

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

Hotel Madison, Mount Vernon A + B
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January 16 - 17, 2000

Contents

National Commission on the Future of DNA Evidence P R O C E E D I N G S Meeting VIII.....	1
Commission Members:	3
Agenda	4
Introductory Remarks	6
Update on Commission Business.....	8
Prototype Demonstration of the Interactive DNA Training CD-ROM for Law Enforcement	12
Research and Development Working Group Report	21
Laboratory Funding Working Group Report	42
Public Comment.....	54
Introductory Remarks	66
Issues Working Group Report, "Forensic DNA Typing: Selected Legal Issues" Legal Issues Working Group:	73
Working Lunch Criminal Cases Review Commission of the United Kingdom	130
Postconviction Working Group Report & Discussion	164
Public Comment.....	176

Commission Members:

Hon. Shirley S. Abrahamson, Chairperson
Dwight D. Adams
Jan S. Bashinski
George W. Clarke
James Crow
Joseph H. Davis
Paul B. Ferrara
Norman Gahn
Terrance W. Gainer
Terry Hillard
Hon. Ronald S. Reinstein
Barry C. Scheck
Michael Smith
Jeffrey E. Thoma
Kathryn M. Turman
Commission Staff:
Christopher H. Asplen, Executive Director
Lisa Forman, Deputy Director
Robin Wilson, Executive Assistant

Agenda

Sunday, January 16, 2000

- 1:00 - 1:10 Introductory Remarks
Chief Justice Shirley S. Abrahamson
Chair
- 1:10 - 1:30 Update on Commission Business
Christopher H. Asplen, AUSA
Executive Director
- 1:30 - 2:15 Prototype Demonstration of the Interactive DNA Training CD-ROM for Law Enforcement
Drs. Pam Collins and Kay Scarborough
Eastern Kentucky University
- 2:15 - 2:45 Research and Development Working Group Report
Dr. James Crow
Working Group Chair
- 2:45 - 3:00 Break
- 3:00 - 4:00 Laboratory Funding Working Group Report
Dr. Paul Ferrara
Working Group Chair
- 4:00 - 4:30 Public Comment

Monday, January 17, 2000

- 9:00 - 9:10 Introductory Remarks
Chief Justice Shirley S. Abrahamson
Chair
- 9:10 - 11:00 Legal Issues Working Group Report, "Forensic DNA Typing: Selected Legal Issues"
Legal Issues Working Group: Michael Smith (Chair), David Kaye (Reporter), Edward Imwinkelried, Dorothy Nelkin, Philip Reilly,

Rockne Harmon, and Jeffrey Thomas

11:00 - 11:20 Break

11:20 - 12:30 Continued discussion, Legal Issues Working Group Report

12:30 - 2:30 Working Lunch
Criminal Cases Review Commission of the United Kingdom
Howard Matthews, Head of Operations
Angela Flower, Case Review Manager

2:30 - 3:30 Postconviction Working Group Report & Discussion
The Honorable Ron Reinstein
Working Group Chair

3:30 - 4:00 Public Comment

4:00 Adjourn

Introductory Remarks
Chief Justice Shirley S. Abrahamson
Chair

CHIEF JUSTICE ABRAHAMSON: I will call to order the eighth meeting of the National Commission on the Future of DNA Evidence. We welcome everybody to Washington, D.C., and thank you for spending a Sunday afternoon, your leisure time, at the Commission, and then spending tomorrow, which for many of us is a state or national holiday, but it is one of the times we managed to get many people together. Thank you for coming.

MR. CROW: Madam Chairman, may I interrupt with an announcement?

CHIEF JUSTICE ABRAHAMSON: I can't stop you, Dr. Crow.

MR. CROW: I have with me here a full-page newspaper story in which our leader has been named news maker of the year by the Association of Wisconsin Newspapers. All of them, I think, are represented here. It cited her intellectual prowess, her willingness to do her homework, and status as a scholar of international acclaim.

CHIEF JUSTICE ABRAHAMSON: All true.

[Laughter and applause.]

CHIEF JUSTICE ABRAHAMSON: Thanks, Jim. Now I have been introduced. So we will start with Chris.

MR. ASPLEN: Chris Asplen, executive director of the Commission.

MR. CLARKE: George Clarke, deputy district attorney, San Diego County.

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

CHIEF JUSTICE ABRAHAMSON: My PR man.

MR. CROW: I've been introduced.

CHIEF JUSTICE ABRAHAMSON: That's not going to do, Jim.

MR. CROW: I'm professor emeritus at the University of Wisconsin.

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

MR. SMITH: Michael Smith, professor at the University of Wisconsin Law School.

MR. SCHECK: Barry Scheck, commissioner of Forensic Science Commission, New York State.

DR. DAVIS: Joseph Davis, professor emeritus, University of Miami and former medical examiner of Dade

21 County.
22 MR. GAINER: Terry Gainer, assistant chief of
23 police, Washington, D.C.
24 MR. REINSTEIN: Ron Reinstein, associate presiding
25 judge, Superior Court of Arizona.
1 MR. THOMA: Jeff Thoma, public defender for
2 Mendocino County, California.
3 MR. HILLARD: Terry Hillard, superintendent,
4 Chicago Police Department.
5 MR. GAHN: Norman Gahn, assistant district
6 attorney, Milwaukee County, Wisconsin.
7 MS. BASHINSKI: Jan Bashinski, chief, Bureau of
8 Forensic Services, California Department of Justice.
9 CHIEF JUSTICE ABRAHAMSON: Jim told you about me,
10 but others on the Commission have made the news. We will
11 have one of the more recent New Yorker magazine stories
12 about DNA that features Barry Scheck.
13 Were you pleased with the article?
14 MR. SCHECK: No.
15 [Laughter.]
16 CHIEF JUSTICE ABRAHAMSON: That's standard. If
17 you just get mentioned in the New Yorker it's good enough.
18 You will get equal time later to discuss that.
19 I don't know how many of you saw Front Line. I
20 did not. It was an hour program on DNA and various cases.
21 We are going to try and get a copy and maybe at the next
22 meeting, if it's allowable under the copyright laws, show it
23 to those of you who have not seen it.
24 Before we proceed to Christopher Asplen's update
25 on the Commission, I do want to introduce special guests
1 that we have with us who will be on tomorrow's program.
2 They are from the United Kingdom and somewhat jet lagged but
3 doing very well. We have Howard Matthews, who is head of
4 operations, and Angela Flower, who is case review manager.
5 Chris and Lisa spent some time in London and met up with
6 them. They are going to talk to us tomorrow at noon. Thank
7 you for coming.
8 Chris.

Update on Commission Business

*Christopher H. Asplen, AUSA
Executive Director*

9 MR. ASPLEN: Thank you.

10 Just a couple of update matters. First of all, my
11 congratulations to Barry at least on the Front Line article.

12 I think he felt better about the Front Line article than

13 perhaps the article in the New Yorker. I don't know.

14 Chief, it may go back to the old law school adage that you

15 never ask a question that you don't know the answer to.

16 MR. SCHECK: The Front Line, if we could get a

17 copy for every member of the Commission. Without knowing

18 who saw it, I think anybody who saw it was powerfully

19 impressed. It is essential to the work that this Commission

20 has done, and I think people like it.

21 MR. ASPLEN: I also think the timing is great,

22 having the folks from the Criminal Case Review Commission

23 here to talk about a way that you can actually do things a

24 little bit differently. I do appreciate their being here on

25 relatively short notice.

1 I would also like to mention the members of our

2 Legal Issues Working Group. Some of them are here and I

3 think the rest of them will be showing up later, but they

4 will be here primarily for tomorrow's discussion on the

5 legal issues report. I appreciate them being here today to

6 kind of take in some of the things we are talking about

7 also.

8 A little bit later on, when I'm finished, which

9 will be soon, we will hear from Drs. Collins and Scarborough

10 on some of the work they are doing with the CD-ROM.

11 To give you a brief report on Dr. Forman and my

12 trip to London and the forensic sciences service

13 international conference on human identification, I think it

14 was a wonderful conference, but what was most striking about

15 it, I think, especially from the context of what the

16 Commission is doing, was the international response to the

17 post-conviction work that we had done and the publication

18 that the Commission put forth.

19 We went to talk largely about future technology

20 issues and the work of the Commission, and I would say, of

21 my presentation, maybe two or three minutes of it had to do

22 with the post-conviction work, simply because that's what

23 they told us to talk about.

24 However, at the end of my presentation there were

25 maybe 10 or 15 more minutes for Dr. Forman to speak, and at

1 the end of my presentation the entire box of post-conviction
2 recommendations that we had brought with us was empty. We
3 received cards from about 15 different people from 15
4 different countries, including Russia, Croatia, Greece,
5 Ireland, Malta, Finland, New Zealand, Australia, asking for
6 our recommendations. We have also received numerous
7 requests over the Internet for it, because they recognize
8 that this is an issue that if they are not presently facing
9 they will face in the future.

10 So I commend the Commission on its work to the
11 extent that it is really having international implications
12 and I think will continue to do so. We will talk a little
13 bit tomorrow about a recommendation to the attorney general
14 that she forward the publication to her counterparts in
15 different countries, to ministers of justice throughout the
16 world to try to apply the same principles in their given
17 systems.

18 So again, the impact of the Commission's work is
19 spreading further than even we thought perhaps.
20 A couple of other updates. Dr. Forman is going to
21 talk. We are going to squeeze in some time for her to
22 speak. She is looking at me somewhat surprised. She is
23 going to give us a short update on the CODIS solicitation
24 and the monies that have been allocated by Congress.

25 I think when we spoke at the last meeting in
1 Washington we believed that it was going to happen, but
2 nothing is a sure thing until you actually have it in the
3 bank. Well, I think we finally have it in the bank. The
4 Department of Justice and the National Institute of Justice
5 did receive \$15 million for the express purpose of DNA
6 offender database backlog reduction.

7 We don't call it elimination; we call it reduction
8 because we know that that won't do the job. However, NIJ is
9 working, and specifically OST is working, fast and furiously
10 to get that money out the door.

11 It will be somewhat of a complex proposition, but
12 we want to do it and we want to do it quickly so that we
13 can, most importantly, reap the benefits and results of
14 getting those samples into the database so that we can go
15 back for the next funding cycle and make the argument how
16 successful the spending of that \$15 million was.

17 Maybe a little later Paul can give us a little bit
18 of insight. He has gotten some numbers back on his
19 outsourcing that have been extremely impressive.

20 Again, in terms of the work that you have done,
21 needlessly to say I think the Commission's work on that

22 issue had a great impact on Congress' decision to make their
23 priority to allocate that money and I think they will
24 continue to do so.

25 CHIEF JUSTICE ABRAHAMSON: Tell us about what you
1 view as the windup period for this Commission.

2 MR. ASPLEN: The view of the calendar at this
3 point in time is that we will probably have two more full
4 Commission meetings between now and probably July. These
5 next two will be working meetings like this. Then in
6 October what we are anticipating is a national symposium on
7 the legal issues. That will be held in conjunction with a
8 major law school, if you will. We are trying to work that
9 out right now. So we anticipate two more meetings.

10 After that, the Commission staff will stay on for
11 the purpose of making sure that any publications get out the
12 door that need to get out the door. There may be a few
13 cleanup items that we need to take care of, but that should
14 be it.

15 So the work that the working groups are pursuing
16 kind of fits that schedule. Kind of. Now that we have an
17 ending time frame, those are the time frames that we are
18 pushing towards.

19 CHIEF JUSTICE ABRAHAMSON: The report of the
20 Commission is envisioned to be a brief overview of the
21 Commission's work with publications that are put out by the
22 various working groups and approved by the Commission as a
23 whole rather than rewrite each of these reports.

24 MR. ASPLEN: Yes. The way we see it working is
25 there are still a number of individual publications that
1 need to be finished and published. Things like the cold
2 case analysis report; Dr. Crow's report; the legal issues
3 report, et cetera. Most of those things will go out as a
4 separate publication. Which means that when the Commission
5 is actually finished its work, what the final full
6 Commission report will be is, as the Chief Justice says, a
7 compilation of those things.

8 We also have the CD-ROMs that are being worked on.
9 That will be separate from and individual products that will
10 be compiled into that final report.

11 Tentatively scheduled. The next two Commission
12 meetings: April 9th and 10th in Chicago; July 9th and 10th
13 in D.C. We will see how that fleshes out with everybody's
14 schedule hopefully sometime in the next couple of days.

15 There are probably some other things that should
16 be noted. First of all, Judge Reinstein has weathered yet
17 another high profile case exceedingly well, as always.

18 Every time we turn around he has got one of the more
19 interesting cases in the country.
20 I think it is also appropriate to commend both
21 Superintendent Hillard and Chief Gainer for the work that
22 they did in their cities given the New Year's celebrations
23 and how successful that was. I know that was a tremendous
24 amount of work, more so than any other New Year's eve
25 celebration you've had. I talked to Chief Gainer
1 afterwards, and he put in a tremendous number of hours. I
2 know that Superintendent Hillard worked and did some
3 tremendous things in terms of coordinating with other
4 agencies to make these celebrations that were so monumental
5 also so safe. Thank you to them for their work.
6 CHIEF JUSTICE ABRAHAMSON: We won't ask them how
7 many DNA samples they got.
8 We are up to Drs. Pam Collins and Kay Scarborough
9 of Eastern Kentucky University on the prototype
10 demonstration of the interactive DNA training CD-ROM for law
11 enforcement.

Prototype Demonstration of the Interactive DNA Training CD-ROM for Law Enforcement

*Drs. Pam Collins and Kay Scarborough
Eastern Kentucky University*

12 MS. COLLINS: Before we get started, I have passed
13 around a handout of what you are going to see. We will go
14 through this as quickly or as slowly as you want us to do
15 so.

16 Let me set the stage before we get started. It
17 has been a while since we met before the full committee, but
18 we have had an opportunity to meet with the working group a
19 couple times. So I have made a lot of progress, I think, on
20 some of the early work with the Commission, developing their
21 brochure and that sort of thing.

22 Let me tell you a little bit about what I am going
23 to show you today. Today is a very early stage to this
24 whole process. It is referred to as a prototype. It's not
25 an alpha version; it's not even very close. It is just to
1 give you an idea visually of what this might look like.
2 These are contained as well in your handout.

3 A lot of the information that is in here
4 originally came from development of the DNA brochure. As
5 Chris referred to, there are going to be two CDs. There is
6 going to be a beginning level CD and an advanced level. We
7 chose those words very carefully because of all of the
8 issues with all the different titles that are involved with
9 it.

10 The plan currently for the DNA evidence collection
11 course is there will be four hours total for computer-based
12 training. There will be two modules. The beginning level
13 module will be approximately an hour and a half long,
14 consisting of five lessons. The advanced level module is
15 two and a half hours, and it will consist of five lessons.
16 That is what is projected to be done at this point in terms
17 of the information and the feedback that we got not only
18 from the Commission, but also the DNA working group.

19 This particular technique that we are using is
20 referred to as the instructional systems design methodology,
21 the way that it is set up.

22 The objectives address topical knowledge and
23 skills that would be required by what we would consider a
24 first responder. This would be a first responding law
25 enforcement officer to a crime scene and also the person
1 responsible for collecting, preserving and processing the
2 evidence.

3 The end user, I think it is important to point out
4 here, would be any police officer who would have the
5 responsibility of being the first officer on a crime scene.
6 It could be the same person, but it could be two separate
7 types, depending on the size of the agency that we are
8 referring to.

9 That is basically what we are going to talk about
10 today. Let me take you through the steps very quickly.
11 This is the prototype. After the prototype there
12 is something called story boards. I don't know if any of
13 you have been involved with developing computer-based
14 training. Those story boards are very detailed and
15 literally everything that you visually would see on each
16 separate screen.

17 Those story boards have already been delivered to
18 the DNA working group. They are working on them and are
19 going to be working on them in the weeks ahead. As they get
20 that feedback back to the company that we are using to
21 actually do the instructional design, after that is done,
22 after you have the prototype which I am going to show today,
23 which is the first step, then you have a story board which
24 will give the feedback from the Commission.

25 From that, in essence a script is written. It's
1 just like in a movie. Script is written. We will do
2 videotaping to develop scenarios. We have already been
3 given some scenarios by the working group. That will be the
4 learning base for the students. It is an actual scenario
5 that the person seeing it could walk through.

6 Once that videotaping is done, then we go to the
7 alpha version. That will go back to that working group.
8 After all those revisions and corrections and editing and
9 all that has been done, the final product goes to a beta
10 version.

11 That is just to kind of give you a sense of the
12 process that one goes through in this. So today you are
13 seeing some very preliminary types of things and what we
14 call a prototype.

15 What I would like to do is go through this on the
16 screen. It should match up with the handouts that we have
17 given you.

18 MR. ASPLEN: Folks, if you think that the way she
19 explains it sounds a little complex, it is infinitely more
20 complex than what she is saying for those of us who have
21 been involved in the process.

22 MS. COLLINS: It is very detailed.

23 MR. ASPLEN: Detailed is probably a better way to

24 put it.

25 [CD-ROM demonstration.]

1 VOICE OVER: Upon completion of this lesson you
2 will be able to distinguish between physical and biological
3 evidence, identify the significance of DNA analysis and the
4 limitations thereof.

5 You will become familiar with the use of CODIS.

6 You will be able to identify the responsibilities
7 of a first responding officer, including how to establish a
8 chain of custody of evidence and the procedures to maintain
9 crime scene integrity.

10 You will be able to identify the importance of
11 elimination samples and DNA evidence as they relate to the
12 different types of crimes.

13 Finally, you will be able to identify the sources
14 and locations of DNA evidence.

15 MS. COLLINS: The voices that you hear are some of
16 the staff just to illustrate what it would be. These are
17 not the final voices necessarily. I think some of the
18 colors and things we talked about might be final, but
19 generally this is just to give you an overview, an idea of
20 how this would work. It is still in the infancy stages.

1 VOICE OVER: DNA, or deoxyribonucleic acid, is the
2 fundamental building block for an individual's entire
3 genetic makeup. It is a component of virtually every cell
4 in the human body. DNA is the same in every cell. For
5 example, the DNA in a man's blood is the same DNA as in his
6 skin cells, semen, and saliva.

7 VOICE OVER: Physical evidence is any tangible
8 object which can connect an offender to a crime scene.
9 Detection of certain types of physical evidence such as
10 biological material are not always visible.

11 DNA testing has expanded the types of useful
12 biological evidence. Virtually all biological evidence
13 found at crime scenes can be subjected to DNA testing.
14 DNA testing has become an established part of
15 criminal justice procedures, and the admissibility of the
16 test results in court have become routine.

17 DNA analysis is similar to fingerprint analysis
18 and how matches are determined: evidence collected from a
19 crime scene as compared to a known sample. If each feature
20 is not identical, the DNA evidence is determined not a match
21 and therefore did not come from the suspect.

22 The following example demonstrates how matches are
23 determined in DNA analysis. In this example the pattern of
24 the evidence specimen matches that of suspect 1.

25 With all the benefits and uses of DNA evidence, a
1 few limitations present challenges for today's law
2 enforcement personnel. For example, identical twins have
3 the same DNA. DNA cannot determine when the suspect was at
4 the crime scene. Additionally, environmental factors can
5 destroy DNA evidence.

6 A useful tool for law enforcement personnel is
7 CODIS, combined DNA index system. CODIS is a national
8 investigative support database developed by the FBI. CODIS
9 uses two indices to generate investigative leads in crimes
10 where biological evidence is recovered from the crime scene.

11 Just as fingerprints found at a crime scene can be
12 run through AFIS, or automated fingerprint identification
13 system, DNA profiles from a crime scene can be entered into
14 CODIS.

15 VOICE OVER: Your mission as the first responder
16 is to identify potential DNA evidence and to preserve that
17 evidence. In addition, other responsibilities include
18 secure witnesses, ensure that all evidence is safeguarded
19 and maintained in its original state, render aid if needed,
20 request crime scene support services, and condense facts
21 into a comprehensive report.

22 VOICE OVER: It's often necessary to take
23 elimination samples to determine if the evidence comes from
24 a suspect or someone else. With this in mind, the officer
25 must think ahead to time of trial and possible defenses
1 while still at the crime scene.

2 The manner in which elimination samples are
3 collected is dependent upon the type of crime. Click on a
4 bulleted line to view evidence collection procedures for
5 each type of crime.

6 MS. COLLINS: Those aren't set up yet, but those
7 will be active. The officer taking the course could click
8 on there. I will show you later a glossary and a notebook.

9 VOICE OVER: A complete record of all activities
10 conducted and visual observations made at the crime scene
11 should be included in all documentation.

12 Procedures for establishing a chain of custody of
13 evidence include a list of all persons who came in contact
14 with the evidence from the time it was recovered at the
15 scene, inventoried, processed and examined to the time the
16 evidence is presented in court.

17 The risk of contamination can be reduced by
18 limiting incidental activity. It is important for all law
19 enforcement personnel at the crime scene to make a conscious
20 effort to refrain from smoking, eating, drinking, littering,

21 or any other actions which could compromise the crime scene.
22 Be aware that personal actions can compromise
23 evidence at a crime scene. Therefore, only move an item if
24 the evidence will be lost or destroyed. Avoid touching
25 anything unnecessarily, adjusting the thermostat or opening
1 doors and windows.
2 Additionally, always use the police radio instead
3 of the telephone when calling for support or backup
4 personnel.
5 Because extremely small samples of DNA can be used
6 as evidence, greater attention to contamination issues is
7 necessary when identifying, collecting and preserving DNA
8 evidence. DNA evidence can be contaminated when DNA from
9 another source gets mixed with the DNA relevant to the case.
10 Here is a list of actions to avoid contamination
11 at the crime scene. These tips will not only help protect
12 crime scene evidence; they may also protect you from
13 biohazards.
14 As a first responding officer, you may be called
15 upon to transport evidence from a crime scene. Direct
16 sunlight and warmer conditions may be harmful to DNA. Avoid
17 storing evidence in places that may get hot, such as a room
18 or police car without air-conditioning. Should you be
19 involved in evidence collection and transportation, such
20 topics will be discussed further in the advanced level
21 training module.
22 The following chart lists examples of sources and
23 possible locations of where DNA evidence can be found at a
24 crime scene.
25 MS. COLLINS: That captures the chart that is
1 found in the brochure. We will have to figure out a way to
2 make that a little bit reader friendly.
3 VOICE OVER: At first glance, the victim's DNA
4 evidence would be found at the tip of the baseball bat.
5 After further analysis, DNA evidence left behind by the
6 perpetrator could be found on the handle of the bat.
7 In this example DNA evidence from both the victim
8 and the perpetrator can be found in the form of sweat, blood
9 or semen.
10 Again, in this example DNA evidence left by the
11 perpetrator or victim could be found in the form of saliva
12 on the cigarette filter.
13 In this picture what appears to be a drinking
14 glass contains valuable DNA evidence. Sweat and saliva from
15 either the victim or the perpetrator may be present.
16 In this lesson we reviewed:

17 The difference between biological and physical
18 evidence.
19 The significance of DNA analysis and the
20 limitations thereof.
21 The purpose and the use of CODIS.
22 The responsibilities of a first responding
23 officer, including how to establish a chain of custody of
24 evidence and the procedures to maintain crime scene
25 integrity.

1 The importance of elimination samples in DNA
2 evidence as they relate to the different types of crime, and
3 the sources and locations of DNA evidence.
4 You have just completed this portion of your
5 training. Click forward to begin the scenario exercise or
6 click the exit button to end this lesson.

7 MS. COLLINS: With this example today the homicide
8 is the hot one. I will go to that. You can see these are
9 the four different areas of topics that we covered.
10 This is the notebook that I made reference to.
11 Here it is giving a warning about downloading files. It
12 opens up a page on which the officers would actually make
13 notes as they go through the scene.

14 MR. ASPLEN: I promised Pam and Kay that I would
15 reiterate and emphasize that this is the beginning stage.
16 For those of you that I saw taking notes here,
17 there and the other place because you saw things that one
18 may characterize as erroneous or not the best way to put
19 things, we are in the process of dealing with all that. We
20 have taken the first set of story boards and internally at
21 OST we are going through those and trying to address some of
22 the initial issues before it gets out to the working group
23 members of which we have more Commissioners than any other
24 working group. So before it gets to you folks who are here,
25 we are trying to deal with some of those issues and there
1 will still be plenty of issues for you folks to deal with
2 when it gets to that stage.
3 If there is anything you saw that you raised an
4 eyebrow about, don't worry about that until such time as it
5 actually gets in front of you, because it has already been
6 changed.

7 CHIEF JUSTICE ABRAHAMSON: Joe.
8 DR. DAVIS: In the real life world fire and rescue
9 would have been there, tramped all over the place, turned
10 the body over, slapped pasties on the chest, and left a
11 bunch of trails and moved furniture and stuff like that. I
12 think that is an issue, in view of DNA and the way it is,

13 that needs to be addressed in the future. The training of
14 the fire/rescue people is, I think, a sadly neglected area
15 in this regard. There are some people who are very good at
16 that and there are others who are like a bull in a china
17 shop. So keep that in mind as something for the future.

18 CHIEF JUSTICE ABRAHAMSON: Barry.

19 MR. SCHECK: Is the idea here that this CD-ROM
20 would be made available to individual officers who slip it
21 into their computer and then go through it and you could
22 track by reviewing your notebook? How are you anticipating
23 using this with trainees?

24 MS. COLLINS: The ideal would be that this would
25 be provided to the law enforcement officer, the first
1 responder. Either through training through their academy or
2 training through their agency or training on their own they
3 would go through the CD. As far as tracking, there is also
4 a capability to track how they do on their test, how many
5 questions they answered correctly, and that sort of thing.

6 MR. SCHECK: We have these computer-assisted legal
7 education things utilizing these lasers, these DVDs. It's
8 like for teaching evidence. They will show you something in
9 court, and then you will make your objection. They actually
10 have almost a verbal response. The judge will then tell you
11 this is the ruling and this is my reason for the ruling.

12 Since you are at this stage, you might think of
13 that as a kind of way to liven it up. You may want to take
14 a look at some of those, if you haven't already.

15 MR. ASPLEN: In terms of the dissemination of this
16 particular CD, I think we see it more as being distributed
17 to individual departments rather than individual officers.
18 Lest I give the budgeting folks at NIJ a coronary, that's
19 the way we see it. We will also consider the possibility of
20 making this available through the Internet, through JUSTNET,
21 or something like that. It shouldn't be a problem.

22 It is also anticipated that it not only be used
23 for credit purposes in individual departments, but quite
24 frankly, if some well-meaning police officer wants to find
25 it on a Web site and go through it regardless of whether or
1 not they are going to get credit for it, great. At the same
2 time, if an academy wants to take this little CD and use
3 this as their block of time for this particular issue and
4 use these standards, great. Good for them.

5 MR. SCHECK: I guess what I am really saying is
6 that what I've really been doing for 22 years is teaching
7 law and clinics and these kinds of things. I think you
8 really should try to make up your mind as to how you see

9 this ultimately in terms of delivery.
10 In other words, will an individual officer or
11 detective take this CD alone back to his or her home or on
12 the job and put it on the computer screen and go through it
13 as an individual exercise with some lectures later or
14 follow-up or discussion of it and with something within the
15 program that represents a scoring system or a product that
16 can be reviewed?
17 As opposed to something that is going to be shown
18 to 50 or 60 people, it might be useful to think through that
19 proposition. You have to have a very good idea of how it is
20 to be delivered and evaluated.
21 I think there are people that can help here, that
22 have given this kind of thing a lot of thought in related
23 fields. Particularly with the expense of these videos. I
24 realize this is not cheap.
25 CHIEF JUSTICE ABRAHAMSON: Superintendent Hillard.
1 MR. HILLARD: Barry, I know what you are talking
2 about, but look at Chicago and look at New York, New York
3 with over 40,000 sworn police officer and Chicago with
4 13,500. In order for us to educate an 8-hour core block of
5 instruction would take us close to two and a half years with
6 the scheduling and with the matrix.
7 What I would hope to do is start out with the
8 academy and then from the academy go to those five detective
9 areas or five patrol areas. I agree with what you say.
10 Individually it would be nice, but I don't think right now
11 those resources are there for us. So I would begin with the
12 academy and then move into the patrol areas and the
13 detective areas.
14 MR. SCHECK: What I am saying is when you do that
15 either at the academy or at the various different stages,
16 you could actually just distribute a CD to people where they
17 do their homework before they come into the class and then
18 use it for a follow-up.
19 Whatever the model is, all I am suggesting is for
20 your department you would want to not just give a disk, but
21 you would want to give teacher's notes, saying this is how
22 you would give it and these are the kinds of lectures that
23 would be done. I think a tremendous amount of thought to
24 the pedagogy of this would be of great assistance.
25 MS. BASHINSKI: I think we talked about this. It
1 could be used in a variety of different settings, from roll
2 call training all the way through. In a smaller department
3 it may well be that you only have one or two people that you
4 are putting through that. I guess you need a plethora of

5 ways in which it would be presented in order to make it
6 useful across the whole country.

7 MR. SCHECK: Yes. I would talk to the chief and
8 say, how would you do this? Would you do it first at the
9 academy? Would you do it next year? How is that done? How
10 many hours do you really get the people? What's feasible?
11 What access do they have? I would give that a lot of
12 thought in order to make sure that this really works.

13 MS. SCARBOROUGH: As part of this project there is
14 an evaluation component at the end of it where we will be
15 comparing the instruction using the CD-ROM and then a
16 platform-based instruction at the training academy in our
17 state to see if there are any differences in the way the
18 officers perform. In order to be able to do the
19 platform-based instruction, it will have to be developed in
20 the traditional way so it will be available to individuals
21 or academies or training institutes as well. So it will be
22 in different types of media.

23 CHIEF JUSTICE ABRAHAMSON: Any other comments or
24 questions?

25 MR. ASPLEN: I should have mentioned this before.

1 We have had requests for over 45,000 copies of the pamphlet
2 that the Commission put out, and that is before we even did
3 the mass mailings to all of the departments. That is just
4 based on people hearing about it, seeing it, getting it over
5 the Internet, et cetera. Over 45,000 copies have been
6 distributed.

7 CHIEF JUSTICE ABRAHAMSON: So there is a need.

8 MR. ASPLEN: Yes.

9 CHIEF JUSTICE ABRAHAMSON: I think it is very
10 interesting and good work. I like the graphics and color.
11 Thank you. We look forward to the next version.

12 MR. ASPLEN: Drs. Scarborough and Collins have
13 another meeting that they have to attend.

14 CHIEF JUSTICE ABRAHAMSON: That brings us up to
15 Dr. Crow, working group chair, on the Research and
16 Development Working Group report. There is a hefty draft
17 here.

Research and Development Working Group Report

Dr. James Crow
Working Group Chair

18 DR. CROW: This report is pretty extensive. We
19 responded -- I did -- to quite a number of requests to make
20 this user friendly. So it starts out at the third grade
21 level. It doesn't end up there. It becomes complicated by
22 the time it's over.
23 I would welcome advice from people in the room as
24 to how to make this more acceptable. I am also interested
25 in finding things that are in error, and I am interested in
1 things that are omitted and that should be included.
2 Our assignment was to look ahead five or ten years
3 and anticipate what technological developments would occur
4 during that time and what the impact of that might be. I am
5 as aware as you are of the difficulties in looking ahead in
6 a rapidly moving field, and I will remind you of one
7 terrible example of a person who tried to look ahead.
8 This was Alfred Russel Wallace, the co-discoverer
9 with Darwin of the theory of evolution. At the turn of the
10 last century he made some predictions about what would
11 happen in the 20th century, and they were atrocious. He
12 said that phrenology will finally come into its own. A
13 second thing that he predicted was that vaccination would be
14 shown to be a fraud. That sort of makes me pause somewhat
15 in making too many predictions.
16 Nonetheless, there are things that can be
17 predicted. One of them is, almost certainly, that 13 core
18 loci are here to stay for a while. There is enough
19 investment in time and effort and equipment on the part of
20 the people that use this that they are not likely to change
21 lightly to another system even if the other system is quite
22 a bit better. So one of our more confident predictions is
23 that we can have the 13 core loci for some time.
24 That is really pretty powerful. With a group of
25 13 core loci the match probability is about one in 200
1 trillion. That is considerably larger than the size of the
2 world population. I will remind you that the world
3 population passed the 6 billion mark last October. I find
4 it interesting as a geneticist that finally we have more
5 people in the world than we have basis in a single DNA cell,
6 which happens to be 6 billion also.
7 Actually, of course, that is a poor estimate,
8 because there is structure in the population and there are
9 likely to be close relatives. So I can't really say that

10 it's almost impossible for two people to have the same set
11 of 13 core loci, but unless they are close relatives, it is
12 exceedingly improbable.

13 Another thing that is a very certain kind of
14 prediction are the kind of technological advances that will
15 make these 13 core loci work better, more efficiently, more
16 rapidly, more miniaturized, and more automated. These are
17 all happening.

18 The speed of the operation is going up, or going
19 down, whichever way you like to say it, and the
20 miniaturizing is taking place rapidly. I've seen a number
21 of articles based on future predictions and in fact present
22 workings of systems that have hand-held computer systems
23 that use a very tiny amount of material and do the work very
24 rapidly.

25 For example, one by Ehrlich at MIT. It can handle
1 8 loci. It happens to be 8 of the 13. It can go through
2 the process in two minutes and classify all of these 8.
3 That can be done today in a laboratory. I don't want to
4 guess how soon this becomes robust enough that you can carry
5 it in your pocket, but it's pocket sized at least, and maybe
6 in two years, maybe in five years, certainly in ten years it
7 would be possible to take something like this to the crime
8 scene.

9 It is an exciting marriage of Silicon Valley and
10 microbiology in using the electronic tricks of one and the
11 microbiology of the other.

12 One of the 13 loci, THO, has a subset. So there
13 is a unit that isn't repeated exactly the same number of
14 units in the unit. To resolve that took ten minutes rather
15 than two minutes. The point is that this system looks
16 accurate enough to be put to use almost any time provided it
17 can be made robust enough to be of immediate use.

18 The other things that we can certainly predict
19 will happen.

20 There will be much more emphasis on mitochondrial
21 DNA in the future and it will require databases. It
22 requires a large database for mitochondrial DNA. Because
23 you can't multiply the components together, the probability
24 of finding it is limited by exactly the size of the
25 database.

1 So I think we can predict some large databases for
2 mitochondrial DNA, which is particularly useful, as
3 everybody in the room knows, because there are many
4 mitochondrial particles in a cell, and therefore a much
5 smaller amount of material can often be resolved.

6 It is also useful because it can trace the female
7 line of ancestry, because mitochondria is always transferred
8 from the mother to the children.
9 The Y chromosome has finally ceased being inert.
10 I have memorized for years and taught for years that the Y
11 chromosome doesn't have any genes except those that
12 determine sex. Actually, it has a very large number of
13 discernible DNA sites, SNPs and STRs. So the Y chromosome
14 is just about as good as any other chromosome now from this
15 standpoint, and it has some unique properties that make it
16 useful; it has some properties that make it confusing.
17 What makes it useful is that it traces the line of
18 the male ancestry from father to son. And it has been
19 particularly useful in ways that are not particularly
20 relevant for forensics.
21 I emphasize that, because probably we could be
22 misled if we wanted to use it in this way. The Y chromosome
23 is a good marker of human population structure. The Y
24 chromosome varies much more from population group,
25 geographical group to other geographical group, much more

1 than the X chromosome does, much more than the autosomes do.
2 Why is that? I think it's because of this human habit that
3 the females do the migrating. The males stay home and carry
4 females to the next colony, and the net effect of this is
5 that the female traits, mitochondrial DNA, are much more
6 uniform throughout the world than the Y chromosome.
7 I say this partly because it's interesting, but
8 partly because we might be pretty badly misled if we tried
9 to determine an individual's ancestry from what his Y
10 chromosome is. One example of this was there is a group of
11 people in Africa who claimed to have Jewish ancestry. I
12 think anthropologists to a person simply refused to believe
13 this.
14 But it has actually turned out that there is a Y
15 chromosome in this population that is the same as the Y
16 chromosome in the Egyptian area, in northern Africa. So the
17 tradition of father to son transmission has carried on this
18 particular gene along with its religion, but all the rest of
19 the genome is fairly scrambled. If you took this particular
20 Y chromosome as evidence of a person's skin color, you would
21 be pretty badly misled. You would say this person is
22 Jewish, whereas in fact he is black in that particular
23 population.
24 If we are going to continue to use the 13 loci for
25 database purposes, there is going to continue to be a need

1 for further refinements for case studies. One way to do it
2 would be just to expand the 13 to more and more loci. One
3 suggestion would be that particularly useful from this
4 standpoint are penta-nucleotide, 5-unit repeats. They have
5 less stutter than the smaller ones do, less ambiguity in
6 interpretation, but particularly nice from the standpoint of
7 analysis is that they tend to have a larger number of
8 alleles and therefore much more heterozygotic than the
9 smaller number of repeat units.

10 Certainly there is going to be much more use of
11 SNPs, single nucleotide probes, in the future, but I think
12 our best guess is that these will be used as an adjunct to
13 the STRs rather than as replacements. Maybe ten years down
14 the road these will be so much better that they will replace
15 the others, but I suspect that replacement will be gradual
16 and reluctant on the part of a great many people.

17 There are millions of sequences in the human
18 genome. We call them Alu. They originated probably with
19 some kind of a virus infection millions of years ago. They
20 are no longer changing now, I might add. But these leave
21 their track from a previous infection that happened sometime
22 in the human population. As I said, there are millions of
23 these. They could be exploited for forensic uses. I see no
24 immediate need for it right now, but there is a possibility
25 there for the future.

1 Finally, just as physical methods tend in the long
2 run to replace chemical methods, I think the physical
3 methods for analyzing DNA molecules will replace the
4 chemical methods. Mass spectroscopy methods are being
5 worked on right now. I don't understand them in the least,
6 so I'm not going to discuss any more about it, but I'm told
7 that they offer considerable promise for the future.

8 A bit about the population structure and
9 relatives. One principle that the committee likes, at least
10 I like, and I think the committee is persuaded, and that is
11 that we would really like to be able to have a sample from 2
12 people and compare it to 2 samples and would like to be able
13 to say that they are different even if there are close
14 relatives involved. One of the difficulties with the
15 present situation is we assume a random population, which
16 can't strictly be true, and we assume no structure in the
17 population, or we have taken it into account with a rather
18 crude correction.

19 It would be nice to have a system that is robust
20 enough that you don't have to worry about it. That is, a
21 system that would distinguish any two persons however

22 closely related they are. There is a property of sibs,
23 brothers and sisters, that makes it very convenient from
24 this standpoint, and we are finally beginning to have enough
25 loci to make this useful. For any particular locus, the
1 probability that two brothers would match exactly at that
2 locus is exactly one fourth and it is one fourth for each
3 locus.

4 I emphasize that this one fourth comes not from
5 any considerations of population genetics or population
6 structure; it comes from simple Mendelism. There are four
7 different ways of putting these genes together and a fourth
8 of the time they will be the same. Furthermore, the
9 different loci are independent of each other whether there
10 is linkage equilibrium in the population or not.

11 What I am saying is that if we use this factor of
12 one fourth, we are dealing with something that is very
13 robust with respect to departures from traditional
14 assumptions. One fourth is not the whole story because
15 there are gene frequencies that add to this also, but they
16 are small, and the one fourth dominates the equation.

17 So I think in the future we are going to find it
18 possible to tell any two individuals apart even if they are
19 close relatives, even if they are brothers, which is the
20 closest relative from this particular standpoint.

21 What does that do to the match probability? With
22 13 loci, the match probability becomes about 1 in a million.
23 If you raise that to 21 loci, it's about 1 in a billion.

24 What I am suggesting here is that maybe the courts would
25 prefer robust evidence that nobody could question: 1 in a
1 million as having more persuasive power than 1 in a billion
2 where you are not quite so certain about the assumptions.

3 Anyhow, I think we can predict that this will be a
4 way of the future. Maybe not the only way to do the
5 calculation, but one way in which it could be done.

6 This also means that racial differences are less
7 important. If I ask for this calculation, thinking of
8 brothers, whether I've taken the database from the right
9 racial group makes much less difference than it does
10 ordinarily just because of the dominance of this factor of
11 one fourth that intrudes.

12 The much maligned 1992 NRC report introduced what
13 it called the ceiling principle, which is roundly denounced.
14 The purpose of that was a laudable one, and that was to make
15 the process such that you wouldn't have to take into account
16 geographical or racial or ethnic differences, and we can
17 approach that by having a system that is robust enough to

18 detect any two people however closely related.
19 This is for the future, but I don't think it's
20 very far in the future at the rate at which new loci are
21 being discovered.
22 I want to talk a little bit about identifying
23 group membership or individual traits from a DNA sample. I
24 will talk first just about the 13 core loci.
25 Charles Brenner, a few years ago, back in the
1 classical antiquity of VNTRs, had a sample of 5 VNTRs from a
2 serial rapist. For some strange reason, they didn't know
3 what racial group this person belonged to. He found that
4 the likelihood ratio of white as compared to black in the
5 population was 45. In other words, this particular set of
6 VNTR loci was 45 times as likely that it came from a white
7 person as it came from a black person. That turned out to
8 be correct, and the person did turn out to be white.
9 I want to ask what happens not with VNTRs, but
10 what happens with the 13 loci. Charlie Brenner,
11 fortunately, has done such a calculation. The average
12 likelihood ratio is something like 70. In other words, if I
13 have a sample that comes from a black person tested with a
14 white database, what is the expected average likelihood
15 ratio? It's about 70. So right now with the 13 loci that
16 are being done routinely one could make a pretty strong
17 guess as to the racial makeup of the person that left that.
18 It's much less effective in distinguishing
19 Hispanics, to nobody's surprise. That is not a very good
20 biological classification, because it's based on language,
21 and there has been no research as far as I know about
22 orientals in this regard.
23 That is what could be done just using the existing
24 13 loci. If we are going to ask further questions about
25 group identification, then we will have to go outside this
1 particular system.
2 But there are other loci. There is the Duffy
3 blood group that is associated with malaria resistance and
4 therefore is very common in parts of Africa and virtually
5 unknown elsewhere. So it's a pretty strong indicator of
6 African ancestry.
7 Again, I would caution that finding one gene
8 pointing to African ancestry doesn't tell you very much
9 about the person's phenotype. A person could have a very
10 light skin color and still have one gene that had its
11 origination in Africa.
12 So our committee looks forward to the time in
13 which we can pay less attention to racial and group

14 differences and more attention to individual trait
15 differences.
16 How are things coming in this field? I don't
17 know, because most of the work that is going on here is
18 isolated individuals studying individual traits and I'm not
19 aware of much in the literature, but certainly it should be
20 possible, as I look forward 5 or 10 years, to identify from
21 a DNA sample whether a person had red hair or not, or was
22 bald if it's a male, had straight hair or dark skin, or was
23 color blind.
24 But once I go through a list like this, I've taken
25 the obvious ones, and there are not an awful lot more of
1 conspicuous traits. So if we are going to try to identify
2 racial features or height, weight, things like this, then we
3 are getting into the realm of polygenic multifactorial
4 traits, with all of the statistical problems that that
5 entails. I don't doubt that within 10 years one could say
6 quite a bit about a person from the DNA profile, but I think
7 it's pretty hard to predict right now how you go about doing
8 it.
9 What about identical twins? Every time we talk
10 about this subject we say all this works except for
11 identical twins. I think it's quite likely that in the next
12 10 years, and maybe sooner, it will be possible to identify
13 identical twins. We could use two kinds of principles.
14 There may be more, but two obvious principles.
15 One is to find regions of the genome that are very
16 highly mutable so that therefore one twin would have mutated
17 more than the other. The immunoglobulin loci have that
18 property, and it should be possible right now in principle
19 to distinguish a pair of twins by the fact that they would
20 have different antibody repertoires.
21 Another possible way is that each of us is unique
22 in the parasites that we carry. Our intestinal bacterial
23 and the various kinds of other organisms that we carry
24 around with us are presumably unique and they are different
25 between identical twins. So maybe we can identify a person
1 not by his genes, but by his parasites. I think it could be
2 done. It's just a matter of how much effort that people
3 want to put into that.
4 This is high tech virology now, but there are
5 viruses now that enter into the organism, join in with the
6 DNA and become incorporated in the DNA. The retroviruses do
7 this. If each of these two twins has a different set of
8 infections, or not necessarily infections but just viruses
9 that cause no problems, these viruses might intrude

10 themselves into the DNA, and they won't do it in the same
11 spots in the two individuals. So by identifying the site of
12 introduction of the virus into the tissue it might be
13 possible to separate twins.

