime or been guilty of anything of having a permanent record in the databases, very similar to people who are found innocent of crimes who get their criminal records expunged from the criminal database.

MR. SMITH: But if somebody has a prior criminal record but no DNA sample or profile in the system and is not convicted on this crime, now what's the reason not to retain the sample?

MR. SAFIR: I don't think we can go backwards. I think we have to go forward, and I think that we're going to have enough of a logistical and legal exercise going on, going forward. I think going backwards just doesn't get you the kind of diminishing -- I think it's diminishing returns, and I think you get a lot of diminishing returns by doing that.

MR. SMITH: Do you propose to search the database for a match before the disposition of a case on which the arrest -- will you search the database before you know the disposition?

MR. SAFIR: Yes, we do.

MR. THOMA: Let me follow up on your civil libertarian response to Professor Smith's question, and let's get to the issue of cost, because we are really interested in prioritizing what we need to do with regard to the fight on crime and the use of DNA.

If I understand you, the cost of testing -- that is, taking the sample -- it would be about \$50,000 a day in New York City, correct? Then we've got training cost to do this, profiling, the cataloging. Do you have any estimates as to what that costs?

MR. SAFIR: We don't have that cost yet. We're working them up now.

MR. THOMA: The other cost, this new crime for refusal to give a DNA sample, you're talking about a new type of criminal, I guess, and whether that's a person is a civil libertarian who believes that that isn't right or -- I think your version would be that they are -- they've got something to hide, so to speak.

MR. SAFIR: Well, whether they're a civil libertarian or not, under my proposal, it would be the law. So, they would be violating the law.

They wouldn't be taking -- they would be making a conscious decision to violate a law that was passed by the state legislature.

MR. THOMA: Okay. And I do appreciate your thought that Michael followed up on on the destruction of those innocent or not prosecuted, though that's a further cost, too, because that extraction from the database would be expensive, as well.

The one thing I wanted to follow up on, other than asking you the question about the cost and how we can address all of those costs with your plan and to look at the priorities as to what our backlog is as opposed to that plan -- you said that most major criminals have committed minor crimes.

I think, in my experience, that's pretty true, and I would agree with you there.

But you also said petty criminals often go on to major crimes, and I guess that depends on your definition, Commissioner, of what major crimes are.

If major crimes are as I would define them, there are 100 to 1 more often petty crimes committed than major crimes, so that it would be hard for me to understand that the petty criminal often goes on to -- see what I'm saying?

MR. SAFIR: I think you will find, if you look at most felons, that you will find minor crimes in their criminal record. I also think that -- I know I could provide hundreds of examples of serious sexual crimes, homicides, assaults that we solved based on information that we obtained at a time that a criminal was committing a minor crime.

MR. THOMA: I do appreciate that. I agreed with you that most major criminals have committed minor crimes, but your statement -- maybe we're just mincing or parsing words -- that petty criminals often go on to major crimes, you know, there are a lot more petty criminals out there than there are major crimes -- I mean in percentages, 1 percent or 2 percent.

MR. SAFIR: I think we are mincing words. I think, if you want me to clarify it, what I will say is that many of the serious felonies that are committed in this country go backwards, as well.

MR. THOMA: Okay. I appreciate that.

MR. KENNARD: If I could elaborate a little bit, Jeffrey, we consider category one or a burglary, anything that's a felony, as a more serious crime versus a shoplifter.

MR. THOMA: And I'm thinking of strike offenses, just being in California. I'm consider those.

MR. SAFIR: And another area which is very important to me here, when I talk about property crime, burglars and car thieves do that for a living. You know, after they burglarize your house, they don't go to their regular job the next day, they go on to their next burglary, and they go on to their next burglary the next day, and one of the things that excites me about DNA evidence is that we will be able to solve a lot of pattern burglars and a lot of systemic car thieves by getting DNA evidence from many of these crime scenes.

MR. THOMA: Saying that we can't get fingerprints but we can get DNA from those scenes? Is that what you're saying?

MR. SAFIR: That is often our experience.

DR. REILLY: I, too, appreciated the clarity of your remarks.

One of the things I think many of us learn through life is that everything is a matter of timing.

Given the concerns that seem to be uniformly shared by people in this room, in particular the backlog, the training problem, the problem that many labs are not set up yet to do the work, would you -- and mindful of your very clear agenda of making DNA analysis a central feature in law enforcement, which I think you said loud and clear, would it not make more sense to say that your currently articulated position could wisely be delayed for approximately five years while you build up the necessary foundations that you yourself have articulated to be a need so that you would be -- in the end have a much more robust system to operate?

MR. SAFIR: I'm not prepared to concede five years. I think that's the typical Federal Government way of looking at things, five years down the road, when most of the people who are currently in the Federal Government aren't there.

I think it's very important that we move with as quick dispatch as possible in a reasonable manner.

Now, as you heard me say, I think it's very important that we develop the capacity to do that. I'm not sure it's going to take five years to do that. I think it's very important that we have the right labs, train the right people, get the right laws passed, and have the funding in place.

There's just no reason, in my mind, that that should take five years.

DR. REILLY: What do you think would be a realistic timeframe to accomplish the goals that you envision?

MR. SAFIR: I think the Department of Justice and the Attorney General has to take the lead on this. I think they have to lay out a program, they have to consult with state or local officials, and put together a program that is a real definitive program moving forward, not just a study program.

MR. GAINER: Commissioner, have you begun in New York to prepare your incoming officers and your current officers and detectives and crime scene processors to specifically attack crime scenes with a view towards collecting more DNA evidence?

MR. SAFIR: Our crime scene people do that now. What we're in the process of doing is we are training some special evidence collection teams in the local precincts, and they will be doing some pilot projects to see how they do, and in fact, we've been working with Professor Scheck on just that issue.

MR. GAINER: And your pilot -- is that in the property crimes area, in auto theft and burglary, as you mentioned?

MR. SAFIR: It will be in burglary, yes.

MR. GAHN: How many people daily are arrested in New York?

MR. SAFIR: A little more than a thousand.

MR. GAHN: Let's say you take buckle swabs from a thousand.

What do you envision as the turn-around time that you'll have a profile and download that into your case index? From the moment of arrest, with the swab, how soon are you going to -- how soon do you want to get that into your data bank and downloaded?

MR. SAFIR: We would certainly want it into the data bank as soon as possible, but the only people who are really doing this in a massive way are the English, and it takes them about two weeks to get theirs into the system.

However, they can also do priority samples in 24 hours.

MR. GAHN: And you said that you believe that New York would out-source?

MR. SAFIR: I think the intake we would probably out-source. I think it makes much more sense to have our people working on casework.

MR. GAHN: And to date, how large is your case index?

MR. SAFIR: I can't give you a specific figure but in the multiple thousands.

MR. CLARKE: Actually, there are some analogs, high-volume analogs in forensics, blood-alcohol level samples or drug cases and so on, with very fast turn-around time requirements.

Nationwide, more popularly being instituted are what are called fast-track narcotics programs, where there is literally a drug chemistry answer within 48 hours, and the whole idea is to get those cases out of the system as soon as possible.

So, I don't think there's any technological bar. Certainly, economic may be the more important one, but there's certainly no technological bar to producing answers quickly, and we have several obvious predecessors to that.

MR. SAFIR: As you know, technology is changing daily in this area, and each day, the timeframe decreases as technology moves forward. So, I don't think that should certainly be a bar to us going forward.

DR. FERRARA: Commissioner Safir, would I be correct in assuming that, when you're dealing with 1,000 arrests a day in New York City, that a significant portion of those individuals are re-arrested repeatedly.

MR. SAFIR: That's right.

DR. FERRARA: Have you considered a system -- establishing a system within New York City that would allow you, upon arrest of an individual, to identify if that person has already been tested and thereby reduce the actual number of samples that you're contemplating?

MR. SAFIR: In reality, that's exactly what would happen, and we have looked at that, and certainly, that would be part of the program, but what I think is important is for us to look at the worst possible case scenario as far as the numbers.

MR. KENNARD: Commissioner, referring back to what Philip had suggested on a timeframe, if this recommendation from this commission were to go to the Attorney General and were to fashion something after the COPS program -- I'm sure you participated in that --

MR. SAFIR: Yes, indeed.

MR. KENNARD: -- as most of us here in this room in law enforcement, do you think that would be an acceptable timeframe, of the two to three years, in that timeframe, of what we have in the COPS program?

MR. SAFIR: I think absolutely. I think that, you know, two to three years is more realistic from my viewpoint, and I think, certainly, as all of you know better than I, this is a resource issue, it's not a technological issue.

MR. SMITH: In New York, it may still be so that very many people as to whom the police department has probable cause for an arrest are given citations instead, at the precinct, I guess.

MR. SAFIR: Desk appearance tickets.

MR. SMITH: Desk appearance tickets.

MR. SAFIR: We still fingerprint them.

MR. SMITH: You fingerprint them. But you would contemplate, I think, then, doing the buckle swab before release for those purposes.

MR. SAFIR: Right. And when we give somebody a desk appearance ticket now, we do not release them until their fingerprints come back.

MR. SMITH: So, you'd be looking for the return on the DNA before you released them, as well.

MR. SAFIR: I'm not sure about that. I mean that's something we would have to look at.

MR. SMITH: Okay. A related question -- and I'm thinking aloud, really, as I listen to you, but if the legal standard that distinguishes those persons who are in the pool of persons arrested in New York from the rest of us is the police department having probable cause to make an arrest, discretionary decision with you whether to make that arrest, just thinking it logically through, why wouldn't it then be okay and desirable to take buckle swabs for everybody as to whom you have probably cause rather than to go to the trouble of making the arrest?

MR. SAFIR: I think the arrest has to be the predicate.

