National Commission on the Future of DNA Evidence
PROCEEDINGS
Meeting IX

Regal Knickerbocker Hotel

Chicago, Illinois

April 9 - 10, 2000

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Agenda

Sunday, April 9, 2000

1:00 p.m. - 1:10 p.m.	Remarks by the Chair *The Honorable Shirley S. Abrahamson* *Chief Justice, Wisconsin Supreme Court*
1:10 p.m. - 1:20 p.m.	Update on Commission Business *Chris Asplen* *Executive Director*
1:20 p.m. - 2:00 p.m.	Postconviction Working Group - Model Statute *The Honorable Ron Reinstein* *Chair*
2:00 p.m. - 2:45 p.m.	DNA Advisory Board Update (power point presentation) *Dr. Arthur Eisenberg* *Chair, DNA Advisory Board*
2:45 p.m. - 3:15 p.m.	Comments regarding R&D Report *Jennifer Smith* *Laboratory Director, DNA Unit 1* *Federal Bureau of Investigation*
3:15 p.m. - 3:30 p.m.	Break
3:30 p.m. - 4:30 p.m.	Research and Development Working Group Report *Dr. James Crow* *Chair*
4:30 p.m. - 5:00 p.m.	Public Comment
5:00 p.m.	Adjourn

Monday, April 10, 2000

9:00 a.m. - 9:05 a.m.	Introductory Remarks *The Honorable Shirley S. Abrahamson* *Chief Justice, Wisconsin Supreme Court*
9:05 a.m. - 10:00 a.m.	Crime Scene Investigation Working Group Report *Cold Case Investigation publication* *Law Enforcement Summit update* *Proposed Recommendation regarding Law Enforcement Training and Education*
10:00 a.m. - 10:45 a.m.	Legal Issues Working Group Report and Discussion *Michael Smith* *Chair*
10:45 a.m. - 11:00 a.m.	Break
11:00 a.m. - 12:00 p.m.	Laboratory Funding Working Group Report *Dr. Paul Ferrara* *Proposed Federal Legislation*
12:00 p.m. - 12:30 p.m.	Postconviction Model Statute *Continued Discussion*
12:30 p.m. - 1:30 p.m.	Working Lunch *Mr. Timothy Schellberg, Esq.* *Smith Alling Lane, Attorneys at Law* *Legislative Update*
1:30 p.m. - 2:30 p.m.	Commission discussion on continued tracking of forensic DNA issues: As technology expands, how should legal, privacy, funding and research issues be addressed in the future?
2:30 p.m. - 2:45 p.m.	Break
2:45 p.m. - 3:30 p.m.	Continued Discussion
3:30 p.m. - 4:00 p.m.	Public Comment

4:00 p.m. Adjourn

COMMISSION MEMBERS PRESENT:

HON. SHIRLEY S. ABRAHAMSON, Chair
JAMES CROW
JEFFREY THOMA
AARON KENNARD
MICHAEL SMITH
DARRELL SANDERS
RONALD REINSTEIN
PHILIP REILLY
JAMES WOOLEY
JAN BASHINSKI
GEORGE CLARKE
JOSEPH DAVIS
PAUL FERRARA
NORMAN GAHN
TERRY HILLARD

Remarks by the Chair

The Honorable Shirley S. Abrahamson

Chief Justice, Wisconsin Supreme Court

JUSTICE ABRAHAMSON: Good afternoon. I'm going to call the meeting to order. We have several commissioners who are in the neighborhood but have not yet made their appearance at the table, so we will proceed and they will be here shortly. And I'll just go around the room and then announce your presence. Shirley Abrahamson.

MR. THOMA: Jeff Thoma.

JUDGE REINSTEIN: Ron Reinstein.

MR. WOOLEY: Jim Wooley.

MS. BASHINSKI: Jan Bashinski.

MR. CLARKE: George Clarke.

DR. DAVIS: Joseph Davis.

DR. FERRARA: Paul Ferrara.

MR. GAHN: Norman Gahn.

DR. CROW: James Crow.

JUSTICE ABRAHAMSON: Okay. The first item on the agenda, which was allotted ten minutes will not take ten minutes. The Commission is proceeding. We have a full day and a half of meetings, and are in our final working stages. As you all know, we're scheduled to meet in July 9th and 10th. It will be in Washington, and we'll talk further about this tomorrow but we are tentatively scheduled for a 25 symposium November 9-10 in Cambridge, Massachusetts at the Kennedy School, which we'll talk about legal issues and DNA, and tentatively was scheduled to have a commission meeting in Washington preceding that on November 8, but these dates are not quite final but they're in the talking stage. And I will now turn it over to Chris, who will get you up to date on a variety of commission business.

Update on Commission Business

Chris Asplen

Executive Director

MR. ASPLEN: Thank you, Chief. The commission staff has been exceedingly busy over the past couple of months on issues that are not exclusive to the commission, but we've been acting as a resource for a lot of the pending legislation that's going on that both Paul Ferrara and Tim Schellberg are going to talk about, both federal and state. It is a very busy legislative season, as most of you probably know, on the DNA front, and a lot of the commission's material is proving to be very useful to individual legislators and legislatures across the country.

Also, we have been providing the postconviction document to more and more state legislators, and in fact, Judge Webster just requested more copies of it for -- he has been asked to be counsel to Governor Ryan's commission on -- Blue Ribbon Panel on Innocence in Illinois, and they are --he's been asked to provide them our materials on postconviction matters. The million copies of the pamphlet, "What Every Law Enforcement Officer Should Know About DNA Evidence," has exhausted its supply. We have run out of them, which I think is a good sign, and NIJ has committed to printing another 500,000 of them, given the nature of the demand that we have.

And to give you an idea of that demand, we have our first confirmed case which was solved by nature of a police officer having read that particular pamphlet. And it's a case in Texas wherein an individual -- there was a serial rape-murderer, if you will, who, as I understand it -- we're waiting for more detail but as I understand it, used both rubber gloves and condoms. However, in that particular case -- it was a strangulation case -- the individual when he strangled the woman used his teeth to tighten the ligature with his other hand, and because the police officer had read about the importance of DNA testing the ligature in a case, they actually got a DNA result off of the ligature and solved that case not too long ago. And again, they've connected him and identified him as being a serial offender. So congratulations to the commission in that regard,and I think the next 500,000 copies will be money well spent.

I have a number of other commission updates, but to help us keep on schedule, I will pepper them throughout the rest of the event.

There is, however, one most important commission piece of business that dwarfs everything else, quite frankly. On February 17, Samantha Pauline Clarke entered the world, and so, Woody, Pops, on behalf of all of us, congratulations to you.

MR. CLARKE: Thank you very much.

JUSTICE ABRAHAMSON: Okay. We'll move on to the next order of commission business. We turn to Judge Reinstein, and it's the postconviction working group, the model statute. And do we have the model statute?

MR. ASPLEN: It was passed out.

JUSTICE ABRAHAMSON: Okay. Ron?

Postconviction Working Group - Model Statute

The Honorable Ron Reinstein

Chair

JUDGE REINSTEIN: Well, if you remember the last time we met, we had a lot of discussion about this and pretty much ran out of time, and Woody had indicated that he was going to try to do some suggested changes that he had discussed at the meeting and Barry also said that he was going to submit some changes. I got Woody's changes. They're in front of you now, where it says final draft, not officially approved. The underlined sections and deletions are all Woody's suggested amendments to the draft that we had in D.C. at the last meeting.

And I didn't get anything from Barry. I looked through my notes about some comments that he had the last time and we can go through those. I thought maybe Chris could lay a little bit of ground work for us regarding what's happening with Congress with Senator Leahy's proposal, and there's also Senator Durbin's proposal, and some questions that raises as to what we do with the model statute which is, as we've always discussed, the model statute for state legislatures to consider, review, utilize in any way that they see fit. I will tell you that in my state, in Arizona, in this legislative session there have been efforts that were led by myself and the Maricopa County Attorney's Office, and also the Arizona Prosecuting Attorney's Office to introduce legislation that pretty much mirrors the draft that we have. We've gone though a couple of iterations of it and combined that with a DNA expansion statute regarding the number of crimes that we take. We're not going to be as good as, in my view, Virginia yet, but probably in about three years. The concern was overburdening the laboratories and the like. But the postconviction statute and the DNA expansion statute have pretty much sailed through. I don't think there's been one vote in either the House or the Senate against either one. The only thing that's hanging it up right now --this is a non-budget year. They have a two-year budget cycle in Arizona, and there's a $227,000

appropriation for the Department of Public Safety laboratory for this, and that's been the hangup, not the content of either of the pieces of legislation. But, Chris, if you want to just tell what's

happening federally?

JUSTICE ABRAHAMSON: Before he does, I want to say that Superintendent Terry Hillard has come in, and welcome.

MR. ASPLEN: Thanks, Ron. There are right now pending in the Senate, there are two different bills which I believe have been supplied to you in your information. One was introduced by Senator Leahy. The other was introduced by Senator Durbin, and they both purport to establish postconviction rights, if you will, in the kinds of cases that we've been discussing. Senator Leahy's extends to all states and convicted offenders, however, Senator Durbin's pertains t federal

offender matters. Also, Senator Leahy's bill has extensive provisions for the issue of competent counsel in death penalty cases, which obviously is not -- is something that we have gotten into. Right now, the Justice Department is considering what response it should have regarding those

particular pieces of legislation. As you can see from looking at Senator Leahy's bill, the standard -- the initial standard that establishes the right to test the evidence is a bit different than that which we state in the model legislation here. I think that it's important to point out that the model legislation that Judge Reinstein is talking about is designed as recommendations for the individual states, as model legislation for the states. It's not a commentary by act or by omission on the federal legislation. That's not before us, and I think that it should be noted that our discussion is limited just to the state recommendations. We don't -- what will ultimately happen to the Senate bills we obviously have no idea, and what course they will take, we don't know, but the commission's recommendations are heavily a part of that. You will notice that in fact, the first purpose listed under the legislation on page 8, the first purpose is to, "Substantially implement the recommendations of the National Commission on the Future of DNA Evidence in the federal-criminal justice system by ensuring the availability of DNA testing in appropriate cases." So again, the commission's work continues to go out on that level, and we'll keep you informed on that status of that particular legislation and things like whether or not it ultimately gets attached to some of the funding legislation that we'll also be talking about, funding legislation that has come up in the House, authorizations for database -- both convicted offender database and forensic index database reduction.

JUDGE REINSTEIN: And as far as the draft that you have in front of you with the amendments that Woody has proposed, I reviewed them all and I don't have a problem with any of them, but they're open for discussion. And in looking at some notes that I had from Barry's comments the last time, I think the only thing that we discussed that is not in here is that on the first paragraph, request for testing, after the word conviction, the last word in the paragraph, we talked about whether that should include, And that may contain biological evidence, as far as the evidence that's in possession or control of the prosecution, law enforcement, or the court and that is related to the investigation or prosecution that resulted in the judgment of conviction. And we could put, comma, and that may contain biological evidence. We discussed that at the last time.

The other was in the preservation order, paragraph 4, under procedures. Remember, this was Barry's suggestion. It said on the end of the first sentence there, during the pendency of the proceeding. There was a suggestion that we include something to the effect that an inventory of such evidence shall be prepared and supplied to the defense, and that had to do with the evidence that was currently in the prosecution's possession or control that could be subjected to DNA testing. And other than that, I think those were all the comments that we had, unless somebody else remembers anything differently. Woody, do you want to comment on any of the changes that you had?

MR. CLARKE: Just that they related -- the primary ones that I dealt with was the addition of the number four about halfway down page 1, and that related to our discussion about some type of diligence requirement, and I think we discussed that at some length, although we certainly didn't refine it or hone it down to any language. So that was language that I developed. And the second item was near the bottom of the first page that just dealt with if any other testing had been conducted. And I included by either party, although frankly, if the prosecution or law enforcement had it done, it better had been turned over to begin with.

JUDGE REINSTEIN: Right.

MR. CLARKE: But frankly, I tried to make it as all-encompassing as possible. But I did have a question about whether or not an or in there should have been an and, or it may be my misunderstanding.

JUSTICE ABRAHAMSON: Are you referring now to B?

MR. CLARKE: Yes. B1, and then the small a and b.

JUSTICE ABRAHAMSON: While we're on that, what's the difference between a and b?

MS. BASHINSKI: Maybe you mean potentially exculpatory.

JUSTICE ABRAHAMSON: Pardon me?

MS. BASHINSKI: Maybe we mean potentially exculpatory rather -- because this is a less clear-cut situation.

MR. THOMA: I don't know if there is any difference.

VOICE: I don't know whether there's any difference either.

VOICE: Well, it seems to me there could be a difference. The techniques now are not what they were years ago, and the evidence could be stronger or weaker, as the case may be.

JUDGE REINSTEIN: But on the issue of -- you're just talking about B1 a and b, and are a and b redundant. Right?

MS. BASHINSKI: Does exculpatory legally mean the same thing as exoneration?

JUSTICE ABRAHAMSON: That's what Chris and I were just saying.

MS. BASHINSKI: Okay.

MR. THOMA: Actually, just to give you an example, something regarding exculpatory evidence could point to another defendant, but -- point to both of them as opposed to one person doing everything. And for example, in a capital case that could be crucially towards mitigating the sentence of death, for example --

MS. BASHINSKI: Right.

MR. THOMA: -- if another perpetrator was more involved in one aspect of it. And that's just an example. I'm fishing, obviously. But I don't really see a difference. I did want to speak to C3. I want to say that I do totally agree with Woody's modification here. We have a case in California that allows the defense to do testing without -- if they're not going to use it without letting the prosecution know what the results of that testing are. That's up to trial if it's not going to be used during trial.

I think what Woody's correction here does it brings us to a court of equity, literally, and this is

really an equitable statute that we're talking about, and you've got to come in with clean hands. If you're asking for some relief from the court here, you've got to come in and show all your cards literally, and if you've got another test or a test that really proves the prosecution's point, so be it, but all the cards should

be on the table. As a defense attorney, I do agree with my friend Mr. Clarke here. I think this is perfect language to be added at this point.

Going back to B1 a and b, I don't see a difference between the two, but leaving an or in there I don't think really matters one way or the other.

MR. CLARKE: Actually, I think if you reverse the two and do b first, they both make sense. It would be a reasonable possibility exists that testing will produce exculpatory evidence, and then basically the second provision is, and as a result of that, the sentence or conviction would have been more favorable, so I think if they're reversed they do make sense.

MS. BASHINSKI: Yes. That's right.

MR. WOOLEY: I think if you read the Supreme Court cases, Bagley [phonetic], Kyles v.Wheatley [phonetic], Brady, all those cases, they define exculpatory evidence to be what is in a, evidence that is favorable to the issue of guilt or innocence and/or punishment. So you actually have one subparagraph b, which is defined by a, and it can be accomplished with just one. It's the same thing.

MR. THOMA: Then I think the prosecution and the defense are agreeing here.

MR. WOOLEY: Yes.

JUSTICE ABRAHAMSON: We don't accept that stipulation, counsel.

MR. THOMA: And I do agree with Jim's interpretation of the Kyles v. Wheatley too.

JUSTICE ABRAHAMSON: So what's it going to be? Do we just keep a, just keep b, or have it perhaps redundant?

MR. CLARKE: I think a little redundancy doesn't hurt here. If you put b first and then that directs a judge -- okay. I have to decide is there a reasonable possibility that something good will come out of this evidence, basically. Then if that happens, then the second question is would that have been favorable had it been known or helped produce a more favorable result. But I agree. There is certainly some redundancy in it.

MR. THOMA: But by and, are we just putting an extra barrier where we're really not doing it, where we're all agreeing that they're both the same thing? If by putting an and, you're saying that both a and b have to occur -- though for the life of me, I can't think of a circumstance where one would be satisfied and not the other.

JUSTICE ABRAHAMSON: I'm going to suggest if it's agreeable with the group that we check out the definition of exculpatory, and if it's as you stated, then I suggest we keep one. Otherwise, as a judge, I would say one of them has to be a higher barrier -- a higher hurdle that has to be jumped. But if they're really synonymous we ought to just keep with one. If they're not anonymous, we ought to know what the difference is, and I'm sorry, but I just don't -- case names are familiar but I can't visualize the language as such.

JUDGE REINSTEIN: Do that while we're here?

JUSTICE ABRAHAMSON: Well, somebody must have a computer and can get into WestLaw Lexis and pick up these cases. Chris?

MR. ASPLEN: We'll do it. The --

JUSTICE ABRAHAMSON: Well, if not I can call the office tomorrow and get it from Madison.

MR. ASPLEN: The only reason I ask that is that I think there are some jurisdictions that really are looking to us putting together something, and if we don't do it now we wait until July, and there's legislatures that will --

JUSTICE ABRAHAMSON: If this is the only hangup, I think we can proceed.

MR. CLARKE: Actually, California has a statute this week that wouldn't hurt to have this.

JUSTICE ABRAHAMSON: And so we can do that, and if you give me the case names again, I'll -- we'll get them checked out and can get them faxed up here and look at them. No problem. Okay?

JUDGE REINSTEIN: Fine. What about the suggestion about -- is this surplusage on the first paragraph to add the words, and that may contain biological evidence?

JUSTICE ABRAHAMSON: What line are you on?

JUDGE REINSTEIN: This would be at the end of the first paragraph after the word conviction.

JUSTICE ABRAHAMSON: (Perusing documents.) Oh, I'm sorry.

MS. BASHINSKI: That makes a lot of sense. Otherwise it could be anything.

JUSTICE ABRAHAMSON: Yes. Does everybody agree with that change?

MR. THOMA: I'd ask Dr. Crow, you just mentioned something that all the time we're making advances, and at one moment there may not be what we think to be the forensic DNA evidence, and some time in the future it may turn out that there is that. Would you be comfortable with a change that includes this language?

DR. CROW: Well, I haven't thought much about this, but things are changing, and what was good evidence ten years ago would not be regarded as good evidence now, I'm sure, just because of the nature of the state of the art. And how the language should reflect that, I'll leave that to you.

JUSTICE ABRAHAMSON: And the phrase you want to add is, that contains biological evidence?

JUDGE REINSTEIN: And that may contain biological evidence. Right. Yes.

JUSTICE ABRAHAMSON: Okay.

JUDGE REINSTEIN: And then the other one was in C4, after the word proceeding, should there be a provision in there that an inventory of such evidence shall be prepared and supplied to the defense. I guess the question is is that a burden, is that a reasonable requirement?

JUSTICE ABRAHAMSON: You'll have to do that again for us. Preservation order four. Is that the one we're talking about?

JUDGE REINSTEIN: Right. And then after the word proceeding on page 2 --

JUSTICE ABRAHAMSON: Just a minute. That's at the end of the first sentence, "Must be preserved during the pendency of the proceeding." And what do you want to add, Ron?

JUDGE REINSTEIN: An inventory of such evidence shall be prepared and supplied to the defense.

MR. CLARKE: So that would be an inventory, current, as opposed to what would the inventory presumably would have been years earlier?

JUDGE REINSTEIN: Right. Because it says, "In order that all evidence in the prosecution's possession or control that could be subjected to DNA testing must be preserved during the pendency of the proceeding."

MS. BASHINSKI: And the court shall order that the inventory, so it's -- the court shall order two things. One, you preserve it, and two, you prepare an inventory.

JUDGE REINSTEIN: Right.

MR. CLARKE: In other words, this would only kick in if a judge decided, All right. This application has enough in it that now we want to make sure we retain the evidence.

JUDGE REINSTEIN: If there's a preservation order at all, that's what I mean.

MR. CLARKE: Right. Yes.

JUDGE REINSTEIN: So for example, if somebody submitted a motion to the trial judge that handled the case and it was a consent defense and there was not just eyewitness identification, but you've got -- not a consent defense but a confession. A judge may decide, I'm not going to order preservation here because this is a frivolous claim. This would be a category five type situation that we had in the original postconviction report.

JUSTICE ABRAHAMSON: Now, where do we have an order in the rest of the statute?

MR. THOMA: It's just the number 4, preservation order under C4.

JUSTICE ABRAHAMSON: Okay.

MR. WOOLEY: But doesn't it say when the proceeding is instituted under this act the court shall

order the preservation, and the proceeding is instituted just by the guy filing it. Isn't that what the first paragraph of the statute provides? So what you've done is you've mandated that the court issue the order upon the filing, unless I've read the statute wrong.

MR. THOMA: There's a mandatory testing, which is a, and then there's testing in the court's discretion, which is b.

MR. WOOLEY: I'm talking about simply, Jeff, the preservation order. There seems to be a clear mandate that the court shall order the evidence preserved upon the -- when the proceedings instituted. The proceedings instituted whenever some guy files it under paragraph one, so now the guy can -- if I'm a jailhouse lawyer I'm going to institute the proceeding and accompany it with my demand that the court order the preservation of the evidence. And I'm not sure that that was what Judge -- I'm not sure that's what your intent was.

JUDGE REINSTEIN: No. In fact, I've had a few of these already, and I've denied them all because they were all what I would categorize as Category five cases. They're just somebody who read something in the paper. They're cases that I handled and they were -- there's no way that testing would produce any exculpatory evidence at all. So by the filing of the motion, I guess on the case that I've handled, I don't consider that as instituting a proceeding other than me being able to summarily dismiss it without even waiting for a response from the state.

MR. SMITH: That's the language you use --

MR. WOOLEY: I could tell from your comments that wasn't your intent, but I think the language possibly can be interpreted that way.

MS. BASHINSKI: So at what point is the proceeding instituted then?

MR. WOOLEY: Well, paragraph one says when the guy files it.

MS. BASHINSKI: So that's -- there is some ambiguity there.

JUSTICE ABRAHAMSON: We'll all have to speak up and into the microphone, otherwise we can't hear you.

MS. BASHINSKI: There is, I think, some ambiguity there.

JUSTICE ABRAHAMSON: And the response was it is started at the petition, the request for testing?

MR. WOOLEY: By the way the statute is drafted, Your Honor, that's how I see it, and I heard the judge's comments. I don't think that's what he meant, and I think it can be interpreted that way, because it says that the person may at any time institute a proceeding. So that means when it's filed he instituted the proceedings, and then on page 2 it says, "When the proceeding is instituted the court shall" so the court is required simply because of the filing, so there needs to be some working of the language to give what Judge Reinstein I think clearly wants is some discretion in the court to say, This is frivolous. I'm not going to order anything.

You could just put instead of instituting a proceeding, I guess you could put just may file a petition under this act requesting the forensic DNA testing, and then you get after notice of the prosecution and opportunity to respond, the court shall order testing if it finds, so once you receive the motion you can summarily rule on it, which our jurisdiction would allow the court to do without receiving a response, if it's a dismissal. I guess the proceeding is the hangup as opposed to just filing the petition.

MR. SMITH: Is there any reason to worry in a different and less orderly jurisdiction about the time between the initial filing and the time when the court actually gets an opportunity to consider whether it

wishes to let this continue? Presumably, one of the things that people are concerned about is the deliberate destruction of evidence.

VOICE: That's what I was going to bring up.

MR. SMITH: And suddenly the opportunity and the need becomes apparent. Now, courts can deal with that too, but it's just whether that should be --

MR. THOMA: And with that in mind, if I can follow up on what Michael is saying, the inventory and preservation makes sense at that point, especially if you're concerned at all about a possibility of deliberate destruction once this is coming under the ambit of the court.

MS. BASHINSKI: Then as a person who may have custody of the evidence I become a lot more concerned about having to do inventories in cases such as the judge is discussing, where ultimately the judge would decide that it was a frivolous petition, because that would open a much larger flood gate of burden.

MR. THOMA: And I appreciate that, especially from your position, but it's difficult for the court to fashion an order and not destroy and evidence that's in the possession of the prosecution, law enforcement, or the court if there's no up to date inventory of what is not to be destroyed.

MS. BASHINSKI: I understand.

MR. THOMA: Okay.

JUDGE REINSTEIN: Well, in looking at the statute that I drafted for Arizona, I eliminated the word proceeding. Thanks, Jim. And I -- because I drafted this there, and it says at any time a person who was convicted of and sentenced for a felony offense and who meets the requirements of the section may request the forensic deoxyribonucleic acid testing and then any evidence that's in the possession or control of the court or the state that is related to the investigation or prosecution. Then I go into after notice and an opportunity to respond, the court shall order testing if -- so we eliminated the word proceeding there.

JUSTICE ABRAHAMSON: So what is the pleasure of the group? Do you have a suggestion for us, Ron?

MR. CLARKE: Is the goal to have for instance something of a prima facie showing prior to a preservation order, or in the alternative it's preserve it once the motion is filed? I don't have a good feel for how many of these are encountered. For instance, they're very rare where I come from, but that doesn't mean they aren't individually important.

JUDGE REINSTEIN: I think they are very rare, although with all the publicity and the like, there may be some that increase for a while. But just like anything else, when you've got something like this, I think it's going to be a peak and then quickly dissipate as far as claims go. But even with all the publicity that we've had, we've seen very few that have come through. MR. CLARKE: The only thing I'm afraid of is it sounds fairly easy, but in some of these cases with large volumes of evidence, it is a significant undertaking to inventory physical evidence. That's the only fear I have. Obviously in those cases where this testing is going to be granted, those are the perfect cases for that order to exist in. The flip side is do we end up ordering that in a significant number of number of cases where it's not a productive undertaking?

MR. SMITH: Maybe Jeff has to be wrong. That is, maybe it is possible to order the preservation of evidence before there's a full inventory of what it is. In a sense, there'd have to be that capacity, and maybe that's the right way to do it.

MR. THOMA: And certainly the wording without adding anything more should preclude such destruction, and it's worded correctly, I think, for everybody to accept, that this is only during the pendency of the proceeding, and Ron's point of some of these proceedings are going to be awfully short when they come to his desk and he can see that they're frivolous, this order isn't going to last very long. So perhaps we could just keep it the way it is.

JUDGE REINSTEIN: What about if we just eliminated the words institute a proceeding under this act, and change requesting to request, so it's going to read may at any time request the forensic DNA testing.

MR. SMITH: Leaving open the question, when it's instituted?

JUDGE REINSTEIN: Yes.

JUSTICE ABRAHAMSON: Well, the theory is that the proceeding is instituted on a request. Is that it? Maybe we should just say, when a request for testing is made under this act, the court shall order all evidence in the possession to be preserved? You don't want anyone to destroy it. Then the next sentence, which is an add on, is an inventory of such evidence shall be prepared and supplied to the defense. The question there I have is by whom? By whomever has it? So you may have several inventories. Is that possible?

MR. THOMA: It is possible.

JUSTICE ABRAHAMSON: Okay. And shall it be supplied when -- as soon as possible after the request, or is it going to be supplied only if you've gotten mandatory testing ordered?

MR. CLARKE: Would it make more sense to have that as a permissive type order by the court about an inventory? There may be no need in some cases and there may be a significant need in others. For instance, at least in many jurisdictions I'm familiar with, a defense lawyer can go down and look at the evidence and see what's there, literally. Other jurisdictions it may be necessary to have an in-house inventory.

MR. GAHN: I've had some experience. I think without the benefit of a statute, I think prosecutors around the country have been dealing with this oftentimes without even going into court. Defense attorney comes to you and says, Look, I really think I've got something here. We need some DNA testing done. And the problem -- the reality of this is that you'll have someone who may very well wish to have DNA testing done, and it may be a very valid request, based upon the nature of the conviction. And the question that the defense -- causes problems -- where is that evidence? Whether some is at the crime lab. Some is admitted by the court. Some's back at the police department. Where is it? And it's very frustrating for the defense to try and locate and make sure that that is preserved, that evidence. Therefore, I think that some type of order is

necessary at the onset, but I think you could make this permissive and say the court may order that all evidence -- because I think some cases you get are going to be able to be dismissed right away and say

this isn't a Category one or this isn't going anywhere. Others are going to be something that yes, I would like for somebody to find that evidence, locate it, and tell whoever's in charge of it that is to be preserved now. And you probably could accomplish it by saying the court may order that all evidence in the possession instead of making it mandatory, because we've been making these judgments for years now --

MR. THOMA: Wait a minute. You're saying -- I was going to agree with you for a second there, but I think, if I could, I'm going to agree with Woody that yes, during the pendency of this proceeding there is an order and we don't necessarily have to have an inventory. We have to believe that people are honorable enough to follow it. But let's go with a permissive statute that the court can order an inventory, especially in the cases that Woody's talking about, where there is a lot of evidence, there are a lot of custodians of the evidence, and the court's going to need that to help foster its way through any postconviction testing. So we could add that, a permissive inventory however that the court can make, but I think otherwise, we leave this the way it is, except for the Chair's minor change at the beginning to just explain what we mean by when this order should occur. That's my position.

JUSTICE ABRAHAMSON: I'm going to ask that we do a slight redraft, taking these comments into account on four. I'm not going to ask for a -- and we're going to look at four and we're going to look at B1 a and b, and we're going to put this on for tomorrow, because I won't call for a vote

on this today. But I think that four is relatively easy to redraft, and I'd be happy to join with the others and Ron and Jeff and Woody and Norm, anyone else who wants to gather in, and then we can have it typed and brought in. And the other thing I'm going to do is move on to our next order of business because both Dr. Eisenberg and Smith -- Jennifer Smith who are here and will comment have to take a plane out of Chicago to get home. So I'm going to move into, for the moment, the DNA Advisory Board update by Dr. Eisenberg, and Jennifer Smith asked if she could comment at that time right after Dr. Eisenberg as part of the public comment so she can get out of Chicago back home before it snows again. Again. Let's --

MR. WOOLEY: May I ask a question of --

JUSTICE ABRAHAMSON: Yes.

MR. WOOLEY: Will we have a chance -- I had another question about Woody's comments in paragraph three at the bottom of the first page. Will we be discussing that --

JUSTICE ABRAHAMSON: Yes. Why don't we do that right after this --

MR. WOOLEY: Great.

