National Commission on the Future of DNA Evidence

P R O C E E D I N G S

Meeting VI

Ritz Carlton Hotel

Boston, Massachusetts

JULY 25 & 26, 1999

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Opening Remarks by

Dr. Jim Crow
Vice-Chair

DOCTOR CROW: First of all, two apologies. The first apology is for being here. As you all know, Justice Abrahamson was supposed to preside over this meeting. She just finished a very tough election and has earned a well-deserved rest. So she has gone on a vacation, and I'm replacing her.

The second point to make here is that many of us got a notice saying this meeting would start at two o'clock, and I don't doubt that some of the empty spaces around here are caused by that. Nonetheless, I don't want to wait for a whole hour doing nothing so what we will do is do nothing anyhow with the present people here.

I'm going to -- I am scheduled to make some introductory remarks, but I don't really have any to make, and I will say a little about the Technical Working Group later on.

So I think I'll just proceed immediately to call on Chris. So the floor is yours. Just do something until two o'clock.

(Laughter.)

Update on Commission Business

Christopher H. Asplen, AUSA
Executive Director

CHRISTOPHER ASPLEN: First of all, that is -- is that working?
DOCTOR CROW: The interpreter.

CHRISTOPHER ASPLEN: Okay. First of all, the apologies were not Doctor Crow's to make, but rather that is our administrative mistake somewhere along the line, and we do apologize for that, but we can do a couple of things this morning before the rest of the folks arrive, and we do expect to have a pretty good turnout today that will not require any deliberative process that can act as more of a necessary update, but there are certainly things that we can update some of the other folks on a little bit later.

First of all, let me say this, that pursuant to our responsibility regarding having a sign language interpreter, as you can see, we do, in fact, have one. If there is anyone here who does, in fact, need the assistance of a sign language interpreter, please let us know at your earliest convenience, and we will make sure that the individual who is behind me continues to be behind me; however, if that is not necessary through the course of the day, we will give him and any of the colleagues that he has here with him a rest.

All right. Secondly, in terms of today's meeting, what we would like to do is rather than reserve all of the public comment for the end of the meeting tomorrow, in speaking to Doctor Crow this morning, we talked about providing some time, kind of on an interim basis throughout the next day and a half, to allow input at the time perhaps at the end of particular sessions so that we can reap the value and benefit of your comments at the time, rather than wait until the end of the day where we simply take note of it and move on.

We do have a number of representatives here from various parts of the DNA community, if you will, and as such, we do want to reap the benefit of their knowledge and their input at the time of the discussion.

Also, let me give you a general update of some of the things that the staff is doing when we are not meeting and some of the things that are going on.

First of all, regarding some of the presentations that have been made, some of the different speeches that have been given recently since our last meeting, there one was one that I participated in at the National District Attorneys Association meeting in Florida last week. They were kind enough to include on their agenda a session on the future of DNA technology where I had the opportunity to explain to them the work of the commission and to talk to them about the various issues that we are addressing, particularly as it pertains to not just presentation in the courtroom, but rather the investigative issues, also. We talked about the database backlog issue. We talked about the arrestee issue. We talked about the nonsuspect case issue; and as such, I think that prosecutors across the country today have a little bit better understanding of what the issues are, although I will say that there was a significant amount of surprise at the nature and quality of the database backlog and the implications thereof. The point being, I think that there needs to be even more education on those issues, regardless of how much we talk about it, and we are sensitive to the issues. There is still a tremendous amount of education that needs to go on out there.

I also had the opportunity about every two or three months to speak to the prosecutors' DNA training class, which they have at their national advocacy center in Columbus, South Carolina,and that particular training is a week long training seminar for prosecutors from all over the country on DNA-related issues, particularly as they apply to the courtroom; however, the past four times that I have participated in that, what they have asked me to do very specifically is to talk about the issues of postconviction DNA recommendations. And, again, that is based on the commission's work, and the last four opportunities I have had, I have taken them, the draft recommendations for postconviction analysis, have used it there and have asked for their comments; and a number have, in fact, sent their comments to me at the -- at the NIJ, and all of them have been very favorable, quite frankly. So that has been a very beneficial way to disseminate the information, disseminate the work of the commission, and I believe that that will continue.

I have a meeting in August with their curriculum development advisors, and we are going to talk about making that a permanent part of the program.

I will say specifically that at the National District Attorneys meeting last week in Florida, Attorney General Reno was there and spoke to a number of issues; however, DNA was one of them, and she specifically raised the issue of prosecution training and education on DNA issues.

One thing that the commission will find itself talking about more in the future, I believe, is as the issues come up will be character, predictive characteristics of genetics and its application in the courtroom and what that will mean for prosecutors and defense attorneys. That will be a very big issue that we will attempt to tackle. We'll talk about that more later, but quite frankly, I think those issues will pale in comparison to the issues that have arisen in the use of DNA simply as an identification tool, but it's something that prosecutors do want to be on the cutting edge of, and we'll try to continue to educate them through meetings like the National DAs conference.

There is also a presentation at the recent Cambridge Health Tech meeting in Tysons Corner that was chaired by Doctor Crow and was also attended by Woody Clarke, I believe, who was there, and Judge Reinstein was also there and spoke about the various working groups that they are involved in for that particular audience, which is composed primarily of scientists and laboratory representatives, but was yet another good organization or another good conference to get the message out in terms of the commission working the issues that we are dealing with.

Also, I think importantly, next Tuesday, Doctor Forman and I will be speaking to the National Conference on State Legislatures in Indianapolis, where we will be talking primarily about DNA in the context of the recommendations that have already been presented to the Attorney General, specifically the backlog issue and the arrestee issue, and we will also be talking somewhat about the uniform statute matter that we will talk about later on today and any other relevant issues that the legislators feel need to be addressed, but that is especially for those two issues for the backlog and the arrestee issue, that is, I think, a very significant audience to say the least. Most of these funding issues, as we have recognized, are less matters for the federal government in spite of the first recommendation that went out, but are really more matters for funding agencies coming from the individual states, and this will be a good opportunity to prepare them for those issues and to alert them really to what the issues are.

So that having been said, there has been a significant amount of the commission's work in the public eye in other ways besides the conferences that we are speaking at, and that is through the media. You may have read a number of the articles that have come up in USA Today, in the New York Times and various and sundry other newspapers, but also on various television shows. Largely that was a result, so that you all know how it works, it was the result of the headline in USA Today, and what happens oftentimes is once a DNA-related story hits one of the newspapers of national note then it -- then everybody else picks up on it, and we start getting phone calls from everyone else. And what happened was USA Today ran the story on the mass -- what they termed as mass testing, which I think was a little bit misrepresented in the headline. Factually, the story was correct, but the characterization was somewhat off. And as a result, we got a number of phone calls for story interviews for the press, but then also for the news media, the television news media, to which we were very -- for which we were very thankful particularly to Paul Ferrara and Woody Clarke for stepping in and being on the Today Show, or CBS This Morning, or MSNBC.

Is that what you were on, Woody?

GEORGE CLARKE: The letters seem all different.

CHRISTOPHER ASPLEN: Yeah, they all run together, but they were very, very important. The show is to be on for the purpose of kind of clarifying what the commission did at its last meeting and what that really meant. And again we appreciate those folks doing that.

One thing that I would like to say publicly is I want to say a special note of thanks to Doctor Ferrara. I was talking to Paul about a month or two ago about some of the things that he was talking about; and from the beginning of this process, Paul has been one of the people to talk about the problems that are going on in Virginia; and when we talk about the examples of the tragedies that can occur from things like the database backlog, Paul has always been willing to talk about his cases and what has happened in Virginia that have been very negative and that have been a bad thing, and that takes a lot of courage. And I told Paul about two months ago that I, you know, respected that and really appreciated his courage in doing that. He says, you know what, nobody has ever said that before. So we do appreciate that.

PAUL FERRARA: Hear! Hear!

CHRISTOPHER ASPLEN: It's true. It's a hard thing to do. And I will add to that. I see Dave Coffman here, also. Dave is another one who speaks to the issue and is not afraid to say, you know, here is what can go wrong, and here is what does go wrong, and that is why we need to fix it as opposed to simply saying, no, not in our backyard. We don't have those kind of problems. And that is very important if we are going to solve the problems. So again thank you on those counts.

To give you somewhat of an idea of where we are going to go today and tomorrow, aside from just what is printed in your -- on your agenda, what we would like to do is talk about the postconviction statute that we have got.

Oh, Robin, do we have copies of the crime scene publication, the pamphlet and the postconviction document?

ROBIN STEELE WILSON: I have hard copies for your conference, but I don't have them available for everyone.

CHRISTOPHER ASPLEN: Okay. Do we have one? Do we have them here? I will just hold them up and show them.

The postconviction discussion today will focus on the statute itself to see if the commission feels comfortable with that statute recommending it, but also how can that statute be recommended; what is it that we want the Attorney General to do with that statute, if, in fact, it's approved by the commission. And Judge Reinstein will do that.

In terms of the crime scene investigation -- thank you -- in terms of the Crime Scene Investigation Working Group, we will talk about what happened at the last meeting and talk about whether or not this commission would like to kind of make a broader statement about law enforcement issues in general and law enforcement training and education in the face of advancing technologies.

What we have talked about is the extent to which DNA provides us a specific example of law enforcement's need and desire for training on technology issues; and if we are really going to have law enforcement do what we are asking them to do, it's going to require -- it's going to require rethinking the resources that we provide them, particularly in training and education, although implementation is another factor.

We will also take a look at, and it may have been -- has the survey been passed out?

Okay. The survey that we spoke about at the last meeting, we finally have something from PERF on that in preliminary fashion. We can take a look at those issues.

The evidence storage issues that you see on your agenda, we have invited some folks here from the Los Angeles Police Department, and the reason that they are here, quite frankly, is because they called us and asked us what we are doing about it. I got a phone call about a month ago asking if we had, as a commission, made any comments or any recommendations regarding evidence storage issues. And I said that we had not done that yet, but the issue of how long should we store evidence, given the nature of success in DNA technologies years later; and more importantly, how to store that evidence, be it frozen, be it dried, et cetera, were issues that we needed to address. And I said basically no good deed goes unpunished so would you like to help us with the discussion and tell us what your experience has been, what the issues are that you are facing so that we can kind of use your example as a way to focus our discussions. So they were kind enough to do that at the last minute, and we have three representatives from LAPD to talk about that.

Tomorrow's laboratory funding report will consist, I think, primarily of two areas. One will be the issue of database sample collection and the recommendation for that and how do we create -- how do we encourage pilot programs that will provide models throughout the country for effective database sample collection. To say the least, we are not getting 100 percent participation.

Is that right, Mr. Coffman?

DAVID COFFMAN: No.

CHRISTOPHER ASPLEN: And I know -- and I know that Dave has been more successful than most in database sample collection and is -- is undertaking some efforts there, but we are going to talk about some ideas we have about developing pilot programs for that.

And then we have the issue of database sample retention. We have received a specific request from Attorney General Reno's office from her privacy advisor, Mr. Bentivoglio, to talk about that issue at this meeting and to -- to try to come to some consensus, at least lay out the analysis of what the issues are regarding database sample collection.

We have forwarded, and I believe she has received, the recommendation that we made on arrestee testing for sampling at the last meeting, but one of the specific issues you may remember from her letter to us was the issue of sample retention. So we will talk about that from Doctor Ferrara's working group standpoint.

And then after that, you will see on the agenda there are privacy considerations and database sample retention. We will then, to some extent, turn things over to Doctor Reilly, and Doctor Reilly has offered or -- I won't say offered. He agreed to help us with that discussion in the privacy considerations surrounding that whole issue.

The working lunch, we have asked Lynn Fereday to come from Forensic Science Service to talk to us about DNA and fingerprinting. And it is positioned where it is on the agenda for a particular reason, and that is in the Legal Issues Working Group report we are going to talk about the constitutional analysis that David Kaye has put together with the commission and the working group's help; but one of the issues that came up in that constitutional analysis is the issue of invasiveness and the extent to which taking DNA either venously or by buccal swab may be deemed too invasive. Well, this is an instance in which this technology may directly affect the legal analysis if we can, in fact, expect in the future to be taking DNA from fingerprints, that is a legal analysis that will be greatly affected. So we will proceed that way.

I believe that when last we met, we had shown you what the -- what the final version of the law enforcement pamphlet looks like. This was the one that was, in fact, selected by the commission at the last meeting. This is the one that is, in fact, being -- is going to be printed. It is rumbling through the process that is internal review with the Department of Justice, and we anticipate that in about the next month, month and a half, this will be ready for dissemination, again, in conjunction with the recommendation that we spoke about last time having the Attorney General recommend -- bring together representatives from the various law enforcement community agencies to talk about how to distribute this and to talk more generally about the issue of education, DNA education, particularly in the context of identification, preservation and collection.

The same is true with this particular document, the postconviction document. It is in its absolute final phases, I am told, and I trust that that is the case. We are -- we are in the process of getting approval for things like whether we can, in fact, have this cover, because this cover involves three colors and needs special approval to get three colors on your document. So we are doing that. We are adding things like Department of Justice boilerplate pages, and making sure everyone's appropriate seal is on the document and such; but again, that will hopefully be done in the next month or two.

What we are considering right now is the possibility of presenting these two documents to the Attorney General at the next commission meeting, which will probably be held in Washington. And what we are considering doing is inviting the Attorney General to the meeting and presenting them to her at that point. We'll keep you updated on if we are going to be able to do that at that point.

The only other thing that I would like to talk about before we move to Judge Reinstein is to give you an update on the legislative process and what is going on with the database backlog.

About two months ago, the Senate passed legislation, which included $30 million over the next two years for database reduction -- elimination, I should say. And the program, it was designed to be a cooperate effort between the bureau and the Office of Justice programs, but I would say tracked the commission's recommendation fairly well with some of the same requirements, some of the same quality assurance concerns; and that, as I said, was passed by the Senate; however, when the House was considering its kind of parallel legislation, if you will, there was nothing included in the appropriations, the House appropriations language for that project. That was not the only victim of the House appropriations process, but it was a significant victim.

The matter now goes to the conference committee for the House and the Senate to see if they can come up with the bill that the President can sign. So the issue is the extent to which the Senate pursues this particular issue strongly enough and whether or not it can be worked out, but that is where the process is right now for that particular issue. I don't believe that they have yet selected the committee members, so we don't even know who is on the conference committee, but we will try to keep you updated and posted on that particular matter.

We'll have to see whether or not that actually comes to fruition. I will say that we have had opportunities on several occasions since -- since the House version did not include the money to speak to Senator staffs about the issues. So we have communicated at their request to Senator Thurmond -- yes, Senator Thurmond and Senator Dewine's staff about the issue.

They said that there is a potential that they would have hearings on this particular issue, but we don't know that yet. And as always, we give -- when we are asked about these issues at NIJ, we go to them with a briefing book that includes everything about the commission, not just that recommendation, but also includes the membership list, and we encourage them to contact you folks and you commissioners and not just the commissioners, but other working group members, because you were going to be the people that they need to talk to, not us. Quite frankly, we have an obligation not to lobby for money one way or the other, and that is -- and that is entirely appropriate. You folks are the ones who have the specific experience to answer their questions about the implications of the backlog and things like that. So if you get a call from a Senator somewhere along the line, don't be surprised if the reference came from us. Yes, Paul.

PAUL FERRARA: Chris, this is Senate Bill 903, if I recall.

CHRISTOPHER ASPLEN: I believe so.

PAUL FERRARA: Is it possible, do you have copies of the language of that bill? I had one very rough copy of it, and I would love to get it.

ROBIN STEELE WILSON: We can copy -- I know where it is in the bill, and I can get it off the Internet.

CHRISTOPHER ASPLEN: And I quite frankly probably have a copy of it in my file somewhere. We will photocopy and get it to people today.

Any questions about any of the commission business?

DOCTOR CROW: I'm impressed having heard Chris talk totally unprepared. I wonder how good he is when he is prepared.

CHRISTOPHER ASPLEN: I get all confused then.

DOCTOR CROW: The other thing I noticed is that the colors on this document are black and blue, which seems particularly appropriate for this commission.

CHRISTOPHER ASPLEN: There you go.

DOCTOR CROW: I think we are ready to proceed with Judge Reinstein so the floor is yours.

Postconviction Issues Working Group Report
Uniform Statute Discussion
The Honorable Ronald Reinstein

JUSTICE REINSTEIN: Okay. If you thought Chris was unprepared, I thought the meeting was beginning in half an hour.

I guess the next thing on the agenda is the Postconviction Issues Work Group discussion and work on the uniform statute for obtaining postconviction DNA testing that you all have and was sent to you. I think the only person on the work group here other than me is Kathryn at this time. Barry is not here yet. And I just want to acknowledge Margaret Berger's work on this. Margaret has been working very hard on drafting after our meeting in -- we met in Albuquerque. The commission discussed this for the first time in Santa Fe, I believe, and then we had a telephone conference kind of refining a little bit more based on some of the discussion at the Santa Fe meeting. But it follows the lead, as Margaret indicates in the commission's notes of Illinois and New York, and what we decided was to do a statute that would be as simple as possible and then follow it up with a much more descriptive comment or note, and you see, you know, the following two and a half pages are a comment, which is pretty much what you see in most statutes around the country.

The reason for the statute, of course, is pretty much what the Work Group has been involved in, and that is the unique aspect of DNA testing as it relates to postconviction relief when, in fact, there in most jurisdictions -- I don't think -- I think it's even more than many jurisdictions, most jurisdictions there are time bars, such as the Virginias where you have 60 days from the time of judgment in order to file for a new trial or for postconviction relief or appeal.

Is that right, Paul, pretty much?

PAUL FERRARA: I thought it was 21 days.

JUSTICE REINSTEIN: Oh, is it really that short?

PAUL FERRARA: It was really -- it was really grossly short, at least a lot of peoples' opinions, but I think 21 days.

JUSTICE REINSTEIN: Okay.

PAUL FERRARA: Before the introduction of new evidence or something like that.

JUSTICE REINSTEIN: And also the recognition that this really isn't newly discovered evidence, which is what you see in many of the postconviction rules and statutes around the country. This is preexisting evidence in many cases that just was not subjected to DNA testing, or was subjected to, let's say, RFLP testing, and now STR with 13 loci is available.

What we tried to do was to break it out into two areas, mandatory testing and discretionary testing, and I'll just walk through a little of the statute.

For the mandatory testing, we talk about the standard that I think is taken from both New York and Illinois about the reasonable probability that the petitioner wouldn't have been prosecuted at all or

convicted if the exculpatory results had obtained -- had been obtained through DNA testing. And then the issue whether or not the evidence is still in existence or in a form that where DNA -- it could be subjected to DNA testing.

And, finally, that the evidence was never previously subjected to DNA testing, or that it wasn't subjected to testing that is now being requested.

One concern that, you know, we talked about at the meeting was that does this create a greater loophole for just a slight difference in the type of testing so if now we have STR with 13 loci, if there is some slight variation from that, you know, if somebody filed a petition and said, well, it wasn't subjected to this particular testing that has been developed, therefore, does the door get opened. I think I would like to see that door maybe get shut a little bit more, because as we discussed at the last meeting, I think that Doctor Crow mentioned that STR with 13 loci is probably going to be the standard for at least another ten years, but do you really have to go beyond that for postconviction testing, unless something miraculous comes up where that is actually going to benefit a defendant at some point later on.

Then as far as in the court's discretion, if it's -- there is still -- it's not as definitive with the mandatory testing for the person, you know, may have been prosecuted, and they may have been convicted, but there is a cloud that -- I mean we grant postconviction relief now if the verdict or the sentence probably would have been different. So in this case it would be a reasonable probability that the verdict or sentence would have been more favorable if the testing had been available at the trial and also go through the same analysis of whether or not the evidence is still in existence and was it ever previously subjected to DNA testing or the testing that is now being requested.

So a slight variance from the mandatory testing that has some impact as we go on in the statute regarding payment for the testing and the like.

As far as payment goes, we have made a recommendation that for mandatory testing, subdivision A, that the court shall order the test and shall pay for testing, but we recognize that in most cases that, you know, an agreement could be reached that the state laboratory would do the testing, and then there wouldn't be any cost to the court or to the defense.

In fact, I have a case right now where the parties stipulated to the Department of Public Safety laboratory in Phoenix to do the testing.

And then for subdivision B that the court may require the petitioner to pay for the testing.

No mandatory appointment of counsel. We say that the court may appoint counsel for an indigent petitioner. I think many jurisdictions, if there is some reasonable basis that is shown in the petition would appoint counsel just to assist the petitioner in going through the process.

And then discovery, as we have discussed throughout the Postconviction Work Group, we hope that there would be cooperation and collaboration between the parties. We anticipate based on everything that we have seen in some of the jurisdictions that are involved in this that there is that cooperation and collaboration, but if not, the court is always going to be interjected into entering orders for discovery for location of the evidence for retention of the evidence and the like.

I don't know what the resistance will be to laboratories, as far as providing access to lab records and underlying data and laboratory notes, but we thought that that was appropriate and necessary.

And then after the testing results are obtained, we contemplated that if they are unfavorable that the petition should be dismissed and other orders may be entered, such as entry of the profile into the CODIS database and any other orders that would be deemed appropriate. If they are favorable, then the court would order an evidentiary hearing, unless there was some stipulation between the parties, which just based on experience is usually going to be the case, but the hearing would have to be notwithstanding any time bars that the jurisdiction in dealing with currently has. And then go through the normal postconviction process of that jurisdiction despite having the time bar.

And then as far as we go into the comments, we make mention of the fact that this evidence really is different that unlike the reasons that you normally have postconviction time bars and really strict standards for not allowing somebody to come in years later, or in some jurisdictions even months later because of the staleness of evidence, that memories fade and the like that with DNA evidence, in fact, that the evidence actually does get better over time because of the advances in technology and the like.

But we also in the comments recognize as well the need for finality, and that that is an extremely important interest, not just for the system, but also for the victims of these crimes, and the concern that we not -- that we try to limit frivolous and meritless claims, because no matter what happens when the statute comes in, I would anticipate that you are going to receive -- that jurisdictions are going to receive a number of frivolous claims. Although the experience in New York and Illinois from what I understand has been that the floodgates really have not opened up as far as these claims, and maybe Barry and Terry Hillard can respond to that as far as the jurisdictions in New York and what is happening in Illinois, as far as the frivolous claims go, but it is a concern, and finality is important.

That is all I would want to say right now, you know, as far as except for taking questions, and maybe going through the comments, unless Barry or Kathryn have anything that they want to add from the Work Group's discussion.

BARRY SCHECK: I guess that what I probably should add is that I think that this is an extremely moderate form of the statute given the reality of what is in the courts. I would be remiss if I didn't tell you that we encounter every day across this county cases where DNA evidence has exonerated individuals, and the court system is extremely reluctant to let them go.

I don't know if -- were you able to get the articles that Bob Herbert wrote last week in the New York Times?

DOCTOR CROW: Yeah, I read it, too.

BARRY SCHECK: Yeah, because there is that case in New York, for example, of Vincent Jenkins, who has been in jail for 17 years, and DNA testing showed that the semen, the predominant semen sample -- and I put this in the record, because I think this is very typical of what we see. A woman was raped in a park in Buffalo, New York. She was walking in that park with her husband. A man came from behind, grabbed her, raped her. He smelled of liquor. When he got up, he said: "The liquor made me do it." He left. She was immediately taken to the hospital. Vaginal and cervical swabs were taken at that time. Four weeks later, Mr. Jenkins was brought before her, exhibited for 25 minutes. She didn't identify him. He

was asked to talk. She didn't identify him. Police and prosecutorial officials persuaded her that this must be the guy. He met the description. He had a prior criminal record.

Seventeen years later, when the testing was completed, she had indicated at the time of the sexual assault that her husband had had prior consensual sex with her 24 hours earlier. The DNA testing showed, very interestingly it was done blindly, that Jenkins did not match either of the two DNA patterns, either the predominant pattern that was found on the vaginal swab and on the cervical swab, and a trace amount of male DNA that was found on the cervical swab, which is exactly as everyone at this table knows, what you would expect from prior consensual sex. That would be the trace presumably of her husband. She is still married to that gentleman. And when the knowns were tested, it turned out that the trace amount of DNA did not come back and match her husband. And at that point, despite, Kathryn, requests to the prosecutor that they really didn't want to do it to these people, because going back and saying to her, well, you know, of course she was insisting the tests were wrong, but you know, I think that is highly unlikely, because it was cross validated with victim samples and everything else. And we have resistance in the court. We have prosecutors coming into court and saying, well, what really happened in this case is that there were three rapists, you know, there was this defendant, who didn't ejaculate, and she didn't notice that two other people raped her in the park that afternoon. And if you think that kind of explanation is an exaggeration, I'll show you the cases of people on death row in Texas where there are DNA tests that are exonerating people or strong evidence of innocence, and the Texas Court of Criminal Appeals, which is an elected court in capital cases in particular doesn't reverse them.

So I mean I just have to out of sheer fairness tell you that in these kind of cases where modern technology is showing that the criminal justice system has failed, and there are people still in power, as in the Jenkins case, the same prosecutor, who tried that case was the one that was in the office 17 years later making the decisions about what should be done, these people will come up with cockamamie theories you wouldn't believe, and danger frankly even in a statute. I mean in truth, the statute should -- the first, Part B, which is a court's discretion standard for reasonable possibility exists a petitioner's verdict of sentence would have been more favorable, all right, I can easily see in death penalty states, and this is designed to cover, you know, the possibility of the DNA test being put forward so somebody doesn't get executed, as opposed to life in prison, which can easily happen, let's say, if there is a murder or sexual assault, and then it turns out that the DNA excludes somebody from the sexual assault, but they say no, that doesn't clear them of the murder, that would prevent an execution or other evidence like that.

Even that kind of discretion in these old cases, I fear based on my experience, is very frequently going to be exercised against petitioners, because, you know, we put in lip service to finality of the system, but the truth of the matter is that there is a lot of people that pay a price when these cases uncover things, and I'm just -- I guess this whole tirade is just to tell you that this is absolutely the least you can do, if you must know the truth, because it will not be easy to implement this. This is not self-executing. There is no public defender service in the state of Alabama. There is no public defender service in the state of Mississippi. We do not even get requests from the state in any great number. And don't tell me that the criminal justice systems in these jurisdictions is so much better than the criminal justice system in Illinois. I don't think it's better at all.

Yet, in the State of Illinois, there have been 14 postconviction DNA exonerations, because you have a statute, and because people recognize the power of the technology, and there are vigorous advocates who

will raise the issue, and you get the tests. There have been seven in New York where there is a statute. Those are the two largest numbers out of the 64 exonerations in North America, and those are the two states where there are statutes. All right. So this is just the beginning.

And, frankly, the next order of business ought to be who is going to help pay for this. In other words, is the federal government before this administration ends going to do something to make this happen, because passing, you know, these kinds of things are not self-executing. It's very, very hard, and every piece of data we have says that there are thousands of people in jail who could prove their innocence with this kind of testing so I urge you to pass it.

JUSTICE REINSTEIN: If you look at the bottom of page two of the comments on the procedures of the pretesting phase where we talk about the fact that the court needing flexibility in handling the requests and might wish to refer it to something like the Innocence Project, which would be a resource center that specializes in that type of testing. And other than the Innocence Project, isn't there one other one that is --

BARRY SCHECK: Oh, no. No. No. There is one at the University of Wisconsin Law School now. I think by the end of -- really by the fall, we will have at least 15 to 20 law schools --

JUSTICE REINSTEIN: Okay.

BARRY SCHECK: -- and other centers that will start taking up these cases in DNA and non-DNA cases.

JUSTICE REINSTEIN: But when you talk about local public defenders officers or a court-appointed counsel in a lot of the jurisdictions, there are -- the ones who have a clue about this are far and few between, if you get beyond the specialized resource centers. And I don't know whether it's appropriate to tie in laboratory funding with passage of a mandatory statute. You know, I know there is a lot of legislation and funding that gets tied into a state doing something; for example, truth in sentencing laws, if you have an 85 percent law, you get money from the federal government for certain things. And I don't know whether this commission, you know, wants to entertain something like that.

MICHAEL SMITH: It's hard to think that that is not worth talking about. You know, I don't know exactly where it goes though, and we don't have a committee on that, unless it goes in your committee, Ron, if you are in favor of taking it up.

JUSTICE REINSTEIN: Well, I guess one thing that we looked to would be -- and that would probably be from a couple of people on our committee that have more knowledge about this than me is what happens in the federal process as far as, you know, when you pass legislation, as far as tying in money to statutes, and this is not just a federal statute. This would be having a state having to pass a statute, or in some instances, a State Supreme Court having to promulgate a rule and telling, you know, the Supreme Court of the State of Alabama that you have to promulgate a rule, or legislators in Kentucky that you have to pass some legislation whereas you can tie funds into that and say you don't have to do anything, but if you want this money for this purpose then you have to have this rule or statute.

BARRY SCHECK: Actually, in that regard, we passed this uniform statute so it could have applicability to any state, but it even can have federal application. I mean one way to do this that I think would be the most efficient, frankly, and is in keeping with the federal function in terms of the millions of dollars that are being put towards DNA testing is simply to pass the statute on the federal level, which says that if

somebody can prove their innocence, or there is a reasonable probability that you wouldn't have been convicted if you have a favorable DNA test result that the states have 30 days to afford you an opportunity for such a test; and then if they don't afford you that opportunity for a test, the Federal District Court can order a test either by, you know, outsourcing it, payment from the Federal Court, or having the FBR or some other lab do it.

And then after that, obviously the statute could be written in one of two ways. It could be written in a way that then remands it to the state court for an opportunity to entertain a claim that the DNA results are favorable, or to let it go back into the Federal Court.

Actually, I must say that in doing further research on this concept that we have discussed, it actually seems to me that if Congress would pass such a statute, the standard that we use here could actually be sustained constitutionally in terms of invalidating a state conviction, but that is more federalism in Federal Court's discussion than you really want to entertain at this table, I think. But I do think that there is a -- without micromanaging the details of it, I do think it is a federal function.

I mean right now when you look at the crime labs all across the country, you know, we are just beginning to do the era of STR testing. I can't begin to tell you the number of conversations that I have had with prosecutors and police chiefs across the country looking at these old cases, and the argument that I think should be persuasive and often is, but not always, is why don't you do the DNA testing on this old case, because one way or another we will get an STR result. We will stick it into the data bank. If this person is really the serial rapist or serial killer that you believe, right, maybe we will, as we begin to look at old unsolved cases, we'll solve others that this person committed; and if the person didn't do it, or didn't do all of the ones you charged then we will know the truth about that.

I mean we are at the beginning of an era where law enforcement has to go back and look at old unsolved cases, and I assure you you are going to find thousands of serial murderers and serial rapists. Our data from the 64 DNA exonerations shows that close to a third of them involve multiple perpetrators -- multiple crimes. I mean in these the defendants were either charged with more than one transaction, or when they were tried, there were prior similar acts introduced to convict them; or when they were exonerated, the person who was found to have really committed the crime through DNA evidence had committed more than one crime. And the more we look at these untyped rape cases, you know, like the 12,000 we are outsourcing in the New York City Police Department now, you know it. You know we are going to find that these are serial offenders, and it just makes law enforcement sense.

I mean I am arguing right now with the District Attorney in Dallas, Texas, Mr. Hill, about a mentally retarded guy, who is accused of -- he has got an August 5th execution date for the crime. He was convicted of strangling a woman and killing her in a bathtub. The chief evidence against him in the case where he went to trial was a confession. He was -- there were three women killed, two black, one white. The strongest case involved the black woman victim, but they didn't try him for that one. They tried him for the white victim, because as you all know, statistically, there is a better chance he will get the death sentence if he is tried on that case, and indeed he was given the death sentence. And now my request to him is very simply, let's type him. I mean what is the big aggravation here? You'll get it. Let's type them with STRs by a lab that is qualified to do STR testing. It will clear all three of them, right, and maybe you will find other unsolved cases. And we are still in negotiations.

I see that certain people in the audience may be interested in hearing this.

JEFFREY THOMA: Not surprisingly, I agree with Ron and Barry on this. I think that it makes a lot of sense to tie it somehow federally, because we have an overriding concern for due process from the federal constitution; and despite that, certain states, mine among them, have passed statutes limiting discovery. Now, fortunately, we have a federal circuit that has saw to it that the overriding due process concern on discovery overrides these statutes in addition to what we have is called tentative before the due process concerns such as under Kiles and Brady and other things for exculpatory evidence.

The states, still, as California is not, alone. I mean, in fact, if anything, it's a little more liberal in this regard do not, I believe, on their own see this overriding concern for due process; and if we can tie something like this to a federal statute, with regard to funding, I think we will see, hesitantly, what Barry says is that they have -- basically the system wants itself to be perfect or considered perfect, and it's not, and it's extremely difficult to get these cases before it; and whatever we can do in that regard, I think is really crucial, and we are some of the only people that can do it in addition to Barry's system that we just talked about.

DOCTOR CROW: Let me ask whether this suggestion of Barry's goes beyond the wishes of the board group?

JUSTICE REINSTEIN: No, not really. It's one of the things that we have -- you mean as far as the funding issue?

DOCTOR CROW: No, I meant the federal aspect of this.

BARRY SCHECK: We didn't -- the idea was to pass a uniform -- a uniform statute without saying which body should pass it. I mean the suggestion that this, that this kind of remedy ought to exist on a federal level, I mean I guess my reluctance is that this -- we didn't draft a federal statute, because it is so complicated that that in some ways is best left to the constitutional and habeas wizards in Congress, or something else, I mean; but in principal to say this isn't somehow potentially a federal function, and it's a way of applying it to the states, I think --

CHRISTOPHER ASPLEN: I would have a different interpretation of that. In the conversations, particularly in the last conversation that we had, the last conference call that we had where Margaret Berger was involved, I think it was viewed as a resource for the states for a potential -- I am sorry -- you are not hearing me. A resource for the states potential state legislation, but when the issue of federal legislation came up, it was not deemed designed for federal legislation; that that really, you know, especially in the context of a habeas, it was, I think that that was somewhat rejected as the development of this, but that is a different issue than tying this -- a statute like this to federal funds, and I think that that -- that is a different issue that we need to address differently and decide which, if either of those want to do it, and I'm not saying that the idea of federal legislation is off the commission's table; but I think in the context of the working group's discussions, I think the idea, and Judge or Kathryn correct me if my interpretation is wrong, but it wasn't really perceived as quote/unquote federal legislation.

JUSTICE REINSTEIN: I had to cut out about halfway through our phone conversation, because I was leaving town.

CHRISTOPHER ASPLEN: Oh, okay. I mean is that --

KATHRYN TURMAN: I remember, yeah.

BARRY SCHECK: Actually, as I recall it, I don't think it's dissimilar to your recollection, because we agreed without any -- with very much discussion that it would not be useful for this body to try to draft a federal statute that implemented these principles, and I agree with that. All right. All that I'm really suggesting is that if we were to agree that this kind of uniform statute is an appropriate form of relief, without telling either the administration or anyone in Congress who would be thinking of trying to implement this kind of thing, I mean, in principle, to say that federal funding would be appropriate to implement this kind of relief, in whatever form they deem wise is good. That is all.

MICHAEL SMITH: So really you were talking about two separate things. One is the funding because this might be more likely to have affect if there were funds available for its implementation. You were talking about an additional matter, which might be worthy of mention by this commission, having to do with the inaccessibility of federal court help in the event that a state doesn't.

BARRY SCHECK: Yeah, I mean, in other words --

MICHAEL SMITH: Two separate issues?

BARRY SCHECK: Right. And I just didn't think it necessary. I mean it seemed to me that if we as a commission are saying this kind of thing ought to be appropriate, if we are saying for every state in the country, it's not exactly like we are saying that the federal courts shouldn't do it if it arises in the context of federal courts, but I agree with you, Chris, that to then take on the additional burden of trying to figure out exactly how one could implement this with federal legislation may be a game that is not worth the candle. In other words, I recognize that there might be a lot of different considerations in terms of whether you do this as a habeas statute, whether you do this as some other kind of statute. The relationship between state and federal court, as we all know, legally is very, very complicated, and it just seemed to me beyond the purview of the commission; but if we are on record of saying we favor this kind of stuff in principle, and we think that federal funding should be put forth to implement it in a number of ways, we are not saying that we are against the federal statute. We are not recommending a specific one either.

JUSTICE REINSTEIN: As far as federal funding goes for the state statutes, let's start there. The database issue, the backlog issue is extremely important to the states, and for them to get some federal funding to increase the ability of the labs to address the backlog issue, the old sample issue and the like, and if there is to be federal funding, you know, it's not out of the question to tie in that if you want this. Then you have to do this as well, but I wouldn't want to hurt the efforts of the labs either, because, you know, to throw it in to make it a political football, but maybe that is what, you know, what the will of the commission would be at some point.

PAUL FERRARA: I might just mention or suggest that we may want to someplace in this uniform statute just specify that the lab, any laboratory conducting the testing pursuant to this demonstrably meet the standards of the DNA advisory board. Having established that, those are the requirements for federal funding from the laboratories anyway.

MICHAEL SMITH: I mean you were talking before about the difficulty of getting -- of moving a case.

BARRY SCHECK: Yeah.

MICHAEL SMITH: I am curious. Is there -- you were talking to some extent about the psychological barriers to forward movement.

Are there financial barriers to forward movement?

I mean is the cost a significant factor do you suppose in resistance to opening an old case or not?

BARRY SCHECK: No. I think that the testing is cheap.

CHRISTOPHER ASPLEN: The testing isn't the issue.

JEFFREY THOMA: Counsel is a small issue, but as opposed to a person that is innocently convicted and the amount of money that is extended during that term, it's -- it's, you know, infinitesimal.

BARRY SCHECK: The real problem, frankly, is finding the evidence; and once you find it, getting access to testing.

MICHAEL SMITH: For that you need a lawyer.

BARRY SCHECK: Well, you need a lawyer, and you need to screen it. You need to make out -- you know that is where the expense comes. You have to get the old transcripts. You have to get the lab reports. You have to go into federal court and sue them. That is what we are doing now, we are going to federal court and filing 1983 actions. I mean I will show you things.

In the State of Missouri, we have, I think, 11 cases now, and when you call the evidence holders in the State of Missouri in cases where it's clear that a DNA test that is favorable to the defendant would exonerate the defendant, and you send them a letter saying, Please don't throw away the evidence, the evidence manager writes us back and says, I'm not listening to you. I don't care what you say. We'll do whatever we want. We will destroy it whenever we want, and we don't recognize any need to preserve this, or do anything about it. The State of Missouri, the state of Louisiana, the State of Florida; and, you know, there is other states where we just haven't even heard from that those states are aggressively resisting any effort to even find the evidence in cases would be plainly exculpatory. And we are taking them to court.

