

National Commission on the Future of DNA Evidence

P R O C E E D I N G S

Meeting III

November 22-23, 1998

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SUNDAY, NOVEMBER 22, 1998

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Chief Justice, Wisconsin Supreme Court

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Chris Asplen, Executive Director

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Dr. James Crow, Chair

Panel Discussion with Members of the Postconviction Working Group

Database Prioritization
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Director of the Massachusetts State Police Crime Laboratory

Conclusion of Panel Discussion on Postconviction Working Group Recommendations and Related Issues

MONDAY, NOVEMBER 23, 1998

Crime Scene Investigation Working Group Report

Road Blocks to CODIS: High Throughput Collection and Accessioning of Convicted Offender Samples
Dr. Amanda Sozer
Associate Director, Fairfax Identity Laboratories

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Michael Smith, Chair

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CODIS Offender Database Backlog Reduction Discussion

Public Comment

Remarks by the Chair

The Honorable Shirley S. Abrahamson
Chief Justice, Wisconsin Supreme Court

MADAM CHAIRMAN ABRAHAMSON: We are going to call the Commission meeting to order. I want to welcome you all to Chicago, although I think some of you can welcome us to Chicago.

We'll start out the meeting, if we can, with introductions of the Commission members.

So we will start with you, Jeffrey.

COMMISSIONER THOMA: Jeff E. Thoma.

COMMISSIONER REINSTEIN: Judge Ronald Reinstein.

COMMISSIONER HILLARD: Terry Hillard, Superintendent, Chicago Police Department.

COMMISSIONER GAHN: Norman Gahn.

COMMISSIONER FERRARA: Paul Ferrara.

COMMISSIONER DAVIS: Joseph Davis, retired medical examiner, Miami, Florida.

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

MADAM CHAIRMAN ABRAHAMSON: Shirley Abrahamson, Chair of the Commission.

COMMISSIONER CROW: Jim Crow, member of the Commission, and teacher at the University of Wisconsin. Or former teacher.

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

COMMISSIONER BASHINSKI: Jan Bashinski, Bureau of Forensic Services, State of California.

COMMISSIONER GAINER: Terry Gainer, executive assistant chief of police, Washington Metropolitan police department.

COMMISSIONER SCHECK: Barry Scheck, Cardoso (phonetic) Law School, New York City, and New York State Forensic Science Review Board.

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

COMMISSIONER SMITH: Michael Smith, University of Wisconsin Law School.

MADAM CHAIRMAN ABRAHAMSON: Several of our members were not able to be here today. Chris has spoken with several of them and especially spoken with Phil Riley and Jim Wooley about some of the issues we're going to hear and we'll interject their comments where appropriate with their prior approval.

The first item on our agenda today is remarks by me, and what I'd like to do very briefly is indicate an overall picture, give you an overall picture of what we are going to be doing this afternoon and then tomorrow.

First, we will be telling you; that is, the various chairs of the working groups will report and tell you what they have been doing, what their progress has been, and ask the Commission members for comments, suggestions, ideas, et cetera.

So we are going to hear from the research and development working group, we're going to hear from the crime scene investigation working group, a legal issues working group, and a laboratory funding group.

Secondly, we are going to hear from the postconviction working group. And you have had distributed to you their working draft, dated October 2, Recommendations for Handling Applications for Postconviction DNA Testing.

This draft or a previous draft was before us at a prior meeting. There were comments on it. They have made changes. A section of the draft is not yet completed, and we will be having the panel discussion of this draft with the Commission and see whether or not it is ready for approval, subject to the final chapter.

We will also be discussing in the next day and a half the issue that came up at our last meeting, namely CODIS and funding for getting rid of our backlog of testing data.

You have before you also -- it was sent to you -- the report and recommendation the laboratory funding working group, with a proposed recommendation to eliminate the convicted offender backlog via funding.

So those are, in essence, a broad overview of what the Commission will be doing in the next day and a half.

With that broad overview, I'd turn this over to Chris Asplen, the executive director. And he will give us a more detailed update on Commission business. Then we are going to go to Dr. Crow, who is going to do a report on the research and development working group.

Chris.

Update on Commission Business

Chris Asplen, Executive Director

DIRECTOR ASPLEN: Thank you, Chief.

First of all, I, too, want to thank you for being here today. I'm going to talk a little bit about some of the travels that I've gone on recently to kind of talk about the Commission's work. And inevitably, when I go somewhere, I see one of you folks also or I see one of the working group members and other folks who participate. So we recognized the extent to which your presence here and your participation in the Commission is only one of myriad of things that you do. So we appreciate your time being here.

Quite frankly, I couldn't have planned it any better in terms of the fact that here in Chicago they just lit up Michigan Avenue last evening. It's not snowing. While it is windy, it's actually pretty fair weather here for Chicago. So welcome to Chicago, and we hope that you enjoy the evening here.

In terms of Commission business, and particularly staff business, I just want to give you a picture of some of the ways that we've been trying to communicate the Commission's work to other people at different meetings and other organizations.

Recently at the Promega conference in Orlando, Florida, myself and Dr. Forman and Robin Wilson, along with members of the Commission were present to present at the Commission in a panel forum the work that we are doing here.

And even though we were slated as the last session in a four to five day conference and it was a Saturday and it was the afternoon and it was Orlando Florida, we still kept about 200 people there. Because that was the level of interest among that particular group, and it was substantial. And we got some really excellent, insightful questions and comments and it was a very beneficial meeting for us.

Some other meetings that I've gone to and spoken at, the National Criminal Justice Association meeting in Las Vegas over the summer again to talk about the Commission's work. I've spoken about the Commission's work to the National District Attorneys' Association, DNA training two times in South Carolina.

I've spoken to an organization that advises the National Institute of Justice Office of Science and Technology called the Burkhalter (phonetic) panel and explained to them the work that we are doing. I just spoke on Friday to the Fourth Annual CODIS Users Group meeting in Arlington, Virginia, and talked to them about the work we are doing. And there also got some excellent comments and questions about some of the recommendations that we're considering.

As we go along, when the opportunity arises, I will certainly communicate to you the comments that I've heard, the questions that have been raised.

We actually had one individual who was at the conference on Friday fax me a letter here at the hotel voicing some issues and support for some of the things that we are doing. So again, as we get the opportunity I'll continue to do that.

If there are other opportunities that any of the Commissioners see to get the word out there, I would appreciate hearing about that.

But the important reason that we need to get the word out is not so much our communication of the information, but really what it's about is bringing those other individuals into the Commission process.

That by nature of the fact that I am there talking about the issues and more importantly soliciting their information, their input, it does become part of the Commission process, and from the beginning we have tried to solicit as much information as possible.

The other thing I'd like to do at this time is introduce to you Robin Wilson, who is the most recent addition to the staff who was not here for the last Commission meeting.

Robin, if you could just stand for a minute.

You've probably all heard Robin on the telephone getting you whatever it is that you would need to do your work here with the Commission. But now you will get the opportunity to meet her and she is a wonderful addition to the team. She is a great asset and has already, in a relatively short amount of time, made my life and Dr. Forman's life a lot easier and I hope has really made things easier for you folks also.

I wanted to talk about the structure of the meeting for just a moment. What we did very intentionally was structure today and tomorrow's meeting in an effort to address the concerns that came up at the last meeting. We have invited Dr. Carl Selavka to come and speak to us regarding some prioritization issues. We have also invited Dr. Amanda Sozer to come to speak to us about database collection sample issues.

Those are a direct result of the issues that were raised at the last meeting. You may remember in the context of the CODIS database backlog discussions we began to address those concerns and decided we really needed some more information in order for us to competently and thoroughly address the backlogs.

So we brought these folks in in an effort to do that, to provide the information so we can make some decisions.

Also, the other issue that came up at the last Commission meeting was the issue of privacy in the context of the database backlog. So we addressed that issue specifically in the last legal issues working group meeting, came up with a recommendation in that, and as such we will discuss that at the Commission also.

So again, what we have tried to do is address the issues that were of concern and interest at the last Commission meeting in an attempt to get to some resolution on some of these issues that we're dealing with.

Finally, two things, logistical matters. Number one, I've been asked by the AV people to ask you to try to remember to speak into your microphone when you speak so we have a good tape of the meeting.

But also, if you can think about if you'd like to join us for dinner this evening someplace, we will try to get a head count and make some arrangements at a local restaurant here and perhaps get together as many folks that are interested for dinner this evening. So before we finish here we will talk about that a little bit more. Thank you.

Research and Development Working Group Report

Dr. James Crow, Chair

MADAM CHAIRMAN ABRAHAMSON: We are going to turn in a very timely manner to Dr. James Crow who is going to give a report by the research and development working group.

Jim.

COMMISSIONER CROW: Is it better if I report from here or should I go up to the podium?

MADAM CHAIRMAN ABRAHAMSON: Wherever you're comfortable.

COMMISSIONER CROW: I'll stay here then.

Before I talk about this, I should mention a logistical question, my own problem. I will be unable to be here tomorrow and the organizers were kind enough to put me on the program today. Lisa, however, will be here. And I hope and expect fully that we'll raise questions and that will call for comment from members of the group. And if they can be transmitted to me today, wonderful, or by E-mail or some other way. But if not, and even preferably, pass them onto Lisa. And she and I, of course, are in very close touch.

The working group has met a couple of times, but I can't say that its progress has been so great. This had better be called a non-progress report than a progress report. But I will have a few things to say, and I will proceed to do so.

The first thing to discover is that there are a number of overlaps with the legal issues group which we mutually discovered and fortunately it's been planned to have a group meeting together on December the 4th, so we'll hope to take up a number of these questions at that time.

We've had two meetings, as I've said. Most of these have been freewheeling meetings without very much resolution but we've tried to pick up the threads and I've written out a sort of tentative statement of a number of things that were discussed and some of the conclusions that perhaps will be reached. I would like to present that to you with the understanding that this is very preliminary. I will read this but I did bring along copies and any of the Commission members who want them are welcome to them.

The research and development working group met on July 20, 1998, at the O'Hare Hilton here in Chicago. Several of the members also met on October 7, 1998, in connection with a Promega Symposium held in Orlando, Florida, about which you have heard.

A large number of topics were discussed and we reached some tentative consensus on a few of them. Some items are presented here mainly to get comments from the Commission and advice as to which directions to go.

The group has not taken any formal action, so everything is tentative. We solicit advice, as I said before.

At the second meeting we took advantage of the presence of several people from abroad who were attending the Promega Symposium. These included, or were, a Dr. David Werrett, Rebecca Sparks, and

Peter Gill from the Forensic Science Service of Great Britain. We also heard from Dr. Angel Carracedo from the Institute of Legal Medicine in Spain.

The British experience with handling a large felon database will provide useful information, has already, as similar problems and opportunities arise here.

The database now stars 391,000 samples -- or it did a few weeks ago -- with a backlog of roughly 100,000. The database grows at a rate of about 45,000 per year. The procedure is to put information immediately into database, but if an individual is acquitted, the sample is removed.

Most crime in the UK is committed between the ages of 14 and 21, and most first offenders are 19 or younger. Recidivism is high, but after age 30 people tend to be leaving rather than joining the criminal population.

I might add that I wish we had more detailed age distribution by recidivism or recidivism by age.

The number of reported matches that they find per week ranges from 300 to 500. We also heard in Dr. Sparks, about which I will say very little. She reported on the detailed plans for improved technology in the future, particularly with more and more use of automation. It was quite impressive to hear. I only wish I understood it well enough to describe it to you in some detail.

Although we have much to gain by the British experience, there are some important differences. One of necessity is the dealing with 50 separate states in this Country, which is not the same issue in Britain.

Our first task, our first assignment, as I understood it, is to do some technology projections for the next two, five and ten years. One of our members prepared a chart giving this kind of information or our guesses about this kind of information, and I have that available for distribution for anybody who wants it, with the clear understanding that this is the first cut as is everything else I've been saying.

This table is based mainly, but not entirely, on the discussions of the July 20 meeting with some modifications suggested by group members. This is a working document and undoubtedly will be modified with further discussion.

To summarize a few of the things, we expect that more and more laboratories will shift from RFLPs to STRs. The trend is strongly underway right now, including the use of florescent detection and multiplex systems. The trend has been underway for some time.

RFLPs, having a large number of alleles, provide much more information per locus. The limitation, however, is that the number of loci is not large and the need for binning procedures introduce troublesome statistical complications.

STRs have the advantage of almost always providing an unambiguous profile. Furthermore, they are amenable to PCR procedures, so therefore much smaller quantities of DNA can be used.

The limitation of the smaller number of alleles per locus is offset by the much larger -- in principle, almost an unlimited -- number of loci.

This is particularly true if close relatives, and particularly, particularly true if sibs are involved. I will come back to this, but I will mention it right now. That a pair of sibs always share 1/4th. That is, the conditional probability of a second sib sharing the first sib's genotype is 1/4th of any particular locus, irrespective of the rarity of the gene alleles. So that gives us a target relationship to strike at, if we are looking for how many loci is required for certain definitive level of testing.

We can expect multiplexing quickly to become the rule. It's already beginning to. CODIS has established 13 STR as the canonical loci, and we expect, as well as along with the process of obtaining allele frequencies for these loci, in a number of populations.

The definition of individual populations is being continuously defined. For example, the East Asian group is now divided into Japanese, Chinese, Korean and Vietnamese.

We can anticipate that most laboratories will soon be prepared to employ some or all of the 13 loci. The FBI or allele frequencies for those 13 loci are promised to be publicly available in about two years and we expect increasing usage for these data for calculations.

We expect STRs, and these 13 loci in particular, to dominate for at least five years and possibly longer. During this period we also expect increased automation and miniaturization. In part, this will be automation and miniaturization of procedures already in use, the same kind of STRs. In part, it will be discussion of new kinds of systems such as chip technology and SNPs, Snips as they are called in the jargon. I'll come back to this.

The CODIS database from convicted felons now has, we are told, over 190,000 RFLP profiles of convicted felons. The database for STR loci is slowly increasing with the anticipation of greater use of these.

We expect it to be well established in five years. But that depends to a large extent on funding, as some of the others groups have discussed. By that time there should be linking among the various States. For comparison, as I said, the British database now has more than 500,000 profiles.

It will probably be possible in five years to make international comparisons. Some can be made right now, because the six STR loci routinely used in the United Kingdom are included in the core of 13 FBI loci. So some comparisons are possible now.

In five years the human genome project will be essentially complete. This will generate a host of new possible markers. By ten years, new systems will certainly be possible.

A serious issue, and one which we must surely address, is the extent to which laboratory systems should keep up with the state of the knowledge. The CODIS markers systems needs to have some stability, because we can't go around changing the system every five years when the time and money investment is so large. In ten years the new systems superimposed on the existing ones will provide new opportunities and then they may also lead to confusion.

We expect greater automation of laboratory procedures and computerized analysis. This should increase the accuracy and reduce the expense.

I say that without full confidence. It seems to me the technical innovations which are supposed to reduce the expense hardly ever do. But we can still hope.

This should increase accuracy and reduce expense, as I said. It will not, of course, replace human judgment. One place in which computer analysis is likely to play a larger role is with mixed samples for which the calculations can be complicated.

There seems to be little need for a recommendation from our group on developing new systems and improving existing ones. New techniques are being aggressively researched by private laboratories, better laboratories, and universities, quite regardless of what we may well say.

The issues are how rapidly these better methods, which are sure to come, should displace an expensive system which is already in place. Databases based on STRs should be around for a long enough time to offset the cost of setting them up.

A note to myself to remind you people, we were wondering how much technical details should go into a report like this. And one possible disposition of this is to have an appendix in which the technical procedures now and anticipated for the foreseeable future are written in appendix form so as not to interfere with the telling of the story, but nonetheless to be available for those who would like it. We have plenty of expertise on the Committee, whether it's writing skill or not I don't know, who can write up these report as an appendix. Let me have advice from you, not necessarily now, as to how much this should be a textbook in other words.

Two other aspects I want to talk about technically. Mitochondrial DNA markers have been available for some time. These have two advantages. One is that since there are many, many mitochondria per cell, samples that are too small or too degrading for nuclear analysis may be informative for mitochondria. So we can expect, and we already are finding, increasing use.

The second advantage is that mitochondria are inherited through the female line and this often permits tracking ancestry and remote relatives. This was used, as all of you in the room know, to identify the Romanoffs a year or so ago.

Until recently there was no way to track the male line of decent. This is no longer true I'm happy to say. There are now several good Y chromosome markers and we can expect more.