JUSTICE ABRAHAMSON: -- and then come back? That will be fine. Because I'd like to get all the comments in and if there has to be redrafting and tinkering -- because we would like to get this approved if we can get that done tomorrow, Monday. Dr. Eisenberg? Dr. Eisenberg is chair of the DNA Advisory Board and both and Paul Ferrara sit on that board too, and attended at least part of their last meeting, and this is especially relating to the use of statistics on DNA in court proceedings, although I don't know what he's going to specifically talk about. And you have before you the database -- you've got a paper on the database that was circulated to all of us. It's dated February 23, 2000, statistical and population genetic issues affecting the evaluation of the

frequency of occurrence of DNA profiles calculated from pertinent population databases. You need an acronym. That's a joke. Okay. Go ahead.

P R O C E E D I N G S

Sunday, April 9, 2000

DNA Advisory Board Update (power point presentation)

Dr. Arthur Eisenberg

Chair, DNA Advisory Board

DR. EISENBERG: Thank you very much, Chief Justice. I appreciate the opportunity to come before the commission and give you an update on the activities of the board -- the most recent activities and just sort of summarize for those commission members who do not have as much familiarity with the activities of the board over the past five years. So again, thank you very much for this opportunity.

First, I'd just like to give you -- show the current members of the DNA Advisory Board -- and as Chief Justice mentioned, both herself and Paul Ferrara serve on not only this commission but also the DNA Advisory Board.

And most importantly, I think that the board owes a tremendous -- the country owes a tremendous debt of gratitude to Dr. Joshua Lederberg, who was the initial chair who really laid the foundation and the groundwork for how the board conducted its activities, and I just inherited his legacy

.

Again, just brief history. The DNA Advisory Board was authorized by the DNA Identification Act of 1994. It was established in March of 1995 and was given a defined life period of five years, and at the request of the board, the director of the FBI actually continued the life of the board until the end of this year 2000, so on December 31 of 2000 the board will be disbanded

. This was an extension originally. The board was supposed to disband approximately one month ago. Again, the scope of the activity was to develop and appropriately periodically revise recommended standards for quality assurance, including standards for testing the proficiency of forensic laboratories and forensic analysts in all aspects of DNA

. And again, the citations to the act are shown here.

The board's scope of activity specifically was actually amended to include statistical and population genetic issues affecting the evaluation of the frequency of occurrence of DNA profiles calculated from pertinent population databases

. And again, this was really at the request at the first board meeting. Under Dr. Lederberg it became clear that we felt the intent of the act was for the board to look into these activities, since several members of the board specified for the act were population geneticists and bio-statisticians.

And again, to recommend these standards for acceptance of DNA profiles into the FBI's CODIS database, which take account of the relevant privacy, law enforcement, and technical issues. And again, the privacy issues were expanded and incorporated into the board's bylaws and is now in the charter

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So at the very first meeting, the board reviewed the House Judiciary Committee report on the DNA Identification Act, and as a result, recommended an expansion of these board's activities to specifically include the statistics and the privacy issues. So very early on in the life of the board it became clear that these were areas that the board needed to become familiarized with and make appropriate recommendations.

And as such, these were incorporated into the board's bylaws by the director of the FBI very early on in the life of the board, and was also, through the granting of the extension, became part of the charter by the director of the FBI

.

One of the very first documents -- official documents that came out of the board were based upon the recommendations to the director of the FBI concerning quality assurance standards for forensic DNA testing laboratories

. And I had commented to Chris that in the last document that you are looking at, one of the statements was to the effect that laboratories are following the

recommendations of the DNA Advisory Board.

In fact, those are now the director's standards, and I think should be referred to as such. The

recommendations were from the DNA Advisory Board but upon review by the director of the FBI, he in fact signed them into law, so they are the director's standards.

JUSTICE ABRAHAMSON: If I can interrupt, that's paragraph five on page 2. "If the laboratory orders testing, it shall select a laboratory that meets the standards of the DNA Board." Dr. Eisenberg is suggesting that we change that to the director of the FBI, and thank you.

DR. EISENBERG: Thank you. And again, these standards became effective on October 1, 1998. There were some timely issues involved here. One of the areas of concern to the forensic community was issues referring to the technical manager-technical leader role. One of the areas of concern were that there were many people in the field that perhaps did not meet the educational requirements, yet had the necessary experience and background and had learned the material and perhaps should be grandfathered in after their credentials were reviewed. In fact, ASCLD lab set up a credential review committee to do such an act.

But the period was specified from two years from the enactment of the standards by the director of the FBI, so all individuals who wished to be grandfathered in need to have all their materials submitted and reviewed prior to October of 2000.

The next document that was issued by the director of the FBI was based upon recommendations of the DNA Advisory Board, referring to the quality assurance standards for convicted offender DNA database and laboratories. Again, the scope is very similar in nature to those of casework samples, but specific areas relating to the types of samples encountered in the convicted sample; typically, more pristine blood samples. There were some references to robotics and the type of personnel required to handle these samples, perhaps their training did not need to be as extensive as those involved in casework analysis. So in fact there are a separate set of standards

that were recommended and approved, and they became enacted by the director of the FBI, effective April 1, 1999

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In both of these standards there were mechanisms for revisions of change. Again, because of the fact that the DNA Board's life was defined as limited and will terminate, that there had to be provisions for recommendations to be made to the director of the FBI in the event that things would change or that the standards needed to be modified. And again, this responsibility was put upon the Scientific Working Group on DNA Analysis Methods, referred to as SWGDAM, and that this group would then make recommendations of revisions as necessary to the director of the FBI

.

Again, one of the areas that were included in the charter of the bylaws of the DNA Advisory Board were to examine the statistical and population genetic issues affecting the evaluation of the frequency of occurrence of DNA profiles. And again, that refers to the document that was provided to the commission. A subcommittee was set up from the DNA Advisory Board.

The subcommittee to address these issues was comprised of Dr. Bruce Budowle, Dr. Chakroborty, Dr. Bernie Devlin [phonetic], and Dr. Fred Bieber. And those four individuals were responsible for making recommendations to the board to review in terms of any question relating to the statistical interpretation that perhaps still troubled members of the forensic community and the legal system that was encountered in casework.

Very early on, the board under the direction of Dr. Lederberg -- a motion was passed strongly endorsing the NRC to report, headed by Dr. Crow, in terms of the evaluation of forensic DNA evidence. The board felt that the NRC II really went a tremendous way towards answering questions and concerns that the forensic community had in regard to statistical evaluations of forensic evidence.

There still seemed to be some areas that perhaps the forensic community still wrestled with, and the scope of activity of this subcommittee was to try and clarify issues related to source attribution, relatives, mixtures, and database searches. And again, the document that has been

distributed to you was forwarded on this month to the director of the FBI for his review

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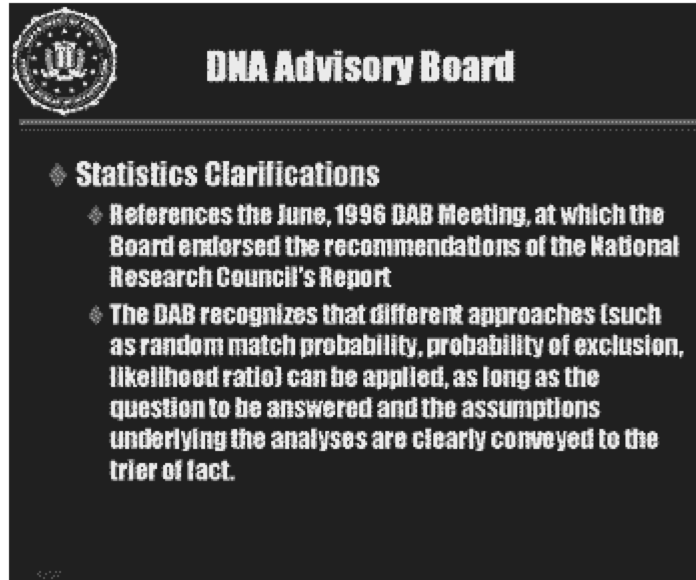
And Dr. Budowle is here, and I would like to ask that if there are any questions specifically related to any of the material contained within this document, I strongly suggest that he would be the best person to direct those to and he would be more than happy to answer any questions about that.

Again, because of the scope of activity of the DNA Advisory Board, it felt that these would be worthy issues to try and address, and I think that this statement here really summarizes the feelings of the DNA Advisory Board, that the board recognizes that there are different approaches such as random match probability, probability of exclusion, likelihood ratios. That any one of these can be applied, but the key is that one must really be very specific as to what is the question that you're asking, what is the answer to that specific question; that there are many different answers to many different questions and when you frame a question in a legal setting in the court, you must be very specific as to what the question is and then give the appropriate answer to that question



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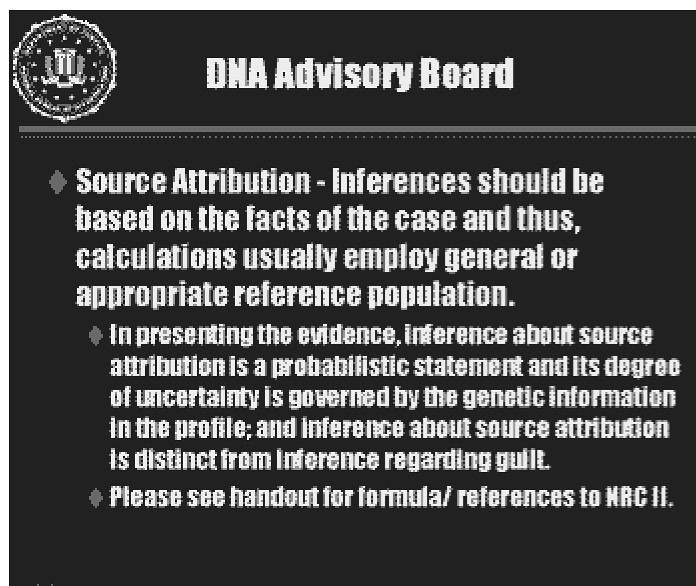
Again, one of the four areas was source attribution, and again, inferences should be based on the

facts of the particular case and that the calculations done usually employ general or appropriate reference populations. And again, any questions related to any of the statistical interpretations are provided in the document



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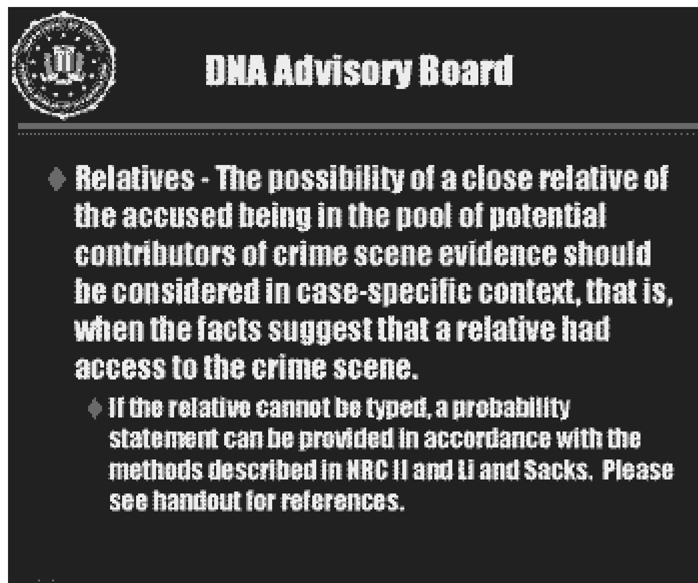
Again, questions specifically to be addressed in terms of the possibility of a close relative of the accused being in the pool of potential contributors, again, this should be done -- the board felt

that these types of issues should be looked at in a case by case basis. If there was absolutely no reason to believe that a relative of the accused be part of the pool of potential suspects, then

perhaps there is no reason to consider relatives in the calculations



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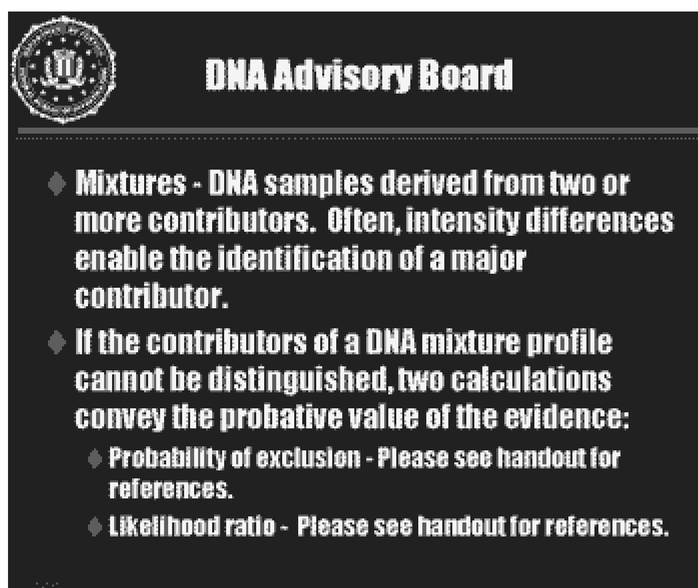
Again, the board recognizes that there are numbers of ways of dealing with calculations based upon mixtures, but there are certain things that one can actually avail themselves, based upon the sample analysis, that often based upon intensities one can actually take a look at a mixture and assign which pairs of alleles come from a particular contributor, as opposed to other alleles found coming from another potential source



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Again, one of the issues dealt with in the NRC II report referred to searches of databases, and again, two questions arise: what is the rarity of the DNA profile, again, looking at the random match probability versus what is the probability of finding such a DNA profile in a database search? Again, there have been some discussions of this issue in the literature, and again, based upon review of the subcommittee, the committee strongly endorses the recommendations of NRC II that in fact the size of the database must be included in the consideration of the second question

.

What are some of the remaining issues that the board is dealing with? Well, one of the major issues that we have before us is a review of an order document that's being prepared by the FBI. This order document is not being prepared in a vacuum. In fact, the FBI has solicited input from both state and local forensic laboratories, and the document is being used by the FBI to audit those laboratories participating in NDIS, the National DNA Indexing System. But more what the FBI would like to see happen -- and I think most forensic labs are in agreement -- is that a forensic laboratory undergoes many audits and many cases where they are being asked to be accredited by other ASCLD, ASCLD lab, or other organizations that provide that type of service. And I think the consensus among the community is that if a single document could be put together that could be utilized by as many of these groups doing audits and/or inspections, accreditations, that would go a long way to trying to simplify the process, perhaps make the process much more cost-effective to laboratories.

The accreditation process through ASCLD lab is an extremely expensive process, certainly for the larger laboratory systems. Those processes take place every five years. Laboratories have to undergo external audits every two years, and now when you throw in the audits that are required by the act for those labs participating in CODIS, if this whole procedure can be simplified then I think the community as a whole would benefit.

So I think that's the background behind the creation of this audit document by the FBI, and again, this was -- a draft of it was made available at the last DAB meeting. A period of time was given for additional comments from other laboratories who are interested in reviewing it, and hopefully, by the next board meeting a consensus could be brought together where the board can examine this audit document again to make sure that it actively portrays the feelings of the board in terms of what the thinking that went in behind the creation of the standards.

So again, this audit document will be used by the FBI for the NDIS audits, and hopefully would be available for use by other accrediting certifying bodies. And it's my understanding that ASCLD and perhaps other groups are closely working with the FBI to accomplish this goal.

And finally, one of the remaining issues is that related to the privacy issues to determine if the existing laws that -- are they sufficient to alleviate concerns? Certainly within the DNA act itself, there are many specific statements made in terms of access to both the data and the samples.

During the course of the last two meetings, we've had some presentations by the ethicist Dr. Youngst on the committee. Dawn Herkingham [phonetic] has put together a summary of the existing state laws related to concerns of the samples related to the convicted offender samples.

There will be other presentations at the next meeting by other people involved in this area, and hopefully within the next one or two meetings, the board will have sufficient material to conclude its charge in this regard

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So again, in terms of the remaining activities of the board, the intent is perhaps to have no more than one or two more meetings before the December 31 termination date. I think the two major issues left on the table for review by the board are those concerning the audit document.

In fact, hopefully the board can review this and come to a consensus that it actively conveys the standards that the FBI director has put into effect related to not only those labs participating in NDIS, but hopefully it will go a long way to simplifying the audit and certification-accreditation of laboratories, and then finally, to -- whether or not the language of the act itself provides enough sufficient rigidity to control, regulate the access to not only the data but those samples that are being collected

.

So if there are any other questions, I'd be more than happy to address them.

MR. ASPLEN: Dr. Eisenberg, tomorrow afternoon we're going to -- the commission's going to have a discussion, looking as the commission phases out and as the DAB phases out, the commission is going to be looking at the recommendations regarding how are these issues addressed in the future, such as privacy -- not just standard recommendations for privacy considerations and technology issues.

I guess my first question is currently the DAB and the DAB's consideration of privacy issues, is that in the context of quality assurance-quality control standards, or do you view that the DAB's considerations of privacy concerns extend beyond that? And then the next question would be with the expiration of the DAB, where do you see it going? How do you see those concerns being addressed?

DR. EISENBERG: Well, in answer to the first part of the question I think the way the board has interpreted the act itself is that part of the scope of the activity of the board was to make a

determination if in fact there was enough provision put into the act itself that regulates the control of these samples.

Now, there's certain language in the act that certainly the FBI has interpreted that any violations of that would prohibit states from participating in NDIS. That is if states allowed more access to samples, the data and/or the samples, then what was specified in the act itself, that that would be perhaps sufficient to terminate their involvement in NDIS. That is one thing.

They also -- the act itself appears to make the statement that if laboratories -- if state-local laboratories who participating in NDIS did not do so in context of the act itself, then they would no longer be eligible to grant funding, so that any potential grants would not be available to them.

Also, there is memorandum of understanding that each state, each laboratory that participates in NDIS is required to sign again indicating that they would be in compliance with the law of the DNA Identification Act itself, which limits -- identifies certain categories of individuals and limits the scope of use of those samples. And again, from presentations -- and we could make this available to the board -- we have another Power Point presentation that Dawn had put together. For time purposes, perhaps, we won't go through it but make the document available.

It appears that in the examination that there are a number of states which appear to permit more access than what was specified in the DNA Act, four states that have no specific provisions in terms of access, six states that permit access to the population statistics database, again, with no identifying information for third parties, which doesn't seem to be specified in the act, three states that permit access for humanitarian purposes, one state that permits access to determine whether there is a parent-child relationship, and finally, one state that permits access to a public official if needed as part of the official's official duties.

So in total there are approximately 17 states which appear to be more liberal than what was specified in the act itself, so the question before the board is perhaps what are -- what needs to be done about that in terms of whether or not those states should be allowed to continue their participation in the NDIS program. Again, these are discussions that are still under consideration.

As far as what needs to be done after the board is disbanded, and again, we have not come to a point where that discussion has been brought up. Certainly, hopefully we can make some recommendation to the director of the FBI in this regard in terms of at least the activity of those states in their participation in NDIS.

The act seems fairly clear that for a state's involvement in the National DNA Indexing Systems, they must comply with the DNA Identification Act and the standards put forth by the director of the FBI, and if they're not willing to do that or if they're not doing that, perhaps then their activity in terms of participation may be curtailed.

So again, that is, at this point, the only discussions or the only things that have been brought up at the meetings, and hopefully, over the next one or two meetings, we can come to some resolution on that regard.

MR. ASPLEN: Thank you.

DR. EISENBERG: You're welcome.

MR. HILLARD: Dr. Eisenberg, did you address the problem -- did you have a discussion about accreditation? I notice in some of my -- one of my handouts they stated that only five out of ten laboratories are accredited. Did you address that?

DR. EISENBERG: Absolutely, sir. At one of the very first meetings of the board, the board statement was that in order to demonstrate compliance with the standards, accreditation is the one and only method that a laboratory needs to demonstrate, and that the fact is that rather than specifying a time period, the board recommended that every laboratory should work towards the goal of being accredited as fast humanly possible.

Again, there was no date specified, no period of two years, three years. Again, depending upon the laboratory's system, each laboratory's system may have its own speed at which that needs to take place. But accreditation is something that every laboratory needs to be, and they need to be accredited as fast as humanly possible.

JUSTICE ABRAHAMSON: Are there any other questions or comments for Dr. Eisenberg?

DR. SMITH: Thank you very much.

(Pause.)

JUSTICE ABRAHAMSON: We are open now to public comment. We're opening up the public comment for Dr. Smith.

(Pause.)

JUSTICE ABRAHAMSON: While Dr. Smith is getting set up, we want to welcome Professor Michael Smith and Superintendent Kennard, who just came in.

DR. SMITH: Bear with me one second.

(Pause.)

Comments regarding R&D Report

Jennifer Smith

Laboratory Director, DNA Unit 1

Federal Bureau of Investigation

DR. SMITH: Okay. So you know -- and I'm very grateful for the opportunity to address the commission. I am the manager of the DNA Analysis Unit for the FBI laboratory. We have two units up there. I actually just manage one, DNA 1, and it's the unit that involves mainly with nuclear DNA testing and serology.

And I'm here today, though it looks like I'm here by myself, I'm actually here representing those individuals up there. These are the examiners of the unit, and some of those names you may recognize because they've been in the field for a very long time, pretty much from the beginning in some instances.

I've been doing DNA working in this field for ten years, and I come today to address the draft of the Research and Development Committee, which we have seen, and I come also to say that I have the utmost respect for members of that working group, especially Dr. Crow, and that I hope my comments are taken today -- I would like you to see me as a consumer of that report.

When I looked at the report -- I did get to see a draft -- I noticed that the mission was written in the beginning, so this group which was formed in November of '97 -- one of the tasks was to predict where the technology would be in five to ten years. And their objective was not to attempt to influence that, but rather to look into a crystal ball and see what was going to happen, and it should be useful for planning purposes.

Well obviously, as a manager, that's what I mean. I'm a customer of this report. How is this going to help me do my job and the people that work with me do a better job using this very valuable technology that we have? So I actually looked to this report and hoped to get some good ideas from that.

So we're looking for future improvements, and I'm here to tell you as a manager, this is what I need, advice on how to make the DNA technology faster, how to make it cheaper. It's incredibly expensive, and I know this commission has looked at the cost of forensic DNA technology, and it is almost frightening because it may be so expensive that we may not be able to offer this in all cases, and that would be a shame.

And finally easier -- cheaper and easier and faster, those are the three areas that I need assistance in. These are the three areas that I hoped this report would address. So when I was able to get hold of the draft report through one of my sources, I was happy to see that there were some technology projections, and that was a good thing. Where would we be in five years or ten years?

The report talks about new genetic markers and what are some of the possibilities with these markers. It also talked about new technologies, for example, chips mass spectrometry. Now, those are the things I was hoping to get from this report. And then it also said something about

statistics, and that raised a red flag for me, and I'd like to spend the next few minutes talking about that aspect of this report.

First of all, if you will recall in 1992 there was something called -- we fondly call the NRC I, and that report which was issued by the National Academy of Science created a bit of a stir in our community. Though it said the methods were reliable and it made some sort of general statements that a three to five -- and in this case they were talking about RFLP match was rare --it came up with something called the ceiling principle, and though I think the members of that committee were well intended when they came up with this ceiling principle, it was a setback for

forensic DNA analysis.

And by a setback, I mean in the courts suddenly examiners were called for admissibility testimonies in which we had to debate these statistical issues, and it was a drain on time and resources. Despite that, we did it and we were successful, but I think what really helped us recoup from this first report was something that came out in 1996, of which many of you are familiar with, and that was this second report.

And I say it helped us because it validated much of what we were doing, many of the technologies we were doing. It took a very serious look at all the information that had been generated by different research groups and it addressed things like reporting the actual frequency. Don't hide from the fact if you have a very informative profile that you report that. Don't put ceilings on your results. Report the actual numbers. And as our technologies were getting more powerful we could do that. We could report more powerful findings.

It gave alternative approaches to getting these numbers, and I think that's the biggest value of this

report. It says there are different ways to skin the statistical cat. It gives you some ability to look at what's happening in the case and decide which approach – kind of what Artie was talking about. Which question are we called to answer today?

It addressed how to do and how to address issues with database searches, and that was obviously going to be important as we developed the CODIS System and began to use that system. Thankfully, it nixed the ceiling principle, and I think that brought a lot of relief to our community. Though we had convinced many judges and many courts to do that, it put a final nail in that coffin.

And it also did something that I think many of us who were beginning to use this tool and recognizing the power of it -- it suggested that we might be able to actually walk into court and say, I've got so much information. I can identify the source of the stain. And as people, many of you who have worked in the field and seen it grow and gain power, this is really where we wanted to end up. This is why we look at DNA, because someday we hoped that we could use it to identify the source.

Just to remind you what the NRC II said, that profile might be said to be unique if it's so rare and it becomes unreasonable to suppose that a second person in population might have the same profile.

Now I'm going to focus a little on this, not so that you perhaps buy into the FBI approach, but you see something that I saw in this working group report that would cause potential problems for us if it's not addressed.

The trouble with the NRC II was it didn't tell us how to do this. It said it might be possible, but they gave us no solution. The FBI decided that they would come up with an approach, that we would use a

calculation that would help determine competence that this person is the source with a reasonable degree of scientific certainty. We did not want to address uniqueness in the same sense, and this is something I thing that's been bantered about, and it's a bit of a confusion. We're really about source attribution, and that's what our policy does.

And basically it says that if this profile exceeds the likelihood of one out of 260 billion, that we would call our identify statement. In other words, we would attribute this individual as the source of the stain.

Now, addressing some of the comments made in the research and development report, this statement was one that I read, and it says that the FBI assumes that this probability is substantially less than the reciprocal of the United States population. The profiles is defined as

unique, so that's not really what we're doing, and again, I draw this to your attention not to say whether we're right or wrong, but just to say this is an issue that I saw on this report, and this is a danger when this committee starts walking back into this statistics.

And it goes further to say there's been considerable criticism of this in the published literature, and I guess I would take slight disagreement with this, because they only quote two papers, Evett & Weir and Balding. They sort of lump in the DAB here, and that's not true as what you heard from Dr. Eisenberg, the DAB does not in fact criticize what we're doing.

In fact, the Balding article doesn't criticize. If you look at the Balding article and read it, it addresses using this type of approach for source attribution. Not uniqueness, but source attribution.

I'd like to take just one moment to look at something that Dr. Weir said later. I think there are arguments that can be made on an academic level, and then there are very practical issues at hand. I'd like to take you back to a paper that Dr. Weir wrote after a practical experience that he had in court. This was after the O.J. Simpson case. An article was written by Dr. Weir in 1995.

And when I read this, it sounds like he in fact is supporting what our identity statement is doing, that if you look at a lot of loci, that at some point in time it's going to be so rare that you can attribute this. Of course, we're not trying to usurp the role of the jury or anything like that; we're just trying to talk about this profile and who might be the source.

He goes further, that he looks forward to the time when these profiles are of such extent and integrity they're recognized as being as probative as fingerprints. And he hopes for the presentation of these profiles without numerical statements. This was in 1995, after he'd been on

the battleground. Finally, to give you some idea of how large or small that number might be, he comes up in his paper with a number such as one in 57 billion. Ours is one in 260 billion.

So I -- again, I think this is the type of issue or this is the type of debate that we will find ourselves walking into if perhaps these things are not left alone.

The DAB has taken the time to address these issues, and Dr. Eisenberg has already gone through those. They have given additional fleshing out to these things such as source attribution, relatives, mixtures, database searches, and bottom line is they give some flexibility in there, as you just heard. And that's what we feel is very important. Let the statistics answer the question that is asked.

In the report -- this is another thing that concerns me a little bit -- it talks about how great the 13

core STR loci are, and that's what most labs are driving towards. But at the end of the statement, you'll see that in the near future it will be relatively easy to have 20 or more loci or the STR type.

Well, I'm here as a manager to tell you it is not easy to bring on a new system. As good as the systems are, you're talking about validation that takes years, so these 20 loci are not here, nor will they be here in the near future. Easier methods, I don't think so. We're already doing 13, and it also brings me back to NRC I and II, where they both said, in the future we'll be looking at more loci, and then -- and I keep wondering even if we did 20, would that ever be enough to satisfy all these arguments? I think we've satisfied it. Thirteen core loci, very powerful results.

So I want to take you back to my original point. As a consumer of this report, I hope that the report addresses such things as faster, cheaper, easier. If you read it as a commissioner, and if you look at it and it goes beyond that, if it begins to address issues that are statistical in nature,and if you have some doubt that this is really the report should be going, then I hope that you leave it out.

And that's all I have. Thank you. And thank you very much for the time.

JUSTICE ABRAHAMSON: How would you like that to read, since apparently I think you have an objection to this paragraph?

DR. SMITH: I think mostly I have an objection of walking to the statistics at all. I really think that -- when I read the report, I can see there are parts of the report that go towards education, and I do think that the education -- if that component is left in the report, you know, where they talk about what RFLP is or what STRs are, if they want to go into some kind of discussion of some of

the statistics and the difference between likelihood ratios, et cetera, that I don't have a problem with.

What I have a problem with are the statements that underline, We would prefer, or we would recommend, or in this particular case, in the near future it will be relatively easy to have 20 or more -- those are the things that scare me, because --

JUSTICE ABRAHAMSON: But look at the sentence above it. Once these get set up, they will be expensive to change.

DR. SMITH: Right.

JUSTICE ABRAHAMSON: It's a recognition you have13 now.

DR. SMITH: That's right.

JUSTICE ABRAHAMSON: Expensive to change, but probably in the future it is going to be easy to get 20, but not easy to change the database, so a change from 13 to 20 --

DR. SMITH: There won't be anything easy about it. That's correct.

JUSTICE ABRAHAMSON: I think that's what it says, so that's why I'm asking that kind of question. And if you were going to edit it, what would you do, take out --

DR. SMITH: I guess I would just leave it alone, is what I'm saying, because we cannot get anyone to say it's12 loci, it's 13 loci, it's ten loci, so to avoid numbers in general -- we are doing -- the community is doing the best it can with the 13. It's sometimes difficult to get everyone to do the 13.

So that's what I'm saying, avoid the numbers, the specifics in that sense, and I look to the DAB's treatment of it as a more general, broad-brush recommendation or approach.