DOCTOR CROW: So the answer to his question is that it's a psychological reputation preserving what it is.

BARRY SCHECK: Yeah, it's all that.

JUSTICE REINSTEIN: The testing is easy. Appointment of counsel is not as easy, but it's -- and in some jurisdictions, like you said, in the south it's tough, I mean, to get appointment of counsel, especially when, you know, as low as they pay for court-appointed counsel if you don't have a local public defender's office, the workload, you know, if you look at the comment on page 2 in the middle, in order to determine the probable impact of exculpatory DNA test results, the court may have to examine the transcript of the proceedings below in order to consider relevant factors. In our jurisdiction what happens, let's say, cases 12 years ago, the judge is gone off the bench, has died. I screen all the postconviction relief requests.

Well, it's easy for me to screen to determine on ineffective assistance of counsel whether it's time barred, whether it has already been raised before in a prior petition or on appeal. Any claims that the person is raising now, and you either move the petition along, or you dismiss it summarily based on that.

Here you are talking about a judge who has no knowledge of the case pulling together all the transcripts, reading them through. You know, see that is how I envision it. Tell me what happens.

BARRY SCHECK: No. No. No. I mean that's -- frankly that is the lawyer's function, isn't it?

MICHAEL SMITH: It should be.

JUSTICE REINSTEIN: But it is, that is what I am saying. What is going to happen is you have to appoint counsel, because the judge isn't going to do that initially, because the way it's going to be initiated is you are going to -- a judge is going to get a petition from somebody, an inmate in the Department of Corrections saying, hey, I want this stuff tested, because I've always said I was innocent. It was an eyewitness identification case, and, hey, I heard about this thing about STRs, STRs, or whatever. And so what is a judge to do. You have to act on it, and the first thing you should do is appoint counsel.

We normally on subsequent petitions for postconviction relief do not afford the right to counsel to somebody, because they have already had a lawyer on appeal; they have already had a lawyer on their first petition, but this is different. So in that regard, you are talking about a judge isn't going to look at that initially.

MICHAEL SMITH: In the inevitable that the considerations of cost and burdens, I mean are going to affect the initial reaction of the judge receiving requests of this kind, and I thought that was the financing question that you were raising at the beginning of this discussion. That is, absent in states that aren't moved on their own back to take up that challenge and appoint counsel and provide for it, that federal funding something can trigger federal funding for that purpose would seem to be necessary, or to get implementation of the statute from the state. Maybe that is wrong.

BARRY SCHECK: No. No. I think it is exactly right, but that funding is not going to be as large as it might be, for example, in the ordinary court-appointed case. I mean, in other words, there is ways of financing this at the federal level. I mean these are the kinds of cases I assure you that law schools and pro bono lawyers would take on. So, in other words, I don't think that you are going to have to spend very much money, if any, or very much money at all paying people by the hour to undertake these cases, but the expenses are doing it. In other words, you know, the expenses that we have: We have to pay for transcripts; we have to pay for reproduction costs; we have, you know, our law school picks up the overhead, and the other law schools will be doing that, but there is some amount of money there, but that is not like, you know, what they call CJA funding in a federal case. You know, I mean you are not paying people even $50, $75 an hour. It's not happening here. This is for a relatively modest kind of grant that the federal government could give various pro bono entities in states. You would get a very, very large return, and what people on this commission recognize, which unfortunately has not filtered through to people in the trenches, is that you will solve a lot of other crimes when you do this, because you are using the STRs. That just is not a message that has gotten through yet.

JUSTICE REINSTEIN: How do you address the issue in Illinois and in New York of a concern that other people would have that this opens the floodgates toward, you know, every single inmate filing some type of petition, because evidently that has not happened in those jurisdictions. I mean I don't know.

BARRY SCHECK: Not really. It's a high standard. This is a very high standard.

CHRISTOPHER ASPLEN: Let me ask this question. If one of the considerations is tying some sort of federal funding to the passage of legislation like this, do we run the risk of shooting ourselves in the foot and not being able to provide funding to those states which need it the most, because they can't convince their state legislators to pass this legislation?

You have got the defenders association of the state saying, This is one of the most important things we should be doing; but you have got the state legislators, who are the same people who aren't funding their defenders association, saying you want us to do what. You want us to pass this legislation that is going to make it easier for these people. And, again, it may be based on a lack of an understanding of the issue, but might we run the risk of preventing those states which need the funding the most from getting it, because they can't convince their state legislators to do it. It's not true that just because you offer federal funding that that legislation is necessarily going to get passed.

BARRY SCHECK: You could tie it to the funding.

JUSTICE REINSTEIN: The backlog.

BARRY SCHECK: Well, you could do that, but I think that you are making -- you are making an argument that there is a possible backfiring of doing that, but you could tie it in a way that isn't an attempt to get major leverage here, but might help funding for this statutory execution itself. That is it could become more attractive to pass this statute and easier for judges to use it if there was federal funding available for the expenses in there. You decide all this other money. I mean I'm not leveraged. Simply a funding mandate if you like.

DOCTOR CROW: Well, is there a consensus emerging that some statement about the desirability of some federal help, a weak statement, would be in order?

Judge Reinstein.

JUSTICE REINSTEIN: Well, it definitely bears looking into, but I want to know about the implications, you know, kind of look like what Chris is discussing.

I mean I don't want to hurt the lab's effort, but at the same time should you tell a legislature, well, you know, you can't have your cake and eat it, too. If you want the money to -- if you want some money to address your backlog and your old samples and what not, which will help you with solving crimes and, you know, faster and solving cases that have been in the system, cold cases, then you also have to consider the other end and decide at the other end of the table.

CHRISTOPHER ASPLEN: Given the nature of -- given the current nature of the legislation, I am not sure that that would not be a relatively fruitless effort on the part of the commission. I mean the bottom line is that issue is going to be addressed. That funding is either going to go out there, or it is not going to go out there based on the decisions that Congress makes in the next month or two. We could spend a lot

of time deciding whether or not we could attach it to that funding, and I don't think we would have any affect on that dialogue.

Now, whether or not there is -- the commission wants to establish a new dialogue or new funding for that process, I think is maybe where there might be an effective discussion, but my concern is just the state of the process right now.

BARRY SCHECK: But, Chris, and I think what Michael is saying is that you don't necessarily have to make it a condition on any federal funding, but you could -- you could indicate that if a state did pass this kind of a statute that there would be additional funding. I mean --

MICHAEL SMITH: Well, you are saying it's modest. I think that is right so long as it's not paying of lawyers, but rather for expenses. It's a modest amount of money and provides a little bit of help. That is all.

BARRY SCHECK: And you are providing some incentive for the states to do that, and the reason I think it's peculiarly a federal function is: (A) it's a national data bank system we are setting up; (B) these cases when you use STRs are going to its multistate. You are going to find offenders in one jurisdiction, when you break the case that are, you know, incarcerated in another jurisdiction, or committed crimes in another jurisdiction. We just see that. I mean what better example can we have than this -- what is the name of this serial killer, alleged serial killer that was just picked up in Texas.

PARTICIPANT: Ramierez.

BARRY SCHECK: Ramierez. Yeah, I mean there was a number of sexual homicides. I think the Kentucky family was even considering a lawsuit about the failure to apprehend him, but certainly I mean that is the kind of case. I mean even looking at we are in Boston, I guess, wouldn't be inappropriate to note that the Boston Police Department is looking into whether the Boston Strangler was really Albert DeSalvo or more than one person. I mean really that is the nature of these cases.

I mean Chief Hillard knows we had this case in Chicago, the so called beauty shop bandit, where DNA exonerated John Willis, two very peculiar MOs, you know, of somebody walked into a beauty shop, would pull out a gun, demand oral sex, put everybody into a back room, ask them to count to a thousand while he made his escape. Willis is convicted of those two offenses, and yet defenses continue in bars this time, same MO, by a gentleman who was picked up and convicted of it named McGruder, and then DNA tests were conducted that implicated McGruder in both the crimes Willis was convicted of.

I mean I can give you case after case after case like this, and these are federal functions; and states are not going to be so eager to do these things, because people pay a price when these things come out. Even if it's nobody's fault, you know, it looks look like a political embarrassment; and if you are going to effectuate civil rights, that has historically been a federal function, and this technology does that, and we should do it.

DOCTOR CROW: Judge Reinstein, tell us what to do.

JUSTICE REINSTEIN: Well, no, I mean funding outstanding, I think what our work group is looking for is any types of additional comments as far as the statute itself what people think about that.

MICHAEL SMITH: I have one question for you, Ron, about that that is in the discussion on page 2 about the things that a court might need to consider when deciding about the mandatory testing categorization, right. And the question -- there is this discussion here of if the petitioner testified in support of consent, I have got that one. So I understand that one. Although I take it that is the not the same thing as acquiescing in a plea colloquy, you know. I mean so there -- and there is sort of subtlety to this, a little bit, because I have a feeling that, you know, a failure to maintain innocence is what is triggered by reading that; but a failure to maintain innocence, we have all these cases, exoneration cases, and we have got confessions and pleas and all that kind of stuff. So it occurred to me that that may be saying more than you intend, not that the judge shouldn't consider it, but that the question of what it means is not --

JUSTICE REINSTEIN: Well, this tied into the category one through fives that we developed; and category five, we started out saying was a frivolous claim, and we took it kind of initially from what The Innocence Project was doing, that one of the things they screened for was it a consent defense; or in a murder case was it a self-defense claim; and if that were the case, then those kind of cases will be screened out. But then we did get into a discussion later on whether or not there was a tactical decision by counsel, but if the defendant actually got up on the stand, and we talked about that when we looked at the transcript and testified that he did it, but it was consensual, you know, you can only go so far.

MICHAEL SMITH: That is right. No, I hear that.

JEFFREY THOMA: Just one point, because the expense issue is a fairly modest proposal, and it may either be the courts or counsel, if there is pro bono counsel that is looking into it, and we have a pretty good statute here with a fairly high bar. Perhaps we could write something in there whether it's the court or counsel that would need the transcript or need other items that it would be our advice that those are made available in those cases that it would be most crucial to the distinction of guilt or innocence.

DOCTOR CROW: You have been conspicuously quiet.

GEORGE CLARKE: I was saving it up. Actually, just a note on the consent offenses. As a practical matter consent cases, the defendant testifies anyway so that does happen, but I'll have to admit it has always troubled me a little bit that should that tie that person in to no longer having the right to DNA typing, that might sound like a reversal of position in a sense or traditional position. But we know defendants usually adopt the weak point, regardless of what the facts are. So, frankly, it has always troubled me oddly enough a little bit that we hold that against the person if later they are deep protesting their innocence, and I think as a practical matter this is an approach that will work. There is going to be very few and far between cases where I think that applies, but I don't think that should necessarily be totally disqualified, because of the power of this technique and the fact that defendants adopt defenses that they think will be the most effective at trial, even if it's contrary to their knowledge of the facts in the case. So that is more an aside as much as anything.

But while we are on that topic, in that specific paragraph on page 2, the second full paragraph down, I think there needs to be -- and I realize there is a reference to the recommendations -- I think there needs to be an explicit comment to direct judges that this decision has to be made within the context of the facts of the case.

One example that comes to mind is a semen stain on a victim's bedding, clothing. That may be absolutely irrelevant to the facts of the crime, or it may be critical to the facts of the crime, and I think judges in particular -- well, everyone who sees these, sees such a model statute needs an explicit reference in that paragraph that what needs to be considered is that this evidence within the confines of the context or that is within the context of the facts of the crime itself.

JUSTICE REINSTEIN: Well, you know, you are right that throughout the comment we just took excerpts from the recommendations and, you know, in that particular paragraph, we said see that, but, yeah, I think that is a good point, Woody.

GEORGE CLARKE: Do you want me to keep going, Doctor Crow?

DOCTOR CROW: Sure. I insist.

GEORGE CLARKE: All right. The other is going back to the statute itself on the first page, regarding discovery. And, again, I think my comments frankly are within the confines of what you discussed and intend anyway, but I think it does or should be an explicit reference that discovery shall be provided to both sides. I think that is underlying all of this, but knowing how statutes can be read sometimes I think explicit references are genuinely needed.

Then the other -- only other major comment I had, frankly, relates oddly enough, Judge Reinstein, to both your state and mine, that is dealing with destruction of evidence, since we are -- I think the US Supreme Court cases are both from Arizona and California that deal with that that there should be a reference that if evidence has been destructed, or destroyed rather, that doesn't create any right to different relief than what is currently the case under United States Supreme Court and individual state law anyway. I know the reference in the statute is to the evidence has not been destroyed, but my fear would be that there would be an interpretation possible that if it has been destroyed that that creates some right to some relief in some fashion when in reality, governing, you know, the law in individual jurisdictions and by the United States Supreme Court should govern this whole area anyway and will.

DOCTOR CROW: Chris said at the beginning of the meeting that sitting around the periphery of the room ordinarily we would have an opportunity to speak at the end, but we decided to provide that opportunity at various points, and I think now is a particular point, and I wonder if anyone has something to say on this particular issue.

(Pause.)

DOCTOR CROW: I hear none. Hearing none, I will proceed.

Well, I wonder if the consensus of the group is that this goes back to your committee with the request to look at it again and develop an implementation plan, something to that order.

Does it make sense to you?

BARRY SCHECK: It seems to me -- I mean the suggestions that have been made are both, in terms of drafting Paul's suggestion about adding a proviso that it should be a laboratory that is consistent with the DAB, that is -- I don't think we need to go back to committee to say that is okay, nor to put a provision in there that Woody wants that Arizona versus Youngblood is still the law and notwithstanding anything in

this section. That is okay. And if we could just have a consensus that it would be a good idea to have federal mandate, to use Michael's words, of some kind of funding to implement this kind of statute, why couldn't it just go off like that? I mean, in other words, I don't know if there -- unless you want us to go back and do some larger plan as the next step, but it seems to me that those amendments and just the sense of the body that it would be good to have a federal -- federally funded mandate to implement this on a state level without telling Congress exactly how to do it with the Justice Department.

MICHAEL SMITH: Yeah, although I was thinking that there is value in eliminating that suggestion to the expenses --

BARRY SCHECK: Right. Yes.

MICHAEL SMITH: -- but for precisely the reason you and I expect how that would be implemented that makes it more manageable.

BARRY SCHECK: But I see no reason for the committee not to put before the commission another writing. I think that might be a good idea, because I do think that paragraph on page 2 might warrant some additional.

DOCTOR CROW: And the working group will have access to this discussion that has gone on here and what has been emerged from this.

JEFFREY THOMA: What is the timing of that? Do they have another working group meeting scheduled before our next meeting, or could it be accommodated or --

CHRISTOPHER ASPLEN: It could be accommodated one way or another. The group is very eager to get together. Yeah, I think -- I think we can get together before that time before the next commission meeting. We'll work something out.

JUSTICE REINSTEIN: The other thing that you wanted to raise to me. I don't know if you want to do it later at the end of the meeting was where does our group go now that the guidelines are done, recommendations are done, whatever the word we used today. And we have done our second cut on the statute, and we will refine that, but you had some ideas on other things that you might want us to do, I thought.

CHRISTOPHER ASPLEN: Well, to some extent that is really what we are dealing with now, and so you know, this discussion that we have just over the past hour is of no surprise to any of us on the working group. The implementation really was quite frankly always the issue. We needed something to implement, which is why this statute was developed. We started this process off with a working group bringing people in like from the ABA's death penalty project to talk to us about just how bad it is out there in terms of the lack of resources available to do these kinds of things. So, again, the difficulty in reaching resolution is of no surprise.

So what Ron and I spoke a little bit about on Friday I think it was whether or not we have addressed or defined that issue enough. Quite frankly, given, you know, what we have said about the past 45 minutes, maybe we haven't. One reason not to try to do this now is, quite frankly, because the experience with the Attorney General indicates that she likes detail. She wants an answer of how she should get something

done. We may not be able to give her all those answers, but she will be looking for suggestions as to how to implement the changes that we are trying to effect here.

So I think there is a value to going back to the working group for a specific implementation plan on how to get these things accomplished. I think part of that is getting a better analysis of the current state of the problem out there.

JUSTICE REINSTEIN: I think it's really jurisdictional. I mean Barry talked about some states in the south in particular. I mean in our state, if I want to get it done as an individual judge, I'll get it done, and that is because the Supreme Court rulemaking power over, you know, trumps the legislation; but in some jurisdictions, that is just not going to happen evidently. It may not even happen, because as you say, the robot maybe is the judiciary, as opposed to anybody else.

CHRISTOPHER ASPLEN: And one of the -- and maybe the most expeditious way to get to that point is one of the things we anticipated, and that was sending this statute to the Attorney General with the recommendation that she essentially advocate for its acceptance by the individual states, be that passage in the legislation, or send it to the Supreme Court justices, send it to the ABA, but to get it out there that way and use the uniform statute as a, you know, as a model.

MICHAEL SMITH: Make it part of the legislative package, a recommendation for a small amount of appropriations.

CHRISTOPHER ASPLEN: Fine.

DOCTOR CROW: David Coffman, did I overlook you?

DAVID COFFMAN: No. I am on the wrong side of this microphone. I am David Coffman. I am with the Florida Department of Law Enforcement, and my primary duties are with the DNA database, and I'm all for working these old historical cases that have not submitted to the lab. In fact, we are starting a pilot project in September where we are going to identify 250 cases that were never submitted, for whatever reason, to the crime labs in the State of Florida, and we are going to work them in Tallahassee.

One thing I would like to ask. This is an interesting proposal, and I'm all for finding incentives to get people to do what they need to do, but I was wondering is it possible that this could be linked? I mean I know in our Lab Working Group, I am a very new member to that group, but we discussed offender samples, getting the backlog taken care of, and we have also identified these cases that aren't being submitted, and we have talked about funding possibly for that. I know that is in the early stages.

Could this possibly be linked, you know, this incentive be linked through working historical forensic cases, rather than to the data bank, because I'm afraid it's going to -- I am afraid the legislature is -- just some of the state legislatures -- I think ours will do fine. I mean they are trying to fund us now to get us totally converted, but I would like it linked to working old historical cases, or the cases that aren't being submitted, rather than to the data bank, because I think in our situation we have actually exonerated people that were in prison for crimes by giving the samples done in a timely manner so that you can get it done both ways. That is all I have to say on that.

DOCTOR CROW: Thanks. Yeah, Phil.

DOCTOR REILLY: I have a concern that may be too detailed for the statute this time, but I was deeply concerned to hear what Barry had to say about what I will characterize as sometimes the resistance of evidence managers to produce evidence on request, and indeed the possibility that they would actually destroy evidence.

Is there a way of statute like this, or a regulation pursuant to it could deal with evidence known to exist at the time of the request but destroyed by the time that efforts went to testing, because to me the deliberate destruction, the deliberate and knowing destruction of evidence after a request has been made for it should somehow work to the benefit of the defendant, the convicted individuals making the request, and I had never thought about this, but basically what Barry has had to said, I am now concerned that it's a possibility. I have heard nothing to say that it isn't a possibility.

What happens in that case, you have got -- you know the evidence exists. You know that it satisfies all other aspects of the statute. Then you go to do the testing, and the evidence no longer exists, because it has been knowingly destroyed, or because it has disappeared.

BARRY SCHECK: What I would suggest in that regard is that I think that -- I know Woody would be reluctant to put into a statute anything that said, even if they deliberately destroyed a sample after it was requested that that would still vacate the conviction, because you could not necessarily show that the tests would have come out in favor of defendant. Basically, we are citing Arizona versus Youngblood, but I think Phil has got a great suggestion that we probably should put in here a provision that says that once a holder of the evidence is notified that a request is being made for this kind of testing that it should be preserved, or words to that effect.

Frankly, the thing to do --

MICHAEL SMITH: Forever?

BARRY SCHECK: What?

MICHAEL SMITH: Forever?

BARRY SCHECK: No, until the -- until the application is decided, because I can assure you in many jurisdictions that is -- we send these letters out saying we are -- we have filed an action in court, or we are going to file an action in court. We think you have the evidence. Please preserve it, and it's the official policy, for example, in Missouri, they say, We don't care. We will do whatever we want. And if it takes you three or four years to get this finally adjudicated in the court, and they come back and say, now, where is evidence, if it's not there, it is not there.

JUSTICE REINSTEIN: Well, what if you ask for a court order for preservation?

BARRY SCHECK: We go to court to ask for a court order, and they say that we are one of those jurisdictions like Florida, David, there is a case called Wilton Detch in Florida -- I'm sure you are familiar with it -- that is typical. Florida has a statute that says you can't get newly-discovered evidence of innocence within three years of final conviction. So we are talking about cases in the '80s. So what we did is a sexual -- oh, my god. For the record that was thunder.

(Laughter.)

BARRY SCHECK: Wilton Detch is a gentleman. It's a one witness sexual assault. There were two hung juries. He was finally convicted the third time. Application for the evidence. The prosecutor takes the position, yes, it's true if the sperm on the vaginal swabs excludes him, he is innocent, but objects under the Florida statute to having the evidence tested. We then put a Freedom of Information Act request. That was denied. Now, we are going to have to go into federal court, and the prosecutor has now stalled us for three and a half years to get that testing.

They also say that the Florida labs -- well, there is some resistance to either -- our suggestion was let David Coffman's lab test it. They didn't like that either. So, you know, there is some concern, well, what is going to happen to that evidence. How do I know that -- in this case, I think they will preserve it, but in other cases how do I know that they will, because it can take three and a half, four years to get this in front of a judge so they will act on it. Although, as I said before, we are now going to federal court in this case so maybe it will pick up the case.

DOCTOR CROW: Well, it would seem to be relatively simple to get a statement of this kind into the report.

CHRISTOPHER ASPLEN: Would that not be a violation of some sort of evidence tampering law already?

I mean it seems to me if something is --

DOCTOR REILLY: That doesn't solve the problem for the individual seeking postconviction relief. It may punish somebody who deliberately destroys evidence, but it eliminates the one possibility the man may have of proving his innocence.

BARRY SCHECK: They are going to say there is no statute. The statutes say that I am the evidence holder, and after X number of years, at my discretion I can destroy the evidence; and I don't care if you sent me a letter, or you told me that there is an ongoing -- or an application. It doesn't matter.

TERRY GAINER: There is no doubt, Barry, you must get those, but I am just not familiar with law enforcement procedures that run labs, if I got a letter like that that I would just say I don't care.

BARRY SCHECK: It's not our lab.

TERRY GAINER: Who is it?

BARRY SCHECK: Most of this evidence is not in a lab. Most of this evidence is in court clerk's offices. It's in police property clerk's offices. It's in various -- it's in district attorneys safes.

TERRY GAINER: I will speak to either the labs, or on behalf of the police departments again, I am not familiar with the police department or any set of professional standards where they would get a letter like that even on the fly that you are thinking about doing that that they would write a letter back, a chief of police or the lab and say, I don't care what you are going to do. I'm going to do what I want. And I would really be curious to see one of those letters where a chief of police or a lab did that.

BARRY SCHECK: You want one or you want 50?

TERRY GAINER: I would like 50 of them, because I will take them to our organizations and confront them with it. This is as unprofessional as can be.

BARRY SCHECK: You're on.

JEFFREY THOMA: It happens, Terry.

PARTICIPANT: It happens.

CHRISTOPHER ASPLEN: Well, that is exactly the kind of information that would be very valuable to us.

BARRY SCHECK: Let me just be clear for the record, because I know I am not. In other words, in order to make an application like this responsibly, you have to have the transcript, right? You have to have the underlying police reports, or appellate briefs, something where you can really point to the record. So if we get a letter -- I am just reminding you of what you have already passed in the procedures. You get a letter. The inmate says, I'm innocent. The DNA can prove it. The first thing we do is send out a preservation letter, because we don't want anybody to destroy it. We can't go to court immediately, because we don't even have a transcript yet, right. We can't make a responsible showing to the judge. So we need them to hold it until such time as we can pull that together. We don't have money to pay for transcripts, right. So it may take a number of months before you go to court, and it's in that interim period where they will destroy the evidence.

GEORGE CLARKE: Actually, Barry, how many have been destroyed after you have written that letter, and as a result of that letter that you write?

BARRY SCHECK: Well, it has happened in about two or three cases so far, but everything goes out under, but the -- what I'm telling you is that in, for example, in Missouri, and I wish I had -- I could give you the exact name of the person. It's Dale something. He routinely responds: I got your letter. I consider it legally not binding on me. I'll do whatever I want, and I won't look for it.

GEORGE CLARKE: Well, what I mean though is how many have actually destroyed it because of receiving your letter?

BARRY SCHECK: Oh, I don't know. I don't know the answer to that, but I do know that this guy isn't looking, right, and won't do it. And so by ordinary operation of their procedures, he could easily destroy it in the interim, because it takes quite awhile to gather all the necessary materials to meet the very heavy burden that these kinds of statutes require, which we want to do.

TERRY HILLARD: Can I ask, who do you address these letters to? Who do you send them to?

BARRY SCHECK: We send it to the holder of the evidence.

TERRY HILLARD: Well, if you send it to a law enforcement agency, I think the first thing you should do, you should either send it to that chief of the police or the commissioner or the superintendent or his general counsel. You know, I know we receive a number of them in the City of Chicago, either come directly to me and my general counsel get it, and then he moves forward on it. But, you know, you are

probably sending in some of these departments that you are sending that letter to, these might be corporals. They might be a patrolman.

BARRY SCHECK: No. No. No. We essentially get it even from the high up.

TERRY HILLARD: But I would think that, you know, not to blow anything out of proportion, but I would think that you should address it to the head of that agency, you know. That is the way to go up to his general counsel.

DARRELL SANDERS: I apologize for being late, but I got the wrong information. They canceled my flight yesterday, and then they told me the thing started later today than it did so my apology.

DOCTOR CROW: We heard that.

PARTICIPANT: Darrell, we are not meeting tomorrow either.

(Laughter.)

DARRELL SANDERS: As a matter of fact, they told me I didn't have a room. Then what I was wondering though is that the last time we met, it seemed like we spent a lot of time discussing the defense bar's concern about keeping DNA; and, in fact, that was going to be misused, and all that kind of stuff, and I apologize if you addressed it before I came in the room, but it seemed like there was a great deal of concern. As a matter of fact, people were defending you, Barry, in your absence, no, it's not true. And I thought it was great, because you weren't there to defend it. So we was trying to push it through, but there was a great deal of debate about whether we should keep DNA just because of the misuse of the allegations that we would be doing different kinds of profiling with it and stuff. I just wonder how that shakes out with this.

DOCTOR CROW: We are certainly going to have something to say about that later in the day.

DARRELL SANDERS: It's a two-edged sword though. You can't have it both ways, it wouldn't seem to me.

DOCTOR REILLY: I think it is two separate issues. Most of that was discussion about long-term, and I will have something. I wrote something on that for this meeting. Long-term retention of samples in a database versus samples directly involved in a conviction process, I do think the two --

DARRELL SANDERS: I guess the key is that maybe I have been a policeman too long and I am a bit jaded about how the defense bar does some things sometimes, but it seems to me that it's an issue that has to be clearly addressed one way or the other. You can't have it both ways, and the fact that if it's not required statutorily about how you go about those processes of those kinds of things, then people are going to establish their own rules and regulations; and of course I want my voice to be heard with the other law enforcement people. I would be shocked to hear that people are deliberately destroying evidence once they have been notified that a postconviction process has started.

CHRISTOPHER ASPLEN: Can you forward, Barry, to the commission an example where you know that something was destroyed after receiving the letter, after receiving your letter? Not after receiving the

letter the evidence wasn't there, but do you have a specific example that can be forwarded to the commission where upon receiving the letter they destroyed the evidence?

BARRY SCHECK: Yeah, but I said this before, and I want to be clear on it. I don't believe that that was necessarily done intentionally in that particular case. I am not alleging that I have such a case. What I am saying happens is that they tell you in many of these jurisdictions now up front, I don't care about your letter.

DOCTOR REILLY: And my proposal did not go to intent so much as during a period of time when the organization responsible for the evidence should be on notice, it disappeared. It may have been totally accidental. I don't think it should got to intent at all. The end result is still this individual in prison lacks the last remaining opportunity to, you know, innocence.

DOCTOR CROW: Well, I think we have discussed this subject. I know we have, but I think we have pretty well done it in, and that the consensus is pretty clear as to what we think about it, or what you think about it, and it's the committee's job to -- commissioners or working group's job to put it into words.

Having said that, let me declare an intermission, and we will be back again ten minutes after.

(There was a short break taken.)

Crime Scene Investigation Working Group Report
Chief Terrance Gainer

DOCTOR CROW: Well, it's time for the crime scene investigation work group.

Mr. Gainer.

TERRY GAINER: Thank you. We did meet on the 28th of June in Washington, D.C., and it was a well attended meeting and talked, I believe, about at least three major areas, one of which was just finishing up the cover graphics of the brochure that we were to get out, and I believe there is concurrence on that.

I don't know if there is examples here of that, Chris, or not.

CHRISTOPHER ASPLEN: Yes.

TERRY GAINER: That was probably one of the easier ones we did. We also had a -- we probably spent a majority of the meeting with the professors from Eastern Kentucky University talking about the distance learning that we want to do in this area and how that should be done, how long the training should be, what should be in the training, who the target of that training would be, and the professors, whose name escape me from Eastern Kentucky. I think there was a full meeting in Santa Fe, too, and did a presentation, are working that up, and are going to give us some proposals, and really use that brochure as a basis for what that CD training ought to look like.

And they had given us some examples during that meeting of other work they have done, and, you know, both Terry and Darrell are here from that meeting if they want to, and obviously Chris want to add to that, but it was pretty straightforward. We spent quite a bit of time talking about the strength and the weaknesses of that and what the -- what the uniformed officer might need, the investigator responding, what some crime scene people could use, the universality of the CD training and how important we think that is.

And I do believe when we get some feedback from them -- due when, Chris? That I don't recall.

CHRISTOPHER ASPLEN: By the next meeting, which is scheduled.

ROBIN STEELE WILSON: First week of August.

TERRY GAINER: They will have their outline of that CD-ROM?

CHRISTOPHER ASPLEN: Correct.

TERRY GAINER: I believe that is the sum and substance of that. We probably -- one of the areas that I think we want we agreed at the subcommittee meeting we wanted to see if generates some discussion here was an issue, I think, that Chris first raised about making a recommendation to the Attorney General concerning the need to invigorate action within police training circles of technology in general, and the DNA training specifically, and we had quite a bit of back and forth on that, because on first blush it appeared to some of us that if we went forward with this interim proposal, which obviously would be part of a final commission report to the Attorney General that on first blush one might think that we were saying that law enforcement or criminal justice was not doing what it was supposed to do in the area of

training, and I think Chris and others made certain, as I recall Darrell did, too, that is not what we were trying to say, only that technology in many areas is changing so quickly that there just probably hasn't been the police resources dedicated to the keeping up with that technology and training us to that level. And then there was discussion about whether that is precisely what would be the ultimate outcome of this whole commission, or our subcommittee, and I think we at least left that with mixed emotions.

Chris, do you want to try to phrase your point of view on this little deal.

CHRISTOPHER ASPLEN: One of -- one of the issues that came up early on in that working group's work, and I think it really first came up in the Dallas meeting was the nature and extent of law enforcement training in general and the extent to which most law enforcement agencies find themselves with inadequate funding to train their police departments to train their officers, be it their academies or be it their continuing education, be it role departments or larger urban departments, that training is always an issue, and education is always an issue.

That dynamic combined with the lesson that we have learned through the DNA experience, and by that lesson, I mean the extent to which DNA developed in the United States really as a prosecutorial tool before it developed as an investigative tool, it developed as a way to prove cases in court, not really to solve cases at first, and the issue of the lack of nonsuspect cases being worked. The question came up whether or not this commission could make a recommendation to the Attorney General that would suggest to her that we need to look at or assess the issue of law enforcement training and education from a much broader perspective and need to reassess our commitment to law enforcement training and education.

Again, as the chief said, the issue is not is law enforcement doing enough to train their people. The issue is does law enforcement have enough resources, be they personnel, or be they financial to educate their officers to the level that is necessary?

And that the DNA example comes in importantly in that we are only going to ask our law enforcement officers to use technology more, not less. Technology and law enforcement's ability to access it and to implement it is only going to become a bigger issue; and if we don't move along with that dynamic, training law enforcement officers and empowering them to use technology more and more, we are quite frankly just not going to protect our citizenry, as well as we could have otherwise. So that is the issue that arose.

TERRY GAINER: And I can clarify it. I remember you discussing about the DNA in technology that it seemed the whole DNA technology conversation started from the court in the prosecutorial end versus the DNA being used as a police investigative tool, which is contrary to the United Kingdom experience.

CHRISTOPHER ASPLEN: Exactly.

TERRY GAINER: So the discussion was: Did we police maybe miss some opportunities X amount of years ago to be on a cutting edge of where DNA technology should have put us from an investigative point of view and whether, in the other segue I think you were making, Chris, was is there some other piece of technology that we ought to be thinking about from the law enforcement perspective that we would be looking at ten years from now.

CHRISTOPHER ASPLEN: And one thing that we recognized early on was that that is not the charge of this commission, but rather should this commission use DNA as the example to say you need to do something else like a commission like a law enforcement technology summit to call the appropriate members of the community together to begin to evaluate that issue.

JEFFREY THOMA: I'm just going to add one thing from the meeting that I came away with that I really appreciated is law enforcement's willingness to adopt or adapt rather to the change and take on the resources is a key component to getting to this, and I think that working group was a good indication of that. I think both Terrys were talking about from the perspective of a lot of the simple training that goes on really goes on in roll call and that type of thing, but we have to think about and implement even more broad training to see when somebody comes to a scene, okay, you have got to look for more things than you ever did and look at the scene a different way, especially if you are the chief person that is going to be taking in the evidence, and I was very impressed with that change in perspective and that willingness to do that.

Again, I think if we do get back to the resources issue, because you have only got so much time of your troops, the people in the field, and you have only got so much money to use to train them more. So that was a very good meeting.

PAUL FERRARA: The other result of that, too, Jeffrey, is we have found that as we have trained our law enforcement agencies more and more as to what we can do and the sensitivity and the specificity of the methods have improved, the volume of evidence, not just the number of cases, but the volume of items of evidence that are being collected and possess potentially probative investigative information is skyrocketing, and that is partially due, you know, partial cause of the backlog problems.

JEFFREY THOMA: And my point is that the law enforcement is willing to accept that challenge, and they are really doing what they can.

PAUL FERRARA: And I don't want to discourage law enforcement for doing just that.

DOCTOR REILLY: Are you -- Paul, are you saying that in a way to suggest that it's an embarrassment that actually will present a problem in the future of the caseload?

PAUL FERRARA: It already is, Phil, and I think it is partially responsible, I know in Virginia, for a lot of the backlog problem, but we don't discourage it in any way, shape, or form. It's just simply a recognition that the resources for the law enforcement to be able to collect this evidence and recognize it, and for the laboratory to have the resources to handle that volume and complexity of items, because now you are talking about cigarette butts, and obviously, I don't need to elaborate, all of the multiplicity of samples in a given case, and so we are spending -- I think laboratories in general are going to be spending a lot more time on a single case, but that is a good thing.

TERRY GAINER: We also talked about the over reliance on technology and detectives losing those abilities that they should have to interviews and interrogations and tie evidence together that if the tendency were just to gather everything that you see at a scene and literally take the room apart and send it to the lab, we put ourselves at a big disadvantage, and we may be creating a cadre of individuals who don't know -- don't recall have to do some of the basics that go along with solving crimes.

DOCTOR CROW: Mr. Sanders, do you have some comments on this?

Were you a member of this group?

DARRELL SANDERS: Yes, sir. I defer to the superintendent, if you don't mind.

PARTICIPANT: Smart move.

TERRY HILLARD: In light of what Paul was saying, you know, usually take, for instance, the CPD, the mobile crime lab would go to a scene, and I was telling Chris earlier during the meeting that we have identified four distinct and individual patterns. It seemed as if a serial killer is on the south side of Chicago, and one of the things that we found, and I think since the inception of my coming to this commission as a member here and going back and telling the word that the mobile crime lab are going to have to be a lot more effective and a lot more efficient than what they have been when they come down to processing a crime scene, and we have seen that in light of these four incidents while we have called in the FBI recovery, evidence recovery team, to come in and not only assist our mobile crime lab. Did some nose get bent out of shape? Yes, it did. There was some egos hurt. Yes, there was. But the bottom line is we must solve the crime. We don't care who solves it, as long as it gets solved.

And I think going back to what Paul is saying is the mobile crime lab would come in and probably process a crime scene in two or three hours, and away they went. Well, if you bring in the FBI evidence and evidence recovery team in there, they came in approximately eight o'clock one night, and they left at three o'clock the next morning. Then they returned again at 10 o'clock and left at 4:00. And you talk of the vast amount of evidence that they recovered, it was astounding. And I think that is one of the ways that when it comes down to having the mobile crime labs, not only inadequate detectives, but seeing what the people from Paul's side of the thing, from the crime labs, what they do, and it's going to help us. It's going to enhance our operation and make us operate a lot more efficient and a lot more effective when it comes down to processing a crime scene in a lot of these cases that we are trying to solve.

TERRY GAINER: I'm sorry. I was just going to add that it also is going to be a very -- I'm sorry.

DARRELL SANDERS: That's all right. You outrank me, too.

(Laughter.)

TERRY GAINER: No. It adds a tremendous cost, too, to this. I mean there is no doubt about it. When we start processing every crime scene over these what could be days, there is definitely a cost to the system.

I recall just over a year ago when the Metropolitan Police Department, along with the FBI processed the crime scene at the Capitol shootings, I don't have the number, the days in front of me, but I think we tied that scene up for, I think, four days and worked it for about 20 hours a day between the two of us. And at some point given that the number of homicides everybody has, let alone the sexual assault cases, shootings or stabbings, whether it's the expectation of the courts or the public, or the defense bar, or the police, we are going to bind the system up a little bit on these things.