14 Whether any of these three has any practical value
15 or will in 10 years, I don't know, but it's not beyond the
16 realm of possibility that identical twins, like the rest of
17 us, turn out to be resolvable.

18 Another point I want to mention briefly is partial
19 matches. It is alluded to in David's report, and that is a
20 case in which the DNAs were not identical but very, very
21 similar and therefore likely to have come from close
22 relatives.

23 One can say quite a bit qualitatively and
24 certainly by use of likelihood ratios quantify this. It
25 would be a property of brothers and sisters that they will

1 agree exactly, that is, both allele locus, a substantial
2 fraction. It's one fourth on the average, as I said a while
3 ago. So a way to look for sibs would be to look at
4 collections of loci that match exactly. That has happened
5 in the past and it will certainly happen more often in the
6 future, and the larger number of loci that are concerned,
7 the greater the probability that this could happen.

8 Another relationship that strikes you in the eye
9 the minute you see it is parent and child. As you realize
10 from just knowledge of parents and children, a parent and a
11 child always share exactly one gene at any particular locus
12 but never more than one. So you can look for a series of
13 single gene matches with very few double gene matches and
14 identify parents and children. So we can tell sibs; we can
15 tell parent and offspring pretty clearly with, say, 13 or
16 more loci.

17 Other degrees of relationship it is not so
18 obvious. There is no way that I'm aware of in which I can
19 distinguish between half sibs and an uncle and nephew,
20 because they share the same fraction of their genes.

21 Cousins are 50 percent as large a fraction. It's probably
22 impossible to make the distinction.

23 Probably this means that we would have sort of
24 like the so-called primitive number system, one, two and
25 many. We could say sibs, parent and child, and all others,

1 and probably make a pretty good guess as to what other
2 possibilities there are but not specifically what they are.

3 I have the impression from Paul that Virginia

4 prohibits the use of this kind of information, and it is

5 very likely to differ from state to state. But at least the
6 technical possibility is there now and could be used on a
7 wide scale if it was so desired.
8 What about database searches?
9 In the 1992 report the report worried about
10 finding suspects by searching a database and suggested that
11 you don't use the database in the case study but pick up
12 other loci which would be independent of how you found the
13 data. The 1996 report, which David and I are well aware of,
14 suggested a numerical correction for this, taking into
15 account the database size.
16 One thing that doesn't come out in discussions of
17 this, at least a problem I've had in talking about this with
18 people, is that both of these studies were thinking of
19 databases that were equivalent to a random sample of the
20 population.
21 We were not thinking of databases from convicted
22 felons. Taking the recidivism rates that are given in your
23 report, it looks as if the prior probability of finding a
24 match from a felon database isn't much different than the
25 prior probability from a case that is picked up from
1 eyewitness identification or some other mechanisms. So I
2 think probably the mechanism that tends to be done -- it's
3 certainly done in Britain -- simply ignoring the fact that
4 this came from a database, probably isn't too bad.
5 But if we have a database of the entire population
6 and then find a suspect by searching through what amounts to
7 a random sample of the population, then you will certainly
8 have to have some kind of a correction for the fact that
9 this was done.
10 This is a topic of great dispute among the members
11 of our committee over a fine point that most of you don't
12 really care about, whether the likelihood ratio is better
13 than the match probability as a way of dealing with these
14 and how you make the correction. What I would say is that
15 the likelihood ratio is in the data, but the prior
16 probabilities will differ in accordance with the manner in
17 which you got the data.
18 I think it may be that if we ever find people from
19 the entire population databases that maybe the much maligned
20 recommendation in the 1992 report that you don't test on the
21 same individuals that you discovered on the principle that
22 you don't test a hypothesis on the data that generated it --
23 that is pretty far in the future and highly uncertain
24 because we don't know what is likely to happen with respect
25 to general population databases.

1 One final remark. Our report says nothing about
2 laboratory standards, error correction and error protection
3 on the assumption that this is the business of the DAB, but
4 I would reiterate the main conclusion of our 1996 report,
5 and that is that the best protection that an innocent person
6 has is not higher and higher standards, which of course are
7 necessary, but is really the opportunity for a retest.
8 That's it.

9 CHIEF JUSTICE ABRAHAMSON: Thank you, Jim.
10 Somebody had a comment.

11 MR. REINSTEIN: Just from the idiot judge
12 standpoint. You asked some questions in the report about
13 what we thought about redundancy. For example, the history
14 and the glossary, and what not. I think that is good. We
15 have a glossary and we have a biological issues portion in
16 the post-conviction report, but somebody who wants to look
17 at technological advances in the future may not even be
18 concerned about post-conviction. I think that's good.
19 Also, I thought the historical approach was really
20 valuable for people who just are not in the field, judges
21 and prosecutors who don't deal with this on a regular basis.
22 I think it's a really good primer.

23 So aside from me reading the report and my brain
24 shuts down when I see a formula, I thought everything else
25 was great. I think the population issues are really
1 important, but most lay people are going to shut down on it.

2 MR. CROW: There was a lot of blood, sweat and
3 tears that went into those introductory elementary sections,
4 but I hope it has helped. We certainly do invite readers to
5 skip that part.

6 MR. GAHN: When I read this a few days ago, I
7 thought this was terrific. However, I got a little
8 concerned when I got to page 44 and page 45. I would like
9 to talk just a little bit about the uniqueness issue and the
10 database search.

11 Correct me if I am wrong. As far as addressing
12 the uniqueness issue, are we backpedaling a little bit from
13 NRC II? I got the sense reading NRC II that they put out
14 the probability that the time will come when uniqueness will
15 be able to be stated. I think they even threw out that once
16 these 13 core loci are in place -- the numbers of years that
17 I've been at the PROMEGA conferences and just talking to
18 those in the field, I always had a sense that these 13 core
19 loci was sort of going to be the answer to the uniqueness
20 issue, that that's the person. I know in the state of
21 Wisconsin when our crime lab does these cases the numbers

22 are in the sextillions or quintillions now.
23 It seems like we are backpedaling a little from
24 NRC II. Can't we make a stronger statement about uniqueness
25 than what is said here?

1 MR. CROW: I'm sensitive to this. The real issue,
2 as we all know, is that uniqueness is a scientific question
3 and we really want a political solution to it.
4 I didn't talk about it now, but it is in here.
5 What the FBI advocated is if you ask if the probability is
6 less than the reciprocal of the United States population and
7 then put in some fudge factors taking care of the
8 uncertainty -- and these are large fudge factors; they are
9 factors of 10 in 2 different cases -- that if the
10 probability is so small that it's less than the reciprocal
11 of the population of United States and you are rather sure
12 of that, then there is every reason to say that person is
13 unique.
14 To get a group of statisticians to make this
15 statement is something quite different. I think what has to
16 happen is that some political or legal group has to just say
17 that if the probability is less than such and such we will
18 call it unique and make that as a political statement.

19 MR. GAHN: Could we make a stronger statement as a
20 Commission about uniqueness?

21 MR. CROW: Maybe the Commission could. Just don't
22 ask my working group to do that.

23 MR. GAHN: If we were to survey all the crime
24 labs, shall we say, in the country, I suspect most of the
25 ones that get a match with the 13 core loci are calling it
1 source or source attribution.

2 MR. CROW: The 13 loci has a probability of about
3 2 trillion. That is 3 or 4 or 5 orders of magnitude smaller
4 than the world population. It is what almost any of us
5 would call unique but we don't want to say it.

6 MR. GAHN: Maybe this is an area we could look at
7 again and that the Commission should decide. We still seem
8 to be on the fencepost here with this uniqueness issue.

9 MR. CROW: I would like to pass it on to the
10 Commission as we have done with everything else that is
11 hard.
12 [Laughter.]

13 MR. SCHECK: With all respect, Norman, I think it
14 is a strategic error looking at it from the point of view of
15 prosecutors and judges. The numbers, no matter how you
16 express it, likelihood ratios, frequencies, everything else,
17 are overwhelming, particularly in a case where there is any

18 kind of corroborative evidence. That is where the focus
19 ought to be.
20 What I get from this is there is a sufficiently
21 vigorous debate within the statistical community that if you
22 try to engage in fudge factors and everything else to use
23 uniqueness, which Dr. Crow is characterizing as a political
24 solution so you can say it, you are opening yourself up to
25 more battles of experts, more unnecessary money spent on
1 debating arcane statistical issues, and it is a mistake.
2 I would actually say, with respect again to this
3 same issue of database searches, that the 1992
4 recommendation and the way that even in the UK that you get
5 a hit on 13 core loci, we've got plenty of STRs. You are
6 going to bring a guy to trial for a serious crime that
7 actually is contesting it, which is going to be a marginal
8 number of cases. You are going to have plenty of samples.
9 Just do it again and don't engage in a statistical debate
10 where there are some very significant statisticians and
11 geneticists who will come in and argue with you. It's nuts.
12 It's a huge waste of time. I would sure like to see the
13 court money spent on other things.
14 In terms of kicking it to the Commission, I tried
15 to wrap my brain around this and look at a lot of the issues
16 for a while. I don't feel competent to evaluate it. I've
17 been litigating this statistic since 1989. I honestly don't
18 feel comfortable. I still don't understand half these
19 formulas.
20 MR. CROW: You understand half of them?
21 [Laughter.]
22 MR. SCHECK: I don't really think in some ways we
23 are competent even to make that decision. It only skews the
24 debate in the sense that we all know that what is going to
25 happen is that the ultimate issue in court is going to be
1 "who made this decision?" when they start talking about it.
2 With the statisticians and population geneticists, it's a
3 bunch of us, and how much significance that has.
4 Frankly, for all practical purposes we are stating
5 what the positions are and ducking.
6 MR. CROW: Statisticians are trained to make fine
7 distinctions, and they do. Let me say this, Barry. Even if
8 one understands every one of these formulas in full detail,
9 the uncertainty is still just as great in this regard.
10 CHIEF JUSTICE ABRAHAMSON: Norm.
11 MR. GAHN: Also in the database search, as I read
12 this, there is a hit in the data bank with the convicted
13 offender at the 13 core loci. We go back. We do a search

14 warrant and get the blood from the convicted offender and go
15 back and look at the evidence. What went to the CODIS was
16 semen from a vaginal swab. We take the cervical swab now,
17 do the semen and test for those 13 core loci and come up
18 with a match.

19 Are you stating that we should be telling our
20 crime labs, now I want you to give me 5 penta-nucleotides
21 and 7 SNPs? Isn't that good, those 13 core loci?

22 MR. CROW: Let me say something. This is on my
23 own, but I would like to present it to the working group,
24 which is essentially what I said a while ago.

25 We weren't -- I wasn't at least -- aware of the

1 recidivism rates that are reported in David Kaye's statement
2 from laboratories of convicted felons. That means that if
3 you find a match, the prior probability is somewhere between
4 5 percent and 95 percent or 1 percent and 99 percent. In
5 any case, the likelihood ratio of 10 to the 15th will swamp
6 that.

7 I think that one should, if the data come from the
8 convicted felon database, simply take the likelihood ratio
9 at face value.

10 To be clear, if we ever go into having databases
11 of the general population, that changes the situation.

12 MR. CLARKE: I have the concern that Norm did. I
13 don't understand as a lay person what is wrong with
14 repeating the same markers. In other words, the database
15 match which has been used for investigation purposes. Then
16 when a redraw is made, what is wrong with using the same
17 markers?

18 MR. CROW: You are testing against the accuracy of
19 the previous test. You are not testing against the
20 representativeness of that. You really have to take 13
21 different ones.

22 MR. CLARKE: But isn't what law enforcement is
23 doing independent of any investigative lead and they are now
24 attempting to determine the likelihood, now that we have
25 completed the independent test, that this person or a random
1 person could have left that sample? That's what I don't
2 understand. In other words, what's wrong with that
3 independent figure, which may be 1 out of a million or may
4 be 1 out of a trillion?

5 MR. CROW: I think technically it's not so good,
6 but I think practically it's the right thing to say.

7 MR. SCHECK: First of all, Norm, just to take your
8 example, I wouldn't retest the cervical swab. I'd go back

9 to the original vaginal swab, because on the cervical swab
10 you have a mixture or some other kind of problem.
11 I'm not saying we should necessarily take
12 positions on these things, but we could throw out
13 possibilities. Why wouldn't you as a prosecutor want to say
14 we took part of the vaginal swab, we got a hit on 13 loci,
15 we have now identified an individual and arrested him on
16 that basis? Okay, defense, we are proposing (a) to send out
17 the second part of the swab for additional testing with
18 different loci and/or have you do it.
19 That gets rid of the replication problem. That
20 sinks the defense. That is more persuasive to the jury, and
21 it avoids statistical issues.
22 MR. CLARKE: I just don't think the statistical
23 issue is there as an end user. For instance, how is Jan
24 going to start operating a laboratory doing not only the 13
25 loci? Now she is going to have to do so many more in addition
1 to that.
2 MS. BASHINSKI: You have just, with that
3 statement, doubled the workload and the developmental
4 overhead of all the laboratories. That would turn around
5 everything we are trying to do, which is to increase the
6 capacity of the laboratories to do more cases without
7 suspects and to deal with the data bank.
8 I think what we need to really pursue is this a
9 practical and/or a legal issue or political issue. There
10 are distinctions and very fine things that are stated based
11 on population genetics. As a matter of practicality, when
12 you apply them to everyday life, it's a distinction without
13 a difference. I think we really need to figure out if that
14 is where we are here, and I think that is where we are here.
15 Because if that's the case, you are asking to derail the
16 progress we have made so far.
17 MR. CROW: It's almost like taking a fingerprint
18 search. Let's say by computer search there are 10 points of
19 identification that match, using that term loosely, and then
20 telling the examiner in the reexamination, you have to
21 ignore those now.
22 MS. BASHINSKI: Right. Find another 10 or another
23 finger.
24 MR. CROW: I was just saying that if these came
25 from a felon database search, you probably wouldn't need to
1 do that.
2 How about this, David? You've thought about this.
3 I'm using partly your data here. Not your data, but your
4 compilation of it.

5 MR. KAYE: I guess I would reinforce one thing
6 that was said earlier. A month ago I was at the Fourth
7 International Conference on Forensic Statistics listening to
8 various statisticians disagreeing with the 1996 and the 1992
9 report arguments that there needs to be any adjustment for
10 database search.

11 Taking the position that Norm and Woody have taken
12 here, I still don't think there is closure within the
13 statistical community, but I don't think it's crucial. I
14 don't think it's that important what this Commission does or
15 doesn't do, because frankly I think experts can come into
16 court on the basis of their understanding of statistics,
17 present a result, and say that when you have got enough
18 matches even in a very large database, as we start talking
19 about the 13 and more loci, that this is secure evidence it
20 is this person by virtue of uniqueness, and that kind of
21 thing.

22 I think the courts are going to work it out
23 regardless of this group. To really understand this
24 statistical issue would require an awful lot of effort.
25 It's a conceptual point that I gave up trying to understand
1 when I was on the committee.

2 MR. CROW: In a way we have been through this war
3 before in the previous committee.

4 CHIEF JUSTICE ABRAHAMSON: David, would you state
5 your full name and affiliation for the record.

6 MR. THOMA: Sure. The last comments can be
7 attributed to David Kaye. I'm the reporter for the Legal
8 Issues Working Group.

9 CHIEF JUSTICE ABRAHAMSON: Thank you.

10 Jeff, you have been very patient.

11 MR. THOMA: I'm just trying to add my two cents
12 from a practical perspective. I really have to agree here
13 that the issue is probability. It's not uniqueness.
14 Uniqueness is not something that has been proved, will
15 necessarily be proved. Until and unless you absolutely had
16 every single person and an inordinate amount of loci, it
17 clearly cannot happen for Norm to ask -- I appreciate the
18 vigor with which he is asking -- this Commission to overturn
19 what research and development and those people have a better
20 handle on than the members of this Commission.

21 Several of us do this practically. I have been on
22 the other side of Woody doing it, and I know Barry has as
23 well. But it is probability. That is what we are left
24 with, and you can't just override that and say X is Y
25 because I want it to be, because it would resonate louder in

1 jurors' minds. You are really going to have a backlash of
2 the greatest order and you are going to have more of a
3 fight, as Barry states.
4 So leave it at probability. Go to whatever amount
5 of probability that you are comfortable with or you believe
6 jurors are comfortable with ultimately and leave it at that.
7 I would vehemently object to trying to call it uniqueness.
8 MR. CROW: That seems wise to me.
9 Do you think that as a result of all this
10 discussion of statistics that that will filter over or
11 spread over or diffuse over into other kinds of
12 identifications which do not use statistics which ought to,
13 in my opinion? That is not anything that we need to be
14 saying, but it is a concern for me.
15 MR. SCHECK: Let me address one thing, Jan. I
16 wasn't suggesting that you necessarily do it in every case
17 such that your lab would have to have this huge capacity of
18 some other markers. Where this issue is going to arise as a
19 practical matter is when the only evidence is a database
20 hit.
21 In other words, it's your classic cold hit case
22 where they are bringing some guy in who says, I was in
23 Minnesota and you said this happened in Chicago. And nobody
24 has any other evidence that links this person to the crime.
25 Then all of a sudden it becomes a serious issue, and in that
1 kind of rare case, why not just get rid of it by doing
2 additional markers that can be found?
3 MR. CROW: Let me agree with Barry and add one
4 point. There are going to be instances arise in the future
5 in which 13 loci aren't enough. Mixed samples, for example,
6 can be confusing. There are going to be special cases, but
7 I think these are going to be rare.
8 MR. SCHECK: Mixed samples are not rare. I get
9 these calls all the time on multiple offenders with the
10 mixtures. There are plenty of state and federal cases
11 dealing with these mixtures that are driving people crazy.
12 MR. CROW: One of the things that we predicted
13 with great confidence is that computer programs are going to
14 be smarter than people in distinguishing mixtures probably
15 before very much longer. These are complicated problems.
16 I'm sure there will be good work on that.
17 CHIEF JUSTICE ABRAHAMSON: Paul.
18 MR. FERRARA: Let the record show that I've
19 managed for almost an hour and 15 minutes not to say
20 anything; I keep my mouth shut.
21 A couple points I want to make or emphasize. A

22 couple of years ago I wouldn't have agreed with Barry, but I
23 do agree with him now with regards to the issue of the
24 individuality and the uniqueness.

25 Now that the courts are getting over the phase of
1 having statisticians in the courtroom arguing ad nauseam
2 about whether the random match probability or likelihood
3 ratio is 1 in 100 million and not 1 in 10 billion, the
4 courts have come to accept an 8 locus match as almost a de
5 facto identification for all intents and purposes, as well
6 they may. Of course we do have access to additional
7 megaplexes to round out that to the full 13.

8 I had one case where an FBI expert tried to
9 testify in a Virginia case to uniqueness and all of his
10 testimony was struck because there was no basis for it.

11 The thing I'm all about and I know Jan is about
12 and the lab directors and the people in the laboratories and
13 the Commission really is work flow, getting work in and
14 getting work out. I for one don't want to go through the
15 terrible drain of staff on admissibility issues or debates
16 with independent experts, discovery motions and pretrial
17 hearings just to be able to get to say "that's the guy" as
18 opposed to "he cannot be excluded as a possible
19 contributor."

20 I have to agree.

21 With respect to the data bank searches, I've got
22 some experience on this that I will talk about. We have to
23 keep in mind that when we report a database hit to a law
24 enforcement agency there are no statistics. In fact, we
25 tell the investigative agency this is an investigative lead.

1 Go check this guy out, because we did a search in our data
2 bank and we made a hit.

3 If you, based on that information, can develop
4 probable cause to get an arrest warrant and get a sample
5 from him, then we will do a direct comparison, and when that
6 comparison is done, admittedly at the same loci, what we are
7 then reporting is either the random match probability or
8 likelihood ratio of finding that individual's genetic
9 profile in a population at random.

10 There is really a two-test here. Quite frankly,
11 from a practical standpoint, in Virginia, in most of the
12 forensic science laboratories it's almost a two-phased
13 approach. We do searches on using 8 loci. We have not made
14 a decision to run every piece of crime scene sample on all
15 13 loci. We will screen with one multiplex of 8, and then
16 when we want to determine if in fact there is a match, then
17 we have the power, the ability, the option and inevitably

18 the necessity when we make a match to go ahead and run the
19 full 13. So in effect there is already a two-phased
20 approach to the searching.
21 Of all of the data bank hits that we have had in
22 Virginia, which has gone through VNTRs as well as STRs, the
23 search hasn't necessarily had to be based on the total full
24 complement of loci. So I don't think it's a problem.
25 The other thing is, with the issue of

1 individuality, I'm not sure that the FBI DNA Advisory Board
2 isn't wading in on that one themselves.

3 MR. CROW: One thing I wish is that the FBI, if
4 they are going to advocate their particular statement, would
5 write it out and let us know what it is. I have access only
6 to one press release, which is clear enough, but that was
7 three years ago.

8 CHIEF JUSTICE ABRAHAMSON: We will try to get
9 that.

10 Chris.

11 MR. ASPLEN: The issues that Norm brought up and
12 Barry talked about and I think David Kaye crystallized have
13 also been expressed but kind of from a different end that I
14 think as executive director it's my job to communicate to
15 you.

16 In speaking at the CODIS Users Group meeting a
17 couple of months ago, in the public comment section after my
18 discussion about the Commission's activity the issue was
19 raised but on a different issue, kind of from the other
20 side. It had more to do with the statistical issues that
21 are talked about, and the sib principle.

22 The question was whether or not by nature of this
23 report addressing issues like that and how we address that
24 becomes something other than what the report was originally
25 intended to be, i.e., the difference between something that
1 professors just speak about, the technological future of DNA
2 evidence, as opposed to something that may well be used as a
3 tool in court to either support the proposition that we
4 should be taking a different statistical approach in a case
5 than what was actually taken on one end of the spectrum, or
6 on the other end of the spectrum, a tool that should be used
7 to make the point that we should be able to define
8 uniqueness or call uniqueness in this particular case.

9 So the question that really arises to the
10 Commission is, what is the Commission's intent on the
11 utilization of this particular document and how can we
12 affect that, if you will?

13 CHIEF JUSTICE ABRAHAMSON: Barry.
14 MR. SCHECK: I have a question that is sort of an
15 informational question that I think relates to this issue.
16 Dr. Crow, you mentioned this business with Brenner
17 and the idea that right now using the 13 core loci you could
18 develop an average likelihood ratio of something like 70 to
19 distinguish whether the person who left the unknown sample
20 is black or white. Do I understand that correct?
21 MR. CROW: Yes.
22 MR. SCHECK: Where is the underlying work or data
23 for that? Is that available anywhere?
24 MR. CROW: I got it by personal communication.
25 I'd have to get it from Brenner. I know how he did it.
1 MR. SCHECK: And what it is for Hispanics.
2 I don't think the DAB has to worry about something
3 like this. The point of Dr. Crow's recommendation, as I
4 understand it, in terms of distinguishing sibs, is pointing
5 towards a direction where you can get out of some very
6 difficult political and privacy problems and policy issues
7 which I think are uniquely the province of this Commission
8 as opposed to a purely technical issue about how you crunch
9 numbers or how you do a protocol in a lab, which I think is
10 probably more properly their jurisdiction.
11 Things like this, I think, should be of greater
12 concern to us, frankly. I'm a bit worried about those
13 numbers. I think before we even venture forth with that
14 other than stating it in the most general terms we should
15 know exactly what the status of that research is, because
16 this is one of those areas where obviously it could be a
17 valuable investigative tool. On the other hand, it could be
18 mishandled.
19 Frankly, for my money, I think the one failing we
20 have collectively is I don't think we have really addressed
21 these privacy and political issues carefully enough. Let me
22 give you one example.
23 There was a case recently decided by the 2nd
24 Circuit dealing with a town. The case went like this.
25 There was a crime in a white community, and the only
1 description they had was that the crime was committed by a
2 black person. It went out over the radio. They then
3 started stopping every black person in this town. The 2nd
4 Circuit upheld that on the grounds that if it had been a
5 description of a white person in a black community that had
6 committed the crime, they would justify the stops as well
7 because in this area blacks were comparatively less likely
8 to be and vice versa. That sort of supposedly evenhanded

9 this.

10 I can easily see where this kind of statistic or
11 this use of an investigative lead could justify all kinds of
12 things that may be more problematical socially and
13 politically than it's worth. These, I think, are the issues
14 where we may solve them, but I think we have to put out some
15 clear indicators that these things are going to become
16 issues sooner rather than later given the power that we have
17 here.

18 MR. CROW: I think we have a tough job pointing
19 out what could be done, which is not the same as saying that
20 it ought to be done.

21 MR. SCHECK: For example, when you were talking
22 about the retroviruses, and I know we can do it with HIV,
23 the first thing that occurred to me is, well, we can end a
24 lot of these things, because every time a convicted violent
25 felon leaves jail, why don't we just inject them with a tag?

1 CHIEF JUSTICE ABRAHAMSON: We'll mark you down as
2 saying that.

3 [Laughter.]

4 MR. SCHECK: I think that is going to be the next
5 suggestion.

6 MR. CROW: I am worried about talking too much
7 about retroviruses.

8 Maybe what we should do is really do this right.

9 Instead of taking just one particular example, what Brenner
10 did was take a random sample from the black population, test
11 that against the black population, and then repeated this
12 experiment over and over again. That's where this
13 likelihood ratio came from. One ought to do this not only
14 for that particular set but for all other large groups. It
15 wouldn't be that hard to do. It would be hard for me to do,
16 but it wouldn't be that hard for a computer expert to do.

17 CHIEF JUSTICE ABRAHAMSON: I would like to wind
18 this up if I can. I know we are running late on the break.
19 Woody had one addition. If it continues on, we will break
20 and come back to it.

21 MR. CLARKE: Actually, as far as the issue of
22 uniqueness, I think it is to some extent a practical
23 two-edged sword as well, because there have been instances
24 in my own county where an opinion is offered about
25 uniqueness. It doesn't carry as much weight as providing a
1 statistical estimate did. In fact, in one instance, a
2 lawyer said, that came across so poorly, I went into the
3 statistics, and I had no intention of doing so. So there
4 are at least two schools of thought about that.

5 The sib principle is the only other thing I wanted
6 to return to. I am concerned about the description. I
7 guess it is a subheading: A more reliable match criterion;
8 the Sib Principle. Is it correct to say more reliable or
9 perhaps more conservative and universal? Something like
10 that.

11 MR. CROW: Maybe robust is the word I want.

12 MR. CROW: I am concerned that the way that is
13 couched, Jim, is that carries a certain criticism that may
14 not be appropriate.

15 MR. CROW: Yes.

16 CHIEF JUSTICE ABRAHAMSON: Any other discussion on
17 this?

18 I think this is an excellent report, Jim. Not
19 because you are from Madison. It has been very helpful.
20 The issue may be whether to have a short foreword to this
21 that might raise some of the problems from a legal aspect or
22 policy aspect that have been raised here without necessarily
23 answering them. But we will talk further about that.

24 MR. SCHECK: I have one practical suggestion about
25 this. As with our post-conviction recommendations, it might
1 be useful to try to send out this draft, and it will
2 probably be true of some of the other drafts we will
3 discuss, to various groups of scientists, ethicists, lawyer
4 types, to get some kind of peer review and feedback on it.

5 MR. CROW: There is nothing very secret about
6 this.

7 MR. SCHECK: We might be able to get some good
8 responses.

9 CHIEF JUSTICE ABRAHAMSON: Why don't you give
10 Chris names of entities.

11 MS. FORMAN: People or organizations.

12 CHIEF JUSTICE ABRAHAMSON: People or
13 organizations.

14 We are in recess. We will come back at 3:25.

15 [Recess.]

16 CHIEF JUSTICE ABRAHAMSON: Paul, we are ready for
17 you, the Laboratory Funding Working Group report.

Laboratory Funding Working Group Report

Dr. Paul Ferrara
Working Group Chair

18 MR. FERRARA: On December 6 of last year the
19 Laboratory Funding Working Group had its most recent
20 meeting. Yours truly, after having set up the meeting,
21 didn't make the meeting. It turned out that the dedication
22 ceremony of our newest new laboratory in Norfolk was set at
23 that same time.

24 I then asked one of our members, Dr. Cecelia
25 Crouse with the West Palm Beach laboratory, to take over for
1 me. She chaired the meeting and drafted the report that you
2 have in front of you, and I think it would be most
3 appropriate if I turn the mike over to Cecelia and she can
4 describe the report.

5 MS. CROUSE: Thank you very much.

6 The purpose of our meeting on December 6 was to
7 try to get some kind of a handle on violent acts in the
8 laboratory. I'm a case working analyst. So this was very
9 cathartic for me. As a matter of fact, this was a 28-page
10 report and it was the cheapest therapy I've ever had.

11 [Laughter.]

12 MS. CROUSE: We finally narrowed it down to about
13 11 pages of things that may be of import.

14 The very first discussion had to do with the \$15
15 million appropriation to reduce the national CODIS convicted
16 offender database backlog. I will let Lisa actually expand
17 on that.

18 There have been several surveys in the past two or
19 three years. I love to get these surveys, because I really
20 think something is going to be done with them. This was an
21 instance where something was done with them, where we were
22 able to sit down as a group, have someone explain the
23 results of the survey, and try to figure out what in the
24 world they really mean and how they are going to help us.
25 Before we can really do that, we have to

1 understand what our needs are in the laboratory. So we
2 divided the process up first.

3 The process begins on page 5. This was actually
4 the easy part. The easy part was identifying where does DNA
5 begin and where does DNA end in a laboratory.

6 It begins with crime scene evidence collection and
7 training, and it ends hopefully with some kind of judicial
8 conclusion.

9 In between there is included submission of the

10 evidence to the custodian;
11 Submission of evidence to the DNA analyst;
12 Screening of the evidence;
13 Submission of individual standards for comparison.
14 You may think that is actually a part of step 4, but trust
15 me, it is not.
16 DNA typing technical protocols;
17 DNA profile review and interpretation;
18 Writing, reviewing and distributing the report;
19 And then having pretrial conferences and
20 depositions. We're a deposition state. That's a huge, huge
21 amount of time for us. Expert testimony, discovery issues
22 and appeals.
23 I'm not going to read this to you. I'm just going
24 to hopefully give you some ideas as to where we need your
25 help.
1 The crime scene evidence and collection and
2 training. We ordered 2,500 of those pamphlets and we are
3 distributing them. Whether they like it or not, it's going
4 in their pockets.
5 We also finally got our sheriff to agree that
6 every single solitary law enforcement officer will have at
7 minimum two hours of training every year in DNA, which adds
8 up to about 3,000 law enforcement officers in our county
9 alone.
10 A lot of that was because of this pamphlet, where
11 we could show them that there was a need for this.
12 He only gave us 45 minutes, but we'll take it.
13 It turns out that one of the surveys that we
14 commissioned from the police forum asked a very simple
15 question to several departments based on their size. The
16 great majority of departments all over the nation were
17 surveyed for this particular question: Do you know when you
18 go to a crime scene what is possibly good for DNA evidence?
19 Without exception, all of them had heard the word
20 "DNA," and they knew kind of what it did. That was good.
21 But in the smaller departments, approximately 57 percent
22 knew or felt comfortable with what to collect at a crime
23 scene. To me that was an extraordinary number, because we
24 have 31 small departments just in our county alone. So what
25 in the world are these 31 other departments doing when they
1 go to a crime scene? This was an eye-opener for me.
2 In the larger departments, almost 87 percent. Our
3 lab funding group pretty much felt that a lot of that was
4 training. It is just knowing what to do.
5 The submission of the evidence. If you don't know

6 what to take at the crime scene, you are sure as heck not
7 going to know what to submit. So that's an issue as well.
8 The biggest issue in the survey was, well, heck,
9 they're not going to do it anyway; why should we submit it?
10 They only do it if there are standards. They only do it if
11 it's a high profile case.
12 On a selfish viewpoint, in the laboratory, if we
13 don't see the case, then we don't do the case. But we need
14 to see the case. We need to have these cases submitted to
15 our laboratory, to all of our laboratories. So that was an
16 issue.
17 The question was asked of 42 departments, how many
18 sexual assault kits do you have in storage right now? I
19 don't care what year they came in. How many do you have?
20 The answer was 8,487.
21 Then they said, how many sexual assaults with kits
22 did you get in 1997? It was one third of all the kits they
23 have in storage. That's terrible. We have got to have
24 those kits. I'm not saying that they all have biological
25 evidence. I'm not saying that they all need to even be
1 screened, but certainly out of the 3,133 kits that were
2 reported there is information in there that we have to get
3 out with or without a suspect.
4 So we've made a commitment to notify agencies:
5 bring your stuff in. I just sent something out a couple
6 months ago that said we want your sexual assault kits
7 regardless; we want them out of the drawers of your desk, or
8 wherever you are storing them, and we want them into our
9 laboratory so we can get those preserved and ready to go.
10 That was a big step for us. We had numerous phone
11 calls of people saying, when do you want them and how do we
12 get them in there? So this ends up being a good thing. I
13 think it is something all laboratories should start to make
14 an effort to do. Get your stuff into us. We will start to
15 prioritize these.
16 When a DNA analyst gets the evidence we prioritize
17 according to court date. We're the same as 80 percent of
18 all laboratories out there. If it's going to court, if it's
19 going to grand jury, that case gets priority.
20 There is a huge difference between the amount of
21 evidence you get before you go to grand jury and the amount
22 of evidence you have before you go to court. We don't have
23 the DNA done necessarily before grand jury. We tell them
24 there is semen or we tell them there is blood or whatever.
25 I think that is true in many laboratories. One of the big
1 bottleneck issues with this evidence is we'll get to a point

2 where they will add more evidence on us.
3 I think the worst thing we ever did was we told
4 prosecutors we've got this great technology called PCI and,
5 man, is it fast. Boy, was that a mistake. I hear it all
6 the time. Why don't you do that quicker than you guys do?
7 I mention it in here. These are real issues in
8 many laboratories. I've done my own survey. I have about
9 four or five burglaries from one detective with broken glass
10 and possible blood. That was last year. Now I am getting
11 gloves, I am getting masks, I am getting clothes. I am
12 getting all this stuff now. The average number of samples
13 went from 7 in 1997 per case. We are now doing 15 samples a
14 case because we can do this fast stuff.
15 The issue is here on step 3. It's screening that
16 evidence. That's a lot of work. You don't just grab it and
17 take the underwear and roll it in a ball and put it in a
18 machine and out comes a DNA type. You've got to find that
19 stain, you've got to verify it, and you've got to run it
20 through the process.
21 It's more of a recommendation for laboratories to
22 sit down and know what evidence is associated with a case
23 and figure out what to be worked and work it. Just work it.
24 That leads us to step 4, the actual screening of
25 the crime scene evidence. There has been a dramatic
1 increase in the total number of samples that are coming into
2 the laboratories, and it is probably one of the most lengthy
3 parts of the process. It increases our workload. And you
4 know something? We don't mind. If this really, honestly,
5 truly helps, we don't mind.
6 What we do mind is, well, just in case the defense
7 wants to know if we asked you to do it. I'm not so sure
8 what that means sometimes. We get some very unusual
9 requests. I cannot think of one time we have told someone
10 no, we're not going to do that; it doesn't make sense to us.
11 We always do it. I'm not sure what role we should play in
12 having that make sense as a DNA analyst.
13 The submission of individual standards is the most
14 frustrating part of our job. When you logically think about
15 why we are doing what we are doing, it's to compare DNA
16 profiles. "Just see if there is DNA there." That is one
17 point that we will refuse, especially if they have got the
18 guy in jail. Sometimes I'm tempted to say, I'm going to go
19 get a swab and I'll go get it myself. Which of course I
20 can't do, but I'm certainly tempted.
21 We have protocols like every laboratory in the
22 United States that says this is how you do it, this is how

23 you handle evidence; this is how you handle standards versus
24 evidence; this is where you put them; this is how you work
25 with them on a technical level. So we know what we are
1 doing. Get us the standards, and we promise quality
2 results.

3 You end up waiting. I have 32 cases on my desk.
4 Seventeen of them are in my "waiting for standards." I
5 don't understand that. So I think this is an issue that the
6 prosecutors can help us with, because I think they need to
7 do something legal to get the standard. That's all we're
8 asking. It would greatly enhance the way that we do case
9 work evidence if we could get the standards in that one
10 single simple thing. I told you this would be cathartic.

11 The DNA typing protocol itself is extremely well
12 defined. If I have 32 samples, I can tell you how long it
13 is going to take me to get a DNA profile. However, the
14 interpretation of that profile and the analysis of that
15 profile is a whole different story.

16 You've now got that information in your computer,
17 and now you go through and you have to go through the
18 technical gyrations to first get the profile, and then in
19 our laboratory -- this is not uncommon -- we have to make
20 visual reads which we compare to computer reads. Then we
21 compile this tome of data, and we pass it on to a secondary
22 person, another analyst, who has to do the exact same thing.

23 It's not as though that secondary person is
24 following me around the lab and I say, okay, here's the
25 handoff. It goes on their desk. We have to wait until they
1 have an opportunity to take a look at it. When they do have
2 an opportunity to take a look at it, depending on where they
3 are in their system, then we have to wait for them to
4 finish. Then we get a note by e-mail: I'm ready to discuss
5 case blah-blah-blah. So then we get together. If there are
6 any corrections or additions or subtractions, we do that
7 then. And now we can write a report. That is an incredibly
8 timely process.

9 Dr. Mark Perlin from a company called
10 Cybergenetics presented a proposal for the impact of a
11 software program called True Allele. This is a program that
12 would allow another software program above and beyond what
13 comes with the instrument to do a computerized analysis of
14 the data, compare it to your original data, and highlight
15 those areas that are different, or if there aren't any areas
16 that are different, say this software program got the same
17 DNA profile as your software program. Plus we would still
18 write them down visually.

19 That would take away that second analyst until we
20 got to the final review process of the entire case file, and
21 then another analyst would come into the picture. But that
22 secondary review happens immediately. Now you take your raw
23 data and let that go one direction on one software program
24 and you go in your direction on your software program, and
25 then the twain meet. Now you have got this great

76

1 comparison. And you're not waiting for an analyst to
2 hopefully pull it off their desk and read it.
3 We are taking a look at this. But then I like new
4 things. We'll have to see how that goes, but we are taking
5 a strong look at it. We have sent off some gels, and not
6 our best gels. We've sent a set of gels with skewed bands
7 just to see what their program does and if they come up with
8 the same results we do. I think that is something that is
9 really positive.
10 The writing, reviewing and distributing. We
11 finally got a LIMS program, laboratory information
12 management system. I would like to sum up that program by
13 saying we're still working on it. It has been three and a
14 half years. It's just not helping us the way we wish it
15 could. We need better software for that program. I don't
16 know if anybody else has experience with that, but the
17 software programs have got to be more user friendly.
18 They're just not.
19 I had already mentioned the pretrial conferences,
20 depositions, expert testimony, and discovery issues. I
21 don't know how we are going to ever cut that down, because
22 it's a very important part. It helps us out actually. The
23 pretrials are instrumental in being able to coordinate law
24 enforcement, the judicial system and the laboratory. It's
25 very, very important. I don't have any issues with the time
1 it takes to do that.
2 The discovery issues are tough. Just when we
3 think we have got the pile together we get discovery issues
4 that the RFLP has been scratched off and PCR put in there.
5 So they want autobanding and they want the films. We don't
6 do that. So that has got to go back. Hopefully that is
7 coming to closure, but these things are very important.
8 We have had three admissibility hearings in the
9 last year. In all three of them the population issues came
10 up.
11 That is where we are with the bottlenecks in the
12 process, the main one being screening of the evidence and

13 interpretation of DNA profiles.
14 There was a very nice discussion -- this is part 3
15 on page 11 -- about measuring the impact of federal DNA
16 enhancement programs. I'm on the 14th floor here, so I
17 think I have elevator lag. I read this several times, and I
18 think more data is needed to make that particular report.
19 That's my opinion -- Lisa may have another -- about what
20 this impact really is.
21 Has it made an impact? Absolutely. I'm not
22 concerned about that. I'm not concerned that the monies
23 went out and did what they are supposed to do. My concern
24 is when the money is not there anymore, when we don't have
25 that DNA Identification Act money or the state
1 identification system's money. I'm wondering how many labs
2 are going to be able to keep up the budget pace that it
3 takes to keep these labs going.
4 It was a full day. In my opinion, it was one of
5 the most productive days. I think we actually started
6 getting to the meat of things.
7 I do have this as an editorial. We had discussed
8 in great detail about the collection of the DNA samples. I
9 know you guys may not even connect that way anymore because
10 you've discussed it so much, but we need a prototype program
11 for our sheriffs offices. We are not just a state system.
12 We have state and county and local. Somehow we have to
13 coordinate these efforts to get everybody. We need a
14 prototype solicitation so that maybe we can have a template
15 for other areas in the country to say this kind of
16 collection process works for these old samples or these
17 uncollected samples.
18 That was my editorial part. But that was the gist
19 of our December 6 meeting.
20 MR. FERRARA: Thank you. Any questions?
21 CHIEF JUSTICE ABRAHAMSON: Should we hear from
22 Dr. Forman?
23 MS. BASHINSKI: Would it be awkward to ask a
24 question about the software program?
25 CHIEF JUSTICE ABRAHAMSON: Go ahead, Jan.
1 MS. BASHINSKI: Is that something that you use in
2 your lab or test in your lab, or do you know anyone that is
3 using it?
4 MS. CROUSE: It's my understanding that Forensic
5 Science Service has purchased it or is at least in the
6 developmental stage. The one issue, which is a big issue
7 with publicly funded laboratories, is, when you ask the
8 question how much does it cost, the answer is, well, we

9 don't want to discuss that. When do you anticipate figuring
10 out when you can tell us how much it's going to cost?
11 This was the answer to that: The software program
12 will be tailored for your laboratory. Which I like, because
13 everybody has a little different technology in the
14 laboratory.
15 What they are looking at right now is every time
16 the software makes an allele call, we have to pay for that.
17 My question is, we run a gel and the gel goes through some
18 blips and you end up with skewed results, so you rerun it.
19 With the software program you have to pay for that double
20 run of your sample.
21 MS. FORMAN: Let's just say that the pricing
22 structure has not yet been decided and there is room for
23 discussion.
24 MS. CROUSE: Exactly. That is kind of where we
25 are right now.
1 MS. BASHINSKI: Is this the only one that is
2 commercially available?
3 MS. CROUSE: Yes.
4 CHIEF JUSTICE ABRAHAMSON: Norm.
5 MR. GAHN: Dr. Crouse, you sort of asked a
6 rhetorical question when you were talking about step 4,
7 screening of crime scene evidence, on what your role is as
8 an analyst and where it fits in. I think it's probably
9 greater than most analysts realize. I understood that more
10 in Milwaukee County.
11 I think there is a genetic predisposition of
12 police officers to pick up everything on the scene, and
13 there is also a predisposition for prosecutors to say test
14 everything. It was explained well to me by a crime analyst
15 that there is a pecking order to the evidence that comes in.
16 I'm in a sexual assault unit, and you have the vaginal
17 swabs, the cervical swabs, the underwear, the bed sheets,
18 the comforter, all that stuff. But once you get a profile
19 off a vaginal swab, aren't you done? Don't you stop?
20 MS. CROUSE: No.
21 MR. GAHN: That's where I think you have to sit
22 down with your people. As far as I'm concerned as a
23 prosecutor, stop; you're all done. I don't want anything
24 else.
25 MS. CROUSE: You want to work in West Palm Beach?
1 [Laughter.]
2 MR. GAHN: Oftentimes, especially with PCR, I
3 don't want the comforters tested. Just leave that stuff
4 alone. We sit down with our crime people, the prosecutors

5 and the sexual assault people from the Milwaukee Police
6 Department, and as the analyst said, we know what we are
7 doing here. We don't just look at your cases. We see
8 Kenosha County or Racine County. We see this every day.
9 This is all we do. We can make a call. And I believe them.
10 They can make a call probably better than I can on what they
11 should test.
12 So I think your role is greater. Don't get too
13 worried about the prosecutor's knee-jerk reaction of test
14 everything. I think you can talk to them.
15 MS. CROUSE: I agree, Mr. Gahn. It's not as
16 though we just do everything that comes in the lab. We
17 demand pretrial conferences and we do narrow the evidence
18 down. I wish we did have more to say about it. That's
19 really all I can say .
20 MR. FERRARA: I think one of the important points
21 in this discussion is this is a very time-consuming stage in
22 the process. A lot of work and time is spent and should be
23 spent with the laboratory personnel discussing with the law
24 enforcement agency, with the prosecutors, which is the most
25 probative evidence, and how should we approach this in a
1 most efficient manner?
2 The reality, of course, from a laboratory
3 standpoint is that -- I second Cecelia's invitation, Norm.
4 Please come to Virginia as well -- not only do we have
5 difficulty with the prosecutor saying, look, I prosecute the
6 cases, you do the analytical work. You don't tell me how to
7 practice law and how to put a case on; I won't tell you how
8 to do examinations.
9 The reality is a cooperative working effort.
10 Sometimes you are successful, sometimes you are not, but if
11 you are successful, you spend a lot of time discussing
12 these. Then, even if the prosecutor agrees, the defense
13 comes along, files a motion and wants everything tested.
14 So the fact of the matter is, in furtherance of
15 the statistics that Cecelia reported, the number of items of
16 evidence being tested per case is increasing explosively.
17 In many respects that is a good thing. Where I have
18 problems is when a prosecutor says, well, I want a
19 microscopic hair comparison done after we have got
20 biological evidence and trying to talk them out of that.
21 The realities are it's a very complex process.
22 The working group's recommendations and predictions
23 regarding automation of the analytical technology is true,
24 but quite frankly, in real forensic physical evidence that
25 ain't going to happen. Convicted felon samples and such

1 obviously are amenable to it, but every case -- I'm
2 averaging 30 items per case right now -- is being examined
3 scrupulously and individually and by itself with no other
4 cases being opened.