JUDGE REINSTEIN: Isn't it true that it's likely that the 13 core STR loci will remain as the standard for some time?

DR. SMITH: In my heart, yes, it's true. I know how long it took us and I know how expensive it is, and right now we are not in a sense meeting the challenge of all the work we have to do because of the cost. So if the technology comes along that allows me to do 20 and it's cheaper, then I think we will consider it. If not, it's -- what I think the committee has done is very difficult, to look into the future, but 13 certainly seems to be satisfying what we need.

JUDGE REINSTEIN: Is the real objection to the last two sentences then, as opposed to everything that comes before it?

DR. SMITH: I'm sorry?

JUDGE REINSTEIN: Is the real objection as to the last two sentences, as opposed to everything else?

DR. SMITH: Yes, I guess. It's difficult, because when I look at that, again, I'm a little nervous about the whole concept of a specific number of 13 or something like that. Yes. I have no problem with the beginning of it. That's sort of where we are.

MR. KENNARD: How about if the one sentence were taken out right after 13 worked very well, the next sentence were struck and then leave the last sentence in, because you were saying there's a good possibility we will get to --

DR. SMITH: But I would say right now it is as good as fingerprinting, personally. When I walk into the court and I testify this individual is the source of this DNA, to me that's the same as -- if not better than a fingerprint in some instances because it's there, so I think that's the part that is at issue.

They're saying it will get better and eventually it will be as good as fingerprinting.

MR. KENNARD: And you're suggesting it's already better?

DR. SMITH: Oh, yes. I don't think any of those examiners whose names I put up there would go into court and testify that that individual's the source if that wasn't their opinion, so therefore, we say a fingerprint identifies an individual as having been there. And certainly with the DNA with the profiles we're seeing with the 13 loci, sometimes less than 13, we certainly have the confidence that that's as informative as a fingerprint.

JUSTICE ABRAHAMSON: Thank you. Dr. Budowle, are you leaving too?

DR. BUDOWLE: Hopefully.

JUSTICE ABRAHAMSON: Okay.

DR. BUDOWLE: I think the issue just the sensitivity of the statement. When you say it's easy to

have 20 or more loci, it implies that 20 or more loci are needed, so you have to be sensitive that when you put a statement in like this that you're not making another recommendation. If 13 loci are sufficient for most situations, then that has to be strengthened.

Technically it's possible to do 20 loci now. It's not an issue, so it's not going to be in the near future; we can do that today. But when you put statements in that fall in, they give implications of endorsement for something more and that becomes a debate. When someone says, I've done 13, that's enough. Well, if you do one and it's all you get, that's enough for that case.

If you can't get any more it applies some information. If you do five and that's all you get, it supplies information and that's all that you have, you use what are established approaches to imply or convey how common or rare something is.

But if 13 are the standard and that's what's being used and they seem to meet the situation well, if you put in a statement it's easy to have 20, there's going to be a lot of litigation over that for these people, and we're going to bog down something that may not be what you intend from your report. Your report is to predict what the future will be, and when you start bringing statements, you're starting to influence what the future should be.

JUSTICE ABRAHAMSON: Judge Reinstein?

JUDGE REINSTEIN: I agree with all this, because when you look at what happens in court, and we talk about fingerprints, whether it's the prosecutor's asking the question, defense attorney's asking the question, or fingerprint examiners answering the question, we still have different views on how many points of identification it takes, and it is very confusing to a jury and maybe for Jeff it's something that's helpful, but I still think that it is confusing, and I don't know that -- and I think most of the fingerprinting examiners that I've seen lately say, Well, we don't look for any particular number, but people press them into that, and sometimes prosecutors do the same thing.

DR. SMITH: I think practically speaking -- I can just tell you what's happened as we've testified across the country -- we've had over 40 of these testimonies and we can give the identity statement this individual's the source. We can give the number. There's only been one challenge to date, and that's in Norm's state, and he could discuss that.

But it's -- by and large, when you start talking about quadrillions or quintillions -- and that was what we were actually trying to avoid, giving a number that is so unbelievable that people start asking, What is quintillion, so at some point you say, This is enough. We know that it is unique to you unless you have an identical twin. Guess what? We've looked at enough of it. We can

say that.

And where you draw that line in the sand, that may vary. We understand that from person to person. And I think Dr. Weir's mind varied from ours, so --

JUSTICE ABRAHAMSON: Mr. Thoma?

MR. THOMA: Thank you. Just very briefly though -- and I appreciate what Judge Reinstein brings up about fingerprinting -- there is a distinct difference between fingerprinting and DNA, and there's no question about that. Fingerprinting is unique, and granted, in a given case, you don't have the perfect fingerprint or the perfect analysis and it's left open to interpretation.

But statistical premises or theory or considering how the likelihood is is the distinct difference between unique, and that distinction and that difference is something that remains. With 13 loci certainly not very much, but in individual cases -- you can't say in every case you're not going to have some question of analysis of 13. Perhaps that's true. Maybe in 20 or 25 years of it, we'll have gone through so much with 13 loci that we know what you're saying to be true.

But with the short amount of time that we've been doing it and the relatively few cases that have come through with regard to STRs, I don't think you want to go out there and say, We don't want to go any further. We don't want to make any more advances. We've got the perfect situation

here. I think the California Supreme Court actually in Venegas [phonetic] made some good points regarding the FBI's procedures; that it's a very good laboratory, it's terrific

Sometimes there are -- there's a judgment regarding certain aspects of it, but the one aspect that I

don't want you to try to conclude is that, Hey, because we've made it here and because it's expensive to do something else, this is where it should remain.

This statement as it remains is clearly true. It will be -- and in fact, Dr. Budowle disagreed with you with regard to the statement -- in the near future it will be relatively easy to have 20 or more loci in the STR type. He thinks it will be -- he thinks it actually is occurring now, or can occur now. We're not saying that it would be easy to change it over; it's just easy to do.

So remember that there is a distinct difference still between fingerprinting, which is unique, and some statistical interpretation of what you believe in an individual case. That's my position. I know I've been a little longer than I was going to be, and I apologize for that, but I just needed some time.

JUSTICE ABRAHAMSON: Dr. Smith?

DR. SMITH: I just want to comment on a couple of things. First of all, something you have to look at is the arguments that are put in this report are not new, so it's not because we did 13 loci that now they're coming up with new arguments. In fact, the STR loci -- the same statistical tests have been applied to those that were applied to VNTRs, so the same conclusions in 1996 are true

today, so there's nothing new in what's being said. It's just really what's being advanced is one approach versus another.

So nothing has changed. The STRs have changed. We've done more loci, but there's nothing new about the use of STRs or the locations we're looking at. Nothing new. And if you read the report, it says that. So that's why I'm here asking why are we going through this in a sense.

Now, you may disagree with me that 13 is sufficient. Fine. And I'll let Bruce comment on the20. My retort to that is 20, believe me, is not commonly done or routinely done, and I think Bruce would certainly admit to that. So that's the big difference. Ask Dr. Ferrara how many -- 20? Do you do 20 on a routine basis? No.

DR. FERRARA: Do you do 13 on a routine basis? No.

DR. SMITH: So that's -- you need to read this report, because if you read the report and what's said, they're not plowing new ground by any means. They're rehashing old things that were already rehashed in 1996, and that's what I'm asking you. Read the report and look at it and see what is new about it, because it is not -- that's not where the future lies, in rehashing the old statistical arguments.

JUSTICE ABRAHAMSON: Dr. Budowle?

DR. BUDOWLE: Two things. One is your mission is to predict the future. It's not for you to decide whether it's to be stable or not. If the community believes it's to be stable, then that's the prediction for the future for you, not for you to make the choice of what it shall be. Twenty could be done. We could predict 50 -- are capable of doing, but the community believes that 13 is sufficient and that's what they hold to. That's your prediction. You can't make the decision for them. That's what they have to decide.

Second is with fingerprints -- I just spent the last week on the stand about fingerprints and uniqueness and all. These are not different issues. The challenges that occur on fingerprints and DNA are the same about whether you have a foundation. In fact the fingerprints are whether

there's a statistical foundation to support your assertion of uniqueness.

There are issues on the subjectivity and the objectivity of the interpretation. The same with DNA. We don't have any real distinction between then when you see the issues particular under the Daubert [phonetic] regime that we're under now, so I wouldn't try to say that because we believe it's unique that there's a distinction between it. In the legal setting we're seeing challenges that are being at least allowed.

I don't know if they're being embraced or not, but they are being allowed. We've already had two of these, and I predict we'll see more.

JUSTICE ABRAHAMSON: Thank you. Norm?

MR. GAHN: Dr. Smith, one of our handouts was this statistical and population genetic issues affecting the evaluation of the -- this is apparently from the DAB?

DR. SMITH: Yes.

MR. GAHN: What do you think of this? This then addresses the -- it appears to be the source attribution relatives. It also addresses database mixtures. What do you think about this document?

DR. SMITH: I find that document pretty much re-endorses what happened in 1996, and it fleshes out a few more issues. In other words, pretty much with mixtures it says you can take different approaches. Probability of exclusion is one, or likelihood ratio. It does not endorse

one over the other, and I think that's a critical thing that needs to be said, because otherwise I think you can be -- it can be used against you.

If you do one approach, you can say, No, this book says you need to do another, and this comes out more clearly and endorses different approaches for different questions. So I think this takes the time to look at that and the individuals chose those topics because those seem to be the ones where some issues still continued to arise in court.

MR. GAHN: In light of this report by the DNA Advisory Board, are you stating that you feel it would be inadvisable for our commission to proceed in statistic issues when they've been covered you believe satisfactorily by this?

DR. SMITH: I think it sufficiently covers it. It re-endorses the '96 report and answers any other issues that might be floating out there. But yes, and I think all the DAB members addressed that too.

Dr. Ferrara was there and certainly -- and I would see that as certainly it should be included in your report. If you're going to go down a path of statistics, that should be included in that, just to say that this is certainly what the DAB has addressed. We're very content with that, I guess I'd say.

DR. CROW: Well, it is in the report.

DR. SMITH: Yes. But I think it's slightly mischaracterized in some places in the report. That's my caution.

DR. CROW: Well, maybe you or someone should show me where I mischaracterized it, but most of the time I simply copied the FBI statement.

DR. SMITH: Right.

DR. CROW: That's hard to --

DR. SMITH: But to me, that's enough. I think the problem is you start getting too many documents floating around, and one attorney uses this one and the other attorney uses that one, and it's -- as I said before, it's sort of a rehash of what we had already accomplished in '96.

DR. CROW: Let me say one thing in defense. One thing we don't say in the report is that we're saying new things which are not new. I see no objection to reviewing the state of the art, which is in a way what I did, and then we start making predictions for the next ten years, and one of those predictions you read up there. And I still think it's going to be relatively easy, whatever I mean by that, to do 20 or more loci ten years from now. There's probably room for disagreement about that, but that's not a statement about the present. That's a statement about what we foresee for the future.

DR. SMITH: It will be your tax dollars that will be paying -- that's true.

JUSTICE ABRAHAMSON: Okay. Any other comments, and she's got to catch a plane. Paul?

DR. FERRARA: Yes. I don't want to -- I just want to reinforce something that Jennifer stated.

The forensic science community, when it went -- as the STR testing particularly has evolved and we made a conscious decision to settle on 13 core loci, that decision was an extremely expensive decision. We, the commission, are concerning ourselves with backlogs of convicted felon samples and crime scene material. I'm here to tell you that the expansion to 13 genetic locations seriously hampered that effort, but a conscious decision was made that the benefit outweighed the cost in terms of the specificity.

Even they dragged me kicking and screaming into the 13 loci because it doubled the cost. It doubles the time. So we don't want -- we certainly don't want to consider any modification to the 13 loci, even though we know other ones are out there. We have to -- you get into a point of diminishing returns, and I think the commission needs to balance -- do we need more loci, do we need greater numbers -- I think not -- vis a vis we need something more standard and more facile for the laboratories to address the backlogs they have without compromising in one significant amount the degree of specificity or individualization or the identity issues.

And so -- now, in reading that language, which I read early on, I interpret it to say yes, there's lots of loci out there, and that's not suggesting that we run that. But I share Jennifer's -- anybody's laboratory director's concern that anybody comes up and suggests, Well, maybe you should be running some additional loci, and I think it's important that the 13 we've got now -- I sure as heck don't want to see those added to or changed in the next 10-20 years.

DR. SMITH: Thank you.

JUSTICE ABRAHAMSON: Thank you, Dr. Smith. Thank you, Dr. Budowle. And we'll take a 15-minute break, which will bring us back at about 3:30, and then we'll come back to the Postconviction Working Group and finish that up, and then go back to Dr. Crow.

(Whereupon, a short recess was taken.)

JUSTICE ABRAHAMSON: If you all would come back to the table? We're back in session and want to welcome Chief Darrell Sanders, who has arrived. And what we're going to do first thing, the most important thing is dinner plans. Chris?

MR. ASPLEN: Can I see a show of hands of folks who would be interested in getting together for dinner, not for business discussion but just getting together for dinner? Okay. Then we'll take a look into getting a reservation to see when we'll get together and where.

JUSTICE ABRAHAMSON: All right. We're going to go back for a moment to the Postconviction Working Group so that -- there was just another suggestion for the redrafting. Jim Wooley?

MR. WOOLEY: Your Honor, I was actually going to ask Woody about some of his additional language --

JUSTICE ABRAHAMSON: Okay.

MR. WOOLEY: -- in paragraph three about the discovery, which was an unrelated -- I don't think anybody had asked him any questions about that.

JUSTICE ABRAHAMSON: All right.

MR. WOOLEY: And I'm not sure if I have a specific question. I wanted, Woody, if you could tell me, how do you think that's going to work in terms of -- and I heard what Jeff said and I agree with it, that people are coming to court and they have some obligations. It sort of reflects the thinking that you have to put your cards on the table. Do you know what I'm talking about?

MR. CLARKE: Yes.

MR. WOOLEY: But how is that operational? How does that work? How is it enforced, what happens, is it -- defendant comes and what?

MR. CLARKE: Well, I think a defendant would have to put it in the application, frankly.

MR. WOOLEY: But how would you know if they didn't and how would -- they have no obligation to disclose it before under discovery rules. I guess what I'm saying I like it a lot. I think it hints at something and I think you've probably heard it before and probably Jeff and the rest of the committee has heard before and perhaps even rejected, when I wasn't here.

It hints at the idea that if you're going to come into court and seek this relief later, you've got to put your cards on the table. I think the prosecutor should have a right to talk to the person, to just flat-out talk to the person before we engage in whatever else we may do in response to this request for postconviction testing. So I think it's a step in the right -- it clearly reflects your thinking and the committee's thinking if we agree with it. There is no Fifth Amendment privilege at that point, because you're asking someone to make disclosures about things that otherwise they previously had no obligation to tell us about, that they had done DNA testing in secret and that it

didn't help them.

You're basically now saying you've got to tell the court about all these things that are harmful, and I'm wondering if maybe you considered even going further?

MR. CLARKE: Well, to go back to the testing, the idea is that, yes. Presumably there's no sanction or way to enforce it except in some instances you actually can tell when a defendant's had access to the evidence and removed some of it.

MR. WOOLEY: Well, then that wouldn't apply, because we'd have knowledge of that.

MR. CLARKE: No. Actually, all I'm saying is that we may know after defense testing that, well, they got the evidence. They took part of the evidence but have no clue other than that, because there isn't a requirement to reveal that in most jurisdictions.

MR. WOOLEY: Okay. I understand.

MR. CLARKE: Circumstantial evidence that it may --

MR. WOOLEY: You know that they confirmed it or they'd have told you otherwise.

MR. CLARKE: Well, they didn't necessarily test it yet, or if they tested it they may have only done a portion of it, but we do have some circumstantial evidence that there may be some results here.

MR. WOOLEY: Right.

JUSTICE ABRAHAMSON: Jeffrey Thoma?

MR. THOMA: And, Jim, I really agree with Woody on this. For example, in California you're given access to a sample and what you have to do in the application -- we should make it part of it. You know that happened. You had access to the sample. You have to explain what happened

with it. You may be explaining under oath or in a declaration. Went to somebody, reviewed it just cursorily, or whatever they did with it, you have to explain that.

But I don't think, for our purposes, we can really overreach and go beyond the DNA testing itself and say, Well -- because this is with regard to DNA. I don't know if we really want to get into having prosecutors have this access that you're talking about with a defendant on a variety of issues or whatever amount of issues. But with regard to this I am 100 percent with my colleague, Mr. Clarke. Let's get our cards out on the table. This is an equitable relief situation that we're doing.

Make defense -- absolutely some declaration of defendant or defense attorney or both, whatever way we can enforce this, and make certain that we know every test that's ever been done with regard to these samples before we do any further testing.

JUSTICE ABRAHAMSON: Do you want a sentence in there to begin with that there be an affidavit by both parties -- by either party saying that there was no testing or what the testing was? Is that what --

MR. THOMA: I think that would be the way for it to be --

JUSTICE ABRAHAMSON: It says it shall be revealed in the motion for testing or response, so it's there.

MR. THOMA: Yes.

JUSTICE ABRAHAMSON: Is that good enough?

MR. THOMA: Yes. I think it's there. I think that would be the vehicle by which to do it, is to actually attach the results or whatever, but make certain that both sides know how many times it was tested, where it was tested, what the results of it were, before a judge has to determine whether he's going to allow further testing.

MR. CLARKE: And what the idea is -- what would be contained in this portion is only that which has not been previously revealed.

JUSTICE ABRAHAMSON: Right. And that's what it says.

MR. WOOLEY: Would you want a provision in there that in the application that it has to be something that -- under penalty of perjury if you make an avowal?

MR. CLARKE: I'm trying to remember if that has to be -- do any of the previous requirements --would they require any such declaration or affidavit? I don't think they would, would they?

MR. WOOLEY: No, but a draft that I saw of the attorney general in California on one of the proposed bills that they were talking about had a provision in there regarding penalty of perjury.

MR. CLARKE: Actually, if the last provision is adopted that I suggested about the reason for the request and that it's not to delay imposition of sentence, that would probably have to be in declaration in form, I would think. I'm thinking --

JUSTICE ABRAHAMSON: Are you talking about number four?

MR. CLARKE: Yes.

JUSTICE ABRAHAMSON: What if you put four in that sentence up front in request for testing, both of them, because both of them relate to the applicational response. Right?

MR. CLARKE: Yes.

JUSTICE ABRAHAMSON: So you put that up --

MR. CLARKE: The only difference is it's not a prerequisite -- well, it is a prerequisite in a sense that it has to be revealed.

JUSTICE ABRAHAMSON: Yes.

MR. CLARKE: And actually, that's a good point because a court should be able to, if it is revealed and it demonstrates something that would derogate from the testing being eligible, presumably it would make more sense there.

JUSTICE ABRAHAMSON: Yes.

MR. CLARKE: Yes.

MR. THOMA: I think it should be in the application.

JUSTICE ABRAHAMSON: It relates to both the motion and the -- if you put them up --

MR. CLARKE: It's not going to arise frequently, mind you.

JUSTICE ABRAHAMSON: No.

MR. WOOLEY: I don't think anybody would ever make that disclosure. There's no sanction attached to its non-disclosure. There's nothing you can -- if you're in jail and you're doing life, you're going to say, We never did any testing that I know of, and you're never going to know because you don't know.

JUSTICE ABRAHAMSON: I know, but if you got to court, don't you think there would be counsel appointed?

MR. WOOLEY: Right. But what I'm saying is, how would the counsel necessarily even know that, and then the person that did it the first time through the lawyer and the first time has no obligation to make the disclosure. I'm not sure how much teeth there is. It's a great sounding sentence and supported by great

sounding things by Jeff about how it's an equitable thing, your coming here. We assume you have clean hands.

I think the only way to put teeth into that thought, frankly, is to say that -- because we have a section on discovery, that a person who's seeking this relief should be available to ask questions, and I assume that's something you have already talked about at some point in time.

MR. THOMA: I don't remember us talking about that. Jim, I think I know what you're asking though, is you're asking the defendant some questions. The defendant doesn't necessarily know where the sample goes, who tests it, what the actual results are, or knows anything about DNA. I think ultimately what we want is out on the table, in the application where it was tested, what the results were, and some vehicle to maintain the integrity of that.

And in the situation that Woody and I are most familiar with, which is under prints, where they do not have to, there's still the chain of custody, and to actually get access to it it will be in the court record, and anybody that takes this case up will know -- will be able to see that you had access to the sample and you'd have to follow up -- that counsel or somebody would have to follow up as to what happened with it, even if they didn't know to begin with.

But if we want to ferret out exactly what kind of language we want and what kind of teeth we want in this aspect of it, I think we want to make it come to the judge when the application is there, and the judge, based on what he sees and what he knows about the record -- for example, the prosecutor would also know that the sample was -- the defense had access to the sample and some of the sample was used or something, and then they would bring that up in their response. And it may be a very easy way to get the whole application knocked out literally, because of the lack of equity, the lack of candor by not complying with this aspect of it.

MR. WOOLEY: Yes. And I agree with the underlying rationale and I'm suggesting that consideration of an additional provision, the lack of candor. If you have people that have pleaded guilty and have stood up in court, and in the jurisdictions I've worked, have admitted there's a factual basis for the plea and have said I did it and explained the whole thing, it would seem that in terms of equity and lack of candor and those issues that perhaps we want to consider that when the person now is going to ask to have these thing investigated later, maybe we'll be able to say, Well, we'd like to ask you some questions about it, and not to be -- the guy's already convicted.

It's not like you can reconvict him by getting him to confess, but you may be able to ask some questions to ferret out how legitimate the application really is. You pleaded guilty, you said this under oath. Could you please explain to the court or to whoever why you did that? What happened.

JUSTICE ABRAHAMSON: Well, if that's done, shouldn't it be done in open court?

MR. WOOLEY: Well, certainly it shouldn't be done in a place where the person could be disadvantaged. It should be done at least with his lawyer there -- his or her lawyer there. Absolutely.

JUSTICE ABRAHAMSON: There's nothing here that would stop that.

MR. WOOLEY: Except for Jeff, a very good lawyer. You wouldn't let your client speak to the prosecutor. I wouldn't.

JUSTICE ABRAHAMSON: Well, that's right. That's why I'm suggesting if it's done it be done in open court with counsel there, if it's done. Like in a suppression motion --

MR. WOOLEY: Right.

JUSTICE ABRAHAMSON: -- the defendant may take the stand. Open court with counsel present.

MR. THOMA: I would suggest leave it be and the judge who's determining this application has access to the information, either himself or through the prosecution or through the defense as to who tested or when or what was tested, because if we try to explain the exact scenario, this thing's going to get awfully long, and we're really going to hamstring judges from conducting this basically in the long run.

JUSTICE ABRAHAMSON: Any other comments on this? Do you want to put that sentence in C3 up to the beginning on a request for testing?

MR. CLARKE: I'm just wondering, it's going to be so infrequent, maybe the provision where it is is fine.

JUSTICE ABRAHAMSON: Okay. It's fine with me. I'm just trying to -- obviously if you read the whole thing you know what you have to do.

All right. We have some suggested changes, and I don't know that we've reached an agreement on Jim Wooley's point, other than to note that it's a continuing issue and problem and that there are no specific penalties there. Okay?

All right. We're now going to move into a non-controversial area, Research and Development Working Group report. Dr. Jim Crow? We told him this was going to be an easy part when he joined the committee; not to worry, everything was going to be okay.

DR. CROW: I was assured there'd be nothing controversial whatsoever in what we dealt with.

JUSTICE ABRAHAMSON: That's right. We're going to have to wire you up, or is there a microphone there?

(Pause.)

Research and Development Working Group Report

Dr. James Crow

Chair

DR. CROW: I do want to get to the substance of what's been written in the report, but I want to make some more general kind of comments first. Our job is, as you know -- was to look for ten years into the future and try to make some kind of predictions as to what will happen.

I want to start out, however, by explaining why you get this report in two parts. It's a short story but I'm going to make it long. I had written a draft of this statistic section and then one of our committee members, Bruce Weir, read it and didn't like it and suggested a large number of amendments, which added to its length, so I, being a good Joe, put those in.

And then I got -- well, to coin an expression first invented by Isaac Newton, I got an equal and opposite reaction from Bruce Budowle. In fact, equal and opposite is a gross understatement of the reaction that I got. So I then tried to write something that both Bruces would agree to. Well, I wrote a lot but it turned out neither of them agreed to it at all.

So I finally got bailed out of this by Lisa. She said let's take out everything that's at all controversial and that's at all difficult and put it in the appendices, then whoever wants to read the appendix can read it, and make a baby version, you might say, for the report itself.

So I sat down the other evening and did that, and it's a rush job and you have it in front of you. I

suggested -- I'm going to talk mostly about other things now because if you have a chance tomorrow -- and you can look at this overnight and make whatever comments you would like to

make about what's really otherwise a rather rough draft. This has not been seen by the working group. This particular chapter is my own writing and I have no guarantee that they'll approve of it.

A little bit of philosophical remarks, if I can so dignify them. This Human Genome Project is going to be finished in a few years, and we'll have an enormous amount of information and an enormous number of new loci that probably will be cheap, but they'll be there. There are 3 billion base pairs per gamete, as you people have heard time and again, and if we look at single nucleotide differences, they occur about one in a 1,000.

That means that if we could sequence 10,000 bases, we'd have 100 differences, and a 100 differences conservatively guessed as to would have a probability of the reciprocal of ten to the 31st power. So we're getting into astronomical numbers in a hurry whenever DNA sequencing becomes something that's practical. And if you read the papers, they tell you that in ten years from now every school boy is going to be able to sequence his own DNA.

I'm not sure we want this. He may sequence his own or he may sequence his father's and find some discrepancy. That's almost certain to happen sooner or later. But the -- I say all this not to just impress you with gee whiz stuff, but I do think the science of this is moving very fast, and although I think the 13 loci are here to stay for a while, they're not going to be the state of the art for very long.

To go on though, STRs really work very well, and I tried to say that in the report. And the 13 core loci are established, and they're certainly established as far as databases are concerned, and there's a large investment by laboratories and by the databases in these 13 loci, so they're here to stay whether they're the bet or not. And actually, as I said, I think they're pretty good, but that

doesn't mean that there won't be better things coming along, and it's almost certain that individual laboratories will be taking advantage of the better things as they come.

It's not feasible to try to predict everything about it, but I think certain things can be predicted.

First, about the 13 loci themselves, we're certainly going to have advances in automation and speed, and I hope with automation and speed comes a reduction in price, but that's harder to guarantee than the automation and speed. I've read quite a bit about hand-held gadgets that will do the equivalent of the analysis that's done by a laboratory now, do it in a few minutes time, and do it with far less materials, and as far as working in the laboratory is concerned, it works very well.

I'm aware, we all are, that it's a big step from something that can be done in a refined laboratory where you don't mind making mistakes, and something that's being done in the forensic situation where you demand much more perfection and much more robustness and much more ability to work, no matter how badly abused the gadget is. Nonetheless, I'm sure we're going to have within ten years -- at least our committee is -- hand-held machinery that will permit analysis at the crime scene itself and perhaps tie it into a database and find immediate innocence or immediate possibility of a suspect.

A little bit about the kinds of additional loci -- they're here now but they're increasing in numbers very rapidly. The one I just mentioned, what we call SNP -- these are just single nucleotide changes that can be discerned by any technique that can do DNA sequencing, and a lot of this depends on how effective that particular technique is.

Mitochondrial DNA is transmitted from mother to child -- has a big advantage, as we've said several times now, of occurring many times within the cell so that trace amounts of material are often more useful for analysis in this way, and the y chromosome is becoming useful. It used to be that there weren't any markers on the y chromosome and it couldn't be used at all.

And I want to take time to be personal for a moment, not that I haven't already, and that is that about 40 years ago I invented a method of using the person's name as a way of studying migration and inbreeding in populations, and we applied it to some of these isolated religious groups like the Hutterites, and it worked very well. And it's been taken up by anthropologists and became very popular. Well, slightly popular is a much better statement. Two or three anthropologists used it.

But at the time I made the statement somewhere that this technique of using names will be replaced whenever the y chromosome has markers on it, and that state is now here. And those of you that looked at this morning's New York Times saw an article in which a person's done what I'd love to have been able to do myself, really just test to see how well the analysis of names follows the real biological ancestry. We all know it isn't perfect, but we're also impressed by the fact that it's remarkably perfect.

And I find two instances of what seemed to me unusually strict monogamy. One is in the Jewish priesthood, where the Cohen name seems to be transmitted generation after generation without a break. And let me tell you one joke too. I'm trying to stall to keep from getting into the nitty-gritty.

But I told one of my physicist friends that the fact that the Cohens and the related names were perpetuated through -- ever since Aaron with hardly any exceptions must mean that the priesthood was remarkably nearly monogamous and that I had the greatest admiration for their morality. This physicist told his wife about this, and she said that means nothing at all. It only means that if there's any hanky-panky going on, it involves other priests.

(General laughter.)

DR. CROW: That woman has a career in genetics.

The serious part of this message though is that we can use y chromosome markers very effectively for anthropological and evolutionary studies and we can identify people as has in fact happened to these people in the middle of Africa which have some Jewish y chromosomes. But it also gives us a caution that we shouldn't use the y chromosome to determine anything important about anything else except just the y chromosome, because the rest of the genes are randomized and play very little role.

So although I think we'll have a large -- there's a lot of talk now about the y chromosome. I think it's going to play an important role in anthropology and evolution, but it won't very often tell us the kind of things we want to know for forensic purposes.

In the controversy within this committee, part of it had to do with whether you used -- as the FBI advocates as the 1996 committee essentially did -- whether you use essentially the product rule to calculate match probabilities or whether you use these corrections based on assumptions about the population structure. I have both kinds of formulae, and maybe I'll ask you to turn to it for just a moment. This is on page 6 of the new handout. There's an impressive-looking formula at the bottom of the page which comes from Balding and Weir and this group of people, and these are measures of match probability in terms of the legal frequency, which is P here, and then this magic quantity theta, which is a measure of population structure. I think you can see that if theta

is equal to zero, this formula up here is simply P squared. And if theta is equal to zero, the second formulae is simply 2P1P2.