Mitochondria and Y chromosomes are one area where SNP technology can be especially useful. The Y chromosome is turning out not to be the depauperate blob of DNA that it was once thought. It determines maleness, but we didn't know anything else for a long time. And there are not any good genes on the Y chromosome, but there are a lot of good molecular markers that are turning up day-by-day.

These gender-specific methods may well find their major use outside the criminal field, as exemplified by the recent study of Thomas Jefferson's descendents.

A little bit about improvements and reliability, the robustness and speed. The working group has had little discussion of this subject. One reason for not doing a lot with it is the existence of the DNA advisory board and the exact jurisdiction between these two is an interesting question for some thought.

We need to consider, in any case, improvements in technology and protocols and in training. We expect in the five year view to have greater automation with resulting increase in accuracy. Over the longer period there will be technology for sample handling and analysis at the scene. A prompt determination of the profile at the crime scene can speed the identification of the suspect, and perhaps more important, quickly eliminate innocent persons with important saving of time and human anguish.

Despite improvements, technical and human error are likely to remain considerably more probably than random matches. As techniques become ever more sensitive, small amounts of stray DNA, possibly planted, can become an increasing problem, and we hope to address that.

The most likely human error that could lead to false incrimination is a sample switch. This can be reduced, as can all other errors, by scrupulous attention to details. Also in performing two PCR reactions with a couple of redundant loci between the two, will permit detection of some possible mix-ups.

But finally, as was emphasized in both NRC reports, every effort should be made to preserve material for subsequent re-testing should there be the need for this.

We want to say something about the question of inferring ethnicity or phenotypic characteristics from a DNA sample. It is already possible in many cases to state the race of a person contributing a DNA sample with a high probability of being correct. With the canonical 13 STR loci, this should be practical in a great many cases I think right now.

I took one example. I chose it, so it isn't really random. But I picked three STR loci. And with those three loci, and particular alleles in them, the frequency of this profile in the black population was about three per million, and in a white population about two in ten billion.

The likelihood ratio here is 2,500. So the probability is 2,500 times as great of finding this particular type in the white population as in the black population. That must be considerably more accurate than eye witness identification of race that is ordinarily used as a way of finding leads.

I notice, however, on reading the report of the legal issues group that they reported a likelihood ratio of 2,500, that gave the wrong answer. Personally, I'm curious to see the data. I don't think there have been enough possible tests of this particular procedure to make a mistake of 1 in 2,500. But in any case, one doesn't expect it to be right.

But the use of purely statistical manipulations with existing data is a possibility right now and as a way of finding leads it offers considerable promise. It also raises ethical and social issues as will clearly come up.

We need to, and I hope we can, do the kind of proper calculations here. Really try all possibility combinations, or at least a very large sample of possible combinations, to see how often one can expect a significant likelihood ratio between two different racial or ethnic groups. The larger the number of loci, of course, the more reliable this particular procedure is.

The question of phenotypic characters is more problematic, both ethically and genetically. The loci now used for forensic analysis are likely to be now used and likely to be used in the future are not associated with any external traits.

And it's an important consideration in developing new systems that what's used as DNA markers for this kind of investigation not be associated with known genes that had any phenotypic effect.

So determining that, for example, a DNA sample is left by a person with red hair is not practical now. How soon it will be, I don't know. The number of common traits that are caused by single gene differences is not likely to be high. It's certainly not high and I think it's not promising that it will ever be high. There may be rare traits, however, that are identifiable.

Using polygenic systems or identify traits based on polygenic systems seems less probable, but I hope we can discuss this. The genome project and other research can be expected eventually to identify some genes leading to identifiable traits.

But this involves a quite different kind of research than goes on for the detecting of new forensic systems, because in the detection of forensic systems one deliberately looks for traits that are not associated. I mean, looks for markers that are not associated with traits. And I, for one at least, hope that that tradition can be maintained.

I will mention at this time again that this is one of the issues that we certainly want to discuss with the legal issues working group, and we have a meeting schedule for December 4 to raise this and other questions. I hope you will ask members of either group for questions you would like to have discussed.

The last part I want to say a bit about has to do with population structure and the existence of near relatives in the database. The question of relatives did come up in our discussion.

There is always the possibility of a suspect being a relative of the source of the evidence sample. Such relatives may not know of each other's existence, particularly if they are half sibs. There are probably quite a number of people who are half sibs and don't know it.

For more remote relatives this is not much of an issue, but for close relatives, it is. I have done some calculations based on four loci of the STRs and just how often, I ask how often one would find a match of unrelated persons and different degrees of relatives, and let me give just a few sample numbers. I did this for African Americans, Caucasian, and Hispanic populations.

Incidentally, the document from which I'm reading here, I have extra copies and I'm certainly happy to have the Commission members have them.

For example, I took the four loci that I had that were easily available and calculated it. And then I extrapolated to 13 loci, on the assumption that these four were representative. Actually, the four are a little more sensitive than the rest of the group, so perhaps these are slightly off from that magnitude, slightly less sensitive.

With 13 loci, the average probability of a random match is 2 to the minus 13th power. That's the reciprocal of 2 followed by 13 zeros. It's as small a number as we're likely to want to know.

How much difference does it make if the population is structured. We have used, largely following Bruce Weir, the symbol theta to stand for the measurement of population structure. This is essentially the same as Sue O'Rides (phonetic) quantity called AFST.

The estimates for these values are usually less than 1 percent. And if I calculate from the equations in our 1996 report, these make no difference of the size of an order of magnitude, and especially if we use the conditional probability equations of Balding, Balding and Donnelly. That changes this probability from about 2×10^{-13} to about 4×10^{-13} , for a theta value of .01.

So it looks to me as if most of the time doing these corrections will not change the calculation by an order of magnitude although if it turns out we have underestimated the degree of population subdivision, then it might change it by an order of magnitude, or even two.

What about half sibs and what about full sibs. Half sibs, that drops from 2 followed by 13 zeros to 2 followed by 10 zeros. So it's still very unlikely that half sibs would share a phenotype profile.

What about full sibs? Let me go back to full sibs for just a minute. It's possibly obviously, possibly not, that full sibs are different from other relatives because two persons who share both parents can have two sets of genes and share these two sets of genes. That's not possible with other degrees of relationship unless the gene happens to be common. So this means that for full sibs, irrespective of the rarity of the gene, there is a conditional match probably of $1/4$. It would be slightly larger than $1/4$ because other genes contribute, but the $1/4$ is the major factor in this.

In any case, that calculation, the probability of full sibs matching the average probability and the STR database is about 1 in 10,000. If you raise that to 15 loci instead of 13, that drops to about 1 in a million.

So what I'm interested in concluding from this rather cursory analysis, fortunately we have some data from Jack Rubarti (phonetic) who loves to analyze large bodies of data, in which the kind of things that I've done on a small sample can be done on a large sample or even the extended set of data.

Two points stand out. One is that the theta correction makes very little difference if one uses the value of .01. We already knew that, but I'd like to point it out again. Second, with additional loci even full sibs have a small match probability.

Paradoxically, as the data on various sub-populations become increasingly available, increasing numbers of loci will render them less needed. An object of the much discussed interim ceiling principle of NRC1, which was so roundly condemned, was to have a procedure which was independent of racial and ethnic classification.

In looking to the future, it's not very far in the future that with an increasing number of loci this objective may be obtained in a scientifically more acceptable way. And if we have a large enough set of loci that they would distinguish full sibs, of course they will distinguish individuals of any lesser relationship and it will be no longer necessary to ask what ethnic or racial group this particular database comes from.

One of our tasks is to ask how soon this utopian state will be arrived at. Thank you, Shirley. That's all I have to say right now.

MADAM CHAIRMAN ABRAHAMSON: Thank you, Jim.

Are there any questions or comments or suggestions?

Barry?

COMMISSIONER SCHECK: What was the view about mitochondrial testing in terms of its discriminatory power? Did you look into that at all?

COMMISSIONER CROW: The discriminatory power is not large compared to a large number of nuclear loci. It's large compared to any one of these. Maybe that's all I can say is it's quantitative. I'll tell you what you already know, but the usefulness of mitochondrial DNA I don't think is so much for forensic kind of purposes as it is for the various other kinds of uses that are certain to be found.

COMMISSIONER SCHECK: I don't think that's true at all. In fact, what we're seeing increasingly is so many of these cases can turn on the mitochondrial analysis of a single hair.

And what's becoming interesting to try to do -- and we've run into this problem in a number of our innocence project cases -- is that sometimes one technological challenge -- and I throw this out to you because I've gotten a lot of different answers on it -- is the extent to which you might be able to extract mitochondrial DNA from a semen stain, particularly a mixed stain, so you can get the male pattern and see if you can match that to the mitochondrial DNA of a hair.

I see a lot of cases where that becomes critical in order to make a case. And I think what you're finding forensically -- I mean, I really commend your group to look at this -- is that many investigations are turning on the analysis of extracting mitochondrial DNA from a hair.

COMMISSIONER CROW: I realize, and I guess I said it, that mitochondria does have the tremendous advantage that there are many more mitochondrial particles per cell, so that a tiny amount of tissue can yield a result. But it's still not as powerful.

COMMISSIONER SCHECK: It's not as powerful, but what I'm saying is forensically it's becoming extremely important, particularly if you have rapists, for example, that use condoms. Which, in the year of DNA, many law enforcement people are warning us about, we're going to be making cases based on hairs.

COMMISSIONER CROW: Pure sperm shouldn't have much mitochondria, but there are enough other tissues around to have it. I should think the Y chromosome is going to be increasingly useful in this context.

COMMISSIONER BASHINSKI: You had a question about the level of technical detail that should be in this. Listening to your description of where we are with STRs and where we're going, I think it's going to be very important for this document to clarify for the general public and for the legal community the degree of acceptance of these -- that this technology has and the widespread use that is coming with technology. And I think we do need to have clear explanations, at least in an appendix, of how these technologies are different and how they are similar. Because I think there is a lot of misunderstanding and a lot of confusion whenever we start talking about new technologies. Sometimes it isn't really that much newer, and we don't want to confuse people.

Anyway, I think the whole issue of what is going on now is going to be very important to make very clear as a follow-up to NRC's work.

COMMISSIONER CROW: I rather expected to hear that response from a large number and I think we probably ought to do it.

One dilemma that we have -- everybody does -- but in writing the NRC2 report we were constantly admonished to make the report simple so any child can understand it. And then as soon as the critics landed on this, they accused us, quite properly, of over-simplification, and therefore making some mistakes. They are minor mistakes, but they're mistakes. So there is a fine line to follow here.

MADAM CHAIRMAN ABRAHAMSON: So you use appendices.

COMMISSIONER CROW: I think appendices is a good way to do it.

COMMISSIONER THOMA: I was going to wait to talk with you later, but I agree with Jan that that would be very appropriate.

COMMISSIONER GAINER: I was simply going to affirm that. And I think one of the audiences of that are the CEOs of either police departments or potential lab directors and members of the general assemblies when they try to figure out how much money ought to be put in this and when.

So it's especially important when you talk about 5 years, 10 years, 15 years. Because there is a misconception if you invest today, they can't see however you'd want to be changing your strategy and changing the number of forensic scientists you need.

And that has to be done very simply so the members of our elected officials can understand that.

COMMISSIONER CROW: Well, another point that I probably should have said, and that is I think we should clearly list the advantages and disadvantages, because every system has both.

MADAM CHAIRMAN ABRAHAMSON: Were there any other comments?

COMMISSIONER THOMA: No. That's the only comment I really have.

DIRECTOR ASPLEN: I would just say for any of the Commissioners who are interested in that meeting on December 4, as Dr. Crow said, it is an important issue. The interconnection between the work of the legal issues group and the research and development group. That meeting is going to be here in Chicago, but it will be at the airport. It will be at the Hilton.

No, it's not at the Hilton. But it will be near the airport. And as such, in an attempt to make it more convenient for folks to fly in or fly out.

DR. FORMAN: It will be at the Comfort Inn, which is a stone's throw from the airport. A new facility we are told.

DIRECTOR ASPLEN: But what I wanted to do is make the offer, as we always do, to all the Commissioners who would like to attend that meeting. All you need to do is to let us know. Call Robin and we will make sure that the travel contractor gets in touch with you so that any of the Commissioners who want to go to that can in fact do that on December 4. I believe that's on a Friday. Again we made it close to the airport so that you can fly in and fly out the same day and reduce the travel time.

COMMISSIONER CROW: One of the speakers that we had at our Promega meeting was Peter Gill from the forensic service. He didn't tell us a thing about what they are actually doing, but he is a member of the Commission in Britain to look at this question of identifying traits as opposed to just racial. So I think we have to look at it.

COMMISSIONER SCHECK: Red hair, I was surprised because when I was over in the UK they said they made a lot of progress on red hair. Dr. Weir said that to us as well when we were last time in Chicago.

COMMISSIONER CROW: I think any human geneticist, even me, would say red hair is the most promising single trait to be monogenic and conspicuous. I think eye color, skin color doesn't mean much. So it's hard. It's hard to think of good -- albinism perhaps could be used, but that is a fairly rare trait.

MADAM CHAIRMAN ABRAHAMSON: Is there any other comments, suggestions?

Well, thank you very much. And not only is everyone invited to the December 4 meeting, but the staff will circulate a calendar for the year to everyone showing all the meetings as of that date, all the working group meetings as of the date. And we will keep updating that as we go along so that everyone can know that.

Thank you very much Jim. And Jim -- I'm sorry, Barry?

COMMISSIONER SCHECK: I just had one thought. One of the things that when I was in the United Kingdom looking at their databases and their figure of 3 to 500 hits per week that struck me, was that that number, by their own admission, is slightly inflated. Because when people are arrested in the UK, they don't have the same fingerprint capacities that we do to identify people who are using aliases. So some of the matches are matching people to each other who are using aliases. And being from New York, even when I started as a public defender in 1975, we always had the capacity to use the fingerprint system to identify everyone arrested in the State with aliases.

But lately I've been traveling other places in the country and I've ascertained that that is not as uniform as I thought it was. I was in Mississippi last week, for example, and they were telling me they don't have that capacity.

What I was wondering about is to the extent to which your group can sort of give us a report comparing AFIS, the AFIS system and potentially the DNA databank system, how those things could be used jointly.

The British model is based completely on the principle of treating the DNA just like fingerprints, both legally, ethically, and practically. And they are better with DNA than they are with fingerprints it turns out.

COMMISSIONER CROW: We have reams of data from David Werrett, as you probably guess. I expect everyone has the same thing.

COMMISSIONER GAINER: What is their turn around on identification of DNA?

COMMISSIONER SCHECK: Well, they make deals. They're a very unusual institution as he explained to us the last time. They actually are -- the forensic science services makes contracts with local police

departments as to how much of the services they want. And in certain areas they will contract to take a certain number cases on a high priority basis and they turn them around within two weeks.

And the reason that's important is that they found when they don't turn them around in two weeks then police find the typing less useful so the point of catching these people in some other way in many of these instances.

But they have the capacity in many of these cases to turn them around in two weeks and they guarantee it.

MADAM CHAIRMAN ABRAHAMSON: But not all cases?

COMMISSIONER SCHECK: Plenty of cases.

COMMISSIONER GAINER: Unless I'm missing something, given our goal in an AFIS identification, a fingerprint is 30 to 60 minutes. Is that what you're shooting for now, Superintendent?

COMMISSIONER HILLARD: Definitely.

COMMISSIONER GAINER: It would be interesting to see how we would ever think in our system that would match up.

COMMISSIONER SCHECK: I guess what I'm thinking about more is to what extent does the AFIS system include a databank of unsolved crimes and fingerprints taken from unsolved crimes. I was very struck by the San Antonio experience. And I've asked this question a lot. I haven't seen -- I mean, how much of a cold case file is there for fingerprints in most jurisdictions? My impression is not very much.

COMMISSIONER BASHINSKI: It's extensive in California and I think most of the States that have had ongoing AFIS systems for a long time, and that's one of the primary goals is to keep your unsolved cases and then you do get hits.

COMMISSIONER SCHECK: That's what I was thinking of is finding out if we can get more data on that and see how the two databases could relate. I think that might be useful.

MADAM CHAIRMAN ABRAHAMSON: Superintendent Hillard?

SUPERINTENDENT HILLARD: Madam Chairman, I wanted to ask Dr. Crow in England, the national database, who maintains it over there.

COMMISSIONER CROW: I guess it's the forensic science service.

Barry knows more about that than I do.

COMMISSIONER SCHECK: They maintain it centrally.