5 So on one hand, how can we increase throughput of
6 forensic science laboratories? That's what the working
7 group is really trying to do. Where are the bottlenecks?
8 What is it going to cost? Will money help, and how should
9 that money be spent?

10 There are a lot of different things. A private
11 laboratory can run, and is doing it now routinely, 10,000
12 convicted felon samples per month based on considerable
13 experience. With 35 DNA examiners, they are capable of
14 running approximately 8 to 10 cases per month.

15 MS. CROUSE: I want to make one quick point.

16 Barry, I saw your eyebrows come together when I said
17 sometimes we run samples that don't work. The samples that
18 don't work are all documented and put in our file folders.

19 MR. SCHECK: What strikes me is that this is the
20 right bottleneck, because this is really where the rubber
21 meets the road, being able to screen the samples in an
22 intelligent way. The onus of this really just can't fall on
23 the lab people.

24 What we might want to recommend or what I think
25 really needs to be done in this area is that we have to do
1 training to develop the expertise among the detectives, the
2 police officers and the prosecutors. Because this is really
3 the training.

4 In other words, we know the answers ahead of time.
5 It's in all the other recommendations that NIJ has put out.
6 You want a team approach. You have to have information
7 about what is relevant and what is not relevant. You have
8 to have the personnel there that are going to say, okay, in
9 this case a vaginal swab is all you need, but in other cases
10 it may very well not be. But you need to have a process in
11 place where this kind of information is done.

12 One of the things we had discussed at the project
13 that Bob Genslin (phonetic) and Jim Peterson were doing was
14 the blind proficiency test. What I had been advocating and
15 I know Bob Genslin somewhat supported is that the kind of
16 testing that has to be done -- and it's not just for
17 laboratory personnel -- is the ability to read and
18 understand and screen the samples.

19 In other words, you don't have to do all these
20 samples, but you have to learn how to decide which things to
21 test and which things not to test in order, and that is

22 something that should be proficiency tested. Enough of this
23 nonsense where you are just giving people easy exemplar
24 samples. You have to be able to test them and promote the
25 skills that are necessary to break these bottlenecks and

1 make the process work efficiently.

2 This is the kind of thing that probably ought to
3 be done in modules. In other words, the government ought to
4 fund pilot programs in various different jurisdictions to
5 build teams and to show how you could do it on an effective
6 basis rather than trying to come out right away with one all
7 purpose, lowest common denominator kind of process. I'm not
8 sure we really know the answers to it yet. That might be a
9 good proposal for some of this money.

10 Finally, the big disconnect in trying to justify
11 the budgets and allocate the money is that the prosecutors
12 and the police never tell the lab people what happened to
13 the case. This is inexcusable.

14 In other words, if you want to justify the budget
15 allocation, some of this money has got to come from the
16 state and local authorities. It just can't come from the
17 federal government every time in these laboratory
18 improvements acts. We're never going to get the money
19 necessary.

20 The only way to figure this out is once the typing
21 is done and the lab submits it to the court system, you have
22 to have a computerized system program in place that tells
23 you what happened to the case, how many days it took for
24 that case to be resolved as opposed to other cases so you
25 can justify this as cost effective.

1 There are plenty of case management systems that
2 have been put in place in court systems, but they should be
3 extended to the labs. I know from our experience in New
4 York City that we are going to try to put this in place, but
5 we don't have the numbers yet.

6 The FBI has been doing this for ten years. One of
7 the big problems is that nobody knows what happened to all
8 the cases, the ones that were hits and the ones that were
9 exclusions. That is a ridiculous gap in knowledge that
10 ultimately makes justifying funding more difficult at this
11 point in time when it should be easier.

12 So I would like to see some of those kind of
13 recommendations in general terms in the report.

14 CHIEF JUSTICE ABRAHAMSON: Chris.

15 MR. ASPLEN: Just briefly, given the extent to
16 which we are hearing the role of the prosecutor here as

17 being substantially greater than I think a lot of people
18 thought, myself included. I used to be the director of the
19 DNA unit at APRI, which is the National Prosecutors
20 Educational Association. I can tell you that we didn't
21 really address that issue that much. At the time it was
22 more a matter of courtroom application.
23 We have the current director of APRI, Kim Herd,
24 here, who I am sure would love to be able to go back and say
25 that one of the recommendations that comes out of the
1 Commission is a reaffirmation that this is a prosecutor
2 issue and that there does need to be continued funding for
3 prosecutor issues, and making clear that while we may be at
4 another level in terms of a prosecutor's ability to present
5 this in the courtroom, and I think we are substantially
6 further than we were two or three years ago because we have
7 no less than Woody Clarke and Norm Gahn teaching these folks
8 this, there are other reasons, more important financial
9 reasons to keep that funding going from the Office of
10 Justice programs to the American Prosecutors Research
11 Institute and similar organizations doing the same kind of
12 work.

Public Comment

13 CHIEF JUSTICE ABRAHAMSON: I am going to cut the
14 Commission discussion for the moment because the time has
15 come for public comment. I don't want to cut off anyone who
16 is on a time frame here. Is there anyone sitting out there
17 who would like to comment now? Then we will return to the
18 Commission. Woody Clarke and Judge Reinstein and others
19 have their hands up.

20 Yes, ma'am. State your name, please, and your
21 affiliation? Do you have a microphone?

22 MS. HERD: I think I talk pretty loudly. My name
23 is Kim Herd and I work with APRI's legal assistance unit.

24 I think Chris has a very good point. We have
25 started to incorporate this type of concern into our
1 training. I think it is an excellent suggestion that we
2 continue to offer that as a reason why we need additional
3 funding, because we don't have very much funding. We have
4 about \$150,000 a year to do all the training in technical
5 assistance that we do. We increased that from last year
6 from \$125,000.

7 You have other programs in other areas of the law
8 that are getting an enormous amount of funding, but for
9 something as basic and as critical as DNA evidence training
10 for prosecutors there is a huge gap in the actual amount of
11 funding that we are getting. That is an area that
12 definitely needs to be worked on.

13 CHIEF JUSTICE ABRAHAMSON: Thank you.

14 Anyone else?

15 MS. CROUSE: Can I be a public person?

16 CHIEF JUSTICE ABRAHAMSON: You can be anything you
17 want. Just give me one more second. I'm going to come back
18 to public comment, but since it's four o'clock, I did want
19 to open it up in case anyone had to leave.

20 I see no other hands up and no one approaching the
21 microphone. So I will return to the Commission.

22 Go ahead.

23 MS. CROUSE: This is to Dr. Crow. I think on page
24 48 of your report you discussed an increase in the
25 sub-population frequency data for publication. One of the
1 very important issues is that the journals are really not
2 accepting these anymore. They are not considered novel;
3 they are not considered new.

4 I've talked to Bob Gaennslen about this extensively.

5 They are very difficult to review. They take an inordinate
6 amount of time. I would like to suggest that there be some

7 kind of a Web site where people can put their information on
8 there and it can be analyzed by virtually anyone that wants
9 to analyze it, and then the discussion can take place in
10 whatever forum. I was wondering if it would be possible to
11 also make that recommendation versus publication, which is
12 becoming increasingly difficult.

13 MR. CROW: One thing we said is that the Journal
14 of Forensic Science now has a new policy as of last year.
15 They have a special format for putting in data. At least
16 that is a step in the right direction.

17 I'm aware of how hard it is to get data published,
18 and this is one way, and the Web site. I'm all for both of
19 them.

20 CHIEF JUSTICE ABRAHAMSON: Woody.

21 MR. CLARKE: I was just going to underscore to
22 some extent what Cecelia brought out and what Kim Herd and
23 Chris described about prioritization. These cases that we
24 have and that we prosecute, when they get to the stage of a
25 trial it becomes a rather unique dynamic. To some extent
1 this wonderful monster that DNA has become has two edges to
2 its sword.

3 MR. CROW: Two edges is a new concept to me, but
4 go ahead.

5 MR. CLARKE: The second edge, so to speak, I think
6 it places many of us in our prosecutorial role about to try
7 a case in a position in which we have to be concerned not
8 just about proving guilt, but about showing that the
9 government did everything it could. That is particularly
10 true most commonly in the most serious cases that we try.
11 Homicide cases; forcible sex crimes, especially now that
12 they carry penalties that are so great, put them in a
13 similar if not identical category, and then ultimately
14 capital cases where I think the government is put to its
15 greatest test.

16 Day in and day out lawyers in my office who are
17 supposed to come to me for approval for DNA typing look at
18 me and they say, I agree with you. I don't expect any
19 surprises to come out of this testing. But think about what
20 you are doing when you stand up in front of that jury. Are
21 you going to leave a stone unturned? That doesn't mean they
22 need to do all 100 blood stains in a case, but they may
23 otherwise need to do testing that on its face may appear to
24 be superfluous or duplicative or whatever. That is that
25 constant tension.

1 I think the answer is, of course, we as
2 prosecutors and as crime laboratory directors and managers

3 have to step in and say no, we agree with you. We have got
4 to do these stains, but we are just not going to do the
5 others. So it's a difficult tension at times.

6 To illustrate it briefly, I have my own sex case
7 set for trial in a couple of months and I had some DNA
8 testing results that weren't very definitive. So I asked
9 myself to do further testing, and I want you to know I
10 turned myself down.

11 [Laughter.]

12 MR. CLARKE: So there is a certain amount of
13 fairness to the situation. I think it does illustrate the
14 problem, and I don't know that there is a solution to that
15 problem.

16 CHIEF JUSTICE ABRAHAMSON: Ron.

17 MR. REINSTEIN: I don't know if it's a solution.

18 I agree with what Woody says. I think it's a judicial issue
19 too. When you come to me or the defense comes to me and
20 asks for a continuance because you know how long it is going
21 to take the lab to do it, I find myself being more sensitive
22 to the lab's point of view as a judge than the prosecutor
23 is.

24 One of the things that I will say is, well, first
25 of all, are you guys going to be putting on cumulative
1 evidence? Are you going to be keeping this guy in jail for
2 a longer period than is necessary? If he gets convicted, he
3 should be in the state prison and not in the county jail.
4 If he is going to be acquitted, he should be out on the
5 streets. So these are the types of things I think a judge
6 needs to do.

7 I was telling Jeff, if I get a discovery request,
8 I may just say no. If it's the judge that has to do it,
9 that is kind of a shame. It really should be the prosecutor
10 working together with the laboratory and law enforcement.

11 One thing I would suggest. If you have a state
12 lab where you have an attorney general that represents you
13 as opposed to the local district attorney, maybe you get
14 that attorney general to represent you in this dispute and
15 have some type of a conference. That is one of the
16 suggestions I had in Arizona.

17 It's important that you recognize the cases where
18 you need more than a vaginal swab. In Milwaukee they have
19 had that discussion, and more often than not it's just a
20 vaginal swab that is necessary. When you talk about
21 cumulative evidence and continuances ad infinitum, I think a
22 judge can step in as well.

23 MR. FERRARA: Clearly more than at any time do

24 laboratories need legal counsel. I've been using our
25 attorney general's office. Fortunately we have got
1 prosecutors who understand the technology and such more than
2 the attorney general's office, but it's the attorney general
3 office's responsibility to learn to be able to assist us.
4 One quick point, if I may, Madam Chairman. We
5 have had this discussion about the priority in cases going
6 to trial. We've heard about and pointed out some of the
7 pitfalls. Keep in mind that we have not discussed yet,
8 because it hasn't gotten to that priority, the rape that
9 just took place last night where the police have no suspects
10 and the investigators are working that case. Biological
11 evidence is available. A serial rapist is out on the loose.
12 In the laboratory we are struggling with all the
13 cases that are going to trial, and the more we do and the
14 more successful we are, the more goes to trial.
15 I think one of the points of the Laboratory
16 Funding Working Group and this Commission is that we have
17 got to do something to address those investigative cases
18 before any lawyers are involved at all.
19 We give priority to court cases. We have to. But
20 there are a couple of times when I have said to my staff, in
21 effect, screw the courts, do that case. There is somebody
22 out on the loose. I'll handle the contempt citation. We'll
23 figure out something. The prosecutor can get a continuance.
24 There is some other way around this, because somebody is out
25 on the loose raping and murdering.
1 That is what was of most concern to me, and I
2 think I related to the Commission in previous meetings a
3 personal history that still pains me with regards to this
4 delay in investigations.
5 This even further compounds it. We're talking
6 about the first priority here, cases that are going to
7 trial, but leave us not forget to be successful, for DNA
8 data banks to be successful, we have got to get to the
9 situation of running crime scene evidence. At that point
10 it's usually the lab working with the investigators and no
11 one else.
12 CHIEF JUSTICE ABRAHAMSON: Thank you.
13 I've got Michael Smith, Terry Gainer, and Barry
14 Scheck.
15 Michael.
16 MR. SMITH: This point may not be of value. I
17 don't know. Listening to this conversation and remembering
18 the earlier conversation that Paul just mentioned, it
19 strikes me as a lay person that the accumulating experience

20 about how to do this, how to decide how many to test, and so
21 forth, and how to balance out the competing priorities, is
22 the accumulating wisdom being harvested and published and
23 analyzed and exposed to peer review?

24 If it's not, then the training issues, it seems to
25 me, are insurmountable. Somehow the conversation you
1 started to have here needs to be embedded in a literature
2 that is accessible to people who are trying to train others.

3 I worry. I've never seen anything written that is
4 intelligible on this subject except complaints.
5 If that doesn't exist, maybe we should suggest
6 that NIJ or somebody else start collecting this kind of
7 expertise and publishing it.

8 CHIEF JUSTICE ABRAHAMSON: Chief Gainer.

9 MR. GAINER: I want to affirm what Paul was
10 saying. I think from the law enforcement perspective it is
11 the non-suspect case that is going to present our greatest
12 opportunities, especially as we pass out these some 45,000
13 bulletins and our pamphlets and quadruple that. There is
14 substantially more evidence that is taken in cases where
15 there are no suspects. We are quickly raising the
16 expectations of our police officers and detectives that case
17 linking and analysis of that has to be done.

18 That was on my mind as I listened to both of you.
19 I think we are going to be missing something if we don't
20 address that now. Clearly a suspect who is waiting for
21 trial is very important, but let's remember, what percentage
22 of arrests do we make in cases? Given the recidivism rate,
23 we need to start working on non-suspect cases.

24 From talking with some of our crime scene people,
25 I was astounded to learn that they weren't doing gunshot
1 residue in cases. They weren't picking up blood because,
2 they said, the labs won't do them anymore, and it's just a
3 waste of time.

4 I'm saying, hey, you collect it. I'll figure out
5 how to get it analyzed, but don't you dare not collect
6 evidence because we don't know what to do it with. We are
7 in a "what to do with it" phase nationwide.

8 MS. CROUSE: Our lab has never turned down a case
9 like Paul was talking about. As a matter of fact,
10 non-suspect juvenile cases, we assign it, we drop it. It's
11 not as though we ever hang up on anyone. It's just that the
12 process can get confusing if we don't have a little bit
13 better handle, as Barry said, a coordinated effort on what
14 to do.

15 CHIEF JUSTICE ABRAHAMSON: Barry.

16 MR. SCHECK: I couldn't agree more about the
17 non-suspect cases, and you are going to get more of it,
18 which is great.
19 When it comes to the training, I think that we
20 should not make a mistake that was made eight or nine years
21 ago on how to approach this expertise. There really is a
22 right way to do this and a wrong way to do this.
23 The training should not be limited to prosecutors
24 when you are talking about how to assess crime scene
25 evidence and what kinds of DNA testing could be done on it
1 and what makes sense and what doesn't. It should be money
2 that goes to judges and defense lawyers. We all need to
3 know this.
4 I can tell you that in all the talks that I give
5 to homicide detectives, sex crimes detectives, judges or
6 defense lawyers, I give the same lecture. There is no
7 difference in terms of how to assess this. Both sides need
8 to know it, frankly. If you want to get an assessment from
9 what a defense lawyer could argue about things not done,
10 reasonably or unreasonably, then you might as well hear it.
11 In the prosecutors' lecture, I'm sure that Chris and Kim do
12 that. You wouldn't be giving a very good talk unless you
13 said this is what they may say.
14 Frankly, I think we shouldn't make the mistake
15 that was done in the past. Eight or nine years ago, when we
16 first started down the road with DNA, if on many of the
17 statistical issues or other issues we had more of an
18 eclectic or joint approach, I think there were a lot of
19 stupid fights that wouldn't have happened. The consensus
20 within the communities about how to do some of these things
21 would have been reached faster.
22 I think whatever funds the federal government has
23 might be well spent educating people in the system about
24 this issue as opposed to more narrowly focused. The defense
25 never gets money anyhow. I just throw that in.
1 [Laughter.]
2 CHIEF JUSTICE ABRAHAMSON: Jan.
3 MS. BASHINSKI: I just want to remind ourselves
4 that we are working on a couple of training initiatives.
5 One is with the police officers and the other we are talking
6 about how to look at old and cold cases.
7 It seems to me this is an element in both of those
8 types of training and potentially what is developed there.
9 Adding old and cold with what has already been developed
10 with the post-conviction analysis, we will have a wealth of
11 material to give scenarios and situations of value in

12 teaching. We ought to aim some of our development of that
13 material toward the end of gathering that stuff and using it
14 for the purposes that have been discussed here.

15 The other point is about the training for officers
16 when we talk about elimination samples. We should be
17 talking about standards as well as elimination and making
18 sure that people understand how critical it is early on that
19 that be collected. I was encouraged that we emphasized that
20 point in that particular type of training as well.

21 CHIEF JUSTICE ABRAHAMSON: Lisa would prefer to
22 talk tomorrow morning. We will start off with her. She has
23 got a form of the solicitation that she will hand out and
24 then talk from that. I think that will be good.

25 Any other comments on the Laboratory Funding
1 Working Group report?

2 Chief Gainer.

3 MR. GAINER: We raised the issue about non-suspect
4 capacity. What is the next step beyond a little bit of
5 dialogue?

6 CHIEF JUSTICE ABRAHAMSON: Chris.

7 [Laughter.]

8 CHIEF JUSTICE ABRAHAMSON: A good chair delegates.

9 MR. ASPLEN: I was sitting here thinking whether
10 or not I should pipe up and say, okay, now what? The big
11 question is, okay, we now have the information; we now have
12 the report that tells us here's the situation. The question
13 is, what do we do about it?

14 It seems to me that there are a number of ideas
15 gelling. One is the educational approach. I agree with
16 Barry. When I mentioned prosecutors, I don't mean them
17 exclusively. There needs to be made a recommendation
18 regarding education in general to the attorney general.
19 Just thinking off the top of my head, some kind of
20 coordination with the ABA or some kind of program with the
21 ABA and APRI, et cetera, et cetera.

22 Another matter that we need to address on the
23 non-suspect issue is what are the considerations that are
24 currently out there on non-suspect testing funding. I know
25 there are some. I know from some of my discussions that

1 there is some legislation pending regarding finances. I
2 don't know what we can do to discuss that or not.

3 MR. GAINER: Do we have some measure of what
4 unused capacity there is in our lab systems to absorb
5 non-suspect cases, if any? Can we do some analysis that
6 said if police start asking for 10 percent more analysis of
7 non-suspect cases, what does that do to the system, and

8 chart that out?

9 CHIEF JUSTICE ABRAHAMSON: Paul.

10 MR. FERRARA: We have been looking at just that,
11 Chief, trying to predict ahead of time. Virginia's General
12 Assembly is in session. The money committees have measures
13 from me with respect to new personnel to expand the capacity
14 in Virginia even further to do the work.

15 We have reduced our backlog successfully down from
16 over 1,000 cases to under 700. Our turnaround time is
17 coming down in the area of four months. Jan can relate to
18 us her experience and situation in California. So we are
19 definitely making progress.

20 The implementation of the technology, the
21 standardization of the technology, the more facile admission
22 of evidence, the training programs -- as experience comes we
23 are increasing our capacity. I'm to a point where I feel
24 somewhat comfortable with predicting the number of examiners
25 I need to do X number of cases.

1 What I can't predict but which needs looking into
2 are the old, cold cases that Jan alluded to. I've got
3 investigators crawling out of the woodwork as they hear the
4 successes, when we do have them, that want to submit old,
5 cold cases.

6 Then there is the proliferation of samples and the
7 use of this technology not just in violent crimes, but in
8 nonviolent crimes.

9 I'm at the point where I'm trying to ask for as
10 many positions as I can physically fit in the laboratory
11 spaces I have. I think it's going to be a long haul before
12 the laboratories ever get to the point where the capacity is
13 commensurate with the demand, plain and simple.

14 In Virginia, where we have had the program for a
15 long time and had a lot of success with it, I have vice
16 squad people submitting bongs and want us to swab the
17 mouthpiece to help them identify who smoked the bong. I
18 tell them, get out of here with that. I don't want to be
19 bothered.

20 On the other hand, I can see their point. They
21 may have a case; a major investigative lead may come out of
22 a search of the data banks. The data banks themselves are
23 just going to explode.

24 I don't know when the forensic science community
25 is ever going to be able to respond fully to the total need.

1 I think that's why this issue of priorities is going to be a
2 constant battle; communications between prosecutors,
3 investigators, the lab.

4 The lab funding group tried to even think what is
5 the cost of eliminating just the backlog of crime scene
6 evidence. There are too many variables.
7 I might point out, if I may, that New York City
8 has taken probably the first stab at actually outsourcing
9 12,000 unworked rape kits. That is a pretty remarkable
10 step. Obviously the forensic science laboratories with
11 respect to databasing need to avail themselves of capacity
12 and capabilities in the private sector. I will be
13 interested in seeing how things work in New York City. Rape
14 kits are quite a different thing than convicted felon
15 samples.
16 Forensic science laboratories are going to take
17 some time and a lot of money to develop the capacity.
18 Jan.
19 MS. BASHINSKI: We are struggling with exactly the
20 same situation in California. I've been asked, what would
21 it take to fix the problem? Of course that depends on how
22 you define the problem. As the potential increases, then
23 the potential workload increases proportionately.
24 The direct question that precipitated the answer
25 was, is there unused capacity? I would say absolutely not.
1 I think in states like ours where a lot of the burden is
2 borne by local agency crime labs as well as by the state
3 crime lab it's even worse. You have a lot of small agencies
4 who have excellent DNA programs but each one of those is
5 going to have to get additional funding in order to begin to
6 meet the demand in their own local jurisdiction.
7 MR. GAINER: We are going to need to be pretty
8 clear in our final report on what our limitations are. I
9 would submit to you with the type of CD-ROM training we are
10 doing all we are going to do is raise the expectation of a
11 police officer that somebody is going to process the
12 evidence that I am telling him to collect.
13 MR. ASPLEN: Chief, along the lines of what else
14 can we do, one of the things we have already done is passed
15 a recommendation last time for that law enforcement summit
16 for the particular reason that law enforcement needs to take
17 this issue on as their own. This non-suspect case issue and
18 things not getting done has to be theirs also.
19 To some extent, the pamphlet and the CD-ROM are
20 forcing that issue. No doubt about it. They are going to
21 force people to sit up and take notice, and it is going to
22 be an uncomfortable fit for a long time, but hopefully it
23 will get people there sooner.
24 What did IACP do at the last meeting? They passed

25 a resolution on arrestee testing. They didn't pass a
1 resolution on non-suspect testing. The resolution they
2 passed, if actually implemented, would do what the
3 Commission was fearful it would do in its last
4 recommendation.

5 A big part of the answer still goes back to law
6 enforcement taking the issue on as their own because it's a
7 matter of priorities, and when it comes up far enough on the
8 priority list, when they go to their funding sources, that's
9 also when they start to see the money for it.

10 MS. BASHINSKI: That's critical.

11 CHIEF JUSTICE ABRAHAMSON: Norm.

12 MR. GAHN: Just one point I want to make. I think
13 there is some capacity and you have to look for it at the
14 crime labs. We meet regularly with the prosecutor's office,
15 the crime lab, the police sexual unit, and the sexual
16 assault nursing examiner. You can't forget that person who
17 is drawing this evidence.

18 But I can tell you this. We approached it from
19 this standpoint. We have technology that is available to us
20 that can identify a sexual assault assailant, and we owe it
21 to the victims to utilize this technology. That's why I
22 think you saw we are issuing arrest warrants for genetic
23 codes, because we owe it to these victims. Everyone at the
24 crime lab and the sexual assault nurses have taken that as
25 their mantra: we owe it to these victims; we have this
1 available.

2 I can only tell you that in Milwaukee County if a
3 victim goes into the sexual assault center, that evidence is
4 picked up within 24 hours, taken to a crime lab, and that
5 foreign profile is taken out and it's worked on right away.
6 Somehow the crime lab found time; somehow I found time to
7 add all of this to my caseload, as did the sexual assault
8 police detectives. We now just gave each other our cell
9 phone numbers. We call each other Saturdays and Sundays.
10 But it's called your job, your devotion to duty, the oath of
11 office that you took. And it can be done. I think we are
12 doing it.

13 CHIEF JUSTICE ABRAHAMSON: When we dealt with
14 taking samples from arrestees we didn't deal with whether
15 you should or shouldn't; we just said, hey, you've got all
16 this other backlog, including non-suspect cases. So we
17 don't think it's pragmatic to get to the arrestee. We said
18 first do the offenders. That is a major issue and I think
19 it should be clearly set forth in the lab working group
20 report on how to set priorities.

21 It goes back to the issue that Michael Smith
22 raised of trying to put together information if we have it,
23 or if not, getting it, as to what is the practical
24 experience of people here on priorities in testing.
25 The other point you made, Michael, if I wrote it
1 down properly, is what materials should be tested, and to
2 what extent you should call a stop at any point.
3 MR. SMITH: It seems to me that if there is a
4 community of wisdom about this, it's not too early to share
5 it in ways that are broader than this room and this
6 discussion. Judges, for example, should be reading about
7 this, because they are going to be making rulings on
8 motions.
9 MR. SCHECK: That's why I would like to compliment
10 what Norman did on this whole issue of the statute of
11 limitations. When you look at what Norman did with those
12 warrants to extend the statutes -- and it's a good example
13 of priorities -- he didn't say let's just abolish the entire
14 statute of limitation for sexual assault crimes; he took
15 cases where it was absolutely evident from the facts that
16 they were violent sexual assaults. They weren't cases where
17 somebody could be pulled in ten years later and say this was
18 consent, and how am I going to defend, blah-blah-blah.
19 He took cases that were obviously the appropriate
20 ones. It's cost efficient. It's a better legal solution,
21 frankly, than lots of others that people would propose that
22 would wind up flooding labs, costing money, saving more
23 samples than you need.
24 It came right out of the direct practical
25 experience about what do you do about these cases and these
1 victims and the possibility of a serial offender. I think
2 that is a real good model. I would much rather see people
3 do what Norman did than try to rework the entire criminal
4 code on sexual assaults, which I guarantee is going to start
5 happening to everyone.
6 CHIEF JUSTICE ABRAHAMSON: Any other comments
7 about the Lab Funding Working Group report?
8 MR. CLARKE: Just about our working group. You
9 raised the question about what we should do. We have
10 wrestled with the question of should we try to put a number,
11 so to speak, in terms of the amount of money knowing there
12 are a number of variables involved. I might have brought up
13 that it would cost about the cost of three F-16 fighters to
14 basically take care of the existing problem. That was a
15 rough estimate.
16 I'm curious if the Commission feels that we should

17 try to do that based on the CODIS survey and the other
18 materials that we have. I don't know if the rest of the
19 working group shares the feeling. I think we can put some
20 numbers on it without a great deal of difficulty. We did go
21 through a fairly extensive process of estimating cases per
22 analyst and so forth with some attached costs. So I think
23 we are in a position where we can do that.

24 MR. THOMA: I certainly think it wouldn't hurt to
25 have that just to make our decisions as to where our
1 priorities lie.

2 MR. SCHECK: I think it's important. I get asked
3 this question constantly. I don't know how the hell you are
4 going to do it. You've already told us now that the number
5 of items submitted per case increases. We used to base it
6 on the average sexual assault case was going to be what,
7 five or six at most? Is that a real estimate? Now we are
8 talking about mitochondrial DNA testing on hairs, which are
9 going to be important in sexual assault cases, and that is
10 running a grand a hair in many places.

11 I think we have to start somewhere in terms of how
12 many unsolveds are there out there, how many old samples are
13 there, blah-blah-blah. I'd love to have a number.

14 When we talk about how much it would cost to do
15 what is an infinitesimally small number of post-conviction
16 cases that are appropriate, on the scale of things they are
17 an infinitesimally small number compared to what you are
18 talking about. I like to quote the cheapest number, so I
19 ask Lisa, as opposed to what a private lab would cost. I'd
20 love to see you try it.

21 CHIEF JUSTICE ABRAHAMSON: Any other comments on
22 this?

23 I want to thank Paul and Cecelia for a job well
24 done. We will continue this in the morning with Lisa
25 Forman.

1 Any other public comment?

2 [No response.]

3 CHIEF JUSTICE ABRAHAMSON: Seeing no one at the
4 microphone and hearing no one wanting to speak, the session
5 is closed for today.

6 [Whereupon at 4:35 p.m., the meeting was
7 adjourned, to reconvene at 9:00 a.m., Monday, January 17,
8 2000.]

Introductory Remarks
Chief Justice Shirley S. Abrahamson
Chair

3 CHIEF JUSTICE ABRAHAMSON: Today we are going to
4 hear from the Legal Issues Working Group on their report,
5 "Forensic DNA Typing: Selected Legal Issues." The group is
6 Michael Smith, chair, David Kaye, reporter, Edward
7 Imwinkelried, Dorothy Nelkin, Phil Reilly, Rockne Harmon,
8 and Jeffrey Thoma.

9 MS. FORMAN: Do you want to do CODIS first?

10 CHIEF JUSTICE ABRAHAMSON: Michael, I am going to
11 hold a minute. I had forgotten that we had put you over.

12 Go ahead. CODIS. I apologize, Lisa.

13 MS. FORMAN: I will make this fairly brief because
14 I have spoken with many people on the Commission about this
15 already.

16 For the record, we received \$15 million to help
17 reduce the CODIS backlog. We were assured of that
18 appropriation on December 27, because we had two continuing
19 resolutions or more. We have been working very diligently
20 on the solicitation to distribute this money and start
21 analyzing samples.

22 We decided that the main goal of that \$15 million
23 this year was to analyze as many convicted offender samples
24 as absolutely possible and get as many hits as absolutely
25 possible within this fiscal year.

1 Because of our experience with the Laboratory
2 Improvement program and the difficulties that some states
3 have in getting that money filtered through their own
4 bureaucratic systems and getting things up and running, we
5 decided that we would take a one-size-fits-all
6 across-the-board approach, and based on the recommendation
7 of this Commission and our own thoughts on the matter, we
8 have decided that this \$15 million will be spent only on
9 outsourcing.

10 There is still room for modification. We welcome
11 all input. But we have less than a two-week period to
12 finish this part up.

13 We will have two solicitations. One solicitation
14 will be to outsourcing vendors and the other solicitation,
15 which will appear later, will be to the public DNA
16 laboratories.

17 For the outsourcing vendors we will have two parts
18 to that solicitation. We will have laboratories that can
19 apply who can do high throughput analysis, whose labs are

20 ready at the moment the solicitation is tendered to us to
21 analyze between 120,000 to 250,000 samples per year.
22 We are also offering a quality assurance component
23 to the solicitation. So laboratories may bid for the
24 process of analyzing about 5 percent of the convicted
25 offender samples. These would be smaller laboratories, and
1 their minimums and maximums are estimated at this point to
2 be not less than 12,000 samples a year and not more than
3 25,000.

4 So we are looking for two different kinds of
5 laboratories, high throughput laboratories and small custom
6 laboratories, in order to fulfill this work.

7 We are requiring that all 13 CODIS loci and the
8 gender probes be applied to all of the offender samples. We
9 are requiring that only platforms that have been validated
10 by the forensic community be used in these analyses.

11 We are requiring the usual kinds of things that
12 you see in RFPs, like 30-day turnaround time; you pay for
13 mailing. All of the kinds of things that make it difficult
14 for laboratories to apply for these RFPs, but in fact they
15 do.

16 We expect that we will find three or four
17 laboratories that will meet these criteria. There will be
18 pre-award audits; there will be post-award surprise audits
19 as well. We will have included in our pre-award auditing
20 team a member from the Inspector General's office who has
21 already been auditing the CODIS program and who has agreed
22 to assist us in this matter.

23 When the laboratories have been awarded, then the
24 public laboratories will be able to identify to us through
25 their solicitation process how many samples they have in
1 house already collected on convicted offenders, which
2 laboratory they would like to use of the laboratories that
3 we can supply them with.

4 When we have all those numbers, we will be able to
5 decide an apportion of how many convicted offender samples
6 we will be able to analyze across the board. Everyone will
7 receive the same percentage of samples to be analyzed. If
8 one laboratory has 1,000 samples and another laboratory has
9 20,000 samples, we may be able to meet 78 percent of their
10 need, or 38 percent of their need, but everyone will get the
11 same percentage across the board.

12 In exchange for the vouchers that they will
13 receive for doing these high throughput analyses, and some
14 laboratories may opt to do the quality assurance component
15 as well, we are requiring that the public laboratories

16 respond by performing 2.5 percent of the amount of samples
17 that they are allowed to outsource in unsub cases. There
18 is a carrot: you get your samples done; there is a stick:
19 you perform unsub case work.
20 That is sort of the basis of the program as it
21 stands right now.
22 Barry.
23 MR. SCHECK: At some point you told us about
24 postconviction cases and whether a public lab could take any
25 of this money and use it in a postconviction case or at one
1 point there was some prohibition that they couldn't?
2 MS. FORMAN: In order for us to maximize our input
3 into the convicted offender database and our hits upon that
4 database we are trying to make this as streamlined as
5 possible. We are requiring that laboratories perform unsub
6 case work. If you can convince us that part of that unsub
7 case work would be something that might be associated with
8 one of your cases, that would be fine, but at this point we
9 are requiring that they perform unsub case work.
10 I should tell you that I presented this at the
11 SWGDAM meeting last week to laboratory directors. There was
12 some concern on their part about their ability to perform
13 2.5 percent unsub case work compared to the number of
14 samples that they had in their freezer for unconvicted
15 offenders.
16 One of the ideas that we talked about perhaps
17 implementing was saying that it would be 2.5 percent unsub
18 case work that has been performed since the beginning of
19 fiscal year 2000, which is when the money became available.
20 Many of the laboratories felt that would be acceptable to
21 them, that they could meet that responsibility if they were
22 allowed to include any cases that they had done since the
23 beginning of this fiscal year.
24 CHIEF JUSTICE ABRAHAMSON: Jan.
25 MS. BASHINSKI: Have you given any thought to the
1 number of samples in that case work? That might be another
2 way, if you looked at the number of samples that they did on
3 unsolved cases.
4 MS. FORMAN: We have thought about it. Certainly
5 I recognize that this particular solicitation is going to
6 select for easy cases. Grab the vaginal swab out of the
7 rape kit and let's go. That would be all right for this
8 particular solicitation. No, we're not telling them how
9 many samples have to be in each case that they attempt. It
10 will be fine for them to do some creative development of
11 their case work.

12 CHIEF JUSTICE ABRAHAMSON: Ron.

13 MR. REINSTEIN: Do you have a ball park figure of
14 what percentage you think each public lab is going to be
15 able to do?

16 MS. FORMAN: Not yet. We know that if we use the
17 figure that we have been using in the Laboratory Working
18 Group of about \$50.00 per sample and we have got \$15 million
19 and every single penny of it went into doing the analysis,
20 we would only be able to do 300,000 samples, and we know
21 that there is way more than 300,000 samples. So we are
22 going to be doing some percentage, but we don't know what it
23 is yet.

24 CHIEF JUSTICE ABRAHAMSON: Paul.

25 MR. FERRARA: Two things, Lisa. It appears that
1 the \$50.00 per sample estimate for 13 loci, which is
2 something we have used for estimation purposes, probably
3 should be a little bit higher, maybe 10 or 20 percent
4 higher. I have no interest in a private laboratory, but I
5 think as you develop the solicitation, in order to maintain
6 the high quality and everything like that, we ought to price
7 it. Nobody has a lot of experience in running high volume
8 of all 13 loci.

9 Secondly, the laboratories themselves, despite the
10 fact that these samples are being outsourced, there is a
11 drain on the contracting laboratory's quality assurance
12 section considerably to review, check, QA, all of the work
13 associated with the private laboratory. So I don't want to
14 ignore that. The grant probably can't address that, but
15 just for the record, there is that cost.

16 Thirdly, my governor's office required that I ask
17 this question: In a state which is already under contract
18 -- in Virginia, a three year contract; we are halfway
19 through it -- with a private laboratory to do the convicted
20 felon samples, would that state be eligible for the federal
21 funds?

22 MS. FORMAN: We are requiring that no STR analysis
23 be done on any of the convicted offender samples that are
24 outsourced by the laboratories. That state that had the
25 foresight to do all of these analyses would be able to
1 submit samples under the federal program that had not yet
2 been analyzed at all.

3 MR. FERRARA: I thank you and my governor thanks
4 you.

5 [Laughter.]

6 MS. FORMAN: There is no one size fits all for
7 this particular program. So the only thing to do is take an

8 arrow and shoot it at the target. We only have until at the
9 latest August and September to get some hits out of this
10 program. So we must move with speed, and if we try to make
11 exceptions for any particular group, it will just slow us
12 down to the point of not getting any data analyzed.
13 If we are successful in this particular endeavor,
14 we can go back to Congress and say, look at what we did.
15 Now can we please go ahead and do the rest of the backlog?
16 Would you please appropriate more money?
17 Then we will have a year under our belts, we will
18 have systems in place, and we can talk about special
19 situations with states that may be able at that point to do
20 their own high throughput analysis for the same or less
21 money than an outsourcing lab would cost.
22 We are not looking for the cheapest laboratories.
23 We are looking for laboratories who will fulfill the many,
24 many, many pages of requirements that we have listed in the
25 draft of the solicitation. We are not going for lowest
1 cost; we are going for highest quality. Our main concern is
2 the quality of the data.
3 MR. REINSTEIN: Do you have a target date for
4 making the awards?
5 MS. FORMAN: We do. I wrote it down yesterday and
6 I don't think I brought it with me. If we do not have all
7 the awards awarded by at least the end of April, it will be
8 extremely difficult for us to meet our goal.
9 CHIEF JUSTICE ABRAHAMSON: Jim.
10 MR. CROW: Give us some idea of how intense the
11 competition for these awards is. How many applications do
12 you have?
13 MS. FORMAN: We haven't put the solicitation out,
14 so we have no applications. I think Paul would probably be
15 better to answer that question.
16 MR. CROW: You can give us a rough guess.
17 MS. FORMAN: I expect that there will be between
18 16 and 20 applications for the high throughput, and I expect
19 that there will be between 5 and 10 applications for the
20 quality assurance part.
21 MR. CROW: Of those, you will award three?
22 MS. FORMAN: There will probably be three to four.
23 Both platforms will be available to the community. That
24 will be one of the criteria, that we make sure everyone has
25 access to platforms that they use.
1 MR. CROW: If you don't get all that you expect
2 and you have to cut back, do you cut back uniformly and
3 easily, or do you make a value judgment?

4 MS. FORMAN: If we have to cut back on the number
5 of samples that we can do because we don't have enough
6 laboratories? Is that the question?

7 MR. CROW: Yes.

8 MS. FORMAN: We would not cut back on anything
9 that has to do with quality. If we had to filter the
10 samples through more slowly, we would talk about that. I
11 don't think we have talked about that. I am expecting that
12 we will have an appropriate number of high quality labs.

13 MR. CROW: And one high quality lab is the same as
14 any other high quality lab.

15 MS. FORMAN: If they can meet the conditions of
16 the proposal, if they pass their pre-award audit, then they
17 should be pretty similar.

18 CHIEF JUSTICE ABRAHAMSON: Chris.

19 MR. ASPLEN: First of all, I want to commend
20 Dr. Forman and also the FBI in their efforts to get this
21 done very quickly. Obviously we are behind the eight ball
22 because of the allocation of the funding, but OST and the
23 FBI are working as quickly as they can. It's a very complex
24 process to get these solicitations out the door, but we
25 realize that unless we do it quickly, we are not going to
1 get the results back.

2 Along those lines, to the extent that we won't be
3 able to get as much result back as we would like from this
4 particular program -- Paul, it won't make your governor feel
5 any better, I imagine -- fortunately we do have examples
6 that we will use when the time comes, such as the results
7 that Paul has from Virginia, from their outsourcing
8 experience. While financially Virginia has taken on a
9 burden that they won't be reimbursed for, the value of what
10 they have done is incredible.

11 Paul faxed me this chart a while ago. In 1999
12 they had 74 hits, and that was after the outsourcing. Your
13 database is about 110,000, right?

14 MR. FERRARA: That's correct.

15 MR. ASPLEN: Which was more than every other year
16 combined?

17 MR. FERRARA: Since 1993, with a small database we
18 had a total combined of, I think, 31 hits going into 1999;
19 74 in 1999 when the database went up to over 100,000. Nine
20 of those hits came in November and 12 in December and 4 so
21 far this month. So it just jumps.

22 Of course the other side is the emphasis on
23 running no-suspect cases.

24 MR. ASPLEN: When the time comes, OST and NIJ will

25 be utilizing information like that, but also the success
1 that we have from this particular program jointly so that we
2 can make the argument again as to the value. The value is
3 clear from Virginia alone, and when we put that together
4 with Florida, et cetera, and some of the other states, we
5 can make a strong argument.