MR. SMITH: Why? If you have probable cause to arrest somebody, why wouldn't that be sufficient?

MR. SAFIR: I'm not understanding what you're saying. If I have probable cause to arrest somebody, I then arrest them.

MR. SMITH: No, no, no. Plenty of people you've got probable cause to arrest you don't arrest.

MR. SAFIR: No, what I'm saying is, if I'm not arresting him, I'm not arresting him for any law enforcement purpose.

MR. SMITH: Okay. And collecting a DNA sample would be a law enforcement purpose, though, right?

MR. SAFIR: Yes. And the other part of that is, in most of our desk appearance tickets, which I should tell you we have limited tremendously, there's a requirement that the person be properly identified, there's a requirement that we believe that we'll be able to find that individual again, and it's a very clear process, and there are not a lot of them, so it's a much smaller universe.

MR. SMITH: I realize that desk appearance tickets are sort of the in-between category, but I think it's got to be true that not everybody as to whom you have probable cause to make an arrest for a misdemeanor, for example, is, in fact, arrested or given a desk appearance ticket, but they're all in the category of persons distinguished from the rest of us by having the attributes that would permit you to make an arrest.

MR. SAFIR: Right. But my view is, if we don't arrest them, then we shouldn't take their sample.

MR. SMITH: Okay.

MR. GAINER: Commissioner, to clarify, because there's been a lot of conversation about how long it might take to get a classification back on the DNA, in your proposal you are open to the concept that if technology is not developed that permits a quick turn-around, maybe something akin to the hour or two or three that we're getting down on prints, that you would be open to the release on bond in the normal course of things before it came back.

MR. SAFIR: Sure. I am in no way suggesting that we require detention until we get back our results.

MR. GAINER: Thanks.

DR. CROW: Let me see if any of the others who spoke today have anything they'd like to add at this stage, or questions to ask.

[No response.]

MR. THOMA: I really appreciated your whole presentation. I think it articulates your position a lot better than I had known it previously.

MR. ASPLEN: We were going to ask you before you left if we could get a copy of your remarks.

MR. SAFIR: Absolutely.

DR. CROW: All right. Thank you very much.

[Applause.]





## Commission Discussion

MR. ASPLEN: If we could at this stage shift gears a bit -- first of all, let me say this. I appreciate all the commissioners' assistance and attention with the diversions that have been going on today as a result of the discussion that we're having.

Again, we apologize for having to get up and leave occasionally and for the staff interruptions. We appreciate your understanding of that.

If we could switch gears a bit and go to the approval of two items. What you found or what you received in your packets prior to the Commission meeting are two matters for approval.

One is the CODIS recommendation, the CODIS prioritization and the non-suspect case recommendation.

As I mentioned at the beginning of this meeting, at the last meeting we thought that perhaps we could put those recommendations in writing that were, in fact, approved the last time, put them in writing, send them out to you, have you sign off, and send them back. However, we thought better of that proposition.

What you have in front of you is the final version that has been, I would say, laboriously transferred back and forth between Chief Justice Abrahamson and myself and we hope is in appropriate format for, again, final adoption.

If that is the case, if we can reach a conclusion on that, we can get it to the Attorney General this week. It will go under cover letter by NIJ's director, Jeremy Travis.

Again, I hope that it accurately reflects the conversation that was had at the last meeting and was approved at the last meeting, and if that is the case, we will simply ask for an approval that that document that you have in front of you be forwarded to the Attorney General.

I, however, will not do that and will ask Dr. Crow to do that officially.

DR. CROW: Are we asking about the recommendation?

MR. ASPLEN: Yes.

DR. CROW: Let me call for a show of hands on this motion -- or first discussion, of course.

[No response.]

MR. GAINER: Well, I guess the only discussion I might offer is if somehow we would convey the thought that we don't want this to come out of pocket.

Several times before when we've made proposals to the justice department about granting, then there's a reduction in the amount of current grants.

We wouldn't want supplanting, necessarily, to happen in this, unless there was a pretty conscientious discussion amongst a lot of people who rely on some of those continuing grants to do some of the law enforcement things we do now.

MR. ASPLEN: If I could address that, I will tell you that that concern, I think, is already a matter for the Department of Justice in that the President's budget has already requested \$15 million for this particular project based on our previous discussions, although it hasn't taken the form of recommendation.

We have let it be known that \$15 million is not the ultimate number that we were shooting towards and is not a finite proposition at this stage. However, that \$15 million was specifically set aside for backlog reduction; it was not taken from anything else.

DR. REILLY: But I am concerned -- the one thing about this recommendation I am concerned about is that, although it's emphatically toned, it does not give a sense to the reader of the magnitude of the amount of resources that need to be devoted to it, and regardless of what might have been appropriated or authorized, I think it is wise to make the reader know the magnitude of the problem and give that person some sense for it, and I realize how you might not want to start rewriting this recommendation, but if, in a cover letter -- therefore, I'm not suggesting a change to the language -- we could make it clear that we're aware of the magnitude of this task -- and I, for one, think that 15 or 20 million is just the beginning.

MS. BASHINSKI: If you increase the number of samples collected, as we've been discussing, it will go up proportionally.

DR. REILLY: I was struck by Barry's comments, a million owed, etcetera, etcetera. Those numbers quickly exceed -- 20 million becomes a distant memory.

MR. ASPLEN: All it takes is for the State of Texas to include one more crime.

DR. CROW: Is this a fairly general consensus, that a cover letter would take care of your issue?

MR. KENNARD: I think the motion should reflect that.

DR. CROW: All right. I'll accept that as an amendment to the motion. Is there a second to the amendment? Those in favor -- well, first discussion.

[No response.]

DR. CROW: I hear none. Those in favor, say aye.

[Chorus of ayes.]

DR. CROW: All right. It's amended. And unless there's further discussion, we'll vote on the amended motion.

MR. GAINER: There were two concerns I think that were raised: supplanting, for lack of a better term, and Phil's issue about the scope of the problem.

DR. REILLY: So, my motion would be to authorize Chris to draft the cover letter that expresses these two additional concerns, which would be the transmittal letter with this recommendation that would proceed unchanged.

DR. CROW: You would accept that as a wording of your amendment? Why don't you accept that as a friendly amendment? I think we're ready for a vote, then.

MR. ASPLEN: I just need to make sure that I have a clear understanding so I can accomplish both goals here.

Something in the cover letter -- again, this would be under signature by Jeremy Travis -- which reflects the changing and, in fact, increasing scope of the issue.

DR. REILLY: Yes, that it forces us to be somewhat uncertain about budget and unwilling to place a ceiling on it.

MR. KENNARD: And the secondary issue dealing with supplanting the funds already in the justice department.

MR. ASPLEN: That these not be funds diverted from other purposes, other DNA or other law enforcement purposes.

MR. SMITH: I'm not so comfortable with that. It seems to me we're not very well positioned to be making comparative cost assessments for the Attorney General, and I'm not too sure why we're recommending that.

MS. BASHINSKI: There's already some history for -- that's the first place people look for funding.

MR. SCHECK: If we limit it to just labs -- in other words, I think other people at this table have the authority to say that you -- the concern is that, if you're going to take the money away from processing, let's say, the cases that they're already asking you to process, then any number we give with respect to the backlog is unrealistic, right?

MR. GAINER: I guess mine was more general.

It is only an expression of our desire rather than, you know, being prescriptive at all to say that clearly there are a lot of funding priorities within the justice department, and right now, into the year 2000 and beyond, many of those funds are already earmarked or encumbered, and again, our collective experience is, if they're going to take 15 or 20 million dollars, the first thing they'll do is whack it from someplace else that sends everybody scurrying.

MR. SMITH: We wouldn't withdraw our recommendation if we knew that it was a zero sum gain, would we?

MR. GAINER: No.

MR. SMITH: So, it seems to me that we're not really saying that we think this should be funded only if it can be funded.

DR. REILLY: But that wasn't the proposal that was on the table.

MR. GAINER: That wasn't an only.

MR. KENNARD: Because many of the issues the Commissioner brought up deal with not only the crime prevention issue but the solvability of crime, going into issues such as the COPS program.

They say, well, if this is all-encompassing with crime prevention and crime reduction, that's what some of our grants that they're presently getting are already doing.

MR. SANDERS: If Justice makes a decision that they're going to take away from burn funding and that kind of stuff, then the whole law enforcement community is going to rise up against it, is what Terry is saying. We're suggesting that that be excluded, that it be new funding, because you'll definitely have an uprising of law enforcement if you suggest that you're going to take it from already existing programs.

MR. ASPLEN: We have seen it actually in the DNA realm, taking it from research dollars, and in fact, I will tell you that that was suggested to NIJ, that money be removed from our five-year DNA program and put into the database backlog, and NIJ, I think appropriately so, refused to do that, because they recognized that, if you take from one and give to the other, you're really defeating the purpose, that the whole system has to work together.

So, I think that we can accomplish those two goals in that cover letter and not undermine the value of the recommendation itself.

DR. CROW: All right. Are we willing to trust the writing of the cover letter? At last, may I call for a vote? Those in favor, hold their hands up. Those opposed?

MR. ASPLEN: For the record, that was a unanimous approval.

The second issue for approval is the legal issues chapter.

Now, this is a --

DR. CROW: This is the legal issues chapter of the post-conviction group.

MR. ASPLEN: That is correct. Thank you.

This may also be a matter of trust, to some extent, and let me explain why.

When the Commission approved the recommendations at the last meeting, they approved them subject to the changes that were made that were basically editorial in nature and to the future approval of the legal issues chapter, which we did not have at the time and we have now.

My proposal, from an administrative standpoint, would be the approval of the recommendations as they stand at this time, with the inclusion of this legal issues chapter, and that that be the final approval, for this reason.