Again, I don't know where that goes. A lot of police chiefs talk about -- I think it came to our greatest attention during the infamous trial of Simpson, and I think most police chiefs, I think sat back and said, probably anybody on a given day could have been caught up with hopefully not as some of the outlandish

blunders that were happening, but the fact that few were processing crime scenes the way the public has suddenly come to expect all these crime scenes to be processed. So I think those days anymore when one and two hours of processing even a murder scene is over, but heaven forbid, I just don't know how we are going to accommodate in jurisdictions where you have two or 300 murders where you could stay on a scene for a day or two to process a crime scene. And then again, what the heck the lab is going to do with all the material you can bring in.

TERRY HILLARD: Well, don't get me wrong. I'm not saying that is going to happen on any and every and every crime scene, especially homicides when we had 700 last year, Lord help us, but I think the next thing of what I'm saying is that we have to get more efficient and more effective at the way we do business, you know; and in order to do that, you have to push the money part of it out of it. You know, you are talking about people's lives here, and I don't agree with Barry all the time, you know, but when you are talking about people's lives, whether you are going to prove that they are innocent or they are guilty, you know, we have to do our job a lot better than what we have been doing it in the past, you know, and you have to realize that, and that can't happen if we process those crime scenes the way they historically did.

TERRY GAINER: I did ask the chief if I could make one more comment, because he is waiting, and he gave me permission to do that. The issue will soon become though for us whether we are going to cherry pick on which crime scenes deserve this VIP crime scene processing and which don't, and I know none of us are saying that, but again given the sheer number, at some point, not dissimilar, I guess, than the small conversations that came up about the search for Mr. and Mrs. Kennedy and the sister-in-law that is there going to be -- should there be an expectation that every crime scene is handled the same for everybody that there is not one where you call the FBI in for one, or you tie up the crime scene at the Capitol, as we did, for four days or not. I mean it might be a whole different debate.

TERRY HILLARD: Terry, I think what I am looking at, I am looking at four distinct serial killers operating in a neighborhood that has been devastated probably in the last 17 months, one with Ryan Harris, the Ryan Harris case, and one where you have close to about 178, 188 convicted registered sex offenders living in an area bounded by ten -- about 40 blocks, 40 square blocks, you know. The human outcry from the public states that these individuals have to be -- we have to identify them, locate them and bring them to justice. And yet the human outcry is so high right now that we have to bring in the FBI, and we have to methodically let them process that crime scene and try and bring these cases to a closure.

DARRELL SANDERS: Chief, I know you are outranked, but you still have a right to speak.

JEFFREY THOMA: But they have covered everything so thoroughly. The only two things I want to remind you that we had lengthy discussions about the fact that we may process and we may collect all that evidence that we are certainly not going to submit it all to the labs, because we would clog it. We would clog it instantly. And our recommendation was going to be to the police agencies that they work with the local labs to develop policies so that you could prioritize what you are going to do and you are not going to do.

And in further to what both Terrys said, I think that the expectation of the general public, because I still think that the vast majority of people live outside our large urban areas, and that they are not affected by a homicide like they are in the large cities, and burglary or property crimes against them are what they are

victims more often than that; and as they discover and understand the capabilities of this DNA stuff, they are going to expect small agencies like myself and rural agencies to start to collect that stuff on things other than on those most serious cases. So I think that was one of the things that we talked about with why the back case log is going to be such a problem, and that even if, even if we were successful, because you know my position has long been and still is that I don't want to be in a position where I have got to look at a family member and say, We didn't process this thing so, therefore, this person was able -- this perpetrator was able to go free and commit another crime. I don't want us to be in that position, but even if we were to get authorization to do it, listen to the lab group, it takes four or five years just to get everybody up, staff trained and running to be able to handle the backlog. So I do think it's a monumental problem. I do think that it is something that we have to be very conscious of and that we have to speak very cautiously about when we speak to the issue, because I'm telling you, it's coming. The more people understand it, and I am like Superintendent Hillard. I believe that I provide service to the people in my community; and if there is a technology there that is going to be able to fit in my community, then by God I want the opportunity to be able to utilize it, and that is what I intend to do.

JUSTICE REINSTEIN: Yeah, Doctor Crow, the last meeting we had you gave a report from the R and D group, and we talked a little bit about the briefcase kit, the DNA on a chip; and then after that Robin sent a couple of articles, one I think from the Washington Post and one from Popular Science, and it got me to thinking at the time, and now that Terry gives his report is this going to cause more problems for you when you have this technology and you have this briefcase kit. You know, in Chicago, you have a mobile unit, and probably you have individual people who go to these major crime scenes, who are going to be able to utilize this. I guess in the Washington Post it said, they are what, three years away. You know, you were talking about within five years. Now, they are pushing it up, and if you look at the The Human Genome Project, originally they said 2005. Now they are down to next March.

DOCTOR CROW: What they really did was change their standards so that they could meet it sooner.

JUSTICE REINSTEIN: But we are talking about, you know, the future of DNA evidence, and I am wondering you know, in Chief Sanders' jurisdiction, if you have this briefcase kit, is this going to create more problems for the individual lost in the street, do you just ignore it, even though you have it, you know, to do something faster and quicker. Just there were a lot of thoughts that I had in the last couple of weeks after I got that. But I don't know whether you all have discussed that, about if you have that in the next three, four years, the capability to do something right at the scene.

DOCTOR CROW: I have two mixed feelings about that. One is that these are undoubtedly exaggerated by the people who have something to gain by promoting that of course; but on the other hand, almost always our expectations of future scientific and technical advancements have been -- they have come faster than we have expected.

DOCTOR REILLY: But the rate limiting step is probably not the technology, as we have seen here.

DOCTOR CROW: Yeah.

DOCTOR REILLY: It's the politics, the economics, the nature of the system. I, for one, am not a bit worried about this problem in the next five years, Judge.

JUSTICE REINSTEIN: Really?

DOCTOR REILLY: Yeah. I am sure we will have a demonstrable chip that can do these kinds of things. Paul Matsurad, I might add, is working on that, but I think it will be in the field across thousands of police departments I think is very unlikely in the next five years.

DOCTOR CROW: I suppose you get a lot of testing in medical circles before this. I don't know. It's not exactly the same techniques.

DOCTOR REILLY: Even in medical circles, the reality of DNA testing compared to the discussions you see among scientists and the media, there is a huge gap. There is very little DNA-based testing on a day-to-day basis in the United States. Very little.

BARRY SCHECK: But the -- one of the things that I was most pleased at, and I apologize for being unable to attend the last meeting, but the recommendation that this committee came out with on not -- on not taking DNA from people from arrest, not for constitutional reasons, but for the practical reasons, I mean this group, because we have been studying the problem is very, very clear. It is the testing of new, unsolved samples, as they do in Britain, within seven to ten days expeditiously is the most important capacity that we can achieve in the system.

JUSTICE REINSTEIN: With the lethargic response that Commissioner Safir was quoted as saying?

BARRY SCHECK: I mean, you know, listen guys, I am carrying the ball for you on Geraldo.

(Laughter.)

BARRY SCHECK: Go get the transcript. I mean go get the transcript last week.

PARTICIPANT: It's a dirty thankless job.

BARRY SCHECK: I mean -- and it is. But, you know, it is quite -- I mean we have to speak. That recommendation is very important, because we know that the capacity to give the labs and the police the opportunity to test unsolved crimes within seven to ten days, the way they do in Britain, and get that capacity into the system is a huge investment, and it will do more to eliminate the guilty -- or the innocent from being picked up and to get the guilty. And you can't emphasize that enough. And, of course, it entails, in order to prevent these backlogs, a certain kind of strategic training. It can't just be people that do extractions. It has got to be criminalists, people that know how to evaluate crime scenes for this kind of evidence and not necessarily take everything, right, but what is important. You need an expertise here where you can look at blood splatter patterns and have an idea, I will take this one because it's victim blood, and I will take this one because it's possibly perpetrator blood. You know, you need to have that.

I mean we are in Boston. The other day they took -- somebody was in jail for what five months on a bitemark case where they finally tested the saliva swabbing on the bite mark that matched, and they let him go. I mean the backlogs are extraordinary. I think we need academic institutions, incidentally, that will help train people, give certificates and degrees, people who can mesh the scientific background and law enforcement who can go back to the various different police departments and help in the training. It would be one thing that we could do.

One of the most amazing statistics, and I hope Ms. Fereday has the slide, because I saw it the other day from one of her colleagues. In the U.K. when you are evaluating your police departments on success in

using the DNA testing, you have got a great scatter plot that shows that the police departments that are best trained in collecting the evidence are having the highest rate of success in solving crime. A really, really clear pattern. And it's that, you know, seven to ten days turnaround and the training. It has to be strategic thinking, and the single greatest issue, just to tell you about that Geraldo, here is Howard Saefer, the police commissioner. He says, oh, thank you, Barry, for telling me to go test the unsolved rape kits, but, you know, the problem with all of you federal bureaucrats -- that is what he called this commission -- all you federal bureaucrats is that you're not going to be for typing everybody at arrest. You just won't cut through things, right? The American people want you to cut through things. And so, you know, there can be -- and, you know, he is sincere about it. I don't want to call him a demagogue, but I think people will demagogue this issue by saying, Let's test everybody at arrest. That is the most important thing, when we all know from a law enforcement point of view, the most important thing is building the capacity to test samples within seven to ten days. That is the most important.

DOCTOR CROW: We are going to this appropriate group tomorrow afternoon.

There is somebody just behind you, Barry, who has been trying to speak for what did I say, the last ten minutes? Yes.

JOE VOLLARO: It hasn't been that long. I just wanted to make a quick comment, because Barry just actually mentioned the first thing I was going to say, which is I think as DNA moves forward, it becomes more important with the criminalistics aspect of processing crime scenes. So that has already been said, but the other point goes back to the crime scene chips and of the crime scene. And I guess Barry also said this, but I don't know that it is truly necessarily that important to be able to do something at a crime scene. There are a lot of limitations of that. First of all, speaking from the standpoint of somebody who processes crime scenes, as well as does DNA typing in the lab, I think it's a particular discipline that is better done in the laboratory, not in the crime scene in the field.

The second point is, at least as far as Boston goes, the majority of cases that we have to do DNA testing on is sexual assault, so we are certainly not going to march into the hospital and collect semen evidence from a victim and test it there, because that is where most of that evidence comes from.

The third point is we are also limited in some way about if we test the sample, and we consume the sample. So then I don't know, does that decision-making have to go to the crime scene, also?

So I think there are a myriad of different reasons why that idea isn't very sound, and I think that expeditious testing in a matter of days or a week or so, as Barry just said and other people have said, is a much more important standard than being able to carry something in your pants pocket to a crime scene to process something in about five minutes.

DOCTOR CROW: Thank you very much. Say, for the record though, do you want to tell what your name is so she has it.

JOE VOLLARO: Yes. My name is Joe Vollaro, and I am the senior criminalist at the Boston Police Crime Lab.

PAUL FERRARA: I would like to second that emotion.

PARTICIPANT: Would you like to sing it, too?

PAUL FERRARA: What we have to realize is that I would suspect that more than half of the biological evidence that we encounter at crime scenes, and they are, of course, submitted to laboratory involve mixtures. You alluded to it, vaginal swabs. Well, inherently, you have a mixture. So a field test, any sort of technology on a chip while I think it has great potential in terms of laboratory -- throughput in a laboratory, one has to recognize that the most time-consuming portions of the DNA analysis precede the actual beginning of the analysis, the differential extraction, or isolation and extraction, and the complex interpretation after the analysis is complete. So that there is no -- not going to be any panacea in that regard. So I -- I agree completely.

GEORGE CLARKE: Yeah, actually, I would like to return to what Terry brought up some time ago about what's driving forensic testing; in other words, who are the laboratories working for, and I think you identified that obviously for years it has been, frankly, for preparing cases for trial for we as prosecutors.

There is a limited amount of testing that goes on to solve the case. Most of the time none, but some of the time that is required to solve it. So it's obviously preparing those cases for trial, and then who is driving that are the 12 people who sit in the jury box, you know, as they become more inquisitive, for lack of a better term, and they start expecting answers to scientific questions that they themselves may be the people who are individually raising, then we have to be concerned about answering those questions. We may very well have five items of evidence in a case typed for its DNA content, knowing full well what the answer is but being able or being -- that is wanting be to in the position of telling the jurors not just what the answer is, but we did it, helping to show that we took every step possible to help exclude this person as the attacker, even though we know what the answer is 99 percent of the time, but we are doing it so that we can present them that we tried our best to exclude this person. I mean we do tests for gunshot residue, which is frequently, as those of you who have dealt with, are very problematic area in terms of demonstrating anything significant, but a lot of the time we do it to show that we did it, fingerprint analysis for comparison and so on.

So it comes down to with all of those demands, what are we doing? We have to prioritize. That is a substantial portion of what I do in my office now is literally not separate people from fights, but when ten prosecutors want a test done, and only five of them get it, then you have to sit down and talk about their cases, how important it is, and, you know, at least at times have to say no, you don't get to have it, and we will pay the consequences if we lose. So that is the unfortunate reality of what goes on now and in an ideal world.

Barry is absolutely right, we would get this testing done in unsolved cases, all cases within a week. I mean that would be wonderful, but it doesn't, I think, fit the reality of today and, unfortunately, the near future.

DOCTOR CROW: Is there somebody around the perimeter of the room would that would like to say something on this issue?

If not, I would want to push ahead, because we want to hear from -- unless you -- excuse me.

CHRISTOPHER ASPLEN: Can I just ask if we have a consensus on that issue?

DOCTOR CROW: Go ahead.

CHRISTOPHER ASPLEN: Let me ask this: Is there a consensus that that kind of recommendation kind of resonates with this group and is worth putting in writing? Again, talking about DNA as an example, the need to kind of recommit ourselves to law enforcement training and education and resources in technology in general and recommend to the Attorney General that she do something, be it a commission, a summit, something like that that allows her to look at those technology issues and how law enforcement gets trained and educated and how they are empowered to use technology.

Is that something that is worth it for us to work on in a working group perhaps to bring back to this commission?

JEFFREY THOMA: In wording it, as we did in the working group, appreciating already the known desire of law enforcement to use their best efforts, I know you'll phrase it properly, but I think the concern --

CHRISTOPHER ASPLEN: I don't think Chief Sanders is going to let me get away with anything other than that.

Evidence Storage Issues

David T. Peterson, Commanding Officer
-Property Division, Los Angeles Police Department
Greg Matheson, Assistant Laboratory Director
-Forensic Analysis Section, Los Angeles Police Department
Maria Foster, Detective Supervisor II
-Los Angeles Police Department

DOCTOR CROW: Okay. I want to make sure we have time to hear the three people that we have as guests, and that they have their full speaking opportunity.

So you arranged for it. You introduce them.

CHRISTOPHER ASPLEN: I will introduce them. And let me just point out that although you may think that there is very little method to my madness at times, the whole issue of, I think Paul first mentioned, the whole first issue of evidence storage issues in the context of our increasing use of DNA, well, lo and behold, the next thing on your agenda is the issue of evidence storage.

The way that Mr. Peterson, Mr. Matheson and Ms. Foster came to the commission's attention, quite frankly, is a result of their own interest in this particular issue.

What happened was, I was at the office, and I got a phone call from Detective Foster asking me whether or not the commission had discussed this issue, decided anything, made any recommendations on the issue of evidence storage. And while we anticipated doing that, we recognize as an issue, we would, in fact, do that in the future, and we offered to the LAPD to come and talk to us about their particular experience, the issues that they are facing so that we could kind of use their experience along with the experience of the law enforcement already on the commission to analyze this issue even further. So we appreciate their being here. We know that when the first phone call was made that it was not anticipated that they would be involved in the process, but we do appreciate their involvement.

Just briefly, David Peterson is the commanding officer of the property division of the LAPD. He is a former US Naval officer, 28-year veteran of the police department. He has worked in the office of city administration -- an administrative officer of public works and recreation and parks departments. He is a graduate of California State University. The division that he commands, the property division, is an all civilian command, 95 property officers assigned to 19 property rooms and stations throughout LA. The division is responsible for booking, storage, security, chain of custody and disposition of the property and evidence items contained in the 330,000 yearly bookings of the LAPD. The rest of the bio is included in your materials.

Greg Matheson earned his BS in criminalistics from California State University at Long Beach and has been a criminalist with the LAPD since 1978. He is currently the assistant laboratory director of the Department's forensic analysis session. He is detailed to manage serology, DNA, firearms, trace analysis, question documents and field operations. Prior to that he was a unit supervisor for the Department's serology DNA section.

It was really at LAPD's suggestion that we include someone from the property division for the LAPD and somebody from the laboratory division in the same discussion and then also that we include Detective

Foster, who is currently the detective supervisor from LAPD as a kind of person closer to the street, if you will, involved in the more direct issues. She is -- Detective Foster conducts detective case management and preparation, training at basic detective schools and major assault crime schools in addition to conducting staff research with the investigative analysis section. Again, the rest of the history is contained on the bios that you have.

And I'll get out of everybody's way.

DAVID PETERSON: Okay. Thank you, Chris.
It's a real pleasure to be here in Boston. Many of us from California saw more rain in the last afternoon than we saw the whole season last year. It's a very refreshing change and a very nice place to have this meeting.

We certainly appreciate being included here. We are here as much to learn as to tell you about our experience in Los Angeles.

In 1983, like many law -- or prior to 1983, like many law enforcement agencies, we did not have a frozen evidence storage capacity in Los Angeles. It was at that time that we put our first freezer in in the property room at Parker Center, our headquarters police building. That lasted until about 1988 when we put another brand-new permanently fixed freezer in our new criminalists lab in our technical center, which is approximately eight blocks from Parker Center and houses our crime lab.

It wasn't long before we filled that one up, too. About three years later, we added, as a temporary measure, a 40-foot-freezer trailer that we rented from a local company. That lasted about another two years.

Needless to say, this story goes on and on, and we are now at a current rate of accumulating frozen evidence storage where we have to rent a new 40-foot-mobile-freezer trailer about every six months. There is a cost to that. The cost itself is not of particular significance, but it's the space and the logistics to hook up the electricity for it, and the ever growing nature of the evidence that we were concerned about.

In Los Angeles, I think we are a little bit unique from many of the agencies here in that we are a full-service agency. We are the custodian of the property. We are the crime lab. We are the detective agency. In order to deal with this problem, the task force was put together within our department, and Detective Foster was tasked with being the chief staff person to that.

We got some information together to try to deal with this primarily from the storage standpoint, but also from all of the perspectives that have been discussed here today. We realize that this is only one part of a much bigger picture.

Detective Foster has some real interesting statistics on what we do store, how we store it and where we are going in the way of making decisions on what to do about this in the future. So take it.

MARIA FOSTER: Props. The only reason I got this assignment is because I have got to write the report; and also because I am assigned to it, I am assuming I have to get promoted to investigative analysis section, who does the back room. We do the research for the officers and the chief of police.
That being said, I wanted to just say I used to think I was a pretty good detective, and I was. The minute I

saw Mr. Scheck in action, let me tell you, I am one hell of a better detective, because now I leave no stone unturned. Whenever I say something, I make sure I can back it up with everything. So here it is.

(Laughter.)

(Applause.)

MARIA FOSTER: Okay. These -- we did an audit of all our research evidence, and these are the -- I brought them, because you just have to look at this. These are all the frozen items that were booked on or before 1983, okay.

PARTICIPANT: How many cases per page are those?

MARIA FOSTER: It varies. It varies. Some of them I just have three or four items; and some of the report numbers will have 20 items, and there is no way of knowing. This is just frozen evidence. And these are all crimes that are not rapes and not homicides for 1983 to 1993. See the difference there.

Okay. I'll pick these up in a second.

These are all our rapes from 1983 to '93. The pile is growing. And these are all our homicides from '83 to '93. So that is our problem right there.

Our problem is that right now we have completely run out of room, and we have to keep everything. The Los Angeles Police Department, I found out, doesn't dispose of anything that is in the freezer. We haven't -- well, we never just got around to needing to get rid of anything, and everything is still in appeals, or we are afraid that it might go to appeals, and there have been so many changes in our chief of police and our chief of police and our chief of police that no one has gotten around to actually addressing the issue until now that we have completely run out of space.

So we had approximately 9,782 homicides between '83 and '93, which is what this pile is. And since then, since '93 to the present, we have got another pile that equals this. Okay. Now it's about 10,000. About 10,000. It will be easier to work with that.

PARTICIPANT: Ten thousand homicides?

MARIA FOSTER: For '83 to '93, that have frozen evidence. Okay. That is not how many homicides we have, because some don't have frozen evidence, and I didn't even go into addressing that. This is just the ones that we have for frozen evidence. And I see notes being taken. I'm so glad about this part. So about 6,700. Our clearance rate is about 67 to 68 percent, all of which were cleared by arrest. Some are cleared for reasons beyond our control, but mostly they were cleared by arrest. So that means we have about 3,100, 3,200 that were unsolved; and of course, because there is no statute of limitation on unsolved, we are supposed to keep those forever.

Okay. Well, that is all good and fine, but now we are dealing with those conviction issues here. If we are supposed to keep the unsolved matters, because we haven't solved them, then now we are supposed to keep the other stuff pretty much forever, because there is going to be an appeal process.

Well, then the question to this commission is: Where does our department draw the line? When do we say, okay, five years is enough? Ten years is enough? Fifteen years is enough? Now it can go in an air-conditioned room, and it can go on shelf storage.

I haven't answered that question. And this meeting frankly has changed my whole perspective on this report. When I found out that there were certain states in the nation that were not freezing their DNA evidence, or they were only freezing it until analysis and then putting it in an air-conditioned room, I said, great, let's join the bandwagon and go with that. But as we did a little more research, then I found out that some of the states that are not doing that are having a lot of postconviction overturnings. And then of course there is the moral dilemma of what if he is an innocent man, and what if there is another stain on the sheet, or what have you. What is the representative sample? Nobody knows what it is, because the powers to be, you guys, haven't drawn the line there, and the scientists need to tell us. And that is where I come in. I'm just a cop. So somebody has got to tell me, yes, it's okay to just do one stain, or you have to do all ten, or no, you have to do all 25. And if you will draw the line for us then I can make some kind of a protocol for our department.

My original recommendation was let's just go for, for example, sexual assaults. The statute of limitations is six years. Let's hold it six years, give it one more so that we can make sure that we can get it into CODIS. Okay. Well, now, I can't do that, because -- or I can't make that recommendation with a clear conscience, because what if seven years from now, even if it is in CODIS, we got rid of all this evidence, and all we have got is the DNA extracts so the information that is in CODIS, now what do we do?

Okay. So I have some real issues, and I'm at an impasse, because I don't know what to do, and I don't what kind of recommendation to make for my chief, and believe me, he wants one.

And jump in here any time, guys. Okay. The premise of seven to ten days, oh, please, I wish we could. The Los Angeles Police Department, right now, if you didn't have a suspect in custody and a court date, that thing is not going to get analyzed, whatever it is. It is not going to happen. Okay. So now if you have got a suspect that is in custody, now you have taken second priority. And when you got a court date, when you go to trial, then it will happen.

And so the unsolves, nothing is happening there. So if you have an unsolved sexual assault that is going to go the six years plus the one that I was thinking of, that evidence might get destroyed in good faith, because we can't catch up, because our criminals can't catch -- we have got 11 people in there. That is it. There is no more room to put another desk. So now what? And, again, I don't come to you with any answers. I come to you with this and a whole bunch of question marks, and that is where we are.

Sir.

GREG MATHESON: Actually, I originally came into this, and like Mr. Peterson had said, back in 1983 when we got our first freezer. It was in response to a nation decision. Back then, you know, DNA was not a consideration when it came to forensic work, and we were dealing with enzymes, and the reality is we still do some cases by enzyme work. We have not completely abandoned a couple of the markers.

We did jump on early, and we started freezing anything that had biological evidence associated with it. We were doing no sort of triaging when it came to it. If an item came in with the custody of the police department through a detective through an officer through the coroner's office, if it had biological

evidence on it, it went in the freezer. It answered a number of questions. Number one: Do we even know if the biological evidence is evidence at that point, or is it just an item that is on? We didn't have to make that decision. We threw it in the freezer.

In the case of other coroners evidence that came to us, we never had to decide whether or not the biology on it was the evidence, because if it came from the coroner's office, it probably smells a little bit, and the property doesn't want their place stinking up. Throw it in the freezer. It doesn't stink. For years that was the philosophy. Anything and everything that had any form of biological evidence got thrown into one of our freezers.

As you heard, we built one. We built another one. We started renting freezer trucks. The advent of DNA came along. We saw, you know, RFLP. You still need to maintain that evidence, because it does degrade, and it will degrade down to the point where you won't get a result.

PCR, you can get a little bit of information out of it. Let's just keep on freezing everything. It still hasn't answered the question.

STRs are coming along, and all of a sudden now the Department came to the laboratory and said, hey, we hear this stuff is great. You don't have to worry about degradation. All we need is a little tiny sample. Can't we quit buying freezers, and about a year and a half ago they came to the laboratory and wanted a scientific answer to the storage problem that we were having. In other words, they wanted the lab to come back and say, You are right. This stuff is great. Don't bother freezing it anymore. Throw it on a shelf.

Personally, I wasn't willing to do that. I was looking at the research that was out there. Yes, the amount of evidence, as you all know, that you need to get a good STR result is extremely small, and I'll be happy to tell anybody that comes to the lab here, it says, odds are 99.9 or higher percentages of the cases that come into our custody could be taken, stored on a shelf, and we will give you a STR date, you know, ten years from now, 15 years, 20 years from now, some of it because that is just when we are getting around to it, but as an illustration, it should still be good.

My concern is forensic evidence, as you all know, it is not pristine. It isn't something that is going to fall on a nice clean piece of ceramic, or something like that dried media that would be collected and placed on a shelf and stored dry, which will last decades, hundreds of years, who knows. A lot of times though the evidence is laying on a piece of concrete that has dirt in it, that has chemicals in it. It's going to start the degradation process. We may not get it for a couple of days. The crime may not even be discovered for a week, or a month or a year, of whatever. By the time we get some of this evidence, the DNA has degraded to the point where, yes, you can get a result today, but what happens if you throw it on the shelf, and there is a slight degradation that is going on, or else you pick up some agents, chemical, biological along with that blood that does keep that degradation process going; what if the officer hasn't gotten this training that we were talking about a few minutes ago, and he doesn't dry it right; or it's all in clotting, it isn't recognized as being biological, gets folded up, thrown into a paper bag or a plastic bag, oh, my God, and thrown on a shelf somewhere, the degradation is going to occur, and we can't give you results down the road.

So I am not willing to tell the department, no problem, go ahead and take everything we have in the freezer and throw it on the shelf. So they are not getting an answer from us is basically what I'm coming down and saying. I'm not going to give that to him.

A little bit of background on our unit. As was previously mentioned, we do DNA analysis on cases that are going to court period. I have got three DNA analysts for the city. At the moment a fourth is going to go on line in a month, and hopefully a couple more that may go on line within the next year, but that is where we are at.

To make up the difference, we send out a lot of our evidence. Our main contractor is Cellmark Diagnostics (phonetic spelling) in Maryland, and they are currently backlogged. The best that we can get out of them right now without paying a lot of extra money is two to three months on a PCR return, and a lot of times that is not acceptable for the turnaround time that we need.

In-house, we are running a backlog once a case is determined to be a priority one, or going to court, of somewhere around a month to six weeks. That is once we know that it's absolutely needed. Backlog currently sits at about 200 cases that are waiting to be done, and the detectives are self-regulating themselves and not requesting things that they know will never get done. So there is a whole batch of unanalyzed cases out there. It's also a good point to point out that the crime rate has gone down considerably, and I am sure you all are aware of that. The City of Los Angeles, we hit a high, I think in the early '80s of pushing 1,200 homicides in one year. In 1998, I think we didn't break 600. I think we were in the 500 range. You know, that is great.

Requests for analysis within our laboratory, particularly in the serology and DNA unit, haven't gone at all. As a matter of fact, they have gone up. What that tells me is that we have never come close to providing the service the department needs for DNA analysis; that we are still somewhere not even, you know, the tip of the iceberg when it comes to the service that we could be providing.

Like I mentioned, our philosophy right now is that if we can get into a freezer, regardless of the condition of the evidence when it's collected, the clock stops at that point. We don't want to be in a position to say, fine, put it on a shelf and maybe have to sit on the stand and answer questions as to why there aren't any results that are obtained from this evidence.

And that was pretty much everything I have. And we are trying to work with the Department, trying to solve the issues. Along with, I would like to mention we are in a little bit of a different situation in that we are compartmentalized. The laboratory no longer has any control or responsibility to maintain evidence at all. That goes to our property division, but it's still within the department. We don't have an agency once we are done to ship it back to. The responsibility for the collection, storage, analysis and retention afterwards falls solely within the one jurisdiction. And you might think that that would simplify things, because the call comes under one head, but it also doesn't allow us to put heated responsibility back on anybody else.

Yeah.

PAUL FERRARA: Greg, if I am not correct, you could serve a population of over 8 million or that nature? What is the --

GREG MATHESON: Actually, the city -- if you don't know how it works, I mean the City of Los Angeles has a crime lab, which I am part of, and the Los Angeles County Sheriff's Department has one. We serve strictly the City of Los Angeles, population of about -- I think it is three and a half million, or something like that. The county is roughly the same. The reality is we have more of the crime in the county than they do, but we handle about three and a half million.

PAUL FERRARA: Did I understand you to say three examiners? Do you have three examiners?

GREG MATHESON: We have three criminalists that can do DNA analysis, that is correct. I have 11 people in my serology unit, three that do DNA, one analyst that is going to be starting shortly. The remainder of them are capable of doing the screens, capable of doing some conventional work, or some are capable of doing extractions, passing it on to the other people to do the analysis, and we are slowly trying to bring everybody back up, but when you are dealing with the number of cases that they have, that darn casework just keeps getting in the way of bringing people on line in the new techniques.

PAUL FERRARA: I am in a population of, a less hostile population in Virginia, I would like to think, although we are about six million or six and a half million. I have got 22 DNA examiners now. This is all STRs, and I can't keep up. You know, you are right. I mean obviously, that is the course.

GREG MATHESON: We don't.

PAUL FERRARA: Have you considered at all -- one of the things we do is when the perk kits and crime scene evidence come in, even though we can't get to actually perform an examination, we open them up within ten days and air dry them so that we can, you know, take the like liquid blood, put them on FTA cards, let it air dry so that we can store the perk kits at least at room temperature, and we are picking up perk kits 20 years old right now, and they are fine with the STR, which are great.

Admittedly, though, some evidence you have just got to put in a refrigerator or freezer.

GREG MATHESON: Actually, we have -- that brings up the old issue of screening evidence to begin with, that we did think about that some jurisdictions around California do that. Again, we don't have the personnel to do it.

PAUL FERRARA: It takes some money to do that.

GREG MATHESON: It takes somebody out to do that. Our concern then, and this is something that has to do with liability when it comes to cases. Are we going to find all the items, all the evidence on the item that is pertinent; if we don't, if there is multiple stains, and you choose to collect five out of the 20 is it going to be the other one that is going to be the probative one for the defense.

PAUL FERRARA: Well, you keep all the stains. You just dry the -- you know, dry the sheet or dry the clothing completely.

GREG MATHESON: And some of it does come down to a matter of turning, because drying is the big issue. I mean if you can get it on the shelf and keep it at a reasonable dry temperature dry, you are going to be able to type that stuff indefinitely.

We have got 10,000 police officers. Pardon me.

MARIA FOSTER: Three years or less experience for the majority.

GREG MATHESON: The majority, yeah, the majority have three years or less of experience. The criminalists, we do not have crime scene techs. The criminalists are the ones that do evidence collection when we are requested by detectives, and that occurs in maybe 10 to 15 percent of the violent crimes in the city. That means the detectives and officers are doing the rest of the collection.

Many times it gets into the property system. The crime lot may or may not see it for four months, six months, a year, who knows.

PAUL FERRARA: The other sad thing, and you alluded to it in the cases gone to court, first priority that all those unsolved cases sitting there with your data bank law and future victims.

GREG MATHESON: Without a doubt. I mean it's frustrating on our part, because we do want to participate in it. That is one thing this group, I noticed, does get very involved in the data bank. We have no association with that other than getting samples in and running it against it, but we don't get involved in the offender data bank at all.

JUSTICE REINSTEIN: Who does that, the state crime lab?

GREG MATHESON: Yes, the State Department of Justice. There are a couple of labs around the state that are better staffed than we are that are contracted to do some within their local jurisdiction, but as a role, the State Department of Justice.

JUSTICE REINSTEIN: California's is RFLP still?

GREG MATHESON: No, they have gone over to STR.

JUSTICE REINSTEIN: Wasn't Jan talking about that, about the backlog when they have to retest?

GREG MATHESON: I think our database has about 40,000 RFLP profiles, and it's just beginning with STR profiles with collected samples, I think, a little over 100,000.

JUSTICE REINSTEIN: So the outsource thing doesn't really -- the recommendations regarding if we are going to outsource really affects the state lab, as opposed your lab?

GREG MATHESON: Right.

DAVID PETERSON: Because of data banking, that is correct.

GREG MATHESON: But like I did mention, we do look for alternate sources when it comes to our evidentiary samples. We don't have the personnel to meet them all, but a lot of those sources are also getting backed up. We recently used another California county crime lab, Santa Clara crime lab, to analyze a case that is 14 years old, and they did that for us, you know.

DOCTOR REILLY: Do you have financial constraints of a serious nature on outsourcing crime scene evidence?

GREG MATHESON: On the analysis --

DOCTOR REILLY: You mentioned you use cell samples.

GREG MATHESON: We are limited, though I have never been told what that limit is. They just start complaining when I start spending too much money. Last year we spent about 130,000 outsourcing analysis on casework. They, approximately a year and a half ago, Cellmark was our second most productive criminalist in the serology unit as far as case output.

Yes, Barry.

BARRY SCHECK: It seems to me that you really do understand the source of your problem. I mean because if you had the resources, and I mean I think collectively it's fair to say we are all kind of amazed at how little they are giving you to work, Rick. I mean, and I know it's not your fault, but this is scandalous, because if you don't have the capacity -- if you have the capacity to evaluate the evidence when it comes in, what you would be able to do, I mean the best of all possible worlds typing before people got to court, to use the technology, but also it would help solve your storage problem, because then you would be able to dry stuff with greater confidence; you would have some DNA extracts, and also going back into your old unsolves, and I personally walked through your freezer system, and it is very impressive.

They have the black dahlia evidence, right? Do you still have that?

DAVID PETERSON: Oh, yeah.

BARRY SCHECK: I have walked through your freezers, and my gosh, you could save a lot of money by expeditiously going through old, unsolved cases.

I have to tell you that I spoke to Mike Jacobs, Woody, the prosecutor in Orange County --

GEORGE CLARKE: Orange County.

BARRY SCHECK: -- who has this tracking program. Are you aware of it? He has gone through old unsolved homicides in Orange County all the way back to 1973, and he has now come up with -- he had something like 3,000 back to '73. I notice, Detective, that you said you had 3,200 unsolves. No?

MARIA FOSTER: Approximately, yes, sir.

BARRY SCHECK: From '83, yeah. And going through those, he then evaluated them, and he now has a list of about 100 cases that he thinks are good candidates for STR typing, which he is going to proceed to do, and I think his phrase was, he told me, he thinks it's the silent epidemic, these unsolved homicides. I absolutely don't understand why. I mean that would also help you solve the storage problem, if you had funding to go through that. If you want, we should issue -- we could issue a recommendation. I'll come and ask for money for you.

GREG MATHESON: One of the reasons we are here is to point out we are not the only department in the world that is operating in conditions like this.

BARRY SCHECK: Well, you did note some circumstances that make you have some expertise now in looking through crime labs across the country and where the evidence is stored; and as for reasons you

point out, you are rather unique, because there is not -- even though there is jurisdictional authority in your police department, it is all going to one place.

GREG MATHESON: Correct.

BARRY SCHECK: As opposed to many other crime labs, where they will get the evidence in a case, they will do an initial evaluation, and then they send it back to the police, and they either don't store anything, except what they analyze, and it goes to different places. You have everything.

GREG MATHESON: Right.

BARRY SCHECK: And you are a big place, and you are not analyzing anything. So you put all those things together, and you are in crisis.

GREG MATHESON: Well, you know, I obviously don't disagree with any of the things that you say regarding the condition of our ability to analyze and that type of thing. Our concern at the moment, and the likelihood of them saying, you know, you get another 20 criminalists that do DNA, and here is a wonderful place to put them in the near future is not likely to happen.

One of things we are looking at and concerned about is if we pull stuff out of the freezer, are we going to run into a problem later on in court? Are we going to run into a problem where we are not going to be able to analyze the evidence?

There are suggestions. There is another California agency that puts in the report that they start all frozen until it's analyzed, and then they say this evidence will be removed from the freezer in two years. It's the notice to everybody that the stuff is going to be put out on the shelf; and then if any change occurs after that point, it's not our problem; or they automatically remove stuff from the freezer after five years, because, you know, the chance, the historical chance of solving a case after that wasn't very good. Now it's getting better, and that chance is taken away from us. Or do we even need to freeze anymore? I mean is the technology stuff that it is a concern that we are overly concerned about, but we don't want to take the chance of destroying evidence that has the chance of exonerating somebody down the road, or something along that line?

PAUL FERRARA: Is LAPD and LASO working together and building a single large forensic laboratory, or is that a --

GREG MATHESON: What is currently happening on that is there is state legislation out in California that will provide money for facility funding throughout the state of which there is currently one proposal where we want to take a large chunk of that money that will build a laboratory or a building that will house individually the LA County Sheriff's lab, the Los Angeles police department lab, Cal State, Los Angeles criminalistics program and some state training facilities on Cal State owned property.

PAUL FERRARA: I mean that is some indication on how far you want away from solving your problem. I mean if --

GREG MATHESON: Are you waiting for the state to do something?

PAUL FERRARA: If you usually do something, it will take you three years before that building is up. Then if you get the personnel, it's going to take you a couple years validation and training before you are in a position even approaching what you need.

MICHAEL SMITH: How many 40-foot trucks do you have in three years?

DAVID PETERSON: We have four today. At our rate we are at every six months we have to have another one.

GEORGE CLARKE: Actually, and like our county, both Los Angeles and San Diego had Grand Jury investigations and recommendations that laboratories be consolidated in each of our counties, but so far no money, no action.

JEFFREY THOMA: Isn't yours being consolidated, Woody?

GEORGE CLARKE: No.

GREG MATHESON: I misunderstood.