6 MS. FORMAN: As a final note, I would like to
7 especially acknowledge the work of Dawn Herkenham, who has
8 been a private consultant to the Forensic Science Systems
9 Unit of the FBI and to us on this particular development of
10 the solicitation. She has done a phenomenal job. I think
11 the way she has put this together will assure that we are
12 only receiving applications from very high quality
13 laboratories.

14 CHIEF JUSTICE ABRAHAMSON: Thank you. That is
15 very tangible evidence of the work of the Commission and I
16 think that is to be commended.

17 Okay, Michael. You have been sitting patiently.

**Issues Working Group Report, "Forensic DNA Typing: Selected Legal Issues"
Legal Issues Working Group:**

Michael Smith (Chair), David Kaye (Reporter), Edward Imwinkelried, Dorothy Nelkin, Philip Reilly, Rockne Harmon, and Jeffrey Thomas

18 MR. SMITH: Most of what we are going to say today
19 has been previewed to you in writing as well as orally, but
20 we welcome the opportunity to try to lay it all out,
21 including some of the variations in viewpoint that remain
22 with in the working group.
23 Let me say a couple of words about our role as we
24 saw it. I think we saw our role less than perhaps some
25 other working groups as making recommendations to this body
1 or recommendations for this body to recommend to another.
2 Rather, we took on issues by referral from the Commission or
3 from other working groups. Some of the issues we took up
4 were self-initiated.
5 Our method basically was to nominate issues,
6 dispose of some without much discussion, but then to discuss
7 others with some intensity.
8 Then, of course, to make demands on David Kaye to
9 go study and write about them for us and ultimately to
10 present to you.
11 Finally, Ed Imwinkelried took mercy on David and
12 joined him in the effort of writing this, from which we
13 benefited enormously.
14 As a result of that, the documents that we are
15 submitting are the two legal memoranda from David and from
16 David and Ed. We are submitting them not as working group
17 products, because they are clearly authored by these
18 gentlemen, but we are recommending them to you as
19 comprehensive and thorough analyses of the legal issues we
20 took up, and we think they are relevant to this Commission
21 and others to discuss. So it's a kind of map from us to you
22 and perhaps from you to others.
23 Not every assertion in the documents therefore
24 represents the working group's view of the subject matter,
25 and I think we are going to discuss a little bit some of the
1 differences, and you'll have different views too.
2 The purpose of raising debate here about the
3 issues and I think ultimately suggesting to this Commission
4 that it facilitate, catalyze a process perhaps through a
5 national symposium later this year or next for wider
6 discussion of some of these issues is really the ultimate
7 product of our work.
8 Although you will remember that the initial

9 discussions of our work focused on the question of the
10 admissibility of arrestee sampling and arrestee databasing,
11 and we discussed that at some length in this body because of
12 the submissions to the Commission by others because of the
13 Attorney General's specific request to us, you will now find
14 that separately discussed in a version of the memorandum
15 you've earlier seen but also embedded now within the larger
16 context of the memorandum that Ed and David have authored on
17 the selected legal issues.

18 The cover document summarizes to some extent the
19 materials in the legal memoranda but also raises issues on
20 which we spent quite a bit of time in the working group that
21 didn't seem to us to be legal issues in the sort of
22 technical sense. They involve legal matters, but they are
23 issues of politics and philosophy which deserve discussion,
24 in our view, here and in a larger discussion nationally.
25 Why? Well, because the intersection of law and
1 privacy issues and public safety issues strikes us as not a
2 matter for a working group on legal issues to try and
3 resolve. Nor do we really recommend to the Commission that
4 it attempt to resolve them in the sense of making formal
5 recommendations to other bodies of government.

6 Let me now turn it over to David and, under his
7 orchestration, to the others for an oral presentation of the
8 material submitted to you today.

9 MR. KAYE: As Michael indicated, the major report that we
14 have developed has been the result of efforts on my part
15 and on the part of Ed Imwinkelried. In addition, it reflects
19 contributions from the other members of the working group.

21 The ideas were generated as a result of our discussion and drafts were the subject of further
discussion. Drafts of the reports, or parts of them, were circulated.
1 to other scholars in the area.

3 In some instances the conclusions are controversial, and
5 we have placed words like "probably" in front of them where
6 things are debatable.

7 We have focused on issues as to which it might be helpful
for the Commission to have a sense of the legal framework, the policy
choices that are available, and the kinds of laws can be passed consistently
with the Constitution. Our emphasis has been on the U.S. Constitution and
its limitations in relation to DNA evidence.

8 The report begins with an analysis of very concrete issues that arise
every day— Fourth Amendment issues, securing DNA for analysis, and
using DNA in prosecutions. Then it considers law enforcement databases.

9 Our discussions of many of these issues led us seriously to contemplate a more radical
alternative, I am going to defer some of that to our chair, who has very ably articulated many of
the reasons one might want to think about a much broader approach than that

4 which is currently being pursued.

6 We are going to begin by summarizing some of the
7 salient points. At the outset, Ed Imwinkelried will run through some
8 features on the first topic that I mentioned, DNA analysis
9 in criminal investigations. As you can see, there are several topics that
11 arise. One which came up in discussion yesterday has to do
12 with inferring physical or even racial groupings from crime
13 scene samples. One might ask, is that permissible
14 consistently with the equal protection clause of the
15 Fourteenth Amendment? Again, the focus is on the outer
18 boundaries of what can be done as opposed to what should
19 necessarily be done.

20 Issues also arise about securing samples from suspects or
21 other individuals and securing samples or records from
22 custodians, such as hospitals, laboratories or others who
23 might have DNA samples. Years ago, Dr. Reilly called the attention of the biomedical
25 community to

what he presciently described years ago as inchoate DNA database.

3 First, Ed's remarks.

4 MR. IMWINKELRIED: David and I are going to be
5 working from this report. I will try to make references to
6 the pages so we will be on the same page.

7 As David indicated, I'm going to be focusing on
8 the investigative stage. As his overhead suggests, there
9 are three aspects that we are going to be talking about:
10 What happens during the investigative phase? You
11 acquire crime scene samples; you obtain suspect samples.
12 Then you draw inferences both from an analysis of the
13 individual samples and from an analysis of the individual
14 samples and from their comparison. What we are going to try
15 to do is identify the legal issues that emerge from those
16 three steps.

17 With respect to each issue, I'm going to try to do
18 three things: identify the issue itself, furnish whatever
19 answer we can identify, and try to in an intellectually
20 honest fashion specify our level of confidence, our degree
21 of certitude in that conclusion.

22 Let's start by talking about the acquisition of
23 the crime scene sample, and specifically the question of the
24 investigative use of inferences as to racial or ethnic group
25 yielded by the analysis.

1 Question: If that inference is yielded by the
2 analysis, does the Constitution restrict the use of that
3 inference as an investigative lead?

4 On the one hand, it's clear that in constitutional
5 jurisprudence race is a suspect classification. On the

6 other hand, we believe that this is not a case like Yick Wo,
7 the case that is mentioned on page 21 of the report, in
8 which racial information is being used to disadvantage a
9 minority group. We think that the Yick Wo line of authority
10 is distinguishable for two reasons.
11 First, if the police pursue this policy with
12 respect to all racial or ethnic groups, they are being
13 treated in the same fashion; no group is being specially
14 burdened or disadvantaged.
15 Secondly, the use of the information is different.
16 It's not a discriminatory use. Quite to the contrary, it's
17 a legitimate investigative use.
18 The analogy that we suggest in text is this. What
19 if we had a government physician on the staff of a VA
20 hospital. The physician has an Afro-American patient, and
21 blood analysis indicates that there is a genetic
22 predisposition towards a particular illness, an illness that
23 could be treated preventively. We think it would be
24 malpractice to disregard that diagnostic lead from the DNA
25 information, and we think that similarly it is legitimate to
1 use this information as an investigative lead.
2 So we are relatively confident that if we are
3 talking about the uniform use of these investigative leads,
4 the Constitution does not forbid that practice.
5 If we turn from the crime scene sample to the
6 suspect sample, the initial question becomes, how do we
7 acquire the sample from the defendant?
8 We would like to suggest to you that the answer
9 turns on whether you acquire the sample directly from the
10 suspect or whether you indirectly obtain the sample by going
11 to a private entity or private person who is already in
12 possession of such a sample.
13 Let's talk initially about directly acquiring
14 samples from suspects. That can be done either via consent
15 or through compulsion. Let's focus initially on the
16 question of obtaining legally effective consent to
17 furnishing of a DNA sample.
18 Issue: What is the legal standard to determine
19 the efficacy of that consent?
20 On the one hand, it does seem to be a relatively
21 lax standard. We cited for you on page 16 of the report
22 United States Supreme Court decision in *Schneckloth v.*
23 *Bustamonte*. In that case the Supreme Court squarely holds
24 that when the issue is Fourth Amendment consent as opposed
25 to Fifth Amendment consent under *Miranda*, the standard is
1 not intentional relinquishment of a known right, but rather

2 a general voluntariness standard to be determined on the
3 basis of the totality of the circumstances.
4 On the one hand, that is a lax standard, but on
5 page 17 we have tried to suggest that even that seemingly
6 lax standard has some teeth, teeth illustrated by *Bumper v.*
7 *North Carolina* on page 17.
8 In *Bumper* you have a situation where police go to
9 a resident and tell the resident that they have a warrant to
10 search. In fact, they don't. The resident is misled into
11 thinking that they have the warrant; therefore allows them
12 to enter the residence.
13 The Supreme Court says this is not genuine, bona
14 fide consent; this is involuntary; this is coerced. In
15 situations in which the person is led to believe that there
16 is a right to search, misled into believing that they don't
17 have the right to refuse, even under the *Schneckloth*
18 standard you have an involuntary search and ineffective
19 consent.
20 Turning from consent to the issue of compulsion,
21 it's clear the police can't compel the provision of a DNA
22 sample without some Fourth Amendment justification. The rub
23 is this. What is the standard? And specifically, can you
24 compel provision of these samples on something less than a
25 full-fledged showing of probable cause?
1 Once again we are trying to be intellectually
2 honest and trying to be very explicit. The Supreme Court
3 has never authoritatively resolved that question, but
4 nevertheless we think there is a relatively solid consensus,
5 a consensus indicating that the answer to the question is
6 yes.
7 On page 4 we have cited to you the famous dictum
8 in *Davis v. Mississippi*, the case written by Justice
9 Brennan. It's a case involving fingerprints. In dictum in
10 the case Justice Brennan says this: Fingerprint evidence is
11 so reliable and the procedures are so minimally intrusive
12 that perhaps you could compel the provision of fingerprints
13 on something less than probable cause if you used carefully
14 circumscribed procedures.
15 Although the Supreme Court has never squarely
16 adopted that dictum, later, as we indicate on page 5, in
17 *Hayes v. Florida* the Supreme Court does approvingly cite to
18 the dictum in the *Davis* case.
19 Throughout the country legislatures and courts
20 have seized upon that dictum. You have statutes and court
21 rules in jurisdictions such as Alaska and Oklahoma, even
22 judicial decisions, and the common denominator is some

23 variation of the theme of founded or reasonable suspicion.

24 So on the one hand, we have to say there is no

25 definitive answer, but we think it is highly probable,

1 reasonably clear that if you interpose a magistrate or judge

2 and you have some particularized showing of the nature of

3 reasonable or founded suspicion, and you use carefully

4 circumscribed procedures, that sort of compulsory

5 identification procedure can probably pass constitutional

6 muster.

7 I have been talking about situations in which you

8 obtain the sample directly from the suspect. What about the

9 situation in which you indirectly obtain the sample? For

10 example, going to a hospital or an academic institution

11 which has already collected the sample.

12 At the outset, I think it's important to

13 distinguish between two situations. We are not talking

14 about the case in which the police go to the private

15 institution and instigate the collection of the sample.

16 They know, for example, that the suspect is at the hospital.

17 They go to the hospital personnel and request that they

18 obtain a sample for the police. That converts the private

19 institution into the de facto agent of the government. You

20 have state action, and the Fourth Amendment would apply.

21 What we are talking about is the other situation.

22 They have already collected the sample for their own

23 reasons, and how the question is, can they surrender it to

24 the police?

25 When I say surrender, I mean two things. Either

1 cooperatively, voluntarily turn the sample over, or do so on

2 the basis of a response to a subpoena. Not a warrant based

3 on probable cause or founded suspicion, but rather a

4 subpoena on the basis of a showing that the object of the

5 subpoena is logically relevant to the subject matter of an

6 ongoing legitimate criminal investigation.

7 That is the issue that turns on the question of

8 the applicability of the Miller case which is discussed on

9 page 8. When we were talking about compulsory

10 identification procedures, I said there was some

11 uncertainty. In those contexts it is much more precise to

12 say there is a flat out split of authority; there is a

13 division of judicial sentiment. The division of judicial

14 sentiment revolves around the extension of Miller to the

15 sorts of cases we are talking about now.

16 Miller is a situation in which the suspect is

17 charged with conducting an illegal still business. The

18 police obtain subpoenas to the banks, and they request that

19 the banks surrender two things. Number one, their own
20 internally generated records of his banking activities, and
21 moreover, the checks and deposit slips which he gave to the
22 banking institution.

23 Miller argues on appeal that even though he gave
24 that information to the banks, they could not surrender it
25 to the police without obtaining his consent. Essentially,
1 he says he retained a discrete, reasonable expectation of
2 privacy in those records, in the checks, in the deposit
3 slips.

4 In an opinion written by Justice Powell the Court
5 rejects all arguments. The Court says he voluntarily
6 conveyed the information to the banking institutions. He
7 thereby assumed the risk that they would convey the
8 information to the police, and he says that this rationale
9 applies both to the internally generated documents and to
10 the checks and deposit slips which the defendant conveyed to
11 the bank.

12 The question becomes, can you extend Miller to
13 either records of DNA samples or DNA samples themselves?
14 As we have indicated on page 10, there is a split
15 of authority over that issue, and a minority of courts
16 refuse to extend Miller. A minority of courts say Miller is
17 intended for the situation when you are dealing with
18 something like commercial or financial records.

19 The argument runs, and it certainly is a decent,
20 strong argument, that medical records are different; there
21 is a much more intense privacy interest in that context.

22 In fact, on the bottom of page 10, running to page
23 11, we cited a recent CNN poll in which 87 percent of the
24 public indicated a very strong concern about the privacy of
25 their medical records. Notwithstanding the strong privacy
1 interest in this type of data, the majority of courts have
2 said that Miller governs in the fact situations involved in
3 DNA. Our conclusion is that the majority view at least is
4 defensible.

5 What can be said in favor of the majority view?

6 The majority of courts concede that there is a more intense
7 privacy interest here, but they point to two things.

8 First, although four-fifths of the states have
9 adopted a general medical privilege, the majority of them do
10 not apply the privilege in criminal cases.

11 Secondly, many jurisdictions have gone beyond
12 negative limitations on the general medical privilege; they
13 have gone to the extent of affirmatively prescribing
14 reporting requirements, reporting requirements for both

15 violent injuries and child abuse. The majority of
16 jurisdictions have said these are indications that society
17 does not recognize a legally protected, constitutionally
18 protected expectation of privacy, at least on the criminal
19 side.

20 Our conclusion is that the majority view, as we
21 read the cases, is that the defendant does not retain a
22 constitutionally protected expectation of privacy either in
23 the records or in the samples, and for that reason, under
24 the majority view, those institutions can surrender the
25 records and the samples to the police without running afoul
1 of the Fourth Amendment.

2 As I said at the outset, we want to be as
3 intellectually honest and as candid as we can about our
4 degree of confidence in these various conclusions. So in
5 summing up I would like to group them into three categories.
6 The first category is a category in which we are
7 relatively confident in our conclusions. We think we can be
8 relatively confident that the Constitution does not
9 generally forbid the use of racial information as an
10 investigative lead. We can be relatively confident that
11 *Schneckloth* is the governing precedent when the issue is the
12 legal effectiveness of the defendant's consent. We also
13 think we are relatively confident that compulsion to submit
14 a DNA sample is an intrusion for Fourth Amendment purposes.

15 The second category is a category in which we
16 think our conclusions are highly probable. We think it is
17 highly probable that when push comes to shove the court will
18 say you can sustain compulsion when we are talking about
19 fingerprints or DNA on a standard less than probable cause,
20 some carefully circumscribed procedure based on a variation
21 of the theme of either founded or reasonable suspicion.

22 Finally, although we have less confidence, less
23 degree of certitude with respect to this, we think that
24 *Miller* under the majority view does govern in the clear
25 majority of jurisdictions, and if *Miller* does govern, then
1 that private institution which has already legitimately
2 obtained a sample of the DNA can surrender that DNA
3 cooperatively or in response to a subpoena without violating
4 any retained expectation of privacy that the defendant has
5 in those samples or in those records.

6 Based on that quick summary of the highlights of
7 the investigative part of the report, I would be more than
8 happy to respond to any questions anyone has.

9 CHIEF JUSTICE ABRAHAMSON: Barry.

10 MR. SCHECK: I must say that in terms of your

11 analytical framework, what really disturbs me is starting on
12 page 3. You footnote Harold Krent's fine article Of Diaries
13 and Data Banks: Use Restrictions Under the Fourth
14 Amendment.

15 I must say that I do agree with him that when you
16 are analyzing these kinds of cases, on the one hand, when
17 you are trying to judge the necessary predicate, phantom
18 suspicion, probable cause, whatever it is, you also have to
19 look at the level of intrusion. When you are looking at
20 access to the genome, much depends upon the restrictions
21 that are placed upon its use. Unrestricted access to it is
22 going to require a heavier predicate and be seen as a
23 greater intrusion. I don't think you give that argument
24 fair enough consideration by just saying, "but see."

25 I think -- tell me if I'm right -- that when you
1 are analyzing all of these issues, when you are talking
2 about acquiring samples, that it has been your underlying
3 assumption that the only use that is going to be made of the
4 DNA sample that you are either subpoenaing from a hospital
5 or taking directly from a suspect or taking indirectly is
6 that it is going to be reduced to its digitalized form and
7 used only for forensic identification purposes like
8 fingerprints. Is that the underlying assumption of this
9 analysis? I'm only asking if that is what the underlying
10 assumption was when you were writing this.

11 MR. HARMON: Clearly in a criminal prosecution, if
12 you obtain something, you can use it for whatever use you
13 need to use it to sustain a conviction or further
14 investigation. If one of these samples were obtained in the
15 manner prescribed by Ed, then the law enforcement could do
16 whatever was necessary to further an investigation, and if
17 that meant other than digitalizing, you know that is what we
18 could do on a sample that we obtained pursuant to a search
19 warrant or consent. I don't think there is anything that
20 limits that.

21 MR. SCHECK: That's precisely my point. Thank you
22 for clarifying it. What I am really trying to ascertain is,
23 is it the implicit assumption here that you are only using
24 this for the limited purposes I describe, or as Rock is
25 saying, once you get the sample, you can do anything you
1 want with it?

2 MR. IMWINKELRIED: It seems to me that the answer
3 to your question depends upon the constitutional right that
4 you are talking about. I think Rock is probably right. Our
5 assumption in the Fourth Amendment analysis is
6 probably the controlling rule, at least at this point. We

7 have indicated that there is a contrary argument to be made,
8 but it hasn't been adopted yet.
9 On the other hand, I think that the argument you
10 are making now does sound under *Whelan v. Rose*, which David
11 will talk about later -- in that challenge to that statutory
12 scheme the court did talk about the safeguards under the
13 statutory scheme to preclude unauthorized use of that
14 sensitive information.
15 So if you are talking about the right of privacy
16 safeguarded by due process, you do have some authority that
17 that is an appropriate consideration, but apart from this
18 argument, an argument that is obviously legitimate, I don't
19 see any Fourth Amendment authority to impose that
20 restriction.
21 MR. SCHECK: The authority is right in the quote
22 you put on page 4. In other words, when Justice Brennan in
23 *Davis* is talking about why some level of compulsion is going
24 to be justified in taking fingerprints, it is precisely
25 because it doesn't probe into the individual's private life,
1 thoughts, et cetera, et cetera, et cetera.
2 MR. IMWINKELRIED: Again, that is dictum that has
3 never been squarely adopted by the court.
4 MR. SCHECK: I understand that.
5 MR. IMWINKELRIED: We are trying to differentiate
6 between square holdings and dictum.
7 MR. SCHECK: There are funny kinds of square
8 holdings. It's not exactly like there is a helluva lot of
9 case law on issuing subpoenas not just for medical records,
10 but for samples from data banks. I think it is frankly
11 self-evident that these other kinds of considerations are
12 clearly raised by the *Davis* dicta, if you want to call it
13 that, or by Krent's arguments or others.
14 Let's forget about where these cases are
15 ultimately going to go. We'll find out, right? I just
16 think that in presenting this, if your assumption -- and I'm
17 glad that Rock made it clear -- if your assumption is even
18 under the Fourth Amendment that you have a right to take
19 these DNA samples and that the use of them is going to be
20 for more than simply using it like a fingerprint, then I
21 think you have to exfoliate that implication much more
22 clearly and indicate that the greater the potential level of
23 intrusion in terms of typing it, if there are going to be no
24 restrictions on the use you can make of that blood sample,
25 then you are going to have a much heavier predicate required
1 before you can take it by compulsion directly or indirectly.
2 DR. REILLY: Barry, what if you could fit into

3 fingerprinting, use a different assumption from Rock's?

4 MR. SCHECK: I have to say my reaction to the
5 entire report and all the DNA data bank cases, which I think
6 are rightly cited for the wrong reasons, is that I think
7 that we should treat these samples just like a fingerprint,
8 and the rationale should be narrowly limited in that
9 fashion. I thought that from the beginning.

10 MR. KAYE: We plan to address that as we
11 discuss collection for database purposes as opposed to more
12 traditional collection of material based on probable cause,
13 or in some situations something less.

14 I agree with your suggestion that the fingerprint analogy must apply to reduce the level of
15 proof on the government's part if those statutes that allow blood samples to
16 be collected for criminal investigations are to be sustained as constitutional
17 based on the analogy to taking fingerprints.

18 Our task in writing this report was to try to describe the law as it
19 exists. While I am sympathetic to Professor Krent's position that in
20 deciding what initial steps can be taken one ought to
21 consider all conceivable uses that would be made, I think
22 the standard approach that now exists under

23 the Fourth Amendment is to say that if there is probable
24 cause to obtain an item, then there may be other uses to
25 which it can be put unless those are independently invasive
26 of privacy in a way that, as Professor Imwinkelried was indicating, causes a due
27 process concern.

28 It's important to distinguish between a
29 description of laws that exist and an aspiration as to what
30 the law might be. I think it's our obligation at least to describe the law. The citation to
31 Professor Krent is intended to indicate that scholars may have other views as
32 to how the courts should approach this. I think they become more
33 important in the database area than here.

34 MR. IMWINKELRIED: One of the things we are trying
35 to do is to force issues for public policy resolution. If I
36 am looking at the state of the case law, I wouldn't advise
37 any defense counsel to be confident that he or she could
38 protect his client's interest by making either that argument
39 based on the Fourth Amendment or under substantive due
40 process.

41 I feel much more comfortable going to a
42 legislative forum and saying, you need to address this
43 because we need privacy protection at this point, and
44 individual citizens can't be confident that protection is
45 going to be forthcoming from the courts.

46 Even though these are tenable, decent arguments, I
47 quite frankly don't have a great deal of confidence that
48 they are going to carry the day and become anything

5 approaching majority views in American jurisprudence. That
6 is what we are trying to say to force issues for public
7 policy resolution.

8 MR. THOMA: One problem with David's statement --
9 I guess I am the minority view of our working group -- your
10 whole point with regard to this is lack of probable cause.
11 So when you bring it back into the context of once you have
12 probable cause, your use is more -- Rock's view --
13 unlimited. I think Barry's point is by going to the
14 article. You are avoiding the probable cause hurdle, so to
15 speak, and still getting the same use of the evidence as if
16 you had all this probable cause before the extraction.
17 I made quite a bit of notes. I apologize. We
18 have discussed this privately, but I didn't get back to you
19 on some of these points. This is extremely important. DNA
20 isn't like fingerprinting.

21 I agree with Rock's position that the position of
22 all the prosecutors would be once you've got it, you do
23 anything you want with it. I think the analysis has to go
24 back to that. If you don't have anything beyond what was
25 spoken in Davis by the United States Supreme Court, that is
1 the last word of the United States Supreme Court on this
2 issue, and you have to take that analysis into the context.

3 MR. KAYE: I suspect we lawyers could continue to
4 debate this. Let me throw in one last observation to make
5 this concrete. Some years ago there was a notorious case in
7 upstate New York. It involved a woman who was in a coma and
8 became pregnant as a result of a member of the staff of a
9 hospital or nursing home -- I don't recall which -- was
10 raping her while she was in a coma. She delivered a child
11 while in a coma. I could imagine an investigator saying, "we ought to be
15 able to collect a blood sample from all male hospital employees and do a paternity test.
18 Is that purely identifying, like a fingerprint? There could
19 be markers in that paternity test that would involve expressed traits that raise more privacy
concerns than fingerprints. The question is whether that use of the evidence, with the attendant
invasion of privacy is justified by the investigative need -- even though
1 there is not probable cause to think that every male employee in the hospital committed this
offense.

3 MR. SCHECK: That's not the only case like that.
4 There have been quite a few. The sensible way to proceed
5 consistent with the principles I am articulating that you
6 would do a paternity test first of all and isolate what the
7 male DNA profile was, again treating it like a fingerprint,
8 and then the law enforcement authorities would try to find
9 out who had access.

10 Then I would say that the proper procedure would

11 be to first see if you could get informed consent from the
12 individuals to get their samples. If you couldn't, then you
13 could go to a grand jury or to a judge based on the proof of
14 access and say, we want to make a comparison for the limited
15 purpose of seeing whether or not you match this fingerprint.
16 Then it would be part of the court order that no other uses
17 would be possible.

18 All I'm saying is I'm intrigued to hear that you
19 wrote this and then said, gee, there is a smattering of
20 cases here that seem to deal with these issues in terms of
21 medical records, and if we apply this to DNA, this is pretty
22 scary and most of the American people wouldn't like it and
23 all the rest of it.

24 I guess what I am bothered by is I think in this
25 draft it would be useful to articulate these other kinds of
1 arguments just a little bit more fully, because I don't
2 think they are fairly or persuasively enough stated here, to
3 be frank. I don't think you do it by just saying "but see."
4 If you want, I would contribute something to that. Then say
5 these are where the issues are going to be.

6 Reading this, it is one thing to say to a defense
7 lawyer -- of course defense lawyers always should think like
8 this -- watch out. The state is going to do something to
9 your client, and don't put money in a bank; don't give your
10 records to an accountant, or whatever.

11 I think it is going to be read, frankly, quite
12 another way, and that is prosecutors and others who never
13 thought for a second, who never even thought, gee, what
14 about a subpoena to all the blood stick cards around. Or
15 what about a subpoena to all these data banks. Hey, this
16 looks pretty good.

17 I think that is how this would be read unless we
18 indicate a bit more persuasively what the arguments are on
19 the other side and what the courts could do. My own view is
20 that we are only beginning to reach this issue, and the
21 courts are definitely going to look at this just as Brennan
22 did. They are going to say this is potentially different.
23 You just can have this for any purpose. We're going to look
24 at the level of predicate.

25 The standard is going to be raised in accordance
1 with what your potential use is, and to the extent that law
2 enforcement institutions assure people with very ironclad
3 guarantees it's only as a fingerprint, then you are going to
4 get greater access, and to the extent that it is more
5 unlimited, I think the courts will go the other way.

6 MR. IMWINKELRIED: We can certainly flesh out in

7 more detail the arguments for the minority view. We have
8 tried to indicate that there is a respectfully contrary line
9 of authority. Again, we don't want to lose sight of the
10 point that our intent is both to pressure the Commission and
11 to pressure a public debate on the question of what should
12 legislatures do to assure protection while the courts
13 struggle with these issues.

14 We think that certainly should not be taken off
15 the table simply because there is this minority line of
16 authority, even if it can be more persuasive and articulate.
17 That is one of the problems with the minority view. We
18 footnote the Dolan case or the Weber case from New York,
19 cases that come to contrary conclusions, while ignoring
20 cases that have come to the minority results that basically
21 disregarded the giant gorilla on the other side.

22 CHIEF JUSTICE ABRAHAMSON: Phil.

23 DR. REILLY: Forgive me if what I am about say is
24 already in a footnote that I've overlooked, but there may be
25 a line of inquiry that will shed some light on this debate,
1 although not from judicial sources.

2 Over the last three years or so a provision of the
3 Public Health Service Act providing for certificates of
4 confidentiality, making genetic databases unreachable even
5 by subpoena, has been used on several occasions, broadening
6 the original intent of that provision of the federal law
7 which was aimed at records of people with a history of
8 alcohol and drug abuse, to protect them. So within at least
9 that administrative application or interpretation of a
10 federal law we might see some more recent inquiry related to
11 genetic databases themselves and might be of some use to us.

12 MR. KAYE: I'm in agreement with almost
13 everything that has been said here. The statute may be worth noting in light of our suggestion
that some of these matters have to be dealt with not by constitutional
17 construction, but by statute. Isn't the statute limited to research
18 databases?

19 DR. REILLY: Yes, it's limited to research
20 databases. I just say defined by a federal grant as being
21 analyzed under research funding.

22 MR. KAYE: Don't the researchers have to seek a
23 certificate from HHS?

24 DR. REILLY: Yes, that's correct. But it goes
25 directly to Ed's point about the crucible of public policy
1 and how here a statute originally intended for a very narrow
2 purpose has been expanded to address very much the genetic
3 data bank issue, and it seems -- I am on very thin ice here.
4 I'm not a Fourth Amendment scholar by any means -- to be the

5 most recent, if you will, articulation in a post-Miller
6 world about how they look at these things, at least in the
7 research databases.

8 It may be hard to actually get text on this other
9 than the form of letters accompanying the certificates that
10 have been issued, but there have been a number of them.

11 MR. SCHECK: Is it part of your analysis, for
12 example, in deciding what one's reasonable expectations of
13 privacy are in certain data -- that doctrine has been
14 criticized for this very reason. The point is, what is
15 reasonable to the average person? What expectations did
16 people have when they gave up their tissues or their
17 biological samples as opposed to putting their money in a
18 bank and engaging in credit transactions? In terms of going
19 on the Internet, your expectation of privacy there is fair
20 warning that anyone can hack you or it is going to be resold
21 to another credit agency.

22 Where they take your blood as a kid and they put
23 it on a card, I think the people's expectations of privacy
24 in that are much greater.

25 You are absolutely right. Miller is, technically
1 speaking, out there as a precedent to be cited to try to get
2 these things, but the argument that this kind of tissue and
3 data and information is raising much more intense privacy
4 interests seems to me self-evident.

5 MR. THOMA: That is why Miller is avoided
6 sometimes, because it is not necessarily relevant if we are
7 talking about more private concerns.

8 MR. IMWINKELRIED: I think you go back to Barry's
9 question. What is the sort of indication of social
10 expectations that is reliable enough, fixed enough,
11 permanent enough to rely on as a factor for decision making.
12 I do have to say if the Texas courts say, look, you've got
13 all of these states saying you've got protection for medical
14 information broadly defined on the civil side, there is
15 pretty solid consensus that there is no medical privilege on
16 the criminal side. Moreover, we have got these affirmative
17 reporting requirements which intrude on medical
18 confidentiality when there is a sufficiently important
19 interest. That is, I think, quite frankly, a firmer
20 indication of social expectations of privacy than even the
21 CNN polls.

22 MR. SCHECK: There is a case that you don't cite
23 here, and that is Redmond. In other words, while the
24 medical privilege is a weak one in the criminal context,
25 isn't it interesting how the Supreme Court went on the

1 therapist/patient privilege?

2 MR. IMWINKELRIED: That's easily distinguishable.

3 Every state has such a privilege.

4 MR. KAYE: Madam Chair, I was going to ask if I

5 could have the chair's permission to move on to the

6 next topic. I fear we could spent all day on this one.

7 CHIEF JUSTICE ABRAHAMSON: What do you gather from

8 the discussion, Professor Kaye, as to what should be done,

9 if anything?

10 MR. KAYE: My current thinking is that Professor Imwinkelried and I

11 shall confer on modifying the first section of the report. The suggestion that the report make

the analogy to fingerprinting quite clear is a valid one.

19 MR. IMWINKELRIED: I agree. We can run that by

20 both Barry and Jeff and get input from them as to

21 appropriate language as well.

22 CHIEF JUSTICE ABRAHAMSON: Okay. David, where do

23 we go from here?

24 MR. KAYE: You've heard what was the

25 uncontroversial part of our report.

1 [Laughter.]

2 MR. KAYE: Our group spent some time in discussing

3 some legal issues associated with the prosecutorial phase,

4 the trial phase, and pretrial discovery of DNA

5 evidence. These are, by and large, not issues that are suitable for the Commission to

9 make any kind of formal recommendations about but there was a feeling within the group that

it might be helpful in a public document to describe the development of the law

12 on the admissibility of DNA evidence. The report discusses the standards that

15 the law uses for admitting novel and new scientific methods.

16 Another topic that involves proficiency test

19 results. Many arguments have been made about the admissibility of laboratory findings and

proficiency testing. In light of the time we have spent so far, I don't

22 propose to go through those here. There is no question

24 that proficiency testing is important, but I would like to

1 move on.

2 I'm also going to skip over questions about

3 whether there should be an exception to the statute of

4 limitations for DNA testing. I will merely suggest that it would

5 be exceedingly difficult to draft a statute that created a

6 specific exception for DNA evidence.

8 In regard to DNA databases, I am going to discuss two kinds of

15 DNA data banking, what I will call limited DNA data

16 banking and more expansive DNA databases.

17 State statutes that provide for convicted offender

19 databases fall into several patterns and display considerable

20 variety. I will run through quickly the kind of questions that face a state or a

22 federal government in setting up a database.

I want to indicate before I begin the kinds
8 of criticisms that have been heard of DNA data banking.
9 Editorial writers have called for legislation to ensure that
10 “scientific advances in law enforcement do not swamp the
11 privacy rights of ordinary citizens.” There has been talk in
12 the Boston Globe, for instance, of “unfettered government
13 sponsored bio-invasion,” and other authors have warned of “a nation of suspects” resulting
14 from the creation of databases. These concerns need to be
15 kept in mind as one fashions a database.
16 One issue that arises is, how do you collect the
17 DNA? I'm not going to belabor that. There are surprising
18 variations in the statutes. California insists, or used to insist on two specimens of
19 blood and a saliva sample. While one might wonder why
20 different states take different approaches, I don't see this
21 as a major issue of national policy.
22 The more important issue is which offenses
23 should trigger a requirement
24 to give DNA. Currently about 8 percent of felons are
25 subject to collection. These are typically in sex crimes
26 and a few violent offenses. There is a clear trend, however,
27 toward expanding the scope of databases, and I would expect
28 we will see that continue.
29 The theories that might justify collection from
30 offenders are worth noting. One theory is a forfeiture of rights
31 theory. The Ninth Circuit said in one case in 1995 that
32 “convicted felons do not have the same expectations of
33 privacy in genetic information that free persons have.” The Fourth Circuit, in the first federal
34 case on this issue, said something similar.
35 A theory that I find more congenial rests on a “predictivist thesis.” In the Fourth Circuit case,
36 the court observed that “the program attempts to
37 address the problem of felony recidivism in Virginia by
38 identifying and increasing the likelihood of convicting
39 repeated offenders and by deterring those who otherwise
40 might commit a second felony.” It then refers to statistics
41 on recidivism, and additional studies from the Bureau of Justice Statistics are collected in our
42 report.
43 Predictivism gives one a basis for
44 identifying offenses that justify collection to the extent that one can satisfy two conditions.
45 First, one must determine which offenses produce DNA
46 evidence. Those we might call target offenses, or
47 traceable offenses. White collar crime
48 is not typically going to be a type for which DNA evidence would
49 be very useful. Therefore, even if white collar criminals
50 are recidivists, one might not want to include them.
51 On the other hand, the collection crime should not
52 just be the same crime for which there is an elevated probability as compared to the general

population. One need not necessarily be a previous murderer to be predicted to commit 22 homicide. Some reports on database hits in Florida and Virginia

1 suggest, for example, that small property
2 offenses may be indicators of later violent crimes.
3 We heard yesterday a mention of the 1992
4 NRC report. Written around the turn of the last decade in the last
6 century, this report remarked that the only useful collection crimes probably would be sex
offenses. That turns out in retrospect -- hindsight
9 is 20/20 -- to have been shortsighted.

10 Nevertheless, even if we reject the forfeiture of rights
19 theory and say that we are interested only in deterring
20 crime and capturing people who have committed offenses, then
21 it does not follow that every felony should necessarily be
22 included. The issue requires more
23 empirical data than now exist. The 1999 federal DNA legislation
24 calls for the collection of statistics on the efficacy of the databases for specific crimes.

1 A third issue that has already been discussed before this Commission
2 involves the time at which one might collect this material.
3 Could it be at the time of arrest? If we adopt this
4 predictivist view, then the question would be, again, Are people who are
8 merely arrested so distinguishable from the general population that
9 the state should be able to take their DNA in light of the
10 extent of the invasion of privacy and the value to law
11 enforcement? That is the balancing test that would
13 apply under the legal framework of the cases upholding searches conducted without a and
without individualized suspicion under a “special needs” theory.

14 One might argue that the “special needs” line of
15 cases should not be followed. Indeed, there is a narrower argument
16 that can be made for taking DNA on arrest. It is based on the need for getting an
18 unequivocal means of identifying an individual. We have
19 traditionally relied on fingerprints for that purpose.

20 Once the biometric identifier is obtained,
21 someone who escapes, for example, can be re-apprehended,
22 even if he has false identification, the police can verify
23 they have the right person; the police know who they have
24 arrested. That is a narrow argument, but it leads to the following question: if you

1 collect the DNA for pure identification, can it be put
2 in a data bank that is then against the unsolved cases?

4 I think the traditional Fourth Amendment approach
5 would be that if the government legitimately has a set of
6 records, it can then use it in other ways because the
7 invasion of privacy was initially justified. Of course, if there is
8 some further invasion of privacy that results from the
9 subsequent use, that would need to be justified, but keeping the legitimately obtained information
on file and using to solve cases is not itself an invasion of any new privacy interest. Fingerprint

records, for example, could be put in a large database. The FBI some months ago announced that the automated fingerprint identification system, AFIS, has come
15 on line; with a few thousand dollars for a device to record a an “electronic” thumbprint at the
station, police can determine whether the fingerprint matches one in the
19 database.

20 Can the fingerprints in a database come from arrested people? I think the answer is
22 probably “yes” under the Fourth Amendment. Similarly, for
23 purely identifying uses of DNA, the result should be the same. Here I want to emphasize that
the analogy to fingerprints has to be complete, that

1 one has to talk about the limitation to identifying loci
2 that are useful essentially only for that purpose, that
3 contain no other socially significant or potentially
4 stigmatizing information that could be revealed and cause
5 harm to any individual.

6 If the system is so structured, I conclude that courts would
11 probably uphold this over some dissents.

13 Another important issue is the range of permissible uses that may be made of DNA once it is
in a data bank. Let's go back to convicted offender

17 data banks. A conviction rather than an arrest is necessary to place a DNA profile in the
database. All such statutes provide that the banked material or
20 the records derived from them may be used in criminal
21 investigations. Since the theory that justified obtaining the profile is that it is valuable
22 for law enforcement, that would seem
23 unobjectionable.

24 The statutes often provide for certain other uses,
25 and these have proved to be a little more controversial,
1 particularly in recent writings from what I will call
2 members of the bioethics community. Indeed this was the
3 subject of one or two briefs in the case challenging the
4 Massachusetts data bank which ultimately was upheld by the
5 Supreme Judicial Court of Massachusetts. There were a
6 number of arguments that by allowing other uses of the data
7 the statute was an unreasonable invasion
8 of privacy and an unreasonable search and seizure.

9 I think that argument is, in principle, well taken.

10 The question is, what are the range of uses that are going
11 to be allowed? Some people argue that statutory provisions
12 that would allow the material to be released under a court
13 order in civil litigation should not be allowed. But if the same
15 material can be obtained by an order to the person to appear
16 and give blood, it's hard to see
17 why it poses any constitutional problem to
18 collect it from a preexisting sample as opposed to
19 compelling the person to appear.

20 More contentious is the possibility of various
21 research uses. Here I shall talk about two kinds of research,

22 what we could call operational research and other research.
23 By operational research, I mean the use of the
24 records for statistical purposes. For example, to ascertain
25 whether alleles at a given locus are in Hardy
1 Weinberg equilibrium, or to ascertain certain
3 allele frequencies, might be useful
4 in computing probabilities that are related to the probative
5 value of a match of someone within the database.
6 Many of the statutes provide that anonymized records, the profiles
10 that are just numerical information, can be used in this kind of
11 research. That seems at least a permissible choice to make,
13 though not the only conceivable choice, where the records
14 are in fact anonymized and solely statistical information is involved.
16 Could the samples themselves be used at least if
17 they were anonymized so that nothing is known about an
19 individual? Could they be used for instance, to develop SNPs, or
21 to validate systems on a convenient set of data.
22 First of all, I think the Constitution would
23 permit this where there is no harm that can be shown to
24 individuals whose DNA was taken in the first place. This
25 would mean certain kinds of security would have to
1 be observed to ensure that individuals are not identified.
2 There is an argument about the lack of informed
3 consent in this area, but we should remember that we are
4 dealing with samples that were obtained without consent in
5 the first place. I think the situation that has engaged the
6 attention of the bioethical community in a very intense controversy about
8 tissue samples that are available in the millions in this
9 country for research does not apply with full force where the samples themselves are obtained
involuntarily, but that argument isn't developed in full in this report.
13 I don't think it's a constitutional limitation that no research use could
15 ever be made.
16 More controversial research uses could be
17 imagined. It was argued in the Massachusetts case that the
18 samples might be turned over to locate "crime genes," whatever
19 those might be. I don't think even behavioral genetic
20 researchers would claim that there is such a thing as a
21 crime gene, although they might claim that there is a
22 genetic predisposition toward risky behavior of all kinds.
23 This area of research raises other questions of public policy that
2 are very important to address, but whether
3 they are constitutional problems is a separate matter.
4 With respect to the constitutionality of these
5 databases, a very important feature that is
6 recognized in most of the statutes is the need for security.
7 If one is going to take the material and try to argue that

8 it is purely for identification and for deterring crime through identifying people, then any other
uses that are made should not infringe on the personal interests of the
11 individuals. The question becomes then, how does one
12 obtain sufficient security in this area?
13 The leading case is one that Professor Imwinkelried alluded to
14 a little while ago which involved pharmacy records in New
15 York, records of prescriptions for controlled substances that were to be stored in a central
location for the use of
18 criminal investigations. Those are medical records; those
19 are surely private in the sense of people's expectations.
20 Yet the Supreme Court in *Whalen v. Roe* refused to even treat these
23 records as having a specially protected privacy interest; it
24 proceeded on the premise that it was rational for the state to want them,
25 it could get them.
1 However, the majority of the Court emphasized
5 that there was security-- these materials were kept under
6 lock and key; there were a limited number of people with
7 access to them; the computers that had them were off line,
8 and so on.
9 It also noted that there had been no instances in the years
10 in which the program had been in existence of any leaks.
11 Those are cautionary observations that relate to
12 law enforcement DNA databases as well.
13 Of course the most secure form of avoiding any
14 exposure of personally significant genetic information such
15 as disease predisposition, would be not to retain samples
18 indefinitely, but to store only the records.
20 In the discussions within our
21 group there has been considerable sympathy with the view
22 that sample retention may be, on balance, undesirable. Certainly if one expands databases
beyond convicted offenders to arrestees, the arguments for constitutionality become stronger if
one does not retain the samples. That eliminates any
25 possibility of untoward invasion of privacy associated with
1 those records, even though there may be criminal penalties,
2 as there are in many states, against such uses.
3 The Working Group talked about all these issues. Should police try to infer the race of an
individual from a DNA sample? Should we broaden the collection efforts to arrestees on the
theory they are different than the general population? Which crimes can be predicted to lead to
other offenses and therefore justify inclusion in the databases? These are all
10 very hard questions.
11 Some genius in our midst that maybe it makes sense to move
13 away from the assumption that we as a society have been
14 operating under for many years, which is that databases
15 should be limited to people who are already enmeshed in the
16 criminal justice system. This focus tends to have a
17 disproportionate impact, for example, on minorities, who

18 are statistically more at risk for
19 being involved in arrests and in convictions.
20 If we moved to a more expansive system, many of
21 those issues would disappear. If everyone's DNA were on
22 file, then there would be no concerns of unfairness as to
23 particular groups. Under what circumstances might it make
24 any sense to put everyone's DNA on file?
25 The matter is
1 so sensitive that the most extreme precautions would have to
2 be taken, probably including destruction of samples.
4 It certainly would not follow from anything we've
5 said that the newborn screening samples would be obtainable today by a
7 subpoena, by the way. Those were not obtained voluntarily.
8 They were obtained by requirements of state law for newborn
9 screening, I presume, in which case Miller would not apply.
11 Again, there is an argument that this would
13 be within the "special needs" balancing
14 test the Supreme Court has used in cases involving
15 collection of information that could be used in law
16 enforcement that is obtained as part of a broad regulatory
17 system. I think it's arguable that the Fourth Amendment would permit this in light of
obvious advantages to law enforcement in having fuller records on people and the limited nature
of these records. I'm being a bit of a Devil's advocate here because part of what our group wants
22 to do is to inspire public debate. We are not saying it should be adopted. Still, one might
argue that a centralized database under strict control, with samples
1 destroyed, would be better than a proliferation of databases
2 obtainable by subpoena growing up in all sorts of private
3 hands.
4 I will leave you with these thoughts and see what reactions arise.
6 CHIEF JUSTICE ABRAHAMSON: Barry.
7 MR. SCHECK: I think the way that you get to that
8 last argument and this breathtaking prospect of universal
9 collection in order to prevent discriminatory usage by
10 justifying it under the special needs exception to the
11 Fourth Amendment, which is something that actually you
12 didn't discuss as a rationale here, shows why it's very
13 dangerous that the special needs exception has been used to
14 justify the DNA data bank legislation. If you took it
15 seriously, you might be able to make the arguments that Dave
16 is making, which I think are dangerous arguments.
17 The special needs exception was originally -- Ed,
18 correct me if I'm wrong here -- designed for a series of
19 cases where in theory you are not undertaking any kind of
20 particularized search. So you can do general administrative
21 inspections of houses. There is a general rule about
22 collection of samples from transportation employees after

23 accidents.