There are still some things that need to be done to the actual publication, such as an appendix of resources, an appendix of glossary of terms, illustrations, blocking some things out in shadow boxes and such.

That takes an extensive editorial process through NIJ. It's got to go through our editors. It's got to go through the lawyers.

Believe it or not, it actually has to go to the Attorney General and then come back before it can ultimately go to the Attorney General. True story.

Now, my concern is this, that if this was not the final approval in the document, we would be put in a position of having it ultimately finalized and then bringing it back to the Commission, quite frankly, if there were changes to be made, that we wouldn't be able to make and that that would be a rather valueless process.

So, I guess the question is does the Commission feel that they have provided enough input, the appropriate input, and are they satisfied with the document that those changes that need to be made are superficial in nature and would approve the staff and NIJ proceeding with at this point?

MR. THOMA: Well, I have reviewed it. I reviewed it last night, and I apologize for reviewing it late.

With regard to the statute of limitations issue, which I know we are going to take up and Barry and I are going to do with regard to the legal issues working group, it's pretty general, and there's nothing specific in this with regard to that, and I know, a lot of these, we end up taking in faith, a good prosecutor that knows DNA, so to speak, would waive any time barriers, and we're left with that, basically.

I don't think get anywhere beyond that which we already have, and that is a concern.

MR. ASPLEN: I would just offer to you that the thinking on it is that the statute of limitations is one of the more jurisdictionally specific issues, which is why it is one of the more generally addressed issues there.

I also think that, based on our discussion previously regarding the continued direction of the post-conviction group, and in anticipation of the symposium, we could include that and come out with an independent firmer recommendation on statute of limitation issues, rather than -- the only intent of the legal issues chapter was for those issues relevant to this particular process and as a guideline for this process.

MR. THOMA: I understand that, and the reservation is a slightly one, Chris, and with that caveat, we are going to follow up on legal issues, and the symposium, which I've already stated is a great idea -- that's all. It's a slight reservation, and it's a recommendation from me for adoption with that reservation.

MR. SCHECK: Chris, in regard to that, you were wise, I think, in stopping the demands that some of us had in the working group to put a statutory recommendation into this report, as opposed to just recommendations, although I think it should be clear to everybody on the Commission that, when you say a category one or category two case, you should get free DNA testing without a statute of limitations and the prosecutors and the judges and everybody should consent to it, we're making a pretty clear statement.

I mean if you're willing to say that people should exercise their discretion that way, then, you know, it seems evident what statutes there might be, but I just want to throw this into the mix for people's thinking, that there is one way to do this in one fell swoop, and that is the following, that you could amend -- you could pass a bill in Congress, and the bill in Congress would say the following, that if an inmate had been convicted of a certain designed crime -- we'll make them, you know, some serious felony -- and you were not -- and you would fall into the category -- and I'm using shorthand language that we all understand, as a category one or two case, and you had asked your state, in a post-conviction motion or at some point, to give you DNA testing and you really have a category one case and they did not give it to you, then the Federal District Court would have the authority, if it would be really a category one or two case, to issue a

Federal writ and order the testing be performed and, if the person couldn't pay for it, pay for it and then could consider whether or not, if the results turn out to be favorable, the continued incarceration of the individual violated the United States Constitution.

Now, that simple one amendment would certainly -- would be far more practical than going to every state in the country and asking them to pass a statute one by one, and it's something to consider.

MR. ASPLEN: It sounds like your intent is not to incorporate that into this.

MR. SCHECK: I'm just pointing out that really is one way of doing it, and you know, I know how these things work. It takes time.

DR. CROW: I hear a motion, and I heard a second.

So, the motion is to accept this, with the understanding that there will be editorial changes that don't change the message and that we trust the editors to do that.

Is that a clear enough statement of the motion? I hear no further discussion. Those in favor, raise their hands. And those opposed? It's unanimous, for the record.

MR. ASPLEN: Thank you, folks. I appreciate that.

It seems to me that, in terms of the rest of the afternoon, we have a couple of goals to accomplish.

One is we need to, I think, revisit a few of the issues that we spoke about yesterday, for a couple of reasons.

Number one, I think that we could use some more guidance on some of the issues.

Number two, some issues came up specifically that we were hoping to get Dr. Reilly's input on that perhaps we could revisit.

However, what I'd also like to do -- and perhaps we can do this first -- is address the issue that we talked about this morning, and what I would ask of you is your guidance in terms of who you'd like to hear from from here about this issue of taking DNA from arrestees and the related issues.

Who should we bring into this process and how should we proceed at this point in an effort to make our recommendations to the Attorney General?

DR. CROW: Is the Attorney General in a hurry for these recommendations?

MR. ASPLEN: The Attorney General has asked that these recommendations be submitted to her by August 1st.

MR. SMITH: These recommendations -- what falls under the word "these"?

MR. ASPLEN: Quite frankly, what we choose to send to her, and I don't want to be smug about that, but it really is up to the Commission, I think, to define what the issues are and to define what she needs to be addressing and what she needs to be --

MR. SMITH: But August is not the end of our entire process.

MR. ASPLEN: Correct. Absolutely not. You're not getting away that fast.

MR. SMITH: It's just a coincidence.

MR. ASPLEN: Right.

DR. REILLY: I'm not sure who we should ask to speak further to us about this problem, but I am sure we should ask more people to speak to us about this problem.

I'm looking at it now from the point of view of how others will receive, if you will, the question of due diligence on our part, and I'm not satisfied that we've done that.

For the moment, one could perceive, although this is a little unfair, the testimony that we've received as particular to the major city in the United States. Most of the players that have testified work out of there, etcetera, etcetera, although they may have national interests, and I would like to get a greater sense for thinking around the rest of the country about this.

DR. CROW: How useful is it to get opinions in writing?

DR. REILLY: There's the internet -- we could send out a survey instrument, a brief one. I want to make sure that we have compiled a bit more of a record upon which to build our deliberations.

MR. ASPLEN: So that you know, as some of the stuff that I've been doing out here, when we're talking to other folks and we're talking to the press, the position of the staff in terms of the Commission is that the goal of the Commission is to receive as much input from all of the relevant community as possible, so that when we make the recommendations, we have followed a process of inclusion of as much as we can, and that's the whole goal, and today was only and always intended as simply the first meeting in a number of meetings that will be part of that process.

DR. REILLY: For example, we have not heard, really, from a member of the minority community.

MR. ASPLEN: Right.

MR. THOMA: And I'm definitely treating this with an open mind, but I worry about this, and I agree with Phil, we need to hear from more minority communities and more other people on this issue, but I'm worried about the recommendation that we just adopted just a few moments ago, with regard to the prioritization of resources, and if I don't misunderstand, at least to this point, until I hear more that sways me toward somewhere else, that we really need to work seriously on this backlog before what we do is open up the funnel and get into this situation, and I know Phil mentioned five years, and I know the Commissioner spoke in terms less than that.

But I think we really end up with cross purposes on so many different fronts with regard to public opinion on the intrusion issue, with regard to the enormous amount of resources, the turn-around time and the effects on that, that I would really need to see a lot to convince me that this issue is something that we should adopt or even address in the near or foreseeable future.

Conviction is one thing, and that's a step, a baby step that perhaps we can take, but arrest or detention, as Michael and the Commissioner discussed, is worse.

MR. ASPLEN: I think that it would be very important to include in the discussion and the recommendation to the Attorney General the logistical issues that I think you're talking about.

I mean it's not just a matter of is it constitutional, what are the privacy concerns, but what are the technology and what are the funding concerns?

I think that that's all part and parcel of the whole process, that I think we bring in people -- and the reason that Steve Niezgoda, who I think just walked out the door -- the reason that Steve is here is because I think of exactly what you're saying.

It's not just a matter of can we or do we want to, it's how could -- ultimately, when could we be able to do this?

I asked Steve to come so that he could kind of start digesting what's going on here, so ultimately he can come and tell us what it means for CODIS, really, from a logistical standpoint.

So, the exact concern you're talking about, I think, is exactly part of the process that needs to be gone through to go to the Attorney General.

MR. CLARKE: And we had a lengthy discussion in our working group, the laboratory funding working group, a couple of weeks ago, about this question, and one of the issues that came up is do we as a commission make recommendations for the next year, next two years, or do we go beyond that, at least to the extent that we can foresee those, such as collection of additional samples beyond conviction, and we spent a good deal of time talking about that, what function we should have in that role, if any, and I think we felt that we should have a role, because I think at least my sense from that meeting is we all believe that this will be a fate accompli at some point.

It may very well extend beyond arrestees to, as was mentioned, births or whatever category is selected, but I detected a clear sense that we all felt this is going to happen, and the question is do we ignore it or do we do something about it?

MR. SCHECK: Well, pursuant to what we were talking about this morning, studies and data, it seems to me that we really can't even get close to addressing the kind of proposal that Commissioner Safir made unless we begin to collect other kinds of data, and these are the categories that came to mind almost immediately.

How much does it cost to type the collected but not tested samples?

Now, I think we already must have some data on that, because that's the recommendations we just made to the Attorney General.

How much would it cost to really type the owed samples? We all know what we mean by that.

How much would it cost to do a DNA testing with a two-week turn-around time on the following categories of samples?



New arrests -- and by that, I mean, you know, new cases where somebody has been arrested, law enforcement wants a DNA test done to either exclude or incriminate, and you know, that obviously is a tough kind of number. You would only be able to get an estimate based on how many, from a survey of, let's say, prosecutors and crime labs within a jurisdiction, as to what percentage of cases they even ask for it for arrested individuals, okay?

But we have to have some way of trying to get at that number.

But how much would it cost for a two-week turn-around time on that? How much would it cost for a two-week turn-around time on all rapes and homicides where there are no suspects, because we can anticipate in virtually every rape and homicide that there's going to be a need for DNA testing, crime scene testing, no suspects.