SUPERINTENDENT HILLARD: When you say centrally, what agency?

COMMISSIONER SCHECK: Forensic Science Service will maintain both the printouts and the samples.

COMMISSIONER CROW: And then they store the samples, too. They have the liquid nitrogen or other refrigerated systems.

One thing that impressed me -- we'll see how much general agreement there is on this -- was how much simpler it is to do this in England than in the United States, mainly because there is just a single jurisdiction.

COMMISSIONER SCHECK: Well, you haven't been to Scotland or Ireland yet.

COMMISSIONER CROW: I forgot about the Irish.

COMMISSIONER SCHECK: They have nothing in there from Scotland just about. It doesn't seem so simple.

COMMISSIONER CROW: England itself is pretty much homogenous in this respect.

MADAM CHAIRMAN ABRAHAMSON: Because Dr. Crow will not be with us tomorrow and our public comments is not until tomorrow afternoon, nevertheless, Jim, if you would take any comments or questions or suggestions from the audience, we would appreciate it. Is that all right?

COMMISSIONER CROW: Sure.

MADAM CHAIRMAN ABRAHAMSON: Dr. Forman?

DR. FORMAN: I just wanted to clarify a little point about who maintains the samples in England. They are maintained by the Forensic Science Service, but it's as a contract with the individual police departments. So the samples are actually owned by the individual police departments and they are contracted out to the forensic science services for maintenance and caretaking. If that makes a difference.

MADAM CHAIRMAN ABRAHAMSON: Thank you.

There was someone else. Would you state your name, please.

DR. CROUSE: My name is Cecelia Crouse and I'm from West Palm Beach, Florida, and I have three comments.

One is as a red head I want to let you know I didn't do it.

But I also wanted to make you aware of what is going on in our State with regard to admissability hearings and population databases. The last couple ones that we've had we have experts down there who are saying that databases go stale after five years. And they're saying especially in States like Florida and California where there is a lot of migration in and out that that is one of the major reasons for genetic drift. And I just thought I wanted to make you aware of that, that the judges like that. They think that makes sense.

The other thing that I'm interested in is when you're considering match probabilities, do you take into account the higher mutation rates in these loci versus RFLP?

COMMISSIONER CROW: The higher mutation rates?

DR. CROUSE: With regard to siblings.

COMMISSIONER CROW: I think for pure matches it doesn't matter. If we were doing paternity testing or something like that mutation rates would matter. But I think for matches, the likelihood of mutation making up the major portion of the cells is so remote as to be ignored.

DR. CROUSE: In my family of 35 members we have three mutations.

COMMISSIONER CROW: Mutations do occur, it's just they don't confuse the analysis.

DR. CROUSE: I mean strictly with STRs. Thank you.

MADAM CHAIRMAN ABRAHAMSON: Thank you.

Are there any other comments, questions, or suggestions for Dr. Crow in that group?

Hearing none, then we will complete that and thank you, Jim.

And I'm happy to also report that one of the things that has been bothering the staff and me is that we didn't have a vice chair so that if I couldn't make a meeting or needed assistance in the interim that there was nobody. So Jim Crow has graciously agreed to be vice chair as long as I agreed to not impose any duties on him. That was our agreement.

COMMISSIONER CROW: That last clause is very important.

MADAM CHAIRMAN ABRAHAMSON: I know you began to pale visibly, so I was very careful to add that. Thank you, Jim. And you're off to your other meeting or staying for this one?

COMMISSIONER CROW: I'm going to stay for the rest of today.

Panel Discussion with Members of the Postconviction Working Group

MADAM CHAIRMAN ABRAHAMSON: Good. We are now going to move into our panel discussion with members of the postconviction working group. Chris will introduce this and handle it. They're going to sit behind us and people that are in this row should sit here.

Is that what you want?

DIRECTOR ASPLEN: I think that would be easier than craning our necks.

MADAM CHAIRMAN ABRAHAMSON: Chris, you take over.

Jim's working draft is here and we'll just hand them out.

DIRECTOR ASPLEN: Members of the postconviction working group, come on up and bring your name card with you so we can know who's speaking.

As you know, the past -- the first, I should say, two commission meetings Professor Berger came and spoke to the Commission regarding the progress of this particular group's work and the recommendations that were being developed. Recommendations that were originally called protocols, then became guidelines, and are now recommendations.

However, at the last Commission meeting the discussion that occurred was such that we felt when it came time to present what is a tentative final draft, that it would be best to have the entire working group come to address the Commission.

Because what we found was that while this group has had the opportunity to think about, talk about, analyze these issues for almost a year now, that it was difficult to communicate with one or two people doing that at a Commission meeting and trying to catch the entire Commission up to speed on the analysis behind the recommendation. Which is really at this stage the important thing that we want to take this opportunity to discuss.

So we asked the working group members to attend, which but for a few we were all able to do, and again I appreciate their time and consideration.

They have met almost monthly since the inception of this particular project and have been working very diligently. And it's been a challenging effort because of the extent to which you're dealing separate, independent components of the system that had to at one time express their independence and their particular advocate's view or their view their part of the system, but at the same time we had to create a document that came together in a way that worked as a system.

So that's what we have done. And we'd like to take the opportunity to have you ask questions about the recommendations of the individual Commission members that are the working group members and as a whole.

Also, what is being passed out to you are some of the results of the surveys that we sent out. About a month and a half ago we began the process of getting input from individuals other than the Commissioners. And we selected approximately 30 prosecutors, a number of law professors, defense attorneys, and scientists, sent them the recommendations and said this is what we have done, please take a

look at it and give us your input. We provided them a three page survey simply to make their job a little easier, but encouraged them to go beyond that survey if they felt comfortable doing that.

And the response has been, generally speaking, very good. There are a lot of very substantive comments made. They've also, by and large, been very positive. There are one or two that are less than positive, but for the most part they've been very positive. So with that, we offer the surveys to you to review at your leisure.

With that, let me begin with the introductions. What I will do is I will simply introduce all the members at one time in an effort to save time rather than change them.

Starting at my far right we have Kevin Curran who is the Federal Public Defender in St. Louis. Kevin has provided not just a wealth of defense perspective, but a tremendous amount of humor in the process, too. Again, we appreciate his participation.

I don't need to introduce Professor Scheck.

Barbara Morgan is the elected solicitor in Akin South Carolina. Has been the elected official there for quite a while, and is a former president of the Solicitors Association in South Carolina.

To my left, Commissioner Reinstein. Again, I don't believe Judge Reinstein needs any introduction. He is a Commissioner and has been introduced to us a number of times. He is the chair of this particular group.

Kathryn Turman, again, Commissioner. Was the chief of the witness unit in the Washington D.C. U.S. Attorney's office; however, now is the acting director of the office of victims of crimes.

Charlotte Word is a noted scientist from Cell Mark and has really been the foundation of the technological aspect of this and as such has been able to provide the information and meaning to really educate the readers about the technology that we are using. And again, we greatly appreciate that very firm foundation.

Professor Berger is again one who needs no introduction because she has been with the Commission for the past two Commission meetings, has already been the force that has tied all the different chapters together. Wrote the introductory chapter and then really helped to bring the entire body of work together in what we hope is a cohesive way.

And then finally, on my far left Dennis Bauer is a prosecutor from Orange County. Dennis just recently won an honor from the Federal Bureau of Investigation as one of its pioneers in DNA technology. Because Dennis has been in this field and has been using and learning about DNA from essentially the beginning of it's history here in the U.S., and as such has provided a very sound prosecutorial base to the work that needs to be done.

So with that, let me turn it over first to Professor Burger to talk about the introductory chapters.

And I think the way we would proceed most efficiently is by going chapter by chapter. Having the representative from each chapter talk about it briefly, and then taking questions at the end of each chapter. And then we will move to some general questions at the end.

PROFESSOR BERGER: We had a number of goals with regard to the introduction. For one thing, we thought that this might be read by quite a wide spectrum of persons, ranging from family members of inmates to attorneys, to perhaps other people within the legal system.

And so we really wanted to sound a number of themes. One to explain a little about the history of DNA, the other to explain a little about the history of this Commission and why it came into being, and also explain how the working group that put these recommendations together is constituted. This really is a working group that is balanced in terms of having people from the prosecution side, defense side, victims side, judges side, scientific side, and a couple of academics rounding off the bench.

We also wanted to try to indicate up front that we were trying to balance two very important considerations. One, that clearly an innocent person should not remain in prison, but secondly that the system, legal system did have an interest in finality and did also have economic considerations for not reopening any case that came along, and had other reasons as well for requiring closure. So we wanted to sound that theme up front.

The other two big items in the introduction are what we called the hierarchy of cases and also the roles of the participants.

With regard to the hierarchy of cases, we tried to define a number of different categories and cases that would be helpful to people in seeing that not every case is the same. That there is a difference, for instance, obviously, between the case where one had biological evidence available to give DNA testing on. If ultimately one could not find this, then really this is simply a case that you could not have postconviction DNA testing, regardless of what the truth of guilt or innocence was.

Secondly, that there were cases where the evidence was truly exonerable, which would put it into category one; and other cases where the evidence, while did not exonerate, was still of the type that would cast some doubt on whether the conviction was properly arrived at, and then might be used only for executive clemency purposes and other kind of purposes.

So one of the things that we sought to do in setting up these categories was also to give you examples of different kinds of cases that were falling in these categories so that people could begin to start a classification process. And I'm not going to go through the various categories now.

Finally, when talking about the roles of the participants, we felt that it's very important at the very beginning to indicate that the kinds of proceedings that were contemplated, offered, in a postconviction setting, differed in some important respects from the adversary proceedings that you have at the guilty or innocence phase when you have a non-convicted suspect where obviously there are certain things that a defense lawyer must do, certain things that a prosecutor must do, certain things that a judge must do.

In this situation where you have someone who has been convicted, but now there is a possibility that there was a mistake, and you are in a situation where perhaps that mistake can be rectified in a case where the evidence would be truly exonerable. There are reasons for more cooperation, there are reasons why the court to assist the process may have to be more proactive than it usually is.

There are difficult problems with the victims advocate who, after all, is counseling someone who may have been instrumental, probably was, in sending this person to prison in the first place or an eye witness identification which is now suspect. These raise very difficult and troubling problems for everyone.

So we simply tried to set out some of the concerns that were reflected in the subsequent chapters and detail the recommendations of what one might do to deal with these kind of issues.

That's really all we have in the chapter. So I guess what we would be interested in is there anything more that should be added, anything that should be taken out?

DIRECTOR ASPLEN: Does anyone have any comments or questions about the introductory chapter? And I suppose that since the introductory chapter really contains I guess the theory or philosophy behind the document, do any of the Commissioners -- Professor Crow.

COMMISSIONER CROW: I just want to say that as I read this I appreciate very much your use of examples. I found the examples very, very helpful. I couldn't have made all those distinctions without them.

COMMISSIONER REINSTEIN: The only thing that caught my attention when I was reading Chapter One was on page 13. The first example there was that prosecutors should not delay responding to a request for DNA testing in the hope that the statute of limitation will run.

I think that statements says more than you want to say. I think it would be more consistent if you were to put prosecutors should not delay responding to a request for DNA testing, period. And than state immediate action may be required. Because it sounds as if a prosecutor would hope to do that.

Do you understand what I'm saying? You just put a period after DNA testing, and then as in the second example, immediate action may be needed because the statute of limitations may run. It just sounds better.

Otherwise I thought the whole chapter was done very well.

COMMISSIONER GAINER: I was just quickly looking at the hand out you gave us and the survey results and feedback, and I was struck by Professor Starrs' letter.

COMMISSIONER REINSTEIN: We were struck by that, too.

COMMISSIONER TURMAN: I should add, though, that we met after we received those comments. And there have been changes that contain some of those comments.

COMMISSIONER GAINER: That's really what I was wondering, not being able to compare before and after, but even noticing one of the ones that were truly innocent or actually innocent, those little things like that. You've obviously discussed those and acted on those you thought appropriate.

COMMISSIONER TURMAN: We spent a considerable amount of time on these letters. Is that a different one?

COMMISSIONER GAINER: It's September, something, something.

COMMISSIONER TURMAN: That came right before and we did make some changes. I know I made some changes in the first chapter.

DIRECTOR ASPLEN: Yes. We were very fortunate to get that letter before. Now all of these we had not received before the last revisions, but that is one we did make changes basically.

COMMISSIONER BASHINSKI: I had a comment on page 16 when you're talking about the role of laboratory personnel.

It really refers only to private laboratories, and I think much of the involvement of a laboratory may well be a public laboratory that is helping advise the prosecutor or the defense attorney for that matter. So I wouldn't limit your comments to private laboratory.

Also, although I don't know if it's appropriate right here because I've lost my train of thought about the context, but the laboratory would have a significant amount of data, analytical data that it will have some obligation to provide. And I think later on in the text is probably more appropriate to talk about that, the role of the lab. But really the laboratory's own records are going to provide the foundation a lot of times for decisions as to whether or not there is enough DNA there to test or anything like that. So making that data available. But anyway, primarily removing from the example the private laboratory.

COMMISSIONER THOMA: The working group doesn't have a problem with that, to strike "private," because it would be appropriate for public laboratories as well.

COMMISSIONER SCHECK: What about adding public and private, just to make sure.

COMMISSIONER THOMA: If you just strike private, it would apply to both.

COMMISSIONER SCHECK: I guess sometimes people don't know that in postconviction setting that a public laboratory will do the test. I can't say.

COMMISSIONER FERRARA: Then perhaps we should add "public" to clarify that. By addition of the term "public," it will enforce the fact that indeed public forensic science laboratories as well as private should participate in this process.

DIRECTOR ASPLEN: Paul, did you have a comment.

COMMISSIONER FERRARA: Well, Jan just answered the question.

COMMISSIONER GAINER: Well, I haven't thought it all out what the role would be, but should there be a role defined in here for law enforcement, whether it's information they maybe come across, the retention of evidence, how it's processed. I just thought that seemed conspicuously absent from roles. Maybe there is not one in this area, but I'm wondering.

DR. WORD: Well, we do mention at some time in the report that there are not consistent standards anyway on how evidence is kept. Maybe a cross reference to another one of the working group's recommendations in there.

DIRECTOR ASPLEN: That issue was one of the many kind of tangent issues that came up. As we started talking about this we saw all these other things that really needed to be addressed.

One is not just the issue of how should it be stored or how was it stored in the past context, but really shed a light on how it should be stored in the future. For these matters that may occur in the future, new technologies that may enable us to test different evidence in the future. Storage capacity, just from a sheer volume standpoint, what should the length of time be for law enforcement agencies requirement to store evidence.

Issues like that that come up that can be addressed somewhere. If we can get that is probably the kind of issue that as the Professor already said we can refer to some work that some of the other groups are doing.

In terms of an active, participatory role in the postconviction process, we didn't see a need to create a chapter on it. But a reference to that responsibility is probably a good idea.

DR. WORD: I think you certainly could indicate that that is something --

COMMISSIONER GAINER: So at least it doesn't appear to be an omission.

DIRECTOR ASPLEN: Right. Question?

COMMISSIONER SMITH: With some reluctance, because I wasn't at the last meeting, and this may have been fully covered there. But I realize I'm actually not entirely clear on what the intended purpose is of the five categories. Because as I understand them, I see the criticism level that the question is raised about, but I'm not entirely sure what they are for.

DR. WORD: I think they were really intended so that when a request for testing came in, they would guide the person passing on that request in being able to classify what kind of a case is this, in sort of what kind of questions do I have to get the answer to in order to be able to make that determination.

And since some of the categories, you get the answer this is not an appropriate case then to go further in, we thought that it would help someone in analyzing the test.

COMMISSIONER SMITH: Do I understand rightly that -- and maybe this is what you say has been changed, but if it were true that the folks who are detailed in that NIJ publication exonerated by science would not have fallen into categories one or two; if that's, is it a concern at this stage about promulgating those categories?

DR. WORD: I'm not sure.

COMMISSIONER SCHECK: Are you responding to Jim Starrs'?

COMMISSIONER SMITH: Yes.

COMMISSIONER SCHECK: I don't think he's right. It's always going to depend on how everybody looks at category one and category two.

One of the more impressive meetings that I've often had was Clay Strange from the District Attorneys' Association who showed us the Erb (phonetic) case in Texas, where the identification, I think, included tattoos and lots of extraordinary identification evidence and some other grounds through operation.

Now looking at that, one might say ah-hah, this is a category two case because even though it's not a witness identification case it was such a good identification.