24 It has always seemed to me incredibly weak
25 rationale for the DNA data banks insofar as it's
1 disingenuous when the point of the data bank is to conduct a
2 particularized search as to whether or not the individual
3 committed a specific crime.
4 If you say, well, we're going to allow that under
5 the special needs exception, which is really nothing more
6 than saying how much does law enforcement want it versus how
7 much we think is reasonable in terms of people's privacy
8 rights, then, yes, you can probably justify, if you like the
9 special needs exception as rationale, taking DNA from
10 everybody. But I think that is divisive.

11 That is why I would say that you shouldn't give
12 short shrift, even though the courts have so far, to some
13 extent to this notion of an identification rationale for the
14 data banks, because it does seem to me that that is the
15 test.

16 I would put it a little differently, David. It's
17 almost like when you go out and you commit a violent felony
18 and you leave your DNA, as Norman demonstrated in his
19 carefully crafted exceptions to the statute of limitations.
20 It's sort of like leaving your picture and your name.

21 We have no objections in terms of the need to
22 accurately identify people within the system to see if they
23 have committed other crimes, to see if they have warrants,
24 to finding your name, your picture, even your social
25 security number that is associated when you are a convicted
1 individual.

2 That narrow kind of identification purpose is a
3 much better rationale than special needs, which I think
4 frankly is flabby logically under Fourth Amendment law to
5 justify these things, because you really are overlooking the
6 purpose of it is to search for that crime that is out there.
7 Finally, when we start talking about getting
8 access for other kinds of research, I take it more seriously
9 frankly. It's not just thrill-seeking behavior, but there
10 is plenty of interest in hardwired desires for narcotics
11 use; pedophilia, which you do mention in the paper, and sex
12 offenses will be an area of research. It's crazy to think
13 it won't. Even if it's multifactorial, people are going to
14 look at it.

15 It does seem to me that informed consent type
16 principles do have application here, because again, what I
17 don't really see as a part of the analysis here is this
18 notion that when you conduct other kinds of examinations of

19 the DNA sample that you have, that is a search or an
20 intrusion which requires a greater predicate under the
21 Fourth Amendment and is an invasion of privacy right.
22 If you are taking it for one limited purpose,
23 there is a constitutional requirement, I would think, to
24 start using it for another. You say, what's the objection
25 to taking DNA samples for purposes of civil litigation from
1 the offender's blood that is going to be preserved in a data
2 bank? What's the harm in doing that? Because you could go
3 about, in theory, and do it directly by going to the
4 individual.

5 I think the answer is, why don't you go directly
6 to the individual and go get blood there? The only time
7 that you would need to go to a data bank is for some reason
8 that individual is dead and you can't directly get it. Then
9 under some kind of analysis of no other means and a
10 balancing of needs there might be a case-by-case
11 determination of this.

12 I am troubled by these other rationales and where
13 they lead.

14 Last point. We skipped it very quickly. It
15 doesn't seem to me we are helping ourselves very much by
16 saying, well, there is no constitutional issue under equal
17 protection when we start looking at DNA left at a crime
18 scene that we can then type to race. As Dr. Crow was
19 telling us yesterday, what is the only race that we have the
20 ability to make any kind of sound inferences from? Blacks.

21 MR. CROW: Actually, I didn't say that. That's
22 the only one that has been studied properly. It was a good
23 guess.

24 MR. SCHECK: And you said also it's a good guess
25 that Hispanics is not going to be too helpful.

1 MR. CROW: Yes.

2 MR. SCHECK: And how sound are those numbers
3 anyhow?

4 You now have decisions of the United States
5 Supreme Court under Wren that you noted in the materials
6 where you can have a racial bias; you can pull somebody over
7 just because the officer wanted to pull over a black person
8 to search that person's car, which we now have the state of
9 New Jersey admitting to as a policy decades long. The
10 Supreme Court says in the Wren case you can't do that with
11 the intended racial bias, but if there was a broken tail
12 light, you have an objective basis to conduct, let's say,
13 whatever search would ordinarily be proper incident to
14 arrest.

15 There is an article I would commend to your
16 attention that you might want to cite by Tony Thompson in
17 the NYU Law Journal about a month ago, saying if you go back
18 and look at Terry v. Ohio, in a way that was a race case.
19 It was just a bunch of black guys hanging out in front of a
20 store in Cincinnati, Ohio, and they picked them up. Then
21 they came up with a more objective standard, but the issue
22 of race has been ducked here.
23 I think it's a serious equal protection problem.
24 We just finished a study in New York City of street stops
25 issued by Attorney General Eliot Spitzer that showed that
1 blacks and Hispanics were disproportionately stopped on
2 false arrests and wrong stops. This is reality.
3 I think, as applied, it is a constitutional
4 problem. It seems to me very troubling to say, well, we can
5 justify all of this by saying we could do it with all other
6 races, when in fact the only thing that we have to work with
7 here is distinguishing blacks. It's troubling.
8 MR. CROW: Or distinguishing blacks from blacks.
9 MR. SMITH: Judge Abrahamson, anticipating that
10 issues of this kind and others that came up during the last
11 couple of hours deserve further discussion, I did promise
12 the other members of the working group they would have an
13 opportunity at this moment to either add or amplify or
14 contradict some of the views already expressed. If it's
15 appropriate at this moment, we should do that. If it's not,
16 we should break.
17 CHIEF JUSTICE ABRAHAMSON: Woody wanted to say
18 something. Then we will break, and then we will come back
19 to the other members, if that's okay.
20 Woody.
21 MR. CLARKE: Thanks. I just wanted to return a
22 little bit to what Barry was talking about in terms of
23 special needs. I guess it's not really the label you put on
24 it as much as it is a question of public policy. I see it
25 in the context of arrestee sampling. The day may arise when
1 we have an inclusive database. I don't think it's going to
2 be in our lifetimes, but it may at some point in the future.
3 I think, as has already been noted, the move
4 towards at least in some jurisdictions taking samples from
5 arrestees is rapidly becoming a reality. It's going to be
6 litigated. It will either be discussed legislatively first
7 and then go from there.
8 This rather remarkable event actually made me
9 think of what goes on in my county. Almost every day, 365
10 days a year people are stopped and searched with no basis

11 whatsoever at a border checkpoint. I believe the basis for
12 that is a federal district court judge once a year signing a
13 general warrant.

14 So it has some applicability in the sense that
15 that measure is taken, and it certainly defies
16 constitutional interpretation other than on the basis of
17 public policy, and the public policy relates directly to the
18 problems associated with unlawful immigration and the
19 transportation of controlled substances.

20 To some extent that will, obviously, be discussed
21 in the context of sampling of arrestees. I think it really
22 boils down to a question of measuring, as courts will,
23 assuming legislatures pass such legislation, the benefit to
24 the public from sampling arrestees versus intrusion on the
25 individual privacy rights of others.

1 The border checkpoint has been discussed for
2 decades. It is certainly one of the clearest examples of
3 what would otherwise, I think, be interpreted as a search
4 based on purely a hunch. And that's all they are. People
5 are pulled over. They are searched, and there is absolutely
6 no need for any particularized suspicion. At least I
7 believe that is the current state of affairs.

8 I think that is going to play a role somewhere in
9 the future.

10 I did want to thank all the members of the working
11 group. It dawned on me 25 years ago I had the pleasure of
12 being a student of Professor Imwinkelried in a contracts
13 class. I want to assure you that is not what sent me into
14 criminal law.

15 [Laughter.]

16 MR. IMWINKELRIED: I want to comment on one thing
17 that Barry said, which I think was well taken. He said that
18 we have come a long way from the initial inroads of the
19 special needs doctrine with Cameron C. Cameron C. are
20 housing code enforcement cases where the Supreme Court says,
21 you know, this is a special public need and it is going to
22 be frustrated, the enforcement of these codes, if we require
23 case-specific, particularized showings of need.

24 So you have got a special need that can only be
25 met if we to some extent relax normal Fourth Amendment
1 standards.

2 One of the things I think David and I are trying
3 to do by citing that theory in this context is to raise the
4 public policy question: Are there special needs that can
5 only be met by moving towards more expansive databases?
6 That's the public policy question that we are trying to

7 press both the Commission and for broader public principles.
8 CHIEF JUSTICE ABRAHAMSON: With that, let's take a
9 break.

10 MR. ASPLEN: Before you go, either pick up here or
11 I will pass out at your seats draft recommendations for the
12 sample retention issue that we will be dealing with today.
13 Please take a few moments to read that during the break so
14 we can talk about it also.
15 Also, for the record, as you have seen, we do have
16 sign language interpreters here pursuant to our requirements
17 under the Federal Advisory Committee Act.

18 [Recess.]

19 CHIEF JUSTICE ABRAHAMSON: Michael Smith, you are
20 in charge for the moment.

21 MR. SMITH: Judge, I've never known you to give up
22 power quite that readily.

23 CHIEF JUSTICE ABRAHAMSON: What I give I can take
24 back.

25 [Laughter.]

1 MR. SMITH: We had a hardworking working group.
2 There were important things to be said by each member. So
3 why don't we just go around.
4 Jeff, do you want to start?

5 MR. THOMA: I will e-mail these suggestions. I'm
6 going to make some specific points where I differ. I would
7 pretty much join in Barry's comment earlier.
8 At page 3, footnote 11, we need to confine that to
9 the federal Constitution per footnote 5 of David's DNA
10 sampling article. It is not mentioned, though it is
11 mentioned in the article that it's confined to the federal
12 Constitution. You have the right to privacy in California,
13 for example, and other constitutions may hold differently.
14 Footnote 13 at page 3. There really isn't any
15 discussion of how DNA sampling constitutes an exigency.
16 At page 17, as Barry and I mentioned previously,
17 and Rock's position as well, a question about his take on
18 it. Probing into a person once you have DNA is a given if
19 you don't have the constraints. We've already discussed
20 that.

21 Page 5, footnote 22. It really isn't an exception
22 to probable cause, because the narrow focal group actually
23 fits within probable cause guidelines more or less. I think
24 it fits better there than as an exception to probable cause
25 in most instances.

1 At pages 8 and 9, I do vehemently disagree about
2 Miller, stretching from bank records to DNA information

3 about somebody. If you look at pages 10 and 11, footnote
4 52, it is not entirely persuasive, though I understand
5 Tennessee's and I understand Texas' position on it. We have
6 got medical records which we stretch from bank records, and
7 then we stretch it to DNA information rather than medical
8 records.

9 The same problem on page 11 with Thurman. It
10 misconstrues the reasonable expectation of privacy per Katz,
11 because you are talking about statistically people having
12 that reasonable expectation of privacy if they do this. For
13 example, in Katz it was what that person's reasonable
14 expectation of privacy is within the phone booth. I think
15 if you have got 87 percent or thereabouts believing they
16 have some reasonable expectation of privacy, it ends up not
17 being a subjective standard.

18 In talking about DNA, this is something Phil and I
19 have talked about briefly, but certainly he knows more about
20 it. Regarding medical information, what you end up doing is
21 literally getting to a point where people are suspect of
22 being involved in the medical system if they feel their
23 information is going to go out. I think you should have a
24 public policy towards people seeking medical advice and
25 medical treatment.

1 What you really have is directly the opposite. We
2 don't discuss that. If people realize that this information
3 at some point can be disseminated in many ways and not
4 stopped at some point -- I think the public good towards
5 seeking medical treatment should be more important than
6 whatever you want to make of the information that somebody
7 has to give up with regard to medical treatment.

8 I didn't say that very well. I will try to shore
9 that up.

10 Page 15, footnote 75. I disagree with that
11 footnote in that Woodson and Reidel may completely disregard
12 Miller.

13 I think you already talked about and we talked
14 about the scope of consent cases. I actually think that is
15 a good segue to page 16 regarding securing consent. That is
16 my first positive point, thought most of my other points
17 with regard to things other than what I am going to discuss
18 are positive with regard to some great work you did.

19 I will go on to page 24. I just want to make
20 certain that we state that Dow is based on a Federal Rule of
21 Evidence and it's not necessarily sound in jurisdictions
22 that don't follow the federal evidentiary rules. We don't
23 happen to. In fact, quite the opposite at some points.

24 Page 28 and 29. I've had this argument and it's
25 actually one of the few things in life I disagree with my
1 dear friend Woody Clark on, that STR necessarily follows
2 PCR-DQ alpha admission as reliable. I think there are
3 enough significant differences with regard to it that if the
4 courts allow one, they don't necessarily allow another.
5 Page 30 and 31, proficiency test errors
6 admissibility. I think we need to bring up the point of
7 Lockett v. Ohio. Even if we go outside Frye or Dow analysis
8 in Lockett, if it is something that could point toward
9 mitigation, that is, that errors could be made, et cetera,
10 our United States Supreme Court says automatically let it in
11 a capital case because there is a certainty that is
12 necessary with regard to the death penalty as a sentence.
13 NRC II's statement regarding inadmissibility. I
14 agree that NRC II does that. I actually find it a somewhat
15 sad commentary. I have found NRC II to be much more
16 partisan than NRC I. I realize that there are those of us
17 that are involved in that, and I have deep respect for those
18 people that are involved in NRC II, but I just personally
19 found it to be much more partisan than NRC I.
20 Page 31. There is some tortured logic in the last
21 paragraph. In California, for example, I don't know how you
22 could follow the logic of not allowing it under character
23 evidence if you follow any of the logic of, say, California
24 evidence codes 1101 to 1108 regarding character evidence. I
25 don't agree with the California law, but it is the
1 California law, and it comes in like the Queen Mary. It is
2 almost like a king's X against a defendant. They would lose
3 in both of these instances if you followed the logic of our
4 California evidence code with regard to that type of past
5 conduct evidence and didn't allow this regarding a
6 laboratory's reliability.
7 At page 32, along the same lines, the first full
8 paragraph I completely find objectionable. I will try to
9 point out as many times that this is recognized. I don't
10 believe it to be character evidence. I don't think you can
11 construe it as that. It is literally just a test of
12 reliability. If it's admitted, it goes to weight, and it's
13 important as to weight.
14 You can't just let it in and act as if there isn't
15 some type of problem with it somewhere. Obviously you end
16 up in a titanic struggle of cross-examination and redirect
17 examination, trying to bolster it again. It simply is
18 putting the lab's work in perspective. For example, eye
19 witness identification. If somebody has been wronged before

20 due to bad eyesight, that type of evidence certainly comes
21 in if it has to do with their reliability to do so.
22 If we look at Professor Loftis or Dr. Yarmie's
23 treatises in this area -- I will bring that in and show that
24 that absolutely has to be put into the perspective of
25 questioning. Not necessarily saying it's wrong, but at
1 least putting it in the perspective that it's less than
2 perfect. We've got in California evidence regarding putting
3 an officer's testimony in perspective sometimes along those
4 same lines.
5 Again, *Lockett v. Ohio*, regarding capital cases.
6 Then discovery. To go through the discovery area
7 and not bring in *Kyles v. Whitley* and *Brady* and acting as if
8 some evidence code can trump compulsory process clause, if
9 we go back to *Burr v. United States*, we are talking about
10 the defendant's right to compulsory process and to get all
11 the information with regard to the case. I think we are
12 going to have to treat that a little more suspect, or at
13 least that evidence code, and believing that the evidence
14 code can trump it.
15 I'm getting close to the end.
16 Page 33. It's tough. I am obviously speaking
17 from a defense perspective, but we rely now heavily on the
18 1996 NRC II. Between 1992 and 1996 I had a lot of problems
19 being able to rely on the 1992 NRC report when I would want
20 to. That is just more of a personal note than anything
21 else.
22 I had this discussion just before we went in with
23 Professor Imwinkelried after pages 34 to 36. For the moment
24 we have a disagreement with it. Since he was also my
25 professor, I will review *Griffin v. California* before I
1 actually -- and it is the reason I went into criminal law.
2 [Laughter.]
3 MR. THOMA: Actually, I worked with Woody. That
4 was one of the first things that got me into criminal law.
5 When I was in law school I clerked for him.
6 I believe, at least my reading of *Griffin*, that
7 the United States Supreme Court under *Griffin* wouldn't allow
8 that to occur. It would put the onus on the defendant to
9 basically show why you haven't done so and so. Basically,
10 it shifts the burden of proof on the defendant in a way that
11 I believe to be unconstitutional, but I promise you,
12 professor, I will read *Griffin v. California* again before I
13 put it to you in writing.
14 If you read 34 to 36, even outside of *Griffin*
15 there is the landmark case of *Simmons v. South Carolina*.

16 What you may be doing is forcing somebody, which Simmons
17 says you cannot do, to give up one constitutional right to
18 enforce another. Here the confrontation clause to exercise,
19 say, your Fifth Amendment right to not have to bring
20 evidence further.

21 Despite these comments, I've really enjoyed the
22 participation in our working group. I have a lot of deep
23 respect and admiration. I just wanted to let my dissent be
24 known on these points.

25 Frankly, I've been a bit busy. I had promised
1 David and Ed some of these comments earlier. I discussed
2 them, I think, at our last working group with David, and I
3 thought I would give them to him, and I didn't. So my
4 apologies for that.

5 I certainly am not taking away from the rest of
6 it. I really think it pretty much comprehensively talks
7 about what we have discussed, and in a way it throws out a
8 challenge to the rest of us to be thinking about some of
9 these issues. As my colleague Mr. Scheck mentioned, when we
10 have certain issues, I think we need to flush out the other
11 view as well.

12 Thanks.

13 MR. SMITH: Rock.

14 MR. HARMON: Thank you. Good morning. It has
15 been a pleasure. Thanks for the opportunity to speak to
16 you. I had never met many of you before.

17 My comments are really more overview and where we
18 fit into things and what I think is lacking to date.

19 When this Commission was formed, I thought this
20 would be a great opportunity to approve something that not,
21 as some people say, cuts both ways, but it cuts one way,
22 whatever way it cuts. Introducing something that only goes
23 one way and that nobody could influence into a system that
24 has two sides to it promised to be something fun to watch
25 and experience.

1 So I hope that whatever came out of this would
2 reflect where we really are. We really can't talk about the
3 future unless we know where we are. I think that is what we
4 have been lacking. Not only our group, but I think
5 virtually every other working group.

6 We have talked about predicting racial
7 characteristics or other characteristics from things. I
8 know when Mike wrote his introduction, I took issue with a
9 comment of his that said in time the offender backlog and
10 the case backlog would be done away with. As I have sat
11 there in my office in Oakland watching things grow and grow,

12 I wondered what the basis for that observation was.
13 Here is the shortcoming that exists to date.
14 There has been absolutely no discussion or no attempt to
15 quantify the past. When I say the past, I means those tens
16 of thousands of unsolved but easily solvable cases, human
17 misery and death that are sitting in our police departments
18 in this country, and virtually nothing is being done to
19 address them. We've talked about what we already know to
20 have been quantified, and that is the offender backlog, and
21 it was really only the existing backlog, not the expected or
22 the real old backlog.
23 As I sat and watched different efforts by the
24 group, I wondered why that was not being quantified. I know
25 there was a survey that was put out by the lab funding
1 survey group. When I heard about it, I expected that
2 would address the problem, and it doesn't. It really
3 understates the problems.
4 I don't seek funding, but I see the people who
5 seek funding: you're always going to get a lot less than
6 you ask for, and you try to quantify something to try to get
7 10 percent or 20 percent or whatever the return on these
8 requests is.
9 As I reviewed the lab funding survey results, I
10 thought, well, this is going to make it worse, because the
11 mound of human misery is going to pile up behind us while we
12 get a small portion of what we have attempted to quantify
13 and present as hope to address the problem.
14 In looking at that survey, it talked about rapes
15 that were submitted. Most cops won't submit something if
16 they know it's not going to get done. There has been very
17 little incentive unless it's in, as the police officers call
18 it, a CYA mode to put in a piece of paper to ask for
19 something to get done when you know it's not going to get
20 done.
21 If we can see the face of a missing child on a
22 milk carton, we need to identify and quantify the tens of
23 thousands of, let's just say, unsolved murders of women in
24 the last 30 years. In the city where my office is located
25 it's about 300. Just multiply that across whatever figures.
1 We will never begin to project what we need to do
2 for the future. We can do that, but we're going to ignore
3 those, and they will die by attrition. The offenders will
4 get out of prison and do it again and again and again. The
5 very premise of the future, we've missed probably the most
6 powerful part of the presentation, and that is those cases
7 that are sitting there and absolutely nothing is being done.

8 In that regard, I wasn't here. This isn't a
9 criticism, but it's an observation. It's my understanding
10 that the International Association of Chiefs of Police
11 endorsed the arrestee sampling provision, but I say that is
12 to the detraction of ever addressing the quantification of
13 the thousands of human misery and deaths that are just
14 waiting there hoping that somebody comes along to do
15 something about it.

16 You probably ought to mark your calendar. This
17 may be the only time Barry and I will agree on some
18 passionate, intense issues. All these other issues about
19 universal database and arrestee sampling, those are
20 distractions that will prevent us from ever addressing what
21 is behind us. If it's behind us now, in ten years as you
22 predict in the future, it's going to be still behind us if
23 we don't do anything about it.

24 We can do something about many of those old cases,
25 and we won't know until we try, and I see very little being
1 done in this country to try that.

2 There has not been any demonstrated need for a
3 universal database. There is not one state in this country
4 which is close to the potential that the databases afford
5 either in complete offender sampling or in accounting for
6 all of these unsolved cases.

7 I know, because I was at SWGDAM meeting last week,
8 that crime lab members and leaders are petrified at the
9 thought that every chief of police is going to bring in
10 their unsolved cases. So we have this silence here. While
11 we discuss these issues here, they operate in a crisis state
12 every day. There is absolutely no way you can ask them to
13 do these unsolved cases.

14 The universal database is contrary to the very
15 premise that got us in the door on this offender database,
16 that a few people commit all the crimes. It takes away from
17 limited resources, and it is really contrary to the very
18 reason that we have been able to withstand legal challenges
19 to these databases that we are selecting people who are
20 likely to have committed the crimes.

21 That is all I have to say on the overall issue. I
22 can't be here this afternoon, so let me just say one thing
23 -- we can disagree on this one, Barry -- about the proposed
24 statute, the postconviction testing statute.

25 In my opinion, there are two very simple issues
1 that need to be addressed that if resolved the entire body
2 of the proposed statute would be probably acceptable to most
3 prosecutors.

4 In the very beginning, the first line and
5 background, there are actually two ways that postconviction
6 testing can be done. One is in the context of a motion for
7 a new trial, and the other is in a habeas corpus proceeding.
8 The statute, the way it is currently worded,
9 suggests that the usual statutory vehicle is a motion for a
10 new trial. That was done because many states in this
11 country have a numerical time limit on those motions. It is
12 not my experience that that is the most usual way that
13 happens.
14 The reason it's important to sell that to the
15 Commission is because then it becomes attractive to do
16 something that doesn't have a time limit on it. I say that
17 is inconsistent with the legal experience in this country
18 that that is the usual way. It is usually in the context of
19 habeas corpus.
20 The reason it is presented in this context that
21 that is the usual way is because the law imposes some
22 demands on any defendant who wants to try to institute
23 habeas corpus proceedings. That is a burden that is imposed
24 on them because they are no longer presumed innocent.
25 The language that I find offensive is it's hinged
1 on the notion that these arbitrary time limits must be done
2 away with and that a proceeding may be instituted at any
3 time. That is really the only offensive language that I see
4 in the entire proposed statute.
5 Once a proceeding is initiated, then everything
6 else stops. Having spoken to a forensic scientist who has
7 done many of these postconviction testing cases for Barry
8 and for other people, his views on this were that many
9 attorneys that he works with -- not Barry -- view DNA
10 testing as the thing that you hold out, that you try to do
11 it at the end of it to prolong the process; you don't want
12 to get to the bottom of things early on if you have
13 alternative ways to attack the record.
14 I suggest that anything that you do should not be
15 to subvert the orderly process of the legal system but to
16 get to the truth of it. The presumption of innocence is
17 long gone. This is a person who has been convicted by the
18 rules, and allowing somebody to come in on the eve of an
19 execution date and institute a proceeding that would
20 absolutely stop everything else that is going on I don't
21 think would accomplish anything when it's the very
22 institution of the proceeding that would allow somebody to
23 stop the process and not any sort of evaluation of the
24 merits of the issues that are raised in the proceeding.

25 Thank you.

1 MR. ASPLEN: If I could invite Rock to continue
2 his discussion on the non-suspect cases and the old cases as
3 we continue to do the work here.
4 I know you couldn't be here yesterday afternoon,
5 but I think it's fair to say that there was a real sense of
6 frustration even in the discussion we had, recognizing
7 exactly what you are saying, the extent to which we haven't
8 gotten our arms around the non-suspect case issue. We have
9 literally included it as a subpart of every recommendation
10 we sent up. It has been referenced in all three
11 recommendations we sent, and we are continuing to do some
12 things.

13 I think it's a fair characterization that we share
14 the same sense of frustration that you do, because it is a
15 more complex and an infinitely more expensive proposition
16 than what we have dealt with already.

17 MR. HARMON: It is the missing ingredient that
18 identifies how serious this is. I think offender backlog is
19 an illusion. You can't solve cases if you don't have them.

20 MR. SMITH: Dorothy.

21 MS. NELKIN: I will be brief. A lot of points
22 were covered before.

23 I start out with real problems on the argument
24 which seemed to be predicated on the idea that tissue is
25 like financial information and that people lose property
1 interest in their tissue once they have an operation and
2 it's stored or they die, or whatever.

3 The question of control of tissue samples is in
4 fact highly contested. Most people have no idea when they
5 go into a hospital that their tissue is being banked and
6 even sold. Sloane Kettering sold all its cancer tissue
7 samples, I believe.

8 Also, the notion of voluntary consent, although it
9 is put in quotes in the text, is limited in the medical
10 context.

11 Also, there is a whole issue which I think is
12 underplayed in the research. People, maybe even when they
13 do consent, they consent for some uses, but they don't
14 necessarily consent for other uses. This is being contested
15 with respect to the CDC tissue samples which were part of
16 research. I guess it was testing for cholesterol, and then
17 pathologists wanted to use it for cancer research.
18 That whole issue, I think, needs either
19 development or qualification.

20 I also had problems on the race issues around page

21 23, with the sentence that there is no risk that a
22 subjective decision-making process will use race to the
23 detriment of racial minorities. The formulation seems kind
24 of naive, and I think it does need some development, but I
25 think Barry covered that.

1 During the discussion -- I can't remember if it
2 appeared in the report -- there was an appropriate dismissal
3 of the idea that there is a crime gene. That is an
4 extraordinary simplistic, journalistic kind of formulation.
5 Nevertheless, there is a great deal of research going on now
6 into behavioral genetics, which I think says a great deal
7 about potential future uses of DNA information.
8 Finally, although I understand the rationale
9 behind the idea of a universal data bank, I think it has to
10 consider the notion of public mistrust, of the ability to
11 maintain confidentiality of data, concerns about use,
12 concerns about using data banks for surveillance for other
13 purposes, not just criminal behavior, and also the whole
14 social need of DNA, which extends far beyond what scientists
15 are willing to admit. It's the notion of body integrity,
16 the notion of personal identity, not just identification.
17 It's an issue.

18 If the report is going to have public credibility,
19 it should somehow contemplate some of these broader issues.
20 Thank you.

21 MR. SMITH: Phil.

22 DR. REILLY: I think the constitutional analysis
23 has been important, but I see it really only as a marker on
24 the grounds to which we can refer to as we move forward into
25 areas that really the courts have not decided.

1 I think Ed was just right when he said this is a
2 discussion to help build the foundation for the most
3 articulate possible analysis of what the public policy
4 should be.

5 I think Dorothy's point about the public trust is
6 a very important point.

7 Frankly, I am very moved by Rock's point. I think
8 about these things too, but you kind of grabbed my heart
9 when you talked about that.

10 I would like to mention one thing to you, Rock,
11 and that is that there a few things I think we can predict
12 with a high degree of accuracy. Databases are going to
13 proliferate. I don't mean forensic databases; I mean
14 databases with DNA. They are proliferating and they are
15 going to continue to proliferate.

16 The cost of acquiring information about a sample

17 is going to fall like a stone knocked off the tower of Pisa.
18 There is no doubt about it. Can I predict whether it's
19 going to be three years or five years or seven years? I
20 can't. And it doesn't dispute the fact that there is a
21 reality right now of tens of thousands of people who could
22 be served by this.
23 Our ability to get access to this information one
24 way or another is going to grow.
25 How do we weigh these what I think are facts or
1 very strong givens with the issue of public trust or the
2 making of public policy?
3 It seems to me, recalling what our mission is, to
4 make a better criminal justice system, to exonerate the
5 wrongfully accused, and to make it more efficient, that we
6 have to sort of weave all these threads together. The most
7 important one, it seems to me, is the issue of public trust.
8 What troubles me most about our deliberations, and
9 it's not our fault, and this continues to be a
10 phenomenological truth, is how little awareness the public
11 has with what is going on after all these years, ten years
12 into the human genome project, 15 years into DNA forensics.
13 The average person on the street has, I think, very little
14 conception of the issues we are debating here about the
15 universality of DNA databasing.
16 The question to me ultimately becomes a question
17 of crafting a system that meets the measure of public trust
18 and delivers the safest possible society to the public.
19 Therefore, I think every issue, including universal DNA data
20 banking, should be on the table.
21 There is a very good bet if you are under 30 years
22 old and you are in the United States your DNA is stored
23 somewhere because of newborn screening. It remains an open
24 question as to how those databases will ultimately be
25 integrated into the quest for universal DNA banking. I
1 don't know what the answer would be. I don't know whether
2 there is a constitutional prohibition against it or not.
3 Since we meet so infrequently and the matters we
4 debate are of such import, I think what we really have to do
5 is devote as much time as possible to seeing how we can move
6 forward to reach the goals that ultimately we all agree on
7 and capture the public trust about these matters.
8 That is not a solution, but hopefully it's a
9 little bit of beacon of light through the fog that we all
10 feel.
11 MR. SMITH: As chair, of course, I have lots of
12 things to say. They have all been said so well. I'm just

13 going to let it be that. That's my report. My gratitude to
14 my colleagues on this working group is enormous. My
15 gratitude to you for listening to us is great. If there is
16 anything else we can do for you, let us know.

17 We have some cleaning up work to do ourselves. I
18 can see that.

19 DR. DAVIS: Madam Chairman.

20 CHIEF JUSTICE ABRAHAMSON: Yes.

21 DR. DAVIS: Could I just add a little comment to
22 the working group. I discussed this with Michael Smith a
23 little earlier and he suggested I do this.

24 From the standpoint of the medical examiner, we
25 are involved in medical legal death investigation and we
1 have a dead body in our clutches, so to speak. We run into
2 situations where we do have to access data banks.

3 I would like to preface my remarks first by saying
4 that about 90 percent of any medical examiner or coroner's
5 office work is non-homicide. In fact, 60 percent of our
6 work is usually in the field of natural disease. Our duty
7 is to determine the cause and, aside from that, opine for
8 death certificate purposes the manner of death.

9 There are some privacy issues when we get
10 involved. One is the identification of the unidentified
11 body. Here we use data from private sources: medical,
12 dental, and occasionally some DNA that may be stored
13 someplace that will help us identify this dead victim.

14 Secondly, of course, we use records to develop the
15 cause and manner of death. I can't think of any DNA
16 incursions that may arise, but it's possible that maybe
17 someday cause of death may be influenced by some DNA
18 repository someplace. That is more theoretical.

19 But it is common for us to seek medical records
20 for identification purposes and for diagnostic purposes.
21 Not common, and rarely we have invoked this, and that is to
22 either include or exclude the dead person from participation
23 in a previous crime. The DNA of that person would need to
24 be matched with the DNA that may be on file someplace else.
25 So those are considerations when we are dealing
1 with a dead body.

2 From the standpoint of privacy, Florida, under
3 Chapter 119 of the Florida statutes has a public records
4 law. Included under public records are medical examiners'
5 records. They are wide open. Anybody can walk in off the
6 street and look at any case file in my file.

7 However, there are some exceptions that are based
8 upon an Attorney General's opinion that has not yet been

9 challenged. One is that private records that we have
10 acquired by virtue of our authority to investigate do not
11 lose their privacy once we have them.
12 We have found over the years that the attorneys we
13 deal with and everything else are quite amenable to this,
14 because they can go back to the original primary source
15 anyway, and they respect our interpretation of this.
16 The other exception is that if our records are
17 released, it should not be if it will harm an ongoing
18 criminal investigation. It isn't the ongoing criminal
19 investigation; it's the harm to the ongoing criminal
20 investigation. So just as a matter of general course we
21 usually don't release the records during the investigative
22 phase of a homicide, but once it reaches the accusatory
23 phase, anybody can look at it, because they all look at it
24 anyway. The defense attorneys and the defendant all have
25 access to those records under the Florida discovery laws.
1 I would like to make a little special comment.
2 Florida some years ago passed an HIV privacy law, which is
3 very, very strict and covers all people. The HIV status of
4 a person in Florida is severely restricted in terms of
5 privacy.
6 Through an interpretation by one of our assistant
7 country attorneys, who is of somewhat liberal persuasion --
8 I wish he hadn't interpreted it this way, but his
9 interpretation is that this also applies to the dead that we
10 have. That results in us having a little envelope in the
11 file in which our HIV testing is kept on file. So far it
12 hasn't provoked too much problem. But I would like to make
13 some comments about this.
14 Prior to the open records law we found in Florida
15 that irregular applications of privacy claims to medical
16 examiner records caused a lot of problems for families and
17 their representatives, especially in estate settlement
18 issues.
19 Insurance companies. In one jurisdiction they
20 would go to a medical examiner's office and get the
21 information. In other jurisdictions the medical examiner
22 would defer to the prosecutor and say no, even though it was
23 a perfectly natural death and there was no reason to
24 restrict it. It was just a hodge-podge.
25 Eventually we were able to straighten that out and
1 get everybody under the open records law, and that has
2 improved the situation quite a bit. In other words, an open
3 record is far better from the standpoint of society than a
4 closed record. That, I think, is very important to keep in

5 mind when we are dealing with these dead bodies.
6 The final comment that I would make to the Legal
7 Issues Working Group. As you review these laws and you
8 consider the future, just keep in mind that way off working
9 in the shadows there is a medical examiner who has a dead
10 body and there are certain issues that are necessary for the
11 proper performance of medical examiner work. It should be
12 kept in mind that nothing should be promulgated that would
13 interfere with the orderly working of the medical examiner.
14 That is my comment for the record. Thank you.
15 CHIEF JUSTICE ABRAHAMSON: Thank you.
16 Are there further comments on this?
17 Barry.
18 MR. SCHECK: First of all, I subscribe, as you all
19 know, very strongly with Rock's remarks about the unsolved
20 cases and that we have to still find some way to put that on
21 the public agenda or, as he says, we will never get to them.
22 They will literally fade away.
23 I think we can accommodate your point that you can
24 try to pursue these things through habeas corpus in theory
25 in the postconviction context. Actually now we are using
1 federal civil rights injunctive relief lawsuits to get
2 access to the evidence, which may be the best and cleanest
3 way to do this.
4 One thing that this committee did not address. I
5 must say that this is an issue from day number one when we
6 met in the planning meetings that I raise every time. As
7 rock pointed out, we have to deal with what is going on.
8 That is the issue of the privacy rights of individuals who
9 give elimination samples.
10 I would still very much like to see this
11 Commission actually work out written forms for the obtaining
12 of DNA samples when an individual is giving consent to turn
13 over a sample if you are going to be a suspect, and another
14 form that puts out informed consent if it's for elimination
15 purposes.
16 The issue of what do you do with the elimination
17 samples is something I think we have to address.
18 Chris, I noticed in the report that there was an
19 indication that in Great Britain they have recently changed
20 their position as to whether or not they put the elimination
21 samples in the data bank. Is that right?
22 MR. KAYE: You mean from mass screens? There was
23 a mention of that in the report.
24 MR. SCHECK: Yes.
25 MR. KAYE: The legislation, as I understand it,

1 adopted this summer in Great Britain provides that if the
2 individual gives written consent to have the sample
3 retained, then it is retained. Otherwise it is not.

4 MR. SCHECK: In other words, when you give an
5 elimination sample, as part of the informed consent
6 procedure in Britain, if the person says I want to put my
7 DNA in there for universal screening purposes, they can.
8 That's the provision?

9 MR. KAYE: Yes. The Home Secretary said people
10 were being frustrated by the inability to have their samples
11 remain on file.

12 MR. SCHECK: Peculiarly British. That actually is
13 important to note, because I think when the presentations
14 have been made in the past we were told that is not their
15 practice to put it into the data bank. But this is an issue
16 we have to deal with right now.

17 So I think we have to do something on these forms,
18 the informed consent form. The part where there was a
19 discussion of Schneckloth and Bumpers is all accurate with
20 respect to what the law is, but it's a bit of a different
21 area. It's a particularized search: we want to look in
22 your home or we want to search you here -- here we are
23 saying we want your DNA, but it's got to be clear. Is it
24 just for fingerprint purposes, just for elimination, and how
25 long are you going to keep it? And when does it stop?

1 That we have found to be a complicated issue.
2 Right now in New York we are trying to deal with this in our
3 Forensic Science Commission. I don't know how far we are
4 going to get. We have a case of a guy that gave an
5 elimination sample and wants it back, and the Westchester
6 County Medical Examiner's office doesn't want to give it
7 back even though by all counts I guess the case is over.
8 We are talking here about destroying blood sample,
9 as to whether you can keep the digitalized record in some
10 kind of a sealed form for later examination. There are
11 different ways of dealing with it, but this is an issue we
12 have to deal with.

13 MR. IMWINKELRIED: There is one line that we could
14 certainly add to the text. Even with Schneckloth it's
15 unclear that if a suspect speaks up and says on the one hand
16 I'm generally giving you consent, but these are the
17 limitations. For example, a person saying you can look at
18 the living room, you can look at this one, but you can't
19 look in the other one. That would be a legally effective
20 restriction voluntarily imposed, and respect for that type of
21 limitation is perfectly consistent with the general law.

22 MR. SCHECK: This is complicated. There are
23 aspects to this that I honestly don't know what to do with.
24 Let's say that you give an elimination sample and they don't
25 solve the crime. There may be a reason to hold it, or hold
1 it in some form for some period of time.

2 I think we have to address that one, and it would
3 be good if we could come up with these forms. I think it
4 would give guidance. We are only at the beginning of the
5 era of mass screening. That's only just begun.
6 This is where the Commission could make its most
7 useful contribution, if we could set up some policies that
8 are both protective of privacy but are not unduly burdensome
9 to law enforcement.

10 CHIEF JUSTICE ABRAHAMSON: Are there further
11 comments?

12 On behalf of the Commission, I want to thank the
13 Legal Issues Working Group for their report and for the
14 excellent discussion by the members thereof. I am assuming
15 there will be some rewriting of that report and it will come
16 back to the Commission, and that these reports are going to
17 be very useful as background material for the Commission's
18 ultimate report and as documents in the literature.

19 As you all know, we are talking about a symposium
20 on these legal issues for the fall or as soon as that can be
21 arranged.

22 I am ready to leave this. I would like to move to
23 the issue about retention of samples regarding the CODIS
24 convicted offender database samples.

25 We got a letter from Dr. Arthur Eisenberg of the
1 University of North Texas, who is chair of the DNA Advisory
2 Board. I also spoke to Art about this.

3 Does everybody have a copy of this letter?

4 MR. ASPLEN: It was faxed to everybody on Friday.

5 CHIEF JUSTICE ABRAHAMSON: The DNA Advisory Board
6 is considering as part of its mission a recommendation on
7 retention of CODIS convicted offender database samples. The
8 DNA Advisory Board would prefer, I think, that this
9 Commission not make a recommendation, and if it does,
10 preferably make the same recommendation that the DNA
11 Advisory Board is making so that the Attorney General did
12 not get conflicting recommendations.

13 I don't see that either group has exclusive
14 jurisdiction of each other or anybody else in this area. I
15 discussed this briefly with Art, and we will discuss it more
16 at their meeting, which is February 23rd. I am on that DNA
17 Advisory Board. They are not exclusive, and I don't think

18 the Attorney General's office will be shocked to have
19 conflicting recommendations or views on a whole variety of
20 issues. I am sure there are a variety ways of handling
21 this.

22 I guess there are two aspects of this. One, your
23 comments about whether we should handle this or just let the
24 DNA Advisory Board handle it, and two, to say that we did in
25 the summer approve a recommendation on offender database
1 sample retention. Or at least we discussed that.

2 We came to a conclusion, as best we remember it,
3 that we thought the sample should be retained for at least
4 five years and then the issue should be explored again
5 because there may be new technology and new information on
6 this. We were prepared to move forward on that.

7 So two issues are before you, and you have before
8 you a working draft of a recommendation.
9 Chris.

10 MR. ASPLEN: In the previous discussions, the
11 chief is referring to the Boston meeting which I think was
12 the last time we took up this issue substantively. I
13 believe Dr. Crow chaired. I don't believe that a time frame
14 was specifically discussed and agreed to at that point.
15 What you have in front of you is a combination of
16 the discussion that was there and some discussions that were
17 had at the last meeting in Washington, D.C. It's simply a
18 compilation of those.

19 What you will see is an explanation that the
20 Commission has essentially determined that there are
21 legitimate reasons for the retention of the samples; there
22 are legitimate privacy concerns that are associated with
23 that.