So what this is is a correction that is much beloved by some statistical groups and thought unnecessary by others.

Well, is it unnecessary or not? The ones who point out how important it is point out that by not using this, you could perhaps make an error by a factor of a hundred. The rejoinder to that is that is if you compute a probability that's 100 quadrillion or that is one in a 100 quadrillion, if that's 100 times too low, who cares. It's still a probability of one in a quadrillion.

And the point that I'm interested in saying about this is that you can make this correction. It makes what looks like a big difference if the probabilities are very, very small. It makes a small difference if they're large, and in any case it would hardly ever cause you to change your conclusion. So what probably sounds

like a trivial issue for you people is enough for statisticians to argue about by the hour, and it happened within our committee.

A few other things before we come down to the subjects of the report. One thing that is certainly true now and it's going to be increasingly true as the numbers go on -- the 13 loci, which are now carved in stone are capable of telling us a lot more than identity because you can quickly recognize brothers and sisters by the pattern that these show, and you can also recognize other relatives and usually you can distinguish between brothers and other kinds of relatives. So it's possible with the 13 loci to make a pretty good guess, if you find another sample, that these persons might well be brothers or they might be relatives other than brothers.

I raise it here because, as you well know better than anyone else here probably, states differ in their view as to this particular point. But certainly the technology is here and it could frequently be found that -- to identify from partial matches close relatives, which could be searched out or whatever the proper procedure is and whatever the law allows in that particular state.

It's also possible now to take a sample of DNA of the kind that's ordinarily analyzed and make a reasonable guess as to what group that particular DNA came from, and with the existing 13 loci the chances of your -- let me say it this way -- and you make an assessment as to which group it came from, Black or White say, the likelihood ratio of getting the right answer versus the wrong answer is about 45, on the average. So you can make a pretty good guess as to the source of the DNA, and it could be useful in further investigations.

But again, that raises questions of whether we want to do that or not. I point out the possibility of it rather than what's the right thing to do. This would be done using just existing markers, the 13 loci. Once you get out of this step and start bringing in other kinds of things that are not part of forensics, that is some of the blood group markers which are not used in forensic purposes, or very common in some groups, very rare in other groups, and the other kind of genes of this type too.

If we follow the kind of rule that's been done up until now most of the time, which is to do your forensic studies on traits that have nothing to do with anything interesting, that is only the parts of DNA that's mainly junk, the 13 loci is about as far as you can go. But if you want to do other things, there are a lot of things that could become possible. And again, in trying to foresee the future, I think we point out that these will become possible.

As far as individualization is concerned, we have reported, and I hope accurately, what the FBI's procedure is. If it isn't accurate I want to make it accurate. And we neither endorse or not that particular procedure, but we do state it. We do mention that it's been criticized by some people for not using the most sophisticated statistics, which is a proper criticism. I think it's the wrong criticism in this particular case, and I think that that principle is rather like to be adopted. It's already being used, of course, by the FBI and by others.

I don't think you'll get a committee of size to ever say that this person has to be -- these two samples have to come from the same person with absolute certainty. All they'll say is that the probability is small. And I think it's necessary for the courts or the legal community or the social community or someone else to say

that once the probability gets to be small enough, we're willing to say that this constitutes a unique identification.

The FBI's procedure is a very sensible one. They took anything from 1996 -- the NRC report is sensible by definition, by my definition. They took the form of calculation and they asked what is the probability -- or how small must it be to be smaller than the reciprocal of the population of the United States? If the probability is less than the number of people in the United States, it's pretty likely there's only one such person.

Then they built in three factors of safety into this. They took a factor of ten. That factor of ten comes from us, because we did a study that showed that the actual best guess as to the accuracy of the VNTR profile is about a factor of ten. Ten too large, ten too small, hundred all the way. Exactly the same thing hasn't been done for STRs, but there's every reason to think it would be exactly the same, and so the FBI took that, quite reasonably.

The other thing they did was used a 95 percent confidence level, which again is the level of conservatism, and then they made one other level of conservatism, and that is you use whatever database is most favorable to the defendant, you might say. That is you use either White, Black,Hispanic, whatever is necessary.

So I think almost anybody would agree that this is a procedure that's safe in the sense it would be very, very rarely would you make the mistake in the wrong direction; that is in the direction of wrongly convicting an innocent person.

Within our committee -- the real controversy has nothing to do with whether this is a sensible thing to do. It has to do with whether it's the most elegant thing to do from a scientific standpoint, and I guess we'll have to ultimately take the position -- I would myself at least -- that the FBI's procedure is the right thing to do. I'm happy to say that the DAB said the same thing. And I might go on to say that I received the DAB's report about a week or two ago, and I find that most of what we've written was actually exactly the same, so we -- I see no conflict between my personal views, which I think most of the committee share, and the DAB.

One thing -- now a little about database searches -- one of the things we need to emphasize is that a database search needs to be treated as that particular database search. There are going to be many considerations come into it other than a pure probabilistic calculation, and specifically, a database of convicted felons is going to have a different probability of finding a match than a database taken from the population as a whole. Recidivism is high enough that the prior probability of a person being found in a database of convicted felons, if he himself is the convicted felon, is an appreciable one.

On the other hand, if we move into the realm where the databases become essentially a random sample of the population, then that really is not a viable consideration, and then we need to do something to take into account that the size of the database influences your probability of finding an innocent person. And we also -- it was publicized very heavily a couple of weeks ago, this statement from Britain where a six locus match was found and then it turned out they picked out the wrong person.

The New York Times regarded that as surprising. I regard it as not at all surprising. With six loci, the probability of a match -- of their particular match in this particular case was about one in 37 million.

That's pretty small, of course. On the other hand, the database consisted of 700,000 samples, so if you go through a database of 700,000 with an individual probability of one in 37 million, you end up with a probability of about one in 50, about 2 percent of finding a match. And now suppose you follow this procedure 50 times, you're almost certainly going to find a mismatch, that is find a correct match of the wrong people.

So clearly, we have to -- that has to be taken into account, and I'm happy to say that I agree with -- I personally agree and I hope our committee will with what the DAB says to do about this, which is to say to follow the policy of the 1996 report. Alternatively, you can deliberately choose not too large a number to use in your original search and then regard that as investigatory, and

then use other things for the conclusions to be reached.

In any case, the database problem, as a problem, is not going to get easier as the sizes of the databases become larger and as the databases become more representative of the population as a whole rather than of people who have previously been convicted of some crime.

Looking to the future, further in the future -- now I'm afraid to say this, but I will say it anyhow, and that is that eventually DNA is become more like fingerprints in the sense of being trustworthy without the necessity for a great deal of statistication. I think almost certainly that will happen if we look to the kind of numbers that I was talking about when I first started talking. It doesn't really make any difference how much substructure there is in the population or anything else. Finding two matches when the probability is one over ten to the 31st power, as I said, is not going to -- well, it's equivalent to certainty.

What are we going to do until that stage is reached? I have a suggestion. I'm not sure if it's going to be accepted by people or not. But I think there's something that is -- would be available in the future that would be an improvement of what we do now -- which I guess I should repeat that what we do now is pretty good -- but would satisfy critics whose -- hypercritics, and that is that I would like to have a procedure that would distinguish between any two individuals, even if they're closely related. Right now we assume that when we make these tests that the individuals are unrelated or we make some adjustment for possible close relatives.

It would be nice to have a calculation in which any individuals, no matter how closely related, would be identified as being separate or the same, and there is an approach to this. It comes from a happy genetic fact. And that is the brothers share exactly one-fourth of their -- they're going to be alike one-fourth of the time, and that one-fourth is determined mainly by just Mendel's rules and has nothing to do with population genetics considerations. It has a little bit to do with it but not nearly so much.

So if we in the future go to this now non-sacrosanct 20 loci, we can easily distinguish brothers, and that means you can distinguish anybody less related than brothers, and I rather suspect that five or ten years down the road something like this will become common. The 13 loci, obviously, we think, is here to stay, but it may -- individual laboratories may very well want to add to it either additional STR loci or new and better techniques as they come along.

And -- oh. Almost certainly it's going to be possible in the future to identify from a blood sample some physical characteristics of the person who left the blood sample. If you're lucky enough, you might be

able to identify baldness, for example, if you found the gene for baldness in the sample, and there are half a dozen other traits. This is now a long way from being -- from having

enough traits to be at all useful, but I don't think we can be at all sure what's going to happen in the next five or ten years as growing out of the genome project more and more individual loci will be discovered that could be put to use for this kind of purpose.

It might be nicer from a purely social standpoint for a sample of blood or semen or something to identify physical properties of the person rather than biological ancestry of the person, but we'll see what the future political opinion holds as to this question.

And finally, every time anybody raises the question -- we can always tell two people apart unless

they're identical twins. The identical twins don't happen very often in the crime scene, but it happens once in a while, and it's worth asking what the possibilities are of making an identification of identical twins.

There are certainly possibilities, and I suspect that a really well-equipped laboratory probably could do it right now. This is a guess, but it may be a good guess. For one thing, the genes that produce antibodies vary a great deal during the development of the individual, so that means that even though two individuals, as identical twins are, start out with the same genes, their antibody-producing capacities will be somewhat different.

They'll be especially different if these people have been exposed to different diseases, but they'll be different anyhow. So I think that's one possibility of looking at these particular loci. They're not part of the natural normal forensic identification, but it could be done.

Or maybe they're going to have different virus infections. We all have different virus infections, even identical twins do, and you can often identify the site in which the virus introduced itself into the genes. And mitochondria mutate pretty rapidly and probably it would be possible in many cases to identify identical twins by a sufficiently careful study of mitochondrial DNA.

And then finally the newest thing on the horizon from my somewhat belated view is that it's not possible to study genes, not just whether they're there or not, which is what DNA analysis does, but whether the genes are expressed or not, which means they follow the protein products or the RNA products of the gene. And identical twins who have the same genes are not going to express them the same way. We all know identical twins are not exactly alike, and that might be another possibility of this.

So I think our committee feels pretty strongly that within ten years identifying identical twins will be about as accurate as identifying unrelated people is now.

Now back to the report itself. What I want from you people -- and I'm sure you want to give it to me -- are suggested revisions in this. I tried to write something that the people who were critical earlier in the day would not be critical of -- not that I had them in mind -- but I tried to write something that would be non-prescriptive but descriptive and predictive. And if you can find sentences in here in which my attempts to be predictive look as if they're prescriptive and possibly could be used, please let me know.

And with that, I'll stop talking, Shirley, and entertain questions or comments or whatever it is.

JUSTICE ABRAHAMSON: I just -- thank you, Jim. I'm just going to move for the moment to see if there's public comment, because it's 4:30, so I'd like to do that, and then if there is none or whatever there is, we'll hear and then move back, if that's all right?

DR. CROW: Yes.

JUSTICE ABRAHAMSON: Okay.

DR. CROW: And it may very well be that people haven't had a chance to read this yet and would like to have the overnight opportunity to do --

JUSTICE ABRAHAMSON: Well, they will not have read the new --

DR. CROW: The new version and the new version that I particularly want comments on are the Chapter 7.

JUSTICE ABRAHAMSON: Is that the one you mostly want -- and that has not been -- that was handed out today, so I doubt the --

DR. CROW: I want to commend Jim Wooley, who read this with such close reading to discover that there were 35 pages missing. He's the only person who pointed it out.

MR. WOOLEY: That's what you get from all those years of scientific training I have in stats and stuff --

JUSTICE ABRAHAMSON: He only reads page numbers, Jim.

MR. WOOLEY: Yes.

Public Comment

JUSTICE ABRAHAMSON: Thanks. So let's do the public comment because that's what we agreed in the agenda, and then we'll come back to this report, and we had someone who wanted to make a public comment.

DR. PROSNITZ: My name is Don Prosnitz. I work for the Department of Justice. My question is assuming that -- and I'm not -- but assuming I were director of a forensics lab, where should I

put my investment? What should I do for my people so that I'll be ready for some of the things you see coming along? You listed all sorts of things that might happen. How would you prioritize them in terms of where I should put my effort now so I'm ready?

DR. CROW: Well, the report does a little better than random with respect to this part because we do try and make predictions two years from now, five years from now, and ten years from now as to what things are likely to happen. I don't think we ought to say which are most important. I think that's a value judgment.

JUSTICE ABRAHAMSON: Let me -- is there any other public comment, questions?

(No response.)

JUSTICE ABRAHAMSON: Hearing none, we will proceed with the commission, but if somebody from the public would like to make a comment, I will recognize them, so just stand or raise your hand. But we'll go back to the commission. Jeff?

MR. THOMA: Just very briefly. First of all, you never cease to amaze me. This is from my reading a remarkable document, and your humility in not mentioning that some of your work in the past has got to be referenced --

DR. CROW: Oh, I mentioned all of my work that's relevant.

MR. THOMA: Okay. But you didn't speak of it. But I just had one question that you may not have the answer to, which would be remarkable in and of itself. What is the likelihood of identical twins?

DR. CROW: They're about 1 in 70 births, something like that. One in 70 births is a twin birth, which means 1 in half of 70 persons is a twin.

MR. THOMA: But identical twins?

DR. CROW: No. Identical twins are about 25 percent of all twins.

MR. THOMA: Thank you.

JUSTICE ABRAHAMSON: We were commenting, Jim, that we didn't think it was that high. One out of 70?

DR. CROW: It's higher now than it used to be, incidentally.

JUSTICE ABRAHAMSON: Because of fertility drugs?

DR. CROW: Yes. Because of fertility drugs, and I'm quoting, naturally, at my age, old data.

MR. SMITH: That doesn't mean that Jeff has an identical twin maybe part of the time or anything?

JUDGE REINSTEIN: I'd like to find out how Jan and Paul feel and then also you, Dr. Crow, about Dr. Smith and Dr. Budowle's comments in regard to the draft on page 9, the second paragraph in f, that particular area about whether it would be relatively easier in the near future to have 20 or more loci and whether it will eventually be like fingerprinting; that type of comment.

MS. BASHINSKI: Well, I think that he's -- what he's saying is accurate, but there may be another way to phrase some of these things so that they can't be misinterpreted as meaning a mandate to do additional things. I don't believe the approach that the FBI is taking -- and correct me if I'm wrong, Paul -- has been widely accepted as yet among forensic laboratories, although it may well come to be.

So I would recommend, for example, the day when DNA profiles are regarded as fingerprints is not here yet. You may say may soon arrive, or some -- say that in a way that doesn't appear to denigrate --

DR. CROW: I guess if there are people who think that 13 loci is just as good as fingerprints we'd better at least accept that as a possible viewpoint and --

MS. BASHINSKI: Yes. Rather than just saying it isn't. And the same thing with the number of --

DR. CROW: I'd be very happy to make that kind of a change.

MS. BASHINSKI: -- loci going to 20. Again, I agree with you. I think there will be things added from different laboratories, but maybe the implication here is that you need to go to 20 and maybe that could be adjusted.The other thing that I picked up on was on page --

JUDGE REINSTEIN: where you say some such criterion -- this is the FBI procedure -- be accepted by the legal and forensic community not as scientifically proper. I know what you mean by that, but someone like Jeff might well turn that around and say, This is not --

DR. CROW: Not scientific.

MS. BASHINSKI: -- not scientifically proper. So I think a little more attention to the way in which the phrases are used would probably be in order. But I don't -- I know our organization does not use their particular approach as yet. It may at some point in time. So I think there is not universal agreement or acceptance that we're there yet with regard to DNA --

DR. CROW: Let me give a partial answer to that. In writing the 1996 report we were very conscious of the fact that the 1992 report led itself to creative interpretations, highly creative, I might add, and we tried to -- and we tried very hard to make the statements in there such that no matter how you tried, you couldn't misinterpret them. Well, I don't think anybody ever succeeded in that, but it's worth the effort. And I think we should take the same view here, and that's one reason for vetting this with you people now. You're more conscious of possible misinterpretations than I am likely to be.

JUSTICE ABRAHAMSON: Would you say not as scientifically precise rather than proper?

DR. CROW: Yes, or something like that.

MS. BASHINSKI: I might even just remove that phrase. Some such criterion will be accepted as a practical definition for forensic purposes, and just not even deal with whether it is or isn't going to be acceptable by the statisticians.

DR. CROW: Yes.

MS. BASHINSKI: That's just --

DR. CROW: That's self-evident?

JUSTICE ABRAHAMSON: Those are good comments. This is on the new handout at 8, and it's line 23.

MS. BASHINSKI: I'd be interested in whatever, Stan, your agency is taking with regard to the --

JUSTICE ABRAHAMSON: Paul?

DR. FERRARA: To follow up on your question, Judge, and follow up on something Jan said, I'm uncomfortable with a comparison of DNA and fingerprints, because they're so different in so many respects, and I don't know really how to articulate it. I mean I'm not telling anybody anything that they don't know already. For example, we have no elegant formulae for the quantification of a fingerprint match.

With respect to the use of 13 loci degree of specificity or precision and accuracy of an individual, it's hard to compare because are we talking about a full comparison on ink print to ink print with all of the resultant points of identification?

One thing I did -- so in a way I'd like this to suggest that even today, the DNA technology in many respects is far superior to fingerprints, even up to and including the point of identification with the difference of the identical twins, of course, whose fingerprints are distinguishable but not obviously the DNA. Another thing that almost needs to be pointed out is when we talk about

database searches with DNA profiles, you search a profile of 13 loci, any good size data bank you come up with one match.

Latent fingerprint -- the search algorithm of automated fingerprint identification systems is such that it's only 60 percent accurate, so again, there are so many aspects to the DNA, which is much more precise -- I don't know how to get that message across. But I'm uncomfortable with that increasing the number of loci eventually will become like fingerprinting, because I think it's --

DR. CROW: Yes. I take that. I think that was --

DR. FERRARA: Do you know what I mean?

MS. BASHINSKI: And yet really, what you're trying to say is that we expect it will be accepted in the same way that fingerprints are.

DR. CROW: Yes.

DR. FERRARA: Absent the 100 years' history that we have with fingerprints that we don't with DNA. Now --

DR. CROW: It's interesting to go back into the history of fingerprints, which I did a little bit. When Francis Galton and his successors were talking about fingerprints, they did a lot of statistics. They don't look too good by present standards --

DR. FERRARA: Right.

DR. CROW: -- but they were very inventive for the times. And then finally it just became so convincing that people forgot the statistics. Well, I think that population geneticists are going to be out of a job in ten years on this issue too, because we won't be needed any longer. The technology will make it --

DR. FERRARA: With respect to the searching of the databases -- and here -- one thing I'm sensitive to. Right now in Virginia we've got a population database of about 120,000 convicted felons. Now the vast majority of them are only done at 8 of the 13 loci. They've got to go back and pick them up.

What we're doing in Virginia when we find a profile at the scene of a crime, no suspect or we've

eliminated the suspect, we report to the law enforcement agency as, quote, an investigative lead, a search of our database of 120,000 individuals resulted in a single match to a single individual, and that information is provided as an investigative lead, no statistics are reported at all except indirectly with respect to the size of the database --

DR. CROW: Uh-huh.

DR. FERRARA: -- and the number of loci search. Now, because it is an investigative lead the law enforcement agency is then armed with that information -- would that combined with other information come up with what is probable cause to get an arrest warrant and get a sample from an individual, and also look at other factors that may be developed during that investigation.

Now, once that individual is identified and a sample taken and a direct comparison to the crime scene evidence, that 13 loci, then you report a random match probability or a likelihood ratio if we're dealing with a suspect. What I'd like this recommendation to -- well, if appropriate, to demonstrate that I don't have to necessarily use different loci in my search of a database and not use those loci when doing a direct comparison of the crime scene material where I use the entire gamut. Does that --

DR. CROW: I don't agree, Paul.

DR. FERRARA: You don't?

DR. CROW: No.

DR. FERRARA: Darn.

DR. CROW: It seems to me that --

DR. FERRARA: Investigative purposes now.

DR. CROW: Yes. Well, you use a 13. You found this guy, and then you test the same 13 again.

DR. FERRARA: Actually, I just search on eight --

DR. CROW: Yes.

DR. FERRARA: -- but I theoretically it could work with 13.

DR. CROW: Well, one practical consideration, with13 loci the probability of a match -- just random match is about ten to the minus 15. Well, suppose you have a database of 100 -- I mean a million, that's still ten to the minus nine or something like this.

DR. FERRARA: Uh-huh.

DR. CROW: So using this multiplication principle that we advocated in '96 would lead you to the same conclusion here, but I just think it's illogical to say that you do a second test which isn't independent of the first test and treat it as independent. They teach you in elementary logic course you don't test a hypothesis through a division that suggested it.

DR. FERRARA: But if the purpose of the data banks is an investigative tool, even if it doesn't come up with one name -- let's supposed we come up with five names. Actually, automated finger identification searches can come up with 100 names.

DR. CROW: Uh-huh.

DR. FERRARA: It depends on where you want to cut it off. But the point is from an investigative standpoint, not a statistical, we're trying to provide useful leads to the police to develop an investigative suspect. That's why I --

DR. CROW: I think what you wanted to advise them to do -- I'll tell you how to run your show -- is not to use all 13 for investigative purposes --

DR. FERRARA: Which we don't.

DR. CROW: -- and then save some others.

DR. FERRARA: But not use any of the --

DR. CROW: Not use any of the six or the eight that you use. Yes.

DR. FERRARA: So when we get to a point where we have a single amplification at all 16 loci, then I'm really --

DR. CROW: Yes.

MR. ASPLEN: -- hamstringing myself.

DR. CROW: Well, I don't think this is easy, but I'm also assuming that this is the database for the random sample of the population and that a person you found there is no more likely to be a suspect than a person taken randomly off the street.

DR. FERRARA: Well, these are convicted --

DR. CROW: I think -- I tried to say a while ago, if these are convicted felons --

DR. FERRARA: Right.

DR. CROW: -- they have a greater -- because of recidivism, they have a considerably greater chance than a random person off the street, and I think that's the way to look at this.

DR. FERRARA: So that if we articulate in your report that a search of a database of, for example, convicted felons --

DR. CROW: Yes.

DR. FERRARA: -- for investigative purposes it might be sufficient to not even specify some statistical approach --

DR. CROW: Yes.

DR. FERRARA: -- but that upon -- ultimately when a random match probability or a likelihood ratio is reported in a certificate of analysis at trial as a result of a comparison, then of course we use the NRC II formulae.

DR. CROW: Uh-huh.

DR. FERRARA: That's what I guess I'm trying to --

DR. CROW: Did you -- you know, it's hard for me at least to answer this without being a Bazian [phonetic], and yet we don't do Bazian in the statistics, but let me say it that way anyhow.

DR. FERRARA: Yes.

DR. CROW: Suppose you have a likelihood ratio of ten to the minus 14th? The prior probability of convicted felons is maybe 2 or 3 percent. It's whatever the recidivism rate is. Maybe it's 20 percent. Well, that's a very high prior, and that means this is quite dispositive. On the other hand I'd feel differently about it if this were random people from the population.

So I guess we're talking at cross-purposes. You're talking about a database from convicted felons --

DR. FERRARA: Which is presumably --

DR. CROW: At the moment what we have. Yes.

DR. FERRARA: Unless we were to develop forensic DNA databases that extended beyond all convicted felons, misdemeanants --

DR. CROW: Or even records from the Army or something like that.

DR. FERRARA: Let me get into -- now you're talking about more or less the population at random --

DR. CROW: Yes.

DR. FERRARA: -- in which case, you wouldn't object.

DR. CROW: Right. And I ought to emphasize that both the 1992 report and the 1996 report were not considering convicted felons. Nobody thought of that at that time. We didn't, anyhow. We were treating these as if they were a random sample of the whole population. That's really for the future to worry about I think now.

DR. FERRARA: But would it be informative for your report to address convicted felon databases --

DR. CROW: Yes. And I think we should. Right now it has one sentence, but it could do better than that.

DR. FERRARA: Okay.

MR. CLARKE: I need to stop you for a second, because this is going over my head faster than an F-16. I don't understand, in the context that Paul has put it in, which is as an investigative tool, because that's how it works.

DR. CROW: No problem there.

MR. CLARKE: Let's assume his database consists of ten people and he's done all 13 markers on the unsolved evidence and he runs it through his database and sure enough there's a match, and the reality is there's a match because the person who left the sample is in the database.

Paul goes back and does a redraw from this person, because there's obviously probable cause -- abundant probable cause, tests the same 13 markers, comes up with exactly the same results. The evidence matches the profile of the man or woman whose sample has been taken, and then he performs the statistical analysis as usual and comes up with some vastly small probability. I don't understand why that is the -- why that isn't the only relevant statistic.

DR. CROW: Well, there are people who say that. I disagree. These are just not independent. With a database of only ten, it doesn't really matter. Or the database of a million or database of 5 million, then it becomes important. If -- I think the main thing we ought to say -- just to punt and say this is a problem that's going to have to be faced in the future, as we finally begin to have databases based upon the whole population, not just convicted felons.

MS. BASHINSKI: But if source attribution is possible and you can do source attribution with 16 or 20, now you have in fact identified that individual, and therefore the statistical analysis becomes irrelevant.

DR. CROW: The source attribution assumption really is -- it is not a database assumption. When the FBI worked that out, they're thinking of this person as being found by police investigation or something like that.

MS. BASHINSKI: But at some point in your report you say, I know I can now distinguish this person from everyone in the world, because I have taken care of all the possible substructure and everything else, so I've got the sibs I can -- with 20 loci I can -- now you know for a fact, pretty close as you can know

anything for a fact, that you aren't going to find another person with that type, and you're still saying you can't use that?

DR. CROW: I specifically did not say database search in the list of things they were considering for assumptions of this.

MS. BASHINSKI: But -- okay.

DR. DAVIS: Let me ask just a quick question to Paul here. Paul, from the investigative standpoint, you're dealing with all sorts of samples which may be attenuated, partially destroyed, what have you, and you come up with something that for investigative purposes might be this person. On the other hand, maybe the sample you've got isn't that good and it turns out that this guy at the time the crime was committed was definitely giving the commencement address at Harvard and it ain't him.

So there may be other elements here that explain why it still must be approached as an investigative tool rather than a definitive tool.

DR. CROW: Amen. I agree --

DR. FERRARA: That's one of the -- I mentioned this before in respect to retention of samples. So as to avoid even the remote likelihood -- and I know this isn't necessary to send the police looking at somebody closely based on a mixed sample, and as they did in the U.K., they went to the wrong guy and found out everything doesn't add up. Let's run some more loci, boom, eliminate the guy.

In an effort to minimize that, that's why the first thing we do is double check our data bank sample against the original convicted felon to make sure that it's not --

DR. CROW: You want to make sure you didn't make a lab mistake. Sure.

DR. FERRARA: Right. And then I scratched myself, and when I talked to my folks about this and say, Look; how many times do law enforcement agencies, based on any kind of investigative information end up looking closely at somebody who's innocent but in good faith are operating on some principle?

I might add one other complicating matter, and correct me if I'm wrong, CODIS folks. But don't we have to search at a minimum of ten of the 13 loci in order to search on a national level? That means if I have a crime scene DNA profile and I've developed nine of 13 loci, which is pretty significant, I can't search a national system on those nine? I have to search at ten.

Now, that of course then, again -- now I've got all ten loci if I've got them, I've got to use.

DR. CROW: Yes. Well, I don't think the FBI wants my advice on this, but it would be that ten's too many for pure search purposes.

DR. FERRARA: Two or three --

DR. CROW: Or half a dozen maybe, something like -- with a half a dozen, the probability is around one in a few tens of millions.

DR. FERRARA: As it turns out right now we're doing two amplifications typically for each of eight different -- two different multiplexes but eventually will come a time when we're going to -- it will be simultaneously all 16, so you're not going to have much to hold back.

DR. CROW: Well, I think whether the FBI likes it or not, it wouldn't, but I think there are going to be cases where you would want to use more than 13 loci --

DR. FERRARA: Or less --

DR. CROW: -- it's going to be demanded by some attorney or something.

DR. FERRARA: Or have to use less than ten, too.

DR. CROW: Yes.

DR. FERRARA: Especially with mixtures, but that's --

DR. CROW: Yes.

DR. FERRARA: In NRC I also you mentioned about the identification of the brothers -- I' sorry. I'm -- but another point that NRC I came out sort of against searching a database and identifying -- or expressed cautions about identification of a sib from a data bank of convicted felons. And I personally am not so sure that's a good idea, because since our database was developed, then there's been two or three circumstances where we have searched a database, not made a match, but identified what clearly had to be a brother of someone who's a convicted felon. NRC I comes down opposed to it.

DR. CROW: Right. Well, you were [inaudible].

DR. FERRARA: Yes, I know.

DR. CROW: There just weren't very many loci, and 13 loci's a lot different. With 13 loci you can usually identify brothers.

DR. FERRARA: So this draft -- do you think it might be -- what you just said is worth --

DR. CROW: I said he was on the NRC I committee -- full responsibility for everything it said.

DR. FERRARA: I disagreed at the time, and, like with the ceiling principle, was seriously outgunned. But I'd like that aspect of this -- I just --

DR. CROW: Anyhow, what I wanted to say and did is that 13 loci is different than four, and it would be pretty hard with VNTRs to be sure you had brothers versus other

25 kinds of relatives, or even --

DR. FERRARA: But now with 13, is it worth stating more clearly that the 13 do offer this --

DR. CROW: I think we do state it.

DR. FERRARA: -- capability? Now, whether the individual state laws -- up until July 1 of this year, Virginia state law in that situation I just described would preclude me from telling the police -- God forbid, but I've been in this situation twice already -- I'm sorry. We didn't make a hit, period? And I'm sitting there not being able to say to a law enforcement agency, But look at this guy's brother.

DR. CROW: Uh-huh.

DR. FERRARA: Now, July 1 comes -- we got a law change from the last session that will allow me to then make that statement.