Now those of us who deal with eye witnesses know that aren't going to be surprised. If you really look at this and interpret it logically, it's still a category one case because there is a vaginal swab that will tell you the answer, notwithstanding how good this eye witness seems to be. And it was an exclusion in that case. So it's really a category one case.

I mean, I think I'm as familiar as anybody with the 28th and 1st DNA report and the 28th and the following 6th in Canada and I don't see anything that would be outside of category two.

DIRECTOR ASPLEN: Any other questions?

COMMISSIONER THOMA: And I will answer as a defense attorney the categories makes a lot of sense, because just by the sheer numbers we need a priority system to regard what cases we need to work on. This is as good a system as we can come up with.

DIRECTOR ASPLEN: Yes.

COMMISSIONER CLARKE: I'm curious, did the working group discuss, really, the term exoneration? It kind of glared out at me a little bit as I was reading the most recent version. That is, exoneration versus basically other standards for lack of a better term.

When I read through the report, when I take the word exoneration. That means to me a demonstration that the person did not do it, period, as opposed to the standard of course that revolves around what should we do. What we do as prosecutors is a decision about reasonable doubt.

Now I'm curious, first of all, were those distinctions discussed by the working group and what did the term exoneration actually mean during the discussions?

DR. WORD: Certainly we discussed this at the working group, and I think that we really attempted to capture that difference in our distinction between category one and category two.

I think that we if you read the examples we give in our category two cases, these are cases, I think, where reasonable persons might disagree as to whether the results are exonerable. And I think that often you really are going to have to look at this in terms of the context of the trial transcript. And I think those are certainly the most difficult cases.

COMMISSIONER CLARKE: I think really what I'm pointing to more directly is, obviously if something is not going to be exonerating by the prosecutor, believe something is exonerating by the associate court, whatever the approach is. But there is also the secondary duty on my part as well, which is if I believe a reasonable doubt exists, I also have to dismiss those charges.

And when I went through each of the chapters, basically when I saw the term exonerated in most instances I think there is a second wrong. And that is exonerating or reasonable doubt is created.

Now we have seen most close relation cases in our own County where one was at one level and one was at the other level. And still in each instance the charges were dismissed. We may not be satisfied that this truly exonerated an individual, but it did create reasonable doubt.

DR. WORD: Well, charges are dismissed. But we're talking about people who have been convicted.

COMMISSIONER CLARKE: Same thing. Dismissed charges or whatever the level of relief is, depending on each jurisdiction, that's something different. Some it's pardon, some it's dismissal of charges.

COMMISSIONER SMITH: Does that mean that you would think you had a duty to dismiss a category two case once you're done with category two?

COMMISSIONER CLARKE: I would take it out of the categories. I'm not even making this category phase. It's really based on this new evidence. Does that leave reasonable doubt for us? I may be satisfied this is the only person who committed the crime. But if I am satisfied reasonable doubt exists amongst 12 reasonable jurors.

COMMISSIONER REINSTEIN: We talked about the difference between exoneration and exclusions and the need for an evidentiary hearing to be held for example to determine if there was reasonable probability to change the verdict or change the disposition of the case because we recognize that not all exclusions would result in exoneration, but they still might warrant a hearing to have a new trial.

So I think that we all recognize that. I'm not sure if it was in the introduction, but I think it was in several of the recommendations for the individual chapters.

COMMISSIONER CLARKE: I think maybe I'm not making it clear. My comments are not category based, they are based on where are we left in this postconviction testing. I may be satisfied that I still think this person did it, but I have reasonable doubt. Consequently, I'm duty bound under prosecution standards to proceed accordingly and dismiss that case.

DR. WORD: Does dismiss the case mean release the inmate?

COMMISSIONER CLARKE: Again, that's jurisdictional based. In my State, even though a person has been convicted and been in prison for ten years, I'm not sure. I think the proper procedure is first of all release, and second of all dismiss.

COMMISSIONER SCHECK: I guess when we were discussing this issue, the term "exonerate" in the literature of innocence, all right, and there is a not inconsiderable literature on the subject, inevitably raises exactly what you're saying.

And is that if there is newly discovered evidence of innocence, such as DNA testing in a category one or category two case that we were talking about, the standard, which is, I think, virtually the same almost everywhere in terms of getting a new trial, okay, would be that there is a substantial probability it would cause a different outcome, or words to that effect.

In other words, what we are talking about is do the DNA tests, given all the facts in the case, it would require that the conviction be vacated.

Now it's happened in many of these cases -- not many, but not an inconsiderable number, a number of them, that prosecutors will nonetheless go back and try the case again.

Just as in other newly discovered evidence cases, just like the 75 people that have been exonerated off death row when we had other conference in Chicago here just this last week, the definition of exonerated always means that your case was vacated, all right, you found some new evidence of innocence. And either the prosecutor A, chose not to re-prosecute you because the prosecutor didn't think there would be a conviction; or B, you were acquitted after trial.

Now it seems to me that that's as far as you can go in America in exoneration. Or C, a government pardons you on the ground of innocence. Those are the -- that's as far as you can go with the official definitions.

I mean, I understand that the word exonerate, maybe we should drop a footnote and make it very clear that is what we mean.

COMMISSIONER CLARKE: I think that's implicit, yes.

COMMISSIONER SCHECK: The implication is absolute 100 percent proof that this isn't the person. You may still have people that, no matter how good the proof, somebody is going to say I don't believe it. A number of prosecutors may very well say I can't convict him, it's not his sperm, but somehow I still think he is guilty. I mean, you get that.

COMMISSIONER CLARKE: I agree, at least a footnote because otherwise I think it's subject to too many interpretations.

I think frankly most people would take exoneration as a demonstration of innocence, as opposed to the legal level, which is not that high.

COMMISSIONER SCHECK: So maybe on page two.

DIRECTOR ASPLEN: Page two, on line 29, a remarkable feature helps to convict but also serves to exonerate, and at that point take the time to express what it is that we mean by exonerate.

COMMISSIONER FERRARA: And also what you mean by innocence. I mean, the average layperson may somehow avoid it. Innocence means this person wasn't even connected with the crime at all, they just got the wrong person. That is what every person thinks of innocence.

But to a lawyer, innocence means that there isn't enough in the legal system to convict the guy, no matter how firmly culpable that person is. And I think these points have to be clearly stated in here for the reader because I'm getting confused. I hear lawyers around this table use the word innocence. I don't know what they are talking about.

COMMISSIONER SCHECK: Well, Doctor, in this report when we talk about innocence, I think unless you can show me an example where it's confusing, we are talking about it ain't this guy. We are not talking about some lesser mental state or anything like that.

We are very serious when we say innocence, we mean this is not the person who committed the crime.

COMMISSIONER SMITH: I accepted that when I read it. Then I read Starrs' letter.

DIRECTOR ASPLEN: The difference between innocence and truly innocence is another issue again.

What you don't have and we will talk about next is a chapter on legal issues per se.

Would it help if in that particular chapter what we did is we explained, addressing Professor Smith's concern that what this is, is really a method of analysis.

What we intend here is a method of analysis which necessarily has to be applied in the context of one's own legal jurisdiction. And as such, there are going to be issues and to highlight those issues which say you may have an obligation not just to consider innocence, but to consider the extent to which this change in status constitutes a reasonable doubt, and you have to consider whether or not you have to dismiss on that basis.

Would that help the understanding?

COMMISSIONER SMITH: I think it would, especially incorporated in the ABA prosecution standards and so on. And I think that would be helpful to obviously prosecutors who are dealing with this issue. I think they need to know that.

DIRECTOR ASPLEN: Again, it's the kind of thing that we want to do in a way that is not preaching, is not pointing out the obvious to the ethical obligation, but simply raises the issue to someone who may be less experienced in these kinds of cases that it's not just a matter of an innocence per se, but whether or not we have to deal with the next issue of is there reasonable doubt.

COMMISSIONER CLARKE: We frequently don't have to resolve that question of actual innocence, because we resolved it at a lower level.

COMMISSIONER SMITH: Either way it is quite parallel, using a slightly different stimulus to handle the process that a responsible public official has to go through.

We are addressing one that the court has to go through, but you're saying prosecutors also have to go through it and not beg to get some advice or analytic points about why that's so and how you might do it.

MR. CURRAN: I think one of the things that you have to realize we're dealing with a progression type document. We start with a summary, introduction, then individual chapters.

So we get back to the protocol and defense recommendations and prosecution recommendations. Some of the issues are amplified and are discussed in a little more detail. Some of these are not, and part of the vagueness is left there so individual parties can discuss. Because we can't provide a document that addresses the secondary cases and the law.

And one of the things that Mr. Clarke brought up was the issue of whether he's innocent or whether he's not guilty beyond a reasonable doubt. Well, if I believe that he did it, then I don't have a reasonable doubt. So some of these things are theoretical ethical considerations and we have to decide. If I think he did it, I don't have a reasonable doubt.

COMMISSIONER CLARKE: I might have to disagree with you, especially the postconviction barrier where a jury has already determined his guilt. If I believe the jury made a mistake or the issues, the difference between whether the jury made a mistake and whether a new jury now based on new evidence would have a harder time doing that, then the postconviction arena I don't think that as a prosecutor that that's the problem.

If I believe that he didn't do, then I release him. If I believe it would be harder to prove it the second time around, I'm going to oppose a second trial. And I think you have left it open enough so that we are in that situation.

My only concern is that the prosecutors not go through that process and make a decision I think he did it, and then I'm going to proceed. That is not what we are duty bound to do.

We have to make an independent evaluation of what is a reasonable jury.

MR. BAUER: That is a little bit how we got to where we are in this document also. This is line 14. I think we have gone through quite a little bit of discussion to get here. We've gone from protocols to guidelines to recommendations. Purposefully to say these are not what you have to do in instances, this is what we recommended you do to help you get through the troubled waters that you're in that you may have not have been in before. Here are things you ought to think about.

So we are not trying to do all the thinking for everybody at every stage of the game. We are trying to give you some guidance what to do and how to do your job better.

DIRECTOR ASPLEN: And I would also point out a comment by one of our reviewers who was Rod Harmon (phonetic) from Almedacam (phonetic) who expressed the same kind of concern, but expressed it in terms of the legal issue being what are the rights at the time of postconviction hearing. It's not the pretrial can I prove this case beyond a reasonable doubt, but rather postconviction, after rights had essentially changed as a result of the system, and what is the legal dynamic at that stage of the game.

So again I think that is the kind of thing that you're talking about that needs to be highlighted and addressed in that legal issues chapter.

COMMISSIONER CLARKE: And actually I took that concept after reading chapter one and thought it might be addressed later and it was not.

COMMISSIONER SCHECK: I want to make sure I understand what you're saying because I think I agree with that.

You look at it when you -- see let's say there is postconviction DNA testing in the case and you take a look at it and you say, well, now I think that a reasonable jury looking at this evidence would have to acquit, all right. Which I think is, generally speaking, the standard for newly discovered evidence of innocence and whether or not the conviction is vacated. That's what you're saying is the standard.

COMMISSIONER CLARKE: Yes.

COMMISSIONER SCHECK: I agree with that, and that is what I think the law is. And to the extent -- and that's what we should say.

COMMISSIONER CLARKE: I think in practice that's what is happening, but I'm afraid in some jurisdictions it's not.

COMMISSIONER SCHECK: I think that is the law everywhere. As to whether or not people want to exercise their discretion on that basis is a different issue, which is the point I thought you were raising. You may have a reasonable doubt now in light of DNA evidence, but that doesn't mean in your gut you think the guy didn't do it.

So you have an obligation as a prosecutor under the law, even though your gut says you're still not totally satisfied. And remember, that's only to vacate the conviction. If the conviction is vacated, then there may very well be an additional investigation and you may develop some additional evidence and wind up with something to try somebody, but those are two different decisions.

COMMISSIONER REINSTEIN: But what Dennis is saying is he would probably fight, and I think a lot of prosecutors would, give a hearing on postconviction lead petition to uphold the original conviction, whereas there are probably some prosecutors who, given that evidence that they will feel that there will probably be a change in the verdict, that they would pull up their tent and say okay, let's go to a new trial.

And I think what he is saying is that he would fight the hearing. And I think a lot of prosecutors would because the original conviction is the state of the law right now on postconviction.

DR. WORD: After all, we have cases where what the DNA testing shows is that some evidence that seemed to point to guilt doesn't point to guilt.

In other words, there was a bloody something found at the defendant's house that turns out not to have the blood of the victim on it. Well, do you now have reasonable doubt? That really is going to depend on all the other evidence in the case, taking out, now, the biological evidence.

And that I think is something on which people can really reach different conclusions. I don't think it's so easy to say based on this now without that other evidence in there the jury would have to acquit.

I don't know that -- I think that's gray area which different prosecutors might reach different conclusions.

COMMISSIONER SMITH: The categories are used in a slightly different way. Like prosecutors may agree to testing in category one cases while opposing it in all others.

Now it strikes me that the point you raised brings complexity to that. Because you're invited here to sit in participatory judgment about what it would look like if you were testing and it came out a particular way. Exoneration wouldn't necessarily be applied. It's a judgment whether or not it should go to testing.

COMMISSIONER CLARKE: I'm trying to separate from the categorization the decision on testing. I'm really looking at it at the end product. Now we have these results, where do we stand.

DIRECTOR ASPLEN: Chief.

COMMISSIONER GAINER: Well, you have raised for me, at least the conversation, to read this in a different light. Let me just suggest something out loud that may be more form and substance. And again, I refer back to Starrs' letter, and I don't know Mr. Starrs by any stretch, but it again to me when I read his

letter it's provoking and I want to say gee, how does it fit in. And I've heard some other people here say that and I've equally heard you say you guys kind of dismiss him as some outside the box or something.

DIRECTOR ASPLEN: No.

COMMISSIONER GAINER: If I misinterpreted, then let me strike that from the record.

But it raises to me, especially in this legal area, whether there is a value in having a minority opinion on some of these issues. And it kind of ties a little bit to what Dennis was talking about, that we can't lay it out for everybody and whether this is a protocol or guidelines or recommendations.

But if it's meant to be thought provoking in some of this and not send someone down a path irrespective of that path, is there a value, especially in this postconviction legal minority opinions. I always find it kind of fascinating when I read cases. I can do what I want, I can further research it, I can strike a whole other way to think about something, and again that may be more form than substance in this area or it may apply to where the whole report goes.

DIRECTOR ASPLEN: I'm not sure what form. I mean, we're certainly and from the inception of the Commission we've talked about the need and import for dissenting opinions on whatever it is we do. I'm not sure the form that that would take in the context of a document which I think is really intended as a user's manual on behalf of the participants in the system.

Maybe there are ways that we can drop footnotes.

COMMISSIONER GAINER: As I say, the risk of thinking out loud is it's not very well thought out. Again, I will just easily go back to the Starrs thing. I just found that he raised some interesting issues. But, I mean, he just raised some issues for me and I kind of hear that give and take a little bit here. What about this direction, what about that. So I've beat that dead horse.

DIRECTOR ASPLEN: So we need to find a way to express it, to express those issues that allows for different interpretations. Is that a fair characterization.

COMMISSIONER GAINER: It is. But again I don't know the value of that. I defer to the legal scholars here on whether there is worth to that.

COMMISSIONER SCHECK: I think what was provocative about Professor Starrs is that he was telling us that there is no such thing as a category three or four case, I guess. Or category four case, where it would be DNA testing wouldn't make a difference.

We respectfully considered that and disagreed with it and thought that there are cases where testing is frivolous.

And something I think that is in this business I think it's important to recognize those frivolous cases, otherwise people won't take seriously the other cases.

And the truth of the matter is we try to embody within category one and category two the fact that Dennis and I may not look at the same set of facts and come to the same set of conclusions. So we try to create

categories where reasonable people can disagree about whether or not DNA would meet the newly discovered evidence standard and cut all analysis short. That is what we are trying to put in this.

COMMISSIONER GAINER: I certainly wasn't suggesting a Starrs minority report by any stretch. But I was wondering again if there are other legal issues that are less certain that could take one down a different thought pattern that are very relevant for someone to kind of glance at.

DIRECTOR ASPLEN: It sounds like the kind of thing we can capture in the legal issues section that allows for that. That essentially divergence of view down a different part of a flow chart.

Are there any other comments on the introduction, Jeff?

COMMISSIONER THOMA: Just that in the last 20 minutes or half an hour I think that I would not relegate what he wants in a separate chapter. I think the footnote idea was very good, just recognizing that we are talking about exoneration perhaps in category one, and just recognizing that however, prosecutors, there may be cases where in light of this new evidence now you're looking at proof beyond a reasonable doubt. Just recognize that as a category.