GEORGE CLARKE: Actually, we together had some concerns about consolidating the two laboratories, because between the two, it would become extremely large. I mean part of the problem would be just the huge size and then the problems associated with that, plus the City of LA does not like and probably should not have to give up autonomy over the work.

BARRY SCHECK: What is the cost? In other words, what is the cost of these new trucks and the storage? I mean I guess what am building towards is there is a certain synergy here. If you were -- what does it cost to go back and evaluate and test an old unsolved case so that you can then dry it versus the cost of buying more trucks and storing them.

DAVID PETERSON: We are going to literally run out of space at some point for the trucks. We literally have to buy land to do that. So we are trying to approach this from as many fronts as we can.

BARRY SCHECK: And there is a Denny's nearby, right? Why don't you just park it on that.

GREG MATHESON: There is a huge frozen storage, commercial frozen storage company not too far from us, and the Department approached them a little while back, and they were concerned about the rest of their food customers and the idea of having bloody evidence around. So they didn't go for that.

CHRISTOPHER ASPLEN: In reference to your point that you wanted to show that you guys aren't the only folks experiencing these problems, along those lines, the commission has asked -- has contracted with the Police Executive Research Forum to conduct a survey of police departments across the country to ask the following questions, generally speaking, and I'm wondering if you happen to know them off the top of your head. What we want to do is just look at rape kits themselves and how many rape kits individual departments have in storage in nonsuspect cases. The theory being one of the things that the commission wants to do is look at that, use that as a base line, given the extent to which those are a reasonable assumption, that if there is a rape kit that there would be DNA testing done, if we could.

Now, in New York City, for example, there is 12,000 that they are outsourcing. Do you have an idea of how many rape kits you have in storage?

DAVID PETERSON: I don't think immediately we can tell you that off the top of our heads. We do have a number.

BARRY SCHECK: Let me get that number, because New York's number is a five-year number. That is over five years, and it's just for the city.

CHRISTOPHER ASPLEN: And, again, it's just -- it's not rape cases. It's just rape kits. It's obviously not every case with biological evidence in it. It is the bare, bare minimum.

DAVID PETERSON: We have a computerized system for keeping track of all of the property that we have, and it's just a matter of running that sort, and we can give you an exact number over any period of time.

CHRISTOPHER ASPLEN: That would be fantastic.

GREG MATHESON: Along with the drop in the ancillary, obviously the rape cases went on down. Over the last ten years, I know from the other end on how many kits we have prepared and we send out for use. Obviously, some of those are going to get trashed, and some of them are going to get lost, but for quite awhile there we were consuming between 1,200 and 1,600 a year, and that has dropped down to between six and 800 in the last couple of years at this point so --

BARRY SCHECK: If you wanted to make one proposal, I would -- along these lines, I would do this. I would go to Governor Davis -- who is the mayor? Oh, he is a reasonable guy, and say, look, this is what we want the money for. We can identify for you rapes and rape homicides, and we know that rape and rape homicides, if you do testing on those, because semen is going to be leading to the identity of the suspect, that that is the best case to test. We want money to do all of those as a way into our storage problem and money to train people to do those. It is also what the British teach us is their greatest success are solving these kinds of crimes, particularly when they involve strangers. That is when the technology succeeds the most.

Thirdly, they are going to be the best preserved, all right, in terms of the stains. I mean they can't think of -- that is one discreet proposal that has real crime-solving impact. It is politically attractive.

GEORGE CLARKE: There already is a procedure we do have in place in California. Again, it's a manpower problem, but our State Department of Justice will accept unsolved cases with extracted DNA, and they will take them the rest of the way. They will actually do the typing, compare it to the limited database that we have, but people in Greg's laboratory, they don't have the manpower to separate those cases out in collaboration with law enforcement to figure out what those cases are to then extract that DNA and ship it off.

BARRY SCHECK: Well, I would even suggest that you can just -- the proposal would be to form some kind of unit that goes in there and systematically goes through those cases, because you and I have been in the lab.

GEORGE CLARKE: You mean a cold case squad in essence?

BARRY SCHECK: That is what I am talking about.

DAVID PETERSON: Well, one of the things that is under discussion partially as a result of this effort is putting together a task force of recently retired executives, free up our active.

GREG MATHESON: To do the evaluation of the case.

BARRY SCHECK: And you, frankly, are in a better position to do this than others, because I actually can read those reports, and I know that, you know, you have bar coded many of these items, and you will be -- you are ahead in terms of computerization of most crime labs. So in theory you get the DR numbers, you stick it into the computer, and you can pull out relevant evidence in the case faster than other jurisdictions so this proposal -- I am still admitted in this state. I mean this proposal is useful. No, I am still there. I am still admitted.

JAMES WOOLEY: Do you do any nonsuspect cases? Did I hear you right?

GREG MATHESON: Well, yeah, we do occasionally. Normally, if -- or to give a classic example, on the west side of LA, we recently had a serial rapist that was working, and through investigative means they felt that they were dealing with the same person. In that situation, we assigned them one of our analysts, and he did every case that was suspected to be from him just DQ2(A)P.M., because that is all that we are currently doing in-house and establish that we are probably dealing with the same person in all of these. So, yes, we do occasionally, but it has got to be a unique situation.

JAMES WOOLEY: In a serial setting like that?

GREG MATHESON: That is in about the time when the media gets involved.

PAUL FERRARA: One final suggestion, Greg, and you may disagree with it, but something we did a long time ago, and that is took all our resources, eliminated conventional serology, eliminate DQ Alpha, eliminate RFLP, eliminate PolyMarkers, and concentrate all the effort on STRs. I mean it's --

GREG MATHESON: To some extent I am short of saying, no, we are not going to take cases for six months, which I have been wanting to do for years to bring everybody up to speed. We did pull everybody off this last week to receive an STR program, and that is -- to some extent that is occurring --

PAUL FERRARA: It's tough to maintain multiple technologies, as you know.

DAVID PETERSON: To put this somewhat perplexing looking financial picture in a little broader perspective for you, if the picture of Los Angeles isn't quite as bleak as we might make it sound, during the last three years, we have gone from a force of 7,800 sworn officers to not quite 10,000. 9,863.

PAUL FERRARA: How many went in the lab?

DAVID PETERSON: None of them went in the lab. That is right, exactly. We have also increased the civilian employment side not nearly to the same proportion that we have increased ours. We are aware of that. We are dealing with it. The economy in Southern California is getting better. Our tax revenue is getting better. We see a somewhat better picture of that in the future, but it's not going to happen right away.

GREG MATHESON: And, actually, you know, that is probably beyond the scope of this commission, but it is something that is a common thing with us in that when personnel is trying to be decided and what is going to be a given to the department, the thing keeps being said that it's awful nice when you have got somebody breaking into your house to have an officer arrive at the door, and they don't want somebody in a lab coat, and that is the philosophy that does tend to go along with that.

BARRY SCHECK: But why don't they put it out for bid? I mean, you know, it does seem -- I mean what about a privatizing solution. Why don't -- I mean if I were you, Greg, I would retire, form a company, right, you know, get a lab, and offer to do the backlog for a certain amount of money, and you could do it efficiently. I am perfectly serious.

GREG MATHESON: I know.

BARRY SCHECK: I mean and the British in a sense quasi, I mean, you know, the police works big. They say, I want this service, and they pay you money for it. I mean in the world of capitalism why don't we do that?

TERRY GAINER: Well, actually in some jurisdictions that is precisely what we are looking at. I can tell you that is why we are waiting in Washington, D.C. to decide whether we are going to build a metro lab. We have reentered negotiations with a private vendor to the tune of about $3 million to work on the backlog, but it still comes down to whether the elected official is going to decide this is an important enough issue to either put the money into the lab, the people, the combination of those. And, frankly, this seems like one of these areas that hopefully after we get this information that will maybe be one of the biggest things the commission does, because I think suggesting to these individuals from LA that, you know, at their level that they are going to try to pull this off is probably slim and remote, because they just don't have the horsepower, and it only becomes done if you get the heads of the law enforcement agencies, along with the heads of the elected officials to say this is an important issue to us. And as long as even, you know, frankly, when you listen to the conversation when we say that whether LA County or LA -- the city of LA, you know, won't give up their turf is part of the very issue that we can't get over. Even if you recognize, the professionals you are, you even mentioned, well, you know, the city doesn't want to give up its turf, and that is permeated through the whole system, and it's only until someone realizes that we have got these tens of thousands of victims out there that none of us have done anything about that we are going to have some significant change, and I think that is what is going to be the powerful statement of this commission. And forgive me for getting up on the high horse.

GREG MATHESON: Bringing back the survey that you were talking about regarding the sexual assault kids, I am assuming you are going to be surveying over the departments, because part of the problem I have seen in surveys that have occurred in the past when you are trying to find out caseload or evidence levels, these to tend survey the laboratories themselves, which don't always -- I mean we happen to have it ourselves, but, you know, our sheriff's department doesn't store their stuff.

CHRISTOPHER ASPLEN: Yeah, we are interested in the departments themselves, not the laboratories.

GREG MATHESON: That will give you a truer indication.

CHRISTOPHER ASPLEN: Thank you, folks. We appreciate it.

(Applause.)

CHRISTOPHER ASPLEN: I'll actually, Greg, I'll give you a copy of that survey before you leave, okay, because I have got it here. I have a rough draft here.

DOCTOR CROW: We are ahead of schedule, but I have no strong objections to quitting.

PARTICIPANT: I second that.

PARTICIPANT: So moved.

DOCTOR CROW: I am going to call on Chris though for whatever logistic things he wants to say.

CHRISTOPHER ASPLEN: I will try to get you out of here by 5:30. A couple of things, if you could, please. We will have for you at the desk photocopies of a couple of things.

Robin, did we already distribute photocopies of the survey? Yes. Okay. But Phil has put together a memo, if you will, on some of the privacy issues that we are going to be discussing tomorrow. And we are going to photocopy them after today's session. We will leave them at the desk. If you could stop by and pick one up for your review this evening before the discussion tomorrow, that would be great.

In terms of dinner this evening for those who are inclined, we will be going to Skipjacks at 199 Clarendon Street, and it is casual and comfortable and innovative seafood from New England and around the world served in a bustling dining room. We will meet in the lobby at 6:30, and we have a 6:45 reservation for 12. It's just a five-minute walk from here. Okay. If more folks would like to come, I'm sure they will find seats for us, so don't worry about that.

If there are any questions, tomorrow we are starting at -- the address is 199 Clarendon.

DOCTOR CROW: How do you spell that?

CHRISTOPHER ASPLEN: It says C-L-A-R-A-D-O-N.

PARTICIPANT: Misspelled.

CHRISTOPHER ASPLEN: Well, it's also handwritten over what was the original typed version, which is Barkley Street or something. So you all may never get there.

However, let me say emphatically that no matter what, tomorrow's meeting is going to start at nine o'clock. Regardless of what anybody else tells you, whatever letters you received, tomorrow's meeting starts at nine o'clock.

ROBIN STEELE WILSON: There will be breakfast available at 8:30.

CHRISTOPHER ASPLEN: Good. Very nice.

Okay. Any questions? There is a question back there.

DONALD HAYS: Before we adjourn for the day, I am Donald Hays, Director of the Boston Police Crime Laboratory, and with evidence storage issues I was wondering if there are any guidelines for the courts or

for the federal courts in regard to evidence storage. I know our Superior Courts are frequently asked the question, because they have large evidence storage rooms for evidence, which has been submitted and entered into the courts. What is happening? Is there -- are there federal guidelines available for federal courts, and are those available for the state courts for their own evidence storage?

CHRISTOPHER ASPLEN: There are no federal guidelines for evidence storage that I am aware of at all.

DONALD HAYS: Are the federal courts storing evidence that is submitted as exhibits, and are those --

CHRISTOPHER ASPLEN: Jim can speak to that better than I.

DONALD HAYS: And is that evidence then subsequently subjected to postconviction analysis? And that is one of the issues I am concerned about.

And how is that evidence being kept by court in storage?

JAMES WOOLEY: Well, the courts don't keep evidence. When a case is closed then it's done, and the original evidence is returned to the prosecutors. The prosecution, we would then give it to the agency, and then that would be incumbent on the agency to store it.

CHRISTOPHER ASPLEN: Are there guidelines to how long the law enforcement agency needs to keep it?

JAMES WOOLEY: Yeah, I am sure the FBI has those guidelines. I mean that would be the question to ask Dwight, who is here, I mean, but it's not a matter of the courts telling us how long to store it, or the court storing it at all. It's a matter of the prosecution's exhibits, they come back to us, we check it back to the office. We give it to them, and we say, see you later.

DONALD HAYS: Okay. And then one of my other concerns is with evidence that is introduced in the court systems, the way that evidence is presented in the courts, taken out of bags, handled, shown around, and then repackaged in some manner, sometimes just thrown back into the bag, gone into property in the courts, made available to the juries for looking at, and then we are subjecting this evidence to postconviction analysis also and DNA testing.

So is there -- is it now the time to set some standards for how evidence should be handled in the courtrooms and subsequent to introduction in the courts for future testing?

JUSTICE REINSTEIN: A very good point.

PAUL FERRARA: An excellent point.

DOCTOR CROW: Good point, actually, yeah.

DARRELL SANDERS: So they are pointing their fingers at the police now?

JUSTICE REINSTEIN: We have standards in our court. I mean I just finished a long trial that had probably 180 exhibits, and we have a box of gloves, and everybody who handles the evidence has to put gloves on for every single piece of evidence, and then it goes to the clerk who reseals it, and she has bags for any kind of biohazard materials or anything like that, and it's done very carefully. And our clerk has

those standards for the court. The clerk of court does that. And law enforcement brings all the time to any one of these homicide trials or rape trials, they help supply the gloves, the bags and the like, and we are required to do that. It takes a lot of time.

DONALD HAYS: We do the same things, but then we get evidence returned back to us, in which exhibits are put into bags together with other items of evidence from the case, and that was not the way we presented them into the court. So I think there is a concern as a laboratory director and with issue of postconviction testing of evidence that has been introduced in courts on how it has been handled, how it has been stored and then returned to the laboratories.

GEORGE CLARKE: That probably varies from every jurisdiction to every jurisdiction.

PARTICIPANT: Absolutely, so I think it is time to look at that.

PARTICIPANT: We have no rules in our court system if we decide we can do that. I mean if people decide, the prosecutors decide to work logs, it's because they have talked to the agent examiner and decided they were going to do that.

The court has no role in that at all in any of the different places. I think that is true in New York, too, when I was in the Manhattan DA's office. The court had no role there, couldn't care less, you know, what happened to that evidence after it was presented, admitted and then taken back to wherever.

CHRISTOPHER ASPLEN: And I can tell you as a participant in the prosecutors training, which is probably the most extensive prosecutors training in the country, we don't talk about that. We will in the future, but we haven't up to this point.

PAUL FERRARA: With the uniform statute, will it be including the uniform statute some recommendation that after trial the evidence is returned and resealed just for this eventuality? I mean spell it out.

JUSTICE REINSTEIN: We could. I am talking about right in the middle of trial, the issue comes up what happens when they go in the jury room. Now I give a special instruction to the jury that you are handling biohazardous materials, and we give them gloves, and we give them bags. Now, you know, and in all the cases that I have had, they usually come back the same way. My guess is that most of the time they don't open the bags, because they are so scared about it.

PARTICIPANT: It's grisly stuff.

JUSTICE REINSTEIN: Yeah.

PAUL FERRARA: Well, there are other concerns, too.

GEORGE CLARKE: You mean in your jurisdictions jurors actually can take back into the jury room rape kits, instead of just you having them examined and looking for --

JUSTICE REINSTEIN: Yeah, but they don't -- I am talking about the clothes usually. I mean they get the rape kits, if they want it, but they never touch it. But they do open up -- I mean they have opened up bags of clothes until we started really giving these instructions about biohazards. Now, I started doing that

about two years ago when I had the head of a crime lab on a jury, and he was appalled when he saw a detective opening these things up, and he -- we were allowed to ask questions. The jury is allowed to ask questions. He sent in a not a question, but a comment about you have got airborne -- I don't know what you call it.

PAUL FERRARA: Blood-borne pathogens.

JUSTICE REINSTEIN: Floating around the courtroom, and it offends me.

BARRY SCHECK: Well, it is true that DNA can fly.

PARTICIPANT: Don't go there.

DOCTOR CROW: Let me take charge. There is somebody back there.

GREG MATHESON: I think one of the things I was going to point out in LA county, fewer evidence items are actually even being taken into the courtroom. Starting January 1st of this last year, no narcotics or drugs of any type are allowed in the courtroom. Everything is being done by photograph, and more biological evidence and other items are being presented in as photographs, not as the original items.

GEORGE CLARKE: Plus you need those latex gloves so you can put them on under the leather gloves.

PARTICIPANT: You can answer that question, Barry.

DOCTOR CROW: Sorry, folks, this is degenerating.

BARRY SCHECK: Seriously, this is -- we really probably have to address this problem in a very serious way, because it's so clear that the technology in this particular area is advancing so quickly, because, you know, you really -- it isn't -- I said it facetiously, but when you talked about, you know, DNA flying, all right. When you are talking about blood crusts, all right, we now have the technology to identify blood crusts. Bob Shaler (phonetic spelling) of the New York City Medical Examiners Office told me last week he has had done 12 analyses, and got results 11 times from fingerprints. So I mean I think we really do have to talk about careful evidence procedures.

DOCTOR CROW: I forgot, and I should do it right now, to ask if there are any other comments from around the room?

Well, as I said before, we are not as early as we were. Unless there is something else, I'll declare the meeting adjourned.

(Whereupon, at 4:50 p.m., the meeting was adjourned.)

Laboratory Funding Report

Dr. Paul Ferrara

DOCTOR CROW: Let me say the same thing that I said yesterday, and that is that we'll have an opportunity for general participation not reserved until the end, but after each of the parts of the program. So remind me if I don't remember this.

Since our regular speaker at the moment isn't here -- well, wait a minute. Here he is. It is my pleasure to introduce the late Doctor Ferrara, who will now speak to us.

PAUL FERRARA: Within your folders, all the members of the -- of the commission have a copy of a short synopsis really of our discussions at our last Laboratory Funding Working Group.
For those who don't have the benefit of it, with permission of the chair, I just would like to read the report into the record. The Laboratory Funding Work Group. Now that consists of myself, Woody Clarke, Dave Coffman, Cecelia Crouse, Barry Fisher, Steve Niezgoda and Dick Weedn. We continued to develop or continued to develop the costs associated with the elimination or reduction of crime scene evidence backlogs nationally. The estimation of the volume of such samples from past, present and future cases is in development through ongoing surveys of laboratories and law enforcement agencies, such as BJS, NIST, PERF, CODIS, and ASCLD, the American Society of Crime Lab Directors.

This data should be available for review and analysis by the Laboratory Funding Working Group by the fall of this year.

Meanwhile, the Laboratory Funding Work Group continues to refine the costs associated with the collection and preservation of convicted offender data bank samples. The work group believes that the consideration of preservation costs is important to assure that all convicted offender samples are maintained in a secure and protected environment so as to assuage any privacy concerns.

The Working Group recommends the preservation of these samples on three levels: scientific, legal and practical.

Under scientific grounds:

(1) The Laboratory Funding Work Group, like the Research & Development Working Group, believes that some of the most exciting current developments would not have been predicted ten years ago. In order to maintain flexibility to take full advantage of the future technological developments, retention of original samples is necessary so that state data banks can retroactively apply advanced technologies to stored convicted offender samples. In the past ten years, we have already experienced one transition in methodology, which necessitated reanalysis of convicted offender samples.

(2) As new loci are identified, retained convicted offender samples, without personal identifiers, provide a source of random samples for establishing allele frequency distribution data for the DNA advisory board mandated population studies. In addition to population frequency data, analysis of these samples also provides important data regarding potential off-ladder and microvariant alleles.

(3) Good laboratory practices dictate that the retention of convicted offender samples provides an additional quality assurance measure for the detection of any potential sample mix-ups.

(4) Retaining -- retained convicted offender samples provide a well-defined source of previously analyzed known samples, again without personal identifiers, for use as training, validation and internal proficiency testing samples.

From a legal standpoint, with all due deference to the legal community, when the DNA profile of a sample from a crime scene is found to match a convicted offender profile in the data bank, that match becomes the probable cause for an arrest or search warrant to obtain a new blood sample for confirmation. At trial, the chain of custody for all samples, as well as the samples -- as well as the sample themselves becomes subject to subpoena. In fact, a provision of Section 2.b.2.c of Senate Bill 903, the Violent Offender DNA Identification Act of 1999, states that "for criminal defense purposes, to a defendant, who shall have access to samples and analyses performed in connection with the case in which such defendant is charged..." Any of a number of definitions of evidence in Black's Law Dictionary could be applied to convicted offender samples.

States are, or should be, treating standard blood samplings as evidence, complete with appropriate security, chain of custody and supporting documentation. Data bank analysts have already been subpoenaed to testify to their analyses of data bank samples in the same manner as those who performed the crime scene work. The costs and resources necessary to provide this assurity to the courts are not insignificant or unwarranted. In point of fact, it may be required by state law; for example, in Virginia, to quote Virginia law: "The remainder of a blood, saliva or tissue sample submitted for analysis and inclusion in the data bank...may be divided, labeled as provided for the original sample, and securely stored by the Division in accordance with specific procedures adopted by regulation of the division," in this case they are referring to the division of forensic science, "to ensure the integrity and confidentiality of the samples. All or part of the remainder of that sample may be used only (i) to create a statistical database, provided no identifying information on the individual whose sample is being analyzed is included; or (ii) for retesting by the Division to validate or update the original analysis."

This is an excerpt from the Code of Virginia. I might -- I might add that that law was passed in 1989, ten years ago.

The Work Group, therefore, considers destruction of these samples after analysis, which analysis may occur years after collection, to be inconsistent with the laws governing preservation of evidence.

Finally, from a practical standpoint, costs associated with the collection of convicted offender samples have been discussed at length by this Working Group. Emphasis on funding and personnel time are critical components. The documented and complete destruction of these samples, which would constitute of course being the biohazardous waste, would only further add to the cost of the laboratories; resampling convicted offenders when a technological improvement is necessitated is an unacceptable alternative.

Having thus established a set of reasons why convicted offender samples should not be destroyed after analysis, the Working Group then turned its attention to any possible advantages of sample destruction. None could be determined. The Laboratory Funding Working Group perceives these samples when treated as evidence to be eminently more secure and less prone to misuse than the myriad of biological samples with personal identification that the general public willingly provides everyday to blood banks, doctors' offices, clinics, employers and insurance companies without any thought of how these samples are used and what, if any, regulations govern their use.

The Work Group instead recommends that states adopt regulations that require convicted offender samples to be maintained in such a manner that is consistent with privacy and confidentiality concerns.

And that concludes our report, and I will be glad to...

DOCTOR CROW: Yeah, well, thank you, and it's open for discussion.

DOCTOR REILLY: You have almost, but not quite, convinced me. I would like to return to -- let's begin. I would like to return to the scientific criteria and just ask a few questions.

Let me begin with item two, saying it provides -- retention of the samples provides a source of random samples for establishing allele frequency.

Certainly, we could establish allele frequency from another collection of samples.

PAUL FERRARA: That is correct.

DOCTOR REILLY: It would be -- I don't know -- what size -- what sample size would you need to do that? Would you want a hundred, a thousand?

PAUL FERRARA: I put 500, a thousand samples.

DOCTOR REILLY: So I must say that, from a matter of principle, I regard that as a trivial argument in favor. There are just databases all over the United States from blood banks. I could get 500 samples for you in 24 hours at almost no cost. So I regard that as not a persuasive argument.

Okay. It sounds like you are not in great disagreement with me?

PAUL FERRARA: That is right.

DOCTOR REILLY: There is other sources?

PAUL FERRARA: That is right.

DOCTOR REILLY: Okay.

PAUL FERRARA: No disagreement there.

DOCTOR REILLY: Item three, good laboratory practices dictate keeping the samples to check on mix-ups.

Now I think that is a little bit more persuasive from the point of view that we want a system that has zero tolerance for errors, essentially. Nevertheless, in all of these matters, I think you have to weigh, and we will get into it later, and I have some discussion points upon it later this morning, you have to weigh the benefits of doing that against perceived, and I want to underline perceived threats to individual privacy. Assuming that you are operating in a system that is somewhat greater than 99 percent, hopefully in its accuracy, and you have ways of checking that through the use of random spiked samples, where you can do validity checks, I'm not sure how powerful that argument is. I agree that there is a potential for, if you will, miscarriage of justice here that would ultimately be captured when you reanalyze the case.

Similarly, four, retained convicted offender samples provide a well-defined source of analyzed known samples. It seems to me for training validation and internal proficiency purposes, you could easily use other kinds of donated samples to do that.

Would you agree?

PAUL FERRARA: That is correct.

DOCTOR REILLY: Okay. So let's go back to number one. This is actually the one that troubles me the most, and I'm saying this not so much because I disagree strongly with your group, but I'm imagining the arguments that will be made from other corners of our society in response to this document.

We live in a world in which genomic technology is moving very, very rapidly, you and I both know that, and there is much discussion about where it will go with snip maps and, you know, also sorts of different things. But the fact remains, as we heard in painful detail yesterday, that we are light years away from having enough money to work with the technology that we have now. And it seems to combine that fact with the fact that I actually believe that the STR system that is going into place now is a very powerful system, and it is unlikely in my mind that a system will emerge that will be so much better in the next five to ten years that it will become an overwhelming technological argument to employ it. I really don't buy, and I think a lot of people will not buy, the argument that we should retain the system, retain the samples, because in three years we will want to start all over. That given the funding problem seems not to wash at all in my mind.

PAUL FERRARA: Let me address -- let me address a couple of the points you have raised, Phil. We have -- we have now been operating a data bank for ten years in Virginia. We are talking about a database right now approximately 200,000 samples, 75, 80,000 of which are actually profiled and in the state level of CODIS. During the course of collection of samples from -- at the prisons, at the jails, the transfer of the samples to the laboratory, excisioning in the laboratory and then through the various steps of the analysis and then the incorporation or uploading of the resultant data to CODIS, I have to admit that mix-ups have and do occur.

Now, I would also agree with you, Phil, that that percent is extremely low considering the number of samples; however, it has given us enough concern that when we make a match using the database to a convicted offender by comparing a crime scene sample, the first thing we do when we make that hit is determine if the individual we have identified is free or currently still incarcerated on that charge, or some other charge. If we determine that the individual is still in custody, we take the extra day or two before informing the law enforcement agency that we may have a hit and that we recommend that agency go out and investigate this individual, we go back to the original data bank sample and rerun it.

Now, we've ruminated about this in Virginia for some time. It's one of these steps that considering from a cost/benefit standpoint, I'm almost inclined to say it's not worth doing it. The likelihood of a sample mix-up of this type is extremely remote.

The other side of the coin is we were concerned and remain concerned about giving a law enforcement agency the name of someone who we have identified and then to find out that because of a sample mix-up of some sort that the person we have identified and sent the police after have gone, used as probable cause

to arrest somebody, take a blood sample, God only knows what events might occur during that particular arrest and search warrant so as to avoid that we thought we would take that extra step.

We have also encountered countless numbers of different situations that have asked us -- required us to go back to the original database samples. We found out, for example, that in Virginia, we have at least four sets of identical twins in our correctional system. We would not have been able to determine that had we not been able to go back to the samples and retest them.

With respect to the chain -- to the changing technologies, I mentioned at least one change. That was specifically from RFLP to PCR, but in between there, we ran through a series of changes in either -- in either methods of detection of the alleles or new genetic loci. Right now, in the U.S., you have a series of various types of technologies being used in the data banks: RFLP, PCR-based loci. Often what can happen is you are looking to do a search of someone's database or search a particular sample, and you find that because of the different technologies in use, it's useful for one or both of the laboratories to go back to the original sample to check at additional loci.

Now, with respect to the 13 loci when you come to situations that we often encounter in the laboratory of mixed stains, you will find that often even 13 loci are not enough to develop the degree of specificity necessary to conduct a database -- conduct successful prosecution, because what happens is you are only able to use a finite smaller than 13 number of genetic locations.

In those situations, we have gone back and looked at other loci available to us, such as FFFL, for example, when other -- when other use all loci are possibly available to us.

While I admit that there is ways to cope with the destruction of samples, I think the Working Group really felt that given all of the various scenarios, both already identified and that we can't even consider in the future that where it would be advantageous to have the original sample, after all is said and done, are not these genetic data banks, forensic data banks the least concerned for the general public for purposes of privacy and confidentiality compared to the rather haphazard form that samples are -- biological samples are provided.

DOCTOR REILLY: Thanks.

If I could respond to you. I have no doubt that from a technical point of view there will be instances such as those you have identified and others in which it will be helpful to a particular case to have access to a storage sample. I grant you that. For me it's a balancing test against how the society may perceive the commission's, if we so recommend, decision to store whole DNA. And I'm not sure that they will weigh it the same way your Working Group has weighed it. As a matter of fact, I would say it is actually dangerous to submit a report that says you could find no reason at all in favor of destroying samples. I can guarantee you, I could have assembled any number of committees that would have come out the other way, are very reasonable people.

The fact that -- the fact remains that in human subjects research in the United States, in clinical medicine, throughout the United States, as technology becomes more powerful, and you see it everyday -- it's on the front page of the papers today -- there are concerns about privacy. I absolutely agree with you that the odds of this database being violated are much smaller than the odds of my doctor's office leaking information about me, but I don't think that is the issue. The issue is that these databases, these forensic

databases, are emerging at a time when the public perceives correctly genetics to be extremely powerful information, and if there is a least invasive alternative, they are going to prefer that, the least invasive here or the more protective alternative.

For me the case hasn't been made yet, and I wondered tactically, even if you and your committee are absolutely right, if it still is not better for the future use of this technology in society to say, hey, you know, even though there are benefits to retaining the DNA, we see the concerns about dignitary harm to privacy, and we are willing to go forward without it, because it seems to be the actual cost to using the databases, the criminal justice system would be very small in not retaining the samples.

PAUL FERRARA: Could perhaps we look at it from this standpoint, Phil, that here is an opportunity to demonstrate to the general public, all of whom have concerns about privacy and confidentiality, that we sort of -- forensic science data banks can serve as an example and a leader in terms of how data banks of this nature should be maintained to provide that degree of assurity, in other words, set an example. Clearly, this question about confidentiality and privacy of genetic information, and I'm out of my league here, but it has to be -- will arise with regards to so many collections of samples; and if this -- if these data banks here are the first to really address this issue, can that serve -- can we serve as an example of how this data can and should be protected.

DOCTOR REILLY: I think there are others who want to speak, so I promise to shut up after this, but let me ask in closing: Do you feel the currently existing statutes offer the appropriate level of reassurance to the American public of the degree of security to the database that you would like to see conveyed?

PAUL FERRARA: Not in all states, no; in Virginia, yes, but not in all states.

DOCTOR CROW: Michael first. Then I will call you, okay.

MICHAEL SMITH: Well, I have, I think, two questions. The first is I was following the discussion about the disadvantages of not having biological samples available later as disadvantages of the prosecution of a case, but we don't prosecute samples, so I am still puzzled why say identical twins? Why do you need for the purposes of prosecution the identification sample on which the probable cause for arrest was based? So that is one.

The second one is --

BARRY SCHECK: Michael, your question is to Paul --

MICHAEL SMITH: Yes.

BARRY SCHECK: -- and I think it will occur to all of us sitting here is that every one of the practical considerations that you raise, name one where you couldn't solve it by just going back to the person incarcerated and getting resampling. I didn't hear one.

MICHAEL SMITH: Yeah.

PAUL FERRARA: In two of --

DOCTOR CROW: Maybe Mike had a second point, if you want to.

MICHAEL SMITH: I think Barry makes a good point. I will have my time for the second point. We need to answer this one.

PAUL FERRARA: Consider the scenario where you're entering a large number of genetic profiles up into CODIS, and as you do so, you search those profiles for any existing match, either with other convicted offender samples or with crime scene material; and when you get a -- when you get two individuals with identical matching patterns, and different names, and different Social Security numbers, we as a laboratory are sitting there saying, oops, what happened here? How do we ascertain that, in fact, these were identical twins? Well, the first thing we did is go back and run those samples to make sure that indeed the profiles were identical. It was informational for us to determine not only in this particular case that these individuals were identical twins, but in other cases where there have been sample mix-ups, it has allowed us to determine at what stage that mix-up occurred, because I will admit another thing. I will concede another thing, and that is that even though we go back and resample the original sample, that doesn't take care of us if a mix-up occurred during sampling, but again we at least have narrowed down where that mix-up may have occurred. It seems situations where a sample, you know, was sampled twice and put in two consecutive wells, and then we have to ascertain and make sure that the whole string of following samples and wells is not misplaced by one. These investigations have all depended greatly upon our ability to go back and have those original samples.

BARRY SCHECK: But in that instance, and in all the other instances, you have to go back to the original people to resample them to see if they are identical twins.

PAUL FERRARA: No. Go back to the original sample.

BARRY SCHECK: Oh, you mean if there was a mix-up that occurred?

I mean you are saying, well, I went back to the original samples to see if we made a mistake that matched them, but your investigation didn't stop there. You went back to the individuals and resampled them to make sure they were identical twins?

PAUL FERRARA: No, what we did then is go to the correctional people and get the information that a -- that confirmed that they indeed, you know, investigated.

BARRY SCHECK: But in answer to the question, you could have -- if you had thrown away the blood samples, and you had typed them and you found you had two identical samples, you could have gone back, found those individuals and resampled them, right?

PAUL FERRARA: Yes. Yes.

BARRY SCHECK: So far in all the examples, and I mean this is --

PAUL FERRARA: Oh, yeah. No. No.

BARRY SCHECK: And I know you are fair about this. Every example you gave us, unless you hypothesize the sudden death of somebody, right, which would be a real rare event, you could solve each one of these problems by just going back and resampling the individuals, yes?

KATHRYN TURMAN: It happens in D.C. on a weekly basis.

DOCTOR CROW: Let me call on you first.

DAVID COFFMAN: Well, first of all, I would like to -- I just want to respond. I have something to read into the record later, but I do want to respond that sudden death -- I am not even going to say sudden death -- death of inmates is not a rare event. We have inmates that are dying all the time from AIDS and other diseases in the prison system. So that is not an absolute rare example.

DOCTOR REILLY: And it doesn't terminate the right -- the ability to get DNA though either.

DAVID COFFMAN: If they died six or seven years ago, and you determined a problem --

DOCTOR REILLY: If you really wanted to know, you could exhume them.

DAVID COFFMAN: Well, that is a little --

DOCTOR REILLY: It has been done many times.

PAUL FERRARA: We do that constantly.

DAVID COFFMAN: Oh, I know, but as far as an example, someone asked for an example where you could necessarily easily. I know all these things you could go back and do it, but is it feasible? Is it time productive?

For instance, we have a low stringency search request. Not a low stringency. There was a case that was done in 1990, very minimal sample. They were only able to get four of the genetic markers. Only two of those genetic markers were the CODIS core loci, which the database was made up of. You could get several hundred, even several thousand matches back. You are not going to have the investigators go out and draw all these individuals, who may have served their time -- they are not under custody anymore -- and have them all retested to confirm that match. If we have it on file, we can do it and only inconvenience the person that is the most likely person who committed that crime.

And as also in our -- is in other states moved to all felons, or even I am hearing some states going to all arrestees. You are going to have people who are not in there for necessarily violent crimes, and there is a stigma attached to someone who is connected to a sexual assault; and to sit there and start rounding up thousands of people, because you had a search that didn't have the, you know, the core loci, I think that is very cost prohibitive, and it's -- I think it's better to maybe just regulate safeguards into the system to prevent this kind of thing.

DOCTOR REILLY: Well, I have heard a lot of things being cost prohibitive in the last two days, and that is about 19th on my list of -- I mean we can't even process the samples we have now.

I am asking you, though, since you were looking at me when you were talking, I am asking you to remember what I said. I am asking you to weigh the arguments that are made here in favor of retention in a public that is not predisposed necessarily to accept a long-term storage of whole DNA on potentially millions of Americans; and if anything, if you think deeply about it, you could argue that I'm speaking out to defend the system we are trying to put in place so it doesn't get harmed by an overreaction to the public.

The first time that there is a report that somebody leaked whole DNA, or sold it, or did something crazy with it, there is going to be a big backlash against this.

DAVID COFFMAN: I understand that --

DOCTOR REILLY: Okay.

DAVID COFFMAN: -- and I do believe we need to have the safeguards in place, but let's also make it clear that we are not talking millions of Americans, such as grandma and grandpa or Aunt Nellie. We are talking people convicted of felony crimes.

BARRY SCHECK: Maybe.

DOCTOR REILLY: We started with sex offenders, but the net is being cast very wide, very quickly. Once a criminal, not always a criminal, I hope, in our society.

DAVID COFFMAN: Well, 67 percent do reoffend. That is a known statistic.

DOCTOR REILLY: Therefore, 33 percent don't.

DAVID COFFMAN: Right. Well, that is the choice they made when they committed the crime, in my opinion, also. And also I am a little concerned that people are only concerned about five or ten years out. That is not very long at all. That is not -- that doesn't make me feel good about destroying the samples, because you are condemning our nation's databases to start over ten years, and we have already been in existence like Virginia, we have been in existence since 1989, and you don't start collecting samples and just start making hits and helping solve crimes. It took seven years into the process before we started getting any real benefit from our databases, and it's growing each year, and it's because we built our databases.

DOCTOR REILLY: Pulling out whole DNA is not the same thing as expunging the computerized code of the 13 STRs.

DOCTOR CROW: Jim.

MICHAEL SMITH: I have got a second question. Well, it's a related point so it does seem to me not inappropriate to dump it in this question.

I noticed that the conversation has more to do with the database, its construction, maintenance and reliability to those who are managing it than with the prosecution of a case.

Now, the second point is it really feels, I guess, that is a lot of the concern that people might have is not about the use of DNA for identification purposes. The reliability of databases expressed in their exclusive focus on identifying alleles, or whatever the code is, system seems to me to be important. Now if the record retention is of that identification profile, the -- it's easy, I think, to argue against efforts to constrict the use of the technology. If, however, people have reasonable fears that other uses will be made of the DNA that is retained, and I think they do, then it seems to me that it's much harder to resist attempts to constrict the use of the technology.

Now, this is already evident in the questions about whether or not arrest samples should be taken. And to the extent that the future is what we are concerned about, it seems to me to lock ourselves in to convicted offenders is not necessarily wise, and that in a sense you do that by retaining the samples, because it's very hard to explain to somebody that you can reliably predict that nobody will make future use, forensic or otherwise, of samples that are on file with the government. The government is not that widely trusted.