DR. CROW: In our report -- it's back in an appendix -- but there is an example of a pair of sibs, and I know they're sibs because they came from the people that we knew that were sibs. And it clearly shows this distinctive pattern that you expect from sibs and they could possibly have been half sibs as far the statistics were concerned, but that's pretty well ruled out. The likelihood ratio for sibs is maybe 1,000 times as large as for half sibs.

Now, not every example will work, but a great majority of the 13 loci ones would permit this.

DR. FERRARA: Is that in the appendix?

DR. CROW: Yes. It's way back in the appendix. Yes. All you have to do is read 50 more pages and you'll --

JUSTICE ABRAHAMSON: Any other comments from the commission?

JUDGE REINSTEIN: Not on that point.

JUSTICE ABRAHAMSON: Okay.

JUDGE REINSTEIN: But on page 9 --

JUSTICE ABRAHAMSON: Of which -- the big one or the little --

JUDGE REINSTEIN: Of the revision we got today.

JUSTICE ABRAHAMSON: Okay. The April 6 one, page 9.

JUDGE REINSTEIN: This is what you've identified as a footnote with the little squiggly brackets?

DR. CROW: What?

JUDGE REINSTEIN: It's what you've identified as a footnote, an example of a situation? Do you see it, line 14 through 22?

DR. CROW: (Perusing documents.) Oh, yes. The British example. Yes.

JUDGE REINSTEIN: Right. I talked to Chris about this before and I had not seen this until I just started reading it. But from what I understand -- and you pointed this out in your remarks -- the difference between the FBI database, which is 13 STR loci and the British one which was six-- it talks about the National Database's report of mistakenly identified an innocent man based on six STR loci.

Should there be an immediate comparison there to what -- that the FBI database has 13 and that it's the database that everything was supposed to do, right, in that case?

DR. CROW: Just exactly what it ought to do. Yes.

MS. BASHINSKI: And if you did the calculation -- you're saying do a parallel calculation --

DR. CROW: With 13 loci --

MS. BASHINSKI: -- for 13 loci. How would you --

DR. CROW: I don't have to do the calculation. I already know the answer. With 13 loci it would be very unprobable in a database of 700,000 to find a match.

JUDGE REINSTEIN: Because the news reports that came out afterward were very negative toward all this and talked about how it had made a mistake, and I forget who it was in the FBI who had said something to the effect that this was mind blowing and the ramifications would be severe, but it was without really going into what the differences between the FBI and the British --

DR. CROW: Right. I think, Ron -- but somebody could verify this -- but I think this has happened several times before in Britain. It just didn't reach the newspapers. They just found the wrong one and checked it out and that was the end of it.

But does anybody know that for sure? Am I right?

JUDGE REINSTEIN: I actually have a copy of one of the articles --

MS. BASHINSKI: -- and they won't tell you how many because they say the don't count them.

DR. CROW: Well, we could probably calculate how many they would find.

MR. SMITH: What is it you say when it happens here? That it shouldn't have or that we expected it all along to happen?

DR. CROW: Well, it depends on how many --

MR. SMITH: Just say one. Next Tuesday it happens here.

DR. CROW: I think you say -- I think it depends on what you'd expect in this particular case. It was either what you expected to find or it was a very unusual finding, or that somebody made a mistake.

MS. BASHINSKI: But the parallel calculation would tell you how much less likely it is.

MR. SMITH: But once it happens, the calculation -- it tells you how less likely it is in terms you're talking about, however relevant. Right?

DR. FERRARA: But I think though -- I don't want to put words in your mouth, Judge Reinstein, but I thought you were simply saying yes. It worked in that in this case they searched a database -- and in fact I have a copy of one article. The DNA profile was submitted to the National Database where a computer

match to one of 660,000 previous arrestees whose DNA was one file, but after the suspect provided an alibi, the police asked for a retest.

This time a new technique which examined ten loci and had a one in a billion likelihood was used. The suspect's DNA did not match at all the loci, and he was released.

And I guess that's the point I'm saying with like our search of eight, or the U.K.'s search of six for

investigative purposes, but ultimately when a suspect is developed you use your full battery and the statistics. In this particular case -- it says here that everyone in the U.K. that's ever been convicted on six-point DNA profiling will want to apply to us to have their convictions reviewed.

I don't see how that follows.

But again, there's a difference between how the database is used and for investigative purposes or for prosecution.

DR. CROW: Well, certainly these people in Britain are smart enough to know that with only six loci they're going to find quite a number of adventitious matches.

DR. FERRARA: They knew they'd been getting a lot of them.

DR. CROW: Right. And I -- although it wasn't in your article, I'm sure that it was the remaining four loci that clarified this, not the same six over again.

DR. FERRARA: Exactly.

JUSTICE ABRAHAMSON: Just to finish up on Ron's point, do you -- I think if I heard him correctly he might want you to add a sentence that says in the United States the database is 13 loci, and therefore the likelihood of this kind of error being made is decreased or something like

that.

JUDGE REINSTEIN: Or even putting out the number what it would have been --

DR. CROW: We could certainly just put out what the number -- what the expected probability is, and improbable things do happen, like perfect bridge hands.

JUSTICE ABRAHAMSON: Well, and as you all have said around the table, you've got the DNA but that you've got to have other -- other evidence in there will make it more likely, like access or the fact that he's across the world at that time.

But anyway, Norm and then Lisa. Go ahead, Norm.

MR. GAHN: Dr. Crow, because I have so much respect for you, and I like you so much, you know, I --

DR. CROW: I don't like that kind of -- here it comes.

(General laughter.)

MR. GAHN: And what's disconcerting -- and I'm really -- I say this from my heart. Come Tuesday I'm picking a jury in Milwaukee, Wisconsin, and it's a case that I filed against a guy eight hours before the statute of limitations expired, and they picked him out of a data bank six-probe RFLP. As I say, filed the criminal complaint and warrant six hours before the statute expired. It's all the evidence I have.

Got a search warrant. Got his blood, redid it, got my statistic. And I'm picking a jury Tuesday, and that's all I'm doing. I've had no other -- this case was six years old.

Are you stating I shouldn't be doing this?

DR. CROW: No.

MR. GAHN: It's the same -- I mean, if you were called as a defense expert in that case, what would you say? What would you say to me?

DR. DAVIS: They're VNTR.

MR. GAHN: They're VNTR. Yes, six. But they're the same ones. We analyzed the exact same ones.

DR. CROW: All right. But anyhow, the probability of a five-locus match with VNTRs is again awfully small, so I probably wouldn't have any worries about this. Unless your database is enormous, something like the reciprocal of this probability -- which it isn't --

MR. GAHN: But you can use -- even though the search in the convicted offender database -- I'm using the same loci, the same probes for it now to go to trial.

DR. CROW: All right. I probably wouldn't do it that way. I'd probably do it the way NRC II suggested doing: divide -- multiply your probability by the size of the database. But it's still going to be small.

But anyhow, let me say one other thing, too .You're talking again about a convicted felon database, and I think we just have to say, and should -- but I don't know how to quantify it except to be a base in and take the frequency of recidivism as the prior probability. But the courts I don't think will do that.

MR. THOMA: Norm, I think what Dr. Crow is saying though to Paul originally is you just can't use that to bolster the statistics because they're not -- there's nothing independent about what the second test is. That's all he's saying. He's not saying don't do it. He's not saying one is better than the other.

All he's saying is that is completely dependent on your first test, so there's no change. You don't have higher statistical -- less of a statistical probability running it twice than you would running it once, because it should come up the same every single time.

MR. GAHN: I thought you were talking about independent -- that it wasn't independent -- the analysis you did -- you got the five-six probe match out of the data bank, convicted offender --

DR. CROW: Uh-huh.

MR. GAHN: -- and I thought you were talking about when you re-analyze it that wasn't an independent --

DR. CROW: Well, if your re-analysis simply checks whether you made a mistake -- is that all you mean?

MR. GAHN: No. I took a new sample of blood and took it and reran the tests totally from the start.

DR. CROW: But you ran the same tests?

MR. GAHN: Exact same tests ran.

DR. CROW: I still agree with what I said a while ago on that point. Yes.

MR. SMITH: Do I understand what you're saying is that the probability somehow is reduced because you did the first test?

DR. CROW: No.

MR. SMITH: That's what it sounds like.

DR. CROW: I wouldn't want to say it that way, but let -- I'll state it the other way around, that if I repeatedly sample from a large database, sooner or later I'm going to find the wrong person.

MR. SMITH: Yes. There's some chance that that will happen.

DR. CROW: Yes.

MR. SMITH: But what he's -- never mind.

DR. CROW: With his case I think you go with what you have, and what I would probably do, as I said, is to take your probability, which would ten to the minus 15th, multiply it by the database size and that will bring it down to ten to the minus 12. It's still convincing.

JUSTICE ABRAHAMSON: Are we done with that? A piece of cake. And I did not listen and I will not read this transcript when it comes back in two years. I would suggest you put all these people down as witnesses on your side so that the other --

DR. CROW: I don't think he wants all of us.

JUSTICE ABRAHAMSON: Oh, okay. Just to keep you from the fence -- is this on the same topic? And then we've got Lisa. Go ahead.

MR. WOOLEY: Earlier today I heard from Jennifer Smith, and she basically asked me as a commissioner to leave out tons of your report, and Judge Reinstein focused on specific language she quarreled with and asked the lab managers here if they had problems with it. I was wondering what do the people think about the overall suggestion of leaving out all of that, because she indicated that it would be some sort of apocalyptic problem for people running labs to have that kind of stuff in.

And I'll be honest, I didn't quite see it as being such a big problem, but are we going to -- we were asked as a commission to make that consideration. Are we going to discuss that or are we all of the mind that we're going to leave it in?

JUSTICE ABRAHAMSON: I asked Dr. Smith and Bruce Budowle and Art Eisenberg, as my closing remarks to all the rest of you are, this report, both sections have page numbers and line numbers, and I

asked all of them to feel free to mark it up and send it to Jim, or you can dictate something with line numbers and page numbers and language. I think that to the extent that Jim will agree with that, he'll do it and clear it with his committee and then bring it back, and to the extent he disagrees he'll bring that back. And I think that's all we can do.

And if they want to mark up whole pages they can do that and we'll come back and discuss it, but I would really urge all of you, as Jim has, to read it carefully, and if you want a word struck or you want proper made precise, put it in, and that will call it to everybody's attention. That's how we work on the court in looking at a draft, and I think that's a good way of proceeding.

DR. CROW: I don't to take this -- after all, I've got blood, sweat, and tears in this chapter. I hate to take it out. But the more important reason is that although Jennifer Smith said we said a lot of the same things, we said a lot of things that are new in here, too. And it's a little hard to talk about identical twins, for example, without having said something about the rest of the population first.

And even if it's repetitive -- and it is -- I think we should leave it in.

JUSTICE ABRAHAMSON: And you have to assume that people who read this are not that familiar with the background and everything else and they don't come to it with NRC I, NRC II, and everything else, and that you have to have a story that makes sense. So --

MR. WOOLEY: My sentiment was to leave it in. She didn't strike me as being persuasive enough that we should scrap the whole thing.

JUSTICE ABRAHAMSON: And so I do suggest that the draft be looked at carefully and then send in the comments.

DR. DAVIS: Let me make a simple suggestion. Leave it as it is, make up a nice one-sentence disclaimer at the beginning of the cloudy crystal ball of the future, throw that in, and if any defense attorney or anybody ever brings that up again and tries to cram it down somebody's

throat they can always say, You didn't read the first sentence. That's all.

Some simple little thing like that, because to go back and redo the whole draft and back through the committee again is mind-boggling. You'll never finish.

DR. CROW: That's right.

JUSTICE ABRAHAMSON: But I think that --

DR. CROW: My committee's just as contentious as this group. More so if possible.

JUSTICE ABRAHAMSON: -- fine tuning is always in order, and we'll listen to these comments.

Lisa?

DR. FORMAN: I just wanted to say something on the record, because a few things have been said about page 9 that indicate an intention that I don't think the commission means, and we're talking about the six-probe match being a mistake. We're talking about the language in this particular page, which probably

needs to be softened somewhat. On page 9, we have the national British DNA database, "Is reported to have mistakenly identified an innocent man."

Well, that's not true. The database identified an appropriate profile and the database -- and we don't know if he was an innocent man or not. We know ultimately that he wasn't involved in that particular crime that they were searching for. We know that he was in the database to begin with, so he was there for something.

At any rate -- and Chief Justice mentioned that mistakes will happen. These aren't mistakes. This is exactly how the database is supposed to act. It is supposed to identify profiles and then the investigative process is supposed to identify whether or not that person was the person who was involved in this particular crime.

I think that Professor Smith, when he brings up what will happen when we find an adventitious -- I love that word -- match at 13 markers what will we do? I do think that this particular working group needs to address the idea that should that happen, what is the scientific approach to that? How many more loci would we have to look at before we felt that this was not an adventitious hit. It was an appropriate hit for this particular crime.

So that's actually the question that we want to be considering, not -- the database is not making mistakes. Those genotypes are right, if you haven't mislabeled the tube or anything. So I wanted to bring that up and clarify that these aren't mistakes. These are real.

DR. CROW: I take the point, Lisa. What I wrote is reported to have made a mistake. That's what the New York Times said. I think I'd rather just say take out the word mistake entirely.

DR. FORMAN: He was identified but ultimately shown not to be part of that particular --

DR. CROW: Yes.

DR. FORMAN: But it's not that particular sentence necessarily. It's the idea that we in this report don't want to appear to be giving credence to the notion that it was a mistake.

DR. CROW: Fair enough. Accepted with pleasure.

JUSTICE ABRAHAMSON: And I think that's the kind of thing that's really quite easily done, to take out the word mistakenly and a series of other things, and that's why you have a lot of people read it, because different eyes and minds read different inferences from the same language, and so the more of us who read it and make these kinds of comments, the better.

DR. CROW: Chris reminds me that I maligned the New York Times. I should have said USA Today.

JUSTICE ABRAHAMSON: All right. Anything else to come before the house before we are in recess until tomorrow morning at 9:00 a.m.? The same place. Anything else?

(No response.)

JUSTICE ABRAHAMSON: Okay.

(Whereupon, at 5:20 p.m., the meeting was recessed, to reconvene at 9:00 a.m., the next day, Monday, April 10, 2000.)

Introductory Remarks

The Honorable Shirley S. Abrahamson

Chief Justice, Wisconsin Supreme Court

JUSTICE ABRAHAMSON: Again, for the record, if you'd each give your names? Shirley Abrahamson.

MR. THOMA: Jeff Thoma.

MR. KENNARD: Aaron Kennard.

MR. SMITH: Michael Smith.

MR. SANDERS: Darrell Sanders.

JUDGE REINSTEIN: Ron Reinstein.

MS. BASHINSKI: Jan Bashinski.

MR. CLARKE: George Clarke.

DR. DAVIS: Joseph Davis.

DR. FERRARA: Paul Ferrara.

MR. HILLARD: Terry Hillard.

MR. ASPLEN: Chris Asplen.

MR. GAHN: Norm Gahn.

JUSTICE ABRAHAMSON: We'll start this morning with the Crime Scene Investigation Working Group Report, and Chris Asplen will give it.

Crime Scene Investigation Working Group Report

Cold Case Investigation publication

Law Enforcement Summit update

Proposed Recommendation regarding Law Enforcement Training and Education

MR. ASPLEN: I may have said this yesterday, but Chief Gainer sends his apologies for not being able to be present today, but given the World Bank Organization meeting in Washington, D.C. -- they're rather busy in D.C. today. Also I received a phone call this morning from Phil Reilly, also apologizing for not being able to attend, but he could not make it.

The Crime Scene Investigation Working Group has been working rather diligently, and there are a number of things for us to talk about. For those of you who weren't here in the early portion yesterday, we're printing another 500,000 copies of the pamphlet because the demand has been so great for it. And there are a number of offshoots from that, and as I said yesterday, we have the one case where it's been acknowledged it was solved because of that. However, there are other projects that that group is working on.

Cold Case Investigation publication

The first project is the cold case publication -- cold case investigation publication, and that is going to be a publication for law enforcement specifically. It will essentially be a guide for law enforcement to use theoretically by both large departments or at least departments which can garner the support of an actual cold case unit or squad, but also will be a tool for individual investigators who are interested in looking at old cases wherein biological evidence may be present and may be tested for DNA evidence and run against the database.

We hope to have that publication in final form by the next commission meeting for the commissioners' review.

Any questions on that? We've talked about that a little bit before. Quite frankly, we were hoping to have had it a little bit further along by now than we do, but we don't. But by the next commission meeting we hope to have that completed. We did -- at the last working group meeting we ran through the first couple of chapters, which include some introductory things and some definitions and some explanation of what DNA is, and now we're at the point of getting into structural issues and issues about how to do the actual investigating, what kinds of evidence to look at, and what those issues are.

The next issue from the Crime Scene Working Group standpoint is the issue of the CD ROM development, and I think it might be appropriate when this thing is all created and packaged nicely that we should call it the Robin Wilson honorary CD ROM on law enforcement, if -- I should say when this CD ROM is completed -- and the first of two will be completed by the July meeting -- it will be so only by the efforts of Ms. Wilson.

It is probably the most tedious and time-consuming activity that the commission staff has undertaken, because every single possible screen that can come up needs to be gone over, and anything that in a two-

hour training can be clicked on and comes up has to be gone over several times. And when you are developing it -- not only developing a two-hour CD ROM but developing one by committee -- by a working group that even works very well together -- don't get me wrong -- it's hard to do.

And we're working with Eastern Kentucky University and a contractor that's putting that work together, and Robin went out two weeks ago and spent the entire week in Kentucky really monitoring the filming of large portions of the CD ROM, and parts of it are going to be video of actual crime scenes and actual evidence collection procedures. Mark Johnsey from the Illinois State Police is our technical advisor, if you will, on that project, and is also the actor in the video.

And as much work as it has been, it is going to be excellent, I'm sure. It is really shaping up nicely and we're really excited about it. The work is going to be well, well worth it, so we do look forward to that. And we've confirmed several times with them that they will have module one or the first CD ROM done by the next commission meeting in July.

There are, however, going to be two CD ROMs, the first of which -- the one that will be finished for July will be primarily for first responders, and it's really based on the pamphlet that we already put together. The second CD ROM will be more advanced and will be for evidence technicians and those individuals responsible specifically for the actual collection, not just the identification.

So again, that project is well underway. It's on track only because Ms. Wilson has made it so. And it's been nice to be able to turn that responsibility over to her and to have her take ownership of it.

JUSTICE ABRAHAMSON: We're going to see it July?

MR. ASPLEN: Yes. We will have a full run through and a full presentation on the CD ROM at the July meeting.

Law Enforcement Summit update

The next issue is the issue of the most recent recommendation regarding law enforcement that the commission put forth, and we forwarded that recommendation to the attorney general. It is winding its way through the Department of Justice, and last week -- at the end of last week I spoke to a representative from the deputy attorney general's office, and I think we've worked out the kinks of getting it to the attorney general, and we're just waiting back now -- waiting to hear back as to whether or not she's going to approve an actual law enforcement summit that we talked about.

And that summit would be held probably in Washington, D.C. We have asked that she preside over it, and it is specifically designed for law enforcement officers, and all -- not just from the first responder but also, and perhaps for this purpose more importantly, towards management, and if you remember, the recommendation was really designed to heighten the issue or put a spotlight on the issues for law enforcement to help bring them into the discussions that are being had from a funding perspective, from an investigative modeling perspective, et cetera.

So what we did was we sent the attorney general not just the recommendation from the commission, but we also attached to that an implementation plan for the actual summit if we were to have it, which included a tentative agenda of speakers and things. What we would do in the event that we're able to have

it, we would sent letters of invitation to the relevant law enforcement agencies and associations, for example, IACP, the Sheriff's Association, et cetera, and ask for nominations or representatives from their organizations; probably two or three individuals, and then we would bring them into Washington, D.C.

I think we're talking about 150 -- Dr. Forman, do I recall that correctly, about 150 --

DR. FORMAN: 150 to 200.

MR. ASPLEN: -- to 200 individuals coming in? But again, going out to the organizations and letting the organizations tell us who they think should come and participate in that particular meeting. We anticipate about a two-day meeting.

We would talk about what the funding issues are, what the legislative issues are for things like databasing. We'd talk about some of the technology issues and some of the modeling issues, for example, what the United Kingdom is learning from really pursuing burglary cases and what they're doing to utilize the database to a greater extent than we are currently. So we'll keep you updated on that as soon as we can. Dr. Crow?

DR. CROW: Is the date set yet?

MR. ASPLEN: No, it is not. We're still waiting for final approval on that, but as soon as we do have a date, obviously all the commissioners would be invited to that also. Superintendent?

MR. HILLARD: Chris, when you get ready to initiate this, it would be nice if -- you know you have the Sheriff's Association, IACP, but you've got some other organizations out there that play a very prominent role in law enforcement, and they might be a little smaller than the Sheriff's Association or IACP, but they need to be brought on board also.

MR. ASPLEN: We have a whole list of organizations. And, Superintendent, what might be a good idea is if we get the go-ahead, and I believe we will, and we actually start to implement the plan, we'll send you a copy of the list and perhaps Chief Sanders and Sheriff Kennard and make sure that we've included everybody that we can include in terms of who should be brought into this discussion.

MR. KENNARD: Would it not be wise to have those that sit on this commission make sure we attend that as well?

MR. ASPLEN: Right.

MR. KENNARD: I know that the National Sheriffs will insist that I be there representing them, but I think that we should have those of us that sit on this commission to try to push some of these things through.

MR. ASPLEN: We will certainly notify and invite all of the commissioners. Again, it won't be an official commission meeting, and I know that we take a tremendous amount of time out of your schedules, both your personal and your professional schedules, but we will make sure that any of the commissioners who want to come will be able to.

ABRAHAMSON: I assume you might have a steering committee for that too.

MR. ASPLEN: Yes.

JUSTICE ABRAHAMSON: I suggest you put our law enforcement people on that steering committee --

MR. ASPLEN: Sure.

JUSTICE ABRAHAMSON: -- so that one, they'll be familiar with the people who are to come and be familiar with the topics that they think the attendees need. Would that be satisfactory to go that route?

MR. ASPLEN: We're just waiting for the green light right now. As soon as someone says, Yes, you can go ahead and do this, then we'll really start to develop the program. And obviously much of the work of the commission will be the basis for those discussions.

JUSTICE ABRAHAMSON: Sounds good. Will they be able to get it in before the change in the administration?

MR. ASPLEN: The target date that we've set is summer, and we don't see any reason why we couldn't hit that target. It's not complex proposition, quite frankly, especially if we have it in D.C. Organizationally it's not a complex proposition. Our only concern is letting people know far enough in advance so that they can attend.

So once we do get the green light we will have to move very quickly, but it won't be a difficult program to put together.

JUSTICE ABRAHAMSON: National law enforcement meetings in that time period?

MR. KENNARD: The National Sheriffs -- we meet the last week, I believe, of June. It will not be into July. We have our annual meeting then. IACP meets in October.

MR. HILLARD: And, Chris, major city chiefs -- they have three meetings a year. That's usually in February or March, then once again in Sun Valley, Idaho in June, and then the same time that IACP does.

JUSTICE ABRAHAMSON: Because if you met in the summer we'd piggy-back with it, and if you didn't that was a good thing to know. So if you're going to piggy-back it may have to be September-October.

MR. ASPLEN: Judge Reinstein, did you have a question?

JUDGE REINSTEIN: Just when you talked about funding before. Last year, didn't you go to the National Council of State Legislatures.

MR. ASPLEN: Uh-huh.

JUDGE REINSTEIN: Is that something that needs to be done again to remind them about funding issues?

MR. ASPLEN: Well, that was at their request that we attended --

JUDGE REINSTEIN: Oh.

MR. ASPLEN: -- and it's a great point, because it really led to some of the issues that we're talking about. And what Ron's referring to is Dr. Forman and I spoke at the National Conference of State Legislatures

last year and quite frankly, in the process of our presentation we were pretty hard on the legislators. We took a very hard line in terms of unfunded mandates and requiring a lot from laboratories, requiring a lot from law enforcement, but not getting them the funding to do it.

And one legislator stood up and really made the point very clear. He said, Look. Let me tell you how this works. He says, I'm pro-law enforcement. I get a list of five things from my law enforcement agencies, their top five priorities. I have a limited amount of money so I can only give them three, but I give them the three that they want. Nobody in law enforcement is telling me that DNA should be in the top three. When they do, I'll give them the money for it.

And that started us thinking about this whole process and where is law enforcement in that kind of discussion. And just to be very clear, we don't want to be in the position and the point is not, Well, DNA should be in the top three, because nobody wants to be in the position of telling law enforcement that DNA investigation is more important than bullet-proof vests or cars or radios or

anything. But what we thought really -- that we need to make sure is that a good understanding of the DNA issues is involved in that decision-making process. And if it doesn't reach that priority level that's okay as long as they're good educated decisions.

So that's part of the reason of having the law enforcement summit, so that these issues can get out on the table for law enforcement.

MR. HILLARD: Just let me ask you, would you have some of the scientists and some of the crime lab directors there so they can articulate to law enforcement exactly how important DNA really is?

MR. ASPLEN: Yes.

MR. HILLARD: I think that's needed. I know myself and Darrell -- I don't know about the Sheriff, and I know Terry Gainer -- to have somebody like Jan or Paul there or some of the other folks that's on this commission to come there and articulate to that gathering of how important this is.

MR. ASPLEN: There's another reason that, quite frankly, we drew up the agenda and then looked at it and said there's a major gap here, and it was laboratories, not just for the reasons you speak about but what we designed was a specific section on laboratories to talk about the relationship between law enforcement and the laboratories, which is very, very important. It's not just a matter of law enforcement knowing what the laboratories can do, but being able --understanding the importance of communicating with the laboratories.

One of the things that we knew was going to happen with this pamphlet has actually happened. Laboratories are facing a larger number of samples and different samples and more samples, and I gave a presentation at an NIJ conference and a laboratory director came up to me after I spoke and said -- after I had spoken about the pamphlet and she came up and she said, Do you know what that pamphlet has done to my laboratory? And I was like a deer caught in headlights.

Now, after about 30 seconds she was kind enough to crack a little bit and I realized that she was not as serious as she was. Her point was serious. She wasn't seriously angry at me but her point was serious. We've generated a greater supply of samples.

What that means is the relationship between law enforcement and the laboratories is much more important than it ever was before, and that they need to communicate so that we're getting the right samples sent to the laboratories and that law enforcement isn't just collecting everything it possibly can and sending it, because clearly the labs can't take that. So, Superintendent, your point is very well taken and we will include a very specific section on -- panel on the laboratory issue.

MR. SANDERS: I was thinking that certainly the major departments are very aware of labs and what goes on with them, but I would think the vast majority of small departments won't have any idea whatsoever. You'd never get them to step to the plate and say, We need more money for the labs, because they wouldn't visualize that as part their responsibility.

So part of your agenda has got to be so that we can communicate that to them, that we all have to work together on it and that it's a -- because oftentimes we don't use them enough for us to be able to have any influence, so therefore, we'd probably figure they don't mean anything to us.

MR. ASPLEN: Yes. Having a vision for the possibilities is really the key.

MR. CLARKE: Well actually and to a large extent, the courtroom is driving some of that to take testimony and evidence away from witnesses and place it more on science, and that's at the heart of the wholesale attacks on eyewitness identification in serious cases, obviously.

Proposed Recommendation regarding Law Enforcement Training and Education

MR. ASPLEN: Okay. The final issue from the Crime Scene Working Group is really a matter of turning over to the commission the development of a recommendation to the attorney general, recognizing that her tenure is limited but recognizing that there's an important in just setting the recommendation out there. A recommendation regarding some sort of entity that would look at the issue of law enforcement training and education in general, and it really stems from the example that the DNA experience provides.

And that example is one of a technology that is clearly one of the most significant we've had in the forensic context, but one in which developed in a laboratory setting. And a tremendous amount of attention was paid in the laboratories, and resources were spent in laboratories creating a robust technology. We spent a tremendous amount of time and energy in the courtrooms making sure that we could get the stuff admitted into evidence, but in that process we created a technology that was fundamentally a prosecutorial tool and not an investigate tool; different than the United Kingdom experience.

The United Kingdom developed something that was investigative in nature, much more so than we did in the United States, and the DNA experience provides an excellent example of how resources for law enforcement training and education need to be thought about as we look at utilizing technology, only more and not less.

So one of the ideas that has been discussed at the working group level for the Crime Scene Investigation Working Group is something like a national commission on law enforcement training and education. I say that somewhat hesitantly in recognizing the commitment that a national commission takes, but that's the kind of idea that has been floated.

What was also talked about though when speaking about an entity that would look at these issues was the idea that the point is not law enforcement is necessarily doing anything wrong on that law enforcement is necessarily to blame for any of this. It is rather the idea that we need to fundamentally rethink the resources that are allocated to law enforcement training an education.

If you look at police department budgets, the amount allocated for training and education --continued education is very, very small, especially if you're in a rural jurisdiction. The chief of police goes to the IACP conference and the budget is gone for the year. But our expectations of law enforcement performance are only increasing, and the technological tools that we have at our disposal are increasing. What is not increasing is the approach towards the training and education of law enforcement itself.

So that's the discussion that's been held at the working group level, and I open it for discussion here to talk about whether or not we want to create a recommendation that would propose the creation of something for that purpose.

JUSTICE ABRAHAMSON: Sheriff?

MR. KENNARD: Let me share with you what I've experienced in my attempt to push DNA to the 3,500 sheriffs in the country, and you hit on a very touchy subject, suggesting that there should be increases maybe in budgeting for this very issue. I get some sheriffs that look at me with a blank stare wondering what the hell I'm talking about, and the last thing they're about to do is to dedicate some of their very scarce resources in furthering what they see as maybe one of my projects as I move up through the chair of the International Sheriff's Association.

So some how I, as well as this group and others need to -- not only the country sheriffs but there are about, what, 15,000 chiefs of police throughout the country, and I bet that there are many with that same attitude in the police chiefs' ranks, that DNA is not on a radar screen for many of them. So somehow we have got to get them aware of the importance of this.