I think the purpose of this chapter -- and I think it's been done very well -- is get these categories and I think they're categories that make sense. Everyone is going to have their own little wants. We know that.

But the purpose here I think was to show or at least get out to everyone that this technology is very powerful and you can do an awful lot now. And prosecutors, maybe your past hard-nose approaches are not necessarily required in a case where you have good DNA evidence.

I think that's the purpose behind it and I think it's done very well. And I don't know that we need to look at minority views and what other people may think. I think it accomplishes it very nicely.

Am I correct in that analysis?

DIRECTOR ASPLEN: Before we go to break, are there any other comments on that introductory chapter?

What I'd like to do before we go to break is to just kind of outline what I think we have come to some consensus on, without getting an official vote at this point, looking towards what we will need to ultimately, and that is approve or vote on the whole document.

We have page 13. Make a change to page 13, around line 229, responding to DNA requests.

Line 16 include private and public. Providing a way -- the third point would be providing a way to mention or refer to law enforcement's role, so that at least it looks like it hasn't been overlooked. That would be number three.

Number four, page two, drop a footnote there in an effort to explain what we mean by exoneration, clarify that issue again as Norm just kind of referenced for us.

And then we talked about some things that could be included in the legal issues chapter in reference to that general point as we are going to create the legal issues chapter anyway. And I think in the legal issues chapter we can find a way, or I guess I should say by its nature, the legal issues chapter should have the

effect of what Chief Gainer is talking about, providing for those other divergent views and other ways to look at it pursuant to whatever jurisdiction requirements there are.

DR. WORD: And, Chris, maybe we can add some language indicating that this is not so much categorization for the purpose of the legal consequences, as categorization to provide a frame work for analysis in other words.

DIRECTOR ASPLEN: Right. Getting to Professor Smith's concern.

Why don't we take a break for about 15 minutes. We need to ask for a show of hands of folks who might be interested in having dinner as a group or to the extent that we can have a dinner tonight. Just a general count.

(A short break was taken.)

DIRECTOR ASPLEN: Professor Scheck, why don't you talk a little bit about what is anticipated to be in the legal issues chapter.

COMMISSIONER SCHECK: It would be very helpful if all of you would agree that this sounds right to you, given the prior discussion.

But basically the purpose of this chapter is to set up what Margaret called a second ago, the framework for analysis. The idea is not to take a position about the issue of whether or not, for example, there ought to be statutes as there are in only two states, New York and Illinois, that permit postconviction testing in what we would characterize as category one or two cases at State expense without adding time limitations.

All that we are going to do is describe the statutory schemes. And it would go like this:

First, there is case law on access to evidence. That is, whether or not you're seeking newly a discovered evidence motion accord or you're going to go to a governor. Is there any case law on just getting access to the evidence for purposes of testing.

Yes, there is. All the reported decisions that directly address access actually permit it. There are some decisions that in effect don't permit access on the grounds that it doesn't have anything to do with getting executive clemency, it only has to do with getting postconviction motions and there's a time limit.

So there are just a few like that. And then there are some unreported decisions that don't allow access, but presumably on the ground that the statute of limitation prohibits bringing a motion in Court.

We will discuss the postconviction statutes and outline them briefly in states on terms of newly discovered evidence of innocence, discuss executive clemency as an option, and then briefly discuss the question of is there a Federal constitutional right to have DNA testing in a case where there would be, quote, truly persuasive evidence of innocence under Herrera (phonetic).

And it seems to me those are all the legal issues that we would just describe indicating what's been decided one way or the other without taking a position as to what the law ought to be.

But I should note in the passing in the introduction to this chapter we will indicate that our recommendations are based on the premise that the lawyers and the Court may find themselves in jurisdictions where there may or may not be time bars to bringing newly discovered evidence of innocence motions. And you would have to proceed from getting the evidence, getting the testing done, and go to executive clemency, or waiving time limitations.

What we have to report, and we have found this in numerous cases, is that notwithstanding the statute of limitations that in theory would prohibit the motion, in many of these DNA exoneration cases -- and I use the term exactly as we defined it -- what has happened is that the prosecution and the Court simply by consent dismiss the case in light of the DNA evidence, even though the statutory scheme would not seem to permit it if anyone interposed an objection. And that's been true in quite a few of these cases, so we should probably just note that.

So the whole concept, frankly, behind these recommendations is that we are saying if you're in a jurisdiction where a motion could properly go before the Court within the time bar, within the statute of limitation, you would do this. If you're in a jurisdiction where the only relief is to go for executive clemency, you would do this. And then what hangs out there is the whole question of going to Federal Court if all else fails and just sort of outline what the arguments might be.

Does that sound -- does that help or does that sound too complicated?

DIRECTOR ASPLEN: Dr. Word, would you like to talk about the biological issues section?

Are there any questions, given the fact that there is nothing in front of you right now, and the fact that I think we've talked about some of those things.

I apologize, if anybody does have any further input into that? Again, that will be forwarded to you as soon as it's done it.

COMMISSIONER THOMA: Chris, I do have one question with regard to our working group, the legal issues working group, we have been wrestling with the statute of limitations on appeals and I don't know whether we wanted to have that addressed in a working group, whether we want it addressed in your working group, or both. That's something that I would like to be able to take back to our working group, some decision on where we go with it, if anywhere.

DIRECTOR ASPLEN: The way that kind of developed again, that's one of those tangential issues that came up and we kind of talked about the appeals issue in this group and then we started talking about the issue of filing of cases and statute of limitations there and said, well, that's the purview of another group.

But we should certainly get the groups together on that, at least representatives of the group together on that.

Professor Smith, do you have a preference?

COMMISSIONER SMITH: We talked a little bit about that and I don't know whether this working group has done so. If it has, of course we'd want to know the product of the conversation, talk through the question of whether there ought to be guidance, recommendations, or whatever out of the Commission on the question of time limits and statute of limitations that come from this group.

DIRECTOR ASPLEN: What we will do then is I think we will put together a document that essentially summarizes the conversations that we've had about it and forward them on to your particular group.

COMMISSIONER SMITH: That will be fine.

DR. WORD: Chapter three is on the biological issues. And as Margaret said at the beginning, this whole document has many different audiences and I think this chapter was largely aimed at being basically an educational chapter, not knowing who might be reading this.

And it was meant to be a fairly basic and just simply go through some simple scientific concepts that may be covered or questioned by victims' families, defendants' families, attorneys who have no experience with DNA testing, law enforcement, judges who have had no experience with DNA testing. So this is basically designed to be a background chapter covering general scientific issues.

The first section is largely just broken into types of samples that may or may not be tested. I know from my phone contacts a lot of people are not aware that certain types of samples can be tested and that they should be considering these. And in going back to look at old cases, perhaps evidence that people thought couldn't be tested is now suitable and should be considered.

There is some discussion on age of samples and where samples have been deposited.

A key part is previous testing and understanding whether testing has been done in the past at the serological level or the DNA testing level and what the meaning of those test results are. Was an inclusion a meaningful inclusion or was it simply at one locus.

The section on types of DNA tests again is meant to be a very general overview for people who have never heard the words RFLP or PCR or mitochondrial, and just need to understand that there are several different types of tests that have different levels of discrimination capabilities and mainly to get some of the words out in writing.

Possible conclusions and results are simply outlining what is meant by an inclusion or exclusion and what that might mean.

Finally, just a very brief discussion on the CODIS databases and things that would be coming in the future that will effect or certainly could effect testing.

I don't know if anyone has mentioned in here but our group is planning on doing a glossary which will have a substantial amount of scientific words that I'm embarrassed to say I had no time to work on them. But some of that will be reiterated in a glossary as an appendix.

DIRECTOR ASPLEN: Thank you.

Any comments on the biological issues?

COMMISSIONER THOMA: Just a couple points. At page 30 with regard to appellate rulings regarding RFLP, actually I'm doing this research for our legal issues group and I have come up with over a hundred right now with regard to RFLP. I can get you a fairly exact figure I think for the next week or so. I notice there is a question as to how many.

DR. WORD: I have that from the FBI and I just never had it with me when I was working on this to fill in the numbers. So I do have that number. Things didn't happen at the same time.

COMMISSIONER THOMA: Second, at page 31, at line 505 you have a portion with regard to PCR testing being used and accepted in the courts.

I do have a problem personally with that, I guess legally, with lumping all different types of PCR testing together since at least in California it's differentiated quite a bit, significantly between DQ Alpha, STRs, different types of PCR testing.

So lumping them all together for this purpose, I realize that you're talking, Dr. Word, in general terms with regard to this section, but that particular sentence is a problem because DQ Alpha certainly has some wide acceptance for a lot of cases with regard to it, but there are several other types of PCR testing that hasn't become so widely accepted through the courts yet.

DR. WORD: I'm certainly speaking from personal experience, and perhaps widely accepted in the courts to you means the appellate courts and maybe I'm incorrect in wording it this way.

Even in California where I've testified in a lot of admissibility hearings, the different types of PCR testing are tending to be lumped together. And I'm aware of only a very few trial level decisions across the country for any type of testing at this point where DNA testing is not getting in, and it's usually for some non-scientific issues, discovery or something else.

So at least in my experience -- and if other people have other experiences we certainly should correct this -- the PCR testing is being largely lumped together and there are appellate rulings on all the forms that I'm aware of with the exception of mitochondrial at this point.

So that's why it's worded that way, but we can certainly modify it if that's not the correct way to state it.

MR. BAUER: If that topic needs to be gone into in more detail maybe the legal issues working group might be more appropriate rather than in the science chapter. Because the experience across the nation is quite different.

In Commonwealth vs. Salk in Massachusetts, for instance, they basically said is that PCR is PCR and all difference types are admissible because PCR is admissible. And even in the trial courts in California we've had differing results by hounding that same issue and I've had several kinds of PCRs, including STRs, admitted because it's just another application of accepted technology.

COMMISSIONER THOMA: I may be a little bit off myself, Dennis, but with all due respect, I think Salk actually did admit one type of PCR evidence and declined to admit another, rather than say all are admissible. The very case that you're citing I think stands for a different premise in a way.

But it really has to do with a difference of opinion I think. What I'd rather do is leave that out of this and if you would like us to bring it up in legal issues, it might be more appropriate.

MADAM CHAIRMAN ABRAHAMSON: Perhaps I could say something about the clear trend seems to be the direction of ever growing acceptance of. I mean, I think that is certainly true.

DIRECTOR ASPLEN: So we can modify the language then.

Norm.

COMMISSIONER GAHN: Dr. Word, I have three comments.

The first is at page 26, line 425. You say "conversely a five-probe RFLP match." I question whether we want to put a number of probe on that. We know from NRC1 the three probe match is strong evidence, four, five, labs are doing seven, eight now.

Why don't we just state that if a RFLP match was obtained previously, and not put a number on it. I think that could be confusing for people who may not be all that familiar with it, our technology. And by putting the number five on it they might get stuck in it.

Because we know there could be a three-probe match but too inconclusive and I think just by stating RFLP match would be sufficient.

The other thing which struck me is on page 27 under line 438, I noted as I read through your document that you talk about -- let me back up here.

I think that if there is going to be questions raised between a defense attorney and a prosecutor in this area, often times it may revolve around what are inconclusive results. And I think that is something that is very important and has to sort of be spelled out for the person reading this document.

I note that you refer to inconclusive results on page 27 here. You also do on page 35, 43, 48, and 50. And on each of the pages you hit all of the things that can be inconclusive. And it's kind of disjointed, a little awkward. I thought it might be better if you were to right off the bat the first time on page 27 list what could be inconclusive results.

Basically it could be lack of sample, it could be sample that's there but degraded, or it could be what the different laboratories call whether it's faintness, whether it's off the sizing ladder, within the sizing ladder. List all of them. Then on future pages just refer back to that. It might read clearer.

Because I found it confusing. You hit everything that's inconclusive, but they're all in different places.

And the last thing I thought might be helpful and help clarify matters, on page 34, your sentence on 568, I found that first sentence sort of confusing, but also I don't know if it's true. I think that you could have a case where not all of the results from a known individual may not necessarily be in the reference in the evidentiary sample.

DIRECTOR ASPLEN: I'm sorry, that was line number what.

COMMISSIONER GAHN: Line 568 and 569.

Again, I don't think that it's necessarily true, but also it very confusing. Why don't you just strike that sentence and state line 570 and 571. Simply with limited exception an exclusion of an individual at any one genetic region eliminates them. Just have that sentence.

Those are my thoughts.

COMMISSIONER SCHECK: Norm, on your first suggestion on page 26 , instead of saying 5-probe, how about saying multiple probe.

COMMISSIONER GAHN: I think that would be appropriate, too.

COMMISSIONER BASHINSKI: I think that would be acceptable also.

I had a few comments. I think that throughout the document we talk about dried evidence, dried or frozen. It's my experience that dry and frozen is the most expeditious way or most effective way of storing DNA evidence.

I also recognize that even if you don't freeze it, you may still get a result. But I don't think we should be encouraging people not to freeze things. So I would suggest that we talk about drying and frozen being optimal, but that you may get results and often do with PCR on dried samples. And there are several points in this document where this comes up.

On page 23, at line 365, nuclear DNA from stains of more than 20 years old have been analyzed successfully, generally not by RFLP. I think I probably would make the statement that when you're talking about samples that old, unless they have been stored and frozen you're not going to get an RFLP result. So you might want to clarify that the ability to get a result with the different technologies would depend a lot on how that's handled.

COMMISSIONER SCHECK: So just say by PCR based tests.

DR. WORD: Well, I'm thinking about some old tests that were provided by the California Association of Crime Laboratory Directors that two or three labs participated in that many of those samples were quite old and RFLP testing was done on those successfully.

COMMISSIONER BASHINSKI: And had been stored frozen is the point.

DR. WORD: My understand was some of those were dried, so maybe I'm incorrect.

COMMISSIONER BASHINSKI: We should look at that data because I don't think you want to imply that you can get an RFLP results typically on something. And I believe those of those were frozen if you can get results at all. We can go back and I can look it up just to verify.

DIRECTOR ASPLEN: If we modify that through some general statement.

COMMISSIONER SCHECK: What about if you say most frequently by PCR based tests.

COMMISSIONER BASHINSKI: I don't believe those were frozen samples. I mean, I believe those were frozen samples that she got her results on. Because I don't think you should imply something that isn't likely to be true.

The 48 hour cut off on the postcoital interval collection of samples you have on the line 279, I can't speak to this with any data, but I'm wondering if that is adequate or should be even a longer period of time with PCR based tests. I don't know.

DR. WORD: Well, I know there are some studies that have been published that show that you can go out to 72 hours for the detention of sperm. But at least in our laboratory in cases where we had information on how long it took the victim to get in and have samples collected that we don't get results after 24 hours.

COMMISSIONER BASHINSKI: That's something I just want to make sure because I don't have the data on that.

DR. WORD: This is based on practical experience. If other people know otherwise and are concerned, we will modify it and obviously the times are going to be loose, depending on the information provided. There are some published results that say sperm can be detected further out, but they must not be getting collected or they're not in sufficient amount to get any results from.

COMMISSIONER BASHINSKI: I don't disagree with that.

DIRECTOR ASPLEN: It might be appropriate to drop a footnote there to that effect.

COMMISSIONER SCHECK: I'm confused. You're saying that there have been anecdotal reports of finding at 72 hours. Is that what you're saying?

COMMISSIONER BASHINSKI: You definitely will find sperm up to 72 hours, the question is in her experience are you finding samples typeable with postcoital interval longer than 24 to 48 hours.

COMMISSIONER SCHECK: Isn't the answer generally no?

I will tell you why I think this is a very important point that we speak accurately. I don't think, as you said before, we should mislead people. I mean, if you tell people well, in our experience somebody has typed sperm 72 hours out.

COMMISSIONER BASHINSKI: I don't think that's the case.

COMMISSIONER SCHECK: I haven't seen it myself. And if you tell people.

COMMISSIONER DAVIS: Would it be worthwhile to comment on a dead victim? Because a dead victim, the sperm survives longer.

COMMISSIONER SCHECK: Yes.

COMMISSIONER DAVIS: Would it be worth it, just a note.

COMMISSIONER SCHECK: What's your judgment about how long that does happen?

COMMISSIONER DAVIS: I think of some British case where they identified sperm -- this is not by DNA but by morphology some weeks later. I don't know the exact time, but it was quite a long time.