DOCTOR REILLY: Indeed, the statutes permit it on anonymous research.

MICHAEL SMITH: The state statutes, yeah.

DOCTOR ADAMS: The point has been made, and I won't belabor it, but Barry you made a comment that you didn't see anything within the practical portion of Paul's report to really warrant the retention of samples that have been collected, but I think in the first paragraph when it talks about resampling convicted offenders because of changes in technologies, in the first paragraph under scientific, which talked about the same thing, I think it's shortsighted to think that STRs will be in existence forever. In fact, within the last ten years, the technology has changed more than once. It has gone from RFLP to various forms of PCR based to now STRs. So to say that STRs will be here forever, that is shortsighted; and ten years --

BARRY SCHECK: We agree.

DOCTOR ADAMS: -- and ten years is not very long at all for other changes to be made.

JEFFREY THOMA: Just like RFLP is still available now, even though you don't really want to use it in that much of the future, if you are going backwards, you can still do the STR match to see if it's within the database, and then use whatever technology has developed since then. So STR is used as the database system.

DOCTOR ADAMS: That is really not as easy as it sounds. Laboratories don't turn on and turn off technologies at a whim. Laboratories have to be proficiency tested, have to undergo accreditation in these areas and can't simply decide next year to retest using RFLP when they haven't been proficiency tested in that for the last five years.

PARTICIPANT: Oh, could I address this actually?

DOCTOR CROW: Oh, yes. Let me get Woody first, and then I will call you.

GEORGE CLARKE: Just a couple of observations. I want to return briefly to the -- what I think was identified, or at least described as a trivial aspect. The allele frequencies -- and actually I don't think it is quite that trivial, and I want to jump into the courtroom for a minute, since that is where some of these fights are. And unless you have been in the -- that has been in the midst of an attack, and I mean an attack on the allele frequency data, the probabilities, estimates and so on, and while scientifically, perhaps, it is trivial or is trivial, you know, is 500 samples enough, and scientifically that appears by all accounts to be true, that is different from whether or not that is trivial to 12 individuals in a courtroom. And when you hear, for instance, a population estimate that these samples match in only 1 out of 500 people have those characteristics, it's a very common attack where you have only sampled 500 people, haven't you, and jurors don't like that.

So, again, while scientifically it may be very trivial, as a prosecutor in a case where DNA is being attacked, you bet your life I want more than 500 people in that database. I want 10, 20, 50 or one hundred thousand people in that database.

DOCTOR REILLY: It looks like you are speaking to me since I characterize it.

GEORGE CLARKE: I am not speaking right at you, but I did look at you Phil, that is true.

DOCTOR REILLY: You misunderstood my point, and I have another solution to your problem. First of all, what I meant was it was trivial to get another set of 500 individuals outside of the database. That is trivial.

GEORGE CLARKE: I agree.

DOCTOR REILLY: Blood banks provide information.

Secondly, there are a myriad of activities going on now throughout the world that would lay to rest forever those issues; for example, the Human Genome Diversity Project, which is amassing allele frequencies on many loci across virtually all populations around the globe in far larger numbers than 500, for example.

GEORGE CLARKE: It's just not the way it goes in the courtroom.

DOCTOR REILLY: Well, I haven't been in the courtroom in the same way you have, but I have been there a lot myself, and I know that, but it seems to me that again, and I am asking you to weigh things that again is not an argument that supports in my mind convincing the American people to store whole DNA.

GEORGE CLARKE: I agree. It's certainly not the most important aspect, but I don't think it should be dismissed.

DOCTOR REILLY: I don't dismiss any of these things that were raised, but I don't think they add up to an overwhelming argument.

JEFFREY THOMA: And whether you still have the data base, even though you don't have the whole samples. I mean you still have that.

GEORGE CLARKE: I understand that, but in any event, that was actually the more minor point.

DOCTOR CROW: I understand you have the 13, but I would like to hear some discussion of how badly you would need to add additional loci to the 13 or snips or mitochondrial DNA.

Do you want to answer it?

BARRY SCHECK: How badly one needs that is how badly one needs to do --

DAVID COFFMAN: To move beyond the 13 STR system.

BARRY SCHECK: Let's step back from this. I think I'll answer that point. We have all -- we all understand these problems pretty well, and it seems to me that what happens here with your group, and I

think you raised from an institutional point of view almost your charge, tell me all the different possible reasons one might want to retain the samples, okay, without -- and I don't think it was really your charge to sit here and weigh the privacy interests and even the political perception of data banking, because you have freely admitted, I think, that, you know, so many of these things can be done with resampling with comparably trivial costs and that the real argument here is the one that Dwight identifies, number one, what is the real cause, you know, we may within ten years come up with a new system, and we are going to want to resample everybody at that time, right?

Or your point, Doctor Crow, what about mitochondrial or snips, to put it concretely; and, yeah, you know, if we do within the next ten years decide that we need these new markers, and we have to go out and, you know, resample everybody to do it, that would be an additional cost that could be saved, right, if we hadn't destroyed the samples. I'll give you that. And that is to me the only real argument, but I'll tell you why it fails and fails badly in my judgment, and you are missing -- you have got to step beyond the really small institutional concerns, because you really haven't given us, other than this potential future point, any serious bureaucratic reason not to destroy the samples.

As Michael was saying before, you go out and you ask people when you take their DNA, all right, trust the government. The government says, we'll only use it for identification purposes, and that is only in the states that have such statutes. What about all the other states that don't have those statutes. What about this statute where they say they want to use it for, quote, charitable purposes. That can mean anything soon. And the political instinct of most people is I really don't trust the government with my DNA. If it is there, somebody will find a way to get it for other purposes than identification with all the technology available. That is a visceral gut point with the public.

And, Paul, I agree with you that the ultimate objective is to persuade people that we can operate these databases in a secure way without bringing on brave new world. That is really our objective. That objective is better served by destroying the blood and taking the air out of the balloon that there is any possibility that these databases will be misused, and that is going to be become increasingly important.

Look at it, we have just spent a day talking about the enormous funding gap between what we can do with the technology and what resources are available in California. That was terrifying yesterday, wasn't it, they have three analysts for Los Angeles. We all looked at each other like, you know, what world are we living in? You want funding from the public on this then you really have to demonstrate that you can be trusted, and you can be trusted, and your best argument is we threw away the blood, because it's always going to come down to that. That is peoples' gut fear, and we are really eventually -- and eventually we are, in the next two or three years, you are going to be asking for billions to make this work.

Not only that, to make this work effectively, you are going to have to go out to deal with the really tough issues that we don't discuss very much, and that is what about these DNA dragnets, what about asking people for elimination samples. People are not going to give you elimination samples if they know that you are also storing blood and that there is all these other issues raised. You have to really build trust, okay. And so it seems to me actually a critical point for us, if this commission comes out and says, you know, there are some potential down-the-road costs here, and there may be some possible instance that we can hypothesize, you know, a dead inmate that we can't exhume, and we can't find his parents; therefore, we can't solve a, you know, a technical problem by resampling. And really that is what you are talking about in the final analysis.

The political game that you are going to have by coming out and saying, you know, it would be preferable to destroy the blood samples so that there will be no argument, you are going to get so much many more benefits. It's really the right thing to do.

PAUL FERRARA: But to do so isn't that contributing to the misinformation that the public would have regarding these data banks?

I mean isn't it suggesting that no, you can't trust government?

Isn't it saying that these forensic scientists are really geneticists in disguise, who could possibly even do anything of a genetic nature? I mean, you know, it's all we can do to knock out 13 genetic loci. I mean we are not -- again it's --

DOCTOR REILLY: Can I respond to that. I think that is an important point that you raise in response, Barry.

Let me ask you this question for the sake of argument. It relates to something in that little memo I wrote. Would you, as a trade off -- not that I have a right to trade off anything -- as a trade off in exchange for retaining whole DNA would you be willing to amend all state statutes to eliminate research of any kind on the samples and a criminal provision for any misuse of sample, a significant criminal provision that will lead to conviction and having your own sample put in the bank?

PAUL FERRARA: Absolutely. In fact, that would be my recommendation. I mean we feel that the statute is like Barry's.

DOCTOR REILLY: But I must say that although I appreciate your point about contributing to the argument, I agree 100 percent with Barry that in the larger context of the society, unfortunately these databases are unfolding at a time when there is great concern about employment discrimination, insurance discrimination. I actually don't think there is much of that either, and I have written a lot about that, but the perception is more important than the reality.

DOCTOR ADAMS: I mean it would be different, wouldn't it, if we could be very specific about what the future need is. It's because we are not specific, that is, we don't know for sure exactly what that future need is. It opens up the imagination to other kinds of needs that you don't actually have and wouldn't ever, but that is part of the difficulty.

DOCTOR REILLY: I must say though I find myself -- I find it uncomfortable to be justifying retention of samples in anticipation of a new technology when we are so far from being able to apply the technology in place.

PARTICIPANT: Right.

DOCTOR REILLY: I find that such a hollow argument.

BARRY SCHECK: I mean how many of you -- you know what is really interesting? Many of us sat around the table at the first NRC, right, and Dwight, when the FBI was justifying DNA and DNA data banks, what was their first argument? I will go back, and I will show you all the crime lab digests. You

said, generic with the FBI, well, we only took junk DNA, and all we have in Washington, D.C. are these autocrats. That is all we have. We don't have the blood. And that was the argument. All right.

Now, of course the states have the blood, and we all recognize that is the issue, but I am only pointing out that any time you debate this with anybody, and you try to justify the databases and say it really serves a good purpose, and I am the person that goes out and talks with all the people, you know, from the Civil Liberties Union and everything else and saying no, no, no, no, no, and I say look at our statute. We wrote our statute so that it has criminal protections, and we protect it and everything else, and they say, I don't trust you. I don't trust the state with the DNA. How do you know we won't have another eugenic scare? How do you know we won't have another one of these lunatic things like sickle cell anemia? How do you know that they won't go after violence genes, sex offender genes for research if it's there. Tell me that in ten years, like you say, the technology will change, there won't be a sudden desire to grab that for another purpose. And, you know, you really can't win that argument. You can't win that argument in the long run. The only way you win that argument and get more money for this technology to be applied correctly is to destroy it and say, listen, it's impossible, because we have destroyed the blood, and there really isn't any justification here bureaucratically that couldn't be taken care of with resampling, or couldn't be, as Phil said, and I think we have to agree, his use of the word trivial in this context is correct insofar as you can go to other sources to get allele statistics for frequencies. I mean it's not hard to do that. You don't necessarily need this. I'm telling you, you are making a terrible error if you don't cease this opportunity, this commission now, and make this a recommendation for the states. You'll be so far ahead of the argument.

DOCTOR CROW: Woody.

GEORGE CLARKE: Well, just as an observation, I suppose, as much as anything, and I want to see if I understand your suggestion, Barry, by destroying the samples and assuming that a new technology develops that then becomes used routinely on criminal casework, would that then require going out finding those people and collecting again?

BARRY SCHECK: No.

GEORGE CLARKE: All right. Then those people are left out of any database searches; is that right? Is that the suggestion?

BARRY SCHECK: We have got them on STRs.

GEORGE CLARKE: Oh, no. No, what I mean is when they have been sampled and let's say profiled using STRs, and that when a technology, and I don't know that there is frankly much doubt that there will be new technology --

BARRY SCHECK: Of course.

GEORGE CLARKE: I mean whether it's chip based, or any of the other suggestions that we have already heard, I think we all realize that in one form or another that is a fait accomplit. But my question is those individuals, whose samples who have otherwise qualified have been profiled using STRs and are then destroyed, do those individuals then need to be picked up in a new dragnet? That may be the wrong term, but a new collection?

DOCTOR REILLY: I think it is the wrong term; but nevertheless, let me respond to that, and the first response is actually a dangerous one for you to make, because I know that there will be many who will immediately criticize it. But if the technologies are going to advance as much as you anticipate, and I think they will, the issue of transferring them is very different. There is no reason why they couldn't be run in parallel.

DOCTOR CROW: I am having a hard time staying out of the argument so I will. But I will ask a question. I think the distinction is being made between existing technology and future technologies is the wrong distinction. Many of those future technologies are here right now. They are pending nuclear-type probes that are being sold. There are -- I have already said snips and mitochondrial DNA. These are not distant future technologies. They are here now, and the question is whether they are useful enough to make it important to retain samples beyond the 13 loci.

DOCTOR REILLY: That is certainly true, but, you know, I am wondering, and I am not necessarily the person to answer it, but I'm wondering how much more persuasive Y chromosome sequencing, for example, and David Page has sequenced the Y chromosome, most convicted felons and men you could just have a little Y chromosome sequencing chip. I am wondering how much better those technologies are than STRs. Why not say, which is, I think, a perfectly valid argument, STRs are good enough. We will make a collective decision in the interest of cost to keep in place the system we have, 13 STRs for X number of years. It doesn't mean that it's there, we have to use it.

DOCTOR ADAMS: We said that about RFLP though ten years ago. That was the system of choice. That was the best technology available at the time, and yet it changed.

DOCTOR REILLY: There are a couple of differences, I think, Dwight. One is that at the time the number of existing samples, the database was trivially small.

DOCTOR ADAMS: Right.

DOCTOR REILLY: Okay. Secondly, I think the advance from STRs or RFLPs is far greater than maybe snips over STRs in terms of the yield. I don't think that it is a clear distinction that one is that much better than the other.

I mean people love STR technology, as far as I can tell. I am not hearing somebody say, don't use it. Let's wait for chip technology. Who is saying that?

DOCTOR ADAMS: One way to understand this is to say that the technological challenge for the identification database purposes would be should a new technology for identification purposes emerge that we prefer the technological challenge would be how can we continue to access the old 13 STR database. The answer to that question would be important to get, but I think that Phil and I and Barry anyway are assuming that that is the technological challenge that needs to be overcome and would be overcome, and it would be worth taking that challenge on to get over the political and legal hurdles of retaining whole DNA.

JEFFREY THOMA: And even without that argument, Dwight, your argument that RFLP is gone, and we thought that it would be here for a while, you are always going to need RFLP for appellate and habeas purposes anyway, even though you are saying, you know, they have to be proficiency tested to even use

it, but it still has to be available. The system has to -- in the legal system, it has to continue. I mean STRs would always have to still be available if they were used for any purpose, even if just databasing. And I agree with what Michael is saying and what Phil are saying. We can say we can stay with STRs for at least this purpose of the database; and if we go further, as Jim says with snips, or whatever we go to next, we can still revert to STRs. One of the reasons we have STRs now is the low cost and the efficiency of being able to do it and compare it. That is it is going to take a little while even if the technology advances to overcome and get down to where it's more efficient cost wise and otherwise to use another system.

DOCTOR CROW: Let me ask Dawn Herkenham if she has something she would like to say.

DAWN HERKENHAM: Yes.

DOCTOR CROW: I thought so.

DAWN HERKENHAM: Hi. I am Dawn Herkenham with the New York State Police, and I know that Doctor Reilly had asked a question about state DNA database laws, so fortuitously, I think the FBI had passed out something on DNA database laws, and I have listened to a lot of discussion, and I think there may be a misunderstanding that only a handful of states do have restrictions on disclosure, and there are actually 46 states that have restrictions on disclosure of DNA records, no disclosure of DNA samples. There are 32 states that penalize the unauthorized disclosure of DNA records; and for the most part, DNA records are defined within the state laws as the results of the DNA analysis or the DNA profile itself.

So there really are not a lot of statutes out there that would wholesale allow a crime laboratory, or whoever has possession of that sample, to disclose it to another entity. And, obviously, you don't have to take my word for it. What we try to include in the FBI's publication under the provision access and disclosure was actually verbatim the language in that particular statute. So you can sort of read that for yourself.

MICHAEL SMITH: Does New York have similar restrictions on the disclosure of criminal records held by DJS?

DAWN HERKENHAM: With criminal history record information?

MICHAEL SMITH: New York State does not have a specific statutory requirement for that. Under regulations, the Division of Criminal Justice Services have held criminal history record information confidential and will only release it if there is another statute in New York or a federal law that authorizes access to that information.

MICHAEL SMITH: In your experience do people who are employers in New York have any difficulty getting that information?

DAWN HERKENHAM: Employers?

MICHAEL SMITH: Yeah.

DAWN HERKENHAM: Well, I will have to tell you that I don't work for DCJS currently. I used to. Actually, I used to be the counsel.

MICHAEL SMITH: I remember.

DAWN HERKENHAM: You know what a hard time I gave you to get criminal history record information, anonymous information for research purposes.

MICHAEL SMITH: For research, right.

DAWN HERKENHAM: So you know I gave you a hard time on that.

MICHAEL SMITH: Right. I am not asking if you gave employers information. I know you didn't.

DAWN HERKENHAM: You know it. And I believe that that same strict confidentiality requirements are still handled and still used by that agency, and I will give you an example, for instance, and you may not agree with this. I know for a number of years, Big Brothers and Big Sisters have been trying to get access in New York State to criminal history record information, and because there is not a specific state statute that authorizes that, they are not permitted. So even something what some may consider a worthwhile endeavor, unless there is a specific statute that authorizes access for specific purpose, that information is not accessible.

MICHAEL SMITH: Well, all I can tell you is that I have seen a fair number of rap sheets that came out of the DCJS system in the hands of people who didn't have authority to get them and who weren't granted that authority pursuant to any procedure that you are describing.

PARTICIPANT: We know that is true. We know that is true. They appear in the New York Post.

MICHAEL SMITH: Yeah.

DARRELL SANDERS: But it seems access to rap sheets is quite a bit different than would be to this. I mean they are just much more available to thousands and thousands of people in the system, and this information wouldn't be. So that is a -- that may be a weak argument, too.

MICHAEL SMITH: But it's a weak argument except in the way that Phil is using it, that is the popular understanding of how good the protections are, the conventional kind you are describing, is the popular understanding is they are not very good. Even though you are all law abiding people, all right.

DOCTOR REILLY: Yeah, please understand I am actually a great proponent of this technology and its use, and what is motivating me is I'm trying to find the right path to make it most acceptable for good reasons to the American people, and we are among those few that have the opportunity to really explore the question in a meaningful way; and I think before we submit a final report, we should apply an acid test to ourselves and say, what would the most virulent critics of the system say about our findings and why. Do they hold up?

DOCTOR CROW: Should we hear from such virulent critics.

DOCTOR REILLY: Actually, I think we should. It's for both NRC1 and NRC2, we sent out our draft reports to people to have them criticized, much as papers are peer reviewed before.

CHRISTOPHER ASPLEN: Along those lines, I don't -- I don't want to affect the tenor of the conversation, because I think it's very valuable, but there is no expectation that this issue is going to be

resolved today, or that any recommendations will come out of this group today, or that any consensus will come out of this group today. We do anticipate bringing in other representatives to come and talk to the commission from different perspectives. So this is just the beginning of the discussion on this particular issue.

DOCTOR CROW: Well, for a beginning it has been a pretty good discussion at least.

JUSTICE REINSTEIN: I just have a couple, a couple of conferences that I have been to, Doctor Chakraborty has said that with the 13 loci that we are at identity. So I guess I ask Paul and Dwight, Phil's question before us, why do you need to go beyond identity when you have got, you know, one in a trillion, or one beyond the world's population, or is that wrong in some instances?

PAUL FERRARA: No. I will give you a perfectly good example, Judge, something you can relate to. We had a data bank hit about a year ago. Because of the limited number of useful loci, among those 13, we developed a -- it was a likelihood ratio of 1 in 2,900. Now, this is a cold DNA data bank hit. As is typically the case, the prosecution and data bank hits had very little other evidence. The defense filed a Motion to Dismiss the case on the basis that one in 2,700 did not constitute reasonable --

MICHAEL SMITH: Sufficient evidence.

PAUL FERRARA: -- sufficient evidence, whatever the term is.

BARRY SCHECK: To do what, to resample the guy, or to --

PAUL FERRARA: No. No.

BARRY SCHECK: -- because that is not what you are going to present in court.

PAUL FERRARA: Yes, that was all we had in court, because absent additional genetic locations to look at, we were limited to only a few number of locations. So the Motion to Dismiss was granted. The guy is walking the streets right now.

DOCTOR REILLY: And that is the only time that has ever happened to you?

BARRY SCHECK: I don't even understand the example.

PAUL FERRARA: Thirteen is not always enough. So I want to go back and get that original sample, look at additional genetic locations. Now, what happens in that cold hit, we went back and got a fresh sample from the guy, all right, which is commonly the case. And we can then -- we then conducted additional testing on that, but we also went back to the original sample as well, at that time, to do the same testing on that material, but 13 loci, Judge, and eight in a straight sample is plenty.

BARRY SCHECK: You went back to the guy, and you resampled him?

PAUL FERRARA: Right.

BARRY SCHECK: So you didn't need the retained sample?

PAUL FERRARA: Right.

MICHAEL SMITH: Not to convict the guy. To convict the sample, you would have needed the retained sample.

PAUL FERRARA: Right, but what I am trying to answer is the question as to why 13 isn't necessarily always enough.

BARRY SCHECK: Let me give you the only example I can think of. I am trying to come up with examples to support your argument.

PAUL FERRARA: Okay.

BARRY SCHECK: And they are really out there. The only one I can think of is that you have a sample that is so small from the crime scene that you can only do one test, all right. I mean --

DOCTOR REILLY: That is not realistic.

PAUL FERRARA: No. The situation there was with the existing loci; and right now, I have got another case just like it, and it's an active case so I don't want to get into any details, but it's the same thing. It's less than 1 in 4,000 likelihood ratio, and we are scrambling around trying to look for additional locations. Now, I will admit that we can run more of those other genetic loci on a -- on this probable cause sample from that individual and not have to go back to the original sample, unless -- and this is I guess we haven't talked about it, and maybe my legal -- our legal arguments are really trivial, but what is the likelihood that future prosecution will be hampered by the fact that the prosecution can't produce the sample upon which the original probable cause was based?

BARRY SCHECK: Assuming that you got the defendant, you took blood from him, you resampled him, and you got a match, zero.

DOCTOR REILLY: That raises a question that I would like to put out to those who know more about it than I do. I'm not even sure that I would characterize a blood sample drawn from a fellow at parole as evidence of any kind in a real case.

Is that really evidence in the traditional sense of using the word?

GEORGE CLARKE: It's probably something that as you tell a chronology to a jury, you would do in a very sanitized or safe fashion. It's like we do with fingerprints. When there is a fingerprint match from an automated search, you generally aren't allowed to let the jury know exactly how you found the person, and we sanitize it by saying sometimes, well, you have to give fingerprints to get certain licenses and so on to take basically the sting out of it. So as a practical matter that is not a real issue at trial.

DOCTOR CROW: I would like to raise one point I would have said yesterday, if I had found the time to do it, but one of the -- it's my fault for not having the time so that is all right. One of the things that the technical committee has wrestled with is that there is considerable sentiment in the group and especially on my part that it would be nice if we had sufficient accuracy in our testing that we don't have to worry about the possibility that there was a relative in the sample that you didn't know about, or that the population substructure were more extreme than the models that we make about that; and if so, then one might use the following criterion. We know that brothers or sisters, but I am especially interested in brothers, share one -- have a chance one in four of having identical genotypes at any particular locus

irrespective of allele frequencies. So that one fourth is a very solid number. It's modified slightly by allele frequencies, which will differ from one group to another, but not enough to affect this number very much.

And we would sort of like to suggest that maybe if the criterion for evidence that is presented in court said not that the chance of two random people matching is such and such, but the chance of two brothers matching is such and such; and if they are any less related, it is less. I think that would be a very nice criteria, and it would get us rid -- it would get rid all at once of the necessity for typing people by race, keeping separate databases, et cetera.

PARTICIPANT: Is that one and four to the thirteenth then applying that thinking?

DOCTOR CROW: Roughly, except it's a little larger than one-fourth, because it modified the others. Now, 13 loci, the average match probability in this case is something like one in ten or a hundred thousand. It's not the high numbers that ordinarily appear in court. If you went to 16, 17, or 18 loci, then you would be reaching the same kind of numbers that one is customary to use with 13 loci with random populations. I don't know how important this is, but it's a consideration that I would want to bring up.

BARRY SCHECK: It wouldn't really affect this issue in the sense that if you wanted to present it to a jury that way, right, just get another -- just you can then do another four loci when you have caught the person and you want to prosecute, you can resample it. I mean in terms of doing database searches for all practice purposes --

DOCTOR CROW: I think you are right about that.

MICHAEL SMITH: This is an investigation.

DOCTOR CROW: I am really talking about what is presented in court.

BARRY SCHECK: That is different.

DOCTOR CROW: I just wanted an excuse to bring that up.

(Laughter.)

PAUL FERRARA: I would like to ask one question if -- with respect to the population databases and its use for statistical purposes, if we give the signal to the public that all these samples have to be destroyed; and as Phil said, yes, we could -- we did get statistical databases developed before convicted felon sample databases were developed, why -- what -- why would the persons -- why would persons feel comfortable giving us samples for the creation of these larger databases?

I mean aren't they going to be just as worried should not --

DOCTOR REILLY: Oh, you are talking about the creation of databases for allele frequency purposes?

PAUL FERRARA: Right.

DOCTOR REILLY: I see your point. You don't completely escape the argument, but I mean one way to do it is to have blood from a blood bank given to you in which there is absolutely no identifier, absolutely no identifier.

PAUL FERRARA: But, again, that is how these samples are stored, Phil.

DOCTOR CROW: There are two people I want to call on.

Did I forget about you, David?

DAVID COFFMAN: Yeah, I wanted to say a thing.

DOCTOR CROW: Let me call on you first then since I forgot about you.

DAVID COFFMAN: I am Dave Coffman, and I promise I will shut up after this, but basically someone mentioned why more than 13 STR loci. We are trying to, as far as having actually been someone with databasing experience in this room, we have had technology changes. I can't tell you what the new technology is going to be. I can tell you right now there is rumblings in the community that they really wish that we had included Y chromosome as part of the core loci already. I mean we just set these 13 back in the fall of '97, I believe it was, and there is already talk that we need Y chromosome issues. It is not -- it's not the fact that 13 does not give you a huge number in a pristine sample, but the problem is the more sensitive we get, we are going to be picking up mixtures more often, and sometimes they can't be resolved, and your numbers plummet at that point.

Also there is talk about automating, using automated procedures for looking at sexual assault kits, doing the differential extraction. If we have Y chromosome issues, that would greatly enhance that capability. So there is just -- I mean this is just what I -- you know, I don't think on my feet very well, but that is just what I came with now, and that is something that we need to consider.

And also as far as my being in civil service, we always have to think of the cost-effectiveness. Now, I know when it's public safety or whatever, we shouldn't think of that, but the reality is we have LA with three people doing the sexual assaults -- not doing sexual -- testing sexual assaults in LA. Sorry about that. You know, the fact is it's hard to get money for civil service. Crime labs have never been staffed properly. You know, they didn't put 100,000 crime lab analysts on the street a few years ago. They put 100,000 cops.

(Laughter.)

DAVID COFFMAN: You know, so we are always understaffed. We are always underfunded. We always have buildings that even if we had staff and funds, we couldn't squeeze them all in there. So that is an issue we have to consider, but my biggest plea is the effectiveness of the database. If you start saying that ten years is somehow an adequate time that a technology can be in place, we have already had that, and it took us seven or eight years into the database formation to really start becoming effective. And to say that we can only account for from here on out, we can only have two years out of ten that were any good is just shortsighted, and that is just all I want to say.

BARRY SCHECK: If the state legislature turned to you and said, I will give 50 analysts, right, because minority caucuses that have special fears about the collection of blood, right, that is a bunch of votes, even in Florida, right? And this group and that group say I will give you 50 analysts, which is how many million? How many million would 50 analysts, more analysts be for you in the State of Florida?

DAVID COFFMAN: It would be quite a bit.

BARRY SCHECK: Okay. If you destroy the blood, you would take that deal in a heartbeat.

DAVID COFFMAN: I got -- we got 69 new analysts in the State of Florida keeping the blood so...

DOCTOR REILLY: But that is not typical of the nation.

DAVID COFFMAN: We show effectiveness.

BARRY SCHECK: What I am saying is when you start putting in this balance, you know, and you start looking realistically at the politics and how people really feel about the government, you know, trust us, we are the government. We don't do anything with your DNA. Right. But if you destroy it, you can get money; and so far, you know, I don't see a lot of success, do you, in terms of money for this?

DOCTOR CROW: Let me call first on chief and then on Jim Wooley.

TERRY GAINER: Thanks. I actually think I want to go in the same direction David did and talk a little about Dwight. Again, we are spending a lot of time talking on the court aspect of this, which is clearly very important on the constitutional aspects, which we spend a lot of time before on the privacy issues, but it seems to me that we are losing the focus somewhat of the investigative value of a database. Again, it seems to -- we have picked the American approach versus the United Kingdom. And however the commission ultimately decides this, we ought to have our arguments in somewhat alternatives, so that if one is going to destroy the blood bank, then this is the social criminal victimization impacts of that; and if -- and as you mentioned maybe that we mandate you keep STRs or have the technology committee get gateways for us that we have heard are always going to come in so many of these technology areas, but never seem to do, because if we only focus on the fact that, again, that it is a privacy issue, or if we argue, you know, the cute turn of the phrase "trust us, we are the government," then we do lose the potential to prevent victimization and to solve crimes, and I think we ought to devote just a tad more time to that and of the argument versus where we have spent an awful lot of time thus far.

DOCTOR CROW: Jim. I saw you too late. Sorry.

AARON KENNARD: Well, I'm glad you finally heard from one of the other law enforcement there. There are four of us on this panel, and you have not heard from any of us here, and I suggest we be very careful if you are going to be bringing on some of these minor or so-called minor groups that have special interests, because what of the overall community do they represent. I am part of the government. I am very offended when you suggest that we can't ever be trusted, and yet you can get a fingerprint card, you can get a crime scene analysis, and you can get a history of -- a criminal history of anybody you want, if you have got enough money, or if you have got enough contacts through the press. So I would ask this commission not be guided that you -- I think possibly listen to some of these people that it may be of some value, but they are not going to be directing or guiding us in our efforts. Be very cautious in some of these special interest groups. What percentage of society do they represent? I deal with the ACLU on a constant basis. I get a lawsuit every week from the ACLU, but the general public in Salt Lake County are very offended by these people.

DOCTOR CROW: Jim Wooley.

JIM WOOLEY: I wasn't in response to what Terry said so I will wait until people want to follow that up. I just had a couple of questions for Paul and his group actually that was unrelated to what Terry said.

JEFFREY THOMA: Just a really quick point. Terry, I don't think we lose anything with regard to matching up to the database by destroying the samples. Absolutely nothing.

TERRY GAINER: It's the technology changes, Jeff. That is what I understood we would lose. We would have to begin recreating -- excuse me. Just so I understand so we can speak the common language. I guess I have understood from a layman's perspective that if the technology changes, then we would have to -- have to have either new samples or create or start or resample what we had held onto or begin the creation of a whole new database. Now if we get gateways, then I guess I don't have a problem with that.

JEFFREY THOMA: You either run them in parallel, or you have to keep the STRs, just as I said, you have to keep the RFLP and the PCR D.Q. Alpha, whatever you have used previously throughout a certain time frame anyway.

TERRY GAINER: But I do think that is a cost, which was not going to be borne, or we just have to discuss the cost of that.

JEFFREY THOMA: And I think the cost is less really of doing it parallely and rerunning it in those isolated incidents when you need it, if the new technology advances.

Then the storage, then the other issues of cost that are going to occur from keeping the whole block, I think it is something you have to balance even within your costs, even by doing it that way, and you are not even taking into account those privacy concerns which trouble me greatly, too. But I don't think you are hurting law enforcement by doing it. I would not want to do that. I think, obviously, we have to figure out a way to do it.

TERRY GAINER: Just so -- I am missing something, and then I will need the technologist to tell me, because again it seems to me we would be losing something. If we change to technology number three, assuming RFLP and STR 1 and 2, I guess I am understanding, absent some type of segue back into the STRs, which will be much, much larger numbers than we had to deal with the conversion of RFLPs to STRs, that when I want to go search a data bank, I won't be able to do it, because the majority of the offenders will be held in a data bank for which the current technology won't let me back in there. That is the way I understood the problem.

JEFFREY THOMA: Otherwise, if you want to do that then you are going to have to, if you do get the new technology, you are going to have to rerun everything if you want to do it that way, and that is incredible, the cost of that would be -- Paul, you know that. It's impossible.

PAUL FERRARA: Well, no, no. It's not impossible.

JEFFREY THOMA: Anything is possible, but it would be extraordinary.

PAUL FERRARA: No. No. Look at the RFLP to STR transition. In Virginia, and Phil is right, in NRC 1, we specifically said that we didn't recommend the creation of large RFLP databases, because in 1990, when we wrote that report, we knew that STRs were on the horizon. So we said that the development of large RFLP data banks wasn't wise. And we were right, because over the next seven years, in Virginia, we

had run some 15,000 RFLPs. Now, we don't bar RFLP pretty quickly, and advisedly so, but there are a lot of laboratories in the United States right now who are still running RFLP analyses.

Now, when they get set up to run STRs and get the funding, they will be able to go back like we did and rerun -- and economically rerun their -- they will have to rerun those RFLPs; otherwise, they are going to have to start from scratch again.

Now, let's say ten years from now I can run -- I can run samples at one-tenth the cost of STRs. Currently, let's say 50 bucks a sample. Let's say I can run them for five bucks a sample, and they are equally as -- as equally as reliable, specific, sensitive, as the STRs, and we want to go to all -- to say arrestee testing, or other states choose to expand, as I wish they would, their statutes to all felons. There is going to be quite an advantage to wanting to say, well, let's jump to that new technology, but that is going to mean rerunning now all the STRs, if you have made that transition, but I can see that -- you know, I can see that happening.

TERRY GAINER: But from the integrity of the database, I mean if the database has a value, that is what we are going to have to do, or we are starting all over again, and I think that is the argument I hear from David and Dwight and others, and from just a practical crime solving, crime prevention, that is a value -- that is a bigger question as anything that we are dealing with here.

DOCTOR REILLY: Although I must say, I haven't heard an answer as to why, if there does emerge a new technology, which is almost certainly too powerful and cost-effective, systems couldn't be run in parallel on a sample. I have not heard an argument.

PAUL FERRARA: Well, you can't, because whatever sample of technology that you are running on crime scene samples, that has to be the technology that your database is based on.

You can't search a -- if you run an STR, I can't search an RFLP database.

DOCTOR ADAMS: Of course not, but if you had -- let's just say that by the time Y sequence technology emerges on the chip, you got two million samples stored in databases in the United States. You really don't -- I mean you really don't want to abandoned STR technology at that point, do you?

TERRY GAINER: I don't know that we would in that area, Dwight, but I can say what is going on in some other technology where I haven't seen the compatibility, and that is in the whole weapons issues in new technology, where one group of people has us doing IBIS, and another has us doing brass catcher, and another has us doing drug fire, with the promise over the last three or four years that somehow these would all be compatible, and they are not.

So, consequently, you are asking departments and labs to do something that is very cost prohibitive, and as a consequence, not inner solving our cases, and again, locking people up and getting the right ones off the street.

BARRY SCHECK: It happened here initially with RFLP D.Q. Alpha, but now we are on the same system, but just so we are all clear about the limited issues, let's say that we decide that we want to do, let's say for the sake of argument, mitochondrial testing, all right, on everybody, because in terms of trace evidence, it's such a good and sensitive identifier. Well, the way you would start is that, because you are

absolutely right, you have to do the testing initially on the crime scene samples. As new people go into the system and are convicted for designated offenses, you begin to type them as they come in, and the statutes would say, as they go out you begin to type them, right? And then the pool of people that -- would you go back and try to resample the ones we don't have yet anyhow, right, the people on supervised release? I mean, you know, you have to start thinking this in terms of system. When the new technology comes in, as long as you are typing the new people and the new crime samples and the people coming out, you are really going to capture for the most part, the people of greatest interest; and eventually over time as the technologies run, you bring them in. So you are not necessarily -- it's not such a, you know, huge thing that you have thrown away the initial samples for the STRs.

TERRY GAINER: That is a good point. Again, when we do these alternative arguments, let's think about the alternative solutions and the alternative cost, and that cost just in dollars.

JEFFREY THOMA: Oh, I think we agree completely on that, Terry.

DOCTOR CROW: Jim Wooley, you have been quiet for a long time.

JIM WOOLEY: Is it accurate that the discussion seems to suggest this to be the case is that your reasons for retaining the samples in the group are those listed in order of descending importance?

PAUL FERRARA: No. No. No. No. No. And it's not meant to be all inclusive. It's just what we could think to put together.

JIM WOOLEY: I mean I know a lot of the folks in your group, and I know you have put a lot of thought into it, but it seems like that is where the discussion is currently framed. I mean it seems the -- the idea that we need to keep these things, because as number three suggests, and you talked about that, that we bungle handling of samples for database reasons is something that seems to me, unless you really have a lot of that going on, that seems to me -- I'm kind of uncomfortable even saying, I mean, do you really have -- do we really have these situations here?

PAUL FERRARA: Yeah, sure.

JIM WOOLEY: Do we have cases -- have you been involved where you get a hit, and you go back, and you find out well that guy was in jail, or he couldn't have done it. So then you rerun it on stored DNA and then somehow find that some mistake was made that saves you now going to get a sample from that guy?

PAUL FERRARA: No.

JIM WOOLEY: Because if it doesn't happen, maybe we shouldn't be asserting that as a reason for --

PAUL FERRARA: I think -- no, that hasn't happened, Jim, but it could, because when you are -- realistically, when you are handling, as we will be, if not already, tens of thousands of samples, transporting them, excisioning them, taking them all the way through the process, I would be a fool if I sat here and said there is no chance that mix-ups will occur.

Now, maybe what you are saying is what is the worst-case scenario if there is a mix-up, further investigation when you go to get probable cause to go arrest this guy, you are going to get a known sample, you are going to check it against your crime scene sample, and you are going to say, hey, wait a

minute, this doesn't -- this isn't the same profile. What happened? Well, meanwhile so you say to this guy, or whoever you have arrested, oops.

JIM WOOLEY: Sorry we arrested you; and if we had had your stored DNA, or we had had stored DNA, we might not have had to have done that, because we could have --

PAUL FERRARA: We could have checked it before that officer went out and arrested that guy.