And the other issue being the budgeting -- I'm not sure that this is a total law enforcement issue. I take it to my commissioners and suggest to them that this should be a broader picture than just Salt Lake County Sheriff's Office. It should be the public safety issue of countywide as well as statewide, and somehow this budget issue needs to cross many barriers rather than just our own little law enforcement barrier.

So I don't know what the chiefs have experienced in regard to this, but --

MR. SANDERS: In the work session, we -- the whole idea of this national commission thing was to suggest that it's not necessarily that's law enforcement not's doing what we're supposed to be doing. It's the idea that what you just identified. They don't know anything about DNA. They

don't know that it's an investigative tool and it can be stuff. I think part of what we were hoping was that if you bring that group together that you'd go not just DNA, but the idea of rethinking the entire way of how we finance, so to speak, our police training and maybe have some sort of federal or state subsidy come of it, like when they did the '68 commission.

When they put that commission together, I don't know what they expected but they came out with all kinds of positive things like the LEEA money, you may recall, those kinds of things.

So our hope or our vision was that if we put this group together, that's what would come of it, those kinds of recommendations to say what you just said. The fact that there is precious resources there, and the when you're trying to train people -- but it's not just that. Look at the technology as it's moving forward. We're getting left behind was our whole argument.

Law enforcement -- not because of our lack of desire, not because of our lack of ability -- we just don't have the knowledge. We've not been presented with those capabilities. But I can tell you that not only DNA but I think all technology is going to be very important to the training of police officers in the future, and that was at least my understanding is that's hopefully what we'd like for that commission to do is to look at all of those things so that we could get a broad spectrum of what we need to do and how we go about doing it.

JUSTICE ABRAHAMSON: Dr. Davis?

DR. DAVIS: It seems to me there is out there a mechanism, at least that can be used for this, and that is each state has its police standards and training commission, and the title alone would indicate that they have a lot to do with setting the standards. Those groups in turn have their national association, and I think that would be very important avenue to work through. The trainers and the people who set the training standards are really the ones who are key to this because you can't expect the individual police officers or their management to know all the ins and outs of how to do the training, but these people are the specialists in it -- at least by their title they are -- and they exist.

To me that's an avenue that can be used for this dissemination of this project -- or the ideas.

JUSTICE ABRAHAMSON: Norm?

MR. GAHN: You may wish to even expand it a bit. You talked about the relationship between the crime lab and the police and how DNA is bringing them together. It also is bringing together prosecutors around the country -- closer relationship, but we've never had such a close relationship with our sexual assault nurse examiners in the past 20 years than we have today, and with our victim advocates.

I don't think the police have had such a closer relationship. I don't think in the past 20 years the crime lab people have ever spoken to a sexual assault nurse examiner, which they do today. You've got -- these nurses are on the front line there and if they don't know that if the assailant --if they don't know that they can swab body parts for saliva, a lot of evidence is going to be lost, and they don't know that. The nurse examiners do not know what this technology can do, so this really needs to be expanded to reach that group too.

And as I said, the relationship between the police and the nurse -- and the crime lab, we've never had it before like we do today, and it's all because of the DNA technology. Your pamphlet that you talked about -- I gave that to our chief sexual assault nurse examiner and she immediately ordered about a thousand from you, and every sexual assault nurse now in Wisconsin has one. They think it's terrific and they follow that, so that's not just for law enforcement. The sexual assault nurse examiners want -- and the victim advocates want it too, because they need to talk to the victims and be knowledgeable of it.

Also, I found out with the sexual assault nurse examiners there's a good number of women who come in and report rape but don't want the police called, and there's a lot of sexual assault kits sitting in hospitals

around this country, and they say this is not unusual. That is not being examined. They don't want police notified. And should those be data banked, and that's the question, and how do you do that?

Will the police pick those up and put them on inventory without having a report from a victim? They're not going to like that idea. But nevertheless, shouldn't those samples go into the data bank?

MR. CLARKE: Actually, Norm raises a very good point. Certainly the sexual assault nurse examiners have been more involved in training going on. The FBI for instance in its CODIS meeting involved them years ago, as does the National College of District Attorneys. So I hate that overused term multi-disciplinary, but that's frankly what it is now, much more so I think than in the past, obviously with the collection of DNA beginning at such an early stage but also with the collection of other forms of evidence.

Sexual assault cases -- the use of date rape drugs has increased dramatically. That's putting additional strains not related to DNA frankly but just in terms of toxicology. I would venture to say more laboratories cannot perform that testing and they have to seek other resources to do that.

DR. FERRARA: Woody is correct. We have seen a great influx in the amount of toxicology work come into our laboratory and incorporating sampling into rape kits to be able to handle that particular situation.

One thing that -- I'm not sure if it falls in this category, and I don't know that it's appropriate or not for the commission to address this, but I think it's worth stating. All of these actions that we are contemplating should have the desired effect of enhancing the amount of collection of DNA evidence from a variety of sources, crime scenes and such. We're heavily involved with the training of sexual assault nurse examiners, pathologists, et cetera, and we have talked about funding for various programs: the education and training of law enforcement prosecutors, et cetera.

One of the things that we haven't said I guess completely -- and I don't know if it's appropriate -- but regardless of the amount of money that is infused into the forensic laboratories for example to cope with this tremendous influx of evidence is the training -- where are the DNA examiners of tomorrow that are going to be necessary to do all of this work? Where are they being trained? And quite frankly, there's only -- typically this training is being done in the laboratories.

But it's important to point out that even once the resources are made available, there is going to be at least a one-year lag time before those resources in terms of personnel who can conduct this testing are going to make their presence felt.

Now, should the Commission on the Future of DNA Evidence somehow address this issue as well? We want to train prosecutors. We want to train law enforcement. But at the same time we want to train examiners. Now, that can be done as it has in the past on a -- a laboratory gets a bunch of positions and starts training the people in-house. There are some efforts to develop institutions which actually train fully qualified or ought to end with fully qualified DNA examiners.

We trained six DNA examiners last year at the Virginia Institute of Forensic Science and Medicine. Another six examiners are being trained this year. That's a drop in the bucket of the need on a national level.

I took the first six graduates and added them to my program. The next six I'm not going to be able to, and they'll be able to go out there. But laboratory directors all over the US have expressed to me this concern as to where -- and what is NIJ doing with respect to assisting in the training of examiners?

JUSTICE ABRAHAMSON: This drifts somewhat, which is fine, into the afternoon session which says, "Commission discussion on continued tracking of forensic DNA issues." What we're talking about now is commission discussion on continuation of training for DNA --

DR. FERRARA: Of law enforcement.

JUSTICE ABRAHAMSON: -- for law enforcement, but we've moved into a nurse practitioner's. We've moved into -- and properly so, DNA examiners, et cetera. So one of the issues that we might think about is do we need a new over-arching national group that will promote these kinds of education techniques in the states, or do you use existing groups and train leadership so that you gather together the leadership of the National Sheriff's Association, police chiefs, crime labs, nurse associations and talk to them and urge them to go down the ranks and do it?

So I don't have an answer to that. I think that's part of the questions.

MR. KENNARD: Judge, I think that you're right on track, you and Chris. I think the committee has very adequately proposed what needs to be done, and I think that Dr. Davis hit it right on the head by way of where it needs to be directed, and that is at the state level.

I sit on a post council for the State of Utah, and that's exactly where we would direct it, mandating not only first responders but providing for investigators' extra training as well. But if we could implement it on a statewide level through the post councils, a four or six or eight-hour block, and it's a 40-hour block, and it's a tough block to crack trying to get something like this added into it, but this is where the summit would come into place in getting the chief law enforcement executives there, making sure they understand the importance of it.

So having said that, that's what I would recommend.

MR. ASPLEN: Sheriff, I think you're right. I think that would be an excellent issue for the summit to address.

To get back to Chief Sanders's point about what the working group was talking about, it was actually taking it beyond just DNA and looking at -- I'll give you some other examples that we talked about: crime mapping and the extent to which -- it's a fantastic technology but the resources actually allocated to train law enforcement and to actually put it into the hands of law enforcement is very different.

And I guess the question is, do we want to suggest the creation of -- we'll use the national commission only as a model for discussion purposes -- a national commission that looks at the issue not -- that would look at the issue of what's the best way to look at law enforcement training? Is it on the state level, is it on the national level? But to really shine a spotlight on the issue of fundamentally rethinking how we approach training and education in general about law enforcement, which is not so much a matter of how can police reallocate their resources, but rather how can we provide -- what resources do they need from society, from government?

MR. SANDERS: It furthers it. It's like when we said this commission -- we have a tendency to talk. It's like you think what goes on in your house goes on in everybody's house, and that's just not the truth. Just simple technology like mobile data terminals, it's something that I would think the vast majority of law enforcement behind. It's not there. The capabilities are not there. And hopefully this national commission would take all that into consideration.

How do we make the resources available so that everybody can participate in it, and the other thing is virtual reality type training. The NIJ's technology groups are doing all -- everything that applies to the military now they're trying to make adaptable to corrections and law enforcement, and I'm telling you, it is absolutely fascinating to sit and watch the stuff those people can do. As a matter of fact, it's scary.

I wish Barry would go with me some time. He'd have a heart attack if the ACLU found out what they could do. I'm confident that if they wanted to they could track me anywhere they wanted to. They'd know exactly what I was saying and what I was doing.

But be that as it is, how do we convert that and if we do make it -- for instance, they're doing some software stuff on 3D modeling for dynamic injuries. There's a lot of discussion going on again about first responders after Columbine and the fact that they did not enter the building. Well, how do you go about doing that, and if you're going to change it and say, Now, if not me, if I don't go in, who does? If not now, when, that kind of attitude, well, how do you provide that training, because -- it's the safe school stuff, all that kind of stuff.

So this commission would look at all that stuff would be our thought, and that somehow we would try to devise a method by which all of the -- if we look at the whole thing of training -- and then certainly our post groups would have to be involved because if you don't get them to buy in or you don't have a way to mandate it it wouldn't do you any good. But what I'm saying is once you put this commission together I'm sure there are going to be some topics there that we would have never thought of here that will come forward.

But I'm really concerned about how -- once we decide that, how do we make it available to all of law enforcement throughout the United States?

MR. HILLARD: Judge, you know I do know one thing. I'm in my 33rd year in law enforcement, and one thing that I know all across the country -- and Darrell made a statement and said what goes on in his house might not go on in mine, but in law enforcement when you have that heated case or those heated cases, the resources are found, no matter whether you're a large, small, or medium-sized department.

When you've got a heated case and the politicians and the community in your butt, you find those resources to allocate to resolve those cases. And I think what needs to be done at this law enforcement summit -- and I don't know if that's the correct terminology -- to make sure that not only the examiners are there, but like what Norm just brought up -- and I never thought about it -- that when it comes down to the health department -- 60 percent of the police departments throughout this country participate in community policing, and when we have cases such as this, we not only talk to law enforcement, to the prosecutors, we talk to the health department. We talk to those rape advocates, the victims of homicide, the loved ones of homicide victims.

So I guess in essence what I'm saying is when you start out you say it's a law enforcement summit, but before it's all over with you're probably going to bring so many different professions into it, because we're acting as one now. No longer is law enforcement in this fight by themselves. We have the people from nursing. We have the prosecutors, the advocates, and the regular citizens out there.

So I just think that if we can educate and if we can train the powers that be, those leaders, and let them go back to their respective agencies and be able to tell those supervisors, those street supervisors on what we need and how we need to do it, it's a win-win situation for everybody when it comes down to DNA.

JUSTICE ABRAHAMSON: What I hear is obviously this has to be at the state level and the local level, but that it's not only law enforcement but everybody up and down the line together have to be educated, but that this is an excellent topic for the summit as to how to manage this education and integrate it and interrelate it with other groups, but obviously each group has to be educated and work together. So I've heard different means of doing it, but ultimately it's going to have to be at the state level -- state and then local level.

One of the things is, at least in our state, the Office of Justice Assistance gets a lot of federal money, and there must be a similar entity in each of your states. And a lot of the money goes to law enforcement, as well as money from the Violence Against Women Act. And it seems to me that that money -- and it's all federal money -- may very well be available, and you'd have to check it, for DNA training, since many of the DNA cases are sexual assault cases.

Norm, do you know anything about that in Wisconsin?

MR. GAHN: I --

JUSTICE ABRAHAMSON: You're smiling. That's why I called on you.

MR. GAHN: I smile because in our office we're just dying in the sexual assault unit, and I have suggested exactly what you said. If there's violence against women and children -- and certainly we see it in the sexual assault unit. But try and get a penny of that money that's dedicated to what -- someone seems to have put domestic violence and sexual assault as two separate entities, and it's unfortunate. And for us -- Your Honor, I've looked into that, and I think you're right.

I think you're absolutely right, but boy, we can't get a penny of that money to come over and help us in the sexual assault unit, unfortunately.

JUSTICE ABRAHAMSON: Call law enforcement officers and see if they won't join you, because I do think it's there. I just don't think it's been tapped, but you've tried, apparently.

Let's talk afterwards. I've got a couple of ideas. I think each state has gotten some percent of the federal pot, and I may be just dead wrong, but that's my sense. I really haven't studied it. And that it's available and much of the money, at least in Wisconsin, has gone to law enforcement. But it's gone to what I call hardware, and I think that they may be ready for some different kind of programs, so you might just look there.

MR. SMITH: Is that at all a product of federal guidelines and regulations for the distribution of the federal money, because if it is, part of the solution lies there.

JUSTICE ABRAHAMSON: Well, the Department of Justice has sent out memoranda on this, because the Conference of Chief Justices felt that the court system was not getting any of these funds, and so there was an attempt to at least open people's minds for a variety of ways of dealing -- that's why I thought about it, not that we've seen much money.

But in terms of law enforcement too, they may not have thought about it for education purposes.

MR. KENNARD: Well, in regard to what Mike was talking about, some of the monies coming through it is through the burn grants --

JUSTICE ABRAHAMSON: Right.

MR. KENNARD: -- comes to the states and then the state justice commissions can determine which particular -- whether it's sexual crimes or the domestic abuse crimes, and then there are also block grants, but there are also some direct grants. Then you're talking about we have to go straight to Department of Justice and convince them on our respective grants that we want for whatever.

But I think the burn grants are where we need to be working with the prosecutors and making sure that we make a case to the state that says this is in a partnership with our prosecutors.

JUSTICE ABRAHAMSON: And that's the ones I'm talking about. You're right at the state level, but there is federal funds from other grants. Dr. Davis?

DR. DAVIS: Just back to this future conference where you have a shopping list of different police agencies and organizations. Add the group that represents posts. They have a national group. Because I hear Office of Justice planning. I hear post and all that, and it sounds to me if you're going to have a national meeting, there are these other groups that have their national representatives. They ought to be listening in on what's going on.

MR. ASPLEN: Thank you, doctor. Chief Justice, if I might make this suggestion? As we're talking about different ideas and they are getting merged a little bit, I would suggest that if the commission by consensus feels they'd like to entertain a recommendation regarding something like a national commission to look at general law enforcement training and education, I'll write something up with the staff and send it out to folks.

And I would propose, again, based on the discussions we've had at the working group level, that we use DNA as an example of how this dynamic -- training and education dynamic works, a picture of the training and education budget issue, if you will. And I think back to some of the presentations that were given, for example, rural law enforcement agencies from Dr. Caldwell to the working group -- talk a little bit about some examples of the kinds of -- not just DNA technology but other technologies that the American public is gaining an expectation of, and then provide a model for how we think that should be approached.

If that's an acceptable proposition, we'll put something like that together for your consideration.

At the same time, I think what we can do is we can look at the possibility of building a discussion on that issue. Not discussing all the issues, but having a discussion on the commission model at the law enforcement summit, that perhaps we could discuss that there also, because I think if we try to do too

much at the law enforcement summit, we'll lose the focus of the DNA-specific issues. But that may be a way that we can merge the two.

So if that's by consensus acceptable, and, Chief Justice, if that works for you, we'll do that and get it out to people.

JUSTICE ABRAHAMSON: What about the law enforcement, what do they think, because I just don't know.

MR. ASPLEN: And then we can take your comments -- we'll send that out to you -- it would be best to get your comments between now and the next meeting, since the next meeting will be our last full commission meeting, in July, and we can make the appropriate changes and possibly approve or adopt it at the July meeting.

JUSTICE ABRAHAMSON: I'm not hearing any objection. It doesn't it mean we accept this as a proposal. It just means we'll see it on paper. Okay. Is that all right? Okay.

Is there anything else you want to say, Chris or anybody else, about the Crime Scene Investigation Working Group? They've got a lot to do between now and July.

MR. ASPLEN: They are working very hard. It's a very dedicated group. And that's not just the working group members who are non-commissioners, but that group has -- both Superintendent Hillard and Chief Sanders participate in that very actively, and it is -- and also Jan Bashinski.

That working group has more full-time commissioners on it than any of the other working groups, and they show up diligently and faithfully, so I appreciate that.

Legal Issues Working Group Report and Discussion

Michael Smith

Chair

JUSTICE ABRAHAMSON: Okay. Hearing no other comments on that, we look forward to their report in July and we go to Michael Smith.

MR. SMITH: Chris told me you weren't going to do that.

JUSTICE ABRAHAMSON: Is that right?

MR. SMITH: Why don't I ask Chris if he'll give my report for me?

JUSTICE ABRAHAMSON: You have to be absent.

MR. ASPLEN: In all fairness to Michael, Michael and I spoke last week briefly, and we haven't had a chance to talk about the meeting that I had on Friday. But the bulk of the legal issues, I guess, presentation, if you will, is more a matter of discussing what the commission would like to see happen at a legal symposium in the fall, so to get our minds away from the law enforcement summit and bring it around to a legal symposium.

The work of the Legal Issues Group has -- will form the basis for that particular symposium and some of those issues, but what we want to do first of all is make sure that the commission states what it would like to see addressed there.

To give you a little background, I met on Friday with representatives from the Kennedy School of Government to develop -- to start the process of developing a joint meeting. And what we would anticipate would be a commission meeting -- and this would probably be in November -- which would be essentially a half-day commission meeting. It would not be a full meeting. It would really be a meeting to wrap up the last bits of business that the commission has, and then would start the actual symposium, and it would be the last meeting of the commission.

The Kennedy School runs forums, if you will, that analyze particular issues and provides a policy insight on particular issues. And what we're talking about is DNA as a model of technology integration into the criminal justice system, using that as an example of the effects that technology has on the justice system. What are the privacy considerations, what are the funding issues, et cetera, and how should those decisions be addressed, if you will. So those are the kinds of things we've talked about.

To be very clear, we don't have anything in writing. Kennedy Center has not committed to us fully. We're in the beginning stages. But what we'd like to do and what Professor Smith and I discussed was opening this time up to the commission to talk about what you folks would like to see occur in that context.

JUSTICE ABRAHAMSON: Are you envisioning panels and speakers? Are you envisioning anything that's interactive with the audience?

MR. ASPLEN: That's certainly a possibility. One of the things that we would do first of all is invite the attorney general to speak. Ideally what we'd like is for her to speak at the end of the commission meeting and act as a kind of final presentation to the commission, close out our work, and then act as the keynote for the actual symposium.

But then there is certainly a vision for different panels to discuss these particular issues. We could break out into different forums. We could have plenary sessions. It is really a very open-ended proposition at this stage.

JUSTICE ABRAHAMSON: And the audience? Lawyers, prosecutors, non-lawyers?

MR. ASPLEN: Since we're talking primarily about the legal issues and it would be focused on legal issues, that would certainly be the bulk of the participants. However, you could certainly see privacy advocates who might not necessarily be attorneys involved and other folks who would certainly be interested in what those legal issues are.

We would probably be limited to about 200-250 people.

MR. SMITH: I don't think it would or could effectively be limited to lawyers, in part because the felt need for such an event arises in part because the law seems an inadequately broad net to catch some of the more important but elusive questions of politics and philosophy that keep popping up when we talk about how to integrate DNA technology into a system of law. And so we'd want to hear from ethicists and philosophers and royalty of various kinds, but I don't think you'd want to have just the royalty in attendance, and that's the trick of putting together the audience for this.

It hasn't really occurred to me -- I haven't an idea about the balance between panels and discussion of -- for a 200-person symposium, because I haven't thought -- and you may have, they may have -- whether there are to be products of this symposium, because if there are to be products of this symposium, it's unlikely that the way to get them is by structuring a day or a day and a half of general discussion in a 200-person crowd. You'd have to have papers and rather specific ambitions for product.

But I myself am not certain that product is the reason to have the symposium. It may be the reason to have the symposium is simply to air and table a set of issues that can't be resolved right now but need a more structured and visible conversation nationally.

MR. ASPLEN: One of the Kennedy School's requirements is that a product be developed.

MR. SMITH: Well, let them produce the product then.

MR. ASPLEN: Now, that product may simply -- may be simply the airing of those particular issues. It may just be a description of that particular discussion. But they do intend -- if this does proceed they do intend to produce some work out of it.

MR. SMITH: It wouldn't be a bad idea. I'm not saying it's a bad idea at all.

MR. CLARKE: I was going to say, the whole database question and potential expansions, that could fill a day and a half easily.

MR. THOMA: I actually wrote that down as one of the first things myself.

Another issue that might be interesting in a national symposium would be the admissibility and weight issues; how to conduct a hearing, not necessarily -- because not all jurisdictions have admissibility hearings at this stage, but certain issues with regard to proficiency and things like that. What should a court hearing with regard to the admission and weight of DNA consist of, and I certainly could see some type of structured debate on that issue, and we can lay out some models from what jurisdictions are doing right now in different places.

Obviously, coming from California -- and we have a little different standard than the national standard -- but it's not that unique. It's just a little different. And I think that would be a discussion that could actually enlighten some people into getting to a more general type of hearing so that -- we have a mishmash, even in California -- you go to one jurisdiction or another jurisdiction or another judge or two judges in the same jurisdiction, they want to look for different things with regard to admissibility hearings, what we call Kelly Fry [phonetic] hearings, and I think it would be interesting to get that out there -- that debate out there, prosecutors and defense attorneys and judges -- what they think is paramount at a hearing like that. It's just another issue.

But I agree with Woody, the privacy and database issues combined would be -- even if you separated them would take a day.

MR. CLARKE: I suppose the most difficult part would be deciding amongst all the topics we've discussed which are the most urgent, frankly. I remember in NRC I, of course, there was a substantial discussion on how DNA evidence should be communicated to jurors, which was thought-provoking at a very minimum.

JUSTICE ABRAHAMSON: It would be a breakout panel? Norm?

MR. GAHN: I was just jotting down a few things. I think the admissibility issue has been beaten. I think we've been there and done that throughout the country, the admissibility of this, and I think we've hit everything we need to hit on privacy. I was thinking something more along the lines of something very, very practical in questions that are asked every single day. And I have police officers and detectives calling me all the time, Can I follow a guy around, and if he spits, can I take his spit and can I use that?

You have a lineup and there's a mis-ID. Can we compel the person who's mis-ID'd to give a blood sample for DNA exclusion? I just thought of another one too. Professor Crow talked about his alternative of the statistic for siblings. If a person does have brothers, can we compel the brothers to give a sample for DNA testing? On the scene, can we take a buccal swab from someone -- a suspect? That's all. Now that PCR is so sensitive, how about taking a swab of the surface skin cells? Does that even reach the level of a Fourth Amendment?

These are very practical issues for the cop on the street, and I think that would probably be one of the more helpful things that this commission could do, is to give those police officers some guidance. We all have all this technology and we talk about a lot of philosophical issues and things, but for that cop and detective on the street, what can and can't they do and what can they take, what is Fourth Amendment, what raises to that level, and who can you compel to give a sample? And that might be I think a very interesting area to discuss.

MR. SMITH: The difficulty, of course, is that at the -- unless the law develops a lot between now and November, they can get on those topics debate. We got it in this group, debate. Now, it's an interesting debate and it's a debate in which we might want others engaged, but it doesn't distill to advice to a police officer directly.

Barry and David could have a debate about whether or not the Fourth Amendment touches -- in what way it touches those questions. But the Kennedy School doesn't look to me like the site for the generation of practical advice to police officers calling you with that question. But it doesn't mean at all that it wouldn't be valuable to surface that debate in a place where its resolution becomes more important. Part of the difficulty is that we can debate it but nobody cares because it isn't at a high enough level of visibility.

If the issues are important -- and they seem to me to be, for the reasons you say -- then they're going to have to reach a higher level of visibility before they're going to be handled. That would be a reason to have a symposium.

JUSTICE ABRAHAMSON: Ron?

JUDGE REINSTEIN: Well, Mike, do you think postconviction is at that high level?

MR. SMITH: Yes. You're already there.

JUDGE REINSTEIN: I mean do you need to have a summit on that?

MR. SMITH: I don't know. That's a question for you.

JUDGE REINSTEIN: As far as one issue.

MR. THOMA: I certainly don't think it's there yet. I mean, we're getting there, and certainly I think in a few minutes we're probably going to finish our recommended statute, but just the fact that New York and Illinois have adopted such statutes, and California and other jurisdictions are thinking about it doesn't mean a lot's going to happen between now and November. I think it's a really relevant topic, postconviction relief absolutely should be on the agenda for issues.

MR. SMITH: One way to do it would be to think of -- is it a day and a half that we're likely to have?

MR. ASPLEN: I would say two days.

MR. SMITH: Because one way to do it would be to -- would be just to work hard to distill from

investigation trial matters and postconviction matters to distill away a set of issues -- a small set of issues, the visibility of which would assist in the evolution of the practice and all that, but not to confine it to one of those three, rather to -- there are different stages of development, but to treat -- the service would really be to permit others to take those foci and use them: journalists and academicians and practitioners.

And I would suggest those three could be included in the 200.

JUSTICE ABRAHAMSON: That was investigation, trial, and postconviction?

MR. SMITH: Yes. I further agree on the admissibility question, but there are other trial issues including what's the way to communicate here? The discussion here yesterday about -- well, I don't want to say what it was about, because I risk being wrong. But whatever it was, it included communicating some of these matters to those who aren't part of the secret society or secret societies, of which there are several at the table.

JUSTICE ABRAHAMSON: It seems to me that what this symposium will have to do is deal with broader issues and lay out the broader issues and narrow issues under that, as well as perhaps some that some would classify as everyday, more practical issues, such as the investigation trial and postconviction, and how you do it, I don't know but somehow a balance between the two.

What about the concept in terms of database and privacy that we've always referred to here in that you've got all this medical evidence out -- I don't mean evidence, but medical information out there?

MR. SMITH: One of the things that would be useful to do in such a setting would be the place the privacy concerns that arise around the forensic use of DNA and the database issues for us in the context where they're properly placed, which is where's my DNA today anyway and questions like that.

I'd like to hear that. We don't have testimony here about that, although you can read. People are writing about that stuff. I'd like to see a third of a conference like this devoted to that. I think others in my working group would too.

MR. THOMA: I agree. I think the two topics that are most at the forefront and visible in the work of this commission have been the issues of privacy and databasing as well as postconviction relief.

MR. SMITH: And the jurisdiction is too limited here to deal with that, for the very reason that the greatest threats and the greater data is out there in other systems as it is.

JUSTICE ABRAHAMSON: And dealing with all of us, even if we're not convicted or arrested.

MR. CLARKE: I think that's entirely part of the whole databasing question, as presented to this commission by the attorney general.

JUSTICE ABRAHAMSON: That's a great title, Where's my DNA anyway?

MR. SMITH: You don't want to know.

JUDGE REINSTEIN: What about some kind of discussion comparing what goes on in Great Britain with --

JUSTICE ABRAHAMSON: Comparative law.

JUDGE REINSTEIN: Yes. What the results have been there and is that a forerunner to what we could have.

JUSTICE ABRAHAMSON: That would be a good session, comparative law in Britain and some of the Scandinavian countries too, and Canada.

MR. SANDERS: So I just want to see you get 200 lawyers together and accomplish anything in two days.

(General laughter.)

JUSTICE ABRAHAMSON: Well, we'll have others. I think we may have some medical practitioners and law enforcement officers, so they'll keep us on track.

MR. SMITH: And that's my report.

JUSTICE ABRAHAMSON: Thanks.

DR. CROW: Is it in order to commend someone for a report?

MR. SMITH: I have to ask Chris whether that was my report or not. I don't know.

JUSTICE ABRAHAMSON: Chris and I have talked to several people among the commission, and we haven't talked to several also in terms of having a steering committee on this conference, and Michael Smith and David Kaye should be on the steering committee. I haven't talked to either one of them, but since it comes out of their working group -- are you willing?

MR. THOMA: And it's my working group, too.

JUSTICE ABRAHAMSON: All right. Good. And I talked to Jim Wooley yesterday and he agreed, and we thought we should have our ethicist, Phil Reilly, but we haven't talked to him. He's in Cambridge too, so that would be good, and Chris Asplen. Okay.

Anyone else here would like to be on that working group? Can we call on you all? Do we have a prosecutor? Does Wooley fit that --

MR. ASPLEN: Well, he's an ex, but it's still in his heart.

JUSTICE ABRAHAMSON: Okay.

MR. ASPLEN: I'm comfortable that --

JUSTICE ABRAHAMSON: And defense. Okay. We included Barry. We haven't talked to him either.

JUDGE REINSTEIN: If you need me, I'll do it.

JUSTICE ABRAHAMSON: Okay. In case we need a judge, let's put down Ron.

MR. ASPLEN: What we'll do is we'll get in touch with you and let you know --

JUSTICE ABRAHAMSON: What the lay of the land is.

MR. ASPLEN: -- and the Kennedy School will also put together a number of individuals. And we'll try to communicate as much as we can via e-mail and telephone, but there probably will be a trip or two required, either to Cambridge or to Washington, but hopefully not many.

JUSTICE ABRAHAMSON: And let the Kennedy School -- I'm just assuming that it will be a broader public policy kind of concept, and that's good.

MR. ASPLEN: That's what we want, I think.