So apparently the processes by which sperm are degraded, lost in the living, cease in the dead. And it's just worth stating it. I'd hate to see people say, well, we can't do it.

COMMISSIONER BASHINSKI: You're absolutely right. And that's a matter of it's very well known that in dead victims you will have semen not disappearing as fast as in a live victim for variety of reasons.

COMMISSIONER DAVIS: Another point, what about in reference to the methodology of collection of the specimen? It says here the vaginal cavity, but then there is some techniques of collection, certain areas are more prone to give you a usable sample than just a blind testing.

And I'm not too familiar with the details, because it's been a long time since I worked in the rape treatment center, but things have changed a little bit as to the techniques of acquiring the materials.

DR. WORD: This chapter was written with the idea that we are looking at all the samples that have previously been collected and are lying around someplace waiting for re-testing. And I think that the types of evidence, collection, and preservation are going to be the work of another group.

COMMISSIONER DAVIS: That makes sense. The only thing is there still may be some samples lying out there in a dead person or removed from a dead person that should not be overlooked.

COMMISSIONER SCHECK: I can't resist telling you this, but I was in Mississippi yesterday, or two days ago. The medical examiner asked me if you could exhume a body that was two years old and do a D&C to see if they could get sperm from the vaginal vault.

COMMISSIONER BASHINSKI: On page 26 at line 413, 412, you talk about tests that have been done in the past on the sample. I would include conventional serology typing in the list of tests, because that information would be very helpful to you in deciding whether you've got a sample that would be used for further tests. You have a list of tests.

DR. WORD: What did I leave out?

COMMISSIONER BASHINSKI: It just said identifications of blood and semen, you didn't talk about genetic typing, serology typing, or protein typing.

DR. WORD: Okay.

DIRECTOR ASPLEN: When it says generally or serology analysis, that doesn't --

COMMISSIONER BASHINSKI: But she lists a lot of different things. I think it's important that if there has been genetic typing, conventional genetic typing.

DR. WORD: Would you provide me a list of some of the things that should be included, and we can certainly add them in.

DIRECTOR ASPLEN: Just genetic typing?

COMMISSIONER SCHECK: Why don't you just say A/B/O testing and protein markers.

COMMISSIONER GAHN: I think you should put that in light of the fact that so many of our code hits and our databases that go back so many years where they did do conventional A/B/O enzyme testing.

COMMISSIONER SCHECK: Virtually all the innocence cases they had, A/B/O typing.

DIRECTOR ASPLEN: Dr. Forman, did you have a comment? Anybody else have any other questions or comments on this particular chapter?

COMMISSIONER SMITH: I just was curious what the relationship would be between the last bit of that chapter and the work that Dr. Crow's going to do in his group.

Testing in the future is a topic in a way that you'll be covering in a draft we haven't yet seen and presumably there ought to be some marrying of the predictions of future testing.

DIRECTOR ASPLEN: What is the connection between this document and that document?

COMMISSIONER SMITH: That document not yet having been produced, might have in it material that needs to be reflected here. If we're going to have this section in this chapter.

DIRECTOR ASPLEN: I think what was anticipated, given the extent to which this document also provides a certain educational function, I think that's why it was included.

Let me ask you this, Dr. Crow. Is there anything that you see in this section that you would disagree with or you would believe is not concrete or determined enough so that it would be ill-advised for us to include it.

COMMISSIONER CROW: No, I didn't mean anything like that. But there clearly is going to be some overlapping, but I think we can worry about that later. But even I'm not sure it does a great deal of harm to say the same thing twice.

DIRECTOR ASPLEN: Anything else?

COMMISSIONER FERRARA: On that subject, I would simply add near the end of the paragraph on page 32 those after lines 530, and this is -- there is nothing wrong with this, but I think it ought to end with a description of what is going to be the standard practice in laboratories for some time to come. Obviously the STR, the 13 core loci.

You allude to it. You say the use of PCR with short tandem repeat sequences, but then you throw in the NTRs, and D1S80 have become common in many laboratories.

I think it might be good at that point, at some point, again, it marries it to Jim's work as the standard to which the forensic science community is focusing is 13 core short tandem repeats.

DR. WORD: I think this chapter was written before those were decided on.

COMMISSIONER FERRARA: It's all that would take, to bring it up today.

DR. WORD: I noticed that, reading it today, that there needs to be probably a little more discussion of CODIS in this and the application of STRs.

DIRECTOR ASPLEN: If I could just kind of try to encapsulize or kind of highlight what we've talked about on chapter three.

Page 30, we need to put the appropriate numbers in there.

Page 31 talked about the PCR acceptance, make that change accordingly.

Regarding Norm's comments on page 26, we want to take out number five and replace it with multiple probes.

The issue regarding page 27, taking that opportunity to really define what we mean by inconclusive and then be consistent thereafter.

Then on page 34 eliminate lines 568 and 569.

Regarding Jan's comments, I think try to I guess promote the use of the phrase of the combination of dried and frozen. Is that a fair way to do that? Find ways to do that.

Page 23, line 366, look into the particular facts of what we are using there as data and straighten that out.

Page 23, line 379, we can drop a footnote there to explain that a little bit better. And also, pursuant to Dr. Davis' comments, include dead victims from an educational standpoint.

And then on page 26, include the specific genotyping from a conventional serology standpoint.

And then on page 34, include Dr. Ferrara's comments regarding STRs and the standard nature of where we are at historically with STRs. They're here to stay for a little while.

The next chapter is the prosecutor chapter, and as such I will ask Dennis to take a few moments to kind of explain where we are going with that.

MR. BAUER: I'm not going to go through it page by page or issue by issue just stick to giving an introduction of what we've done and where we've come. As I said earlier, this is the 14th draft and we have taken an input from a variety of sources. I've got two very thorough letters from Jim Wooley who is on the full Commission. And after the first one of those, took it to our State of California District Attorneys' Association's forensic science committee, had some very energetic discussion -- Jan was there, she's smiling -- and got a lot of very good input.

And I took the notes from all of that input and incorporated the suggestions into the subsequent drafts after that.

There is the concern that there has to be some kind of compromise in understanding that we're dealing with very experienced prosecutors from very large offices all the way down to the part-time prosecutor or sole practitioner in a rural jurisdiction. So we have to address a large outline that would be meaningful to a large variance in the audience.

So we tried to address some large issues. Some of those including the cooperation, coordination with the other parties that are involved; the witness, the defense, and the judiciary.

And the other, one of the other main ideas was to make it explicit and perhaps redundant that it's necessary to consult with the vast body of experts that are already in existence both in the legal and the scientific fields when you get a request.

And also, as far as the input, you will see if you've read the handouts that were given to us today on some of the inputs and surveys, et cetera, that we have accommodated not only in chapter four but the other chapters a lot of the input that's come in, including as we're sitting here Margaret and I were discussing

adding in a phrase or a footnote that would address insuring the maintenance of chain of custody, which hadn't been addressed very well in any of the guidelines anywhere. So that when we are subject to a defense request that the prosecution is opposing, that we seek whatever insurance we can get that the chain of custody will be maintained including a request for judicial orders to insure that chain of custody is maintained.

DIRECTOR ASPLEN: Thank you. Questions and comments on the prosecutors recommendations? Recognizing we've already addressed a number of those in the introductory chapters.

Woody.

COMMISSIONER CLARKE: I'm going to throw more gas on the fire. It really relates to the category five. Perhaps I should have brought it up earlier.

One of the aspects of a case where a request for testing would be deemed frivolous is when a defense at first trial, it may have been consent, self-defense, or entrapment.

Now the comments I'm about to make are not going to apply to the majority of those cases because defendants normally have to testify factually in those cases and they would fit the criteria that the working group has described as frivolous.

There are some instances in which defendants don't testify. A lawyer may rely on the state of the evidence and establish self-defense by testimony of other witnesses and there are some other instances, I think consent as well as rape cases.

I'm not sure that should be held against the defendant. Because that is a tactical decision made based on the state of the evidence. So to lump those cases -- and they are few in number, I know -- into a category of five I think may be unfair when this technology might be able to resolve guilt or innocence in those cases.

So I think it's a consideration that has to be made. But again with a caveat that defendants usually do testify in those cases, and if they do then I think it does become a category five case.

MR. BAUER: Professor Starrs has also addressed a couple examples also of what you're talking about and we've discussed that since we got Professor Starrs' letter which I think is a couple of three months old by now.

But I think that as the Chief mentioned earlier it may be appropriate to put a footnote in there also to indicate that there are occasions where even where reasonable minds can differ and the factual analysis can also differ.

Maybe this is more important for the judicial chapter also to be aware of that sometimes even when prosecutors are very sure that this is a frivolous category that there still may be one where you want to order testing anyway.

COMMISSIONER CLARKE: I guess the bottom line of what I'm saying, you can't hold a defense tactical decision against a defendant.

Just a couple of other comments. There is an underlying -- not theme but process, whereby if the defendant or inmate asks for testing he's informed that basically his known sample will be uploaded, I supposed it would be in the CODIS system.

Has it been explored whether or not that is lawful.

COMMISSIONER SCHECK: I think the assumption here was was I told that it's not lawful if you're not in the category of offenses covered by your State. You can't do it. It's that simple.

In theory, virtually everybody who is asking for these testings, in theory, is probably going to be typed already as a convicted offender. But maybe not.

COMMISSIONER BASHINSKI: That wouldn't be true certainly in our State because we have limited categories. The person could have been convicted of some other type of offense. So I think that's not stated properly.

COMMISSIONER SCHECK: It would be illegal, you're right.

COMMISSIONER CLARKE: I think it's appropriate, but I'm just concerned that it might need some further provision or a stipulation. I'm not sure it would still be legal.

COMMISSIONER SCHECK: I think you can't get it in.

MR. BAUER: Chris and I got this similar input two days ago in Arlington in some oral comments by a couple of prosecutors also. And I think that part of the problem is dealing with 51 different jurisdictions. The issue was, well, if it fits the legal criteria for entering the database, he's already there. If he doesn't fit the criteria you probably can't put it in there.

And this is perhaps maybe going to be true in the 51 jurisdictions, but it may also be an opportunity to stipulate by an agreement by the defense to allow his profile to be entered in even if it's not provided for by State law. And I'm not sure that is going to automatically be illegal or not proper in every State depending on how the law is written.

So again, it's one of the things that we can put another footnote in, but we're getting so specific. I think this will work itself out.

COMMISSIONER CLARKE: Obviously the biggest concern is we don't want people committing unlawful acts.

DIRECTOR ASPLEN: An excellent point.

COMMISSIONER CLARKE: The last one is just specific to one section, on page 47 on the goals which I think are excellent. The one on line 773, when it talks about providing a split sample to the defense for duplicate testing.

That's I assume not really what it's for. Since this is joint testing, wouldn't it be more appropriate to word this something on the order of retaining a portion for duplicate or additional marker testing. In other words, the idea is to retain a sample, but it's not really giving it to the defendant to go test on his or her own.

MR. BAUER: I look at it this way. If you look at the whole chapter, one of the things that we've mentioned is in category one cases I suggest the prosecutors on their own have the evidence tested, even if there is not a defense attorney involved.

So if the prosecutor decides he's going to have it tested and it comes back to further inculcate the defendant the defense attorney or defense team may decide they want to re-test it on their own again.

So try to keep those categories of goals to cover all situations. How would you re-word it then with that comment?

COMMISSIONER FERRARA: Just put the word, where feasible, where possible. Because you might be hurting both the individual who is perhaps wrongfully convicted by requiring the sample be split in which case neither laboratory can develop enough genetic information to make a conclusion. So it's preferable to indicate that where possible, sample should be preserved for future testing, but also knowledge and that is often not the case.

DIRECTOR ASPLEN: Anyone else?

COMMISSIONER CROW: Does split mean split into two? I think maybe divided or subdivided may be closer to what you mean.

COMMISSIONER FERRARA: Again, where that is possible. Sometimes it's not possible to split the sample with any meaningful fashion. It may not be. It usually isn't.

DIRECTOR ASPLEN: Any other comments on that section?

COMMISSIONER SCHECK: Actually it's a more puzzling thing than even that, to be honest with you.

What you run into in these situations is that if you have old degraded samples, the most important thing is to get a result. And you would like to get the best lab that is capable of extracting it to get a result.

Then you would like to have a sample left for replicate testing; you would like to have a sample left for replicate testing that you could put into the database, because if there is an exclusion you want to find the real person through the database; and then finally you want to have a sample left over if you ever catch another individual that you can do testing yet again so that you're not relying on old testing but on new stuff.

I just think we want to rephrase that instead of provide a split sample so much as maximize the opportunity to do new run tests for a variety of purposes.

MADAM CHAIRMAN ABRAHAMSON: Someone have any other comments on it?

COMMISSIONER SMITH: I just wondered what a judicial officer was? Because sometimes a judicial officer might have to decide. Maybe that's entirely clear, but in some sense it's not. I thought maybe prosecutors might be within that group. Does it mean the Court? Maybe just say the Court.

DIRECTOR ASPLEN: What page?

COMMISSIONER SMITH: You said it several times, but I'm just looking at page 45. The decision on whether retention should be done may have to be made by a judicial officer.

COMMISSIONER BASHINSKI: It could be clearer.

COMMISSIONER SMITH: If you mean the Court.

DIRECTOR ASPLEN: Any other comment on that section?

Norm?

COMMISSIONER GAHN: Just as I spoke with Dr. Word. I think in those areas where you talk about inconclusive results, I think if there would be a battle, that battleground is very ripe between the defense and the prosecution in these cases.

Maybe a little more amplification of what we mean by results would be helpful in the area.

The other comment I have was -- and maybe Mr. Ferrara can answer this. Does the DNA advisory board require accreditation?

COMMISSIONER FERRARA: For purposes of Federal funding yes. I don't think we flat out required in general.

Very strong recommendations.

COMMISSIONER BASHINSKI: You don't require it until 2000-and-something even for Federal funding. It's not a mandate, there's a time frame where you say you encourage it.

COMMISSIONER FERRARA: Currently it's not.

COMMISSIONER BASHINSKI: Currently it's not required.

COMMISSIONER GAHN: The reason I ask is on page 55 when we talk about selecting a laboratory, perhaps you might want to put down an accredited laboratory when the defense and the prosecution are selecting.

The reason I asked it because I didn't know whether the DAB required it. But since it doesn't, maybe we should put down an accredited laboratory.

COMMISSIONER FERRARA: Certainly we should.

On that same subject in that same area, Norm, we ought to remove the reference to technical working group because they no longer exist.

COMMISSIONER GAHN: I agree with that.

COMMISSIONER SCHECK: But on the issue of accreditation there are a lot of excellent laboratories that are not accredited, so I would oppose that.

COMMISSIONER GAHN: I mean, maybe just a recommendation that they look at accredited laboratories.

COMMISSIONER FERRARA: Does this Commission not want to take that position?

COMMISSIONER SCHECK: I think as long as somebody complies with the DAB guidelines, I just feel a lot of these -- some of the best private laboratories are not accredited.

COMMISSIONER FERRARA: But how do you determine compliance with those standards without accreditation?

COMMISSIONER BASHINSKI: There is a middle ground in that there is a mechanism for those laboratories to have their DNA programs inspected without becoming accredited initially by the ASPLAB (phonetic) lab.

COMMISSIONER FERRARA: Through NFSDC you mean, but that is under the auspices.

COMMISSIONER BASHINSKI: Right, but it's not accreditation.

COMMISSIONER FERRARA: Yes, it is.

COMMISSIONER SCHECK: You see, this is the point. That there will be disagreements in that.

COMMISSIONER FERRARA: I think it's a worthwhile issue to discuss if this Commission does or does not want to make that recommendation. But given our -- given the strong interest in maintaining high quality of work throughout, I don't know why we wouldn't want to require any laboratory doing this to be a strong recommendation at least to be accredited if not an absolute requirement.

That furthers the -- I mean, we all know that absent some mandate for accreditation, the next best thing we have to do is try to encourage it.

DR. WORD: In any event, it seems to me this somehow has to be consistent with whatever is recommended and it needs some kind of cross reference to ultimately the laboratory.

DIRECTOR ASPLEN: I think maybe the way we can address that -- I don't want to fill the document up with footnotes -- by way of saying there are certain considerations regarding what laboratory you wish to use for this particular testing. The current trend is towards accreditation, and explain that briefly, which would make a suggestion that that is the best way to go. But really put it in the contention of here is your prosecutorial decision making issue.