Then how much would it cost to do certain other designated felonies, and I would put into this category burglaries, or some percentage of them, where you think you could profitably do crime scene evidence.

Now, I'm just following -- I'm doing what the Commissioner is doing, saying, okay, let's follow the British model. They're looking at two-week turn-around time.

How much would it cost if we were to do a survey -- maybe we don't have to do every state or every city right away, but I think we do need some data in this regard to get a sense of what the costs are.

My fourth category, then, is how much would it cost to do old, unsolved cases? Let's just limit it to rapes and murders, and I have to give the Police Commissioner credit, because when I went to him with a lot of these notions, you know, I said, well, let's count the rape cases, let's stop destroying them after five years, and you know, he did that immediately, and he's counted them. He's got 10,000 rape cases in the city, in New York alone, untested, old unsolved rape kits.

I think we should find out, for example, in other jurisdictions, how many they have, you know.

So, once -- I don't know, you know, how extensive this survey would be, would we take a certain number of representative states or jurisdictions, but without this kind of data, you know, which maybe you could contract out and have done in, you know, a month or two, I don't know how we begin to make any sense about these problems.

I think we know that these are more or less questions, and then, of course, we would want to look at ASCLAD, the survey sheet that Paul says ASCLAD puts out, maybe we could even work with them to some degree, in having some uniform definition of a case and ask them how many -- can you tell us with any precision how many samples you test per case.

Without some notion of this, I don't know how we can even begin to -- how could you possibly recommend taking samples from every arrestee, unless you had a handle on this?

DR. CROW: I suppose you want to balance this against the cost of reducing the backlog.

MR. SCHECK: The backlog was the first thing I said. These are all backlogs, I would say.

MR. KENNARD: We would say arrestees would be the very last thing. Let's get our priorities in place.

MR. SCHECK: I should say personally that I just sense -- I know that, by the time we start -- if we do any of these things, we are going to find, as we travel down these roads, a lot of interesting civil liberties questions that we hadn't thought about.

Already we have our issues about, you know, fuzzy searches.

I can tell you right now, one issue that's emerging in our working groups is what about local crime labs that are collecting samples for elimination purposes but not returning them or destroying them but are keeping them to create their own mini data banks outside of CODIS, you know, outside CODIS data banks, for lack of a better term.

These are things that, you know, just sort of started happening, and I'm sure, as we proceed down the road, there's going to be a lot of other issues that arise that we have not thought about.

MR. GAINER: Well, we're raising, clearly, interesting issues and important questions. I guess I'd like to - - unless it's only me -- bring some structure as to what it is we're trying to do by when, and given that August 1st is only 150 days away, which means our end product probably only has about 120 days, we perhaps ought to decide what form it is and what we want to accomplish, and then we could answer some of those questions about what we ought to ask.

So, I sit a bit confused from a global commission point of view is what the "this" is that Professor Smith was talking about.

Now, clearly, from the crime scene processing group, we have some goals in mind, but I guess I'd like to see some clarification from the Commission what it is that we have in mind, or we can get sidetracked by important but interesting issues that come up.

So, for instance, even on this one, I don't know that we should get too sidetracked on this complicated issue, which is very important, has a lot of questions to be raised, and this become, you know, the national commission on testing all arrestees, and I don't presume that we're doing that, but sometimes it feels like maybe we're losing sight of where we want to be in the few short whiles that we have to be together by August 1st, and I need some re-clarification of that.

MR. SMITH: My point was similar, and it's just simply that it seems to me that the proposal that the Commission has put forward is one of a whole bunch of possibilities for reaching beyond existing or projected databases for DNA identifying information that would be used with the law enforcement.

There's lots of other possibilities, and it would be a mistake, I think, for us to focus, even for a August 1 delivery date, on that particular proposal as if it weren't part of this larger set, because we could very much change our minds about the value or the timing of this proposal if we had a proper understanding of what the rest of that universe looks like and what a principled and effective approach to it would be, and so, I'm very reluctant to try and respond at all until we've done some of that other work, which is probably not going to be August 1st, to the Commission's proposal, at least as a formal matter to the Attorney General.

Now, if what she's really looking for is for us to do something specifically on that, I take that to be a slight change in our mission.

MR. SANDERS: I guess the thing that concerns me is, whether we want it to be an issue or we don't want it to be an issue, the Commissioner is probably one of the most visible people in law enforcement, and he's raised the question.

He's also put it on the agenda for the major city chiefs and now he's talking about the executive committee of the International Association of Chiefs of Police.

So, regardless of what this commission thinks, it's going to become a question that needs to be addressed, and what concerns me is that, though we ought not be driven by headlines, we are, and the American public starts to hear this discussion.

When you hear things like they said about the rapist, the most serious serial rapist in New York's history, they could have tracked him back to the first arrest with that computer crime.

So, let's just say, for instance, in the discussion, that the guy raped 30 women. He could have been arrested after the first rape, and that's the kind of emotional thing that's going to drive this thing, and it's going to become an issue whether we want it to or not.

So, I just don't think we should lose track or lose sight of that.

I would also think that that's probably one of the reasons that the Attorney General wants recommendations as quickly as she can get them, because whether we want it to be a political issue or not, it's going to become one, and there is going to be pressure put on there, so I don't think we can lose sight of that.

MR. ASPLEN: If I could, I don't think that the Commission necessarily has to come out and say, Madam Attorney General, you should do this, you should do that. Remember that much of the value of what we do is in the analysis itself and to allow the Attorney General and her staff to make the decisions based on that analysis, but it seems to me that, to some extent, the issues break down kind of like this.

There is the issue of whether or not the proposition is a constitutional one and whether or not there are constitutional -- initially, constitutional prohibitions against it and that we could maybe address that, certainly in a more expeditious way than the survey that Barry is talking about, and we could possibly do that in relatively short order to come up with an analysis of the constitutionality of it.

The next issue, once you get past that, may well be the broader, grayer area of privacy and societal concerns and whether or not, from a privacy standpoint, this is something that we want to do.

Along those lines, it seems to me that the comments made this morning regarding keeping a lid on Pandora's box, that perhaps an analysis of, if it's constitutional and if we think about doing this, here are the recommendations we would have to make it a secure system.

Here's what we need, the destruction of sample, perhaps, etcetera. How do we ensure a security system that's constitutional? How do we secure and really provide confidence in this system?

And then I guess the third component is, all right, now here are the logistics of actually trying to do this. We've laid out the constitutionality and the guidelines, but here are the realities of trying to do this in the face of our backlog of convicted offenders, etcetera.

Does that kind of process help from a procedural standpoint, that kind of definition of the areas, or not? Is there a value to that?

MS. BASHINSKI: I'd like to see broader issues defined first and then worry about our product next, and I don't think they're mutually exclusive at all, and I think we have to do what you're talking about, which is identify the most significant issues. This is one, but there are several others.

We may or may not have an answer or a product or other strategies to suggest, but I think it's certainly our obligation to identify what those issues are and what the questions are that need to be answered for the most significant things that we can think of that relate to DNA.

So, I don't want to just talk about can we afford to do something. I think it's more important first to talk about what those things are and what the legalities are.

MR. CLARKE: There's an ebb and flow to the issues within this commission's work, as well. The post-conviction review, for instance, has been marvelous and was probably the driving force -- and was the driving force behind this commission.

Now, we're seeing other issues coming to the forefront in terms of sample collection, database samples, and even proposals as to who to take samples from. That's being brought, I think, more to the forefront not only because it's technologically driven.

Now we're seeing new advanced forms of sample collection, the ability of laboratories, if not already, in the short future, ability to do high-volume work, probably volume beyond any of us is even aware of, in many respects.

MR. ASPLEN: It is, quite frankly, also an excellent opportunity to enforce or to highlight, again, the issue of the backlog, the database backlog, if we say this is -- you know, we believe it's constitutional, theoretically, we believe that here's how you make the system secure, but we're not ready to go there yet.

We've got these other problems. We need to learn to walk first before we can run. So, let's revisit the issue in two years from a logistics standpoint, from a funding standpoint.

That's purely hypothetical, but I offer it only as a process of analysis for us to look at the issues.

MR. GAHN: You're exactly right. I mean I can't -- it's something I think we could address in a few years, or someone address it, but right now, the efficiency of taking samples from arrestees is going to be based upon your case index, and if you have your continued backlog of all these unsolved cases and they aren't profiled and put into the data bank, it makes no sense to me.

MS. BASHINSKI: You identify it as an issue.

MR. THOMA: And if we identify it as an issue, I think I agree with the way -- Chris' analysis. A lot of our issues would go this same way, and I have no problem with doing it that way if we're going to examine that issue.

MR. CLARKE: Because it may be more effective, as disdainful as it would be with respect to backlogs and old cases -- at some point, it may be wiser to cut off the leg and to move on.

I mean I don't like the sound of that, but it may be more effective in fighting crime to literally cut off the gangrenous portion of the leg.

MR. GAINER: That was a lot of the conversation we had in our working group with the prosecutors. Why work back in 1972 when there's so much more we can gain in the last -- closer time?

MR. CLARKE: And some of those cases, even if solved, may not turn into anything. Some of them obviously need to be worked, there is no question about that.

MR. GAINER: There is not a case we wouldn't like to solve, but there is just a finite amount of people, time, energy. If a person committed murder in 1972 and we haven't caught that person yet, the likelihood that that person is a recidivist now, 27 years later, is slim and remote.

But I do feel bad when we don't work out a rape case that happened last year, because I'm really confident that that person is out raping as we sit here and jaw-jack about this stuff.