JUSTICE ABRAHAMSON: Good. Anything else on this that we should discuss? Michael, Chris, anyone else?

(No response.)

JUSTICE ABRAHAMSON: Okay. We are on our way to a symposium in November, we hope. We haven't really looked at anything else other than the Kennedy School. Right?

MR. ASPLEN: Correct. We went there first and it seems to be a --

JUSTICE ABRAHAMSON: Okay. A good possibility? All right.

MR. SMITH: If that doesn't work out, you can always --

JUSTICE ABRAHAMSON: Pardon me?

MR. SMITH: I said if that doesn't work out you can always use the University of Wisconsin.

JUSTICE ABRAHAMSON: In the winter? Let us see how hearty you all are, and we are too, although I don't know that Boston's very much better in terms of weather.

Well, let's break, and we'll come back -- it's 10:30 approximately. Why don't we come back about 10:50 and we'll start on Paul, and then I'm hoping we can continue along and maybe leave earlier. It's going to apparently snow in Chicago this afternoon, for those of you who have to get out of here. So, 10:50. Okay?

(Whereupon, a short recess was taken.)

Laboratory Funding Working Group Report

Dr. Paul Ferrara

Proposed Federal Legislation

JUSTICE ABRAHAMSON: We are going to reconvene. Paul Ferrara will talk about the Laboratory Funding Working Group and proposed federal legislation. We then have a lunch, and Timothy Schellberg will give us a legislative update. And we're going to try and keep pushing the agenda forward, that is we'll take less time, and lunch will be a little earlier because we'll try and beat the snow out of Chicago.

So those of you who have very late flights might try and get earlier flights. The snow is expected later in the afternoon, and it's supposed to be light flurries. That's the best we can tell you. If you've got a five o'clock plane, we've been advised you should leave 3:30 to make that plane.

Okay. Now, Paul.

DR. FERRARA: Thank you, Madame Chair.

The Laboratory Funding Working Group that I chair has actually not met since the last full commission meeting. However, what I'd like to do is report on at least one important activity of myself and other members of that working group.

Specifically, on March 23 of this year, I and several members of the subcommittee and members of the commission received an invitation from the chairman of the House Judiciary Committee, Henry Hyde, to testify before the Crime Subcommittee of his full committee, which was considering three pieces of legislation dealing directly with the issue of DNA testing and DNA funding.

Bill McCullum is the chair of that subcommittee. Senator Bobby Scott from Virginia is the ranking minority member. The three bills that we spoke to were House Resolutions 2810, 3087, and 3375. These were bills that were introduced by Peter Visclosky, Anthony Weiner from New

York, and Representative Gilman and Patrick Kennedy of Rhode Island.

None of these three bills are the Forensic Science Laboratory Improvement Act bill, which is HR 2340, although I think it's important to point out that many members who addressed the subcommittee did refer to the Forensic Science Laboratory Improvement Act. Now, all three bills share some commonality and some differences.

Speaking to the bill were first the patrons of those bills. They also had written documents of support from Governor Pataki and the director of the FBI laboratory, assistant director of the FBI, Donald Kerr. Those providing direct testimony included myself, Dave Coffman, Mike Sheppo -- Mike representing not only the experiences and interest of the State of Illinois, but also representing the American Society of Crime Laboratory Directors. David Boyd presented testimony on our panel, as did Barry Steinhardt from the ACLU, and lastly, a representative of the Innocence Project.

Now, these bills -- for example HR 3375 -- and I think Tim Schellberg will be presenting probably much better information with respect to some of these bills, but these bills include -- like 3375 included the $30

million over a two-year period that is the amount of the recommendation that we made with respect to the reduction of DNA convicted offender samples. It also provided almost $50 million for the reduction of DNA backlog cases, a $6.6 million figure for the establishment of a convicted offender database made up of those convicted of federal crimes and the District of Columbia, and $2.8 million for the development of a missing children DNA data bank.

That almost 50 million over two years for the case working laboratories included also the FBI laboratory, and also included in the District of Columbia and federal prisoners also military violent offenders.

Now, the bills vary somewhat in who they include any earmarks, but fundamentally all three bills cover much the same issues that we have been discussing in this commission, money to reduce the convicted offender database and also money to address the reduction of case work backlogs, which of course continue to plague laboratories throughout the United States.

I thought what might be somewhat informative would be to describe in general the support of the laboratory people that were testifying was favored -- the House Resolution 3375, but also went on to say that a more comprehensive Forensic Science Laboratory Improvement Act, 2340, really was a broader approach and covered other areas other than the DNA analysis, but also included them.

Now, with respect to the presentation made by Barry Steinhardt of the ACLU -- and I have copies of the written statements that each of these individuals had made. I can make them available to all the commission members should you be interested. It's quite a few pages. With respect to the summary of the ACLU's opinion, that can be distilled down to three areas.

One, there should be a procedure established for destroying the physical sample used in DNA testing, an issue that of course we've discussed at some length. It's on thing for the government to permanently store a genetic fingerprint. It is altogether different for the government to permanently retain the biological samples which can be used for future genetic testing.

Second point, only persons convicted of serious violent felonies should have their DNA entered into CODIS. While we understand the federal government's desire to help the states address their DNA backlogs, the government should only include test results from persons who have been convicted of serious violent felonies and where biological evidence could be relevant.

And thirdly and lastly, states should provide criminal defendants with access to DNA testing to establish their innocence.

Aside from the dissenting opinions or the opinions expressed by the ACLU, the rest of the members of the panel, with the exception of the representative of the Innocence Project, which had their own spin, the members were -- the members of the forensic science laboratories -- of course David Boyd, statements from Don Kerr, Steve Niezgoda, Dwight Adams from the FBI, were all very supportive of these three pieces of legislation.

Now, my observation in this was that the subcommittee is struggling with having, in their case, at

least three bills, all more or less aimed at the funding for reduction of DNA backlogs. And they were very supportive, although somewhat confused by the variety, to say nothing of throwing into the mix other legislation. I think Tim will have more information with respect to those other pieces of legislation.

When I spoke to the chief counsel for the committee, it was clear that the committee was very conscious and aware of the benefits of the DNA technology and the use of DNA data bank, and so I tended to concentrate our efforts and my remarks to the issue of what happens -- what are the failures of DNA technology and DNA data banks, and related specifically anecdotes with respect to individuals whose freedom -- who would remain jailed in Virginia, for example, for a period of six months until DNA results could demonstrate their innocence, as they contended right from the beginning, and for reasons of not being able to make bail served six months in prison strictly as a result of a delay of DNA testing.

And compared to case of Jemma Saunders that was a relatively small loss of freedom compared to the loss of Jemma Saunders' life, which is directly attributable to a DNA backlog in Virginia, where here -- the perpetrator of her crime could have been identified before -- the individual committed her murder was released because DNA results were not available.

The committee seemed very -- when put in those terms, that subcommittee really seemed to pay attention. They knew what the data banks could do. There was a lot of discussion with respect to the privacy issues, the retention of samples to the privacy concerns, and to how the data banks work.

The committee took testimony for a period of over four hours, and after the formal presentation several members of the committee including Representative Bobby Scott had long discussions with those of us who were present, trying to really get a grasp on this. Now, at this point I have not heard anything further from the subcommittee with respect to the next step of those actions.

Suffice it to say that here was an opportunity for several members of the scientific community and the National Institute of Justice and FBI to present some compelling reasons why funding for the reduction of DNA backlogs of convicted felon samples and case work were particularly critical.

One of the questions we had difficulty in answering -- and I think all three of the laboratory people did -- is we were asked point-blank what did we feel about the worthwhileness, the efficacy of a database of missing children, and we were all somewhat -- had some difficulty in trying to address that particular issue, because in practice none of the laboratories are really developing a database of missing children.

And we pointed out programs such as that of John Walsh on America's Most Wanted to encourage parents to get and retain blood samples of their children, and we pointed out that in the identification of missing children, usually laboratories would depend upon getting samples from -- that are representative of that child from their biological parents. A small portion of that total, roughly $100 million, had to do with the development of missing children.

The subcommittee seemed very impressed with -- the testimony provided seemed very supportive, but no action was taken at that point. And with that, that's a brief summary of the activities of myself, the working group, and that of other individuals associated with this commission.

And with that, I'll try to address any question.

JUSTICE ABRAHAMSON: Jan?

MS. BASHINSKI: Paul, can you give us any sense of the substance of the discussion about the destruction of samples and where you felt that was headed?

DR. FERRARA: I related to the subcommittee the very discussions that we had had here with the commission, and that the commission had discussed this issue, and under the -- through the request of Attorney General Janet Reno this commission had been specifically asked to discuss this and had not reached consensus except to say that we would like to defer any addressing that particular issue for a period of five years.

They understood and heard the same arguments with respect to the reasons why you retain the samples, and they also heard from the ACLU the ACLU's concerns with respect to the retention of the samples.

JUSTICE ABRAHAMSON: I'm sorry we didn't talk to Art about that yesterday. I don't know what the DAB ultimately did on the recommendation on retention.

DR. FERRARA: DAB did nothing. I think actually the DAB taken under advisement the recommendations made by this commission, and I believe remain moot on that point.

JUSTICE ABRAHAMSON: Are there any other questions?

(No response.)

JUSTICE ABRAHAMSON: Paul, Do you view that the group has completed its business? Will it have more in July or in November?

DR. FERRARA: Our group -- the working group which of course approached the issue of the reduction and the costs associated with the reduction of the convicted offender samples was able to come up with some pretty good numbers and estimates. The group continues to struggle with how we would ever develop a cost associated with the reduction of crime scene backlogs, given the infinitely more complex nature.

It is interesting to note that many members of that subcommittee questioned how these figures seemed extraordinarily low given our estimates of a hundred-fold increase in -- an estimated hundred-fold increase in the cost of a crime scene case vis a vis a convicted felon case. They also questioned the $30 million for the reduction of the convicted offender, when we -- hearing estimates of some million samples being backlogged of the convicted offender samples.

And with respect to the reduction of crime scene samples, they quickly recognized that they were dealing with a dollar figure that was much greater than they would even want to consider. That's when we got into the Forensic Science Laboratory Improvement Act, which I believe is something in the area of $850 million over a five-year period. But this committee was not -- it was not their intention to address that bill. It's just that several members of the panel who presented information tried to point out that that was a much more comprehensive, albeit extremely expensive approach.

The subcommittee was very supportive of any and all of these other three pieces of legislation, all of which realistically have a better chance of success than the Forensic Science Laboratory Improvement Act.

DR. DAVIS: Paul, is there any press interest in those proceedings?

DR. FERRARA: What was -- very little. I was stopped in the hallway by -- I didn't realize that a local Richmond radio station had a representative who follows legislation, and that was the only member of the media I saw.

JUSTICE ABRAHAMSON: Woody?

MR. CLARKE: There are -- as another member of the working group, and I think -- I don't know, Paul, if you agree with me or not, that we might need a little more direction on. One is a relatively -- well, it's a minor issue compared to the other, and that was the whole area of sample collection and whether or not we were going to seek a pilot study, so that's certainly one aspect.

DR. FERRARA: Right. Of the two major functions I think the working group wanted to be able to address was what are the costs associated with the reduction of the crime scene backlog, which as I've said, is a monumental task and one that could be probably as easily arrived at by some order of magnitude. And as Woody just pointed out, the other intention of our working group was to try to develop a model for sample -- convicted offender sample collection.

MR. CLARKE: So I think we might need a little direction on that. And the other is with regard to the backlog, I had at least -- and, Paul, tell me if you agree -- the sense that we had a pretty good handle on a per-case cost estimate. Then the only question became could we extrapolate that number into something that could end up ultimately in a recommendation? I think we're almost all the way there.

I think we have a good per-case, per-sample cost estimate. Then it's simply a question of multiplying. Of course, figuring what to multiply it by is certainly not easy to grasp, but I think it would be helpful to provide an estimate, and that calculation is most of the way there.

DR. FERRARA: Woody's right. We can -- in fact everyone if they had to guess would look at something in the area of maybe $5,000 as opposed to $50 for a typical analysis of a crime scene -- of all of the evidence associated with a crime scene. What the working group does not have is a good accurate estimate of the total number of cases that are out there, crime scene cases that would have to be the multiplier by the $5,000.

MR. ASPLEN: And that's a question that gets asked time and time again, and it's hard -- by legislators and also by way of updated commission staff work. We met with Representative Weiner the day before the testimony, and it's hard to explain why that number is almost an impossible number to get your hands around, and it's a constant problem.

DR. FERRARA: The survey information that we'd had from various groups really doesn't tell the whole picture: the participation in the survey, the completeness, the source of the data, et cetera.

JUSTICE ABRAHAMSON: The reason I asked you the question about the status and what else had to be reported is I'm looking ahead to November when we will give to the attorney general a final report, and as

we see that final report, it would have an introduction that would look at the broad picture and explain the workings of the commission, and then have attached to it the various reports of the working groups as well as other information we may have gotten and materials we're putting out to the public that are not necessarily part of the report but we think the

public ought to see, and reports to the commission.

I think that's what we're aiming for, so I think that between now and probably July each of the working groups should put into final form that which they'd like to see as part of the final report, and then the appendices and et cetera that should be part of it.

DR. FERRARA: And if nothing else, we can do as the working group is present a model sample collection program, of course review the work we've done with respect to the convicted offender backlog sample, and also provide a good description of why the issue related to coming up with the cost of all of the crime scene evidence is so problematic, and perhaps at least list the vagaries and elements that affect that.

I had a laboratory director call me Thursday from a laboratory where her chief of police had directed that they would do every piece of evidence in a homicide case using DNA analysis and that is all, so that the various issues with respect to how laboratories streamline their work, deal with investigators and prosecutors in an attempt to develop the most probative pieces of evidence; the practical aspects of what you do and what you don't, even if we can't come up with a dollar figure to eliminate the backlog of case work.

And we could also describe the efforts that some cities and states are taking with respect to even

outsourcing certain crime scene samples or rape kits, which I know I have some misgivings about, and I think my counterparts do. But it is a reality and we have to address it.

JUSTICE ABRAHAMSON: I think that Chris is going to be in contact with all the group leaders and their reporters so that we move from here to final reports that might be the subject of the July meeting, as well as other things. Jan?

MS. BASHINSKI: This is really more of a question for you, Paul. What kind of discussions has your group had about the practical problems with out infrastructure and our ability to deal with this huge unmet work load? You talked about needing funding for training of DNA analysts. I've been asked to develop cost estimates for things like how much would it cost to outsource these unsolved cases in California, and of course one of my immediate responses is I'm not sure that's the best way to handle it.

And then the second response is, even if you did outsource, what is the collective status of the infrastructure, public and private labs, capable of dealing with that level of work load. Did you talk about that?

DR. FERRARA: Yes, we did, Jan, and quite frankly, ended up throwing our hands up in the air. Within the time frame and the context of the issues, when we started to try to enumerate all of the factors that contribute to the cost, not just the analysis -- not just the DNA analysis, which represents a relatively small piece of the total cost of processing crime scene evidence, but the collection of the evidence, the

costs associated with building laboratory facilities, training personnel, quality assurance costs, and all of the indirect costs, we gave up in exasperation saying

how in the heck can we put a dollar figure on all of these.

And that's when we came up with the suggestion of at least let's lay out some of these factors that the lay person reading this might not -- well, why does it cost $5,000 to do a crime scene case, and what is a case, and what are the average number of samples and what's the difference between a B&E case and a rape when you're talking about mixtures and differential extractions and all of these really complex issues. So there is really no way to characterize a typical case.

We focus on rape kits, for example, which is excellent and that provides of course -- represents a large portion of the cases, but comparison between a rape kit and all of the physical evidence and issues associated with a violent crime, and the discussions with prosecutors, defense attorneys, what evidence should be analyzed?

We're facing in Virginia several cases of national magnitude where the national media get involved and say, So and so's been convicted in Virginia and Virginia won't analyze the DNA evidence. Well, what they fail to say is that vaginal swabs or oral-anal swabs were tested and found to be consisted with the suspect, so that by convention our unwillingness to examine every stain on bed clothing is -- the representation is they're not analyzing all the evidence or potentially exculpatory evidence, when in fact you have to try to, from a practical standpoint, arrive at some items of evidence that are most probative.

But invariably, if you don't analyze it all someone will come along and say, Well, if you did, could that be useful? Now the question becomes how dispositive -- if that's the right term -- is the analysis of 17 stains and perspiration and other stains on a bed clothing vis a vis the vaginal swab. Those are practical issues.

DR. DAVIS: Paul, if I were a legislator and somebody was presenting this to me with all of this vast amount of money and mushy stuff, my only approach would be to request that some studies or some projects -- pilot projects be developed where very clear questions could be addressed and an agency or a jurisdiction picked out, funded, and then the results analyzed after a period of time, because it looks to me that if we try to just dump money into this bottomless bucket with all these unanswered questions, it would be a waste and a disservice.

It would be nice to find out within a single set jurisdiction just how they did develop all these things, and I think the answers are going to lie there.

DR. FERRARA: One of the things we did discuss was to try to look at the amount of money, for example, that had been spent by state, such as Illinois, Virginia, and Florida in the last ten years, and try to point out the huge costs associated with those particular states in what they've done to put their program together. But when I told Representative Bobby Scott that we spent $9 million in Virginia for the convicted offender database, he said, I don't understand. Why would the entire US only need 30 million?

MR. THOMA: Paul, one question. What about owed samples, was that a topic of discussion at all, because I've spoken locally with parole and probation both up in Mendocino County, and they're at a loss -- they're not even familiar with our statute that made it mandatory in '96 and then got beefed up in '98. Is that even out there on the table --

DR. FERRARA: Well, that's kind of the thing that we -- actually, we haven't acted on it -- we've done some preliminary work, but Woody was going to, working with our working group, try to address those sample collection issues. How to address them if not quantitatively in terms of the numbers, the various difficulties that different states are facing with respect to the collection of those owed samples. And really, this gets to the funding needs for corrections and sheriffs.

In Virginia, I've been very fortunate for eleven years. Corrections officials and sheriffs have been

collecting samples from those in jails and in prisons without one extra red cent of funding at all, and with a state law. But again, while that's been successful in Virginia, it's been a disaster in other states.

MS. BASHINSKI: A short comment, Jeff, because you can call my office and I can give you all the information, because we are reimbursing local agencies $35 apiece for every sample that they collect now in an attempt to encourage them to do that.

MR. THOMA: Yes.

MS. BASHINSKI: So without that kind of incentive, it's very difficult to get people to do it.

MR. THOMA: I'm sure you have, but I'll pass the word along --

MR. CLARKE: We identified this problem long ago. It's not just 50 states --

MR. THOMA: Oh, no.

MR. CLARKE: -- it's every jurisdiction within those states and it's multiple agencies within those jurisdictions.

MR. THOMA: Right.

DR. FERRARA: That's right. Ironically, we've been struggling in Virginia as of late because we can take all felons. And part of that rationale, at least one factor, was the fact that corrections -- and the sheriffs said, It's far easier for us to take samples from every convicted felon rather than try to ascertain what charge -- what that person was convicted of.

The other difficulty we've had now is that despite the fact that we've made modifications in a local inmate data system to put a check when somebody is sampled, currently, this year, of the approximately 18,000 samples we receive a year, almost 50 percent have already been sampled. And obviously we need to work with corrections and with the sheriffs -- actually, the sheriffs now are using this local inmate data system. The state correctional people -- hey, it's easier for us to pull that second sample than it is to check a record.

So now I'm dealing with almost 50 percent duplicates, which if I don't ferret them out and send them to a contract laboratory I'm wasting a lot of state money.

JUSTICE ABRAHAMSON: Any other discussion?

MR. ASPLEN: I would just add, again, by way of an update, that NIJ has officially put out the solicitation on the CODIS funding, thanks to the efforts of Dr. Forman and John Paul Jones of NIJ. They worked very hard at putting something together that we hope will be effective.

We were somewhat constrained by statutory language in terms of the $15 million for offender backlog. We're working with folks to change some of the statutory language, should we get another round of $15 million to better enable us to be more efficient in the allocation of that money. I don't want to spend a whole lot of time on it, but so you know. We're on the move with that.

DR. FERRARA: And the deadline for the application is May 15, 30 days from now.

MR. ASPLEN: We're pushing very hard to move very quickly on --

DR. FERRARA: As well we should. I don't disagree. I think it's critical we demonstrate and impact as soon as possible.

MR. SMITH: Is there -- maybe I've lost track of this, but earlier we talked about what the methods were required by statute for the sampling of convicted offenders, and I'm just wondering, in your states anyway, is it two blood samples and 25 hairs and all that kind of stuff, or do we have a standard increasingly easy way of doing this? Is anything happening around the country on this?

DR. FERRARA: There is considerable variation throughout the country with respect to the nature and type of samples that are collected. We are still collecting venous blood samples in Virginia. Part of that is the fact that a venous blood sample tube is drawn by each convicted felon in that classification, so a second tube is relatively easy.

Secondly, while it's a more invasive, and you have all the difficulties associated with --

MR. SMITH: Classification. That's only then for those who are going through into your prison system.

DR. FERRARA: Into the prisons and into the jails.

MR. SMITH: For probationers and parolees, you don't have that opportunity.

DR. FERRARA: We don't have to. We get them when they go in, and have been for ten years.

MS. BASHINSKI: We're drawing blood from the probationers and parolees, and technically at the moment we're more comfortable with knowing we'll get --

MR. SMITH: Technically you're more comfortable?

MS. BASHINSKI: No. The reason that blood as opposed to saliva is that our number of samples that we would have to reanalyze is a lot less when we use a blood sample, and so we have -- that's a technical reason for using blood rather than saliva.

I think we do need to develop alternative collection methods in order for this owed samples to be most effectively collected.

MR. SMITH: It seems pretty obvious.

MS. BASHINSKI: And that's a very important issues.

MR. CLARKE: I think what you mean also, it's easy to deal with -- or easier to deal with the individuals who go to prison or stay in local custody. It's the ones who walk out the door are the difficult ones --

MR. SMITH: It's about 50 percent in a lot of jurisdictions.

MR. CLARKE: Pardon?

MR. SMITH: It's about 50 percent of felons in a lot of jurisdictions.

MR. CLARKE: Depending on the statute and the individual state, yes. If you've got all felons, like Paul, then you're going to have a lot of people going out the door.

MR. SMITH: I'm just wondering if we as a commission are doing anything on that particular subject, and if so, is it your group that's doing that?

DR. FERRARA: I think that would be the intention of the report, the second task our working group had intended to develop, and that was a model or the good and the bad and ugly of sample collection issues.

MR. CLARKE: Because we've heard, for instance, descriptions of technologies as simple as putting your finger into a laser lancet, I believe it was, that automatically deposits the sample on a card.

MR. SMITH: That was a year ago. By now it ought to be --

DR. FERRARA: I might point out that I wanted to go to a buccal swab for a number of years, but yet I have not yet been able to develop a kit that, as Jan indicated, one, you have the issue of retests and I think we can handle that. What concerns me more is the integrity of the sample.

With saliva samples, the opportunity for some interfering substance, exchange of biological fluids among persons who are going to be collected. We've noted considerable efforts in Virginia among the prison population to somehow avoid getting that sample. But I agree. There's got to be a better way to do it that would certainly be less invasive, but until I'm really comfortable with something we'll probably remain with the blood sample.

The laser lancet that Woody refers to is nice because there's no direct contact between the laser and the individual, so contamination issues, cross-over -- the amount of sample is probably sufficient. But $2,500 a unit multiplied by the number of correctional facilities and sheriffs offices just in Virginia, that gets to be cost prohibitive. Even a buccal swab sample kit would probably run four or five bucks apiece, where right now I'm not -- we're not paying anything to corrections. Of course, they're buying those extra vacutainer tubes.

And then the transportation --

MR. CLARKE: $2,800 or $28,000?

DR. FERRARA: $2,800 I believe for the laser lancet.

JUSTICE ABRAHAMSON: Something like that. Norm and then Ron.

MR. GAHN: Just two things. I know that -- we do buccal swabs in Wisconsin, and of course -- and I can tell you it's so much easier for probation and parole when you do a buccal swab, but even now in Wisconsin we had a kit which had that coarse brush at the end. That was for the RFLP. I'm told now that because of the PCR, our crime lab is just going to a Q-tip, so the cost of that is even less than what it was.

So my camp might be able to have some information -- our experiences and just what type of extractions we're getting, because those are all outsourced and how many have to be redone. I know some do, but it seems like it's awfully effective for us.

DR. FERRARA: Yes. Even -- you have to even take into account -- when you determine what kind of sample you want to collect from convicted offenders, you have to keep in mind the analytical process involved. In other words, to take the full advantage of robotics units, for example, for aliquotting or extraction, what works best?

Right now we're used to punching an FTA card circle, and that gives -- makes it pretty good for running a large number of samples. And a saliva kit -- you can't even see for sure exactly where the sample is, what's the loading, et cetera, et cetera.

MS. BASHINSKI: And that's been our biggest problem, because we have a very highly automated extraction processes. It's not not doable, but it isn't trivial either.

JUSTICE ABRAHAMSON: Ron?

JUDGE REINSTEIN: On the laser lancet, if you had a large jurisdiction for example of adult probation office where you could make everybody after leaving court go to a particular location where they essentially sign up for probation. Would that be workable? I understand that in local sheriff's offices and what not, but if you had hundreds of people going through --

MR. SMITH: 700 would cover the cost of the machine.

JUDGE REINSTEIN: I'm sorry?

MR. SMITH: 700 would -- if you could avoid the $4 cost of the kit, you'd only need 700 lancet experiences to have covered your costs.

JUDGE REINSTEIN: Well, what's the downside for the labs with the lancet as far as the card?

MS. BASHINSKI: I don't know -- I haven't investigated that particular piece of equipment, but you would be able to use that kind of a specimen.

We have a unique problem because we also have to collect a palm print and fingerprints at the time that the blood sample is given. The fingerprint is important to us because it identifies the sample. The palm print is important because our law requires it. We're trying to get a palm print file.

That begins to complicate it, because now you're dealing with having to be in a facility where somebody knows how to take that type of a fingerprint, so it really isn't the blood draw that's causing the problem for us. It's the complication of having to collect all these other things at

the same time. And so our people do go to a central place where they have a blood draw.

JUDGE REINSTEIN: Would the card create a problem, like you were saying with robotics, as far as outsourcing, as opposed to having a blood sample?

MS. BASHINSKI: No, because you'd have -- a lot of people can work with stains on a robotic station.

JUDGE REINSTEIN: Right.

MS. BASHINSKI: Bloodstains -- blood as opposed to saliva.

DR. FERRARA: Right. It's just simply a -- whatever methodology you are employing in the laboratory, you want to design your kit to make it amendable. But none of these issues are, as Jan said, are insurmountable. I'm still looking at developing a less invasive, simpler means of collecting samples, and in doing so, when we make that determination we'll also be looking at how will this affect the analytical side of the equation?

For example, right now we take blood samples and aliquot them on what I refer to as FTA cards. For saliva or buccal swabs or cotton swabs, the cards would then have to be somehow provided to all of the places where samples are being collected, so you lose control of that card. And then collection of the right information and then the transport -- actually, I don't think you could use FTA cards in some of those situations. You'd need to use something like -- because the FTA really binds up the DNA and affects your extraction methodology.

MR. SMITH: I'll bet there's a piece of writing that tracks the various jurisdictions experience with this today. Is there some place we can go and find out about Wisconsin's experience or -- it would seem to me that it would be useful to have such a thing in this country of federal experimentation and all that.

MR. CLARKE: It's also an institutional problem and in begins in the court. By court, I mean in the justice system. A judge, for instance, has to order this, at least in our jurisdiction. Many judges don't realize some crimes quality, some don't, and it's not a condition of probation. It doesn't really fall on our probation departments. It's a required by law statute.

And so if the prosecutor doesn't bring it up and the judge doesn't bring it up, that defendant walks out the door convicted of a qualifying crime, and nobody knows any better. Sometimes the jails pick it up or the Department of Corrections, but if they're a walk out the door type, there they go. That's an owed sample that'll probably never be collected.

JUSTICE ABRAHAMSON: This is something that you can do judicial education in, if it's up to the judge.

MR. CLARKE: Absolutely.

JUSTICE ABRAHAMSON: So what you have to do is call your -- California has a major office of judicial education and get it out on the agenda, and then you do it every year so you remind them.

MR. CLARKE: And that it helps improve --

JUSTICE ABRAHAMSON: Sure.

MR. CLARKE: -- it certainly increases the success rate. There's no question about that. And we try to do it at the prosecution level as well to ensure that for instance all defendants -- and that's a large group in California convicted of -- I'm not sure how it's called nationwide, but assault with a deadly weapon. That's a qualifying crime in our state, and there are thousands of individuals convicted of that crime every year.

And I'll bet the percentage who are actually ordered to go give a sample is less than half. That's just a guess.

JUSTICE ABRAHAMSON: Right. And the prosecutor can say to the judge, would you please order it?

MR. CLARKE: Exactly.

JUSTICE ABRAHAMSON: You've got a double covering there, as well as -- do you have forms -- unified forms in the various state, so if you had a uniform form, it might have it on it.

MR. CLARKE: It helps as a reminder.

JUSTICE ABRAHAMSON: Yes. Right. The bench book. Any kind of material like that. The bench book is a good one.

But, Michael, you raise a good issue.

MR. SMITH: If Barry were here he'd do this quite eloquently, but to me the idea that we focused all this attention on generating the capacity in labs to process stuff like this, and we haven't devoted as a country or a commission enough time to ordering our understanding and knowledge about what's necessary and best for doing it strikes me as too bad.

JUSTICE ABRAHAMSON: Is that a good symposium topic?

MR. SMITH: By November we should have solved this problem, at least with a report from somebody.

JUSTICE ABRAHAMSON: Okay.

MR. SMITH: -- that says what's going on and what's good.

JUSTICE ABRAHAMSON: Do we have enough information at the table?

DR. FERRARA: Woody said he'd take care of that. As part of that model system though, maybe where we surface all of the issues and what works and what doesn't.