24 However, because of the extent to which we are in
25 the infancy stage of the entire utilization of the DNA
1 database, there is a value to retaining samples for a given
2 period of time, in this instance five years, and then
3 reevaluating that issue preferably by a body that is of a
4 broad-based constituency, if you will, that is
5 representative of privacy advocates, law enforcement, the
6 judiciary, et cetera, et cetera, as opposed to reconsidering
7 that proposition purely by practitioners.

8 It also recognizes that while we suggest the
9 retention of samples because we are in the beginning stages
10 of database usage, there are things that we recognize could
11 be done to ensure and address privacy concerns in the
12 interim.

13 That includes issues such as limiting the research

14 that can be done on database samples and the kinds of
15 research that can be done on those samples, and also the
16 issue of criminal penalties in all states as opposed to the
17 34 or 36 states.

18 There are a couple of arbitrary things in here. I
19 shouldn't say arbitrary.

20 CHIEF JUSTICE ABRAHAMSON: Discretionary.

21 MR. ASPLEN: Not even discretionary. The date of
22 April 3, 1999, I'm not sure if that's correct only because I
23 didn't have the letter on me. It's at the office, so I just
24 threw a date in there. As well as the exact date of April
25 31st. I'm not sure that that's exactly correct. However,
1 I assume that the correct dates will be put in there.

2 I am not sure by recollection whether the number
3 of states that contain criminal penalties for DNA database
4 misuse are 34 or 36, but we will get that number right also.
5 I just put that in there.

6 CHIEF JUSTICE ABRAHAMSON: Phil

7 MR. REINSTEIN: I would like to say something
8 briefly about the letter. I am troubled by this letter. I
9 would be very upset if this group did not feel comfortable
10 weighing in on the retention of samples issue. Particularly
11 to the extent that it says it appears that the DAB has "the"
12 statutory mandate to address sample retention. I am not at
13 all sure that that is the correct use of the article.

14 Perhaps "a" statutory mandate would be appropriate.
15 Having vented my peak about that, let me go on and
16 address the issue here.

17 I am concerned about the three paragraphs stated
18 as the "therefores." Personally, I could only comfortably
19 accept A if B and C -- I'm lettering the paragraphs -- had
20 more teeth. I think it is not enough to say "recommends
21 that you advocate for the passage of criminal penalties for
22 the misuse of a DNA database" in paragraph D. I think a
23 recommendation to retain samples for five years must be
24 coupled directly with an immediate, very strong effort to
25 get the other 14 jurisdictions up to speed on uniform as
1 possible penalties.

2 I think the bulk of the consent about these
3 databases in the future will be other uses of the samples.
4 I'd have nothing but operational research at this time.

5 MR. ASPLEN: Simply making paragraph number 1
6 conditioned upon and include at the end of paragraph 1
7 "conditioned upon the following"?

8 MR. REINSTEIN: I said A only if B and C. And not
9 make it advocate.

10 MR. ASPLEN: There is an operational issue there.
11 We are making recommendations to the Attorney General in an
12 issue like this that is often state driven and the decisions
13 are made on the state level. She may not be able to do
14 anything other than advocate for those particular issues,
15 which is why it's placed that way.
16 You will remember that this issue came up in the
17 arrestee sampling matter. We could suggest to the Attorney
18 General that she perform or not perform arrestee testing,
19 but rather it had to be from an advocacy standpoint.
20 MR. SMITH: Just out of curiosity, if there are
21 jurisdictions now that have provision for sample destruction
22 under some circumstances, under all, whatever they are,
23 local policy basically, this surely isn't suggesting that
24 the Attorney General advocate that those state legislatures
25 convene to change their statutes to provide for five years
1 of retention. That can't be what we have in mind. It does
2 say that now. So it goes a little bit too far.
3 It also says that at the conclusion of five years
4 this question will be revisited. I'm not so sure that that
5 is the message. It needs to be revisited within five years.
6 It's not obvious we should wait five years to do it.
7 MS. BASHINSKI: I would ask a question for
8 information purposes on the DNA Information Identification
9 Act of 1994. It's my understanding that it is already the
10 case, based on this quote, that there is a federal
11 restriction on uses to which CODIS samples can be kept, and
12 I think there may also be a federal restriction on what
13 samples can go in. Do they not say convicted offenders? I
14 don't recall that part of the statute.
15 MR. HARMON: Yes, it does.
16 MS. BASHINSKI: If that is the case, we are really
17 merely saying just enforce the federal law because it
18 already exists.
19 MR. ASPLEN: I'm not sure that the discussion that
20 has been had up to this point and continues is that that
21 federal law is clear enough.
22 MS. BASHINSKI: Right, but the federal law does
23 cover what is stated in here, which is that the convicted
24 offender database samples can only be used for specified
25 purposes, does it not?
1 MR. SCHECK: I wish you were right. The way the
2 statutes are set up the restriction is on CODIS information,
3 and you also have to meet CODIS standards, and you can only
4 use CODIS information in a certain way and input in a
5 certain way, but it doesn't necessarily say to the states

6 that you must, to be part of the CODIS system, have a
7 particular policy on what you do with the samples. That is
8 not part of the statute.

9 MS. BASHINSKI: That is true. This doesn't talk
10 about the samples either. It talks about database samples.

11 MR. SCHECK: That is where the issue is.

12 MS. BASHINSKI: Basically it is amplifying on what
13 is already in the federal statute.

14 MR. SCHECK: That's correct.

15 CHIEF JUSTICE ABRAHAMSON: Jim.

16 MR. CROW: I have a little different concern. I'm
17 not as sure as you are, Phil, about the total undesirability
18 of doing any research on these data. What if one asks what
19 the gene frequency of convicted felons is relative to the
20 population as a whole? Is that a prohibited subject?

21 DR. REILLY: I would advocate to prohibit that for
22 the next five years. I think the political damage to the
23 effective working of this system is far worse from
24 investigating that. Furthermore, I'm not sure we have the
25 tools in terms of genotype/phenotype correlation to do the
1 research in the next five years.

2 MR. CROW: That is a judgment about the quality of
3 the research, not the desirability of it, as far as I can
4 see.

5 DR. REILLY: I would distinguish the desirability
6 it in a perfect world from the political realities. If two
7 years into this we see a lot of, whether it's good or bad,
8 behavioral type research being done on these databases, it's
9 going to be the death knell of this system. I guarantee it.

10 MR. CROW: The almost certain prediction is that
11 you are not going to find anything. On the other hand, I
12 think asking the kind of question that David did, are these
13 in Hardy Weinberg equilibrium, questions like that, I don't
14 see that these have any social significance whatsoever.

15 DR. REILLY: But I did say, did I not, operational
16 research, and that is exactly the kind of research that I
17 would permit. I didn't say no research; I said just
18 operational research.

19 MR. CROW: This says limited to validation studies
20 necessary to ensure reliability of the data for the CODIS
21 database.

22 MR. ASPLEN: Thus the title "working draft."

23 CHIEF JUSTICE ABRAHAMSON: What does operational
24 research mean?

25 DR. REILLY: For example, I think allele
1 frequencies are within my meaning of the term.

2 MR. CROW: So they would be all right.

3 DR. REILLY: They would be all right. What I
4 don't want to see is this. I don't want to see somebody
5 pulling all the records of people convicted of vehicular
6 manslaughter, if that is a correct statement of the crime,
7 and then looking at the dopamine D4 receptor to see if they
8 have a differential frequency of it and therefore saying
9 these people are more likely to be drunks and therefore more
10 likely to kill, et cetera, et cetera. That is going to harm
11 every side of this system.

12 MR. CROW: Can't you protect that better by asking
13 for strict anonymity? I'm assuming that the database
14 doesn't identify a person as to the reason he is in the
15 database.

16 DR. REILLY: No, but you would be pulling out
17 selected cohorts of the database. You would say, I want the
18 convicted felons who are convicted of crime A, and in some
19 states that is actually a big challenge to anonymity. In
20 smaller states that is going to be a relatively small
21 database.

22 MR. CROW: I share that concern, but I wonder if
23 you can't take care of it by strict anonymity.

24 MR. SMITH: You can in some senses, but what Phil
25 has done over the course of these meetings, and Dorothy in
1 our working group, is to say, look, the vulnerability of the
2 underlying technology here, which is so critically important
3 to exclusion and inclusion in investigations and proof,
4 requires us to be very attentive to the non-scientific,
5 non-legal questions that are going to influence the
6 political environment in which these things should take
7 place. This is a protective resolution by us.

8 There are researchers out there now to do research
9 of a kind on these samples which could very much unsettle a
10 consensus that it is wise for states to be building this
11 capacity.

12 MS. BASHINSKI: I would like to make a comment on
13 what it's restricted to. I agree there should be some
14 restrictions. If we restrict it only to the currently
15 recognized or acknowledged CODIS loci, that would prohibit
16 any development of other loci which are valuable for
17 identification purposes. I would argue, for example, that
18 many people will be using YSTRs or mitochondrial DNA, or
19 what not. As long as those loci are specifically for and
20 used only for personal identification, it ought to be
21 expansive enough to allow that sort of research to be done
22 on those loci.

23 MS. FORMAN: Why do you need those databases to do
24 the research on those loci?
25 MR. CROW: I didn't understand that.
1 MR. SCHECK: The question is, why do you need
2 those databases to do the research on these loci?
3 MS. BASHINSKI: My comment is that you have a
4 large number of samples which are there and which, contrary
5 to our previous discussion, Lisa, are sometimes very
6 difficult to come by otherwise.
7 Those 36 or whatever number of states that do have
8 restrictions use a phrase similar to what I articulated,
9 that whatever loci they use, and they are not restricted to
10 using only the CODIS loci, but they are restricted to using
11 loci that are for, and solely for, law enforcement
12 identification purposes.
13 I think to craft it this narrowly prevents you
14 from being able to use other loci, and I don't think that is
15 what we want to do.
16 DR. REILLY: To me that would fall under
17 operational research. I don't associate that with
18 behavioral investigation.
19 MR. THOMA: That does refine it a little bit.
20 MS. BASHINSKI: You need a phrase.
21 MR. ASPLEN: It would be for either current or
22 potential future CODIS loci?
23 DR. REILLY: Research into efficiency of
24 identification for CODIS use.
25 MS. BASHINSKI: It doesn't have to be CODIS, which
1 is the national system.
2 MR. SCHECK: I think you should limit it to
3 forensic identification.
4 MS. BASHINSKI: The term is identification,
5 however you modify it.
6 MR. KAYE: It may be helpful here to allude again
7 to the 1994 Act and the restrictions that are placed on the
8 FBI under the heading of the Act "Privacy Protection
9 Standards." The exception reads as follows: "If personally
10 identifiable information is removed, test results may be
11 disclosed for a population statistics database, for
12 identification research, and protocol development purposes,
13 or for quality control purposes."
14 I don't know if that captures what you want. But
15 clearly, I think, attention has to be given to reworking
16 this paragraph and thinking about whether one wants to
17 include a phrase like "you advocate for stringent
18 restrictions allowed and that the research be limited."

19 Does stringent restrictions mean in addition to that
20 limitation by virtue of the conjunction?
21 MR. SCHECK: I remember when that was put in. It
22 was put in for the purposes of embracing just what we are
23 talking about.
24 For drafting purposes, when you talk about
25 population -- what was the exact phrase, David?
1 MR. KAYE: This Act refers to a population
2 statistics database.
3 MR. SCHECK: A population statistics database
4 could be. That is probably within the law, and it would
5 embrace some of the things Phil is saying we should keep
6 out. That's not what was intended when they put it in
7 there, but they were thinking about Hardy Weinberg and all
8 these crazy variations.
9 Nobody was seriously suggesting that it be put in
10 there for population studies to study dopamine receptors or
11 anything else. If we don't want that, we could probably do
12 a little bit better at drafting it.
13 MS. BASHINSKI: Are the population studies
14 restricted to those markers of value for identification?
15 MR. KAYE: Not explicitly. Remember the way it's
16 phrased: identification test results may be disclosed for a
17 population. This is not talking about the samples, which is
18 a big gap in much of the legislation that has been written
19 by the states as well. It includes limitations on the use
20 of the records but not on the samples explicitly. The
21 Massachusetts Supreme Judicial Court interpreted that to
22 mean that you can't use the samples at all, and you can only
23 use the records for these things.
24 This is sort of a lawyer's issue, but I guess the
25 point as to exactly how to draft this, maybe Chris and I can
1 talk more about this phrase.
2 Let me offer one other observation that arose at a
3 conference this summer. The International Congress on
4 Forensic Human Genetics had a talk from a behavioral
5 geneticist, a psychiatrist doing research into behavior. I
6 asked her, would you want any of these criminal databases
7 for your research?
8 Her answer was, no, what possible use could they
9 be to me?
10 I said, well, what about drivers and maybe
11 alcoholism?
12 Anyway, her answer was, well, God, I'd have to
13 have an awfully enormous database to get any useful
14 information out of this. I want family studies.

15 So I think we may be at the current time
16 exaggerating the demand that exists. That doesn't mean one
17 shouldn't have a prophylactic rule and one shouldn't think
18 ten years from now the situation will change. If we talk
19 about a universal database, then the value of that material
20 becomes much greater.

21 DR. REILLY: I think in many respects you are
22 correct. There is not that much behavioral and genetics
23 research being done in areas that would make use of these
24 populations. Family studies are more powerful. That is not
25 where I am coming from. I am very much coming from the
1 notion of protective resolution.

2 One of the few things I've learned in life is
3 perception is reality. If 85 percent of the American
4 people, which they currently do, think that genetic
5 information can be used against them, if that mentality
6 flows into a public criticism of this kind of operation, we
7 are going to be in trouble as we go forward to serve justice
8 in all its manifold ways.

9 This is definitely a protective act on my part.
10 It's not because I believe there is that much research out
11 there. I think five years is a short term. It will take
12 more than five years for good genotype/phenotype research to
13 be done in other populations to catch up to this anyway. We
14 are not harming the future of scientific progress at all by
15 putting a five-year hold on this.

16 CHIEF JUSTICE ABRAHAMSON: I gather from the
17 discussion that at least some would like A to be conditioned
18 on B and C so that there is a tighter joinder there rather
19 than three separate paragraphs.

20 Two, it's not the conclusion of five years but
21 within the five-year period that there should be a
22 reconsideration.

23 Somehow convey the thought that we would like the
24 Attorney General's office to advocate strongly, recognizing
25 that her position with the states is only as an advocate.

1 That's B.
2 On C, that it not be limited to validation
3 studies, that at least look at the language of the 1994 Act
4 for use of similar language, and that it would relate to the
5 samples, not merely the records.

6 MR. CROW: The important protection to me seems to
7 be that you prevent the possibility of subdividing this
8 database by cause or by crime. I can't see a great deal of
9 social harm in looking at the whole database with strict
10 anonymity.

11 DR. REILLY: I agree. Nor can I see a great deal
12 of interest by behavioral scientists.

13 MR. CROW: I don't think anybody cares for this
14 information. That is not how I would do research on
15 behavior genetics.

16 CHIEF JUSTICE ABRAHAMSON: I also gather that we
17 are proceeding along with a retention recommendation and
18 sending me to Reno to explain, to Eisenberg and others, that
19 we are going to do that.

20 MR. CROW: You'd better go anyway, Judge.

21 [Laughter.]

22 CHIEF JUSTICE ABRAHAMSON: Right.

23 Chris is going to try and rework this and see if
24 we can get another draft before the end of the day.

25 MR. ASPLEN: With David's assistance.

1 CHIEF JUSTICE ABRAHAMSON: Yes.

2 Barry.

3 MR. SCHECK: I have a drafting suggestion, and
4 that is that with respect to the first paragraph, the first
5 sentence says there is a recommendation, given the early
6 stages of development, that the samples be retained for the
7 next five years, or that the issue be revisited within
8 the next five years.

9 I would also like to see the Commission say, on
10 the other hand, to allay privacy concerns about the misuse
11 of the samples, that we do not in principle favor indefinite
12 retention of these samples, and that when the issue is
13 revisited within whatever the appropriate period is, that
14 the burden of proof is on those who say they need them to
15 justify continued retention of the samples for whatever
16 period.

17 I think that is an important principle. Just to
18 say we will revisit it in five years is not giving any real
19 thrust to it.

20 I am thoroughly unimpressed with the technical
21 arguments for retention, and they have gotten much weaker
22 since Dr. Crow's committee has hardened its view from our
23 earlier discussions of this, that we have STRs with us for
24 ten to 15 years, and that the likely new technologies to
25 come on board can be run in tandem with that system, and
1 that is the way the technology is going to develop.

2 If you recall our earlier discussions of this,
3 people are coming here and making an argument that I would
4 take seriously if it were true, and that is that, well,
5 there is going to be something new happening within the next
6 three years where we are going to have to throw out the STR

7 system and go to something new completely and retype
8 everything, which is not what we see happening in the
9 future.

10 All I am saying is that we should make a
11 principled statement that the presumption is against
12 indefinite retention of these samples, and the burden is
13 going to shift to them when we revisit this question to
14 justify it.

15 CHIEF JUSTICE ABRAHAMSON: Woody.

16 MR. CLARKE: How about just the opposite.

17 Actually, from all the presentations that we did receive, my
18 impression is exactly the opposite from Barry's, that in
19 reality the sample retention becomes extremely important
20 during this time period as a result of the possibility of
21 new technologies. Unfortunately, if I can remember the
22 expression, those who forget history are condemned to repeat
23 it. We've already seen it happen once in the relative short
24 period of DNA typing.

25 I have no objection to the matter being revisited.

1 That doesn't trouble me at all. I am troubled by a
2 statement that says "should be retained for the next five
3 years" as opposed to "should be retained" and a welcome to
4 revisit the issue. That doesn't bother me.

5 I think when there is a time period placed on the
6 retention period, that lends some credence or at least
7 conveys to me that we feel as a Commission that samples
8 should be retained five years, as Barry put it, unless there
9 is something shown to the contrary. I don't think that is
10 the sentiment or furthermore what we heard from the majority
11 of presenters to the Commission at our various meetings on
12 the issue of sample retention.

13 So I feel strongly that the recommendation should
14 be made "samples should be retained." Again, I have no
15 objection and I think it would be appropriate to leave an
16 opening for the matter to be revisited even if were to be
17 within five years.

18 I don't think there should be any burden on anyone
19 to show one way or the other. Thus far, I think the
20 evidence has shown quite dramatically why they should be
21 retained. The last paragraph on the first page of the
22 working draft that refers to the technological change
23 possibility in my view is the overarching reason, at least
24 from what we have been presented, why these samples should
25 be retained, and I would emphasize it much more in the
1 draft.

2 MR. SCHECK: I agree. That's the best reason, the

3 technology change.

4 CHIEF JUSTICE ABRAHAMSON: I think you have a
5 dispute on your hands as to which way the presumption should
6 go. I suppose if you said anything, it is that there is
7 significant disagreement about that. But maybe I'm
8 misreading the group.

9 MR. SMITH: Isn't the end result of our
10 disagreements about this that we don't want to recommend to
11 the Attorney General that she advocate either the retention
12 or the destruction of samples in the near term, that we do
13 think that she ought to see to a formal revisit of the
14 question of whether she should do that within five years?
15 I don't think we could agree on what the Attorney
16 General ought to say to each and every one of the 50 states
17 about how they should handle this question.

18 CHIEF JUSTICE ABRAHAMSON: This says for five
19 years. You don't object to that.

20 MR. SMITH: I'm not so sure. I'm pretty sure I
21 don't want to say that the Attorney General should advocate
22 to the 50 states that they all adopt a policy of retention
23 for the next five years and that they do it now. That is
24 not the case as it stands.

25 MS. BASHINSKI: What states don't retain them?

1 MR. SMITH: Wisconsin. At least the advocates for
2 retention tell me that we are the only state that provides
3 for destruction. If that's the case, I'm not too sure why
4 I'm suggesting the Attorney General advise us to change our
5 policy.

6 MR. ASPLEN: Would you be comfortable with making
7 that exception to that?

8 MR. SMITH: The question really is whether or not
9 there is an agenda to be advanced by the Attorney General
10 for retention. That's the way the thing is drafted now. If
11 that's the case, then that is what this is trying to do. I
12 thought what this was trying to do was to say we are not
13 suggesting to the Attorney General that she ought to press a
14 policy upon the states with respect to this question now but
15 she will revisit it within five years.

16 The clear majority of states are retaining, right?

17 CHIEF JUSTICE ABRAHAMSON: You would think there
18 would just be a statement here that the states vary, that
19 most states retain samples, that this should be examined
20 within five years to determine on retention.

21 MS. BASHINSKI: Or maybe even with one exception
22 the states currently retain.

23 MR. SMITH: I think that is right. There is an

24 interest that could be advanced.

25 MS. BASHINSKI: I'm thinking we make it clear what
1 the current status is and then say it's an issue that we
2 advocate should be revisited, but at the present time the
3 status quo is just fine, given these two additional caveats.

4 MR. FERRARA: If you want to build consensus, this
5 is the closest you are going to get. If there is anything
6 that goes beyond what Barry suggests, I'm not going to go
7 along with it. Looking at it again in five years, that's
8 fine. Let's look at it in five years when we have got more
9 experience.

10 One of the reasons why I'm so against it is I've
11 got the experience to know why we don't want to get rid of
12 those samples. Regardless of what Barry thinks, in actual
13 practice you don't want to get rid of those samples if you
14 want to assure quality of the work that is being done. I
15 can't tell you how many times we are going back to the
16 laboratory, to the original samples, and we are making a lot
17 of hits, but we are not making one mistake.

18 MR. ASPLEN: Are you comfortable with the approach
19 that Michael takes, which doesn't necessarily advocate for
20 the indefinite retention, doesn't advocate one way or the
21 other, but simply deals with the revisiting issue?

22 MR. FERRARA: Yes. This is fine like it is.

23 MR. THOMA: Can I just bring up a point following
24 up on Michael? I think if what we do is advocate visiting
25 it within the next five years, we are talking about a time
1 period where we might have a better feel for whether STRs
2 are going to continue or not. I think if we leave out
3 advocating a policy of retention and leaving that to the
4 states -- for example, California, as David alluded to, has
5 specific examples of samples that don't continue to be
6 retained, those exclusions, and that would certainly not be
7 put in here.

8 If you put in every exclusion in every state, I'm
9 not saying California is the only one. It's just the one I
10 know. Wisconsin has destruction. If you leave that out but
11 feel comfortable that within the next five years we should
12 continue to revisit it, then within that period come to a
13 more definite conclusion.

14 CHIEF JUSTICE ABRAHAMSON: It would be that states
15 vary as to retention and it can be which samples are
16 retained, that there is no agreement about years of
17 retention of samples here, and that this should be
18 reexamined within the next five years. Is that generally
19 agreeable?

20 Phil.

21 DR. REILLY: I just think we would be doing the
22 Attorney General a disservice if we did not also ensure that
23 in the first paragraph or perhaps even earlier we give her
24 the opportunity to state an awareness of the privacy issues.

25 The word "privacy" does not appear in the "therefore"

1 paragraphs. If you buy into my argument about the way the
2 American people will debate this, I think we would want to
3 reassure that she is aware of those issues.

4 MR. ASPLEN: Something to the effect of
5 engendering public trust in the system requires a continuous
6 analysis of the privacy concerns.

7 MR. SCHECK: And give consideration as to whether
8 indefinite retention is appropriate, given privacy
9 considerations. I don't mean to quarrel with Paul about
10 what would be in the short term appropriate or inappropriate
11 for quality assurance as the systems are put on line. I
12 think we all agree that that is a concern.

13 On the other hand, I think the whole point here is
14 that we are beginning to recognize that the one thing that
15 the DNA Identification Act of 1994 never reached -- and I
16 remember we debated this in NRC I -- is the big privacy
17 question of what do you do with the samples. What do you do
18 with the blood samples on the state level?

19 The legislation never addressed it. The issue is
20 left to the states. The states have not, frankly, given
21 altogether serious consideration to it until now.
22 Although there is indeed a major federal interest
23 here, what you have to recognize is that, notwithstanding
24 what CODIS wants to do and what the federal government says
25 as to how they restrict the operation of the federal

1 database and the information, a state now is free to do
2 whatever the hell it wants in terms of collecting samples
3 from any number of groups. You can have a hodge-podge
4 system here with some states taking a much different view of
5 the privacy problems than others. On the face of the
6 legislation, that is already the case.

7 Constitutionally speaking, I think you could
8 legislate on a federal level some of these issues. I'm not
9 suggesting right now it's the smart thing to do, but you
10 could under the spending power and even arguably to protect
11 privacy purposes.

12 Pursuant to section 5 of the Fourteenth Amendment,
13 there is an argument for a uniform federal system. Indeed
14 the beauty of CODIS when it was first put into place was
15 that the privacy restrictions on the use of the data were

16 very, very strict. I think we would all agree that if it
17 weren't that way in the first instance, then the whole
18 expansion of DNA data banks would be much more difficult
19 than it is right now.

20 MR. CLARKE: Procedurally, do we have the luxury
21 of an opportunity to evaluate a rewrite?

22 MR. ASPLEN: I have just asked David to take a
23 stab right now at paragraph number 2. I'm going to redraft
24 1 and 3 as we eat lunch and do other things. My goal is
25 that we come back with the major issues fleshed out. I
1 think we can take a vote for approval purposes conceptually
2 and then clean it up on any minor details that can then be
3 sent out, and we can forward it up.

4 Remember that that is the goal. The reason that I
5 suggest that is because we did receive the letter from the
6 Attorney General a while ago, and we were asked to approach
7 this in a relatively expeditious fashion.

8 CHIEF JUSTICE ABRAHAMSON: Anything further to
9 comment on?
10 Jan.

11 MS. BASHINSKI: One very small comment. With
12 regard to retention, I just want to make the comment that we
13 don't want to imply that this group is united on the issue
14 of retention being a major problem. Our statement should
15 not reflect that we think the samples shouldn't be retained
16 either. A balanced statement.

17 CHIEF JUSTICE ABRAHAMSON: As always, balanced. I
18 think that became clear in the discussion, but thanks for
19 reminding us.

20 Lunch is in the back of the room, I believe. We
21 have a working lunch. We are going to hear from Howard
22 Matthews and Angela Flower, our guests from England. Then
23 at 2:30, Ron, you're on.

24 [Recess.]

25 MR. ASPLEN: As I mentioned yesterday, we have
1 with us today Howard Matthews and Angela Flower from the
2 Criminal Cases Review Commission. The reason they are here
3 is because when Lisa and I were in England in October
4 someone suggested to me that I should in fact go to
5 Birmingham, stay an extra day -- twist my arm -- and speak
6 to these folks, who were essentially doing the kinds of work
7 that we were talking about in our postconviction
8 publication.

9 To be clear, they go way beyond the scope of
10 exonerations based on DNA. I think you will find
11 fascinating the different applications that they use and the

12 scope of their mission and the kinds of cases that they look
13 at.

14 It was pretty clear that what I was hearing in

15 Birmingham you folks should hear also.

16 With that, I will turn it over to Howard Matthews.

Working Lunch
Criminal Cases Review Commission of the United Kingdom
Howard Matthews, Head of Operations
Angela Flower, Case Review Manager

17 MR. MATTHEWS: Thank you very much. Thank you for
18 the invitation to travel all this way to the U.S. for an
19 hour or so. I hope it will be useful.

20 [Laughter.]

21 MR. MATTHEWS: It's not a problem for us, believe
22 me.

23 Picking up on something mentioned earlier, if
24 anybody here is frustrated about not having their DNA in our
25 database, I'm sure we can sort something out before we go.

1 As you will see there, I'm Howard Matthews, head
2 of operations at the Criminal Cases Review Commission in
3 England. We are not a British commission, because, as you
4 all know, Scotland has its own law and they have recently
5 established their own Criminal Cases Review Commission, the
6 SCCRC. We are the CCRC, which is what I may slip into
7 calling it.

8 You've got a presentation in two parts today.

9 First, I will talk about the Criminal Cases Review
10 Commission in general. I will go a bit into its background,
11 why it came into existence and structure at the moment, the
12 kind of cases that we are dealing with, the investigations
13 we carry out, again in a very general nature. Angela will
14 be able to go into a bit more detail about the use we make
15 of DNA, the relationships we have with the rest of the
16 criminal justice system, and the results that we have got to
17 date.

18 We were established in 1997. So we have got a bit
19 of data to go on.

20 The background to why we exist.

21 In the 1970s there were a number of now world
22 renowned cases, the Guilford Four, the Maguire Seven, and
23 the Birmingham Six, explosives-related convictions following
24 the IRA's campaign on the mainland. A lot of pressure to
25 get convictions in those cases.

1 That led to a Royal Commission on Criminal
2 Justice, the same as your commissions except we have to have
3 "royal" in front of it, which in turn led to a Criminal
4 Appeal Act in 1995 and established the Criminal Cases Review
5 Commission and the statute.

6 Those bombing cases, there were 40 dead as a
7 result of the combination of Guilford, Birmingham, all of

8 them put together.

9 At the time the investigations were carried out
10 into those convictions there were no rules about detention
11 and questioning, no rules particularly about disclosure of
12 evidence, and all of those convicted protested their
13 innocence vehemently and went through the normal appeals
14 procedure. They went through the Court of Appeal and also
15 tried the Home Secretary, who at that time had the power to
16 refer cases back.

17 Prior to the establishment of our commission the
18 arrangements for reviewing conviction were that the Home
19 Secretary had the power to do so. Nobody else, just him,
20 and it was always a him, could ask the court to reconsider a
21 case.

22 It was limited to cases tried in indictments. In
23 our country, in Crown Courts there was no other review of
24 cases convicted anywhere else. He only referred four or
25 five cases a year out of many hundreds of applications.

1 And it was a reactive review. It relied on
2 somebody going to the Home Secretary and presenting him with
3 good reason why he should refer a case. There was no
4 proactivity. He couldn't go out and seek on his own behalf.
5 People also pointed out that the person sending
6 the convictions back to court was also the person who was
7 responsible for the investigation in the first place. So he
8 was responsible for police and law and order and the review
9 of that if it did go wrong.

10 In those bombing cases three appeals went up to
11 the Home Secretary. They were all slightly different, but
12 they went up again and again and again and were turned down.
13 Eventually they were passed through to the Court
14 of Appeal. The convictions, as you will probably be aware,
15 were allowed on altered records of interview, unreliable
16 confessions, fabricated confessions, flawed scientific
17 evidence at the time. Fresh scientific evidence, new
18 evidence, came up. The tests that were done at the time
19 were found to be flawed, and there was nondisclosure; fresh
20 psychiatric evidence about some of the appellants and more
21 unreliable confessions.

22 If anybody wants to interrupt, put your hands up
23 and I will stop if I am taking too much for granted.

24 So the Royal Commission was established after
25 those convictions had been quashed. It had a very wide
1 scope: to examine the effectiveness of criminal justice
2 system in England and Wales in securing conviction of the
3 guilty and acquittal of the innocent.

4 It gathered evidence over a two year period and a
5 report was published in July 1993 and covered a very wide
6 area. The report did not just cover the Criminal Cases
7 Review Commission; it covered investigation of crime and
8 trying to pull all the disparate parts of the criminal
9 justice system together to make them work more coherently.
10 What were miscarriages? Out of the Royal
11 Commission we got a few headlines of areas where miscarriage
12 came from, the genuinely hidden evidence of innocence. One
13 particular case we've had is that of Ryan James, who was
14 convicted of murdering his wife and making it look like
15 suicide. Later on the wife's genuine suicide note was
16 discovered. So a miscarriage, but perhaps no deliberate
17 activity. Just something new that came up.
18 The yet to be discovered science. Again,
19 generally no fault, nobody particular at blame that someone
20 has been convicted wrongly.
21 False confessions. Plenty of evidence that these
22 happened, and a real responsibility on the prosecutor to be
23 aware of the possibility, especially with vulnerable
24 victims, vulnerable applicants, that people of a low
25 intellectual capability can be browbeaten into making false
1 confessions which they don't even understand at the time
2 they made them.
3 Frail evidence. Turning Queen's evidence. Other
4 inmates suddenly coming up with evidence that they have
5 overheard so and so in the prison yard confessing.
6 Nondisclosure. Again, before the Royal
7 Commission, nondisclosure of evidence. Things never came
8 up. Prosecution had information that should have been
9 released and never was.
10 Deliberate misconduct.
11 And then just plain poor performance. Somebody
12 has not deliberately got things wrong but simply has not
13 been very good at their job or poorly instructed. We have
14 an issue here where we are just now formulating our policies
15 on how we notify other organizations within the criminal
16 justice system of poor performance that we have discovered.
17 We may discover poor performance in any area. It
18 could be police; it could be investigations; it could be
19 forensic science; it could be other experts; but it's
20 important that we get that information back into the
21 criminal justice system so the poor performance is stopped
22 as soon as possible.
23 In 1995 the Criminal Appeal Acts brought about the

24 Criminal Cases Review Commission. Where do we sit in the
25 government of Britain?

1 We are what is called an NDPB, a nondepartmental
2 public body. It means that we are responsible to a
3 committee of Parliament. We are not part of a department;
4 we don't report to the Home Secretary; we report to the Home
5 Affairs Select Committee.

6 We are funded by a grant from the Home Office, but
7 we have our own structure, our own chairman, our own chief
8 executive, and our own budget, and we are left alone to do
9 our job.

10 That job is reviewing any criminal conviction in
11 England, Wales, or Northern Ireland. So it could be Crown
12 Court, it could be Magistrates Court, it can be a parking
13 offense, it can be a murder. Anybody is free to apply to
14 us. There is no charge for them to apply to us. All the
15 costs are met by the Home Office as long as they have
16 committed a criminal offense, and we even have applicants
17 who have not committed a criminal offense but are still
18 convinced that we must review the fact the world is against
19 them.

20 The end result of it is that we can direct the
21 appropriate courts to hear the case again. We can make a
22 referral back to the Court of Appeal or the Crown Court if
23 it's been a magistrate's conviction originally, and they
24 will hear that referral.

25 The structure we have at the moment.

1 A chairman and a chief executive who were the
2 first appointees in January 1997, who spent most of their
3 time setting the place up.

4 A director of finance and personnel.

5 And 13 commission members. They have come from a
6 variety of backgrounds. Our legislation requires that two
7 thirds of them should be legally qualified; one third of
8 them need not be. We have got 13 at the moment. That
9 equates to 7.2 full-time equivalents, because many of them
10 are part time, anything between one and four days a week.

11 And they come from all backgrounds. We have Crown
12 prosecutors; we have got barristers; people from business,
13 financial directors; somebody from the Serious Fraud Office;
14 ex-chief constables.

15 They are all appointed on open competition, and we
16 are just going through a round now. Three years have gone
17 by, their contracts have expired, and the Home Secretary is
18 now appointing new commissioners. The old ones are free to

19 apply for their jobs again, but they have to go through the
20 interview procedure themselves.
21 Head of operations, me.
22 Two legal advisers to provide advice to the case
23 review managers about points of law.
24 One investigations adviser, an ex-police officer
25 who advises us on carrying out interviews.
1 A head of information who deals with all the press
2 interests in our activity, which, as you can imagine, varies
3 with the case we are dealing with. When we have high
4 profile cases, we have to organize press conferences in
5 large rooms for tens of journalists. When it's not so high
6 profile, we are left alone.
7 Forty-three case review staff. They are the ones
8 who actually carry out the review of the cases.
9 Case review managers.
10 We just introduced a new category of case workers.
11 So you can already see, I think, that the
12 organization is tipped towards case review. We have few
13 support staff. Fourteen staff actually support the case
14 workers, process applications, and carry out the
15 administrative work for the case review managers.
16 And then ten management support staff.
17 I think we are up to a total -- I'll take that
18 away before you add it all up and I'll get it wrong -- of
19 about 86 at the moment. We are authorized to go on up to a
20 total of about 50 case review managers.
21 Current structure is very flat. There are no
22 senior managers. The case review managers don't report to a
23 senior manager who checks their work. I will mention here
24 how the work is carried out.
25 The two animals who do case work are the case
1 review managers and the commission members. For every
2 application that we have that we review a case review
3 manager and one commission member are assigned to it.
4 The case review manager goes out and does all the
5 work. The commission member makes sure that the work is
6 done in the right order, the right time, and we are not
7 chasing our tails pointlessly.
8 So we have one manager and one member per case,
9 but that said, when we have very large cases, more case
10 review managers can be assigned to it. But there will
11 always be one case review manager and one commission member.
12 DR. REILLY: Excuse me. What kind of training
13 does one need to be a case review manager?
14 MR. MATTHEWS: Case review managers have come from

15 a wide variety of backgrounds. They've all got some
16 experience in investigation; solicitors, barristers,
17 ex-police officers, trading standards, social services. Our
18 chairman is very keen on testing and recruitment, and we
19 test for analytical skills. That said, there is no
20 particular background people would have to come from. It's
21 just the skills that they must bring.

22 When the case review manager and a commission
23 member have reached a conclusion about a case, which could
24 be in half a day if it's fairly straightforward, or it could
25 be in three years, as we've still got cases alive from when
1 we took them on, their investigations are passed to another
2 commission member or group of commission members to make a
3 decision. So the case review manager and the commission
4 member who investigated the case are not the ones who decide
5 that it will go back to the Court of Appeal or not. That is
6 always taken by a separate member.

7 The statute gives us a slight problem because it
8 says if we are not making a referral, we can decide with one
9 commission member. If we are making a referral, we need
10 three. You never know when you are starting is this going
11 to be a referral or not. So the commission member and the
12 case review manager will decide whether this is looking like
13 a referral and call a committee if necessary.

14 Once the decision has been made, the applicant is
15 given 28 days to respond. I will come later on to the
16 statistics. We refuse an awful lot more cases than we
17 refer, and the applicants are given the opportunity to come
18 back and make further representations before we finally
19 close their case.

20 Once we finally close their case, some of them ask
21 for an application form and apply again with the same
22 grounds, some new grounds, anything they can think of that
23 might persuade us. They go to the back of the queue, and
24 the queue unfortunately at the moment is quite long.

25 So we do try to be as thorough as we can. We try
1 to address every issue that the applicant raises. If they
2 have a genuine concern about an issue which we know is not
3 going anywhere, we will explain to them why it isn't going
4 anywhere so we don't have to do the work all over again when
5 they reapply.

6 When an application comes in, it's a simple
7 application form. I've passed around an information pack
8 which has got an application form in it. If any of you get
9 criminal convictions in the United Kingdom, you don't even
10 have to ask for the form now.

11 [Laughter.]

12 MR. MATTHEWS: And we will provide help for people
13 to fill application forms in. They don't even have to fill
14 in an application form; they can write us a letter. We do
15 know that the average reading age of our applicants is
16 around seven. So we've tried to make the application form
17 as simple as possible, and a lot of them do get help in
18 filling in application forms from probation officers and the
19 police and the prison services.

20 The first thing we do is check that the

21 application is actually eligible according to our statute.

22 The applicant must have been through the appeal procedure.

23 So they must have, if they were convicted in a Crown Court,
24 applied for leave to appeal to the Appeal Court. They can
25 have had that leave turned down or they can have been heard,
1 but as long as they have completed that procedure, then they
2 can apply to us.

3 We have a wonderful catchall which appears a

4 couple of times called exceptional circumstances. Nobody
5 can define exceptional circumstances, but if we see one, we
6 know what it looks like, and we can take an application from
7 somebody who hasn't appealed.

8 For instance, if we have got two codefendants one
9 of whom has been to appeal and one of whom hasn't, if we
10 find grounds to refer the case of the one who had been to
11 appeal, then we can take the other one as well, because it
12 would be a waste of time to tell him to go on appeal and get
13 turned down.

14 MR. SMITH: Do you need an application from the
15 other one, or can you initiate applications on your own?

16 MR. MATTHEWS: We can initiate applications. One
17 of the powers we have in the Act which we haven't used yet
18 because we are inundated with applications is that we can go
19 out and seek miscarriages of justice. So if something comes
20 to our attention that we think needs investigation, we can
21 choose to do that.

22 MR. SMITH: But at this point that is theoretical;
23 you haven't done it?

24 MR. MATTHEWS: We haven't done it actively. What
25 has happened is that we have come across investigation
1 activities or operations that have gone wrong. We may have
2 one applicant who has been part of that operation. Suddenly
3 there are 20 more who were arrested and convicted on the
4 same operation which is now flawed. So we will then go out
5 and find them as well.

6 We screen for issues now. What we used to do, as

7 soon as a case was eligible, we would stick it in the queue
8 and it would go to the back, and we had over 1,000 cases
9 waiting to be looked at by a case review manager.
10 What we are doing now is looking at those cases
11 briefly to see if they raise genuine issues that are really
12 going to need investigation. If they're not, then we will
13 try and close them straight away. So if we can close them
14 with a minimum of case worker effort, we will do so. If
15 not, then they have to go on to wait for a full review.
16 The sort of issues we are screening out are the
17 jury was put off because the victim's mother cried in the
18 public gallery, therefore it's a miscarriage of justice. So
19 we can deal with that sort of thing fairly quickly.
20 Then we pass those on to a full review. A full
21 review is when we assign a case review manager and a
22 commission member to the case to start looking at it in
23 detail. That full review process will involve going back to
24 the original investigation and looking at all the documents.
25 I will come on to how we actually investigate cases in a
1 second.

2 One of the options we have when we are in full
3 review is that we can appoint an investigating officer. One
4 of the particular powers within our Act is that if we think
5 that the original investigation needs investigation itself,
6 we can appoint usually a police officer from another force
7 to go in and review the original investigation.
8 It's not done often. We have done about 15, I
9 think, in the time of three years. They become very
10 lengthy. They need careful management. We are responsible
11 for managing that investigating officer, and we can change
12 them at any time if we want to. It has to be a careful
13 decision, and this is one that does have to be made by a
14 committee of three commission members, to send a police
15 officer into another force to investigate what appears to be
16 a problem with their original investigation.
17 The application profile. What do we get? At the
18 moment we are getting three a day. When we started we were
19 getting five a day. That has tailed off now, but it seems
20 to be remaining fairly steady.
21 Twenty percent of the cases are ineligible; 20
22 percent of our applicants over the three years have not been
23 to appeal. At the moment we don't know how many of those we
24 send away who then come back again, having sought leave to
25 appeal and being refused, but it's not many, because we are

1 trying not to send people around pointless bureaucratic
2 loops. If their conviction was five years old, there is no
3 way the Court of Appeal is going to allow them to appeal out
4 of time. So we will try and deal with their case. If the
5 case is very recent, a very recent conviction, then we will
6 say go back to the Court of Appeal and seek leave, and very
7 often they may get it.
8 Truly ineligible applications are those who have
9 got an appeal pending. So they will apply to the Court of
10 Appeal and us just to be on the safe side.
11 Thirty-four percent then are closed at that
12 screening point. So 34 percent are raising no significant
13 issues that are going to go anywhere.
14 Once they have got through there, we have got 32
15 percent are in custody and 14 percent are at liberty. At
16 the moment our policy is that we deal with those in custody
17 first. So anybody who is in prison, when their turn comes
18 up we will deal with them.
19 We have an unfortunate group who were in custody
20 when they applied to us. They waited so long they have now
21 got out. So they are at liberty and they have gone to the
22 bottom of the queue.
23 We are trying to address at-liberty cases and we
24 are starting to do that now. The Home Affairs Select
25 Committee is keen that we should particularly consider
1 significant at-liberty cases but of course didn't actually
2 say what significant meant.
3 The average age of convictions is 33 months. We
4 have some convictions going back to the 1950s. We've got
5 obviously ones who have only just come out of Court of
6 Appeal. So the average is 33 months, and that has come down
7 quite significantly from when we started.
8 The average sentence is just under five years.
9 Again, that belies a big spread. We've got a lot of lifers;
10 we have a lot of fines: 5 pounds for a parking offense in
11 1957. Because it's a criminal conviction, we must deal with
12 it. As you can imagine, anybody who is prepared to pursue a
13 parking ticket since 1957 is very keen that their case
14 should be considered fully and will not take a quick and
15 lighthearted view of any review that doesn't go into all the
16 details. I think the lowest offense we have is a 3 pound
17 fine in 1962 for a barking dog in Ipswich.
18 So why do people apply to us? What are the common
19 grounds that people think a miscarriage of justice has taken
20 place?
21 Confession was beaten out of them, forced out of

22 them; they never meant it in the first place; it was only a
23 laugh; they should never have done it and they have changed
24 their mind.