JIM WOOLEY: My only point is that that seems to be sort of, in terms of anecdotal support for there being that real problem, that seems to be kind of small. It seems that if you just list them all one after another, it seems like the technological change argument. That is the real one, and that is the one where this discussion needs to take place.

PAUL FERRARA: Clearly. Clearly.

JIM WOOLEY: And the idea that we need to do this, because people are bungling database samples in handling them, I think, is where the discussion doesn't -- but the technological change area, when you look at history, I mean there is reasons why that really needs to be flushed out just on those issues.

PAUL FERRARA: I mean, again, you are absolutely right. I mean there is no -- I mean clearly the main reason we don't want to do this is protection of our samples against some future technology.

JIM WOOLEY: Right.

PAUL FERRARA: But we wanted to point out there are a myriad of reasons why we in Virginia go back to those database samples on a routine basis for a variety of reasons. And so then we looked at all the reasons why it's nice to have those samples, and then we said, all right. Now, where are the privacy and where is the risk of these samples falling in information being released? And we, from a laboratory standpoint say, there ain't any. So what is the point of taking a chance on destroying the samples and eliminating a variety of advantages to keeping them simply for the sake of giving, giving the warm and fuzzies to the general public or the ACLU --

JIM WOOLEY: Yeah, I understand that.

PAUL FERRARA: -- when, in fact, what people ought to be looking at and be concerned about, and it goes beyond the purview of this commission, is the -- is the willy-nilly nature in which samples are collected all over the country, but...

DOCTOR CROW: Let me. We haven't heard -- let me say it another way around. I said at the beginning that we would give people, who are attending the meeting here, a chance to speak after each presentation. I think this is a good time to do it.

So let me ask if there are people that are around the rim of the room who would like to say something. Yes, you first.

DETECTIVE FOSTER: Hi. I am Detective Foster from the LAPD, and I wanted to present kind of a different -- you are all scientists and very knowledgeable experts in everything, but the warm and fuzzies, for god's sake don't ever say that outside of this room, because we want the warm and fuzzies. There are

very few people who do vote, our Vietnam era raised on, and all the Pentagon papers stop, and General Westmoreland and all the lives and all the people that died because of that, that is who we were raised on.

And look at the syphilis experiments. Yes, they are one in a million, but they are there, and they are in the American memory. You can't ignore that. You are scientists, but you are not the cops; and if your entire case is focusing on one drop of blood, then that copper hasn't done his job, or that guy is such a good criminal that he is going to get away with this one. Everything cannot be based on that one-in-a-million shot. I am not a scientist, but you can't -- you can't tell me yes, just trust the government, because, no. Yes, we should trust the government, but always without being completely naive and without being completely ingenious about the whole thing.

Mr. Scheck is completely right, and the gentleman here whose name -- I can't see, you have to convince the American public, and I admit, this is it. We are under 40, and we are young, and we don't know what the hell is going on, and you just can't tell us that this is a really good idea, because maybe if we can't -- we need more than the 13 loci. Then that is just not a good argument, because we don't know what the devil you are talking about.

So when you make these policy decisions, positions, and especially as a police officer, if you have got a 71 percent recidivism rate in the county of Los Angeles, then why are you worried about your data bank. They are coming back. They are coming back within one year. You have got them coming and going; and next year, if you can't get them this time, then you get them again. That is seven out of ten of all the prisoners that go in LA county alone. If you guys need more comparison samples, you are welcome to them. Come to California.

Thank you.

DOCTOR CROW: Thank you.

Anyone else? Please.

PARTICIPANT: What was her point?

DAN ERLICH: Hi. I am Dan Erlich. I direct the Whitehead Institute Chip DNA Project. I sort of see this group struggling with trying to bring this very powerful technology to bear for the public good, and it has taken us a long time to even come up with the 13 loci to have enough of a mandate to get started on this, and I have seen the struggle of getting going as being something which we shouldn't -- we can't afford to lose momentum about; and at the same time, we have to acknowledge that the technology will be changing in ways that have been brought out. So what is certain to happen is that the costs of doing the assay will plummet. It will -- it will -- in fact, with current technology plummet if the facilities were properly centralized. The point where they are, for example, in genomics for the Human Genome Project. Immediately, if you were to apply it by economies of scale, you would find that the assay cost would go to a small fraction of what it is. As the new technologies develop, it will further plummet. And it's also certain that the consensus that we have got to achieve the 13 loci, that will prove to be an incorrect decision that we will find that in the future there will be more powerful ways to apply similar technology, which will be more effective in the public good of crime solving.

And because the assay cost will plummet, and because the choices in what went into the database will change, we will want to redo the database, and what that will mean is the cost will be entirely associated with picking up samples. It will, particularly when these people are no longer available, and you have to send somebody out to collect it. So this is, I think, the best reason for keeping the samples is that you are going to have a far more effective tool if you are able to modify it over the next period in time.

DOCTOR CROW: Thank you.

We perhaps haven't emphasized, as we should, on the fact that the changes are likely to be instrumental in modifications rather than substitution of total new things.

Yes, Phil.

DOCTOR REILLY: I would like to put a question to both Doctor Erlich and Doctor Crow. Looking at it from the point of view of population genetics and the power of the 13 STR loci and admitting full well that there are better technologies ahead, if we froze this technology in time and said we are not going to go with a different set of loci, whatever, but we will try to implement technologies that reduce the cost of asking questions, would that be such a terribly bad solution over the next decade?

DOCTOR CROW: That is going to happen anyway.

DOCTOR REILLY: It's going to happen anyway. You said that, you know, in retrospect, it would look like a -- you said incorrect when you referred to the 13 loci.

You really didn't mean that, did you? It was quite correct at that moment in time, and it's a damn good system.

DAN ERLICH: In fact, the decision needed to be made two years prior, but -- and also it is true that it will be highly desirable to change it. So I think that what will happen is that the method of assay will begin to affect the choices as well, because we will find that we, if we had only chosen a slightly different 13 loci, the cost could be reduced by another factor of four, because we will be analyzing shorter strands of DNA, or something like this. So I think it is certain that the database, the choices will need to -- the best choices will change with time in fairly short time horizons.

DOCTOR CROW: I don't have anything to add to that. I'm just going to preside.

Let me call on Chris though for one other point here. Just give me time for an intermission, and he wants to make one announcement first.

CHRISTOPHER ASPLEN: We were fortunate enough to have the bureau provide us with these beige documents for state DNA database statutes. We don't have enough for everyone; however, if you contact Dwight, we will make sure that anybody who doesn't have one and who wants one will get one. This is primarily the result of Dawn Herkenham's enormous efforts on the weekends and other times to put this together, and it has been great value to myself as commission staff already, and I think it will be a great value to the commission's work. So we appreciate the FBI providing that to us.

DOCTOR CROW: My watch tells me it is time for us to take a coffee break. Let's promptly reassemble in here at eleven o'clock and hear Phil Reilly.

(There was a short break taken.)

DOCTOR CROW: Unfortunately in my tunnel vision this morning, I overlooked a person who was very eager to say something. He is still here so let's have your word in here, and we then will move on to Phil.

JOE BELLARO: Just once again, I am Joe Bellaro. I am the senior criminalist in the Boston Police Crime Lab. I want to throw in a couple of things. I have forgotten much of it, but a couple of things.

Just to echo Doctor Reilly's points, I have been in this community since PCR has been in this community, and I seen it go from snips, D.Q. Alpha and Polymarker work, so snip is nothing new to this community, but I have seen it cycle. Then we have gone to STRs, and now there are thoughts of maybe going back to snips eventually. But just one thing that he said that I agree with is the jump from RFLP to PCR is a significant jump, but any jump since then have really been minuscule, it really has, in terms of the background of jump to PCR. So I think it is possible for the technology to, at this point, plateau and maybe fine tune and add, but I really don't think it's going to change dramatically.

In line with that, sometimes the user doesn't have absolute control over the technology, also, and so manufacturers and industry and academia also dictate certain things in the community, which, you know, we may have to deal with, and that may require resampling some or all samples.

Then the other point just has to do with privacy, and these are really interesting discussions to me, but I just did want to mention this. The privacy issue, I think, really can vary depending on who you poll, and I think this room represents upper middle class, educated America, which has its perception about issues of privacy, but I think if you get in your cars, and you drive to Roxbury in Boston, which is a lower socioeconomic area, and you ask the people that are the victims of most of the crimes and are suspects or perpetrators of the crimes, I think you will get a vastly different opinion as to should samples be destroyed, should they be kept, or should they even be collected at all. And I know you have considered that. These are a little bit new to me, so I am just trying to catch up, but I think it's important maybe to think about that end of the area, also. That is a big concern.

DOCTOR CROW: Well, thank you. Thank you.

Privacy Considerations and Database Sample Retention Discussion

Well, next on our program is Phil Reilly. So I will turn the meeting over to you. There is a copy of Phil's statement available out in the hall, if any of you didn't pick them up.

DOCTOR REILLY: Thanks. I was asked by Chris to put together a short memo that I think of as serving merely as a jumping off point to further our discussions of privacy. I did not know at the time that I wrote it that a significant portion of the discussion would precede my remarks and that I think much of what we talked about in the first half of the morning really relates to privacy issues.

Some of you may have gotten a chance to read the memo. I think what I will do is really make one general set of comments about privacy and then ask us to think about privacy issues that surround conducting research on CODIS databases, because I think of that as a relatively under-discussed topic before this commission. I am not sure that we have formally confronted that issue.

One of the things that I sense, and I could sense incorrectly in my discussions with individuals around this table is that we tend to think about privacy as informational privacy, but there is at least one other alternative and broader sense, that is in the nature of personal autonomy. The notion that even if there is no discernible economic or physical harm to an individual from knowing something about him that there is a dignitary harm, which is dignitary harm is taken from the language of bioethics, and I can assure you that there are many individuals in our society who think it is absolutely wrong for you to know things about them, even if no discernible harm flows to them, that it is a dignitary harm. And that notion is imbedded in both the ethics and the legal literature as well.

But having said that, and I'm sure many other people will in due course have comments about privacy, let me ask you to look at the second half of the memorandum, the second page of the memorandum, and I would like to confront you. Let me go to the top of the second page. That question about sample retention. Let me remind you that not so long ago, there was a major transition in the Department of Defense's policy on sample retention for DNA databases for identification purposes. Originally, as I remember Victor Weedn was very involved in this -- I may have the actual numbers wrong. The samples were to be retained for 75 years. It took very little public challenge to that to radically change the policy within the Department of Defense. And now I think these samples are eliminated at the time of discharge from the service; is that correct or incorrect?

Does anyone know?

I think there has been a dramatic change in that direction, and my point is it happened with very little public discourse.

Yes, Sara. If you want to clarify that, go ahead.

SARA COMLEY: Excuse me. I am Sara Comley, and I have the letters from the appropriate official in the Department of Defense about their change in policy, and I have also heard it mentioned.

DOCTOR REILLY: Sure, go ahead and tell us.

SARA COMLEY: At first it was either indefinitely, or a hundred years, and then they lowered it to 75, and now it's down to 50. The destruction of the sample is not done automatically upon discharge. It has to be petitioned for.

DOCTOR REILLY: Petitioned. Then it can be destroyed at the request of the individual?

SARA COMLEY: It can be destroyed, but it has to be petitioned.

DOCTOR REILLY: Thank you very much. The point I was trying to make is that department changed significantly with relatively little public effort. There was one -- actually one or two lawsuits brought by a couple of Marines, who didn't want their samples in there in the first place.

Let me ask you to consider the question of how long may the sample be retained, and let me ask you to think about this individual that I mentioned here. I don't know if you had a chance to read the paragraph. We have an individual --

DOCTOR CROW: Well, maybe you better read this paragraph.

DOCTOR REILLY: Read it out loud. It's just so wordy.

DOCTOR CROW: I have been trying to read it while you are talking. I can't do it.

DOCTOR REILLY: Okay. Is that a comment on my writing or -- either way, it comes out as a negative, Doctor Crow.

Well, okay. Assume that an individual's STR identity has resided in the CODIS database for 22 years and that his DNA sample has been retained. Assume further that after serving a five-year felony sentence, he has led an exemplary public life, so for, let us say some 17 years thereafter. Does his autonomy interest in destroying his DNA sample that has been retained now outweigh society's interest in retaining it? It seems to me that unless we embrace the notion of once a criminal, always a criminal, we should contemplate the right to petition to destroy the sample after a period of years.

Now this is a paragraph I wrote assuming that we were not going to be automatically destroying samples. We have discussed that this morning. I distinguished the sample from the STR profile, which I think deserves the same treatment as physical fingerprints, permanent retention; however, because the existence of the DNA sample carries with it a threat to privacy, albeit small, the argument for retention is somewhat weaker and decays over time. For the sake of discussion, I ask what evidence is there from studies of recidivism and crossover crime that destroying a retained sample of an individual with no arrests for ten years after his last parole would harm the goals of CODIS?

Is there information available to challenge my point?

I know there is recidivism, but we also know that crimes committed by youths, and there is a decay over time. My individual, I now imagine, is a roughly 45-year-old guy with a clean record for 17 years. Weigh the benefit of keeping him in there, and I am thinking of the DoD where you can petition to have it out, although I would prefer to say it automatically leaves. It shouldn't be a burden on an individual against the benefits of keeping it, and prepare your answer for the American people.

BARRY SCHECK: The British data shows the correlation to youth, which is no surprise, because that is what all American criminological data has always shown.

DOCTOR REILLY: I think that my point that I make here about time actually lurking in my mind when I wrote this paragraph was my concern about how to deal with the evolution and transition of new technologies into the system, too. That was sort of in the background, if we could imagine time frames that were working.

So is there anybody here who would oppose destroying DNA samples on a man like this?

JUSTICE REINSTEIN: It might depend on what his crime was for me, and I would have to see more evidence about the recidivism rate for that crime. So clearly, if it was a homicide, I might say contrary to what most people believe, should go ahead and destroy it, because --

BARRY SCHECK: Do they have recidivism especially at multiple years is very, very low later.

JEFFREY THOMA: A sex crime might be different.

JUSTICE REINSTEIN: Yes.

DOCTOR REILLY: And of course that is where we began with sex crimes, this technology, and one might argue there are a certain class of crimes for which it wouldn't be appropriate to destroy the sample, but again, trying to answer the American people's concern about the least invasive approach to the use of this information, there are going to be, especially if we move to things like use of DNA for burglary, auto theft, things like that, there is going to be a large cohort of individuals in the database with very clean records by the time they hit 30 or 35 years old.

DARRELL SANDERS: I am not saying I understand. I am not sure why you are saying destroy the sample in the first place. If, in fact, the person is in CODIS, what difference does it make about whether he is 45 -- I mean it's 22 years later, or we are dealing with this, as long as it's not postconviction and stuff. If we decided we are going to keep the sample what difference does it make whether he is -- I mean he has got a clean record, or he doesn't. What are we going to use that sample for rather than the identifiers? I don't understand. You have got me really confused right now.

DOCTOR REILLY: Then it's my fault if you are confused, not yours, because retention of whole DNA carries with it the possibility, however small, that that DNA will be subjected to other kinds of questions about that individual; and therefore, in the minds of some people, not necessarily me, raises a privacy concern. I will give you an example, and this relates to the second half of my memo.

Let's us say that people are interested five years from now in whether or not an allele that has been associated with predisposition of alcohol abuse is found much more frequently among people convicted of vehicular manslaughter. The beginnings of behavioral genetics in criminal law. That is information that an individual might very well not want known about himself by anybody. As long as we retain whole DNA, we carry with it the possibility of asking other questions other than identity. And what is the harm to the system in throwing out this guy's DNA?

TERRY GAINER: Well, as you said, that is much of the debate we had this morning.

DOCTOR REILLY: Only there it was different in that we were -- I was among those who made the argument don't save anybody's DNA. If I lose that argument, and save DNA, then there is a subclass of individuals for which I could build a different kind of argument that is within their rights to ask to have it destroyed, because they no longer fit the pattern for which the data bank was established.

GEORGE CLARKE: We have to back up a little bit. Let's take an individual convicted of a crime, and let's say I am convicted of writing a bad check for over $400, which in California is a felony crime. There are ramifications of that that follow me for life: (A) -- at least in California, and I am confident probably in most states -- (A) I can't ever vote again. That is now gone. I can't ever possess a firearm of any sort. That is now also a crime. No matter what relief I later get, and I can go back to the court four years later and say I have fulfilled the conditions of probation, I have been a model probationer, and I am now mayor of the City of San Diego, but I still can never do either of those two things again. I can now answer a question when an employer asks me: Have you been convicted of a crime? No. But I have those other disabilities that follow me for life. So I hate to use the term balancing. That is what we do. That is what the law does. But isn't this another at least question of balancing the provision of this sample knowing that as a -- and we are only talking convicted felons at the moment in your example -- is balancing that reduced expectation of privacy. That is really the question underlying all of this discussion.

DOCTOR REILLY: And I would agree with that. My answer to you would not be that what you have just described justifies doing yet more in the same direction.

GEORGE CLARKE: I understand. And in Virginia, I would be giving a sample of my blood. Not in California, but in some states I would be giving a sample of that blood. So I don't have an answer to your question.

BARRY SCHECK: This is a very serious issue. In terms of the different way that you have what they call -- in New York, we call it relief from civil disobedience. I assume in other disabilities in other states you have similar, but there is a statistic that Brian Stevenson just collected in the State of Alabama. In the State of Alabama, 31 percent of African-Americans have been disenfranchised by some form of felony conviction. They can't vote.

And that reminds me that, you know, as part of this issue and retention and part of these other reasons that all of you in the law enforcement community ought to seriously consider throwing away the blood is that you are going to be collecting it primarily from, given current incarceration rates, minorities in disproportion to others within the population, and that makes people nervous. And when you think about the notion that 31 percent of African-Americans in the State of Alabama, disenfranchised by some form of felony conviction, which could be things like bad checks, you know, it makes you think, and there is no particular reason that, you know, some of these -- it's just another one of these things that makes people very, very nervous, particularly when you get into the area of technology, this kind of technology.

One final point in regard to this before Phil moves on to the other thing. Just throw this out for a thought, because I was very struck by Sheriff Kennard's remarks. I hope you didn't interpret my thing like, you know, who can trust the government even if they say. I am not saying that. I'm telling you that I think people, ordinary people, will say that; and the other gentleman that said if you go to neighborhoods filled with people that are different from us here, you know, socio and economically, I didn't know what your conclusion was when you said if we polled them about collecting DNA and storing DNA, what would

they think. I actually think that is not a bad exercise for us if we have any money left, Chris, that we could try to come up with some kind of carefully worded polling questions and some stratified samples over different, you know, economic groups, just to see what peoples' perceptions of this are, because it's my instinct, and I am really thinking ahead to what do you tell people when you ask for an elimination sample. If you are a detective on the streets of Los Angeles, give me your DNA so we can do an elimination sample, and we will destroy it, or we will -- I mean, you have to win the trust of people. My instinct is that if you did polling right now, on this whole enterprise of data banks, right, I think people are more distrustful of it than not.

TERRY HILLARD: I know I haven't said anything all morning, but I beg you, Barry, to come to the City of Chicago, come to Englewood, go to New City, go to Woodlawn, go to the West Side where these neighborhoods are being inundated with criminal sexual assaults; and like I spoke yesterday of four distinct individuals what we believe are serial killers. Those folks, and I have to say my folks, in those respective neighborhoods are not distrustful of the data banks. They are wondering why aren't they in the data bank, you know, and this is not only the people in the neighborhood, but some of the media. You know, I just think that when we start talking about the demise of the data banks and some of the things such as that, we have to realize that on the one hand, as the young man over here from Boston stated, that if you go to Roxbury, you might find a different opinion of people very critical of this, but I think if you come to some parts of the City of Chicago, you will see that minorities are just like anybody else, and I'm one, you know. They are the most victimized, the most misused and most abused when it comes down to a lot of criminal offenses. And they want the same as everybody else, you know. You can't have it both ways. If you are going to use it to get criminals out of jail, you have got to use it to put the criminals in jail, the people who commit these offenses. It is as simple as that.

This is a tool, you know, and I would -- if you came to the State of Illinois, unless it's a mandate and stated that we are going to get rid of all the samples, the demise of the data banks, which took us what seven to ten years to try and come up with, I think you are going to have a real problem with the Democrats and the Republicans in Springfield.

We depend on the Illinois State Police. That is our lab, because we -- well, when Terry was there, we gave up that right, and they took it over. They have done a damn good job, and I just think that when it comes down to law enforcement in the State of Illinois, and I think I can sort of speak for the IACP, the Illinois Association of Chiefs of Police, because I am a member of that committee, you have a real fight on your hands. You really are, you know, and I just want to get back to one thing. This is a tool. Don't forget law enforcement is using this tool. It was put there not only for law enforcement when it came up, but for the defense, for the prosecutors and to right or wrong. It has been and has rights and wrongs across this country. But let's not forget about the victims. We are always talking about the offenders and their rights. Let's not forget about the victims. The victims have got certain rights, also. And I don't want to get too emotional about this, but you know, I have been in law enforcement for 31 years. That is all I have been hearing, and we need to put it in the right perspective, just like the good Doctor Reilly says, We have got to put it in the right respective, but let's not forget about those victims, also.

And when you start talking about minorities -- I can speak from experience -- we want the same as everybody else. It's as simple as that.

JEFFREY THOMA: If I can just, in a year and a half, Terry, there is probably nothing I have disagreed with you on, and I don't disagree with your point, but if I could just add to what Barry said about Alabama. But I appreciate it with regard to sexual offenses and crimes of that nature, but in Alabama, the 31 percent disenfranchised, you have to understand also that the average person that is being convicted of a felony, their criminally appointed defense attorney is receiving $100 or less so those are -- a lot of those cases are cases that are resolving, because of the lack of resources on that person's defense. What we need to do is make a clear division between those cases in which people are being disenfranchised and in those odd occasions in which their rights are being infringed upon without infringing on the victims rights, Terry. And I totally agree with you in that regard, especially with regard to sexual offenses, and I think we have got pretty much a consensus in that regard that we would not want to do anything to limit any of the resources of law enforcement; and with destroying the samples, I don't think Barry or Phil or Michael or myself are making any argument that we should do anything to limit that.

BARRY SCHECK: Yeah, we are not talking about the demise of the data banks. We are talking with strategies to get more funding so that we can do it better. In Illinois, you don't have any samples in the data bank yet, and I think that that is wrong. I mean there should be more funding to get it there.

PARTICIPANT: Yes, they do.

TERRY HILLARD: Yes, we do.

BARRY SCHECK: Okay. How many are there? I was talking there were very few samples in the data bank to run STRs.

DAVID COFFMAN: They are the third or fourth largest state.

BARRY SCHECK: STRs?

DAVID COFFMAN: Oh, no. Well, they are converting now.

BARRY SCHECK: That is what I am saying. There is no STRs in the Illinois state data bank, I have been told, in all these cases where we are getting people out we want to run against the data bank. Don't get us wrong, the strategy here is to come up with something that is going to get more money for the kind of enterprise you are talking about, not less. That is what -- the debate is more along those lines.

TERRY HILLARD: But what we need to do is when we start talking about the samples,retention of the samples, myself, Terry, Darrell, to the sheriff, we need those folks who control those labs to be here so we can hear their side on it, because I don't control the Illinois state lab. I depend on the Illinois state lab, because that is my laboratory, but, you know, I would have to go to them and get their opinion and their criticism on what they would and what they wouldn't do.

DARRELL SANDERS: Still to me, this thing is getting more and more confused in my mind. If all we are talking about is the privacy of convicted felons, I am not nearly as concerned about if Paul tells me that he needs to retain those blood samples for the proper use for law enforcement then I support that a hundred percent. I don't care about what people think about -- I would be much more concerned about the blood that I give, and Dwight and I were talking during the break, he just had his physical, and they took three tubes of blood. I mean if you are going to worry about privacy issues, that is what you ought to be

worried about, what the medical profession is going to do with it, what insurance people are going to do with it, and those kinds of things. But for us to spend the amount of time that we are spending concerned about how it's going to be perceived by the American public, if whether or not law enforcement keeps blood samples of convicted felons, I am telling you, to me it just doesn't fall anywhere on the spectrum of priority. If you are concerned about the misuse of blood and those kinds of things, well, yeah, then let's go into the scientific community and make those kinds of statements and do whatever we need to do.

For the commission, as far as the future of DNA evidence and its applications to law enforcement, I just think we are missing the boat here. If you ask me do I care more about what the ACLU says about what we should do with blood, or what I care about what David Coffman and Paul are saying, I am going with David and Paul. It's very simple. And I think that I am mainstream, and I will speak for the majority of people, and I know I speak for the people of my community. Most of them are going to go the same way. There is going to be a few that would side with the ACLU, but I think Terry Hillard said it exactly right. The people that I know, the people that I associate with are much more concerned about victims and victims' rights than they are the rights of those people that are accused. Though I understand Barry and Jeff and those guys do a great job making sure that we take care of those people that need to be taken care of to the best of their ability, and I recognize and respect that. I am just suggesting to you that on a priority that we are least concerned, especially law enforcement, and I think that we represent the majority of the people.

I really hate to see anybody go to jail that shouldn't go to jail, and I think that the blood sample should be used, but Terry also pointed that out, it can't go both ways. You can't use it to get bad guys out, and we need to keep samples for that reason. We can't keep it to put bad guys in, and I still have lost the sight of what this 22 years later, the guy that led this exemplary life. I mean I don't care if it's burglary or what, if a guy has committed a crime, in my mind he ought to be worried about all the technology that we got to find him. If, in fact, he is doing nothing wrong then I don't see this. I would think this privacy argument must have been had on fingerprints the same way. They have got my fingerprints, because I am a policeman and I served in the United States military, but I don't care if they dug out my fingerprints. And if there is a crime that has been done, and they have got some technology that is going to be able to use those fingerprints to prove whether a person did a crime comparably, because I am not worried about it. I didn't commit a crime. If I committed a crime, then I probably would be much more concerned. So I guess I'm -- I'm losing it here. I am trying to be very quiet.

(Laughter.)

DOCTOR REILLY: Well, we are going to rescue you. I am going to throw you a life preserver right now.

DARRELL SANDERS: And I am not upset either.

DOCTOR REILLY: Being a doctor I know your pulse is 107.

DARRELL SANDERS: Actually, my fingertips are cold, but my heart rate is not up.

DOCTOR REILLY: I think the last couple of comments have certainly given an important perspective about the victims, but I -- I think it has introduced the sense that there is a polarity around the table that doesn't exist. Everybody in this room is concerned about victims. I want to assure you I am. I am trying to do sort of what Barry suggested. I'm trying to tell you that despite what you and I might think, there are a

lot of people that don't agree with us, and I am not sure that you do represent mainstream American thinking about this, because there is loads of data from public opinion polls repeatedly that say the American people are very worried about who has access to DNA information.

I am anticipating a public debate about this that I'm trying to make us aware of. That is all I'm doing. Okay.

And as for this gentleman, it may be from my hypothetical gentleman, it may be fine. He committed a crime. He was convicted of a felony. We will retain his DNA. In my memo, I said we would retain his STR profile just like fingerprints. I didn't say anything about knocking that out so...

DOCTOR CROW: All right. There are two people. First Michael, and then I will call on you.

MICHAEL SMITH: Well, I -- we have had bits of this debate before, and every time we get to it, there is a part of me that gets very irresponsible in some way, I suppose, but I keep thinking that the best way for the world to be organized about this is for there to be a universal DNA database of 13 STRs, because I can't think myself partly, I suppose, for the same reasons, that is, if I'm identifiable from a crime scene sample, I have a hard time finding a principle or reason why the government shouldn't have on file my 13 STRs. I feel very differently about there being retained a universal tissue sample system now for all the reasons that Phil is talking about.

Now, those are two entirely different feelings existing in this body here, and it seems to me that there is a way in which we approach this question from kind of historical steps that lead us to a very narrow question about whether or not we should be destroying the tissue samples of convicted felons; but the larger question is how could we go about in an environment where there is sensitivity on this subject, and there surely is, how could we go about creating a system 10 or 15 years from now in which the profiles that would be useful for identification purposes only are actually accessible to law enforcement when they have crime scene evidence. Those databases are building as we speak, probably the ones you are talking about, the medical databases, research databases. There is the birth blood spots. As a law enforcement matter, as a matter of deterrence as well as protection, it seems to me ideally it ought to be possible to find out who it is whose blood I have got at the crime scene, and if that is the way to do it best, not convicted offender tissue samples. So it's worth sort of realizing one of the reasons why some of us are asking questions about the need to do things about which a lot of people have objections is because we are anticipating a world in which far better larger access to identity would be possible through the DNA technology.

So I think it's hard for us to find ourselves categorized as somehow resisting the use of the technology to identify criminals to the contrary. The question is how could it be maximized within the political constraint of the country.

GREG MATHESON: Greg Matheson, Los Angeles Police Department.

I think a little piece of information that maybe you are missing for a lot of people that are having a hard time understanding why we shouldn't be keeping the samples is the types of abuses that could occur to it. There was one example made, but I think for clarification for those that maybe don't know it, you know, some additional examples. We had in Paul's report a number of reasons why it's important to keep them,

but maybe we all need to be a little clearer as to what this perception of abuse, or the actual potential for abuse and how it can be used against a person needs to be brought out and further examples given.

DOCTOR CROW: That is a challenge for you, Phil.

DOCTOR REILLY: Yeah, as long as you realize that I will be making points now that I don't necessarily agree with. Okay. I could tell you what the arguments are. The arguments are as follows, and the arguments that are commonly made in clinical medicine and in NIH-funded research, in questions about employers use of tissue and genetic information will spill over into law enforcement. They are -- and I am somewhat repeating myself: (1) that I have, as an individual a personal right, a constitutional right to have you not know anything about my DNA, unless there is a compelling reason supported by the state to override that. Okay. That is just -- if you want a dignitary way.

Secondly, there is, and I think these are actually weak arguments. There are arguments that whole DNA stored in databases of this kind will inevitably at some small level leak, and people will use it to ask questions about structural genes, other than, you know, areas other than the identification of loci, such as, you know, you have had a criminal record involving drugs. Do you have a gene or an allele that predisposes to drug abuse, and that is very powerful information about an individual.

I don't think -- I mean, first of all, we don't have the knowledge to even suggest that right now,but people are anticipating this. Will we find such allele some day? Yes, absolutely we will. We will find alleles that correlate with behaviors that are considered to be asocial, and that will be very powerful information.

Do I think that is important now? No, I don't.

GREG MATHESON: Then what is the fear that somebody has, or how can that information be used that can hurt them in their life?

DOCTOR REILLY: The fear is that, and I think they are weak arguments, but they are widely held. The fear is that people might, for example, that insurance companies might get access to this. We guard them, because all insurance companies have to do is ask you for the sample. So I quite agree with you. So I mean I, in other contexts, would be among the first to attack these arguments. I am trying to act as counsel to the committee anticipating the arguments. That is what I'm doing.

GREG MATHESON: So then it sounds like what we either have to do, or you either have to do is come out with legitimate ways to counter that or decide that it's too great and not worth the effort to get rid of the samples.

DOCTOR REILLY: Essentially. Essentially.

MICHAEL SMITH: There is also the irrational arguments. I mean to be sure, the dignitary interests you are talking about can express themselves irrationally as well as rationally.

DOCTOR REILLY: And they are still dignitary. People have the right to behave irrationally.

PAUL FERRARA: Those people won't trust us to destroy it any more than they will trust us.

DOCTOR REILLY: I think that is a fair concern.

JIM WOOLEY: We are talking about two possible schemes, legislative schemes, schemes that say we retain these things for legitimate forensic research reasons to cope with changes in technology. Then we are saying people won't trust us to do that the right way, and we would have to violate that scheme and commit crimes to do the things that people are afraid of.

MICHAEL SMITH: That wasn't the irrational.

JIM WOOLEY: Or the scheme is that we flat out destroy it, but who is the we? It's the same we. If they don't trust us to do the right thing with it, those people, I believe, won't trust us to destroy it.

MICHAEL SMITH: That wasn't the rational argument I was referring to.

JIM WOOLEY: Well, let me just finish my point then, but the discussion this morning the suggestion seemed to be the reasons to keep the DNA samples has been overstated. The importance of needing to do that has been overstated. I am struck also that it has probably been overstated a little bit how much better that many more people will feel if we have a scheme that says, we, the government will destroy it. People don't trust the government. I mean I have been a prosecutor for 14 years. They don't trust me. They are not going to trust me to do the right thing with it, anymore than they are going to trust me to destroy it. I don't know how many more people we are going to marginally, you know, get to, you know, you know what I mean?

DOCTOR REILLY: I find that argument persuasive.

DOCTOR CROW: And I do, too.

Phil, you gave two points now. Is this all of them?

(Laughter.)

DOCTOR REILLY: Are you after me today, Jim?

BARRY SCHECK: Actually, he made a lot more in his memo.

DOCTOR REILLY: I actually -- I think the most and firm aspects of the state statutes, as they currently exist, and I haven't read them all recently, but I read them a lot of them over the last couple of years has to do with the language that permits research on the sample. I think that is an open invitation for attack.

Let me make the points that are in the second part of my memo. You may disagree with point number one where I say little meaningful research should be done on STR profiles. What I mean in there is little meaningful research would be done in STR profiles that couldn't be done in other populations as easily. Okay. But let me just take a moment, and the lady earlier mentioned the study. Let me just take a moment to recall for you that in general in the United States, research involving human subjects, and these individuals are human subjects whether they are convicted felons or not, operates under a rather heavy regulatory burden that is completely ignored in the state statutes having to do with research on CODIS databases; and, in fact, the current statutes would fail miserably any of the current tests employed in either the Code of Federal Regulations, which has a history of being especially concerned about research conducted on prisoners, because of the historic abuse in that setting. So I find since all these statutes were written with absolutely no attention to a huge body of law and regulation on human subjects research, it is

as though it wasn't even considered, and I think they are very vulnerable on those grounds. For example, what statute -- I ask you, those of you who have looked at it, what statute says who will decide what constitutes anonymous research? What statute defines it? What statute identifies a regulatory body to make sure that it is done right? As far as I can tell, either none or very few of them. That is a weakness that is really -- it's an underbelly that somebody is going to put right into in court someday. Now, you can say well, it's anonymous. What is it? Well, there is a huge debate in the federal government right now as to what anonymous research means, and it's all tied up as to what constitutes minimal risk. You know, I could give a whole lecture on it, as I frequently do. These are infirmities in the state laws, and I spell them out a little bit more here. I don't like to sit here and read what I wrote. You can read it yourself, but I mean the fact remains that conviction and sentencing do not include automatically joining a population of research subjects. That has never been true in the United States, and that is what we have done with these statutes, and you cannot tell me that the statutes include currently an absolute guarantee of a pure anonymous and anonymity function in the research. I think quite to the contrary, because they will be a very limited sample of people, and a very limited sample of questions, and it will be possible to reconstruct who the people were in a small cohort who were the subjects of the research, i.e., I have got -- and I don't know which example I use here.

Let's imagine that in the State of Massachusetts, I want to do research on 400 convicted pedophiles, and I want to ask whether an allele has a certain frequency that has a relative risk much higher in that group than the general population; and I find out that that is, in fact, true. That information is generated about just 400 people about who we have already heard that it would be possible for other means to find out who was the set of convicted pedophiles during those years. That would be easy to do, as I understand it; therefore, you can begin to reconstruct the odds that such and such an individual is in the database, and, therefore, such and such an individual is much more likely to have this gene that that affects his behavior. Now, maybe as is suggested, maybe we damn well ought to know that, because maybe that will totally affect, for example, parole decisions or postconditions on monitoring and all this stuff. Maybe we want to know that, but I think we better be very clear on what we are doing and why we are doing it, because at the moment it looks like we are -- I can see somebody, and maybe it represents a minority in society. So, yeah, you turn all these people into guinea pigs as well as convicting them. What right do you have? What other statute in the United States says you can do research on tissue taken from convicted felons? I know of none.

This just slipped in, and it slipped in under the promise of the anonymity, but no system, no system at all to ensure that that takes place.

Silence indicates to me that I'm right.

TERRY GAINER: The only caveat may be that those type of laws would have the state jurisdictions or, for instance, the crime lab like in Illinois draft up the rules and procedures so it is unlikely that you would see a statute where the checks and balances would be in the statute. The fact is if we were drafting them, I would suggest you wouldn't put that in there, you would make it part of the regulatory system to implement the statutes.

DOCTOR REILLY: But it is not at all unlikely that the statute wouldn't include a provision to say and such and such a body will be charged with doing this in a certain period of time, because I can cite in many said statutes in other areas where that is exactly what does that.

TERRY GAINER: Well, I know what happened in Illinois, because we helped write the statute; and if we look in the book, you will see in there that the -- in the document which was provided by the FBI that there generally is some caveat in there that the rules to implement it will be borne by the agency which is overseen in most states by a rulemaking body so that it has to be --

DOCTOR REILLY: Then I will put this question on the table. Many of these statutes have existed from anywhere from eight to two years. How many of those states -- and I don't know the answer to this -- how many of those states make provision for anonymous research have created a body of rules under which to conduct it?

TERRY GAINER: You have to ask.

DOCTOR REILLY: My bet is zero. I am just saying it is an infirmity. Someone is going to get the same idea I had and go after it.

DOCTOR CROW: Please.

SARA COMLEY: I am Sara Comley, and I just want to mention the fact that Phil did not mention that the heavy regulatory burden only applies to federally funded human subject research; is that not correct?

DOCTOR REILLY: Actually, there are -- that is not completely correct, and I will elaborate on that.

SARA COMLEY: Okay. Please do.

DOCTOR REILLY: Yup.

SARA COMLEY: And also that I read someplace that the deliberations on an IRB is not subject to legal discovery, and I asked Victor Weedn about this, because I was concerned about it, and he said that that was true, but that you could subpoena members on an IRB. IRBs are often pushed as a solution to this problem in human subjects research, and I for one am integral in IRBs that are responsible or qualified or resourceful or free of conflict of institutional interests, and we have seen that recently with Duke and the Veterans Hospitals in California and others.

DOCTOR REILLY: Well, I certainly agree that -- taking your second comment first, I certainly agree that the institution review board system has been under attack recently. As you must know, there are at least three major federal studies that have called it into question. I won't get into the particulars.

The Duke study, which I think may have been largely politically motivated, but the fact of the IRB system may be a weak system, which I don't grant you, is not an argument, therefore, in favor of conducting research without oversight. That is the first point.