In 1989 when we passed our statute it applied to all those incarcerated on July 1, 1989, so we've never had to deal with probationers or parolees. Clearly that's the place to take the samples, at intake, then you eliminate all the other problems. But the fact is that other states -- California doesn't do it that way, so now they've got to struggle with how do we get them from probationers and parolees.

MS. BASHINSKI: Well, we do now. We didn't for many years, so we have this backlog of people that are out there.

DR. FERRARA: Fourth Circuit US Court of Appeals has ruled that you cannot -- refusal of somebody to provide a sample cannot affect their probation or parole.

MR. GAHN: It's not a revokable act.

DR. FERRARA: Yes. Revocation.

JUSTICE ABRAHAMSON: Well, Paul, maybe your working group can take an attack on this, and you obviously are not going to be able to do -- maybe you will -- a 50 state study, but you can at least do some of the states that are represented at the table and indicate what's happening and suggestions for a pilot -- for various pilot programs.

DR. FERRARA: We will do just that, Madame Chairman.

JUSTICE ABRAHAMSON: Okay. All right. Robin?

MS. WILSON: I just wanted to state for the record, for the federal legislation, all of the bills of course are available online at the House of Representatives home page, which is www.house.gov, and then Thomas is the Library of Congress search engine, and you can just scroll down to Thomas, click on it, and enter the bill number. And all of the testimony is online, and you can also access the Federal Register because there is oral testimony and there's written testimony, so a lot of times when the appropriations process happens they refer to the Federal Register and review the written testimony that was submitted to get information on the appropriations, just for information.

And also the solicitation is online as well, NIJ's website.

JUSTICE ABRAHAMSON: Thank you, Robin.

I'm going to now -- we'll break for lunch. We'd like you to get your lunch, come back here if you will, and we're going to do the statute. We've got additions and changes on the computer and we'll show them, and I wanted to thank Paul for making a very special effort to get here, and appreciate that.

Did you want to say something else?

DR. FERRARA: No.

JUSTICE ABRAHAMSON: Okay.

MS. WILSON: I wanted to just amend -- not the Federal Register, the Congressional Record. Lucy reminded me it's the Congressional Record that the written testimony is submitted to, not the Federal Register.

MR. ASPLEN: We do need to move rather expeditiously with lunch and such, because we need to get our speaker out of here. He's got an early flight, and we need to vote on the postconviction model statute before any other commissioners leave. So we do need to move quickly.

JUSTICE ABRAHAMSON: Let's go.

(Whereupon, a short recess was taken.)

Forensic DNA Legislation 2000

JUSTICE ABRAHAMSON: All right. If I can direct your attention to the screen? We have the model statute and we've inserted the changes we made yesterday, and Ron, take it away.

Postconviction Model Statute

Continued Discussion

JUDGE REINSTEIN: Well, there's a couple of things that came up. One is on paragraph one in request for testing. We talked about the problem yesterday regarding institute a proceeding under this act, and we talked about instead putting file a petition requesting, rather than waiting until the proceeding so that the court could act on it summarily if need be. I think the use of the word proceeding was the hangup there.

I don't know how people feel about whether we should put file a petition under this act or just whether that's surplus and you don't need that.

And then at the end after the word conviction, we talked about adding, And that may contain biological evidence. We had a pretty good consensus on that although it is a very long sentence.

JUSTICE ABRAHAMSON: Does anyone object to including those words? I think that that's what people wanted. Okay.

So the next change was --

JUDGE REINSTEIN: In B. Well, first the original had an a and a b under number one, and you remember we had some discussion of whether those were redundant. Woody was suggesting whether a and b should be reversed. There was a question as to whether we should have an and or an or.

And then this morning Dr. Crow talked to me about -- and it's not up there now because this is with the changes -- where we would have had the wording, If the results of present-day DNA testing had been available at the trial, but instead Woody came up with some language to combine A and B, and it says -- you see it there -- A reasonable probability exists that the testing of the evidence will produce DNA results which would have rendered the Petitioner's verdict or sentence more favorable if the results have been available at the trial leading to the judgment of conviction.

And that eliminates having the and/or, the redundancy issue, but, Dr. Crow, will that answer the present-day issue, because it does come in later on too?

MR. THOMA: I think it takes care of the present-day issue. I think it takes care of the definition of exculpatory evidence. I think it covers every concern we've had.

JUSTICE ABRAHAMSON: Does anyone object to the new language?

(No response.)

JUSTICE ABRAHAMSON: Okay. Then that's all right. We'll take the next --

JUDGE REINSTEIN: The other one was that it's not really a change but it's something we did discuss yesterday, and that's at number four, C4, preservation order. We talked about, When a proceeding is instituted under this act, the court shall order that all evidence. There was an issue yesterday as to whether it should be a shall or a may.

And I know Jeff and I talked about that this morning, and we have had discussion in the past about courts that just don't enter the order.

MR. THOMA: I agree. You're characterizing our conversation exactly correct. Could I go back to B1 again and change -- ask to change one word? If the results had been available at the proceedings leading to the judgment of conviction as opposed to the trial, because certainly we can't limit ourselves strictly to cases in which a trial occurred.

There are a lot of circumstances in which somebody is looking at either walking out the door with a conviction or spending the rest of their life in prison and end up agreeing to walk out and still want that exoneration. So would that be satisfactory if we change it to, At the proceedings leading to the judgment of conviction as opposed to the trial, because I don't think we're trying to limit it to cases in which a trial occurred.

JUDGE REINSTEIN: I think in the postconviction report we talked the possibility of there being a plea proceeding that would still lead to a DNA exoneration.

JUSTICE ABRAHAMSON: What about the sentencing?

MR. THOMA: That would still be right --

JUSTICE ABRAHAMSON: Because a judgment of conviction would be all right? Okay. No problem.

JUDGE REINSTEIN: And then on that preservation order, Woody, I think you were discussing that yesterday, whether it should be a shall or a may.

MR. CLARKE: Right. I think the point that I was trying to make was that in the scenario that you see or any other judge may see where you want to reject a claim as frivolous, that I think there should not be a mandatory duty to preserve in at least those instances. A permissive order here would be more consistent with being able to weed out the frivolous claims.

MR. THOMA: Let me remind us of what Barry brought up at the last meeting. I think there are those agencies that might see a petition like this and may actually -- I know it's an incredible minority -- but may seek to destroy or limit access to evidence. While I agree the permissive should be with regard to inventory -- and we talked about language about inventory, and I don't even care whether that's in here or not, because I think a judge can do that on their own without it being in the statute.

I think we need it here that when somebody is rendering a petition pursuant to this act, that at least until such time -- and we're saying only during the pendency of the proceeding, and the judge obviously has the ultimate authority to dismiss the proceeding summarily if it doesn't meet criteria in their mind. It could be a very short time, but during the time that the petition is pending and it has not been dismissed, I think it should be mandatory.

MR. SMITH: But it's comprehensive as well, and the proceeding might be pending in that sense for quite a long time, and evidence no longer needs to be preserved if the evidence which is going to be used in the proceeding has been tested. So --

MR. THOMA: If the proceeding is still pending I think you still need to preserve the evidence, even if it has been tested.

MR. GAHN: But, Jeff, how is a police department -- if this comes to a court, say an inmate sends a petition to the court and the court finds this is frivolous, this isn't going anywhere, how is the police agency who may destroy it ever even going to know about it? I think what Woody's saying is correct.

Do you know what it means to preserve this evidence wherever it may be, whether it's in the court, whether -- this is very, very -- I have tracked down evidence for Barry Scheck that has taken days and days. Sometimes it can be weeks. And what I'm saying is that I don't know how an agency would even know about it if this comes to the judge and the judge rules it, but as long as the judge at some point -- there might be something to this. Now I'm issuing the order. I want this stuff preserved.

But if everyone that comes in, a preservation order comes, it's sometimes -- if you're looking back six, seven, eight -- it's a monumental task.

JUDGE REINSTEIN: Well, when we changed in the first paragraph, Eliminating institute of proceeding to just File a petition requesting, I don't regard the filing of the petition itself meaning that a proceeding has been instituted. A proceeding isn't really instituted until the court has a hearing and effect appoints counsel and the like, because I think you can have summary dismissal of the petition without a proceeding being held.

MR. CLARKE: It's like petitions for habeas corpus.

MR. THOMA: Right. If there's no order to show cause after the petition, then --

MR. GAHN: A point comes when the judge -- I don't want to have to have been too premature that upon just something coming in --

MR. THOMA: I think that's what Ron is intending that there be two different things. This is not just the petition having been presented --

MR. GAHN: Right.

MR. THOMA: -- but the proceedings having been instituted by the judge receiving the petition. They are two different things.

MR. CLARKE: Also, in looking at the comments that's attached to the statute, it appears to put preservation in the discretionary range, looking at page 3, in the middle, Title procedures at the pre-testing phase. In the comments now, not the statute. It talks about, Orders may have to be issued requesting the prosecution to locate evidence that could be subjected to DNA testing, and to preserve any evidence that is found.

So it sounds like in your discussions that it was to be permissive as well.

JUDGE REINSTEIN: It was, and that's one of the things that came up in Arizona when we were introducing the statute is how we could incorporate the comments into the legislation, and the decision was that we couldn't but we would put it in the legislative history.

MR. CLARKE: Comments -- there it is, right in the middle, Orders may have to be issued.

JUDGE REINSTEIN: When we talked about it, we didn't talk in terms of a proceeding being instituted. When a court gets a request, when a prosecuting office gets a request, when a defense office gets a request there's a lot of things that are going to go on before that as far as searching for the evidence and the like. And that once a defendant or defense counsel or something like the innocence project then files a petition on behalf of the defendant and it appears that there are some reasonable grounds for ordering the testing, that that would be in effect instituting the proceeding, as opposed to all the other preliminary work.

So you wouldn't necessarily order the preservation of the evidence until such time as that search occurred.

MR. THOMA: And that's why we changed that first paragraph to begin with from institute a proceeding to file a petition.

JUDGE REINSTEIN: I know what you mean, Norm. It can be taken both ways too, just like we talked about yesterday.

JUSTICE ABRAHAMSON: Structure shows only two parts. The structure of the statute is requests for testing, and the second part is introducing the result in a proceeding, so --

MR. SANDERS: In the spirit of what we're doing, don't we want to provide for close postconviction release, especially if the evidence is trustworthy, so why is it a big deal if we say shall instead of may? I don't understand.

Commission discussion on continued tracking of forensic DNA issues: As technology expands, how should legal, privacy, funding and research issues be addressed in the future?

JUSTICE ABRAHAMSON: What I hear -- and I was with you on I don't understand what the big deal is -- you issue the order. If it's so hard to find then they're not going to so easily destroy it, Norm, I would suppose, and if they are into a destruction week then when they get to that I assume they would check any evidence against the list of Do not destroy. But that may be very simplistic in terms of how evidence is really stored.

MR. CLARKE: That's also subject to verification in every agency --

JUSTICE ABRAHAMSON: Right. Sure. I understand that.

MR. GAHN: I guess the issue, having had a number of these and just looking for evidence, and it can be in so many different places, I don't think it makes a difference whether we say shall or may in the final analysis, but it's when that order is issued, at what point. I have no problem getting to a point of privacy concerns that are looming out there larger than just the things we're doing.

And there are groups out there that this stuff -- that I think call out for public discourse and public disclosure discourse and discussion.

MR. ASPLEN: Norm, are you talking about I guess two different propositions; one being should the Department of Justice be more aware of the implications of DNA and its uses and abuses, not from an investigative standpoint in the use of solving crimes but rather in those areas that may come under the jurisdiction of civil division violations? And that seems to me to be a brilliant observation that for two years we haven't really touched upon, but is something that most specifically she can do, to get her own people together to talk about that and be prepared.

And maybe we don't have the cases yet, but to be prepared for instances in which there may be civil rights violations based on that. But I think that's a different proposition than how do we continue to discuss these issues from a broad society standpoint so that we can have the input from all aspects of the system. But yours is one that I think that we can certainly come up with something on that we can work on also.

MR. SMITH: It's interesting. In the information -- the observation that in legislatures decisions about the forensic DNA stuff being made in a stew of political activity, much of it stimulated by DNA activity elsewhere. And I think that's increasingly true. I'd be surprised if the attorney general needed to be told that, but you may be right.

It seems to me there's an awful lot of activity in Congress. There's an awful lot of other places where DNA matters are coming for consideration that would be possibly Department of Justice matters. I don't see it as easily within our grasp to make recommendations about that besides because we haven't been studying it.

JUSTICE ABRAHAMSON: No. But I could see that the introduction to this final report would indicate that it's within -- forensic DNA is within a broader picture of DNA and privacy.

MR. SANDERS: It's a more realistic picture -- if you just showed her all the positives and didn't raise the red flag that the dark side is there, then would we be derelict? That's what I heard Norm say and I agree with him --

MR. GAHN: Yes.

MR. SANDERS: -- and I think we would be derelict in our duties if we didn't mention that.

DR. CROW: It seems to me very likely that forensic uses are going to be dwarfed by medical, especially medical, but other uses of DNA that are potentially very much invasive of privacy, and more obviously invasive of privacy.

MR. SMITH: One of the questions that -- not yet very effectively raised I guess by our working group was in a way this. That is, where the environment, the contextual concerns are moving at the pace they are, or appear to be -- what's the best strategic position for those who have interests in the forensic use of DNA and for investigative use?

Is it to find alliance with these other areas? Is it to point to the danger they represent? Is it to foreswear any -- those are strategic questions that are of great importance and could have powerful implications for public safety. Difficult for this group to do. Our intent was simply to raise those issues, and it is our hope that they would be dealt with in a small part in this November symposium, but in the future; these are strategic issues.

DR. CROW: And are these issues for the National Institute of Justice, or who worries about medical privacy, to raise this question again?

MR. ASPLEN: The answer is not the Department of Justice until such time as you get to the instance that Norm is talking about.

JUSTICE ABRAHAMSON: It could be the NIJ under appropriate leadership in the department.

MR. SMITH: One way to look at it is does NIJ interest here, does Department of Justice interest here, which has to do with the effects on its responsibilities of mismanagement if you like of policy and private enterprise in areas which are -- we now see in the legislature. They're responding to forensic DNA proposals with the aftermath of bad tastes in their mouths from handling insurance and health proposals.

Now, that makes it a justice issue, doesn't it? If nothing else, the ability to be responsible for the stewardship of public safety is affected by how well the rest of this stuff is being done and how sensitively. But beyond that, I don't know how it could be really for justice.

MR. ASPLEN: I think if we look back to some of the things that have gone on in the commission process, let's take a look at the arrestee issue.

When -- about a year and a half ago, when Commissioner Safir started talking about arrestee testing, the national discourse consisted of Commissioner Safir on Larry King Live one night and a representative from the ACLU on Larry King Live the next night, and public perception was being based on that level of discourse. And I think that the commission provided a very important role in raising the level of discourse to a certain intellectual level -- I don't mean to --

VOICE: [inaudible].

MR. ASPLEN: Well, right. And really, that's the way ultimately we dealt with it. And I don't mean to imply that Commissioner Safir's or the ACLU's were not intellectual approaches to it, but raised it to a certain broad-based level of discourse, which was very important on a lot of levels, particularly on a legislative level.

You may remember that we gave you a number of updates at times, saying the number of times that we got phone calls from state legislatures and from federal legislators asking what our position was on it, the attorney general asking what our position was on it, and that's a better way to do things. It's a better way to make decisions.

Now, when those issues come up in the future and when sample retention issues come up in the future, where do they look? I can tell you right now that the Department -- when a DNA issue comes up in the United States Department of Justice, the first place they come right now is the commission. The first -- when the postconviction legislation came to DOJ they called the commission. When statute of limitations issues came up, they came here.

And now that the funding legislation in the House of Representatives is here, the commission is involved through -- obviously through its staff. The commission goes away, that resource isn't there. And on top of that, there is the inherent value of the discourse itself, the inclusion of the different points of view.

MR. SMITH: But that's the key, isn't it? I mean, that's what the commission [inaudible]. Federal offices rarely have that quality, and to recommend the creation of one that does is laudable but quixotic.

If we think that it needs a commission, maybe we should recommend a commission, but apart from that I think we just recognize a big problem. But what proposal do we have that solves that problem except to cry, Watch out. This problem's going to come back and hit you in the backside, unless a permanent commission or something like –

DR. CROW: Would the Department of Justice like to have somebody like this group that it can call up and ask for a position statement? Are we --

MR. ASPLEN: It sounds like a question I'd get from a reporter, and let me try to address the way I would if it was a reporter.

DR. CROW: Yes.

MR. ASPLEN: I would say, I think that the Department of Justice has recognized and received numerous benefits from the commission process, and that the commission has better enabled -- or has enabled it to better handle a number of issues that have come up. But I would have to leave it at that in terms of --

DR. CROW: Who wants it.

MR. ASPLEN: -- who wants it and who would know.

One obvious -- the easy way out is to say, In three of four years another commission like this should be established.

MR. SMITH: We sort of did that, didn't we? In the resolution, if I remember it right about the sample retention issue, what we said was something like in no more than five years a body should be assembled which is not the creature of the labs or the law enforcement interests to revisit the question whether or not it's necessary or desirable to retain samples.

Now, the sample retention issue for a bunch of reasons that we've noticed has within it a lot of these other questions, so I think some of us anyway during that discussion of that resolution were thinking that that body if it actually were created that way would be there at a moment in time, but it might be necessary for somebody to reach out and grab this by the throat again.

Beyond that, how do you recommend that? It seems to me that's -- it's not plausible. We recommend that you create a body that has characteristics of a kind that federal bodies don't have.

MR. GAHN: Why can't we recommend a commission similar to this but made up of a -- the issue five years from now may be who cares about those samples you took at the crime lab because everybody in the world has them now, or who knows what it's going to be? That may be a completely moot point.

But don't we have a responsibility even to recommend maybe you need a commission that's made up not -- pretty much of law enforcement but of medical ethicists, department health and social services, the employment industry, the -- that you need one in some national group that is going to at least be there to look at this stuff, at least be a sounding board for when these really problem -- and issues are going to come and hit this country.

MR. SMITH: Let's hope we have leadership of the country at that moment to appoint such a body. I don't see how we can do it.

MR. ASPLEN: We can't appoint it. I guess the question is can we make the recommendation so that it is out there? And clearly, this attorney general cannot do that and this administration cannot do that. But I guess the issue is should the point be made that this should be done again or something similar to this should be done again?

DR. CROW: I think we have to be subtle. It's such a standard joke about national academy committees that the first thing they recommend is more money for another committee like itself. I'm all for doing this but I think when we're asked about how to do it.

At the same time, is the military a major issue here, with their gathering DNA in enormous quantities?

MS. BASHINSKI: Military data banks are an issue. Yes.

DR. CROW: Yes. Because these may come to the surface faster than the other things we've been talking about.

MS. BASHINSKI: What if we simply made a list of what we consider to be unresolved by us but potentially significant issues or issues which we feel will emerge, and then say nothing about it other than that? Is that subtle enough, too subtle? Rather than just say --

DR. CROW: Not subtle.

MS. BASHINSKI: -- rather than just say the one issue that we've already identified, because there are a number that we could list, I think, that remain unresolved.

MR. ASPLEN: I'm sorry, Jan. Are you saying just list the issues that remain unresolved --

MS. BASHINSKI: Yes. Just --

MR. ASPLEN: -- the potential issues in the future, and --

MS. BASHINSKI: Then leave it there.

MR. ASPLEN: Or maybe add to that, Here's how we think that the commission has been beneficial in dealing with a number of issues that have come up that have benefited from this kind of discussion.

MS. BASHINSKI: We didn't do this --

MR. ASPLEN: Here are the issues in the future that we think may --

MS. BASHINSKI: Yes. And then just leave it.

MR. ASPLEN: Which in effect would not be a recommendation to the attorney general but would really be a matter of part of the final report, would perhaps be the conclusion, if you will.

MR. SMITH: I want to have Norm keep worrying though, because if you come up with a description of a body that has the quality of open-endedness but also the promise of actually being there in a condition that would be desirable at the moment when it's needed, then there's absolutely no reason on God's earth why you shouldn't recommend it.

MR. GAHN: And I think we should. We're the only national group right discussing DNA issues in -- granted, it's been in a forensic context, but it's affecting all of society because it's law enforcement. We're the only national group and we've seen issues here that we can't address in a forensic context, issues that are going to affect the country at large, and we've seen them and they're out there.

And there should be another national group similar to this made up probably of a completely different group of people, and we should say, You need a group that some day you can go to.

DR. DAVIS: Let me ask another question. We're talking about our knowledge of DNA, but across the street is the agricultural group, Monsanto and the rest. And that is a huge operation which has far greater impetus to move in terms of its financial backing, and that's a big DNA area, and Lord knows what else there is out there in a DNA field. I think we're just a small piece of the pie.

I'd be interested sometime in seeing somebody draw up a pie, and how much is police and forensic and so forth, how much is agriculture, how much is whatever else there is out there? I'm sure there's a lot going on all over the world that we don't know about, or we -- individuals within

the group may know about it, but as the collective group, I don't think we know about it. At least I certainly don't know.

JUDGE REINSTEIN: One of the things you'll see in that report that comes out every week from Tim Schellberg's group is a section that has agricultural aspects of genetics. Another one is regarding medication and genetic discovery. Another one is DNA forensic expansion postconviction, but it's divided up like that. I know there's a section in there regarding agricultural issues.

MR. CLARKE: Well, I'm assuming the report is not an epitaph in the sense that NIJ will continue to make recommendations to the attorney general. Is that correct, on whether a group should be convened, shouldn't be, should be different, et cetera? In other words, the institution itself doesn't die --

MR. ASPLEN: Certainly not. NIJ is bigger than the national commission. But I agree with Michael that that would be purely a matter of the vision of the particular director of NIJ, and this could be --

MR. SMITH: NIJ was almost itself eliminated by Congress not so very long ago.

MR. ASPLEN: Yes. And this is -- as with all things, they have a limited political life. They have a limited media life. DNA seems to be going infinitely longer than I ever thought it would on both counts, which I guess is a good thing, shows my lack of vision. I thought we'd all be tired of this by now, but it doesn't seem to be slowing down at all. But five years from now many of these issues may not in fact be issues.

NIJ doesn't go away, but it would be completely dependent upon who runs it.

JUSTICE ABRAHAMSON: What I hear, which may not be what you all said, but what I hear is a consensus that issues about DNA, both forensic issues and non, will continue. Some of the same issues we've grappled with will be here in the future. Others may not. That the sense of the group is that we recommend in our final report that NIJ and the Department of Justice consider or keep in mind DNA issues and consider forming one or more multi-disciplinary groups to deal with issues that come to the Department of Justice, both the forensic in the criminal justice system and in maybe employment and insurance, which I think the Department of Justice has an interest.

Now, have I captured some of it, none of it, all of it in addition?

DR. CROW: We could certainly say that there are issues that are too futuristic or too big or too difficult for us to have handled, but they're not going to go away.

JUSTICE ABRAHAMSON: And maybe even give some examples, and I like Norm's reference to the dark side -- that's a good phrase -- which are essentially privacy issues, which are of great concern. I think we're going to see an era of -- where privacy is a key concern across the board.

MR. ASPLEN: The issue has been raised that the DAB was statutorily authorized -- Congressionally authorized as a standing matter. Now, I don't know if that's a -- charges the issue more or less. It's certainly more difficult to accomplish, and I'm not sure that the attorney general could have an affect on that.

MS. BASHINSKI: You're suggesting that there be something established legislatively? Is that what you're saying --

MR. ASPLEN: I'm not suggesting. I'm saying that would be one possibility that there be -- that a recommendation be that there be a statutorily authorized body that would review these issues through the attorney general.

MR. SMITH: Unless -- the idea that we might be able to in words describe a future agenda of importance with confidence is a fascinating one. That's why I'd like to see it worried on some more. I'm skeptical about our duty to come up with a form of words which would serve well over a lot of years in an area as fast moving and ill defined as this one.

So I come back to what I said before. That is, one of -- one service we might do, whether it be ultimately a legislatively created permanent standing body or not, is to recommend that at some point in the not too distant future there be created a body, not a permanent body, but a body at that moment whose composition in general terms is described in a way that sounds right to us. Not whose agenda is described by us, but whose composition is described by us, and is given responsibility by our recommendation for something likely to exist at that time.

Now, if that body is any good, and if there are important issues to be seized and it is created, it will seize them and it will do a better job of figuring out what they are than we will today, trying to imagine what that future looks like. So that would be, in my view, probably the most -- strategically the best way to try and do this.

Trying to lay out the agenda for a permanent body strikes me as -- we're no better qualified than Congress, and look what a mess they make of it.

DR. CROW: I agree with all of what you said, but I want to emphasize one aspect, and that is I would not want this to be permanent. I think most groups work pretty well for a while and then they -- I think it's happening to us.

JUSTICE ABRAHAMSON: I tend to agree, and one should note that when this body was set up, we in effect set up our own agenda.

DR. CROW: Yes.

JUSTICE ABRAHAMSON: And grappled with a universe and then had to narrow it to topics that we could handle, and they've evolved according to the interests of the group and their qualifications, et cetera, and did not deal with the universe, cannot deal with the universe, and hope you deal well with what we undertook.

So I would agree with that.

MR. SMITH: As long as you serve as chair?

JUSTICE ABRAHAMSON: Right. Not likely. Okay. Ron?

JUDGE REINSTEIN: Well, in addition to making recommendations -- and sometimes you wonder where those recommendations go -- would it behoove us to have a group when the new administration comes in who would be a liaison for these issues made up of law enforcement, science, prosecution, defense, and the education community, maybe the courts, a limited number of people who would liaison with the new

attorney general, deputy -- I don't know what the title is -- the White House, NIJ, and the like to put some life into the recommendations as well?

JUSTICE ABRAHAMSON: We can do that in our report and then rally around when there's a change and see how we do it.

MR. ASPLEN: And because there is a technical life of the commission that extends through 2001 -- although we won't be meeting -- there will be some legitimacy to be able to do that. That would be more of an administrative function by NIJ.

MR. SMITH: There will be transition committee. Right? The transition committee will reach out or not as it's moved. But trying to determine now who the transition committee should talk to strikes me as --

JUSTICE ABRAHAMSON: Yes. But the idea of a transition committee that Ron has just proposed is a very good one.

JUDGE REINSTEIN: And the way that you have the symposium and the last meeting scheduled, it sounds like it's the week of or the week after the election, so we'll know a lot more then. At that last meeting, in addition to closing out the work of the commission, we can also work on that transition issue.

MR. SMITH: We'll try and get some members of the new president's transition Committee for Justice.

DR. DAVIS: Let me ask one question. Is there a plan afoot that after this is all over there will be

published say a one-inch thick, paper-bound book entitled, The National Commission on whatever, or is this just going to end up with a collection of minutes?

MR. ASPLEN: No. It will not be a collection of minutes. It will, however, be a collection of -- yes. There will be a book, as you anticipate. Much of that book will be a collection of recommendations and what we've already done, but it will be weaved together in an appropriate report form.

JUSTICE ABRAHAMSON: So that all of the work will be available in one place, but we're not going to rewrite all of the work groups' reports. We'll have an overall summary and then they'll be there.

DR. CROW: What happens to -- I keep thinking of my group right now, which has a big, fat report, and it may ultimately agree to do this. On the other hand, the commission may not want it, or may not agree.

MR. SMITH: What I understood was the working groups would submit and the commission would dispose as it saw fit. With respect to the Postconviction Working Group's work, we saw fit to endorse it unanimously at the time --

DR. CROW: Yes.

MR. SMITH: -- he fixes it for us. Right? Now, with respect to my working group's report, I don't think we ever thought that the commission would or should endorse it in that way. So we've submitted it, and if the commission sees fit to put it before the public, that's fine, but that was its purpose.

DR. CROW: Yes.

JUSTICE ABRAHAMSON: It's a report to --

DR. CROW: It's a report to the commission, and the commission does --

JUSTICE ABRAHAMSON: Right.

DR. CROW: -- does what it wants to with it.

JUSTICE ABRAHAMSON: That's right.

DR. CROW: I think so. Yes.

JUSTICE ABRAHAMSON: And it would so state in the introductory materials.

MR. SMITH: I think yours may be like that too, because the commission can't determine the future by adopting your report, so --

JUSTICE ABRAHAMSON: Right.

DR. CROW: It won't hurt if this report gets buried. That kind of thing's happened before.

JUSTICE ABRAHAMSON: No, no. I don't think it will be buried.

DR. CROW: Yes.

JUSTICE ABRAHAMSON: And then of course, you'd be very free to distribute it as a report that was submitted to the commission, but we would not stop you from –

DR. CROW: I should think we have rights to free speech, and if we want to publish it on our own we could do it.

MR. SANDERS: And it is anticipated that it will be, as was the report from the postconviction, printed and distributed through NIJ. Now, if that comes along with a unanimous approval by the commission or not --

DR. CROW: It says the same thing whether it's endorsed or not.

JUDGE REINSTEIN: You've got to give us the answers to all those formulas.

DR. CROW: That's right.

JUSTICE ABRAHAMSON: But is there anything else to come before the commission?

DR. CROW: There's a pride of authorship that's beginning to make an appearance here.

JUSTICE ABRAHAMSON: If not, we are adjourned. We will advise you of the time and place which is July, Washington, at least as of this moment, for the next commission meeting, and we'll also tell you about the November symposium and meeting as soon as the arrangements are made with the Kennedy School.

You are free to leave, and we will make arrangements for a skeleton crew to remain until 3:30, when there is a public comment session.

MR. ASPLEN: One more thing. I apologize. Dawn Herkenham had a baby boy --

DR. CROW: That's a suitor for your young girl.

MR. ASPLEN: -- Thomas John. Both mother and baby are healthy and happy.

(Whereupon, a short recess was taken.)

Public Comment

MR. ASPLEN: I hereby open the floor for public comment. It's 3:30.

(No response.)

MR. ASPLEN: Hearing none, we're adjourned.

(Whereupon, at 3:31 p.m., the meeting was concluded.)