MS. BASHINSKI: When I hear people say that they aren't finding fingerprints at scenes, that tells me they're probably not putting the energy -- that if they put a lot of energy and effort, they would be finding a great percent of scenes with fingerprints.

So, if there's a problem finding fingerprints, where are the resources going to come for the street enforcement for people to spend that time at the scene to collect those specimens? That's another great cost we haven't even talked about, but it's the front end.

MR. GAINER: I'd like a clarification on what those issues are that we're trying to resolve, because clearly, we're all pretty good problem-solvers if we know what the issue is, but I think we've raised so many different things here, I don't know which one we're concentrating on.

So, it's hard even to think, at the next Commission meeting, let's bring someone in to talk about -- what? If someone could say what's the top five things we're trying to wrestle with, then we'd be in a good position to advise the staff as to whom we want to listen.

MR. SANDERS: It's like digging in sand. The more you dig, the more the sand comes in.

MR. SMITH: Let me give you an example of a question like that.

To be responsive to the Attorney General on this proposal, it seems to me we have to have a better grip on whether or not disposing of the tissue immediately upon generating a profile is going to be good practice, because if the answer to that question is either we don't know or no, then the privacy concerns associated with the existence of a database like that is different than if it's simply a file that's on record for persons who have been arrested.

It's a very different world, those two worlds, and so, I feel like these issues are too entangled for easy resolution.

DR. REILLY: But I would think that we have close to us, if not in this room, people who can give us an opinion about that.

MR. SMITH: That's right, we had some before, but it seems to me that issue would be worth talking through. Maybe we have to have a list of the kinds of issues like that that we need to have talked through before we can properly respond.

DR. REILLY: The more I think about it, I think what we should do is formulate or attempt to crystallize a short series of questions, I don't know whether it's going to be three or 12, agree upon them, ask a series of experts to comment in writing, and I would turn to law professors, population geneticists, molecular biologists, and say you've got 60 days.

I mean I've seen this used effectively in the past, and if nothing else, again, it goes to due diligence, and I'm not saying that the quality of the replies will always be good, but for you to be able to say as part of your report to the Attorney General, as to the question of retaining whole DNA, we asked 30 molecular biologists or 30 forensic scientists and we got the following spread of answers; as to the prospects that STRs, while possibly not the perfect or best available tool, will be an adequate tool for the next decade, we asked a group of people -- I think that's not that impossible to do and is actually much more efficient than meeting every 90 days and bringing just three experts in.

MR. THOMA: I'm more for that than I ever was after listening to Norm and Terry. It made me think about whether we're dealing with these older cases, and what Jan says about, you know, crime scene processing has changed and become probably more efficient than it ever has, and I think we really do need to list our concerns and move in that direction, and scientifically, it's an accepted practice, and I don't think it would be a bad idea at all, but even in doing that, Phil, I think we need to prioritize as to which ones are most important for us to have addressed.

DR. REILLY: I think that's a profitable way to use part of the afternoon, just as a first iteration, what are the five questions you would most like to see answered to your own satisfaction, Chris, before you took it on your shoulders to walk up in front of the Attorney General and say here's what we think.

MR. THOMA: And I don't think one of them would be do we take DNA samples from each person arrested. I don't think it would be one of those five.

MR. ASPLEN: Whether it is or is not is not an issue. Our personal opinion on that matter doesn't matter.

We're in a position of having to deal with that issue and finding a way to do that. However, in terms of the broader mission of the Commission, if you will, and looking towards the termination of the life of this Commission, I am in full agreement with the identification of those.

DR. REILLY: One thing I'm convinced of, this Commission may terminate, but there will be other commissions like it in the future, because we're going to be watching the evolution of this for the next decade, and well it should be watched.

MR. GAHN: I'd like to just present one other thing.

We've danced around with this since the start of the Commission. We hear all these statistics on someone who has committed a crime in the past and are they more likely, then, to commit crimes.

Mr. Levy, I think, brought up a very good point, and I'm just wondering if it's something for the Commission to consider.

What if we -- and I think it would be a very relevant population -- what if we just took a really extensive criminal records check on every cold hit so far in America and just see?

I mean that's the reason we have this data bank, is get that cold hit, and here we have a population now of quite a few of them. We have about 20 in Wisconsin.

MR. ASPLEN: Steve, can you give us an idea about how many cold hits there are in the country?

MR. NIEZGODA: Yes. There's 500, roughly.

DR. CROW: Well, that's quite a large number.

MR. GAHN: We've talked about this since the start of the Commission and the British model and all. Why don't we look at all our cold hits in this country and just see what does the criminal history show?

MR. CLARKE: So, Chris, to go back to your question of about a half-an-hour ago, I think we should hear from David Kaufman. What's going to be not just now available but on the horizon in the next one to two years?

DR. REILLY: Off the record, I approached a senior molecular biologist in the United States who said his lab would do all 450,000 samples in six months for \$50 a sample. I'm not going to quote him, because he's not here.

He regarded the backlog problem as trivial and that we've completely underestimated the ability to do large-scale typing, that the right labs haven't been involved.

There are, from what's available in the human genome project, genome sequencing centers around here that make the best forensic laboratories look absolutely primitive. If you wanted to do it, you could do it very fast.

I'm not saying we should go that route, but you could do it.

MS. BASHINSKI: Do you think it is a good idea to try and identify these questions? Who ought to be sampled, and how should that data be secured or limited? What's the access to it, all those other issues.

DR. CROW: All of these are relevant, and what we're asking for is whether to institute a arrestee.

MS. BASHINSKI: That includes the arrestee, that question.

DR. CROW: Is there an approach that says you don't look at this or you don't do it, at least, until you've made a little more of an impact on the backlog, a certain fraction of an impact, rather than dollars? It might be easier to do it in terms of how much you accomplished rather than how much it cost.

MR. SMITH: But if Phil is right, we could see that backlog evaporated by the time our report is published.

DR. REILLY: Only on a theoretical basis. We have all sorts of logistical obstacles, such as some states being unwilling to out-source their samples.

What I'm saying is that, in a plutonic world, you could gather up all the samples, send them to just a handful of labs, and so 13-STR typings very quickly, all sorts of logistical problems that Paul is far more aware of than I am.

MR. SCHECK: When Chris started wrestling with the problem of the backlog -- is it about a year ago already? -- I mean the first bottleneck we hit was the owed sample problem, and that's really just a question of state bureaucracies collecting samples from people from whom they're supposed to be taking urine tests every month.

DR. REILLY: Agreed. I'm only talking about samples in possession. But that in itself would be a big step. I believe you used the term 18 months or the term was used for 18 months as a deadline.

I personally think that's a realistic timeframe only if the states are willing to out-source. If it's not willing to out-source, I don't think we'll come remotely close to that.

MR. SCHECK: One of the things, in terms of our delphic questions, I mean I think it would be very useful for all these discussions to try to take some positions on things where we don't necessarily need a tremendous amount of data in terms of recommendations, and these, I think, are some of the privacy issues, because I think that, in terms of moving moving forward in certain areas, we saw with the discussion with Mr. Steinhardt this morning that -- I don't want to misquote him or anything, but I think Dr. Reilly got him down to issues like, you know, it would significantly reduce his concerns about some of these privacy issues if we -- after STRs, we were, you know, to adopt the position or make a recommendation about destroying underlying samples, assuming that we can get beyond certain quality assurance issues, all right, which I know are there but I can't articulate them all.

But things like that, you know -- I mean I think there are certain discrete issues that we can actually take positions on, and I would argue that it's very helpful that we do, because it gets the debate, you know, off the ground.

I mean, for example, one of the things that would be useful, I think, for the next meeting -- and it doesn't necessarily have to be speakers -- is to just get a better handle, more information on who out there is really saying that we have a genetic basis for certain kinds of behavior that would be considered by courts at a sentencing phase or something like that.

I don't think we need to understand all of that. We just need to understand what's out there in order to issue recommendations to the point of saying, well, this could be happening and you ought to have these concerns or those concerns.

In other words, I'm very disturbed. One thing that I would like to see, Chris, and I have asked for it, is we should have an analysis. I know Dawn Hirkingham is supposed to have this data. I'd like to see an analysis of all the database statutes in the states and which ones of them would permit anything other than forensic identification purposes.

In other words, Massachusetts has that provision that Mr. Steinhardt described this morning about, quote, you can use this for humanitarian purposes, whatever that means, how many of them still say law enforcement, how many have been corrected, and I think that's an area where we really could make some



progress towards making some bright-line recommendations, if I read the room right, that would assist us -- would create a better comfort level in terms of moving on to other things.

MR. THOMA: Well, I think, even if we don't address the backlog, which I think would be a monumental error, from what I know now, the owed sample problem is something that is almost insurmountable, and you can't go past that to try to get to a new group of people to take their samples when you've got whatever million -- I'm sure it's increasing since the last time we heard that -- I don't know how we can jump past that to go to a newer, broader spectrum of people that will now owe samples, instead of a million or two million owed samples, make it 50 or 60 million, whatever we're going to do.

MR. SMITH: That, of course, is one of the points that the Commissioner was making about the advantages of doing it at arrest. It's the one point in the criminal justice system where everybody who's going to go forward is in hand.

MR. ASPLEN: That's one of the conclusions we came to in Paul's working group. It ensures 100-percent compliance, and it's the only way to ensure 100-percent compliance.

If I could do this, for administrative purposes, to make it a little clearer for me, I think the first thing we need to do is figure out how we're going to deal with the specific request that's on the table right now and then deal with the issue of what other issues does this commission need to deal with, understanding that some of those issues are going to intersect, and utilizing the recommendation that Phil put forth in terms of the different questions that we need to ask.