25 Mistaken identification. It simply wasn't them.

1 We've just had a referral of mistaken identification where
2 an applicant had been jailed for three years for a burglary
3 on mistaken identification. It turned out three years later
4 the police managed to check an unconfirmed fingerprint from
5 the scene and identified it with a known burglar from the
6 same area. So we managed to get that applicant out of jail
7 before Christmas on bail.

8 New witnesses or experts. Particularly when
9 anybody convicted keeps a very close eye on their own
10 particular crime, if they see a new expert has come up, then
11 they will want that expert who will cast doubt on their
12 conviction. Or a new witness who has genuinely come
13 forward. The defense never found them at the time and now
14 they are willing to speak.

15 Prosecution failure to disclose. The prosecution
16 had information that it never passed to the defense.

17 Defense incompetence. Quite popular, defense
18 incompetence. Just didn't do a good job and the brief was
19 useless.

20 Retraction of evidence. Witnesses at the original
21 trial are now willing to retract their evidence, that the
22 story they made up at the time was a false one. One case
23 we've looked into recently the witness certainly was not
24 willing to retract their evidence, but it was in the
25 applicant's mind that they would.

1 Forensic evidence. Either the forensic evidence
2 was false, was wrong at the time, or there is new forensic
3 evidence.

4 Changed evidence. Everybody has changed their
5 mind. It was all a pack of lies at the time and everybody
6 would tell the truth if they were only asked again.

7 Breaches of the legal safeguards. Now that we
8 have acts which dictate how people must be questioned and
9 handled in custody, it was all done wrong.

10 And it's all a conspiracy from two policemen who
11 arrested me. One of them is living with my wife, and so
12 both of them concocted this story to get me out of the way,
13 to, obviously the entire world is conspiring, the judges,
14 the courts, and everybody else.

15 Trial was conducted poorly. One where the judge
16 fell asleep, apparently.

17 There is a new legal argument. We do have a few

18 cases of new legal arguments and we try to deal with those
19 fairly quickly, because if it's on a legal point, our legal
20 advisers can address that point fairly rapidly and send it
21 straight back to the Court of Appeal.

22 One where an applicant convicted in the
23 Magistrate's Court of an offense that didn't actually exist
24 as an offense at the time he was convicted of it. It came
25 in a few days later.

1 Similar evidence. Very popular. The applicant
2 reads about a case just the same as his where the person on
3 trial got off, and it was identical, so why didn't he get
4 off?

5 Once we have got the application, where do we
6 start? We start by looking at the documents. The applicant
7 must come to us with something new. We can't refer a case
8 back purely on the grounds that the court heard all the
9 evidence but the jury made the wrong decision. If
10 everything was before the jury and the jury made that
11 decision, then that is not a miscarriage of justice.
12 So what we have to check is that what the
13 applicant is telling us is genuinely new. We look back at
14 the documents. We get the trial transcripts, which can be
15 difficult if the conviction is very old. We get summings
16 up; we get Court of Appeal files, which again can be a
17 problem because before we existed nobody ever asked for this
18 stuff. Once the case was finished, once it had gone through
19 the Court of Appeal, it was put in a basement in London and
20 nobody would ever want to look at it again. Now we are
21 sending off requests for ten files a day to a Court of
22 Appeal who have never been resourced to supply that. So
23 actually getting the Court of Appeal file can be a problem.

24 MR. THOMA: Excuse me. Do you have court
25 reporting at all levels?

1 MR. MATTHEWS: We don't at Magistrates Court; we
2 do at Crown Court. There is no recording at Magistrates
3 Court at all.

4 MR. THOMA: Just clerk's notes?

5 MR. MATTHEWS: Yes, if that.

6 CHIEF JUSTICE ABRAHAMSON: What percent of your
7 cases come from Magistrate?

8 MR. MATTHEWS: It's low, 12, 15, something of that
9 order. Magistrates Court cases give us a problem, because
10 if they are old, there is simply no way we are going to be
11 able to reconstruct the original trial. The memories are
12 gone; the papers have gone. I think Magistrates Courts
13 destroy their papers very, very quickly, in about a year or

14 so.

15 MR. CLARKE: What crimes are they?

16 MR. MATTHEWS: In the Magistrates Courts?

17 MR. CLARKE: Yes.

18 MR. MATTHEWS: Occasionally assaults, lots of

19 traffic offenses, parking, speeding. Adulterating wine was
20 one of them.

21 The Home Secretary, as you are probably aware, is

22 looking at reviewing whether a case can be tried at

23 Magistrates Court or Crown Court and whether the applicant

24 has the choice as to which court he goes to. So we went

25 through our Magistrates convictions and took a quick look at

1 whether we would be able to actually do them or not. Out

2 of, I think, 200 we had 20 or 30 that were going to be

3 impossible. The only way they would be tried again would be

4 to go back to court, and the original evidence had gone;

5 everything had gone. So we haven't actually crossed that

6 bridge yet.

7 MR. REINSTEIN: Has it ever been discussed as to

8 whether or not to limit the cases to just Crown Court cases

9 as opposed to Magistrates Court?

10 MR. MATTHEWS: Not yet. I don't know if anything

11 is going to come out of this Home Secretary's review of

12 either-way cases, but for us it's all criminal convictions,

13 and for the Home Office before us it was all criminal

14 convictions as well.

15 We can carry out interviews. We have very

16 wide-ranging powers. We can do pretty much anything that

17 will further our investigations. We can interview the

18 applicant; we can interview the witness; we can interview

19 the victims; we can interview the investigating officers; we

20 can get judges' notebooks.

21 We can carry out forensic tests. We can either

22 instruct new forensic tests on existing evidence if it's

23 still available, or we can have the original forensic tests

24 reviewed.

25 We can appoint our own experts who we will pay.

1 Experts on anything -- firearms, forensics, medical.

2 And again, we can appoint our own investigators.

3 The powers we have got. Access to documents and

4 material from any public body. That immediately covers the

5 police, the court service, customs.

6 It gets a bit more difficult with health services

7 and our welfare services who are in the public domain, but

8 some of them don't consider themselves to be public bodies

9 as far as this Act is concerned. Because we are fairly new,

10 we are still discussing with individuals when we go to them
11 that we consider them to be a public body. We have a
12 discussion about it and eventually they either agree or not.
13 I think in every case so far they have agreed.
14 The investigating officer again, and the power to
15 direct and change that officer if necessary.
16 Powers to take any steps appropriate in the
17 exercise of our functions, which is pretty wide-ranging.
18 Relations with other bodies, with the police and
19 with customs and excise. They are both assisting us and
20 probably the subject of investigations. We will be looking
21 at what they did originally and asking them to help us in
22 supplying the original material that was part of the trial.
23 Most of the police forces now and customs and
24 excise have got particular offices nominated to deal with
25 our requests, because under section 17 of our Act we send
1 them a note saying they must preserve everything connected
2 with the case. Then when we get around to reviewing it, we
3 will ask them to send it to us. So they take all the
4 notebooks, all the transcripts, all the physical evidence
5 and store it for us and mark it that it can't be interfered
6 with in any way.
7 Forensic Science Service can be subject to the
8 same. They can be helping us out by reviewing old material,
9 or we can be looking at an investigation that they carried
10 out sometime ago.
11 The court services running around trying to find
12 all the old transcripts for us, all the old judgments, an
13 area that they weren't used to doing before.
14 Other public bodies. I mentioned health. Medical
15 records can be a problem because local health authorities
16 deny they are the owners; it's the doctor. Then the doctor
17 denies he's the owner; it's the health department. So you
18 go around and around in a circle until we eventually get
19 them out.
20 Social services files, particularly in cases of
21 intra-family sexual abuse where we are trying to get hold of
22 the social services file which contains all the details of
23 allegations of sexual abuse within a family. Social
24 services are very jealous of giving that information out to
25 anybody, understandably, and us being a new organization who

1 they are not used to.
2 Private bodies we have no power over at all. They
3 don't have to give us anything. We try and get their
4 cooperation, but there is no line in the statute that says

5 we have the right to see anything that they have.
6 The new regulations in Scotland do have the power
7 to get access to private bodies. They have to go through
8 the courts, but the statute exists to give them access to
9 information held by private bodies, such as telephone
10 company. We can't get telephone records unless the
11 telephone company are minded to cooperate.
12 At the moment we are putting together some
13 proposals to revise our legislation, and that will be one of
14 the areas that we want to try to cover.
15 After all that, the case outcome.
16 We decide not to refer a case to the Court of
17 Appeal. There is nothing in it. And this can have come as
18 a result of half a day's work because there were no issues,
19 or it can be many months or years. A single member can make
20 that decision, or we could have a committee. We may call a
21 committee because it's a very complex case. It may be a
22 referral, it may not; it's going to depend on the decision
23 of the committee. They may decide not to refer a case to
24 the Court of Appeal.
25 We will send the applicant the reasons why we
1 think he's not going to go to the Court of Appeal, and he
2 has the 28 days to come back and argue the point or bring
3 any new evidence forward.
4 We do refer a conviction or a sentence to the
5 Court of Appeal, and only the committee can do that. Once
6 we have made that referral, the Court of Appeal has to hear
7 it. They have no discretion about whether they want to hear
8 the referral or not. They have to do it.
9 From a Magistrates Court it goes back to Crown
10 Court. So again the Crown Court there would have to hear
11 our referral.
12 Once the reference leaves us it becomes the
13 property of the applicant. There is no further involvement
14 from us once it has left us as a statement of reasons. This
15 can mean the Court of Appeal gets our statement of reasons.
16 So they get our reasoning of every issue, why we think the
17 conviction was unsafe, but the applicant is perfectly at
18 liberty to ignore all those and go for something else.
19 What has happened in a very recent case is that
20 the barrister involved and the applicant were concerned
21 there was police malpractice. We didn't find enough
22 evidence of police malpractice to refer it, but that's the
23 line they chose to follow, and the appeal failed.
24 CHIEF JUSTICE ABRAHAMSON: How much evidence do
25 you need, preponderance or convincing beyond a reasonable

1 doubt?

2 MR. MATTHEWS: Our statute talks about a real
3 possibility that the conviction was unsafe. As you all
4 know, every time real possibility gets defined a little bit
5 more and a little bit more, unsafe gets defined a little bit
6 more.

7 The Court of Appeal has commented they will seldom
8 see a sentence as a miscarriage of justice unless it was
9 manifest, unless the judge got the sentencing completely
10 wrong. It can be severe, but the judge at the time was the
11 one who knew the circumstances, and the sentence dealt out
12 in those circumstances, if all the evidence was before the
13 judge, cannot be a miscarriage of justice. So sentence
14 referrals are getting a bit fewer and farther between.
15 So where were we at December? We had received in
16 three years 2,996 applications. Six hundred and fifty of
17 those were ineligible. So they are the ones who hadn't
18 appealed or were in the process of appealing. And we have
19 closed 752. That means we have reviewed them and reached a
20 decision.

21 Out of 752 cases we have referred 70 back to the
22 Court of Appeal. At the end of December, 32 of those had
23 been heard and 24 had been quashed.
24 That is a reasonable position for us. We have
25 still got 1,500 cases waiting to be reviewed now and 1,100
1 we know of that are waiting for a full review. We don't
2 like having the queue, but those figures show that we are
3 referring about right. We wouldn't want every single case
4 we referred to be quashed, because it might mean we were
5 missing some that were borderline. Equally, we wouldn't
6 want every case we referred to be upheld, because then we
7 would be referring unnecessarily.

8 Similarly, the proportion, 70 cases out of 752
9 that were closed, is a reasonable proportion, because part
10 of our task is to improve the confidence in the criminal
11 justice system. So we are there to sort out miscarriages,
12 to identify them, and also to improve the confidence in the
13 criminal justice system and show that it is not as bad as
14 people had thought.

15 CHIEF JUSTICE ABRAHAMSON: How long does it take
16 you from the beginning to the end?

17 MR. MATTHEWS: If you average all the cases
18 together, it takes us 40 working days to close a case, but
19 those 40 working days can be stretched over three years
20 because a lot of the time is dead time waiting for
21 application information to come in. The solicitors who are

22 getting information from the original trial have to make
23 fresh submissions, and a lot of our time is spent waiting.
24 Every case review manager carries a caseload of about six
25 cases.

1 CHIEF JUSTICE ABRAHAMSON: Are the applicants
2 generally in prison during this time?

3 MR. MATTHEWS: Yes. Once we make a referral, the
4 solicitor can usually apply for bail, and depending on the
5 nature of the crime, they may get it or not.

6 MR. SCHECK: How many of these have come to be DNA
7 exonerations?

8 MR. MATTHEWS: Angela is going to do DNA in a
9 minute, but we've had about 40 cases so far that have
10 involved DNA. So after those 752 we've specifically used
11 DNA on about 40.

12 I don't know how many have been quashed as a
13 result of DNA, but I know we have some that DNA has not been
14 the deciding factor; it has been just one of many factors.

15 And we've had cases with DNA evidence where there has been
16 no referral. We've see the DNA evidence and decided there
17 was not a miscarriage of justice.

18 CHIEF JUSTICE ABRAHAMSON: How are you viewed by
19 the prosecution, defense and judges?

20 MR. MATTHEWS: Very well, I think. We have a good
21 reputation. I would say that, wouldn't I? I wouldn't say
22 we had a terrible one. We take our time. Our chairman's
23 guiding principle is that we must do things properly; we
24 must never rush; we must never push things through for the
25 sake of getting them through; we must make sure that we
1 cover everything. When the people you are dealing with see
2 that you have done a proper job, they're happy and they
3 don't think we are fiddling about.

4 MR. SCHECK: I've seen the reports in the Bentley
5 case. Maybe you could describe a little bit for us these
6 reports. As you said, your purpose is to enhance confidence
7 in the system. So in a sense what you are doing, whether
8 you refer one and it's quashed or you refer it and it's not
9 quashed, you are analyzing what is right and wrong with the
10 system and you seem to be making suggestions on how to
11 change things. Is that right?

12 MR. MATTHEWS: We identify, I suppose, where we
13 have referrals something has gone wrong, and how do we
14 address what has gone wrong. What needs to be changed?
15 The issue that has brought this to the fore is
16 that if we find that there has been police malpractice from
17 a currently serving officer, we are under a responsibility

18 to get that information back into the criminal justice
19 system so that the performance of that individual can be
20 addressed.

21 We could potentially find something systematically
22 wrong with the criminal justice system. We could find an
23 area that is not working in principle.

24 MR. SCHECK: What are the remedies if you find
25 that a prosecutor has withheld exculpatory evidence, or
1 conversely, that a barrister is incompetent?

2 MR. MATTHEWS: As I say, we have just developed
3 and it's out for consultation, and I think one or two of the
4 professional bodies have come back with responses now that
5 who should we report professional discipline to.

6 If we find a barrister or solicitor or forensic
7 scientist or a police officer or anybody, how do we get that
8 information back into the system? How would those
9 professional bodies, how would the bar association, how
10 would the office for regulation of solicitors like us to get
11 that information back into the system that they can act upon
12 it?

13 We have a clear obligation to report crime. If we
14 discover a crime, then there is no question. If we discover
15 incompetence, it gets more difficult because the
16 organization could obviously say, well, who are we to judge
17 incompetence on this one particular case or one particular
18 aspect? So it's a very live issue for us at the moment.

19 We've had a case where we were issuing our
20 statement of reasons which was very critical of a certain
21 police force. The statement of reasons went to the
22 applicant, who immediately went to his representative, who
23 immediately went to the press, and the first the police
24 force saw of it was the front page of a national paper
25 saying that we had branded this police force as incompetent.

1 So we have had fairly vigorous discussions with
2 the Association of Police Officers about how we get that
3 sort of information to them without breaching our
4 obligations under the Act that we should not disclose
5 anything to anybody other than the applicant. What tends to
6 happen is that we will issue notices to police forces on the
7 same day, or at least make sure that they are aware of what
8 is coming.

9 MR. SCHECK: Let's say that you find that there is
10 a prosecutor that has withheld exculpatory evidence. I take
11 it that is not necessarily a crime. It could be a crime, in
12 theory. In the UK would you ordinarily have like bar
13 associations or disciplinary committees that would

14 ordinarily pass upon those? Are those in existence? How
15 does that work?

16 MR. MATTHEWS: I'd have to confess ignorance here,
17 being neither a lawyer nor a scientist, my expertise on DNA
18 and on the law. I don't know if Angela would know any more
19 about that. She may be able to answer you in a bit more
20 detail. As far as our policy goes, we notify the
21 professional body and their own disciplinary procedures then
22 take over.

23 If there is nothing further for me, I will hand it
24 over to Angela who will go through our use of DNA in case
25 review.

1 [Applause.]

2 MS. FLOWER: Good afternoon, everybody. I'm
3 Angela Flower, case review manager with the Criminal Cases
4 Review Commission in Birmingham. My background. I'm a
5 lawyer by trade and I'm part of the case working staff at
6 the CCRC where I've been now since 1997.

7 Prior to that I was in private practice as a
8 solicitor in England, and I was aware of DNA profiling,
9 having encountered it in a number of cases but only to a
10 limited extent. Since working at the CCRC I have become
11 acutely aware of the power of this fascinating technique,
12 although I can't pretend to have done anything more than
13 scratch the surface of understanding its many complexities.
14 I would like to look at the way in which we have
15 used DNA profiling in case work since we started up at the
16 commission. DNA profiling comprises a very small aspect of
17 our work. We use a multiplicity of other forensic
18 scientific techniques, but today I want to look at a few of
19 the cases where DNA has been a real issue.

20 It is quite difficult to categorize the types of
21 case, but I think they fall into three loose categories:
22 Those which are pre-1989 where DNA profiling
23 wasn't available at the time of the original trial. The
24 problem we have in those cases is that very often the
25 original exhibits will have been destroyed. So to some

1 extent we are at the mercy of the retention and destruction
2 policies of the original investigating police forces.

3 The second category, post-1989, we are looking to
4 obtain results in cases where early profiling attempts have
5 failed or were inconclusive, or perhaps to explore a
6 particular aspect of a submission, such as a new theory or
7 alternative scenario.

8 The third category is a miscellaneous hodge-podge

9 of stuff that applicants send in to us, which includes
10 anything from requests for recalculation of statistics,
11 challenges to the database comparisons, the way in which the
12 random occurrence ratio is stated, although that is not so
13 much of a problem since the UK case of Adams, which seems to
14 have put some order and discipline on the way in which
15 scientists now express this evidence in court, and that has
16 alleviated a lot of the concerns.

17 We also get applications from applicants who
18 obviously have no understanding of what DNA is. For
19 example, in consent rape cases we have applicants insisting
20 that a DNA test will prove their innocence when in actual
21 fact it won't prove anything of the sort.

22 The first case I would like to look at today is
23 the case of X. I will be referring to all the cases that I
24 am going to touch on today by an initial to preserve privacy
25 and anonymity for our applicants.

1 This is a good example of how DNA can be used in
2 some of the older cases.

3 In this particular case it appeared that the DNA
4 issue was going to be quite clear-cut and simple, but it
5 soon became very complex. We had to take some unexpected
6 steps and we got some quite unexpected results.

7 It is also, I think, a good illustration of the
8 fact that our commission is prepared to make every effort
9 regardless of expense so long as it is reasonable to obtain
10 the best evidence possible in order to evaluate the safety
11 or otherwise of a conviction even after the death of the
12 applicant.

13 The brief facts of this case are that it occurred
14 back in 1961. A couple in a car were kidnapped by a lone
15 gunman. The male victim was shot twice in the head and
16 killed, and the female victim, who I will refer to as V, was
17 raped, shot and left for dead, but did manage to survive
18 albeit paralyzed from the waist down ever since.

19 So what led to his arrest? First of all, the gun,
20 the murder weapon, was found hidden under the seat of a bus,
21 wrapped in a handkerchief. The bullets and cartridge cases
22 that were found at the crime scene were actually fired from
23 the murder weapon. That was demonstrated by ballistics.

24 Two cartridge cases fired from the gun were found
25 in a hotel room. We knew that X had occupied the hotel room
1 on the night of the murder.

2 He was arrested two months later. After quite a
3 long police chase, it took them two months to track him
4 down. It was a nationwide manhunt.

5 The evidence against him at trial was that he was
6 linked to the gun obviously, the hotel room, and the crime
7 scene by the ballistics evidence. He was identified on an
8 identification parade by the female victim, but only after
9 she heard him speak. He shared the same blood group as the
10 killer rapist. And as a result of that he was convicted and
11 executed by the state by hanging in 1962.

12 Just to briefly look at the forensic evidence that
13 was available at the trial. After examining the items from
14 the crime scene, a scientist was able to state the blood
15 groups of the parties. He examined the female victim's
16 underwear and was able to say that the killer was a glucose
17 secretor.

18 Just to sum up the groups that we knew, male
19 victim, female victim, X and the killer rapist. As you can
20 see, they have the same profile.

21 Glucose secretors at that stage were about 35 to
22 40 percent of the UK population. So it was hardly
23 compelling evidence, and that is all that was available with
24 the techniques that were around in those days.

25 Since the execution, X's family has mounted a
1 campaign to clear his name. There have been several books
2 written, several TV programs and films have been made. The
3 solicitors have submitted numerous petitions to the Home
4 Secretary. The case has been reinvestigated twice, and in
5 1997 the CCRC received an application to review the
6 conviction.

7 You can just look now at the relevant crime scene
8 exhibits and stains. There were a lot of tests carried out
9 on various items that had been left over from the original
10 investigation, but these are the ones that we are concerned
11 with for today's purposes.

12 The victim's underwear was stained with a mixture
13 of vaginal fluid from her and seminal fluid from the killer
14 rapist. The slip, or underskirt, was stained with blood
15 from the female victim, and the handkerchief wrapped around
16 the gun contained stains of unknown type and origin. It
17 wasn't possible at the original trial to say what they were
18 or where they came from.

19 After the trial, the underwear and slip were
20 destroyed as a potential health hazard, but cloth samples
21 were retained and kept in storage by the metropolitan police
22 forensic science laboratory. The handkerchief was retained
23 and stored by the original investigating police force. so
24 although this man's conviction was almost 40 years old, we
25 were lucky enough to be able to find some of the original

1 physical exhibits.

2 Between 1991 and 1995 the solicitor's for his
3 family requested DNA profiling on the remaining exhibits to
4 see whether they would yield any fresh evidence. That
5 request was eventually granted, after extensive negotiations
6 with a number of various public bodies and authorities, in
7 1995.

8 This is a photograph of the cloth as it was in
9 1995. You can see that it is extremely small. It's about
10 10 millimeters by 10 millimeters before it was cut, and that
11 is pretty much all we had to go on.

12 This is a photograph of the cloth from the
13 victim's slip. It's slightly dark. It takes a while to
14 come up. You can just see the original blood stain on the
15 fabric.

16 We don't have a photograph of the handkerchief,
17 but it's an ordinary gent's white cotton handkerchief, and I
18 couldn't see that it would be very interesting to you to see
19 a photograph of that.

20 The attempt in 1995 to obtain DNA profiles. We
21 used the standard STR analysis, 6 point STR. These were
22 tests, by the way, that were carried out by the victim's
23 family's solicitors at their expense rather than by the
24 commission because this, of course, was before we came into
25 being.

1 The fabric was then cut into four pieces for
2 extraction. Unfortunately, one of the scientists dropped a
3 piece onto a non-sterile rack, so it was viewed as
4 potentially contaminated and excluded from the 1995 tests.
5 The fabric yielded 40 microliters of extract
6 containing DNA, of which 20 microliters were tested; 20
7 microliters were frozen and stored.

8 The first test was negative, and in view of that,
9 no attempt was made to test any other item. At that stage
10 the forensic science service in the UK were predicting major
11 advances in DNA profiling, and a view was taken that it
12 would be sensible to wait for the advances of science and
13 see what could be done.

14 So our investigation then starts in 1997. This
15 was an enormous case. The original documentation filled
16 several boxes in several rooms in several police stations,
17 and that was because of this nationwide hunt for the killer
18 between the time of the commission of the crime and the time
19 of X's arrest. So there were vast quantities of
20 documentation to read, a number of witnesses to be traced
21 and interviewed, a number of scientific tests to be

22 conducted. For example, ballistics, forensic linguistics,
23 psychological and psychiatric analyses, and other
24 document-based matters.

25 There were six CCRC investigators put onto this
1 case as a team, and the case logically split into about five
2 or six areas. So one of us managed to deal with each one
3 and then keep in contact with the others and see how things
4 were going.

5 The whole investigation took over two years.

6 Our preliminary inquiries revealed that there had
7 been a massive nondisclosure to the defense. There were
8 gross irregularities in the interview process, and there was
9 a great deal of fresh evidence, and the early indications
10 suggested that conviction may well be unsafe.

11 We therefore made a decision to pursue the
12 question of DNA profiling further, but that was only after
13 consultation with the forensic science service and X's
14 family, because they were unhappy with our proposed use of
15 the 20 microliters of stored extract, because if that
16 failed, there would be little or no material left for any
17 future attempt.

18 We negotiated with them and reached a position of
19 compromise. These were the few sources that we had
20 available to us from the original material in 1997, the 20
21 microliters that had been frozen and stored, the remains of
22 the cloth and fluid, and the small piece of potentially
23 contaminated cloth that had been excluded from the 1995
24 test.

25 We had the cloth sample with the blood stain from
1 the slip and we had the complete item, the handkerchief.

2 The DNA profiling techniques that were recommended
3 to us by the FSS in 1997 were short tandem repeats, the
4 second generation multiplex, which had already failed in the
5 1995 tests. So we didn't see any point in that; enhanced
6 sensitivity STR, which they call ESSTR; mitochondrial mini
7 sequencing, and mitochondrial full sequencing.

8 Looking firstly at the enhanced sensitivity,
9 ESSTR, that's a research technique which had not been
10 validated for forensic case work. It's a modified version
11 of the standard STR technique, and the modification is that
12 the number of times the template DNA is copied is increased
13 to make the analysis more sensitive.

14 I believe that this was first used in the
15 identification of the Romanov remains, the Russian royal
16 family, by the forensic science service in the UK in about
17 1994-95. The results in that case are generally regarded, I

18 believe, as being quite compelling, and therefore ESSTR was
19 the technique of our choice for these tests on this very
20 small piece of remaining material.

21 Two typical concerns identified with ESSTR were
22 that contaminant DNA can be copied up and generate an
23 erroneous profile and that the template DNA is small and the
24 balance reaction is altered, and the net effect of that is
25 artifacts produce confused data and hinder clear
1 interpretation.

2 The effect of both of those concerns is to exclude
3 the true source. In view of that, we took the view that
4 there was little or no risk to X that this would operate to
5 his disadvantage; if anything, it was going to exclude
6 rather than include him.

7 Looking at the ESSTR results, the cloth from the
8 victim's underwear, the stain had two components, seminal
9 and vaginal fluid, which were successfully separated
10 although traces of each remained in the other. So there was
11 a major and a minor element to each fraction of the stain.

12 The major profile from the seminal fraction was a
13 male, and it gave a result at 4 out of the 6 STR loci. The
14 major profile from the epithelial fraction from the female
15 had a result at 6 STR loci. So we had a complete clear
16 profile.

17 There was also evidence of DNA from the third
18 source, and we thought that could be contaminant; it may be
19 the female victim's lover because we know from what she said
20 to the police that they had sexual intercourse about 54
21 hours prior to the rape.

22 The two profiles from the underwear being split
23 there. The color shading indicates what we say is the
24 identity of the contributors. It's blue for the victim,
25 yellow for the rapist, and green for the unknown trace

1 profile.

2 Looking at the profiles from the handkerchief, we
3 didn't know what the stains were, but the scientists thought
4 they were probably nasal secretion or sweat. It was a male
5 profile, and we got a clear result at all 6 STR loci. That
6 is a color representation of the stain on the handkerchief.

7 The cloth from the slip, we thought it was the
8 blood stain from the female victim. Again, it was shown to
9 be female, with clear results at all 6 STR loci. You can
10 see that that is represented there in blue for the victim.

11 Just to summarize the preliminary ESSTR results.

12 We have the underwear showing seminal fluid with 4 point

13 comparison, vaginal fluid with 6, the handkerchief with 6
14 points nasal fluid. You can see by the color these two
15 match at the corresponding STR loci, and the slip bloodstain
16 which matches the vaginal fluid on the underwear.
17 Represented another way, on the colored shading
18 you can now perhaps see the distribution of the staining and
19 what is attributable to each of the parties.
20 This piece of evidence was particularly
21 significant because it established a link between the
22 handkerchief and the underwear that had never been made at
23 the time of the trial. It simply wasn't known whether or
24 not the person who put the handkerchief around the gun was
25 the same person that committed this crime.
1 So the seminal fraction of the staining on the
2 underwear definitely originates, according to DNA evidence,
3 from the same male individual who left the staining on the
4 handkerchief.
5 All this was very interesting, but it didn't give
6 us any ideas as to the identity of the rapist. So we had to
7 look around for some comparison sources to see what we could
8 do with these profiles. The potential options to us were X,
9 who was deceased, his brother who is still alive, his
10 mother, the female victim, and the male victim who is
11 deceased.
12 We spoke to X's mother and brother, and they both
13 agreed to cooperate in the provision of saliva samples for
14 DNA profiling.
15 Looking first at X's brother, who I am going to
16 refer to as B, he's not an ideal comparison source because
17 his nuclear DNA will be unique, but some features will be
18 broadly similar to the nuclear DNA profile of X, and we
19 thought that some useful information could be gleaned from
20 that.
21 When we looked at a comparison between the
22 handkerchief and B, you can see that there is a full match
23 at 3 STR loci, a partial match at 2, and no match at 1. The
24 scientist's view provided that that is moderate support for
25 the proposition that B's brother contributed to the staining
1 on the handkerchief and the underwear.
2 Moving on the X's mother, again she is not an
3 ideal comparison source, but some features of the DNA will
4 be similar. So we thought it was worthwhile running a test
5 to see what we could gain from that.
6 When we look at the handkerchief and the mother,
7 you can see that there is a partial match at all 6 STR loci.
8 The scientists' view of that was it was strong support for

9 the proposition a brother of B and the son of M contributed
10 to the staining on the handkerchief and the underwear.
11 At this point we needed to get a comparison
12 profile from the female victim. This obviously is a
13 sensitive issue and one that I know your commission has
14 considered and investigated in great detail. This lady had
15 obviously been traumatized by what happened to her, and it
16 was a very difficult time for her when we had to make the
17 approach. But she was a lady of great common sense and
18 courage, and she made an informed and very brave decision to
19 assist us in this case.
20 She agreed to provide the saliva sample. Her
21 nuclear DNA showed to be identical to the profiles from the
22 blood stain on the slip and the epithelial fraction of the
23 stain on the underwear. So that goes some way to
24 authenticating those items, because there had been great
25 problems with the continuity of these exhibits and how they
1 had been stored, and we anticipated all sorts of problems
2 with people saying how do you know where these pieces of
3 material came from? They've been on a file in an unmarked
4 envelope, and they could be anything or have come from
5 anyone.
6 When we look at the underwear, the slip, you can
7 see that the profiles are entirely consistent with the
8 history of the crime. We've got a perfect match to all 6
9 STR loci.
10 The probability of a match, scientists tell us,
11 would be something in the region of 1 in 300 million. So
12 it's a fairly compelling statistic.
13 We then needed to look at corroborative profiles,
14 because the FSS in the UK tend to duplicate their results
15 when they can; that is, to conduct a second test from the
16 same source to confirm the results. In this case there was
17 insufficient material from the small piece of cloth from the
18 underwear, so in an attempt to obtain corroboration, we
19 looked at the other sources.
20 There was the 20 microliter pellet that had been
21 stored and frozen. We got the family's consent to go ahead
22 and test that, but unfortunately it had degraded in storage
23 and there was no result.
24 We then managed to have a look at the extraction
25 liquid retained after the 1995 test, and lo and behold, we
1 managed to get a clear result at all 6 STR loci, which now
2 improves the quality of the profile that we had before,
3 which only had 4. And that matched the handkerchief and
4 also matched the underwear.

5 Again, just a graphic representation of what we
6 already know but with the additional profile, the extraction
7 liquid, with a result at all 6.
8 We still didn't have a direct comparison source
9 from X himself, so we looked at the possibility of
10 alternative reference samples. The only thing we could
11 think of was that he had sent a couple of postcards to his
12 mom back in 1961, and they were used at trial for reasons I
13 won't go into. We thought that perhaps his DNA could be
14 detected from the saliva on the back of the postage stamp.
15 There was a partial profile on stamp 1 with a
16 result at 2 STR loci, and stamp 2 gave a partial profile
17 with a result at 2 also. They matched the 2 corresponding
18 STR loci on the handkerchief. That's a very common
19 combination and was of little evidential value. I think the
20 figure that the scientists gave us was only 1 in 14, which
21 wasn't particularly useful.
22 Then we had a complication in that stamp number 2
23 yielded a second partial profile with a result at 5 STR
24 loci, and that was inconsistent with any other profile in
25 the case. That could have been contaminant. We don't know
1 who licked and fixed the stamp onto the cards. It could
2 even have been the postmaster. Possible explanations and
3 options are quite many and varied.
4 At this stage the STR results couldn't be taken
5 any further without exhuming the remains of X. So we
6 decided to investigate the possibility of mitochondrial DNA
7 testing. The same exhibits were tested, and I will run
8 through this very quickly.
9 This is a profile from the handkerchief, the
10 staining on the underwear, the female fraction. We couldn't
11 get a stain profile from the seminal fraction with the
12 staining on the underwear. We got one from the blood stain
13 on the slip and one from stamp 1.
14 Apparently it's very difficult to obtain
15 mitochondrial DNA from semen, especially when it's old or
16 degraded.
17 The same comparison sources, the brother, the
18 mother, and the female victim, who had already provided
19 their saliva samples, and we have that sequenced.
20 When we looked at the handkerchief and B, we had a
21 perfect match on the mini sequence, but that is only a
22 screening and elimination technique that forensic science
23 service use, and so we moved on to a full sequence.
24 The full sequence was confirming the mini sequence
25 by 380 positions at duplication and 225 positions which were

1 taken from a single extract, and therefore they are
2 unconfirmed, but the total of positions that were confirmed
3 was 605.
4 Looking at the underwear, the slip and V, we've
5 got a perfect match there on the mini sequence, and in view
6 of the compelling STR results, we made a decision that there
7 was no point in going ahead to a full sequence.
8 The rarity of mitochondrial DNA profile, the
9 sequence is uncommon and unlikely to occur more often than 1
10 in 100 in the general population, and the FSS advised that
11 that was moderately strong support for the proposition that
12 mitochondrial DNA on the handkerchief came from X or a
13 maternally linked relative, but that relates to the
14 handkerchief only, not the underwear.
15 So with the mitochondrial DNA technique we have no
16 link between the handkerchief and the underwear, and there
17 is no information as to the identity of the killer rapist.
18 We then asked the genetic statistician to consider
19 whether or not the STR and mtDNA results could be combined.
20 He said that they are mutually exclusive. One can't be used
21 to increase the evidential link with the other; the combined
22 results can't be expressed numerically, but they provide
23 strong support for the proposition that the DNA on the
24 handkerchief came from a full brother of B.
25 Looking at the standard levels of support that we
1 use in the UK -- I don't know if your system is the same --
2 what happens is it is expressed as two alternative
3 propositions on a scale of 1 to 6, and the times more likely
4 is converted into the level of support, going from weak or
5 limited to very strong, and being left to the discretion of
6 the scientists when it is particularly compelling.
7 At this stage we took further advice from the FSS,
8 and they told that if a matching reference sample was
9 obtained from X, then the STR random occurrence ratio could
10 be as high as 1 in 6 million and the mitochondrial DNA
11 results could be confirmed. If the reference sample didn't
12 match, then X could be eliminated as a source for the
13 staining on the underwear and the handkerchief.
14 So we were advised to apply for an exhumation. It
15 could be possible to extract DNA from his bones, teeth and
16 hair, and given the results in the Romanov remains case,
17 which is exactly what they did there, the scientists said
18 they were cautiously optimistic that this could be done.
19 Just a bit of background. This gentleman was
20 executed in 1961 and buried in a prison yard. He was then
21 exhumed and reentered in a family burial plot in 1966. His

22 aunt was then buried on top in the same grave in 1977, and
23 the family owned the exclusive burial rights to the plot.

24 There are two ways that we can get an exhumation

25 order in the UK. The first is by coroner's warrant, which

1 can only be issued to redetermine the cause of death. There

2 was no issue to how this gentleman died. He was hanged.

3 [Laughter.]

4 MR. MATTHEWS: There wasn't any prospect of that

5 being granted.

6 The other way is by Home Secretary's license,

7 which is usually used to remove remains from one location to

8 another. These applications were apparently quite common in

9 the UK after the abolition of capital punishment, because

10 everybody who had got a relative buried in a prison yard

11 wanted to take advantage of the system to have remains

12 removed to consecrated ground.

13 The procedure is actually quite complicated. You

14 have to get the application together, get the consent of the

15 next of kin, get the consent of the burial authority, and

16 then submit the application to the Home Office

17 Constitutional and Community Policy Directorate, who

18 hopefully grant the license to exhume.

19 This is an extreme step and not one that we wanted

20 to take lightly. We consulted the family. Obviously they

21 were very distressed by this prospect, and they raised a

22 number of interesting and valid points, which included the

23 privilege against self-incrimination extending to X's

24 remains. If he is not alive to waive the privilege, then

25 his remains should not be disturbed.

1 As he was originally interred in quick lime, it

2 was unlikely that there would be anything left.

3 And ESSTR is a research technique and can't be

4 relied on in legal proceedings.

5 We, of course, had to take a view on each of the

6 matters that they had raised, and we found that the

7 privilege against self-incrimination was inapplicable

8 because he had already been convicted.

9 We spoke at length to a pathologist, who confirmed

10 that quick lime is used to dehydrate flesh on a corpse and

11 has no effect on bones and teeth.

12 We interviewed the original prison officer who was

13 present at the execution, the burial, and the first

14 exhumation, and he told us that there was a full skeleton at

15 the time the remains were transferred in 1966.

16 As the interment was in a zinc lined hermetically

17 sealed coffin, there was every reason to suppose that the
18 remains were still quite well preserved, and the FSS said
19 that they had full confidence in ESSTR as a result of the
20 Romanov remains case and there was no reason why we
21 shouldn't make the application and go ahead.
22 Despite the objections raised by the family, the
23 application was submitted in 1998. But then the burial
24 authority withheld its consent due to the absence of consent
25 of X's family. That left us in a position that even if a
1 license was granted by the Home Office, then our exhumation
2 would have constituted actionable trespass, and as a
3 nondepartmental public body, we can't really be seen to be
4 committing unlawful acts, and therefore the application to
5 exhume was suspended.
6 The family's current attitude is that the
7 objection to exhumation is not absolute, and if the Court of
8 Appeal were to express a view that it should be carried out,
9 then their objection may be withdrawn.
10 Just to conclude that. On the one hand, we seem
11 to have significant evidence suggesting that X's conviction
12 may be unsafe. On the other, we have significant DNA
13 evidence which tends to suggest that his conviction is safe.
14 That can't be confirmed without an exhumation. So X's case
15 was referred to the Court of Appeal in 1999, and the outcome
16 is awaited.
17 It will be interesting to see how the Court of
18 Appeal deal with the question of the DNA evidence. That is
19 referred to in our statement of reasons. There is an old
20 common law case in the UK called Robinson, which I think
21 goes back to about 1914, which says that the crown cannot
22 improve its case on appeal. The defense don't have to rely
23 on grounds identified by the Criminal Cases Review
24 Commission.
25 The advances of science are generating this type
1 of situation on an ever-increasing basis. So hopefully when
2 this case is heard, the Court of Appeal in the UK will take
3 the opportunity to make some statement that will clarify
4 matters for us for the future.
5 That is the end of Mr. X. If I can just quickly
6 run through a few other examples of how the CCRC has used
7 DNA profiling in more recent cases. It won't take anything
8 like as long.
9 Mr. Q illustrates the point that DNA evidence can
10 provide a reason for declining to refer a case. It is one
11 of our Northern Ireland cases.
12 In 1995, a female victim, a German student, was

13 camping when she was approached by two men, Mr. Q and Mr. A.
14 One man raped her and one man assaulted her, but she
15 couldn't say which one was which.
16 There was a single large semen stain on her
17 clothing from the rape. They tried the old quadruplex test,
18 which looked at, I think, 4 of the STR loci, and that
19 failed. So there was no forensic evidence at court with
20 respect to this matter.
21 Q denied the rape or any offense, blaming A, and A
22 admitted the assault, blaming Q for the rape. The evidence
23 at trial was that the semen couldn't be attributed to either
24 but it must have come from one of them.
25 When the jury heard that A had admitted the
1 assault, understandably they convicted Q of rape.
2 The application to us was that contemporary DNA
3 profiling of the semen stains would show that A committed
4 the rape and not Q.
5 The outcome was that we got a partial profile
6 which excluded A as a source, included Q as a source, and
7 although the random occurrence ratio was very low, only 1 in
8 720, we declined to refer the case to the Court of Appeal.
9 The case of Mr. O. This is an illustration of how
10 physical experts can yield fresh evidence and how a
11 preposterous defense can gain credibility.
12 The facts of that case are that it's a conviction
13 for armed robbery in 1997. Three men were involved, all
14 wearing balaclavas. One was dropped at the scene, and Mr. O
15 and several other suspects were arrested in the vicinity
16 within about an hour.
17 In his first interview with the police, Mr. O said
18 that he wasn't involved. He was released pending result of
19 forensic examination of footwear impressions at the scene,
20 which matched his shoes, and in his second interview, when
21 this was put to him, he made no comment.
22 About 18 months after his arrest he wandered over
23 to the police and told them that he had been approached by A
24 in the street just before the robbery. A had bullied him
25 into exchanging shoes, and so A must have left the footwear
1 impressions at the scene.
2 At trial, of course, we had the evidence that A
3 wasn't one of the original suspects; O was tried alone;
4 there was the footwear impression, and the adverse
5 inferences that the jury were told they could draw from his
6 failure to mention in interview that he had been forced to
7 exchange shoes with A.
8 Our investigation was quite interesting. After

9 his conviction, as a result of what he told the police about
10 A, a marker was put onto A's PNC, or police national
11 computer file, to the effect that if he was ever arrested
12 for another recordable offense, a saliva sample was to be
13 taken from him and entered into the database and run against
14 the DNA profile taken from the balaclava.

15 By the time we started investigating A's
16 conviction this had actually occurred, and we discovered
17 that A's DNA profile did match the saliva on the balaclava.
18 That was insufficient in itself to justify a referral, so we
19 looked at the trainers. That yielded 2 profiles,
20 unidentified female and A. There wasn't any DNA relating to
21 a present, and on the basis of that the case was referred to
22 the Court of Appeal, and we expect it to be heard in the
23 next couple of weeks.

24 Has everybody had enough? I've got about 5
25 minutes to go.

1 MR. SCHECK: What is a balaclava?

2 MS. FLOWER: It's a woolen helmet with eye holes
3 cut that you often see terrorists or criminals using.

4 The case of Mr. C. This is perhaps an
5 illustration of how DNA evidence can support a defendant's
6 account of his movements.

7 The facts here was that it was in one of our
8 Newcastle nightclubs just before DNA evidence was introduced
9 into case work. There were two fights going on in the club
10 at the same time, although in different areas, which is not
11 uncommon for Newcastle on Tyne.

12 A female victim, sadly, was struck in the neck by
13 glass and bled to death in fight number one. C said he was
14 only involved in fight number two, so he couldn't have been
15 anywhere near V.