The second point, while it is true that the Code of Federal Regulations that I alluded to applies to federally-funded research, it does so in a very broad manner. Any institution that uses federal funds of any kind whatsoever is potentially subject to the reaches of those regulations; and furthermore, there is unquestionably a trend in the United States to extend the reach of IRB-type oversight to all kinds of human subject research regardless of the funding. There have been two bills introduced in Congress about that. Senator Glenn introduced a bill, as you may know,several years ago. And there is within, for example, biotechnology industrial organization, now BIO, a group of us are deliberating on how to bring

that level of oversight to non-federally funded research. So I think your points go to some weaknesses in the system, but they are not an argument against overseeing research in other settings.

And remember my main point in all of this is to tell you that others will perceive this and will criticize it. That is my main point.

BARRY SCHECK: I mean this argument is not an insubstantial one, while, Jim, I agree that there will always be people that won't believe the government has even destroyed the blood, and we just had this conversation is that still it's visible. It's tangible. People understand that you have destroyed the blood, and you can't do anymore DNA testing on that blood, and it's real different than the computer profile which you are always arguing to people is just a fingerprint. So it goes back to what Chief Hillard was saying, it seems to me that if we -- you know, my objective here, if I persuade you of have nothing else, I hope that, you know, being the person that actually has them typing the old cases to catch criminals, I mean I don't know what else I can do to demonstrate that that is what I want to see happen. I think, frankly, that law enforcement has failed in making its case about the utility of DNA data banks, and yesterday's discussion proves it. We all know it. You have failed to make the case to the people to give you enough money to type right after a crime. Failed. All right. And I'm only suggesting to you that a way to make this argument more successfully, because Chief Hillard is right, you go to people and you say, hey, we have a sex offender in our neighborhood. We want to collect the DNA right away from these people and put it in our data bank so we can connect the crimes. That is a winning argument, but if you want to -- I just think you are going to be much more successful if you can come to them and say, look, we are throwing all these civil liberties concerns that not just the ACLU. It's not just the ACLU. A lot of people in their gut have about this stuff being collected for exactly what Phil is talking about. Somewhere down the line, they are going to find some gene, right, and they are going to use that against me later, or against others later. It is not totally fanciful, and it's just a much more powerful argument. You are going to get far more people behind this enterprise and more money for what we want to do rather than less, and it's not -- and when you say Chief Kennard and Sanders that, well, what Paul and Woody -- if Paul and Dave Coffman say that is what we need, then you will go with them, because they are the people you rely upon, well, you know, that is fair enough; but in fairness, I mean you are making the best case you could for obtaining the samples; and if you really evaluate it, other than this idea that we may have to change the technology in the future, it's not the most powerful case.

So I mean in that respect, I respectfully submit to you we shouldn't be -- we all have the same goals here. I am just strongly suggesting to you if you say, throw away the blood, you eliminate a lot of these arguments, some of which are really not trivial. This is not a trivial argument about finding the genes for -- I mean, look, they are going to -- the first gene they are going to look for is sex offenders, violent behavior, and it's going to come in through sentencing. A defense lawyer is going to be the first person to make the argument. The first DNA to come into court for this is going to be a defense lawyer --

DOCTOR REILLY: That has already been done in the Mobley case in Georgia.

BARRY SCHECK: -- who comes in and says, Don't execute this person, because he has a bad gene, and then it will spiral into let's go look at that other stuff, and that is really beyond the scope of what we are initially doing, because we are only saying this is a fingerprint. So if it's only a fingerprint just save the fingerprints.

TERRY GAINER: Actually, it may at first come in in a civil suit where someone is saying that the government should have figured out that the person had this streak and didn't do something about it.

DOCTOR REILLY: Well, the first has happened.

Now are people here familiar with the Mobley case? Let me just say we are worried about that. It's very interesting. It's a reported case. I don't have the cite with me, but --

CHRISTOPHER ASPLEN: Can you spell that, Phil.

DOCTOR REILLY: M-O-B-L-E-Y. Steven Mobley was a man who committed a murder in a gas station that had a little convenience store. He had a history of violence in his childhood, and a paper had just been published in the American Journal of Human Genetics talking about a mutation in a gene called amonomene oxidase A gene, which codes for protein, which is a neurotransmitter. It affects brain function, and it turns out that research was done on a kindred in the Netherlands, which there were a number of men who had a history of violence in a family that otherwise was a very reputable upper middle class family, and it was a very curious profile, and it turned out that they had an X-linked condition that affected males that had this pattern of sudden violent behavior.

As part of the defense in the Mobley murder trial, the defense attorney petitioned the judge and asked that Sondra Breakfield, a researcher at Massachusetts General Hospital, who had done the work be brought down to draw blood and do a test for amonomene oxidase A deficiency, and if that was present that this individual would qualify for a genetic version of the insanity defense. That is exactly what was done. It's just like what Barry was anticipating, but it has already happened. It's a reprise of the XYY controversy 20 years ago.

DOCTOR CROW: Some of us are old enough to remember the XYY situation.

DOCTOR REILLY: I am. Of course, you are younger than I.

DOCTOR CROW: We must stop soon, but let me give Phil an opportunity to say whatever he wants to say in closing.

DOCTOR REILLY: I don't think I deserve the last word. My only point is when I looked -- when I drafted this memo, I was trying to think of what individuals, who are deeply committed for whatever reason in opposition to this system will look to, and one of the things they will look to is the research issue, and I would for one in an instant trade off the right to do research, even anonymous research, on these databases if it further the goals of creating and maintaining the databases. I think it was a mistake to include them.

CHRISTOPHER ASPLEN: Can I just ask. I see a lot of heads nodding around the table. Is that a general consensus? I am not asking for a recommendation or anything. I need to go back to the Department and give them an update on some of these issues.

Is that a general consensus around the table regarding the research issues and that they need to be looked at significantly?

TERRY GAINER: State what the premise is.

CHRISTOPHER ASPLEN: That the research provision issues that Phil talked about are of significant concern and need to be considered further by the group; is that fair?

DOCTOR REILLY: Let me just restate what I would say. I would say that in those statutes that explicitly provide for research on the database samples that there should be evidence that great care was taken to ensure that that research proceed according to principles and practices already widely recognized in the United States and other contexts. And another approach would be to say, it shouldn't be done at all. And, actually, given the kind of yield you get on the research, it would be quite easy to just say don't do it at all for a while.

AARON KENNARD: Why would we just say not done at all?

DOCTOR REILLY: That would be okay with me for now, because, actually, Chief, I think the yield would be incredibly small, and I think the risk we are taking of having a provision in there is not worth the gain that you can anticipate in the next five years around behavioral genetics.

CHRISTOPHER ASPEN: How about that proposition, the not doing it all? And, again, I am very hesitant to even ask this question, because --

DOCTOR REILLY: People might want to think about it a while.

PAUL FERRARA: I mean one of the things we have to consider -- I mean my inclination is to say I can live with that, but we have to clarify what we mean by research, because we use these samples for method validation, for looking at new technologies, so I mean as long as it's --

DOCTOR REILLY: No structural genes.

PAUL FERRARA: Fine. I can live with that. I wouldn't know it if it hit me.

DOCTOR REILLY: And then the statutes provide for other people doing the research.

DOCTOR CROW: Yeah, I think that is fine. I think we have done this subject, and I do want to allow complete time for our dinner speaker. Now, we are having what is euphemistically called a working lunch.

What about the lunch? Where is the lunch?

CHRISTOPHER ASPLEN: Where is the lunch going to be? What are we doing? Is it outside getting set up right now or --

ROBIN STEELE WILSON: It's upstairs.

CHRISTOPHER ASPEN: It's upstairs. And will we bring it back to our --

ROBIN STEELE WILSON: We eat up there.

CHRISTOPHER ASPEN: Is there a place upstairs for our speaker to speak?

ROBIN STEELE WILSON: She would prefer to do it in this room so...

DOCTOR CROW: Why don't we then go up and eat for a limited amount of time.

CHRISTOPHER ASPLEN: Let's go eat somewhat expeditiously and return.

(There was a short break taken.)

Working Lunch
Technology Development: DNA from Fingerprints

Lynn Fereday
Support and Improvement Manager
DNA Business Area
Forensic Science Service
London, England

DOCTOR CROW: I'm particularly looking forward to the upcoming presentation. Britain has faced many of the problems that we face and faced them earlier and solved many of them, so we will get some more of it this afternoon.

It's a pleasure to introduce Lynn Fereday, who will talk about DNA from fingerprints. It's all yours.

LYNN FEREDAY: Thank you, everyone. It's a great pleasure to be with you and to talk to you about some recent innovations regarding protection of DNA from fingerprints and contact tracings.
PARTICIPANT: Can you turn that up a little bit?

LYNN FEREDAY: My involvement with DNA has been since the introduction of DNA back in 1987 in the U.K. I was involved with Dave Barrett and others in setting up the first laboratory where training and operations occurred; and subsequently, I was involved in the setting up of the database in the U.K.

After this presentation, on fingerprints, I could tell you a little bit about how many procedures we went through when we set up the database and how we set up our legislation. Many of the issues on that hinged on the discussion today. So I'll just begin with my talk on fingerprints.

Back in June of 1987, there was a publication by Roland Vanoorsho at the Victoria Science Center in Australia, and he described how they could take DNA profiles from objects that have been handled.

The work they did centered on a case where Maxwell Jones was involved in a Melbourne suburb of Sunshine. This was a domestic stabbing in which a knife was discovered. There was blood on the blade of the knife. Maxwell Jones wanted to identify the assailant's blood or the handle of the knife. The profile handled the knife and got a profile from the assailant, or the suspect, I should say, but there was no evidence of blood presence. So in order to answer the question, how did you know it was blood, or where did it come from, a series of experiments were undertaken in which profiles from palms and other items were actually identified, a leather brief case, handles, pens, car keys, a locker handle and telephone set were all swabbed and profiled. In each case, the correct profile was obtained. Some of these items revealed DNA more readily than others; and to some extent these are predictable items, items like a leather briefcase and locker handles where consistent use or prolonged use occurs, you could expect to find or detect the DNA profile.

In addition to those samples, some cleaned items were profiled. There was a plastic knife handle and a glass, which also revealed DNA profiles after contact after the items had been cleaned. The Forensic Science Service had also undertaken similar work where we take DNA profiles for swabbing of palms, vehicles, and telephone hand sets.

The work I'm going to present involves analysis using our second generation multiplex, the SGM, which contains six loci and the amonogen test. The SGM is the STR technology, which is database.

The first big thing is washed hands will give no profile for at least a half an hour. So when looking at DNA on these touched objects, you have to work on where the material is actually carried from. We have found that different people shed cellular material to different extents. We have characterized these individuals as good, medium or bad donors or shedders, and this is reflected in our ability to obtain a DNA profile.

Interestingly, the last person to touch an object does not necessarily leave the strongest profile, but the DNA profiles detected will reflect the history or the use of an object.

This graph shows different individuals whose hands have been swabbed and to the different extent to which you can reveal a DNA profile from them.

This individual obviously is a good shedder or donor. This one is poor. And this one again is poor. I mention those three, because I have profiles from these individuals, which I will show you later basically just showing the different individuals' ability to leave DNA after contact.

So the question is what exactly is detected. A good shedder leaves a large amount of cellular material from their palm and fingerprints; and if you press -- if the hand is pressed on a cellular acetate sheet, what is left behind can actually be seen. It is visible. Other experiments involved pressing hands on a microscope slide and then staining it with differential hematoxylin staining. What has been observed are small amounts of tissue. From the good donors, you actually see some nuclear material.

So obviously DNA profiles would be obtained from the good donors. That doesn't mean to say DNA can't be detected from sweat. There are glands in the body that produce sweat, those in the hands and the hair where DNA is produced in the sweat so it's not just the presence of cellular material. The presence of sweat can also produce DNA profiles.

This is a diagram and representation of what is observed in the different stages of good and bad donors. You see where the trace material is left behind. We have a profile of that donor where just one allele seems to fit, another donor where three complete loci have been detected; and a good donor where a profile of five complete loci and two further alleles were detected. We were using the SGM system, the multiplex system.

I don't want the scientists amongst us to be too amazed of the results, but this is an example of the fingerprint taken from a bad donor, and only one loci is observed.

PARTICIPANT: Could you put that up a little bit. Push it up a little bit.

LYNN FEREDAY: Sorry. Okay. Here we have a fingerprint from a medium donor. Interesting enough, there are some alleles present which don't belong to the donor, which probably transferred secondarily, which I am going to talk about in a moment. And these are poor profiles, but this is what we are getting at the early stage using SGM.

Here we have a profile from what we classify as a good donor. It's a lot cleaner than previous ones, still not the end of the story. There is still more work to be done.

So when we are looking at DNA for palm prints, what we have done is to modify the instruction protocol. In the U.K., we plan to use the key extraction method. We are now moving to using carogen; and other extraction methods, phenyltorophen will obviously not be equally effective, if not more so. Obviously, extraction is key since we happened to cover this area, and I can go through it.

PARTICIPANT: Excuse me. Could you repeat the form of extraction which you are using for this.

LYNN FEREDAY: We are moving to carogen in these experiments.

The application procedures is also utilized. For routine casework, STR technology has been validated using set cycles in the application stage. Here the reason for that is to ensure that when you came to interpretation, you could rely on the results. You wouldn't pick up the low levels of DNA with providing preference. Here the application stays increased to 34 to allow for picking up the low levels of DNA.

The latest results using the new SGM plus technology has profiles from the palm print where someone has gripped an object.

Now, secondary transfer has also been detected. That means if I were to touch this microphone, I could rub DNA on it. Besides leaving my own traces, I would pick up traces, and early experimentation showed that I could transfer whatever I picked up on to something else. This is the sort of danger area that we are in at the moment. We have to understand what it is we are detecting and determine it carefully.

A hand swab has been taken, and the profile of a partner has been revealed, extreme force being factored, the secondary DNA has been secondarily transferred. Again, shaking hands, as I indicated earlier, I could shake hands with someone, not only would I pass some of my DNA onto them, but I could pick up DNA from the individual's hands I am shaking, but also pick up some DNA from someone else, who I had previously shaken hands with, whatever the contact is.

Another interesting twist is in strangulation cases, there have been examples where a manual strangulation has occurred. Marks on the neck of the victim of the deceased have been analyzed, and the DNA profile of the assailant found from trace material left. This is not due strictly to the neck, but if an arm has been used, or the hands of the assailant have been swabbed and traces from the deceased have been uncovered. Examples using the earlier STR technology called for four loci were analyzed.

Similarly, the ligature is found at the scene. Generally, a great deal of force is used in strangulation. Sufficient material from the hands of the assailant would be left on the ligature so it is an opportunity to look at the ligature and perhaps recover DNA profiles from the assailant. Another interesting option, which hasn't been considered previously.

The situation that one is faced now is how long does DNA persist. We all know that DNA, being a biological material, if it is not kept in ideal conditions will deteriorate. In fact, fingerprints or contact traces are a slightly different situation. We just don't know how long it persists, DNA will persist on objects. We are looking at various experiments to actually test the situation. Such items such as polypropylene to acetate sheets are being touched and left lying around to see how long DNA would persist or to what extent it would deteriorate, and background levels of DNA are being explored in terms of looking at door handles, telephone hand sets, to see what one would normally expect to see residing on such items.

Just to come back to the critical issues. Obviously, contamination is a very important issue. Extra is detected from what has come from previous contacts. We need to be aware of this when we come to interpreting our results. So we need to look at precautions, make sure both internally and externally precautions are taken.

Since the very beginning of use of DNA technology, our scientists, we work closely with the investigators, the police officers. When we started with RFLP, we talked about precautions that should be taken. There weren't that many; however, at that time, scientists had contact with police officers, because we were attending scenes of crime with them when invited to such an extent that it became routine for all police officers to wear all in one protective disposal suits to scenes. This is very common -- this is common now in the U.K. At a scene of crime, officers attending scenes will wear protective clothing. I mean protective clothing in the form of a jumpsuit with a hood in addition to gloves.

When we moved to PCR technology, we also explained the need to be very careful about precautions that should be taken when recovering evidence. To such an extent that when we were lecturing to presurgeons, we were advising that perhaps masks should be worn to avoid the actual examiner contaminating the victim.

This is now routine as far as STR work is concerned. In the laboratory, more technicians are required to wear protective clothing in the form of lab coats. We have specific colored -- specifically colored lab coats for particular areas, so that you can see when people are not wearing the correct protective clothing. Both caps and masks are worn at all stages. So internally we are avoiding contamination; but externally, as we heard yesterday, I think Barry made a comment about flying DNA. I could guarantee you can't see any flying DNA, but if you swabbed the area you printed in, you will find lots of DNA, and that is what we are talking about. When it comes to police officers taking over items, laying items out, allowing other people to look at them, this is a no-no. That is where contamination occurs. This is sort of an education process that we are going through constantly, both internally and externally, to ensure that the evidence that is recovered is protected and is easily understood and interpreted.

Having gone to contamination, we come to the interpretation. With the current system, mixtures are generally quite easily interpreted, because there tends to be a major/minor imbalance in peak heights when you have a mixture in a normal case. In this sort of contact recovery, the DNA profiles show more of a balanced peak. So the mixture interpretation would be very much more complicated. We have to look at the -- the critical issues would be secondary transfer of the systems so we have to look at all these experiments that we are carrying out to carefully understand what it is we are detecting when we are swabbing contact traces.

Further work we are doing in partnership with the police is swabbing vehicles, and a lot of this experimentation is in support of that work. Source of samples we are looking at are various areas within the vehicle. The reason for this is that there are initiatives in the U.K. where we are trying to reduce minor crimes, and improve the detection rate, and a large number of examples of light crimes take and drive away cars, and full profiles are obtained from car samples, but they are dependent very much on the driver.

Profiles obtained from the area of vehicles, include the steering wheel, hand brake, gear stick, window button, lighter.

And generally the profiles reflect the use of the car. Where you have multiple users, you get multiple profiles. This is a better profile from a good donor, PJ, who I pointed out earlier on the graph, but at that time he was actually down to the low, medium level. The comment is that this is a good profile for him. This is the gear stick of the car that he drives. He is the sole driver, but he had a bad day when he gave the sample. Obviously, there are going to be differences. It will read DNA to varying degrees on different occasions.

A profile is recovered from one car here where it is the sole driver.

Here we have Sam, who was a very good donor, if you remember from the graph. It's a good profile. Interesting enough, this is from the car lighter in his car. Sometimes his partners were driving the car. So you are getting a low level of gene from someone else who is being a car user and using the car lighter.

The third profile is a mixture -- it's a minimum of three people. It is an owner and two other drivers, and we also think service engineering, because substituting the week before the car was swapped the car had been serviced. So to just show you how complicated the profiles can be.

Here we have the steering wheel of the driver is shaded here. Actually, this profile comes from the partner. So the person who was last driving the car hasn't left the strongest profile. The partner's profile is stronger.

Now when we are looking at fingerprints a lot of the time they are enhanced and the results of what can be obtained from DNA profiling after the techniques and experiences differ. There are reports of DNA recovered after all of these forms of treatment. Some you might question, but I think it will depend certainly on the case on high samples extracted, and that one involved extraction using phenyl chloroform, but there are reports of DNA profiles being obtained after all of these enhancement techniques.

Let me explain that others will allow 13 million profiles to be detected, but generally caution has to be employed when enhancing fingerprints if you want to take DNA afterwards. I am specifically quoting here of exams of fingerprints in body fluids, but this would also apply later when we are talking about furthering contact traces.

Another report relates to the use of UV, shortwave UV, with these samples being irradiated for 30 seconds would be a low DNA.

I just want to come back now to some other initiatives that the FSS is working on with the police. We have scientists working with the police forces currently, looking at scenes of crime, working alongside police officers. One of the things that we found early on was that there are so many scenes of crime, and it's very difficult for the police force to be deployed efficiently. There is quite a lot of work required in examining a scene to ensure that if clues present, they are found and they are recovered correctly.

We spent a lot of time educating the police in terms of training the police in terms of what to do at scenes, and here and now we are looking at consolidating that and considering other aspects besides body fluids. Some of the examples in the last month or so have revealed a case where there is a chin print on a window ledge where someone has broken into a home, and that will be examined; a forehead print on the windscreen of a car where a car has been stolen and subsequently smashed, but very often in these sort of

cases, the driver of the car says he wasn't driving the car. If this DNA profile is obtained, it provides very strong evidence as to who was driving the car during that crash.

A palm print on the burglar alarm where the burglar alarm is being stopped at the building and fresh fingerprints are recovered. These are all part of the projects. As I say, it's an initiative looking at what can be recovered in the minor crimes it seems where the scientific eye is employed together with the police eye.

BARRY SCHECK: I am having a conceptual here. There is a palm print, let's say, on the burglar alarm, okay. How do you both preserve the palm print with enhancement techniques and also swab it to do the DNA?

In all those examples which you are giving us, which comes first? I mean if you swab the palm print to get the DNA, aren't you destroying the print, or do you just take a picture of the print? I don't understand.

LYNN FEREDAY: Well, I think in these examples, because the scientist is working alongside the police officer, the police officer would then indicate whether or not it were feasible, if there is enough information to do an examination or to enhance the print. It will be a joint decision as to what procedure would follow, and these are very early findings. Normally, if the palm print was found on a burglar alarm, there ought to be sufficient identification or insufficient. I would rather think this is an example where there is insufficient information for an identification. The sorts of things we are looking at here are insufficient for identification.

BARRY SCHECK: So what you are saying is it's an either or? You have to make a decision whether you want to do a DNA swabbing of a print versus an enhancement?

LYNN FEREDAY: You can do an enhancement, and then, well, yes, you are probably right. Yes. Yeah. But it's still early days. We haven't actually developed the protocols to satisfy all the answers here. At this stage, we are just looking and finding information which would otherwise be lost. That is the initiative.

There are other cases where SGM plus has been employed, again using 34 cycles at the application stage, and here evidence has been provided which the court can assess and careful interpretation. Generally, in those cases there will be no other information available.

As far as I'm concerned on the fingerprints exam, that is my presentation.

Is there any questions?

DOCTOR CROW: We might see if there are questions about this part of it and then ask her to go on with the other discussion. All right.

GEORGE CLARKE: Just a follow-up on what Barry asked. When the initial examination is made to determine if there is a print there, that is obviously done visually first? If it's a latent fingerprint that is otherwise not visible, I think what Barry was getting at is are there attempts to make that latent print visible first by any of those traditional means? And then is that the crossroads so to speak?

LYNN FEREDAY: Yes, that is the routine. Generally scientists are involved with enhancing fingerprints for the police. Then we could go on to the DNA profile. It would really depend on what we have got, and

the sort of things that we are doing more routinely are enhancing latent prints in body fluids, because then you could go on and profile the body fluid, and that is enhancing the print on its own in the absence of any other body fluid. This is still in the experimentation stage.

BARRY SCHECK: I guess what I was confused about, just so we don't misunderstand the data that you gave us. At one point you describe that it still might be possible to get profiles even after certain enhancement techniques are used?

LYNN FEREDAY: That is right.

BARRY SCHECK: Okay. But when you were talking about taking it off steering wheels, doorknobs, everything else, you were talking about instances where there had been no enhancement, you just did an experiment where there is this, and then you swabbed?

LYNN FEREDAY: What we are talking about now is I have done that. There is nothing there to identify me with that contact. We are talking about me going up to the door to prove I have been in here. I have touched the handle of the door. It's that sort of area we are talking about. I haven't got to print. There is nothing identifiable there to say it was me.

BARRY SCHECK: All right.

LYNN FEREDAY: Another example. If I have been in this room, there is a glass which I have used. I haven't left a fingerprint. I have left some impressions there, some contact. You could swab that and prove that it was me, or you would find my DNA to show that I had been in the room.

BARRY SCHECK: But isn't there -- it's just stupidity on my part, but wouldn't there be some way -- I mean in a way what you are saying also is that I guess the terminology would be swipe, right, what you did there was a swipe? It's not in a sense a print, or latent print. I mean because you wouldn't be able to get characteristics for a print? No?

LYNN FEREDAY: The information I gave on latent prints was just for your benefit really to show that we can get DNA after making prints enhanced. The work we are talking about now is contact, and most of the contact than anything else. Okay. And so we are talking about potential use of recovering DNA from a fingerprint. If you were going to use that as a source of your DNA database sample, we have to look at a whole different protocol. It's the sort of thing I would envisage there is to ensure that you were taking the fingerprint from an individual and making sure that the DNA recovered was from that individual, you have to make sure the hands were washed to start with, and then that person could actually sort of do this sort of thing to ensure if it were a poor donor, you would ensure some DNA on the fingerprint. You could then use that to get the DNA profile for your database. We are a long way from that. That is what I'm talking about.

We are talking about several things. We are talking about the ability to recover information about an individual where it would appear that there is nothing there. You can't see anything. You can't identify anything. You can provide some DNA information, and the element of caution is on the interpretation, what does it mean.

BARRY SCHECK: Is it possible -- I don't know enough about fingerprints, frankly, but let's say that there is a glass where you can literally, you know, you can tell that there is a print there. It's not I guess alleles. It's not visible before enhancement.

Could you take a digital picture of that and then use that for fingerprint comparison and then swipe the print off the object to do the DNA?

LYNN FEREDAY: I don't know information in my gene code. I think you probably could, if the definition is adequate, but, no, that is not what people, what the police do in fingerprint work.

JOE BELLARO: I have lot of comments, questions and things, but I guess the place I would start is the history of PCR-based DNA really evolved around identifying a bodily fluid or actual visual stain, not just because we could, but because the probative value of linking that sample to somebody was much higher than the probative value of what fingerprints can often be, which is they can be deposited from a casual contact. So I have a lot of problems with the probative value of this approach; but then further on that, as far as the technological approach, in order for you to even derive value, if you accept that they can be probative, in order to even derive the value, you have to push the limitations of PCR extra cycles, which people that are familiar with PCR have always known the potential pitfalls of that, and the biggest pitfall is not just detecting background contamination in reagents or handling other things, but to potentially mistype a sample, because you are just starting with too little DNA. And as a PCR scientist, I always taught that that is the worst thing you can possibly do is to mistype something. It doesn't really matter how many safeguards you put in place to try to interpret things, if the potential is there to do it, I have never understood why to pursue that as a scientist first, but then as a criminalist second. I think you just have to let something go sometimes, because personally I think it compromises the integrity of the entire science. It sometimes pushes things to get what I would call miscellaneous samples sometimes.

So I would appreciate any comments from you on that, but I understand a lot of this work is early, but I don't understand.

CHRISTOPHER ASPEN: Can I make a comment to that, to kind of explain why she is here. Okay. And I said this at the beginning of the meeting yesterday. What I explained was the reason to look at this technology is not what you are talking about. Rather, what we wanted to have an idea of is the basics of the state of the research to see what affect this is going to have on our databasing issues, given the extent to which one of our considerations in taking DNA from arrestees, which we are still working on that for the Attorney General, one of the constitutional issues is the invasive nature of it. So what we are concerned with, as much as anything or more so than the issues that you are talking about and whether or not we are approaching PCR too far, that is not the point. What we are saying -- what we are talking about is more of a pristine circumstance where we are specifically looking at some sort of tacky substance, or whatever, so that we can possibly get to the point where under very clean, very pristine circumstances can we use this technology for databasing purposes and thereby affect the constitutional analysis.

So I think that what we have asked -- what we are looking at is very different than where you are coming from.

SARA COMLEY: Well, one of the interesting things that was brought up was that it takes 30 minutes after somebody has had their hand washed to get DNA from their fingerprint. That was particularly interesting.

Did you use any kind of sticky substances, adhesive substances?

LYNN FEREDAY: No, not at all. In response to the comments that were made about the integrity of the PCR technique, this is just a research stage. We have been looking at the copy numbers for DNA for sometime. We would not take this forward unless the matter was fully validated and safe to use. So we fully recognize the issues here as scientists. We are progressing carefully and cautiously. The routine work that is used in the database follows the validated number of cycles, but that doesn't mean to say that the PCR technique hasn't been pushed to its limits yet. This experimentation will show to what extent the cycles can be increased safely.

BARRY SCHECK: How about paper? Paper is -- you know, I mean everybody has always missed fingerprints. You have a better chance of getting a fingerprint off a piece of paper than you do off of a gun, a knife.

Did you do experimentation with paper?

LYNN FEREDAY: Not that I am aware of, but I wouldn't necessarily rule out the fact that you could get paper -- fingerprints off paper or easily again a smooth surface may be better.

BARRY SCHECK: I know that is true with fingerprints, but you didn't do paper?

LYNN FEREDAY: We haven't done any experiments yet as far as that. It's in the very early stages. The resources are limited, as you are aware, and that is basically the tone of what we have been able to achieve.

GEORGE CLARKE: Just so we are clear. On the instances, for instance, where a latent print would be identified and enhanced with min hydrin would you then go ahead and swab it for DNA following the enhancement?

LYNN FEREDAY: In the U.K., we would advise not to use min hydrin, to use other methods. The example there was quoted using phenyl choloroform extraction, and we wouldn't be able to do that routine.

GEORGE CLARKE: So in other words, min hydrin would act as a preventative of obtaining DNA information?

LYNN FEREDAY: Yes, it would destroy it, yes.

GEORGE CLARKE: As opposed to other methods?

LYNN FEREDAY: There are alternatives. Generally, when it comes to enhancing latent fingerprints, the Forensic Science Services is sought, and then we would offer the best recommendation appropriate to whatever the case circumstances required.

GEORGE CLARKE: I think to clarify one thing, because obviously a point could be made if there is a sufficient fingerprint why is DNA important, and I think -- I know Terry Gainer and others could probably verify this, that most latent fingerprints recovered at crime scenes are not sufficiently identifiable, or they don't have sufficient characteristics to identify any one. The smaller percentage are usable to identify people so that partial fingerprints become very important if DNA is obtainable from them.

LYNN FEREDAY: That is right.

DOCTOR CROW: I don't hear any further questions, so why don't you continue with your presentation.

LYNN FEREDAY: Okay. I thought perhaps it would be useful just to summarize the position in the U.K. Back in '93, there was a royal commission on the criminal justice system, and around at that time we had been using RFLP using two different approaches, the multilocus probe and the single locus probe. We had set up a database using this RFLP single locus probe to such an extent that we had between three and four thousand samples on the database. We had a number of hits from those cases. And the legislation at that time was strictly the use of DNA to only those cases where DNA had been used to secure a conviction. So only those samples could be handled in the database.

This policy was quite frustrating from an investigative point of view, and at times we were literally policing the laws, because we weren't able to do more than just use those DNA samples from individuals where DNA had been used to secure a conviction on our database. Nevertheless, we had to achieve 80 hits. So there was considerable lobbying to help the legislation change and four agencies were involved in that change: ourselves, the police and the office worked together to secure a new set of legislation. The Criminal Justice and Public Order Act came in in 1994. That act stated that any individual, who had been convicted, cautioned or suspected of committing a recordable offense could have a nonintimate sample taken, and that sample could be stored in the database. Those samples would be stored indefinitely pending a change in DNA technology.

So our database, which is now well over 500,000 and with over 56,000 crime stains is based on this legislation. The way in which the database works is that we have casework in laboratories where routine investigative cases goes into. We also have teams where undetected fences come in -- what do you call them. There is no suspect in the case. Then we also have a team where the criminal justice examples, the database examples come in. We have three sources of sorts coming into the database. These are all resourced independently all within the FSS.

The whole basis of the database is that just based on an investigative tool. So the samples taken from individuals, who committed a recordable offense, can only be held if they have been convicted. So all of our 500-odd samples on the database are from convicted individuals. If people are acquitted, the samples come up.

When we set up the database, we had wanted it to be linked to the Peace National Computer, but unfortunately we haven't achieved that as yet. The data on the Peace National Computer would hold the information about the individuals being convicted, and there would be a page there to show that the DNA sample has been taken, and whether or not it has it on the database.

Now, I don't know half the details, but I know there are categories of offenses in the U.K. where someone has not reoffended in those categories after a certain amount of time, they will come off the Peace National Computer, and that once, although that doesn't apply to the database, once that information is had on the Peace National Computer, you would likewise apply it to the database. But other than that, all our database samples are held. If somebody is convicted, they are held indefinitely.

One of the other issues is we registered through the Data Protection Act so that in terms of what we can do with it, the data, it's all registered. Nowhere in the legislation are we allowed to use the database samples for search purposes, and we can share the data, but the sharing of the data is restricted in terms of what is recorded and registered through the Data Protection Act.

Okay. I will take any questions.

AARON KENNARD: A question. You articulate that you can share the data. Share what data with who?

LYNN FEREDAY: With other countries. We have registered for that. In the U.K., our database has been shared, the information and the way in which we set the database is being shared. Throughout Europe, we are pushing forward in terms of sharing data simply because everybody is so much closer, and criminals don't respect boundaries. We have agreed through the European National Defense Science Institute that we will share seven loci, so that if an individual needs to be shared across countries, the seven loci will be the loci sharing information. Those seven loci are contained within the loci used in the USA, so it is information for us to share with you as well.

The other interesting feature, as far as DNA is concerned, is the very first case in which DNA was used actually involved in a mass screen. In the U.K., we are not supposed to call it a mass screen anymore. They are intelligence-led screens.

(Laughter.)

LYNN FEREDAY: Anyway, this first case involved the murder of two young girls, and it started out with the police thought that they were connected, but they didn't have information to actually demonstrate to the police the murders were connected. Then an individual came forward and volunteered that he had murdered one of the girls. He admitted he committed this crime, but he hadn't committed the other one. So at that time, because the DNA technology was patented, Professor Jeffries did the analysis and showed the cases were connected, but the person who was volunteering that he committed one of the murders was actually innocent, and it moved on in that there was some information, scientific information, in the form of conventional grouping, and the mass screening involved screening out using conventional grouping, then following it up with the RFLP multilocus probe technique. The person who committed the crime was actually identified, but the interesting twist is that he wasn't actually identified through the mass screen. He was identified, because one night he was at a pub, and he was boasting to his mate that he got somebody else to give a sample for him, and a man overheard this and reported it, and he was apprehended that way.

So there are two issues there. One mass screen was not set up quite as it should have been. So there have been improvements. The screens now are a routine method of policing. They save several months of police resources, and the case that I was talking to is the suspect of the perpetrator was a pitchfork, and I am sure many of you have heard of him or the case.

Coming back to the mass screens. This is a major way of saving police resources. What happens is that once a crime is being investigated, and DNA evidence has been found, police immediately do a scoping of who or what area they have to screen. They decide on a select area, and they then look for volunteers in that area. One of the first cases involved a murder of the young girl using STRs. Now it involved the murder of a young girl where a breast swab was taken of saliva from a bite mark on his breast, and a very limited amount of information was found from the STR profile. There was great deal of media coverage. Through the screen the perpetrator of the crime was actually identified. In addition to the DNA evidence, it was an interesting bite mark, which also played a major part in the conviction of that individual.

The interesting thing about the mass screens is that although there seem to be some unease about continuing with them here, people are volunteering constantly. They volunteer for a reason, because they know they are innocent. They have nothing to fear, and we will end up with crime detection.

The volunteering is amazing in that one case the police generally quote that the detection using mass screens has solved about 100 or 200 samples, in that order. In one case, the methods of samples being analyzed was much higher than that, and it had spanned the RFLP and STR technology. The police went to one home, and they were coming to collect the DNA profile from the son in the family. Another volunteered the other son, who according to her view was in the area at the time. He actually was the guilty person. That just shows you to what extent people are prepared to go along with volunteering for the screens. DNA has eliminated far more people than it has convicted or incriminated.

At the moment should I give you some data?

PARTICIPANT: Sure.

LYNN FEREDAY: In terms of hard facts, we have 547,000 samples on the database, 56,000 crime stains, and hits of suspects to crime stain are 48,000; on crime to crime, over 7,000. And promised screens, we have received more than 40,000, and the majority of those are eliminating people.

GEORGE CLARKE: Do those go into the database?

LYNN FEREDAY: Oh, sorry. I should have mentioned that. That is the volunteer samples. They are held separately. The DNA database is an investigative tool. The information is provided to police to further investigate the case. The samples from mass screens, or the intelligence-led screens, are held separately and never go on the database.

BARRY SCHECK: When are they destroyed?

LYNN FEREDAY: I think after -- again, that is covered in the legislation. That is generally after that screen is completed.

DOCTOR CROW: One question. What use is made of the data for the person who his sample is taken and is later acquitted?

LYNN FEREDAY: None at all. The sample that is given is just purely for the database purposes. There is no provision or search work on those samples. Those samples are held in a secure way, and there is no access to them for anything other than grading or to rectify a problem in the analysis stage.

MICHAEL SMITH: But is it included in the database, the profile, until the acquittal?

LYNN FEREDAY: Yes.

MICHAEL SMITH: So during that period between arrest and acquittal, it can be searched, right?

LYNN FEREDAY: The legislation states that the sample is taken from the person whose suspected or for the court of defense, and the information can be held and used for speculative searches until that person is convicted. Once that person is convicted, that information has to go. So that means if we had a hit, or match on someone, and that person was acquitted, we would have to check that that acquittal time was after the match, and that happens routinely.

The other thing I wanted to say was the samples are for database purposes only so that if the police are told there is a connection to this individual, in order to take the case to court, if they so wish, another has to be taken and analyzed, and the casework continues, and that is the evidential sample.

AARON KENNARD: Ms. Fereday, in regards to your gathering of your statistics have you -- can you articulate the difference between a random hit or a hit that was generated from police; and in regard to this, I am suggesting that if I send you a case with a suspect, his DNA, and the crime scene indicates some other things, is this included in your hit, or are you talking just hits that are random?

LYNN FEREDAY: What you are referring to there is a suspect and a scene stain. That would go to the casework team. That is in general regarded as a hit, okay, because if you sent me an undetected case, that would go in and be compared with that hit, then that is a general hit. Where you know who it is, that is not regarded as a hit.

AARON KENNARD: That is not regarded as a hit.

LYNN FEREDAY: We have a number of what we call cohits, and the one that springs to mind is someone was stopped for drinking and driving. His sample was taken, and he matched a rape case. Those are the sorts of cases that are coming up daily. It's quite amazing.

AARON KENNARD: They may send you four of five different samples from the crime scene, and they all may match, they all may hit, but it wouldn't be counted in your statistics as one hit?

LYNN FEREDAY: Generally, we try to avoid duplicating samples from one scene if it was obviously from one individual.