So, if we could take a few moments and talk about the limited issue of the DNA from arrestees proposition and the related issues that we need to address so that we can have something in the short term for the Attorney General, identify what those issues are involved in that process, it seems to me the first issue we need to address is, is this a constitutional proposition -- does that make sense? -- and that we could, through the method that Dr. Reilly has set forth, send that questionnaire out, or at least questions to that, among other things, as to whether or not it's a constitutional proposition.

Does that make sense? Does the Commission agree that that's an important part of this process?

DR. DAVIS: Are you asking is it a constitutional question or is it constitutional do it?

MR. ASPLEN: What are the constitutional ramifications of that proposition?

DR. REILLY: So, you might phrase it as -- you know, you would quote language of a statute that Commissioner Safir might have recommended and say, based on your knowledge -- he's a professor of criminal law -- and not to go just to academe, there are many other wise minds we might approach -- based on your knowledge of the law, would you -- in your opinion, would a Supreme Court decision find in favor or against this statute, applying your knowledge of Fourth Amendment-related law?

DR. CROW: I think we could take that and condense it into fewer words, but the idea is fine.

MR. SCHECK: It should probably follow the Commissioner's proposal. In other words, there would be restrictions in there about using it -- treating it like fingerprints, only for identification purposes.

DR. REILLY: So, we should formulate it and make it tight and make it as unambiguous as possible, because many of the readers won't be worried about ambiguity.

DR. CROW: I certainly do like the idea of doing it just by mail, though. We got a great deal out of hearing the speakers who were here today, but it's a volume issue.

DR. REILLY: I know when I've worked on NRC committees, we've taken some comfort in the fact that we could turn to outsiders and say -- you know, we got a couple hundred other opinions about this, that maybe it wasn't a formal analysis, but at least we read through their replies, and it's sort of like the comment period in the Federal Register.

MR. ASPLEN: So, that seems to me to be issue number one or hurdle number one to jump over, to deal with.

The next issue would then be, if it's not a constitutional issue, what other privacy issues are there? I mean, you know, just because we can, should we kind of thing, and again, it more goes to how do you keep the lid on Pandora's box?

How do you make a system -- if you agree it's constitutional, how do you make it secure?

DR. REILLY: I think there you might be asking a different set of people those questions.

MR. ASPLEN: I agree.

MR. SMITH: There's an area in between, is there not, of what do we think the potential distorting effects might be of doing it? I mean the kinds of questions I was asking the Commissioner had a little bit to do with that. Will it change arrest practices?

You know, the standards with respect to other processing decisions in the criminal justice system could be very much affected by this. That's not a constitutional question, but it would be folly not to put those kinds of questions into the mix.

MR. THOMA: It could create a lot of short-term arrests.

MR. SMITH: It needs to be investigated, that's all.

DR. REILLY: And the simplest way to do this is to put a question something like this: What is the most cautious possible approach to introducing large-scale use of DNA data banks, and it might be, for example, to absolutely forbid a low-stringency test, to say that the only purpose that we will ever run a sample for is to seek an identical match, period, and that we will never save the DNA, and you know, you build in things like that, and you may limit it in some sense as the ultimate use, but for current use, you also diminish objections to it. That we've heard clearly today from our testimony.

I don't think there are a lot of questions. One of the things we have to be careful about is this notion of encryption and protection and all of that. I'm not sure we have the expertise available for that. So, definitely, we would have to go outside for that.

I hope I'm not shorting anybody here, but I certainly am not an expert.

MR. CLARKE: Some of that already goes on in terms of how database samples are collected and when they're typed by outside laboratories.

DR. CROW: Couldn't you ask people, too, how high a priority they place on this versus the backlog?

MR. SCHECK: Do we have the capacity, Chris, to do those questions I raised before, to do any surveys before the -- any survey data? I mean wouldn't it really help to know how many unsolved cases people have?

MR. ASPLEN: I hate to say no to anything. All I can say is that we would, you know, certainly proceed with due speed.

MR. SCHECK: Does CODIS have any of that?

MR. NIEZGODA: I don't think so.

MR. SCHECK: We're asking the wrong audience. We've got to ask the cops.

DR. DAVIS: If you're going to do something like that, you'd have to do it on a very narrow basis, select a limited number of people, get the data in detail, and then run with that, rather than try to do it across the board. You'd never get it done if you tracked everybody.

MR. SANDERS: You've still got the concern on the law enforcement side as to why you're asking that question and how it's going to be used against them.

DR. DAVIS: Another thought I have in reference to what this commission is supposed to do -- I don't know if it's supposed to come up with the final, complete, the ultimate, penultimate, whatever, answer and answers to every single problem in the future where DNA enters into it. If that's the charge, I don't think this commission can ever do it.

So, I see the Commission issuing two sort of reports, one where we have some advice, with details, and the other is where we issue that there are problems to be considered in the future by additional studies and other people, in other words sort of a two-prong approach.

Those things that we can dish up in a reasonable, final fashion, we ought to concentrate on those being put through, and then those which need further analysis and go beyond the scope of this Commission -- those could be mentioned or passed on, and I'd like to see -- I'm looking to the end of this someday. I hope there's an end.

MR. ASPLEN: I understand that sentiment.

DR. DAVIS: I don't want to put you out of a job, Chris.

MR. ASPLEN: I have one to go to. It's all right. I agree 100 percent.

I think that, in terms of my request of some direction on the particular issue, what I see is the constitutional questions, the questions regarding the potential privacy concerns, incorporating what Professor Smith -- I would include Professor Smith's concerns about how this changes the process, the investigative process, in kind of those other miscellaneous concerns and then, you know, Barry, your

considerations regarding the actual numbers, which would reflect, you know, what are the logistical realities of the whole issue.

I think that what we can do is the Commission staff can kind of take those concepts, get back to you in the next week or two for some more guidance but develop probably what will be a couple of different questionnaires to go to a couple different communities and then see how you feel about that and start to get those out there and begin to deal with this issue that way.

Does that make sense? Are people comfortable with that?

MR. SCHECK: It does.

Chris, are you including in this the concern about racial targeting?

DR. REILLY: I think that's implicit in the concern about the impact on the system. I certainly think it should be included.

One of the questions asked by somebody is to what extent does this progress reinforce inequities in the system?

MR. SCHECK: There tends to be a disconnect between -- you bring a panel of people together like this and then you go back and you look at, as Mr. Steinhardt was talking about, our -- you know, what seem to be intractable problems of racial profiling on highways, and you know, we really should find a -- there are people that address these kinds of issues, and I know they have specific concerns, because you know, putting apart everything else, if you begin to look at this issue, if I were the Attorney General, and I'm saying, well, I have some logistical problems in thinking about arrestees, there may be a constitutional concern, there may be these concerns, but I'd have an awfully serious concern, just in policy terms, of you know, literally, the public relations of all of this, because there is a racial component that -- a racial targeting component that people in this country have a good basis for worrying about, and we should hear from people in that area.

DR. CROW: Well, you could ask whether -- how this will affect racial inequities or possibly improve them. It could work either way, in principle.

MR. THOMA: Well, I can tell you pragmatically how it does. I mean just in Mendocino County, where we have probably between 40 to 60 percent dismissal after an arrest, in the Native American population, that's well over three out of four.

DR. CROW: Are dismissed.

MR. THOMA: Are dismissed.

MR. SCHECK: I mean those statistics that Mr. Steinhardt gave about Maryland understate the New Jersey turnpike. I mean there were more than that.

MR. GAINER: I just feel compelled to mention from a police perspective that a prosecutor dismissing the case is not a definite indication that there wasn't probable cause to make the arrest. Many prosecutorial decisions are based on whether they think they can win.

So, we shouldn't jump to the conclusion that, if 50 percent of the cases are not prosecuted, therefore the police made 100 percent bad arrests.

MR. SMITH: If probable cause to make an arrest is the threshold for taking a DNA sample, and that's what this reduces to, that's an interesting thing to look at. Why choose that as the threshold.

It's not a particularly efficient threshold, I don't think.

It's not particularly related to the uses later to be made of DNA samples taken, and it seems to me it drives you back to the question of what's the best, most efficient, most effective for law enforcement purposes, method of collection, and do we have problems with that?

DR. REILLY: I would pose a parallel question, though. You pose it from the point of view of law enforcement.

Echoing what I've heard from the Attorney General, I would pose it as what is the best thing for justice, and the two are not always exactly in parallel, and I would at least entertain -- I will not dismiss out of hand the prospect that Commissioner Safir's proposal actually is one of the single best things to protect historically discriminated against communities, that the rapid analysis of DNA to exclude may actually help more than hurt those communities. I'm not willing to at least dismiss that possibility.

DR. CROW: Well, we should ask the question in such a way as to permit that possible answer.

MR. SCHECK: I guess the point that Mr. Steinhardt was making this morning about what we found in the case in New York, the 41-bullet shooting, that they began looking at this anti-crime task force that was involved in this incident and finding some extraordinarily high number of stops per arrest.

Michael, I don't think you were suggesting this, but I -- maybe you were. You know, I'm saying that I am, you know, truly concerned about any kind of law enforcement system that's going to start taking the DNA samples from people at stops that don't come to probable cause.

MR. SMITH: It reduces to anybody they want to take them of, doesn't it? Under these standards, you could take DNA samples from anybody you wanted to take a DNA sample from.

MR. SCHECK: Frankly, if anything, I guess where I'm thinking is that that -- you know, we're not Great Britain.

In Great Britain, when they say we're going to take a DNA sample from everybody on an imprisonable offense, that has a different kind of cultural significance than it does in the United States, where if you can pick people up off a highway and profile them, because everybody may have a busted taillight or move in and out, and it's used as it has been demonstrably used, as a method of racial targeting, and then if you're saying, well, we're going to let everybody on misdemeanors -- arrested for misdemeanors have their DNA samples taken and thereby lower the bar for pretextual arrests, you know, that may be an argument for raising it and saying, well, let's only take it from people charged with felonies, if you even want to go down this road.