16 The evidence against him at trial was that S, who
17 was V's boyfriend, was standing near to her when she was
18 attacked and had bloodstains on his shirt. In addition to
19 the blood from V, he had C's blood type on his shirt.
20 Although that was only 30 percent of the UK population, the
21 jury heard that C had a severe cut to his finger caused by
22 glass, because he had been interviewed by the police after
23 they checked the attendance records at local hospitals. On
24 the combination of that, C was convicted of the murder of
25 this girl.

1 The submission to us was that if the blood on S's
2 shirt was not from C, then that lends support to his account
3 that he was not involved in fight number two.

4 The outcome was that DNA profiling showed that the

5 blood on the shirt didn't derive from C, S or V, and coupled
6 with the discovery of some undisclosed material, this formed
7 the basis for referral to the Court of Appeal.

8 Again, that is one where we are awaiting the
9 result.

10 The last one I want to mention today is the case
11 of J. I find this one particularly interesting. Again,
12 it's not resolved, but I can't wait to see what happens with
13 it.

14 This is in 1986, again before the advent of DNA
15 profiling.

16 A family of five were discovered dead in a house,
17 a mother, father, daughter and her two children. All had
18 died from gunshot wounds fired from a rifle. The facts were
19 that there were only two possible scenarios. Either the
20 daughter, who had a history of mental illness, had killed
21 her family and then shot herself, or J killed all five
22 victims. He was the brother who stood to inherit the family
23 wealth.

24 Initially the police thought the daughter was
25 responsible, but a couple of days later they found a
1 silencer for the rifle in a box in a cupboard in the house.
2 When they examined that, they found there was blood present
3 due to backspatter, and that was the same blood group as the
4 daughter.

5 She couldn't have shot herself with the silencer
6 attached to the rifle because her arms weren't long enough
7 to have positioned the rifle into her chin to blow her own
8 brains out. She couldn't have shot herself and then removed
9 the silencer and put it in the cupboard, for obvious
10 reasons, and the only other evidence against J at trial was
11 an alleged statement of intent to a former girlfriend he had
12 said that he wanted to bump off his family to inherit the
13 money.

14 The submission we had received was that because at
15 trial the prosecution claimed the blood on the silencer
16 derived from the daughter alone, that was very damaging. It
17 could have derived from two or more of the victims, not
18 including the daughter, and it could have been an erroneous
19 blood grouping at the time as a result. This would show
20 that the daughter could have shot the four victims with the
21 silencer on the gun and then removed it and killed herself.
22 So we are awaiting the result of that. The FSS
23 are attempting a new analysis called STR SGM Plus technique,
24 and the blood in the silencer is being examined to see
25 whether it is from more than one source so it can be

1 separated and profiled.
2 Just a note about STR SGM Plus. This examines 10
3 of the STR loci, which generates random occurrence ratios in
4 the region of 1 in 1 billion. It has been used in the UK
5 now for about six months by the forensic science service. I
6 think there are plans to replace the 6 loci profiles in the
7 database with 10 loci profiles so that the UK database will
8 eventually run on a 10 point STR.
9 I was speaking to the chief scientist at the
10 forensic science service last week. He was telling me of a
11 case in Bolton, in Lancashire, a few weeks ago where the DNA
12 database identified a hit on comparison with a crime scene
13 stain, as a result of which a suspect was arrested and
14 charged with, I think, a sexual offense.
15 The random occurrence ratio based on 6 point STR
16 was 1 in 37 million. CPS thought that was low and asked for
17 an extension to 10 point, and that excluded the suspect.
18 And the FSS are currently conducting research into the
19 situation.
20 There are a number of implications for this, not
21 least of which that everybody in the UK who has ever been
22 convicted on 6 point STR profiling will want to apply to us
23 to have their convictions reviewed. I think it is a quite
24 worrying phenomenon, and I shall be glad to hear what the
25 FSS have to say about this and how and why it's happened.

1 That's really all have to say today. Thank you
2 very much for your attention. It's a great privilege to be
3 your guests here in Washington, D.C., and to meet you all.
4 I would like to take this opportunity on behalf of the
5 Criminal Cases Review Commission to wish you all the very
6 best of work in your future endeavors.

7 [Applause.]

8 MR. CROW: Are these 10 loci included within the
9 database?

10 MS. FLOWER: I don't know if you use the same 10
11 loci in your 13 on CODIS that we use in the UK.

12 MR. CROW: The six are. I know that.

13 MS. FLOWER: It's the same 6, because we make
14 comparisons against your database.

15 MR. SCHECK: Has anything comparable ever happened
16 before, 1 in 37 million? How many other loci was he
17 excluded on, more than one?

18 MS. FLOWER: I don't know. I'm still waiting for
19 a report from the FSS to find out why this happened. It
20 could be that there was some mistake made when the original

21 test was done. It could be that it's gene mutation; it
22 could be a close family. I don't know. As soon as we know,
23 I will put something on the e-mail to you so that you are
24 aware of it too.

25 CHIEF JUSTICE ABRAHAMSON: Something must have
1 been suspicious to ask for a review with 1 in 37 million.

2 MS. FLOWER: Apparently our crime prosecution
3 service thought it was quite low.

4 CHIEF JUSTICE ABRAHAMSON: Thank you very much.
5 Thanks to both of you for coming and for giving us that
6 interesting talk.

7 We are back to the Postconviction Working Group
8 report and to the retention of the sample base.

9 Ron, what had you planned for the hour? I'm
10 trying to see how much time we've got.

Postconviction Working Group Report & Discussion
The Honorable Ron Reinstein
Working Group Chair

11 MR. REINSTEIN: We discussed this at the last
12 Commission meeting. The work group has not met since the
13 last meeting. Based on the discussion that we had,
14 Professor Berger went through it and prepared the draft that
15 is in front of you.

16 The only other thing is Rock's comments this
17 morning regarding the first paragraph. He believes that we
18 shouldn't subvert the orderly process of the legal system.
19 Based upon all of the cases that we have heard
20 about initially, why the Commission was started, and the
21 work of our work group, we felt that a model statute would
22 be beneficial. So we took the lead of Illinois and New
23 York. We are open to any discussion on it.
24 Otherwise, I think from what Chris had mentioned
25 this morning to me, it is up for approval today whether or
1 not the Commission wants to approve a model statute or
2 change the wording again.

3 CHIEF JUSTICE ABRAHAMSON: Norman.

4 MR. GAHN: Ron, when you talk about forensic DNA
5 testing of any evidence, did you talk about any probative
6 evidence?

7 MR. REINSTEIN: No.

8 MR. GAHN: I am looking in the third sentence
9 under Request for testing. It says "any evidence." It
10 seems a little broad. I think if we say "any probative
11 evidence." There is a pecking order to the evidence.

12 MR. REINSTEIN: I don't have any problem with that
13 at all.

14 MR. SCHECK: Norm, the reason we phrased it that
15 way is that by definition under mandatory and even
16 discretionary testing it has to be probative evidence,
17 because it has to be biological evidence that can meet the
18 legal standard that it will create a reasonable probability
19 there wouldn't have been a conviction. It has to be very
20 exculpatory. By definition it has to be probative.
21 The reason we didn't use the phrase "any probative
22 evidence" there is, as the rest of this indicates and as the
23 report we just heard indicates, we didn't want to limit it.
24 In other words, we didn't want to say you can only look at a
25 vaginal swab, because it could very well be blood on a
1 silencer of a gun or a stamp. There is no limit these days
2 to what we could do.

3 I think just as a drafting matter we think that
4 refers to probative evidence, but we didn't want to limit
5 its scope. That is the reason behind it.

6 MS. BASHINSKI: I have a question about the
7 definition of exculpatory. I know we all know what we mean.
8 There is very good verbiage in the report about category I
9 cases, and so forth. But we have an Innocence Project type
10 statute in California. I am sitting around the table with
11 six lawyers and I can't even explain to them exactly what
12 the criteria should be, because they aren't used to thinking
13 about the cases in the same way that you are.

14 I am wondering if there is a way to identify. For
15 example, one of the statutes that I'm aware of says
16 something about identity having to be an issue, which is an
17 Illinois statute, I think. So there are two things. One,
18 identity is an issue, and two, the piece of evidence you are
19 looking at would definitively resolve the issue as to
20 whether or not the person was or wasn't the perpetrator. In
21 other words, a more explicit statute about what does this
22 mean.

23 When you just read exculpatory results, obviously
24 if the person were exculpated, they would never have been
25 convicted or prosecuted. The question is how is that
1 defined and is that clear to everybody reading the statute?
2 I may be stating the obvious, but it sure wasn't
3 obvious to this group of people that I was talking to as to
4 under what circumstances is it mandatory.

5 MR. SCHECK: I'll readily concede. When the
6 Illinois statute talks about identity, it also talks about
7 you should get a test if there is non-cumulative evidence of
8 innocence. A test could generate such a result, which is a
9 somewhat lower threshold than this. It has the advantage of
10 simplicity.

11 I readily concede that it is not evident to many
12 who read this what the difference is between the mandatory
13 testing standard and the court's discretion standard. That
14 has been debated back and forth.

15 If you just look at the mandatory testing
16 standard, I think that is about as clear as you can get in
17 the sense that whatever you are testing, looking at the
18 evidence as a whole there has to be a reasonable probability
19 of a different outcome. That can't be a hard standard to
20 apply, because that is virtually the standard for vacating a
21 conviction with newly discovered evidence in virtually every
22 state.

23 MS. BASHINSKI: Again, I'm not a lawyer, so I

24 don't know. Looking at how much trouble we had to go to
25 define all this in that postconviction review pamphlet, if
1 you could come up with some way that gets the spirit or
2 intent of that into this legislation, because that document
3 won't be available.

4 MR. SCHECK: Sure it's available.

5 MS. BASHINSKI: It will be available, but it won't
6 be part of this. It's an independent document which may or
7 may not be referred to by people interpreting a statute like
8 this.

9 MR. SCHECK: I would imagine actually it would be.
10 If experience serves, NRC I, NRC II, things of this nature
11 are relied upon by the courts. I would even imagine that
12 any legislation that would be written on this subject by a
13 state or federal government would probably want to make
14 reference to our Commission recommendations with respect to
15 the categories of cases. That would be a wise idea.
16 Reasonable lawyers could differ on how you define
17 these standards. I'm not sitting here telling you that this
18 distinction between mandatory testing and court's discretion
19 testing -- we went through a lot of formulations. You could
20 cut that a number of different ways. The basic thrust of
21 this is that there is a category of cases that are probably
22 best embraced by I and II where you should give the inmate a
23 shot to prove innocence with a DNA test.

24 MR. REINSTEIN: I'm really hesitant to over-define
25 legal terms like that, especially when you talk about a
1 model statute. If a state wants to do that, they can do it.
2 If you look at the definition of "reasonable doubt," every
3 state struggles with it; every court struggles with it. I
4 think it is as simple as you can get, and you let the
5 individual states have at it if they want to define these
6 words.

7 MR. SCHECK: I think it should be clear to anybody
8 who is looking at the legislative history of this that the
9 thrust of this -- I should mention about Rock. We should be
10 clear. The one point he made we talked about, and that is
11 he's saying, well, in many states you don't make a motion
12 based on newly discovered evidence. Technically speaking,
13 that is one that you would make before the appeal is
14 exhausted, and in some states you would have a remedy of
15 habeas postconviction. The time limits on habeas in most
16 jurisdictions are as draconian as the other ones.
17 If you wanted to really make this even more
18 complete in the background, we could talk about the federal
19 postconviction standards, which are one year for everything

20 other than a capital case and six months for a capital case
21 that begins to run on April 26, 1997, and they are over by
22 April 27, 1998.

23 Frankly, if you wanted to talk about the time
24 limits more in the background, it's even worse. Rock, let's
25 just be clear, is against the idea of not putting a time
1 limit on our thing. The committee considered that at great
2 length and we rejected it.

3 MR. REINSTEIN: I honestly didn't understand, at
4 least from Arizona's standpoint, what Rock's argument was,
5 but I guess it has to do with what happened in Virginia and
6 some of the other states.

7 MR. CLARKE: I can embellish on it, if you like.
8 First of all, I think we discussed some of these things at a
9 full Commission meeting. The draft was prior to that. I
10 think that is actually one of the topics we discussed a
11 little bit.

12 It's my strong feeling there has to be some
13 requirement of due diligence. We have encountered it in our
14 own state, not repeatedly, but enough to be concerned, where
15 an individual in fact in his defense holds back. If this
16 were to read literally "at any time" without some qualifier
17 like due diligence, these could run on ad infinitum.

18 MR. SCHECK: We discussed this at great length.
19 There is a requirement here that the evidence has never been
20 previously subjected to DNA testing or was not subjected to
21 testing which is now requested which can resolve an issue.
22 It is clear from the description of it in our report we are
23 only talking about situations where there wasn't a very
24 informative test done the first time.

25 MR. CLARKE: I'm talking about timing of the
1 request.

2 MR. SCHECK: I thought you were talking about
3 somebody that comes in with more than one request.

4 MR. CLARKE: Not at all. In other words,
5 particularly an individual sentenced to death. It's in his
6 or her interest to wait until the last minute to bring this
7 up without any limitation in terms of diligence. I think
8 there has to be a due diligence requirement, and that may be
9 perfectly legitimately brought up ten years later. Absent
10 that type of showing, there is no limit, and it can be
11 brought on at any time.

12 MR. REINSTEIN: That's what Judge Webster brought
13 up at one of our earliest meetings. We discussed that at
14 length.

15 MR. SCHECK: We've rejected it for a number of

16 reasons, the so-called latches argument. If you begin to
17 look behind in these things and start saying, well, in this
18 death penalty case was the client who wanted the DNA test
19 being advised by the lawyer not to have the DNA test, for
20 whatever reasons? Or we are dealing with people that are
21 indigent, that are stuck in penitentiaries and may not know,
22 frankly, what is available?

23 One very good example I was mentioning to Rock is
24 Kevin Green. Kevin Green is the marine that was exonerated
25 by the DNA data bank testing of Mike Jacobs. Kevin had at
1 one point attempted to get a DNA test. He hired a lawyer,
2 gave him some money, it never happened, and he basically
3 spent his time trying to stay alive in San Quentin. He was
4 trying literally to stay alive.

5 He's as smart a guy as you will find. He never
6 wrote to the Innocence Project, never wrote to anybody else
7 to pursue it and was lucky that this prosecutor was looking
8 at that serial murderer rapist.

9 I think you have to get a perspective. We are
10 talking here about people, realistically speaking, from 1981
11 or 1982 through 1994, when DNA testing began in earnest on
12 cases of this nature, which I think would be a reasonable
13 date to agree that it became commonplace in appropriate
14 cases. In 75 percent of these cases where you could even
15 come close to meeting the fairly rigorous standard that a
16 test would make a difference in the outcome the evidence
17 samples are lost.

18 So to start litigating over latches in this
19 context and what the reasons for it would be one way or the
20 other is probably a game not worth the candle.

21 CHIEF JUSTICE ABRAHAMSON: Let's let Phil get into
22 the conversation.

23 DR. REILLY: I just have a minor technical
24 drafting question that you can edify me about. Given the
25 fact that it may not be clear what evidence is in the
1 possession of the prosecutor, should a model statute like
2 this specifically include a provision for searching for
3 evidence prior to requesting testing, or is that just
4 assumed and is not an issue?

5 In other words, should it begin by saying that a
6 convicted individual should have the right to request a
7 search prior to the testing?

8 MR. SCHECK: I'd like to see it, but the way we
9 tried to cover it was under the section on preservation
10 order where we indicate when you first come into court and
11 you make a motion that that triggers an obligation not to

12 destroy the evidence and to go look for it.
13 DR. REILLY: I understood that, but I have two
14 small problems with it. One, it seemed to be out of order
15 in the logical sequence of events, and secondly, even with
16 the preservation order, that might be construed to pertain
17 only to that which the prosecution knew was in its
18 possession.
19 I'm talking about misplaced or mislabeled
20 evidence. I would want to bolster for the sake of the
21 applicant the right to search. It seems to me little harm
22 is done in adding that. Maybe it's not necessary. I posed
23 it as a question for that reason.
24 MR. SCHECK: That's a good point.
25 MR. REINSTEIN: Maybe the committee could put
1 comments where it has structure of the statute.
2 DR. REILLY: Often the comments to a statute get
3 lost over the years the statute stays.
4 MR. THOMA: Judge Reinstein, I think he was
5 talking about the order in which that procedure is last. I
6 think it's covered, but I think that point might be well
7 placed within discovery, whether discovery should be there
8 or not or somewhere else.
9 MR. REINSTEIN: The preservation order?
10 MR. THOMA: And discovery.
11 CHIEF JUSTICE ABRAHAMSON: They want, I gather,
12 something that would say the defense can come in and say,
13 what evidence do you have?
14 DR. REILLY: I was trying to give it a little more
15 chance to the applicant to push the system to look a little
16 harder. As time goes by, people change, things get
17 mislabeled or get lost. It seemed to me like the request
18 for an inventory, if you will, should precede the request
19 for the test.
20 MR. REINSTEIN: You are just saying that the
21 defendant could make a request of law enforcement, the
22 court, for --
23 DR. REILLY: A best efforts full inventory of
24 existing evidence.
25 CHIEF JUSTICE ABRAHAMSON: That is subject to DNA
1 testing.
2 DR. REILLY: Right. It was an argument for the
3 sake of completeness.
4 MR. REINSTEIN: Barry, when the Innocence Project
5 does it, you use a search, right?
6 MR. SCHECK: No. What Phil says is important. If
7 you look at our protocols that we gave you, and I think it

8 is even in the recommendations, we have a lot of trouble if
9 we make an application or a request to search and then we
10 can't get an answer. Then somebody orally says, well,
11 that's destroyed. We have forms that say put this in
12 writing, and then they refuse to put it in writing. Then we
13 wind up going to court trying to get them to look.
14 In quite a few of these cases, I think close to 20
15 or so, initially people say we can't find it, and then they
16 find it. That happens repeatedly. Even in the Kevin Green
17 case they couldn't find it. People just move. These cases
18 are 15 or 20 years old. They just move things around, and
19 who wants to bother going to look for it?
20 You're right, basically.
21 DR. REILLY: That's a rare moment.
22 CHIEF JUSTICE ABRAHAMSON: Savor it.
23 [Laughter.]
24 MR. THOMA: We have testimony regarding Los
25 Angeles Police Department and their situation with how much
1 evidence they have and where it's kept and how many more
2 trailers or whatever they need.
3 MS. BASHINSKI: Barry, wouldn't you, though, at
4 the same time you are asking for this preservation
5 -- because you don't know at the time you ask for a
6 preservation order what there is to preserve. Could you not
7 then go in at that same time and say preserve it, and, oh by
8 the way, conduct a search? Is that what you are suggesting,
9 adding it to that part?
10 MR. SCHECK: That's what I think Phil is
11 suggesting.
12 MS. BASHINSKI: I don't think you can do it any
13 sooner.
14 MR. SCHECK: Right.
15 MS. BASHINSKI: You have to go to court.
16 MR. SCHECK: You have to make a showing that there
17 is something that you know is out there. In other words,
18 there is a vaginal swab, there is a handkerchief, there's
19 something that, given the record in the case, if it exists
20 it's probative or potentially probative. If you were to
21 redraft this, one would say that you have a right to go to
22 the court for an order for them to look if they refuse, and
23 obviously not destroy it.
24 MR. REINSTEIN: I guess under preservation order
25 you could put search for all evidence in the prosecution's
1 possession and control that could be subjected to DNA
2 testing and it must be preserved during the time of the
3 proceeding and the state shall provide a list of all

4 evidence available for testing.

5 DR. REILLY: For example, it would be very
6 interesting if that list didn't match the original list in
7 the trial.

8 MR. CLARKE: What happens is the evidence gets
9 fragmented.

10 DR. REILLY: I'm not suggesting nefarious acts.

11 MR. CLARKE: In fact prosecution and law
12 enforcement will have most of it and the court will have
13 some of it.

14 MR. REINSTEIN: Prior to DNA, the prosecution may
15 have used X, Y and Z, but they decided not to use a bed
16 sheet or comforter that there might be biological evidence
17 on. The prosecution just didn't need it.

18 MR. CLARKE: I think it should cover all three,
19 because all three may have the evidence or a portion of it.

20 MR. THOMA: Actually, the U.S. Supreme Court in
21 Callis v. Whitley covered that really well in an area with
22 regard to exculpatory evidence, basically the prosecution
23 and any of its agents, because they realized that exact
24 point that Woody brings up. By its very nature in trial
25 it's going to be separated.

1 MR. SCHECK: Some of it is never going to be used
2 and it goes back to the police lab.

3 MR. CLARKE: I was going to say prosecutors'
4 offices would have the least of that evidence generally.
5 It's going to be law enforcement or the court.

6 MR. SMITH: And the court is not an agent of the
7 prosecution.

8 CHIEF JUSTICE ABRAHAMSON: I think that if the
9 group wants that kind of inventory provision, it should be
10 put in separately, because it should be on motion that it be
11 done, and at a time. Because otherwise you've got it at the
12 tail end, and I don't know where it fits with your motion
13 for mandatory or discretionary testing. That is one thing.
14 The second thing is we still have, I think, a
15 division of the house on whether there should be any statute
16 of limitations here. That's the "at any time." I hate to
17 mention the word statute of limitations, but that's what it
18 is.

19 MR. CLARKE: Do we have a division?

20 CHIEF JUSTICE ABRAHAMSON: Is there a division?
21 Woody is not divided, right?

22 MS. BASHINSKI: Again, I'm not an attorney, but
23 because I work for the attorney general's office in
24 California I know there is concern, particularly with regard

25 to the death penalty situation, that there be some time
1 frame prior. For example, if there has been an order for
2 execution, some reasonable time prior to that order that the
3 request has to come and not necessarily at the eve.

4 I don't know how you do that or how you put it in
5 there, but that was definitely a concern expressed by our
6 appellate attorneys.

7 MR. CLARKE: And it becomes more egregious with
8 those cases where either prior DNA or serology has been done
9 so an awareness already exists on the part of both client
10 and appellant counsel that this evidence at least existed
11 and may or may not continue to exist, and it may have
12 probative value.

13 MR. SCHECK: I think we've covered that in terms
14 of prior DNA testing.

15 I know one of the cases that your people are
16 concerned about, but I think this is really a misplaced
17 concern. It's just another example of the depth of the
18 concern about executing people faster and distorting the
19 rest of the criminal justice system.

20 You are going to put statute of limitations into
21 this kind of a thing because there is a fear that some
22 people just prior to execution will give one last request to
23 have another sample tested that could take, if you did it,
24 48 hours, and therefore we are going to spawn a whole series
25 of court challenges by many people who have been
1 incarcerated for decades, who could prove their innocence
2 with samples disappearing. I just don't think this is
3 right. We have too much experience with this.

4 MR. CLARKE: At the same time, the writ of habeas
5 corpus requires that you show due diligence. In ten years
6 there may be diligence. That's not a problem. All that I
7 think should be in there is that the application reflect
8 that the person was diligent. There may be valid excuses
9 for a 15-year delay, but I don't think a defendant should be
10 able to just raise it and then diligence becomes a
11 non-issue. It should be an issue.

12 MR. SCHECK: I disagree. Frankly, I think it's a
13 constitutional problem. No matter what you want to say
14 about the issue of diligence, you really have to cut to the
15 chase and ask yourself this question: There is a guy
16 sitting in jail and the DNA will prove him innocent, and you
17 want to keep him there for the rest of his life because
18 you're going to make a ruling that he didn't apply within
19 somebody's definition of due diligence, and Lord save us
20 from the definitions of due diligence that I've seen across

21 the United States and these courts.
22 You go tell that to Clyde Charles who was told he
23 didn't have due diligence after seeking a DNA test for nine
24 years in Angola prison and he was in there for 19 when the
25 DNA exonerated him in 2 months. You go tell it to some of
1 these people. I think it's a very, very bad idea for what
2 is really, given all that we have been talking about, an
3 extremely small number of cases.
4 By the time you get to the number of cases where
5 you are going to meet the standards, where it would be
6 probative evidence that could prove innocence, and in 75
7 percent of these cases the evidence has disappeared, you are
8 talking about total in the United States maybe 100 to 150
9 cases per year, and individuals can either face death or
10 life imprisonment.
11 There comes a point in time where you just have to
12 stop listening to the attorney general that is pissed off
13 about Robert Abadon litigating the Cooper case because it's
14 just another thing that they want done and say let's do some
15 justice in America. How many more people do we have to get
16 out like this? I love you, but I really have no patience
17 for this.
18 MR. CLARKE: You have a funny way of showing it.
19 [Laughter.]
20 MR. REINSTEIN: Our work group discussed this over
21 and over again and this was what we came up with.
22 CHIEF JUSTICE ABRAHAMSON: Jim.
23 MR. CROW: It seems to me as if Phil's point sort
24 of got lost in all of this. I should think the two of you
25 could simply find a clause or whatever that would take care
1 of that point.
2 MR. REINSTEIN: I think there are two issues. One
3 is adding something regarding an inventory and the other one
4 is the statute of limitations.
5 MR. THOMA: I think the inventory search doesn't
6 change the face of what the law is. It should be accounted
7 for, obviously.
8 Madam Chief Justice, I call for a question.
9 MR. CLARKE: I have one more item with regard to
10 the model statute.
11 CHIEF JUSTICE ABRAHAMSON: One of the things I was
12 going to do was suggest that we bring this back, bring in
13 the discovery, what I labeled the discovery issue. This "at
14 any time" is a recurring issue that we have had that has
15 divided the house. At least why don't you all think about,
16 since it is coming back, having alternative provisions

17 relating to the timing? I know there is strong feeling that
18 there not be any "statute of limitations" and then there is
19 strong feeling that there at least be, if not a time period,
20 due diligence.

21 You are going to have this debate in all the
22 states that care to adopt this, and maybe you should just
23 face it and put some commentary on it.

24 MR. REINSTEIN: My concern is not so much for the
25 capital defense. In most of the states, they usually have a
1 lot of attention drawn to them as far as capital litigation
2 goes, but it's the other ones --

3 MR. SCHECK: Texas. Most of the calls I get for
4 tests on the eve of execution come from Texas. Texas and
5 Florida.

6 MR. REINSTEIN: What I'm saying, Barry, is that
7 one of the things we talked about in the committee was the
8 person from Mexico who can't speak English, can't read. He
9 got his first shot at a public defender in postconviction
10 relief early on before DNA was in existence, or even if it
11 was, the guy just totally missed it, and then he hears from
12 a cellmate or some counselor at DOC about this DNA thing.
13 He comes in years later, and it wasn't his fault because the
14 guy can't even read. That was the big discussion; it was on
15 those people.

16 CHIEF JUSTICE ABRAHAMSON: Anyway, I want you to
17 think about that. You can put all the arguments pro and con
18 in terms of diligence and the need for lengthy times and no
19 time limits. So we have got those two points.

20 Woody, you've got another point?

21 MR. CLARKE: There are a limited number of cases
22 where there has been secret either DNA or serology testing
23 done, and I think the provision should have a requirement
24 that in those instances, which are not numerous but they are
25 usually in significant cases, that that be revealed in the
1 application for postconviction DNA testing, and discovery
2 provided if it hasn't been previously discovered, which
3 would be the norm when secret testing was done.

4 CHIEF JUSTICE ABRAHAMSON: You want the defendant
5 to reveal his or her secret testing.

6 MR. CLARKE: Correct.

7 MR. SCHECK: That has never been contemplated.

8 The secret testing problem is on the other side. What about
9 the governor of the state of Virginia revealing the fact
10 that a guy was eliminated?

11 One final point on this. We've been through this
12 with the committee. We've only debated this for two and a

13 half years. It's not a committee of defense lawyers; it's a
14 committee of prosecutors and crime lab people and everybody
15 else who have been looking at this. It also is
16 unconstitutional. You might give that some thought.
17 The question I pose to you, Woody. I think the
18 United States Supreme Court, even this one, is going to rule
19 that you can't have the statute of limitations stand in the
20 way of somebody who could prove innocence with a test like
21 this. This issue is going up, because the reality is that
22 the federal habeas corpus limitation is one year. In fact,
23 less than one year. There are lots of people who are coming
24 forward saying, I'd like a DNA test, because they can't even
25 get access to a court in the state.

1 MR. CLARKE: I'm with you on that one, Barry.

2 That's not the contention.

3 MR. SCHECK: That is a contention area.

4 CHIEF JUSTICE ABRAHAMSON: All right, gentlemen.

5 I'm going to ask you to do this. Discovery provision;

6 consider secret testing on both sides.

7 On the time issue, set forth this debate in terms

8 of constitutional as well as policy arguments on both sides,

9 which can be done in your commentary and with alternative

10 provisions. I think that is what our model statute is

11 about.

12 MR. REINSTEIN: Thank you, Judge. We will see

13 this again.

Public Comment

14 CHIEF JUSTICE ABRAHAMSON: I'm moving along
15 because some of us have to leave to catch planes, and we
16 want to get to the reworked draft of convicted offender
17 database sample and public comment.
18 As I did yesterday, I will ask, since it's 3:30,
19 if there is any public comment that has to be made now, or
20 can it wait a few moments?
21 MS. CONLEY: It can wait.
22 CHIEF JUSTICE ABRAHAMSON: Fine. I appreciate
23 that.
24 There has been a redraft of the "therefores." Did
25 you change anything on the first page?
1 MR. ASPLEN: Changed a few matters pursuant to
2 Professor Kaye's suggestions.
3 In paragraph number 3 I have eliminated the word
4 "necessary" in sentence number 2 and the word "security" at
5 the end of "control."
6 Under the privacy concerns area, I have included
7 profile at 13 STR loci used in the CODIS system.
8 I have changed "DNA contain significantly." I
9 have included "more sensitive information."
10 Those are the only changes I've made there.
11 MR. SMITH: Is the last sentence a holdover from
12 the preceding draft?
13 MR. ASPLEN: The last sentence is a holdover from
14 the preceding draft. Professor Kaye suggested the
15 elimination of that. The only reason I kept it in was
16 because a couple of the Commissioners seemed to think that
17 it was a good idea to state those.
18 MR. SMITH: It can't be that Professor Kaye
19 thought it was a bad idea.
20 MR. ASPLEN: In fairness to him, I have his copy
21 of what he wrote.
22 MR. KAYE: I recall what I was thinking. There
23 were two thoughts. One is, and this is perhaps the more
24 significant one, that when you read these last two sentences
25 of the paragraph together, it creates a certain impression.
1 It says that whole sample DNA contains significantly more
2 sensitive information about an individual. The specter of
3 genetic behavioral research and behavioral profiling has
4 become a theoretical possibility.
5 It sounds like the sensitive information is
6 something relating to behavioral profiling, and it is much
7 more than that. It is genes that may be linked to cancer

8 and other matters that someone would not want revealed. I
9 thought the easiest way to deal with that is just to
10 eliminate the one sentence that gets more specific rather
11 than write a whole bunch of sentences.
12 The second point is, why single out that research
13 unless you think it's not a valid research to undertake?
14 It just seemed to open a can of worms that didn't
15 need to be made explicit.
16 Finally, it is a theoretical possibility that this
17 research will be undertaken regardless of any of these
18 samples. Behavioral research is done all the time by
19 behavioral geneticists.
20 So it doesn't quite get at the right point.
21 MR. CROW: I agree. Let's take it out.
22 CHIEF JUSTICE ABRAHAMSON: Which one are you
23 taking out, the last one?
24 MR. CROW: The last sentence of the first page.
25 CHIEF JUSTICE ABRAHAMSON: So it would end "while
1 the nature of digitalized DNA profile at 13 specific STR
2 loci used in the CODIS system present few opportunities for
3 manipulation beyond its intended uses, whole sample DNA
4 contain significantly more sensitive information about an
5 individual."
6 MR. CROW: That's good.
7 CHIEF JUSTICE ABRAHAMSON: Any other comments on
8 the first page?
9 All right. The second page.
10 "Therefore, public trust in a DNA database system
11 must be maintained by the continued analysis of and
12 attention to relevant privacy considerations. Given the
13 relatively early stage" --
14 MR. ASPLEN: I did not include it, but I would
15 include "stage of development."
16 CHIEF JUSTICE ABRAHAMSON: "Given the early stage
17 of development of the DNA database, engendering public trust
18 is particularly important. The issue of sample retention is
19 one which raises many of those privacy matters and as such
20 should be continually evaluated. The Commission recommends,
21 however, that in no later than five years a formal
22 evaluation of sample retention issues should be conducted by
23 a broad-based representative body. Sample retention even
24 with continued analysis of privacy issues should be
25 conditioned on the following:
1 "First, all states should adopt criminal penalties
2 for the misuse of DNA records and samples. Currently only"
3 -- blank -- "states have passed such legislation.

4 "Second, research on database records or samples
5 should be limited to that which is directly related to the
6 use of DNA evidence for identification purposes unless the
7 individual's whose DNA has been taken give their formal
8 consent."
9 MR. CROW: Let's take out the apostrophe.
10 CHIEF JUSTICE ABRAHAMSON: On "individual's,"
11 right.
12 Any comments?
13 MR. THOMA: Just one grammatical. "Sample
14 retention if recommended" within the last sentence of the
15 first paragraph. It is not necessarily so that sample
16 retention is going to be recommended by any such body.
17 MR. SMITH: In the "meanwhile."
18 MR. THOMA: Oh, you mean current sample retention.
19 That's fine. I withdraw that.
20 CHIEF JUSTICE ABRAHAMSON: You want to be put in
21 "meanwhile, sample retention even with continued analysis of
22 privacy issues should be conditioned on the following:"
23 MR. THOMA: I will withdraw that. Now I
24 understand.
25 CHIEF JUSTICE ABRAHAMSON: Any comments?
1 Phil.
2 DR. REILLY: To the extent that the dynamic of
3 informed consent would be taking place with somebody still
4 in prison, there is a strong line of thinking to suggest
5 that a consent process is not valid under those
6 circumstances, that you can never get truly informed consent
7 to research from a prison population. That is a
8 well-known body of literature within bioethics. I'm not
9 saying I support it; I'm just saying it's there.
10 Second and separate comment. Would it be
11 inappropriate -- I'm not sure myself -- to add to the last
12 paragraph a sentence that says something like this: Efforts
13 to use convicted felon databases in behavioral and genetics
14 research should not be undertaken at this time.
15 MR. CROW: I don't like it. I think this is well
16 enough alone. I agree with your sentiments, but I don't
17 think we should be saying it here.
18 MR. SMITH: It sounds a little bit, Phil, the
19 other way, doesn't it? It sounds like we're trying to hide
20 something.
21 MR. CROW: I'm afraid that too much talk about
22 many of these things just generates the opposite of what it
23 is intended to do.
24 DR. REILLY: Fair enough. I appreciate the

25 responses.

1 [Laughter.]

2 CHIEF JUSTICE ABRAHAMSON: Jan.

3 MS. BASHINSKI: We have the term "forensic" in
4 here. I don't know if it matters at all, but did you want
5 to add "forensic identification"? I think this is fine.

6 MR. CROW: There may be identification other than
7 forensic.

8 MS. BASHINSKI: I think it ought to be confined to
9 the forensic identification uses for which the samples were
10 collected.

11 MR. ASPLEN: That was part of the conversation
12 that we had before.

13 CHIEF JUSTICE ABRAHAMSON: We've added "forensic
14 identification."

15 Paul.

16 MR. FERRARA: Jan makes a good point. We talk
17 about DNA database system, but implicit in that is obviously
18 we are talking about forensics DNA.

19 MS. BASHINSKI: I think it makes it consistent.
20 Are we taking out that last clause on the last
21 page? Did we say informed consent is going to be taken out?

22 MR. FERRARA: Just the apostrophe "s" after
23 "individual."

24 MS. BASHINSKI: The clause is still in.

25 MR. ASPLEN: The clause is in.

1 CHIEF JUSTICE ABRAHAMSON: I think it's then "have
2 been given." "Individuals" is plural.

3 MR. ASPLEN: "Individuals have."

4 CHIEF JUSTICE ABRAHAMSON: Any other
5 communications on this?

6 I had suggested to Chris, and I don't know what
7 his response is or what yours is, that if the group is ready
8 to adopt this, I would suggest we might consider not
9 communicating this until after we communicate it to the DAB.
10 It's a matter of courtesy and politeness.

11 MR. SMITH: You can talk to yourself about it.

12 CHIEF JUSTICE ABRAHAMSON: Yes, I will, and Paul
13 too.

14 MR. CROW: Why don't we appoint the two of you to
15 bring this up at the DAB.

16 CHIEF JUSTICE ABRAHAMSON: We'll talk about this.
17 We are going to.

18 MR. SCHECK: Handle it however you want, but they
19 already know about it, right? It's all public.

20 CHIEF JUSTICE ABRAHAMSON: Yes, they will. It's a

21 matter of courtesy.
22 MR. ASPLEN: It's a matter of formal transmission
23 to the Attorney General at this time or not.
24 CHIEF JUSTICE ABRAHAMSON: I propose that if it's
25 adopted, we don't make formal communication. I always think
1 you can talk to people and listen. We may have something
2 that we haven't considered.
3 I would like a motion, Judge.
4 MR. REINSTEIN: I move that we adopt the wording
5 of the final draft where we came up with the changes at
6 lunchtime.
7 DR. REILLY: Second.
8 CHIEF JUSTICE ABRAHAMSON: There is a motion and a
9 second.
10 Those in favor will say aye.
11 [Chorus of ayes.]
12 CHIEF JUSTICE ABRAHAMSON: Any opposed will say
13 aye.
14 [No response.]
15 CHIEF JUSTICE ABRAHAMSON: That's how I get
16 unanimity.
17 [Laughter.]
18 CHIEF JUSTICE ABRAHAMSON: So this is adopted as
19 drafted.
20 Phil.
21 DR. REILLY: Is there going to be public comment
22 now?
23 CHIEF JUSTICE ABRAHAMSON: Yes. It is now open
24 again for public comment.
25 Sara.
1 MS. CONLEY: I'm Sara Conley. My public comment
2 is in two parts. The second one is much longer than the
3 first.
4 The first one. I am getting to commit my second
5 outrageous public act. The first one was committed in
6 Berlin in 1989. I made copies of the Federal Advisory
7 Committee Act for the members of the committee.
8 Each person is to get two pieces of paper. One is
9 the Federal Advisory Committee Act and the second is a
10 schedule that the Global Criminal Justice Information
11 Network gave out in their briefing books about the schedule
12 of their meetings and their working groups about six months
13 in advance, and the contact person for those working groups.
14 I just want to say one thing about the Federal
15 Advisory Committee Act. I read it. The word "public"
16 appears between 8 and 11 times; "interested person," 2; "all

17 interested persons," 1; "any persons," 1; "citizen" is zero.
18 I would like to refer you to section 32 on page 1
19 about definitions, and on section 10(b) and (c) on the
20 requirements of what should be made available to the public.
21 That concludes my first part.
22 The second part is rather extensive. If anyone
23 has to leave or you want to terminate me --
24 CHIEF JUSTICE ABRAHAMSON: I may terminate me.
25 Dr. Crow will take over.
1 MS. CONLEY: Okay.
2 Public interest is the issue in matters of DNA
3 samples and the length of retention of the samples, whether
4 compelled or not, whether in a forensic setting or a
5 research setting, and the attending privacy issues.
6 Within the last two years I have had several
7 experiences as a volunteer in research studies. The first
8 involved an extramural NIH funded study which is ongoing.
9 I signed two informed consents on my first visit.
10 One was for release of medical records and the second was
11 for the taking of a blood sample.
12 I put restrictions on the blood sample because of
13 the vague wording in the blood sample informed consent. The
14 restrictions I put on the sample was no genetic testing.
15 Those vague words were "genetic testings may be
16 done," but under questions from me, I would not be told
17 when, if ever, genetic tests would be done, would not say
18 which, if any, genetic tests would be done. If genetic
19 tests were done, I would not be told of the results.
20 When I said I would not put restrictions in the
21 blood sample if I would be given the opportunity to consent
22 to any genetic tests and be given the results, I put the
23 restrictions on the use of the blood sample as no genetics
24 to be conducted.
25 I only learned where the blood samples would be
1 stored when I asked.
2 I then asked for the research protocol, which was
3 sent to me in a few weeks. I was hoping to see more
4 specific information regarding genetic tests, but the
5 research protocol was no more informative than the informed
6 consent on this matter.
7 Therefore, I let the restrictions stand.
8 It was only upon receipt of the research protocol
9 that I learned it was a multicenter study.
10 At a subsequent visit, I then commented to one of
11 the study administrators that it was unfortunate as a former
12 genetic researcher I could not remove the restrictions on my

13 blood sample due to the absence of options to consider
14 giving consent it provided with prior knowledge to what
15 genes and/or alleles would be tested for, if any, and I
16 would be told the results.
17 The administrator then asked if I would
18 communicate my position to one of the medical doctors. I
19 agreed.
20 This is where it really gets interesting. She
21 ushered me into the doctor's office where she was sitting at
22 her desk working on her laptop. It was only when I was
23 leaving that I commented that I didn't mean to interrupt her
24 work, at which point she informed me she was taking notes on
25 my conversation.
1 After this experience and the receipt of the
2 research protocol, I then asked for the contract with the
3 pharmaceutical company where the blood samples were stored.
4 I told her that I should have been told this before my
5 talking with her, and I then requested a copy of the
6 contract.
7 I called her the next day and asked that I wanted
8 her notes on our conversation that "you deleted" from her
9 laptop. By that, I do not mean just push the delete button.
10 She told me she had interviewed a lot of research
11 volunteers and some other comments, all of which was
12 irrelevant.
13 As of this date, I have not received a copy of the
14 contract between the storage site, that is, the
15 pharmaceutical company, and the particular site where my
16 blood sample was taken.
17 The second study was an intramural NIH funded
18 study beginning within the last two or three months. On the
19 basis of my experience with the extramural multicenter
20 study, I requested a copy of the informed consent be faxed
21 to me before my first visit. Which was done, and it was
22 much more informative than the other blood sample informed
23 consent of the extramural NIH funded study.
24 In that it was for genetic tests. It mentioned
25 the disease conditions that they were interested in, but not
1 the specific genes and/or alleles they would be testing for.
2 At my visit I did request a copy of the research
3 protocol before I would sign an informed consent. Since
4 this study was for genetic tests for genetic diseases, as
5 one would expect, this genetic test research protocol was
6 very specific. So I made a list of questions and I asked to
7 speak to the principal investigator.
8 The principal investigator came in. I asked

9 several questions, one of which was, were the samples going
10 to be kept on site? And the answer was yes.

11 Referring back to the informed consent, which was
12 still unsigned by me, figuring that I was "among my kind,"
13 that is researchers in a research lab, I queried what was
14 his rationale for the language in the informed consent that
15 the results of the genetic tests would not be communicated
16 to me.

17 I received the usual "you won't be able to
18 interpret the results." He then asked me if I was familiar
19 with two of the three genes of interest. I was familiar
20 with one of the three.

21 I then commented that I felt this language was
22 unwarranted and my lack of familiarity with two of the three
23 genes as of that day did not mean that I would not be
24 familiar with the two or three genes a few months from now.

25 By the way, this was a small study with four
1 co-investigators, all of whom walked by one at a time during
2 our discussion.

3 The bottom line is I did sign the informed consent
4 with no restrictions. I did not ask how long the blood
5 samples would be retained only because they were not going
6 off site, and I assumed, perhaps naively, that I could
7 request a termination date later.

8 There are informed consent forms just for DNA
9 samples, and I think this Commission should develop informed
10 consent for DNA samples for forensic research or other
11 research studies.

12 Thank you.

13 MR. ASPLEN: Thank you, Sara.

14 MR. CROW: Anyone else from the public who has a
15 comment?

16 [No response.]

17 MR. CROW: It has been moved we adjourn. Is there
18 a second?

19 [Motion seconded.]

20 MR. CROW: It doesn't call for a vote.

21 MR. ASPLEN: As always, thank to the Commissioners
22 and to the DNA Commission staff.

23 [Whereupon at 3:50 p.m. the meeting was
24 adjourned.]