KATHYRN TURMAN: Just to make sure I understand this, when you do a mass intelligence screening, you do not compare the people that you collected and marked to anything but that one crime scene? You said the stain you don't, while you are at it, run them through the entire unsolved cases?

LYNN FEREDAY: The whole point about the mass screenings is that investigating that one major crime, compare it to that crime and separate from the main database.

MICHAEL SMITH: I'm trying to think about, given your testimony, about the extent of an eagerness of volunteering, why is it thought necessary to destroy the volunteered after the particular incident is closed?

LYNN FEREDAY: Simply for the reason that that is why they are volunteering. They are volunteering for that particular crime.

MICHAEL SMITH: So they are innocent of that crime?

LYNN FEREDAY: They know it is not going on the database. It is for that particular crime. I can't remember -- I'm pretty sure this is in the legislation as well.

JIM WOOLEY: How often do you solve these cases through a hit through a mass screen?

How often does that come up?

LYNN FEREDAY: I am not a hundred percent sure of the figures. They could be out of date, but I think we have run like 74 screens and over half have been through the screen.

JIM WOOLEY: But in these screens, how do you get 100 percent or a high number of participants in these screens? I mean is there some mechanism by which --

LYNN FEREDAY: Well, the one I described earlier was one where there was a lot of media coverage.

JIM WOOLEY: Right.

LYNN FEREDAY: Either on television or on radio. I am not sure that is what happens generally, because I haven't actually lived in the vicinity where a screen has been run, but I assume that is the methodology that people are persuaded. The other thing is people want crimes to be detected. Certainly, the nature of the crimes that we are talking about, they are usually very bad rapes or horrific murders, and there is public initiative actually to support, but the whole point is what you are going to keep coming back to is DNA eliminates, and that is the basis on which legislation moved. The potential is there to be realized and, you know, that is why our legislation has changed the way it was.

JIM WOOLEY: What is the legislation relating to mass screenings?

Is there legislation about that, or is this just all citizens in different communities and --

LYNN FEREDAY: It's a volunteer basis only. I don't -- I can't remember, but I don't remember whether it is in the legislation actually. It's based on a voluntary basis only and on condition that it is not stored on the database, and it's destroyed when the period is defined. I think it's after the investigation.

BARRY SCHECK: I think, if I recall the way that the legislation was drafted is that they had a definition of what was quote/unquote an intimate sample, that you couldn't take -- you couldn't take blood. You couldn't. It was an intimate sample. So they redefined intimate sample to include sample when you are arrested. If they took blood from you then that is not an intimate sample, but the screens would still -- is operating on the principle of informed consent.

LYNN FEREDAY: Right. Should I just take you back a moment. In the early legislation, we did have difficulty as to what an intimate and nonintimate sample was. It's in the Criminal Justice and Public Order Act. They set out -- the basis of it was not to mention DNA at all and to combine DNA and fingerprints. So the whole point is fingerprints or any other sample could be used and taken and put on a database and used as an investigative tool. Then the definitions in terms of what constitutes an intimate sample, what

constitutes a nonintimate sample was then clearly defined, and a nonintimate sample is a scrape from the inside of the mouth, like a scrape, a pulled hair sample, a swab from -- I can't remember the -- there are a few other incidentals, but those are really the ones that really apply to us just now; and the intimate samples, the blood sample or swab from a body orifice other than the mouth basically, I think that is basically what the wording is.

The whole rationale behind that was that it was felt that a buccal scrape or a pulled hair sample would be noninvasive, and that then would also save police resources, because prior to that, a police surgeon would be required to take a blood sample, and that became very expensive, certainly in the early screens, because only blood was the option for the analysis system.

So this moved us into the mass screening period where a buccal scrape could be taken. The individual himself could actually take it, if they really wanted to, but generally a police officer would take a sample. So you are looking at resource savings the whole time. Also considering what are the implications, it is less invasive; at the outset, consideration to civil liberties, or liberty group in U.K. where issues were discussed with them, and they supported the database. They found that it was okay. It was a less intrusive way of policing and generally has been.

JUSTICE REINSTEIN: So having listened to everything that we discussed this morning, I want to know what your reaction is to that, based upon your experience, because I mean you seem to be light years ahead of us.

LYNN FEREDAY: I feel very uncomfortable sitting here this morning, because we have been there. We have been through most of these things, but the timetable was different. When we had our discussions, we had just gone through two types of RFLP, and we had gone through -- we were on the second PCR, and we hadn't moved into the STR at that time. We knew there would be changes, and what I think the talk and your experiences in DNA should tell you that things move quite slowly in DNA, and then suddenly they go 90 miles an hour, and you cannot budget for no upgrading and technology. I think it's very dangerous not to.

The reason why our samples are stored indefinitely is simply for upgrading and the technology changes. How that will be funded, when and if that happens, is another matter, but the option is there.

The low point about it is you have then to put in place secure measures to ensure that those samples are held for the purpose in which they were taken and no one other purpose at all.

TERRY HILLARD: Miss Fereday, can you expound on the security of the samples. You are saying you don't destroy them. So tell us about the security, how you go about ensuring that they don't get in the wrong hands.

LYNN FEREDAY: Well, they are held at a -- without giving too much away, they are held at a site where only the access is controlled and only those people within the access who need to access them achieve that.

TERRY HILLARD: When you say controlled, controlled by who?

LYNN FEREDAY: The FSS, government persons. We are an agency in the government so you could say they are personnel.

The role of the FSS has been not only -- I better start again. The data on the database is actually owned by the police forces. The role of the FSS is to run the database and to act as a custodian to the database. As part of that custodian responsibility, we have to ensure the sample is stored, integrity of the sample is achieved, and legislation is followed and adhered to. So we have to enroll them. We have a role as a supplier of the database, and also to act as a custodian. One of my functions is to oversee the custodian role so we make sure that there is no way that any unauthorized personnel can have access to the data.

DOCTOR CROW: Okay. Thank you very much.

(Applause.)

Legal Issues Working Group Report
Constitutional Analysis of Arrestee DNA Sampling

DOCTOR CROW: Next the Legal Issues Group so, Mike, let me call on you.

MICHAEL SMITH: Well, I am handicapped today, because I don't have David Kaye with me, as I did in Santa Fe, and I was told what I ought to do is incorporate by reference everything that David said in Santa Fe and then shut up, but...

Let me do a couple of things. One is not to try and substitute any reports from my mouth for David's report on behalf of our Working Group on the Fourth Amendment, Fifth Amendment questions.

David and I, and David through me, seek whatever additional points, questions, that folks have, and this is intended to be a fairly comprehensive treatment of the questions that he addresses and seems to be. But just to remind you of what they are, in the paper itself, David addresses, rather quickly, the question whether there is any problem under the Constitutional protections against incrimination. No, there is not. Whether under the due process of the Fifth Amendment and the Fourteenth Amendment, there are problems with the database methods that we are pursuing. Answer again, no. And you'll see so long as the government provides reasonable and effective safeguards to ensure the confidentiality of DNA samples and data. Just exactly what we were talking about this morning. So that there we didn't find the legal issues go so much really to talk about, but we did spend a lot of time, and David's memorandum spends quite a bit of time taking apart, as carefully as he can, the Fourth Amendment interests, that is the interests against unreasonable searches and seizures.

And in conclusion, because he goes to virtually everything we could think of as sort of subparts of that question, dealing with the invasiveness, the relative invasiveness of the seizure, and whether or not different methods of collecting DNA samples for profiling are searches under the Fourth Amendment. They are a critical piece of the analysis, because the differential invasiveness of the methods of collection matter a lot in the constitutional jurisprudence and probably in the, as this suggested, in the political consciousness.

But in any event, he does that fairly thoroughly and ends with the question whether skin scrapings constitute search, an interesting question. And the answer to that question might have a great deal of effect on some of the things we were talking about this morning. If it's not a search, I think both legally and politically, because of a slightly different set of questions; but I think that report also suggested if it's not a search, we are not there yet anyway. And so we ought to assume that the collection, the compulsory collection of a sample for profiling is a search or seizure under the Fourth Amendment. The question then becomes whether or not given this invasiveness it is a reasonable one in the absence of a warrant.

And David just goes through that stuff pretty well, too, and I think concludes, as we did as a group, that there isn't really a Fourth Amendment problem to the collection, the compulsory collection of DNA samples with the least invasive methods if they are properly stored and the security is properly maintained.

You might look at -- well, you just might take my word for it, but one of the things is that he hasn't fully developed, and I think after this morning's discussion, he probably should, is he notes that strain of the jurisprudence that focuses on whether or not the seizure seizes something that can reveal private medical

facts, and it seems to me that the storage of tissue question might turn out to have some importance to that, but David doesn't address it directly. You will see that discussion on page 19 of his memo.

And that is where he speculates a little bit about some of the potential future methods of collecting DNA samples for profiling and whether or not they are searches, and whether or not if the tissue is not retained, we don't have something that is a routine non-Constitutional question. And that is an interesting place for that to end up, if that is where it ends up. And I guess until I heard this morning the luncheon presentation, I thought perhaps we were closer to that than we are.

Now, not to avoid any discussion, because we need comment and feedback on David's discussion of those Constitutional discussions. I want to tell you, because we have already discussed them in Santa Fe as well, something of what remains of our work that we plan to report to you and submit to you before the end of our time, David is going to work with Ed on a report covering a bunch of topics. Briefly, they include questions that have been raised here like fuzzy searches and the admissibility of evidence questions. I don't know what they are going to do in that. That is Ed's territory, not mine at all, but I think they are going to talk about or discuss a bit the questions raised very early on in this commission's deliberations about methods for addressing admissibility questions when science or technology changes, science courts, panels, experts appointed by the court, that kind of question, and take a look at some of the literature on that.

They are going to do something on the records of proficiency testing and have their use in the admissibility of evidence, error rates and rules governing their admissibility, that is admissibility of the error rate evidence; and then finally some discussion of the effects on the rational for statutes of limitation on prosecution; the extension of time for prosecution, and whether or not some of the DNA technology affects or ought to affect state deliberation about what their rules should be on statutes of limitation.

PARTICIPANT: Typical profiling, too?

MICHAEL SMITH: Right, and some discussion of the development of and the use of, you know, typical -- what was it?

JEFFREY THOMA: Phenyl typical.

MICHAEL SMITH: Phenyl typical profiling. But I don't think they are going to go into that. We are not going to go into that, unless we are directed by the rest of you to the extent that we went into the Fourth Amendment questions.

Now, let me ask you -- let me sort of put to you some propositions that are at the edge of what we are doing. That is there are questions in our minds that come up at each of our meetings about the use by law enforcement for investigative purposes of databases, other than databases specifically maintained for law enforcement purposes. Now, this is not so much because it's a current practicality, but because of thoughts we have had that it's not unlikely in the future, particularly in special kind of cases where we have crime scene evidence and no hitting CODIS, that access to and use of DNA databases, particularly digitized profiles, could be of enormous assistance in the investigation of crime.

So there is a set of issues that haven't really been addressed that we should be looking at and that are developing as the technology develops that we think we have some obligation to take a look at. We have

asked Doctor Forman to prepare a little report for us on the feasibility of and the sort of proximity of feasible searches of this kind, but medical databases, military databases, research databases, other places where profile information that could be identified to persons are potentially of great use in crime investigation.

And so -- okay. That seems to us, relates a little bit back to the question about the collection of DNA profile information from persons other than convicted offenders, the development of larger and larger groups of persons, who are appropriately targeted for sample collection for these purposes. As the invasiveness of the sample collection goes down, these begin speculating about much wider groups, and I just want to -- this seems to me to be where we were at this morning and where our committee is, that is, asking questions about the balancing that goes on, if we are using, if we have a special DNA profile database based in the criminal justice system and law enforcement, the limitations of that from a victim's point of view and a crime solving point of view are fairly clear, because we have got to have a failed criminal justice intervention in order to have a successful one.

And in the article that was -- I don't know who put it in the packet, but in our packets was an article by Jean McEwen, and in there you will see a reference to a Harris Poll conducted in '94, in which 57 percent of the thousand in the sample found it acceptable to build a database with DNA profiles at birth. Now, that is a different way of putting the question and getting the answer to what is the American public tolerance for DNA databasing. But it's specifically as to profiles, partly for the reasons, I suppose, or related to the reasons that in the British system they don't retain the volunteered samples. It seems to me further exploration of that is desirable. It isn't so much or exclusively a question for the Legal Issues Working Group, but it seems to me that it's coming, that the accessibility of digitized databases of information, which could be useful in the investigation if you have got a crime scene sample is on the horizon, and so we want to take a look at that at our next meeting.

What else have I got? That is all. Questions, or comments, or further direction from the commission.

AARON KENNARD: Go ahead, Barry.

BARRY SCHECK: No. No.

MICHAEL SMITH: Fight it out.

AARON KENNARD: I have in regards to the invasiveness, I am wondering if the committee would like to hear from what is on the horizon, if I could ask you to get up and speak to what you have.

BRIAN WARD: I am Brian Ward. We are talking about at lunchtime the laser.

PAUL FERRARA: Lancet?

BRIAN WARD: Yeah, I think that Doctor Ferrara certainly is more knowledgeable about that than I am.

PARTICIPANT: I think that is technically known as the poker thing.

BRIAN WARD: We were talking, in fact, that there is a little poker thing out that actually has a potential to nick your fingertip with a laser and also take a fingerprint and blood samples simultaneously.

MICHAEL SMITH: I mean to put that in David's frame, as I understand David's view, because of its -- because of its engagement of the internal body, even though by laser, it constitutes a search or seizure under the Fourth Amendment, but mind you, right, these are kind of two interrelated and mutually functioning things. How invasive is it, and what is the need for it, and all that sort of stuff. And invasiveness is both of the body, and the lancet does invade the body; whereas, the adhesion of shed cells not.

The question is what information can you get from it? The more information you can get that is of the medically private kind, the more invasive it is, even though it doesn't prick the skin. So I think as a legal matter, these issues we were talking about this morning, they are interrelated.

BARRY SCHECK: I had some -- it seems to me that when we write these legal memorandum on these issues that it's a really good idea to -- and we try to do this in the postconviction report, and believe me it was rewritten how many times -- to make it objective in terms of saying, well, this is what the law is, or this is what the areas are, and to try to give both sides without characterizing it. You know, these, some of these issues are not particularly good. I mean it's all like out here, but there is no question that taking blood or even a buccal swab, or, you know, a skin scraping is, quote, a seizure -- I mean a search under the Fourth Amendment from the United States Supreme Court case law. I mean we have it all the way down to the learning in that Skinner case, and it's not particularly controversial or anything to talk about. It's not a Fifth Amendment problem.

What I found particularly troubling about the way this was written and a little muddled, frankly, in that in the area of due process, which is really what we were talking about before, the bodily and dignitary interests of privacy information, which is where we are going, I thought this was a bit gratuitous. I mean there is a series of informational privacy cases that it discusses on six and seven, where he doesn't cite any cases that are to the contrary that talk about the release of -- the unwarranted disclosure of private medical facts may raise a Fourth Amendment issue, right --

MICHAEL SMITH: Fifth Amendment issue.

BARRY SCHECK: A Fifth Amendment, a due process issue. And he just says, well, I just think that is, you know -- I just think that is going to be wrong, and --

MICHAEL SMITH: Let me hold you there for a second and to defend him in the sense that Phil's paper this morning was to be input to the production of this document, and we didn't have it. David didn't have it. So to some extent there was a division of labor there that hasn't reached fruition.

BARRY SCHECK: Yeah, okay.

MICHAEL SMITH: I will report this back to him, absolutely.

BARRY SCHECK: If you take a look at that discussion from five and six, I mean I really think that that is a -- just from an objective point of view, it was gratuitous to say, well, this means nothing when, in fact, when the discussion occurs of the Fourth Amendment, and we talk about what is really the issue here, and that is it's not the initial invasion, but it's the use you make of the information, okay, that when you look at the Skinner case and what the Supreme Court is saying about that on page 17, and the rest of it, it is very clear that that is what they are worried about. Remember, it's not the mere blowing into the --

taking the urine sample or blowing into the thing. It's what you do scientifically to the analysis of that body sample that matters. I mean, in truth, from my money, this is justifiable constitutionally really on the theory that it's like pedigree information under what he calls the identification.

AARON KENNARD: Right, that is correct, identification only, and I have had a discussion with him.

BARRY SCHECK: Identification only. I think that the -- and it does indicate at the end, because he has to, because the case is expressed out about it, that the so-called special needs exception is a much tougher fit. As a matter of fact, I believe again in the interest of objectivity, he is dismissing the most important objective -- objection in terms of special needs. The so-called special needs exception has to do with doing random car stops, right, or administrative searches, or things like that where you are not necessarily focusing on the investigation of white crime per se, right. And I think it's a bit disingenuous to just say, well, when we are doing a DNA database search, right, and we have unsolved crimes in the profiles of unsolved crimes in the system, and we are now going to compare you to those that we are not really investigating you for those crimes. All right.

Do you see what I am saying?

MICHAEL SMITH: I do, but I thought --

BARRY SCHECK: It was an investigative search. That argument is much bigger.

MICHAEL SMITH: I thought you were not using that use, but rather the placement of the profile in the database.

BARRY SCHECK: You are telling me that --

MICHAEL SMITH: No, I am not. I wouldn't think of doing that.

BARRY SCHECK: No. No. No. No, I'm just -- if you examine it, it's -- I can give you the exact page, but it's really -- it's an active orifice, because it's very clear that the special needs exception turns on doing like random neutral types of searches, okay, that don't necessarily -- they are not directed at solving a particular crime.

MICHAEL SMITH: Yes.

BARRY SCHECK: And so the argument that he is making here that if we take DNA from everybody at arrest --

MICHAEL SMITH: Right.

BARRY SCHECK: -- and then we put it in the system --

MICHAEL SMITH: Right.

BARRY SCHECK: -- we are not necessarily thinking of investigating you for any particular crime. The problem with that argument, the argument that is going to be made in rebuttal is: Wait a second, in our database, we have 46,000 like in Great Britain, right, they have 46,000 specific crimes that are actively under investigation. So it fails the rationale, in my judgment, and for good reasons, because then if this is

a special need then the violence gene is a special need, and the other things are special needs; and I think really, if you look at the way the British justify it, and the way in theory you are always justifying it here, which gets back to the discussion we had in the morning, is that you are telling the public and in a sense telling the court we will treat this no differently than a fingerprint.

MICHAEL SMITH: There is very little we can tell the court, if you know what I mean. It's rather that what David -- I think what David and what the committee thought is that to the extent that we are looking to these clauses of the Constitution to solve these problems for us, we may be exaggerating its power to do so. So that David might very well agree with everything you said about that, but he has the view that as this jurisprudence develops, it will not become more protected, but less so.

BARRY SCHECK: Well, that is precisely the point. It's not -- a lot depends on the rationale by which this is justified.

MICHAEL SMITH: Right.

BARRY SCHECK: And what is very peculiar, if you look at the memo, is that one issue that never really went through the courts, has never been decided by the United States Supreme Court is what right do we have to use fingerprints.

MICHAEL SMITH: Yes.

BARRY SCHECK: All right.

MICHAEL SMITH: Right.

BARRY SCHECK: As an identifier within the system. All right. Now, there are, you know, good and sound reasons for using it, okay, as a simple identifier. It's dangerous if you try to justify this on a more expansive and elastic rationale.

MICHAEL SMITH: Like the special needs rationale?

BARRY SCHECK: Like the special needs rationale, and I am just saying that I think that unfortunately this memo did not adequately address what I really see in the Skinner case, which also is a due process consideration that it is the actual use of the DNA information. You see the real part -- this issue to me, frankly --

MICHAEL SMITH: But isn't this why this morning's discussion was so important?

BARRY SCHECK: Yeah.

MICHAEL SMITH: Because you can't use the 13 STRs in the source of ways that you are referencing here in this discussion, but you could use the tissue.

BARRY SCHECK: Yes. Right. And the reason why the rationale is so important is the hard question is not so much, in my mind, ultimately whether you can craft the system that will pass constitutional muster to take it from somebody at arrest. Remember it has to be one that if you are really serious about it, you have to be able to say, we are only using it for identification purposes. There are absolutely no research

purposes that can be used for this. I mean you did notice that the British said that, and many of our statutes did not say that.

In addition, if you look at this case law, there can't be any real discretion within the holder of the evidence to use it for other purposes.

So Dawn and I were talking, and I think it's an important point to note I was looking at Chief Kennard of Utah, right, in this book to see what you could do with it in Utah under your statute; and if you look at the -- if you look at the Utah description here under access and disclosure, it says: The samples shall be classified as private and the Department of Public Safety, you know, can do -- may not transfer or disclose it except as under these provisions. And then Dawn and I began discussing what does that mean, you know, who creates the rules. Obviously, the Department of Public Safety creates rules, but what standards are they using. We spent a lot of time when the DNA Identification Act was passed to make sure that it was limited to DNA identification purposes only, which is only recognition of crime scene samples and lost bodies, right, and not any other purpose. And a lot of the statutes, unfortunately, are vague, and so I mean these are the kinds of things we really ought to clean up, and it should probably be explicated more in this memo --

MICHAEL SMITH: That is good. That is helpful.

BARRY SCHECK: -- in order to make the case.

MICHAEL SMITH: I think he was pretty clear in trying and then failing in the case of communicating it to you that to ask that question in the context of a system that was constructed so that the samples were destroyed as to the 13 STRs were taken.

BARRY SCHECK: He was --

MICHAEL SMITH: That is what it says.

BARRY SCHECK: He was assuming that it is in a context --

MICHAEL SMITH: He wasn't assuming. He was just saying what if. If that then, right, then the categoric exception probably applies rather than an individual balancing.

JEFFREY THOMA: And this is in draft form, Barry. Actually, I just got some input to David even since this draft came in.

MICHAEL SMITH: And, Barry, it would be really good if you have the time to e-mail him some of these observations. I mean I would be very grateful for that.

BARRY SCHECK: Well, finally, I would just make this suggestion to you. When -- I guess we are running out of time with this commission. I would suggest that in terms of proficiency testing, error rates, and all these other kinds of issues that they are running off to write a report on that you include somebody like Doctor William Thompson.

JEFFREY THOMA: He is.

MICHAEL SMITH: This will be more of a summary report of stuff.

BARRY SCHECK: I mean we have all been through these things, and you are sending off somebody who has quite a parson view to write a report on these issues where he has already published very, very strong views that are in opposition to others, and that is a problem for me when you are trying to come up and do a report, and again I am very grateful to him for a clear legal analysis in doing the work and all the rest of it; but even here, I thought he could have made a better effort to do less characterization of what he thought were strong and weak positions.

MICHAEL SMITH: That is fine. The solution, the cure then given the nature of man and the limitations of a Working Group process like this is to the extent you can -- I got notes from this -- but to the extent you can, if you provide him and therefore the rest of us with somewhat of a contrary view that could then work with that would help us do what you want.

JEFFREY THOMA: And, Barry, perhaps I can talk with you between now and Monday.

BARRY SCHECK: Monday is the meeting?

JEFFREY THOMA: Next Monday.

DOCTOR CROW: Anything else?

MICHAEL SMITH: Just along the last point I mentioned. I mean I think I would be grateful for sort of on- or off-the-record communications about this question of the desirability in the future, some future time, of law enforcement access to other databases; and in light of that, I simply want to raise the question whether a lot of the questions that we have been debating here aren't better addressed by simply taking on frontally the question of an identification only universal database next year. But the future of DNA evidence suggests to me that that is a question that actually needs to be addressed partly for the reasons you said this morning. A lot of this doesn't look like the right place to be having that debate.

GEORGE CLARKE: I have one item I want to ask especially while we still have Lynn Fereday, and I can't recall if we heard this in the context of the commission, but it's my understanding that it wasn't too many years ago that police could not even obtain an order for the production of blood or saliva from someone who was, in fact, suspected of a crime.

Is that correct, or have I mixed the Canadian experience?

LYNN FEREDAY: I think you have mixed the Canadian experience.

GEORGE CLARKE: All right. Okay.

DOCTOR CROW: Well, have you got everything you need? Of course not.

MICHAEL SMITH: I really do want to hear something off the record then about this question of the universal database. I do think we ought to put it back on the table in a better form than we have.

Some of the other things we talked about this morning, if you think out in the years in some parts of this country, virtually, everybody who is male anyway will be in the offender database. Particularly if it goes to arrest. I am just sort of wondering if it isn't more appropriate and evenhanded to put everybody in the database and not call it a criminal justice database.

BARRY SCHECK: I hope you don't think the silence is an assent by me.

MICHAEL SMITH: Take the subject.

BARRY SCHECK: Let me see if I am understanding what you are saying. For example, blood cards, heel stick cards?

MICHAEL SMITH: Yes.

BARRY SCHECK: You are thinking why don't we just type the heel stick cards?

MICHAEL SMITH: I am asking that question, because it seems to me we ought to ask it. We ought to ask it in the interest of law enforcement, all right, future victims, all of that. There are interests balanced on the other side. I want to know what they are, because it seems to me if we don't ask the question that way, we are looking at expenses and costs to other interests of privacy and a constitutional nature that we may not need to address that way, that they are better addressed in the larger context, because basically we are approaching that larger context anyway, particularly if digitized databases, not from the law enforcement world, are, in fact, becoming available through warrants or other exception by statute over the next 20 years to law enforcement. And if that is what is going to happen maybe we should be planning that future, rather than just sort of falling step by step.

BARRY SCHECK: If that is what is going to happen, then maybe everybody will shutdown. I mean I just find -- I mean you are really talking about why don't we have universal access to everybody's Social Security number. Why isn't everybody fingerprinted from birth and have that put in, too. There is no difference, as far as I'm concerned, with that question. Why don't we take the fingerprints of every child at birth and stick into a big FBI data bank.

MICHAEL SMITH: Answer.

BARRY SCHECK: The answer is that we don't like a total surveillance society. We are still a free country, and this goes to the heart of what I have been trying to tell you people, you know. I mean everybody out there doesn't like this. They look at this, and they say, this is exactly what the plan is. That is the master plan.

MICHAEL SMITH: What I am saying -- here is what I'm saying to you, Barry. I think you should listen just one more time to this. We are going to get there anyway, and that if that is the case, if I am wrong, that is fine.

BARRY SCHECK: I hope not. That is why we are here.

AARON KENNARD: Do we not already take a footprint of every baby born?

BARRY SCHECK: We do. We take their fingerprints frankly.

AARON KENNARD: We take their footprints now.

MICHAEL SMITH: It isn't in the surgical database those.

BARRY SCHECK: Not for that purpose.

AARON KENNARD: For identification purposes.

BARRY SCHECK: Oh, you mean ultimately if they are missing?

AARON KENNARD: Yeah.

PARTICIPANT: But the only reason we are taking it is for identification purposes; is that not true?

PAUL FERRARA: The heel print. The footprint is, yes, but then the genetic testing is for a specific limited purpose.

BARRY SCHECK: Yeah, but you aren't taking that -- you aren't taking that heel print so that you could later identify a baby as to -- identify an individual as being at a particular place at a particular time.

AARON KENNARD: True.

BARRY SCHECK: You are taking it to make sure you don't mix-up the babies.

AARON KENNARD: Or the baby is missing or you get --

MICHAEL SMITH: If you had a footprint at a crime scene that was of this kind, do you think you could develop a probable cause for looking into the footprint database to see which kid it was? I just ask the question. It seems to me that you could, and that is much harder to imagine doing than searching a digitized database of --

PARTICIPANT: All right, Chris.

CHRISTOPHER ASPLEN: I mean as the person who will receive the phone call tomorrow from the Department of Justice after reading the headline in USA Today about universal databases at birth, let me just say that, you know, it is a discussion that has come up, and not just in the context of the Legal Issues Group. It's a discussion that has come up in the context of the Laboratory Funding Working Group, and if you look at issues like getting 100 compliance on your collection, et cetera, et cetera, as with everything else with the commission, there is a value in asking the question. There is an inherent value in asking the question and addressing it, even if the answer comes up no, that is not what we want to do, and there is an inherent value in the exercise. So I don't --

MICHAEL SMITH: You thank me for raising it, right?

CHRISTOPHER ASPLEN: The question is will I thank you tomorrow.

Yeah, and what we can do is we can simply, you know, put it on the agenda at a future meeting after that Working Group kind of maybe defines the issue a bit that it wants to present. Again as with much of the commission's process, the process is as important as the result as the recommendation itself.

MICHAEL SMITH: Well, then for tomorrow's papers, I was asking the question rather than giving the answer.

Public Comment

DOCTOR CROW: Let me ask for opinions, questions, whatever it is from around the rim of the room.

Please.

SARA COMLEY: I really was going to let this go, but I cannot refrain from commenting. At the very first meeting, I raised the matter of the openness of the Working Group, of the various Working Groups. Now, I understand there is going to be a Legal Issues Working Group, I guess, a week from today.

MICHAEL SMITH: Maybe. We may have to change that date.

SARA COMLEY: Okay. But the point is if that is the first advisory committee of the Global Criminal Information Network Advisory Committee, which is a new committee, legal counsel spoke and made the distinction between two functions of a working group. If a working group was meeting, and it was deliberative, it should be open to the public, or it was supposed to be open to the public; if on the other happened, they were just -- it was a hearing, it was a working group hearing that that was not required to be open to the public. So it is hard to imagine that on this Legal Issues Working Group meeting, whenever it takes place, that it is going to be devoid of a deliberative content. I mean that is very hard to imagine at this point. Now that is my first point.

I wish you would run this by again or maybe for the first time about whether it is required for a federal advisory committee's working group that is going -- meeting which is going to have a deliberative content can that be open to the public?

PARTICIPANT: It is.

SARA COMLEY: Okay. Now, I have faxed various agendas of other advisory committee meetings that post their agendas, post the members of their meetings that are open to the public. There is some committees that are working groups. There is a task force, whatever you want to call them, and the transcripts are also put on the Internet. Now, that may be discretionary, whether the working group is deliberative, or accepting, or is merely a hearing, or it may be mandatory. My point is is that faker is for people like me, the public. It is not for the committee members. It is for me the purpose of the faker paper is so that I can have access to, that I can have input to, that I can hear the deliberations, and I can comment upon those same.

So I would ask that even if it is not required, a working group deliberative meeting is not required, it is not prohibited; and, therefore, it should be open.

Thank you.

JEFFREY THOMA: Aren't our working group meetings open? They have been, haven't they?

CHRISTOPHER ASPLEN: Yeah, there were initially in the Postconviction Working Groups when specifically addressed, there were a couple members who didn't want the initial meetings open to the public for this reason. They were scientists, who were discussing issues -- they were scientists who had to testify in court, and they were discussing issues from a devil's advocacy standpoint; and as such, what they didn't want is someone coming back later and saying, well, didn't you at this particular meeting say

this, that and the other thing, which would have been inappropriately represented, and that was a big concern in getting their involvement initially.

There has never been -- there has never been a time where we haven't said that someone could come, and Sara, have you gotten all the materials that you have wanted in terms of what the commissioners have received and working from?

AARON KENNARD: Mr. Chair, if I may. You made illusions in a couple of your comments, Barry, in regard to law enforcement we have been woefully inadequate in our battling for or obtaining funding for the DNA. As the vice president of the National Sheriffs representing over 3,100 sheriffs throughout the country, I am going to go back and speak to this very issue and let them know of what your concerns are, and I am sure other people in the committee, to share with you our frustration, we are woefully underfunded and trying to build jails. We are up against the wall in regards to how we do the heavy duty, up front stuff. I have to go and get a $130 million bond to build a new jail; and if I have to go to my public and ask for a bond issue to build this, this very thing of DNA where the public doesn't know much about DNA, I'm open to suggestions, anything that you, if you had in mind, if you were just making an overall criticism of what is happening, or if you had something in mind that we in law enforcement should be doing.

BARRY SCHECK: This is my frustration when we had the other discussion in the morning when we were suggesting throw away the samples, and some comments were made that you -- that people weren't so sure when we were -- that we were making the suggestion for the purpose of getting more funding to do -- to make the database in a true sense operational in the U.S. I mean Paul will tell you, I went down and testified for him to get money in Virginia in front of his legislature and have done that in other places, and because it's -- you see, I have really looked -- and none of this is personal, you know, at the people here, because we all know each over, and we know that people are acting in good faith. I mean it seems to me that it is actually a national scandal. It's a national scandal that there hasn't been money put into testing old unsolved cases and new unsolved cases.

The public, in much of the remarks that Chief Hillard made, I mean there is a broad consensus that that should be done, broad consensus, and the public doesn't really understand how bad our database system is, how bad the funding is in terms of -- I am not talking about the labs being bad. I am talking about the inadequacy of resources to do what is necessary to type unsolved cases. I mean, you know, I mean a lot of it is that there is probably very few people that I have more political disagreements with than Howard Saefer and Rudy Giuliani. I spend most of my time suing them on civil rights cases, but when it came to -- when I suggested to him, why don't you -- what, you are throwing away rape kits and you are not typing them, you know, he responded -- maybe he responded too far, but you know everything being tied to the rest. The point is, you know, these remarks are made in complete good faith and after much discussion of these issues, but what I am really saying to you is that for the concerns that were raised about future technology changes to this system, and some of the other concerns that Paul raised that I think we would all agree are not as, you know, not that pressing, just as somebody that is out there in the public debating this and actually championing the use of these data banks, I really think that people are overlooking the deep seated distrust that people have, and, you know -- and I know Michael was just raising it for discussion, but then I saw it going right through Chris's mind, right? What the problem is is that somebody will write in the paper in the morning somebody said, Take it from people at birth.

When the mayor of the City of New York was asked about this issue when it arose, he hadn't been briefed on it, it is my understanding. And instinctively, he said, well, just take it from people at birth, and the next day the New York Times wrote an editorial saying let's shut it all down essentially, all right, before there hadn't even been an intelligent discussion about what the issues were. And I am telling you, you know, it is a national scandal that the resources haven't been put forward to the things that we would all agree need to be done, all right, testing, new cases, new samples, and you go a long way towards using peoples' concerns if you would do something that costs very little for law enforcement and shows that people are very concerned about the privacy issues, and that you want to deflate the debate that is raging among people who are of good faith. And it's not just the ACLU is really what I am trying to say. It's a gut feeling by the average person on the street why are they keeping that blood if they don't really need it, if they are keeping the blood. If it's only used with a fingerprint, why are they keeping that blood. And it may be that they won't believe it when you say you destroy it, but a lot of the people will. A lot of the thinking people on this issue will. So that is -- I mean I am willing to, you know, go anywhere to support this.

AARON KENNARD: I may call on you to come and speak before the National Sheriffs.

BARRY SCHECK: Well, okay, that is fair enough, but you have to support destroying the blood.

CHRISTOPHER ASPLEN: I don't want to -- I don't think I fully answered Sara's issues.

DOCTOR CROW: Sara has the floor, since we took it away from her.

CHRISTOPHER ASPLEN: Okay.

SARA COMLEY: Go ahead, Chris. If you are going to say what I think you are going to say, I have a response.

CHRISTOPHER ASPLEN: Let me take a moment and think. You look lovely today, how is that?

(Laughter.)

CHRISTOPHER ASPLEN: We don't have any policies where people can come to the working group meetings. The individual members of the different working groups have, and I know that your working group early on said this, but they do consider them to be open to the public. We do. I know we have, at least at the last couple of meetings, discussed what the general agenda was in terms of when the next meetings were coming up. I don't know what kind of further advertisement you are looking for in terms of the public dissemination of when and where those are. I hope that in just seeing the way we have conducted this meeting by saying we are not going to wait until 3:45 when all the discussion is over to let the public weigh in on this, but rather to let them do it periodically, and you have probably been, you know, as beneficial as any to our process.

SARA COMLEY: I do my best.

CHRISTOPHER ASPLEN: I hope that it's clear that we are not -- that we are open to as much public input as possible. Sometimes it's a logistical issue process, but we can certainly make more efforts to advertise, you know, the working group meetings more.

SARA COMLEY: I get a lot of notices of working groups and subcommittee meetings through the federal registry when they are on short notice. Then I depend upon usually the executive director to either send me a fax or put a message on my answering machine.

What you didn't say that I thought you were going to say, so you started out talking about one particular working group meeting that the reason it was -- that some members did not want it open was because there was scientists present, and they didn't want particular -- would you go through with that comment, finish that comment, and then I will respond to that comment.

CHRISTOPHER ASPLEN: It's simply a matter of what -- there was a fear that in talking through these issues, and at times taking a devil's advocate approach, not saying something that they wouldn't necessarily believe, but throwing it out there for argument's sake, the concern was, hey, I make my living on the stand, and what I don't want is for something to come back out of context and to be faced with that on the stand, and that is very unfair, and if you force me to that position, you will not reap the benefit of my knowledge.

SARA COMLEY: Well, this is really going to be offensive.

CHRISTOPHER ASPLEN: I can take it.

SARA COMLEY: In the first place, it is not up to the working group members whether they are scientists or nonscientists to decide whether they are going to be open to the public or not if there is a deliberative content. I can sympathize with the scientists about the testimony and the devil's advocate, but that can be handled very easily. I mean they just have to -- I mean we have had statements today where people have emphasized over and over again, I can give you the argument, but I do not want you to think that I agree with it. Barry Scheck did this. I mean a lot of people have done this, and I really feel that can be handled. It may be that the working group is not an appropriate forum for a moot court exercise.

CHRISTOPHER ASPLEN: Okay. I'm not sure that -- that the definition of what is deliberative process and what is not is necessarily that cut and dry. I can tell you at this stage in the game in terms of looking at the future of the commission's work, I don't anticipate that being an issue in terms of the subject matter that we are going to carry anymore.

DOCTOR CROW: Do you have a question?

No comments here.

I will count to ten. So adjourned.

Any old business, any new business?

JEFFREY THOMA: Chris, we don't have the schedule for the next full commission meeting; is that correct?

CHRISTOPHER ASPLEN: Not yet.

AARON KENNARD: Do you know where it will be?

CHRISTOPHER ASPLEN: It will be in Washington.

AARON KENNARD: D.C.?

CHRISTOPHER ASPLEN: D.C.

DOCTOR CROW: I guess my only task then --

PARTICIPANT: I thought it was Washington state out west with me.

DOCTOR CROW: Well, now that we are ready to adjourn, let me thank everybody. This has been a most at least interesting meeting, vigorous and interesting.

And I especially thank you for coming across the Atlantic to give us your wisdom.

So we are adjourned.

(Whereupon, at 2:37 p.m., the hearing was adjourned.)