MR. CLARKE: Ironically enough, I'll be almost all of us, if not all of us, are all in the fingerprint database.

MR. SANDERS: The drug interdiction profiling on the highway does not in way, shape, or form indicate the amount of arrests.

I mean we do a lot of intrusions, I guess, as far as a quizzical kind of thing, but to bring it to the level of arrest or to suggest that even -- Mr. Safir was suggesting that we'd make -- with that probable cause thing, I still do not understand why you would think that the law enforcement industry -- would suggest that we do DNA testing on everybody that we could establish cause.

MR. SMITH: I'm not saying you want to or that you would.

I'm just saying that, if we're trying to find a standard, a good one, for answering the question, from whom can we and should we take DNA samples for identification purposes, there are some problems with triggering, using the arrest power as the basis for that, because that reduces to simply a standard of -- if you have probable cause to make arrests, we now have crossed the threshold.

I'm making simply the argument that that doesn't look like a very good standard for me, either from a law enforcement point of view or from a principle point of view.

It also has the problem that Barry's suggesting. That is, it leaves wide open to individual decision-making by highly discretionally charge officers the question of whether or not we're going to take the sample, and I'm not sure that's desirable.

MR. THOMA: I don't know whether we want to go any further with this, but there are a lot of discretionary aspects to this. How full the jail is at any particular time has to do with whether an arrest is effectuated, and I don't know if we really want to get into all that.

MR. GAINER: The record needs to be cleared up that, if arrest was the threshold in probable cause, there are enough professionalism and training and oversight and leadership and punishment if that's violated to assume that law enforcement can handle it.

Again, I do hear a lot of conversation that, somehow if this was to go, then we'd have a group of law enforcement officers running rampant.

We as chiefs of police no more support that than we would using false arrest to get fingerprints or to search cars or even the example that was used in the most simplistic form, that someone was stopped for a -- I don't remember the underlying -- they stopped them for a traffic violation and searched the car.

Well, it doesn't happen that way. There has to be a lot more to what goes on from the time a police officer stops a car till he makes the search of the vehicle. If it does happen, then there's a lot of things that we all need to do to make that it doesn't.

MR. GAHN: The practical effect of all of this is that haven't we learned something from the past years when all of the states enacted their legislation to take convicted offender samples?

We've got 450,000 still sitting in freezers, and to me, this makes no sense ever even addressing this issue right now. I mean it's something to address, but we have to tell the Attorney General --

DR. CROW: We've got a job to do first.

MR. GAHN: -- we don't have the capacity to do that.

I think contracts should be let by states for out-sourcing before anyone signs it.

MR. ASPLEN: And if that's the conclusion, that is a perfectly appropriate and valuable recommendation to make, no doubt about it.

JUDGE REINSTEIN: But at the same time, it would be helpful to have answers to Barry's list of how many owed samples are there -- I would guess that, you know, each state has the number of probationers and parolees that they have out there, and then, as far as unsolved crimes, that's going to be a tough one, I would think.

DR. CROW: It's time for a coffee break. You know, I've decided that the most pathetic object in the world, really, is a population geneticist in a group of lawyers.

[Laughter.]

[Recess.]

## Continued Discussion

MR. ASPLEN: For those who are interested, there will be a press conference today at four o'clock.

I'm a wise individual to the extent that I'm smart enough to ask the Department of Justice how they wanted to handle that, and what they asked was that -- what they suggested was that Dr. Crow, Dr. Reilly, and myself do the press conference.

For anyone else who would be interested in being here at that time to answer any individual questions that they might have, do individual interviews with them, you are more than welcome to do that, and they may be interested in having some input from the individual commissioners. Again, that's at four o'clock.

MR. GAINER: What would you represent the Commission's position is on Commissioner's Safir's recommendation or request?

MR. ASPLEN: That there is no position. What I've been saying today has been that, number one, the Attorney General has no position on this and that what she has done is she has requested of the Commission to provide an analysis of the issues and recommendations regarding those issues, that it's not a matter that she has decided to do this and wants to know how to implement it, but rather, that's the job of the Commission, is to simply lay out the analysis on them.

That's what I have been saying. That's what I'll continue to say.

What I think Dr. Crow will mention is the progress of the meeting today, how well this went, what occurred at the meeting today, and then Dr. Reilly can talk about what the particular, you know, privacy issues are as they pertain to this particular subject matter.

MR. THOMA: Chris, can I just make one comment?

With regard to where we have gone with this and where we're going to go, in the greater realm of what our responsibilities are, I would like to hope or think that we have some consensus that this doesn't automatically take a top priority when we've already mentioned several priorities that I can't see no matter how these issues -- and I appreciate the way that you want us to address them -- no matter how they're addressed, I can't see them, right now, taking precedence over the other responsibilities we have and the priorities that we've already mentioned.

So, I'd almost like, perhaps the way Phil said, to have this addressed by some experts but for us ourselves to let it be known that, right now, it doesn't have a high enough priority to be working on as opposed to the priority of backlog, the owed samples, and what we can do to accomplish that.

I really think we're going to get lost in it if we get into, okay, we have to address this right now, and that opposes what we were originally going to do.

MR. ASPLEN: I think that we can certainly proceed in parallel tracks. I don't think that the other issues that the Commission is addressing need to be put on hold by any stretch, especially given the suggestions of Dr. Reilly in terms of how to proceed.

If we proceed by nature of surveys, questionnaires, etcetera, etcetera, we can continue the rest of the process of the Commission.



Again, though, since this is a specific request from the Attorney General, it's got to be one of the top priorities. But I'll show you. We'll move in parallel fashion.

MR. THOMA: And I appreciate that, if Ms. Reno has a question of us, we will address it immediately, but what I'm saying is that our immediate response might be that it has a lower priority than some of our other objectives, in the greater realm of things.

MR. ASPLEN: We won't respond to her until August in any event other than to say we're working on the issue.

DR. REILLY: Can I ask a question about that? Jeff, do you feel -- at this moment in time, do you feel that you would be prepared to give the Attorney General an answer about this question? That's what it sounds like, that you've reached a conclusion.

MR. THOMA: No. I mean I don't have a closed mind about it, but I know how difficult it's been for us to try to reach our other priorities and objectives already, and to put this first and foremost on the next thing on our agenda, so to speak, it creates a bit of a problem in that we're only in existence through September, at least for now, and perhaps sometime beyond that, we're going to have some great difficulty reaching our other objectives if we do this first, right now. No, I'm not closed to this issue.

MR. GAINER: Isn't it pretty reasonable to assume that the Attorney General is going to be looking for some feedback when you get back to Washington? I can't believe that she's going to sit back and say get ahold of me in August.

MR. ASPLEN: We stay in pretty close touch with her staff on these issues.

So, what we'll do is we'll just continue to keep her updated. We'll forward the CODIS recommendation, for example -- I mean how are we not letting this overshadow everything else this week. We'll forward the CODIS recommendation up.

We'll probably forward up to her staff the draft proposal for the post-conviction recommendations. So, we'll be doing all that other stuff, also.

We'll let her know the progress on this issue, also, but in terms of, you know, the finalized version of that, we haven't even been requested for that until the end of August, beginning of August.

DR. FERRARA: Would it be appropriate at all, or helpful, Chris, if you provided the Attorney General, on a short-term basis, the results of just the straw-poll of the Commission on the issue?

MR. ASPLEN: I guess it might depend on how we define the issue. I think that the issue is actually several issues.

It's is it constitutional? What do we need to do from a security standpoint, a privacy standpoint, and then, if we can or if we deem it to be constitutional and doable, what will it take to get us there from a financial standpoint? That would be difficult to straw-poll on, I think, at this stage.

What straw-poll were you talking about?

DR. FERRARA: I would suspect -- maybe I'm wrong -- that most of us feel like here is an idea that might have some merit in the future but it's premature at this point, because we still are struggling with existing issues that are more critical.

MR. ASPLEN: I think putting it that way maybe puts me in a little bit more tune with what you two gentlemen were saying.

I think that what we can do is, when we do have the conversation with the Attorney General's staff, we can say we're working on that issue, but we don't want you to lose sight that there are other matters more important that we're also working on at the same time. Does that kind of help that concern?

MR. SCHECK: I'm just guessing, but if we were to do a consensus of the views around the table, after struggling with all these issues -- after all, we're a commission, we look at a lot of problems -- I think the strong feeling of people here is that whatever its merits in terms of civil liberties or other issues, we ain't ready for it yet.

MR. ASPLEN: And in essence what we're saying is, just because, right now, it happens to be a big media issue, a big issue in the press doesn't mean that it is the level of issue that should get us off-track of what are more legitimate, more pressing issues.

That sounds to me to be the kind of thing that we shouldn't even wait for a request from the Attorney General but actually send that up.

MR. SCHECK: Absolutely.

MR. THOMA: I think we have a consensus. I'm not certain, but I think we have a pretty general consensus on that.

DR. REILLY: I would be concerned about the wording. I would want to have something in front of me with a statement.

MR. SCHECK: We're not saying that Commissioner Safir's notions are necessarily wrong-headed or anything else, but compared to what we're seeing --

MR. SMITH: The Attorney General has not asked us that question. She's not asking us what we think of his proposal kind of like in New York. She's presumably asking us a question along the lines of do we want to suggest something to her about what she should do with respect to other jurisdictions' attitude towards what Commissioner Safir proposes to do in New York, and it seems to me that's the question I'm understanding us to be given, not what do we think of Commissioner Safir's proposal kind of --

MR. GAINER: Well, maybe I missed this, but is what the Attorney General asked us to do what we read in the paper? I mean that's a strange way to communicate, unless Chris, through some staff work, has had some request. I mean we're all presuming, because we read in USA Today, that the Attorney General has asked us to do whatever it is in here, and I submit, in our experience, that's probably not what has transpired. So, what is this thing, if any, that's been requested?