Would that help us to analyze it? It wouldn't get us into any potential conflict or commit the Commission to a recommendation on that ahead of time if you in fact decide to address that specifically. Does that help the issue?

COMMISSIONER GAHN: One further comment for Dennis then.

This is one of those questions where you asked where you do it at your peril, where everyone would look and say boy, is he ignorant. But on page 43 on 714 what is a "West" plea?

COMMISSIONER THOMA: North Carolina vs. Alford.

COMMISSIONER GAHN: I know the Alford, but what is a "West" plea?

COMMISSIONER THOMA: It's the same. It's a California case out of Monterey County.

COMMISSIONER GAHN: Since we have 49 other States, why don't we leave that out.

DIRECTOR ASPLEN: Do you want to keep Alford?

COMMISSIONER GAHN: Yes.

DIRECTOR ASPLEN: Charlotte has a comment regarding the lab accreditation issue.

DR. WORD: In chapter eight there is a paragraph on page 95 in the section where consideration in choosing your laboratory, and one is whether your laboratory is accredited. So perhaps a cross reference to that would be appropriate.

COMMISSIONER BASHINSKI: I have a comment if we're done with the accreditation issue.

DIRECTOR ASPLEN: Okay.

Paul, is that fine?

COMMISSIONER FERRARA: Yes. I knew we had it in there someplace.

COMMISSIONER BASHINSKI: This is on page 48, full discovery of previous DNA testing not used. I'm uncomfortable with the wording, but I don't know what better wording there would be.

This comment, "there are numerous outside experts from universities, research, and medicine with excellent credentials who are capable of rendering a fresh opinion." That's true, but there are also a lot of people who are very willing and ready to render opinions they are not really competent to render.

And I don't know how you want to say this in a way that gets at that without unduly limiting people's freedom to select experts.

I think the emphasis here maybe should be going back to the original laboratory and seeking to have it. You sort of make -- this paragraph somehow implies that the lab isn't going to rethink its work or won't look at it again.

MR. BAUER: Should we put in a cautionary statement there saying but beware of experts with lesser credentials.

COMMISSIONER BASHINSKI: I would like this to be affirmatively encouraging you to go back to the original laboratory and encourage that laboratory to review and consult with you and say that in a very positive way before you start recommending other avenues I guess is what I'm trying to say.

I don't know how to say it. Paul, maybe you have a more graceful way.

COMMISSIONER FERRARA: No, I have sort of a less graceful way of saying it.

MR. BAUER: Actually that was in an original very long version that we chopped mercilessly to make it not so long a document.

COMMISSIONER SCHECK: Jan, would it help if we got rid of the phrase "even if a laboratory has a policy against," and just say there are numerous outside experts. Limiting it to the fact that you can get a fresh opinion.

COMMISSIONER BASHINSKI: That would be fine.

DIRECTOR ASPLEN: Say that again, please.

COMMISSIONER SCHECK: Just get rid of the phrase.

COMMISSIONER BASHINSKI: There may be laboratories that do.

COMMISSIONER SCHECK: He is talking about the FBI.

COMMISSIONER BASHINSKI: They are in the minority.

COMMISSIONER SCHECK: I think it's wrong to say things about the FBI and I think we should get that sentence out of there.

COMMISSIONER FERRARA: I thought Jan was going to take issue with the statement on line 789. One, I sort of challenge the factual basis for making that statement.

COMMISSIONER BASHINSKI: That was my next statement. You can go ahead.

COMMISSIONER FERRARA: How do we come up with this statement? "Forensic DNA laboratories, especially State run laboratories are notorious for being extremely conservative in interpreting their own results."

COMMISSIONER BASHINSKI: I think that's definitely excessive.

COMMISSIONER FERRARA: There are a set of standards for declaring samples inconclusive, so maybe to be commended for going extremely conservative. But we are following standards. And one, I don't think any State lab versus a local or Federal are more or less conservative.

DIRECTOR ASPLEN: Let me guess, you'd like us to strike that particular sentence.

COMMISSIONER FERRARA: I'm not crazy about it. It's a compliment in a way. My note is, is this such a bad thing.

MR. BAUER: It wasn't meant to be an insult at all.

COMMISSIONER ABRAHAMSON: Maybe what the point is that in light of more data and experience some of those matches might now be seen differently and that's what one really has to put in. Not about being conservative and whatnot, and just say therefore, it is worth going back to the lab to reexamine the data.

COMMISSIONER BASHINSKI: And it's more aggressive, this whole wording here is just --

COMMISSIONER DAVIS: Perhaps there is a better word than notorious.

COMMISSIONER BASHINSKI: Or aggressive call.

DIRECTOR ASPLEN: Let me suggest that we agree to take lines 787 to 797 and rework that section, that paragraph. Would that be more comfortable?

COMMISSIONER BASHINSKI: Yes.

COMMISSIONER GAHN: Chris, I think that goes hand in hand with the issue I had on what is an inconclusive result. That's basically what I'm talking about.

And we know as prosecutors -- and I'm not finding a we know -- how many times have we gone through cases where while the K526 is a little light I'm not going to call this and we get frustrated with the analyst at times. There are so many examples of what's inconclusive, and I think that is what is important here, to bring that out.

COMMISSIONER FERRARA: Again, that is the correct thing for the laboratory to do.

COMMISSIONER GAHN: Right. It is correct.

COMMISSIONER BASHINSKI: And shopping around to find someone who is a little bit less careful isn't the right way to fix it.

COMMISSIONER DAVIS: Isn't your idea that the laboratory was properly careful, but the newer techniques will bring out what they didn't see before.

MR. BAUER: Part of it is just experience based, because we have a recent case that both Barry and I were involved in, unknowingly on the opposite sides where the outside expert turned out to have been the supervisor in the laboratory. And the outside expert now said yes, that's clearly a match, where his own laboratory originally with lesser experience at an earlier date would not because it was faint bands.

So I think the key here is experience. But I understand the footnote and maybe the dissenting view that Jan says that you're shopping around for somebody who will make a call for a price maybe.

COMMISSIONER BASHINSKI: Or out of lack of experience.

DIRECTOR ASPLEN: Any other comments on that?

I would summarize then as follows:

In the prosecutor section we need to look to the extent in which prosecutors must consider defense tactics. By the way, to find a way to incorporate that in there, essentially where it's appropriate, not to hold the defense tactics against the defendant, not to do that.

Secondly, we need to clarify that the CODIS admission issue and the extent to which that's legal and appropriate in various settings.

Third, page 47 I think line 773, what is that? I can't read my own writing.

Maximize the ability to do further testing.

Page 48, change to the Court from what was I think judicial officer. Make that change.

Again, to address the inconclusive phraseology, be more specific and exacting maybe refer back to the original clarifications that we made earlier on in the document.

Page 55, I have a footnote regarding the accredited laboratory issue and we can refer back to page 95 on that since we have done that later on in the document.

Line 9, 13, and 14, the issue regarding the guidelines. Line 7, 14, take out "West" for that kind of plea. And then rework line 787 to line 797 appropriately. And then that is the issue on line 792 and 792.

With that, I will ask Barry to talk briefly about the defense chapter.

COMMISSIONER SCHECK: I don't think I have anything more to add than what is there.

DIRECTOR ASPLEN: Any comments about the defense counsel section?

COMMISSIONER BASHINSKI: On page 74 at the top, I don't agree with the dry atmosphere at room temperature. I say again, freeze the evidence, don't keep it at room temperature. Page 74, line 1216.

COMMISSIONER SCHECK: But you don't disagree.

COMMISSIONER BASHINSKI: I don't disagree that dryness is the most important thing, but you are making a statement that the best way to store is dry at room temperature and I don't agree with that.

COMMISSIONER SCHECK: I think the only thing I want to put in here is that when you are looking at these old cases you're going to be finding dry samples at room temperature.

COMMISSIONER BASHINSKI: I didn't say that those samples couldn't be tested. I said if you are going to say what the best way is or imply what the best way is to preserve it, that that's not the best way to preserve it. And that is all I'm saying. And I think that sentence implies that.

COMMISSIONER SCHECK: Well, the only problem, Jan, is if you look at it in the context of what we are saying you do at this point in time establishing the chain of custody, we are now at the stage where you have found the rape kit vaginal swab in some courthouse in Virginia in a paper bag, okay. And now we want to send it to the Department of Justice for testing, all right. And we call you up and we ask what is the best way to send this.

Are you suggesting that you would at that point suggest that we freeze it and put it in the cooler.

COMMISSIONER BASHINSKI: No, but when you send it to us we will put it in the freezer. And this statement says the important factor is storing the evidence in a dry atmosphere and at room temperature. I think dry is the most important, but at room temperature.

DR. WORD: Jan, I agree with what you're saying and the sentences you're pointing out have two directions. And we are looking at old cases and you're looking at new and our statements are misleading and we need to revise some of these.

Because clearly most of the postconviction evidence isn't going to be frozen. Everyone knows that. But for future, if available, it should be frozen. I think we need to tighten up some of these sentences.

COMMISSIONER SCHECK: Right. But what I said, I don't want people shipping things in coolers because when you start doing that they're going to ruin the evidence.

COMMISSIONER BASHINSKI: Just strike at room temperature.

COMMISSIONER SCHECK: I got it.

DIRECTOR ASPLEN: Any other comments?

COMMISSIONER FERRARA: My editorial comment. On page 70, line 1164, the 1996 NRC publication DNA Technology and Forensic Science. Well, NRC, as we know, did two studies, one in '92 entitled DNA Technology and Forensic Science, and one in '96, a Valuation of DNA Evidence.

COMMISSIONER THOMA: The Valuation of Forensic DNA Evidence.

COMMISSIONER FERRARA: So whatever one or if you may include both of them.

COMMISSIONER THOMA: I'd suggest using both.

COMMISSIONER SMITH: I think this is what Barry was talking about before. On page 74, if the results are favorable to the applicant defense counsel and prosecutor should join in either a motion to vacate a conviction or where such motions are time barred and application for executive clemency.

I take it that you wouldn't discourage them from joining in such a motion if the bar would be waived. And if that is the most common way of doing it, maybe we should encourage them to do it.

COMMISSIONER SCHECK: Yes.

COMMISSIONER THOMA: It depends on your prosecutor. I remember we talked before in our group about that.

COMMISSIONER SMITH: I understand that.

DIRECTOR ASPLEN: Any other questions or comments?

Then I would summarize by saying on page 74, we will take out "at room temperature." Line 1215.

On page 70, clarify which report we are addressing.

COMMISSIONER THOMA: Change the name.

DIRECTOR ASPLEN: Clarify and add.

On page 74, add "consent to waive" or language to that effect.

At this point in time we are running a little bit behind. However, I think this is a wonderful discussion. What we are trying to do is really convert a document which is a working group document into a document which is a Commission document which is why we are doing this.

Our goal is really to try to finish this this evening on a conditional basis. And what I mean by that is that we essentially vote on it theoretically to approve it with the changes that we have listed here.

What would happen then is we would make those changes, send the documents back out to all the Commissioners, and gets you to sign off on it or make changes as you feel is necessary.

That way we would not have to come back to full session before we actually get underway with producing a full document. We would have final approval at that time. That is what we are trying to accomplish here.

However, we are in a situation where we have people in this group who will have to leave this evening and our next speaker has to leave this evening. So what I would ask is there any objection to going to about 6:30 this evening in an effort to accomplish those goals. Any objection?

Seeing none, hearing no objection I should say, then what we will do is I will ask Dr. Carl Selvaka if he is in the room. There he is. I would ask him to present to us so he can then catch his plane and then we will come back to the discussion on the recommendations.

So the folks up here can go back to their seats. We can put the power cord into position, and I will take this time to introduce Carl to the group.

Carl is the director of the Massachusetts State Police Crime Lab. He is also the president of the American Board of Criminalistics. He is the former director of forensic sciences with the New York division of criminal justice services.

He has also worked with the Bureau of Alcohol, Tobacco and Firearms, the U.S. Army forensic toxicology drug testing lab system, the National Medical Services, a private forensic laboratory near Philadelphia.

As I mentioned earlier today, I asked Carl to come and talk to us about issues surrounding prioritization because prioritization came up at our last Commission meeting and we wanted to deal with it so that we could then discuss the CODIS backlog issue tomorrow.

Carl is going to talk to us about prioritization as it pertains to backlog samples, and then some of the issues that come up with regard to prioritizing collected samples, et cetera.

So with that, I will turn it over to Carl. Thank you.

Database Prioritization

Dr. Carl Selvaka

Director of the Massachusetts State Police Crime Laboratory

DR. SELAVKA: Chris told me that you all expected somebody outstanding in their field on this one, so thank you. I also, because I knew I'd have an audience of attorneys, I better put a disclaimer up here. By the time I was done disclaiming I didn't know whose opinions, including my own, whether these are them. But you have heard others disclaimers before so they are of little use probably.

What I'm here to do is to give what I'll call a hit-and-run. You have had a long discussion that I wasn't privy to and didn't really know about until I got here today so I'm bringing you what I guess would be considered a completely unbiased opinion, unweighed by any previous decisions made by this august body.

I'm coming to you from the State perspective and a little bit on the national basis just because us States (sic) tend to talk to each other. I'm going to take you through three discussion points and then leave, and then tomorrow you have at least an hour on the agenda to talk about this and I'm sure it will give you some things to think about. Hopefully you won't hate me for doing it. I will talk you through the four kinds of DNA backlogs that there are, prioritization concepts for them, and then some issues, strategies, and needs related to them.

By way of background, I did come from New York prior to this. I oversaw the accreditation effort there. There is a mandatory accreditation requirement in New York State. I oversaw it with Barry and a number of other people. The Commission that instituted the accreditation also implemented the DNA databank and had to manage the offender collection there in New York.

Since then I have gone to Massachusetts to the State Police crime laboratory and when I walked through those \$30,000 stainless steel doors I was very surprised to find out that we not only had the problems that New York had in their collections, but more in addition.

Our law has a checkered past. We are the 47th State to have a DNA databank law and the first one to have it enjoined. It was enjoined almost at the point of inception in that we didn't promulgate rules and regs for governing the collection process so we were immediately enjoined from doing collections after the first set.

We put up, we promulgated some emergency rules right after I got there. We got unenjoined. We did a collection of about 2,000 samples and then we got enjoined again on a Fourth Amendment petition from four inmates sponsored by the ACLU.

Essentially a single judge, Judge Borenstein (phonetic), has decided that recidivism as a concept does not function well in Massachusetts. He has said essentially that there is no reason to pull these convicted offenders in and take their blood. That there is no reason to believe that they are any more likely to commit future offenses of the same type for which they have already been convicted and sentenced than you or I.

We have filed an interlocutory appeal with a single judge. Seven weeks ago we had oral arguments. No decision has been rendered. The AG assures me that that is a bad sign. So we have appealed to the

Supreme Judicial Court, a petition to them to take the case directly rather than taking it through Appellate. And if that looks promising, all things considered we should have something, oral arguments in front of the Supreme Judicial Court sometime in January or February. Which effectively enjoins my database for the rest of the fiscal year in Massachusetts.

That is, of course, the first shot across the front of the ship. We will see what happens when the dynamite goes off at the end.

Now with respect to what I'm here to do for you today, I want to take you through four types of backlogs. You may not have considered all of them, so I just want to set the ground rules.

There are convicted offender samples which have been collected. There are those which are owed. There is new casework received by laboratories. And then there are old cases that laboratories either have on hand or in their heads somewhere with detectives or DAs. That we will call cold cases.

I won't address postconviction testing, you've done that already.

Essentially, I'll use anecdotal information, because that's really all we have, from a few states that have some data about which I'm familiar. New York State's backlog of collected samples is around 7,000 with 3500 owed, and once things are up and running New York State will garner about 4,000 samples more per year.

Massachusetts has collected 2500 samples, is owed 11,500 in retrospective collections. Once we're done we should have about 1500 new samples per year coming into the system.

On the National basis, talking with Steve Misgoda (phonetic) of the FBI, about 250,000 samples have been tested from convicted offenders collected throughout the United States for RFLP. If you add those to the 350,000 backlog for RFLP, all of them need to be tested for STRs.

So essentially you have 600,000 samples that have been collected in the U.S. Backlog that need STR testing. You also have about a million samples, anecdotally speaking, that are owed to the system of convicted offender collections.

In our best estimate at this time, if the laws didn't change anywhere, would be about 100,000 new cases submitted for convicted offenders per year that would require testing.

I should also point out that somewhere, did you receive a handout of my presentation slides? Good, so you don't have to take too many notes. It's been a long time since I was a student.