MR. ASPLEN: I'll tell you what it's been generated from. It's been generated specifically from her chief privacy officer, John Bentivoglio, in conversations I had with him. I think I talked about this a little bit yesterday.

The conversation was had with him; we suggested the possibility of having the Commission look into it. He then went to the Attorney General, and she signed off on the memorandum that he sent her in that regard.

Now, we are due to receive a formal letter from her requesting that.

However, it takes time for those things, and we didn't get that last week, and I asked Mr. Bentivoglio specifically last week, do you want me to bring this up in the Commission meeting, do you want me to begin to address it this way, and he said yes.

So, we will get something formally in writing. However, having it from Mr. Bentivoglio and the meeting that we had with Dr. Forman and myself and David Boyd and Jeremy Travis at one point -- that was where the idea originated.

DR. REILLY: So, we do not have a framed question in writing.

MR. ASPLEN: Not in writing, no. Not in writing, no.

DR. REILLY: Well, I certainly agree that it's not the purpose of this Commission to respond directly to a proposal coming out of the City of New York.

MR. ASPLEN: I don't anticipate that that would be the framed written question. That was never part of our discussion. It was never anticipated in any of the discussions that we had.

MR. GAINER: All of which makes your response as clear as mud.

MR. ASPLEN: Just so we're clear, to put a period at the end of that sentence, the feeling that I'm getting is that, when given the opportunity or put in the position of communicating with the Attorney General's representatives, that it is the general feeling of the Commission that, while we will, in fact, respond to her request and we will accomplish that goal, we don't want the particular visibility of that issue to draw attention away from those matters that the Commission has looked into and have deemed to be even more relevant, more pressing matters such as the database backlog, etcetera. Is that a fair representation of the way this should be presented to her staff, her representatives?

MR. CLARKE: Yes.

MR. ASPLEN: All right.

That having been said regarding that particular issue, what I would request and what Dr. Forman would request, I am sure, and what Ms. Wilson would request, as we begin to develop these questionnaires, surveys, etcetera, is that each of the commissioners develop five of their own questions that they want asked, that they feel need to be answered in order for us to accomplish the mission of this commission, and if you could, include in that recommendations for who we should address those questions to.

DR. CROW: You have in mind now the response to the Attorney General.

MR. ASPLEN: I think both. I would say both.

MR. SMITH: This has the virtue of inserting the question into a larger set, and I think that's where it belongs.

JUDGE REINSTEIN: You're not talking about large group agencies. You're talking about maybe focused people who actually do the work.

MR. ASPLEN: Maybe both. If you have individuals, you know, let me know who the individuals are.

DR. REILLY: I think it would be, in the interests of time, extremely difficult to get responses from agencies where people have to sign off.

I think we should ask people who are more or less experts, knowing it's ad hoc, informal, and limited, so we can get rapid response, and promising them, if they want a degree of anonymity. I guess there's no such thing as a degree of anonymity.

This has been very helpful in the NRC committees that I have served on, to get these experts saying you're way off on this or, you know -- and then to sort of sift through all the responses, but I just think agencies could take so long to respond.

MR. SCHECK: In terms of agencies, what Paul just gave me in terms of this 1998 national study of DNA laboratories, there's a lot of numbers here that are relevant to us, and if it was -- they finished collection on December 15, 1998.

Maybe there's some way that we can get some access to this data. This would be very useful.

MR. ASPLEN: The answer is I hope so. I would think that, given the particular circumstance we're in right now, we would be able to.

My guess is they will be a little leery, and we talked about that survey in Paul's working group meeting, and we will certainly look into that possibility of getting those numbers.

MR. SCHECK: I mean they have known cases, unknown, you know, non-suspect cases.

DR. FORMAN: The BJS survey?

MR. ASPLEN: Yes.

DR. FORMAN: They had till the end of yesterday to respond, and then the Census Bureau is expecting that they will have all the data that they do have collated by the end of spring.

MR. SCHECK: What's good about this is that it has how does your laboratory count DNA caseloads? By case, you know, in parentheses, multiple pieces of evidence and samples by sampled evidence, by sample, other, then known subject cases, unknown subject cases, received and analyzed? I mean those are reasonable numbers. That's useful.

Do they do non-subject cases? Do you do substrates? I mean, you know, take that as an issue. How many laboratories actually take substrate controls and then run them through in their DNA testing?

Now, that is, I think, a minimum quality control in doing the test, but if you require that, that means the number of samples analyzed per case goes up and the expense of it does. I mean that's the kind of minutia we're supposed to be knowledgeable about.

MR. ASPLEN: Dr. Forman very wisely request that I give you two weeks' time to send me those questions, to send us those questions.

Thank you, Dr. Forman.

I encourage you to do it sooner than that, but at least in two weeks, if you could get that to us, we would appreciate it.

Let me do some other housekeeping and then we'll move on.

Under the category of mentionables, next Commission meeting is currently scheduled for May 7th and 8th, which is a Friday and a Saturday that time, place to be announced.

Working group meetings that are coming up: legal issues, March 15th in Chicago; post-conviction, March 22nd in D.C.; research and development, March 29th, Chicago; crime scene, April 9th, D.C.; lab funding, April 25th/26th, D.C.

Other things to mention: NIJ science and law conference is April 15th and 16th in San Diego; the fourth annual conference on the future of DNA, May 3rd and 4th in Albuquerque, New Mexico.

Much as it may sound like a Commission function, it is not a Commission function.

We have registration forms here for anyone interested in adding yet another thing to your schedule of events.

MR. SMITH: Do you have agendas for the two?

DR. FORMAN: We do have tentative agendas.

MS. BASHINSKI: Can I make a request that the minutes of this meeting would get out to us relatively quickly? It would be helpful for us.

MR. ASPLEN: I will tell you that we have agreed to pay whatever the premium is to have these done in a week because of the recognition of that importance. What happens is we get them first, and then we kind of have to cull through and fix some things and then get them back out, but as soon as possible, we will do that.

DR. CROW: I'm a little bit vague about the five questions. Give me the five questions, and I'll turn them in to you.

MR. ASPLEN: Dr. Reilly, this was your idea.

DR. REILLY: It was my thought that, from the privacy of one's office or home or wherever, with some reflection, it might be interesting to see what kinds of issues percolate to the top of people's concerns as this Commission moves forward and that there is an advantage in having a small set of questions

formulated by each individual independently of the group to see where we are, and it was not meant to be limited in any way. That was the whole point.

DR. CROW: It's the whole commission.

DR. REILLY: Yes, just to see what's bothering people.

MR. ASPLEN: And that is a great benefit to us, because by administrative function, Dr. Forman and I kind of -- we set the physical agenda of what occurs, but what we don't want to do is set the agenda for the Commission. That's not our function.

Our function is to make happen what you folks want to happen, and that's why your input in that regard is so important, but sometimes by nature of setting the physical agenda, you set the larger agenda, and we don't want to do that.

MS. BASHINSKI: Are these questions we want to ask others?

DR. REILLY: I would be as broad as possible. What are the things that most concern you as the Commission moves forward?

DR. CROW: But these are questions for the Commission to answer, not outsiders, aren't they?

MR. SMITH: They're questions we want the answers to, is what it comes down to.

DR. REILLY: My fantasy is that the staff will sift through this and they'll say, gee, seven or nine people focused on this question, maybe we should get some more data along the lines that Barry was talking about, or whatever it might be.

It seems to me a simple exercise, taking very little of our time, that might be helpful.

MR. GAHN: I have no problem doing that, and I will formulate my questions, but I'm a little confused about the Commission itself now. We spent such a long time going over those issues that we identified, and all our working groups have done such a tremendous job, and I thought it was a very aggressive program when we started out, and I wonder, are we going to be able to accomplish what we set out a year ago?

Is the Commission moving forward, or are we winding down?

DR. REILLY: Well, I would be willing to be that, whether the Commission is moving forward or winding down, that there are many questions that will be unresolved by its activities now, and to the extent we generate good ones, we're doing a service for those who come after.

The role of DNA in our society -- no one yet has an imagination broad enough to anticipate the impacts on our society. It is gigantic, and there will be commissions on DNA evidence in 2005, I guarantee you.

MR. ASPLEN: Norm, to answer your question, number one, we're actually doing both. We have an eye towards, you know, putting -- you know, finishing this up and kind of scheduling accordingly. So, in that regard, we are winding down.

The particular working groups, like the post-conviction working group, we have a few more issues to address, and then we're pretty much finished.

I think we've fundamentally identified the crime scene group, and I think that Dr. Crow is, you know, comfortable with where his group is going. So, we've identified what needs to be addressed.

To the extent that new issues come up like this process with the Attorney General's specific request, there are going to be a few things that come up between now and then that we need to address that perhaps we haven't thought of, but in line with will the questions be inconsistent with what we set out as goals originally, I don't think they will be.

What we want to do is use those questions to, I guess, better redefine what the individual working groups are doing and to put that in a context.

We're really looking to make sure we're on the right track, for one, and then are there any other issues that, when we originally set this process in motion, that we're not hitting?

We're not taking this time halfway through to change our agenda. We're not doing that. We're making sure we're on the right track with where we're going and tweaking the process a little bit, if you will.

That having been said -- Public Comment

## Public Comment

DR. CROW: The next thing to do is to ask if there's anyone in the room representing the public who has a comment to make. The floor is yours.

[No response.]

DR. CROW: I hear none.

MR. ASPLEN: I think that we can conclude.

[Whereupon, at 3:30 p.m., the meeting was adjourned.]