COMMISSIONER DAVIS: What do you mean by owed?

MR. SELAVKA: Owed means they are convicted offenders who are index offenders and who owe the system a blood or a buccal swab.

MADAM CHAIRMAN ABRAHAMSON: So it hasn't been collected yet.

MR. SELAVKA: They have not been collected, that's correct.

As far as casework goes now the numbers become a bit more anecdotal even in the convicted offenders samples. Essentially about 23,000 samples of casework forensic DNA typing were done in the United States in 1998. About 6,000 backlogged case samples remain according to Steve Misgoda.

We really don't have a feel for how many in the future we should expect. I'm estimating, again based on anecdotal information, that the number of cases received by laboratories today and those that we may receive by 2001 might triple, based on investigators greater use of technology and our greater sensitivity.

Go ahead, Jan.

COMMISSIONER BASHINSKI: Is that 22,000 cases or 22,000 samples?

MR. SELAVKA: I believe they are samples tested.

COMMISSIONER BASHINSKI: So maybe 1/5th as many cases.

MR. SELAVKA: Let me take that back. These are samples that could go in CODIS so they are cases. I apologize.

COMMISSIONER FERRARA: You're talking about casework DNA samples.

MR. SELAVKA: No, these are cases, because these are CODIS ready cases if you will. This is from the summer survey for CODIS.

COMMISSIONER BASHINSKI: Unsolved case profiles is what you're talking about.

MR. SELAVKA: Casing that could be submitted to CODIS.

COMMISSIONER FERRARA: So it would have to be cases because we ran that many samples in Virginia alone last year.

MR. SELAVKA: Yes, sir. I apologize. So those are cases.

What we don't know even more so than this and unexplored is how many cold cases are testable. We don't really have a good sense at the National level, but we know there are probably a lot of cases.

We don't really know what the impact of the DNA Advisory Board's recommendations are going to be on the recruitment of scientists, retention of those scientists, and productivity in the laboratories. We're probably going to bog down our laboratories in meeting the new higher quality standards. And the testing technologies we anticipated as you have heard about already will have an impact on our ability to do testing and casework and databanks.

When it comes to laboratorians, if we take the world view and sort of talk with the FBI about this issue, what would be the future of the number of samples that could present themselves to CODIS for testing and entry.

If we look at all felonies in the United States, it could be as much as around a million a year that could be presented to the system for testing and incorporation. If we look at all the rest, it would be around one and a half million.

The FBI is planning on CODIS being able to take an about a million convicted offenders a year. That way, if we are anywhere less than that we should have sufficient server-client capacity if you will.

Casework samples we don't have good numbers of suspect and no suspect cases. Some are survey anecdotes. But we do suspect if we tested all possible cases the number of cases that could be submitted to or run against CODIS could equal one and a half million a year.

Again, big load. They're planning on that at the FBI in terms of their client-servers architecture.

When it comes to prioritization, I want to set aside some apparent benefits and then sort of address the reality and take you through some examples. These again are my opinions and raised for discussion points and not as what you should do. You decide.

But the apparent benefits of prioritization include an increased potential efficacy of the tests that are run giving reasonable results and probative value to cases sooner than later. And it is good policy and looks good. It makes you feel good when you prioritize. It makes you feel like your doing something positive.

The reality is I think there are some cost benefit questions that have to be addressed. When you try to prioritize case work I think the reality is local politics and policies will always outweigh the National -- if they're anything less than standards, they will be outweighed by the local reality.

And because of that, there is really no national policy that's likely to overlay on top of the regional, local, municipal realities that already exist, of which prosecutor gets served first, which kind of high-profile case gets run over others. There will always be jurisdictional and political reasons why things get tested.

There are also some efforts underway to provide some funding and resources otherwise to the effort for casework prioritization and testing and that includes the DNA laboratory improvement program grant. They are now in phase four of a planned five year, five phase program. And also the state identification systems grants giving somewhere around \$200,000 a year to most states in order to provide some infrastructure for testing for DNA as well as to other components of databasing.

Let's look at where the offenders are physically. The ones who we care about the most are those who are basically sentenced to time served, those who are on probation and parole, those in jails, and those in prisons.

The people that owe samples, as I have talked to people in other states and looked at my own situation, are those who are sentenced to time served. Almost all of them owe me samples. I don't have a lot of them. Probationer and parolees owe a lot of samples and people sentenced to jail terms owe me a lots of samples.

The places where I have been able to get my samples are in prisons, sort of descending order from there. Jail inmates, parolees and probationers. So the larger number of collections have come from prisons.

Our liability I would argue though, comes with the following considerations. The people sentenced to time served are a huge liability because they are under no supervision at all. Those on probation or parole are under moderate supervision, and those in jails are under moderate supervision as well.

You could look at liability at another way, too, from a social aspect. That is sexual predators might be seen as providing us with the highest liability in terms of collection. Those involved with crossover crimes in the younger part of their career could be our greatest liability.

When you add all these things together I think we have to ask the question how can prioritization alleviate this liability. That's really what prioritization is about.

You can imagine some schemes for doing prioritization. One could be a simple time basis. The first person out to hit the streets should be the first collected and then go backwards to the last one out. Maybe we should look at their crimes in the likelihood of recidivism for those crimes and use that to govern how we collect. Perhaps we should look at the likelihood of a person committing a certain kind of offense and leaving biological samples behind.

All of these are strategies that could be used. The reality is we will still end up with National inconsistencies unless you can come up with a standard. We also are missing some very important data at the local and state level to allow us to do some of the prioritization schemes that we can imagine.

And the time that you would spend and the errors inherent in doing any selection of samples for people out of this process are going to have significant costs and perhaps a cost not just in monetary terms but programmatic.

These are thorny issues that we have to deal with. I have a proposed strategy in order to enhance CODIS' effectiveness significantly. If we remember the goal, and that is, I think, to rapidly populate CODIS with as many profiles as possible, especially for convicted offenders, but also in the case of trying to minimize the cost and errors involved in that rapid population and create a firm infrastructure for offender collections and casework efforts.

One way we could do this is with collected samples, rapidly test all of them using STR and commercial laboratories with essentially no prioritization. If we can do them quickly prioritization becomes immaterial.

On the other hand, for samples we are owed from convicted offenders, perhaps we should prioritize them on the amount of supervision on the audience being collected from. Those who already hit the street, get theirs first. Those under limited or short term supervision, get theirs next. And finally get those in prison.

We do need a robust mechanism to make this happen, and that's the last point I'll argue. What exactly is a robust method. If you haven't lived in the process of collecting these things, I'll take you through what it means to me.

First of all, there are three key points. We need to identify a person as early as possible that they owe a blood or a DNA sample. We have to somehow get people to take ownership of the collection process. And finally, we have to do a double identification and verification that that is the right person we collected from and they were supposed to have a collection because they were an index offender.

Who identifies these people? Well, it could be identified by district attorneys, judges, and clerks of the court. Jail administrators and wardens can identify these people. Probation directors and parole

administrators also could be the identifiers. You notice the laboratory is not really involved in the early identification of these offenders. We are not there yet.

We need some tools for this identification to occur. There is a missing infrastructure for information management. MIS stands for Management Information Systems.

Clerks of the court generally have an automated process by which they put in the results of the case. Criminal history databases are built on that data. Many times, New York State and Massachusetts are two examples, I've talked to other states, too, the clerks don't always put it in there. It's not always accurate.

Sex offender registries in some states are linked to the DNA databank. That could be a missing link in some states.

Correctional management systems. When a person is received by a correctional institution they're supposed to have some data of identity, the crime for which they're convicted and sentenced, and that could trigger the blood draw request.

The DAs have information systems available to them to track cases and look at sentences. And then finally, DNA databank administrators.

None of these databanks in most states are linked. All of them contain somewhat different information.

In order to do the best job we need to link them. And that is a piece where perhaps you could specify or recommended some piloting, pilot projects or funding to try to assist in that.

Also, because of the turnover of personnel involved in the collection process and the identification process there is a constant retraining need. In New York, for example, we have a person set aside at the policy analyst level, the supervisor level, who does nothing but goes out and trains people how to do the collection properly and tries to get them excited about doing it.

So it usually takes slides. I've got three of her slides here. She goes out to the correctional facilities and tries to get them excited about the fact that for once they can try to keep future crimes from happening as opposed to taking care of people who are already convicted of crimes. Tries to get them excited about giving these criminals, these sex offenders a place to live, a spacious home with many doors and a large scenic fenced in yard and something nice to wear such as this forest green all cotton two-piece ensemble with a matching jacket.

It seems trivial, but someone has to do it. The people turn over routinely enough we have to make it happen. That takes money. New York State happens to use Burn funds for that. Not every state has that kind of availability of funding.

When we talk about ownership of the collection process, the laws in most states do not specify who gets to go get that blood. Most of these look like unfunded mandates to the locals. And in many cases, frankly, they are.

Most of the efforts are poorly coordinated. Florida has one of the best systems, Virginia is doing a good job now, California is coming along, Illinois is doing a good job, but many of the others states, especially us late arrivers, don't have any procedures in place and are very poorly coordinated.

In many states it revolves around a person who acts like a point of light to get it done. In New York City state Jim O'Connell, if this guy got hit by a truck New York State's program would be in deep trouble. He essentially makes the whole division of correctional services program of collection happen.

The prisons have some infrastructure available to them already, such as correctional health care facilities and contracts, department of health and medical examiner health, hospitals that can do collections. They even have contractors. Contractors provide you with responsiveness, with competitiveness, so a good price and good response, good service, if you will. They often lower the cost overall of collecting these samples.

In Florida they've now got a contract to do collections at the courthouse for those who would be sentenced to time served, they can collect them before they hit the street. It's good thinking by Florida. They have a program set up for it. They have set aside money in their State budget. They are getting it done. Many other states, my past and current included, are not in that situation.

It's a bit thornier, it ties people in knots at the local level for probation and parole. The reason for this is there is really no health care structure for probation and parole. They're law enforcement orphans. They don't have the things that jail administrators have or prisons have.

We've really got them poorly designed for the task of doing collections. They have a lot of administrative burdens, they are responsible for a wide distribution of services, and they have very limited access to funding. They're usually very overworked and very underfunded. That is a place where we could use some money.

On the third essential element of doing early identification is taking a double identification and verification step. We have to do this. We have to make sure that if there is a hit against CODIS we have a person in the databank for which the candidate match is forwarded that was supposed to be there. We have to make sure the finger or thumbprint that was collected was verified against AFIS. We have to make sure the sentenced offense is an index offense in that State, and that they were sentenced after the time that the databank law went into effect. All of that is very important.

In New York State we continue to have problems with people. New York State's law doesn't allow you to collect from people who are convicted of attempted anything. If you rape someone, you're sentenced and convicted for rape, we get your blood, convicted and sentenced for attempted rape, we don't get your blood. But the jailers love to get blood, so they get them on attempts anyway.

Then we figure out, whoops, that's not the right guy, we have to do an administrative removal process and get that blood out of there.

We have some people who know in localities, the jailer knows that this guy's a dirty scumbag. And even if he is not convicted of an index offense, he'll collect him anyway because he knows he is going to do something down the road. Well, that's great, but it increases the cost to the system.

We are on the road and we want to do the right thing but we've got to have all the pieces of this puzzle in the right place at the right time.

Again the goal, rapidly populate CODIS, minimize the cost and errors and create a firm infrastructure.

There is money to do this with. I would argue again that I think the samples we have on hand, let's get them done quickly and populate CODIS. The other ones, let's prioritize and do a good job with them.

Overall a successful database again, you know this but just to remind you, it identifies the right person and exonerates the innocent. Gives us the ability to link cases and ultimately saves a lot of lives. That's why we are doing all this. That's why you're here.

You're going to cause a lot of people to think outside the box. What you do here is very important. It impacts everybody, laboratories and those that collect blood for CODIS especially.

I wanted to make sure I acknowledge people who helped me with this. That includes people in New York, people in Florida, and my lab for letting me be here.

Before I slide out I do have a little bit of time for questions to help you with anything I can then I will be leaving and the dust will settle later.

COMMISSIONER SCHECK: First, on the samples owed, are you telling us by intuition, are you telling us by some data that those are mostly coming from people that are on parole, probation, time served, people on some form of supervised release in the community?

MR. SELAVKA: Anecdotally from the states are whom I most discussed, I'm most familiar. That's our data. Prisons are not a problem. Prisoners we are getting.

COMMISSIONER SCHECK: So in other words, it's the people that are on the street that could commit crimes which we could actually type with the database that we have to capacity to get and type at this point.

MR. SELAVKA: That is exactly the point. We want to get the ones under the least supervision first because they are the ones that can commit more crimes now and they are the ones whom we've had the most problems because of missing infrastructure elements.

COMMISSIONER SCHECK: Do you have any sense whatsoever of how many old unsolved cases there are that can be typeable.

MR. SELAVKA: There is a lot more hand waving on the number of cases for which we don't really know. I can only tell you, you know well in New York we tried to get that number. It's very hard to get at.

COMMISSIONER CLARKE: Doctor, on the convicted offender strategy, aren't those people who are on the streets who have done time served, aren't they going to be actually the most difficult to find and the costliest to obtain samples from as opposed to somebody who is under some type of supervision or in custody.

MR. SELAVKA: I think the first part of your statement is absolutely correct. They would be the ones that are most important to get. I don't think they're the most difficult, if we use Florida's very new example of how to go about this.

What we need is for the conditions of sentence, this basically means we have to work with district attorneys, clerks of the court, and judges. Work with them in order to make it a condition of sentence even when the sentence is time served, that they provide that blood prior to hitting the street.

COMMISSIONER REINSTEIN: I agree if there is a sentencing order they can make them do anything. But I thought you were talking about capturing samples of people who were already on the street and going back to get those old ones that have been released in the last several years.

MR. SELAVKA: I look at that question somewhat pragmatically. If we believe in recidivism we will see them again. And what we can do is try to create the traps to hold the person in a stranglehold until you get the blood the next time at the very worst. And at the best, send letters to the home of record and do the best to find these people. Notify them of their obligation to provide the blood.

In some jurisdictions we've had district attorneys who actually chase this problem down. They know where the guy lives and they get a bench warrant to go get it.

Again, this is a local problem. It's kind of like politics. It really comes down to an individual district attorney or assistant district attorney believing in the program and making it work.

Everything we do at the Federal level is about providing funding for them to do it. The states ultimately have to work with the localities to make it happen.

COMMISSIONER SMITH: Are all these backlogs blood backlogs or are some of these systems designed to do swabs?

MR. SELAVKA: There are definitely states that are doing buccal swabs. But I talk blood because that's the world I live in, but I believe more than equal states are moving to buccal swabs.

COMMISSIONER SMITH: This may seem tangential, but if in fact probation and parole agents have no contact with the people who are stated on probation or parole, then I'm not sure that the most important thing to do is to collect blood samples. It seems to me the most important thing in jurisdiction like that is to see to it that some contact is achieved. And if some contact were achieved, and it weren't blood we were trying to get, then maybe the kind of contact ought to include a brief swipe at the cheek I would think.

The idea that people have no contact at all with their probationer or parole is in itself something really to worry about.

MR. SELAVKA: I hate to say this, but what I found in my two years experience in New York, and I'm sure I'm going to find in Massachusetts when I get unenjoined, the DNA databank is acting like a quality control measure for the entire system of criminal justice.

We are finding database errors in AFIS, we are finding criminal history errors, we are finding unreported crimes and sentences, and we are finding everything through the provisions of DNA samples. It's horrible, but it's reality.

COMMISSIONER BASHINSKI: You were talking about the unfunded mandate. Our estimates are with the new changes in our new databank law that it's going to cost -- these are blood draws -- about a million

dollars to draw the samples, that is the first year, of the people that we don't have that we are supposed to have. And the legislature passed a law without any money in it. And it's an unfunded local mandate which it's supposed to come out of the department of justice's budget.

MADAM CHAIRMAN ABRAHAMSON: Is that California's department of justice?

COMMISSIONER BASHINSKI: Yes. Not Massachusetts.

The other issue is that we have I'd say about 25 percent of our sex offenders, they're registered sex offenders, no one knows where they are and they are supposed to register every year.

MR. SELAVKA: Yes, ma'am. That is why let's get our blood early on in the program and use that to find the sex offenders the next time around.

MADAM CHAIRMAN ABRAHAMSON: One of the issues before the Commission is whether we should propose that this backlog of samples collected should be put into CODIS and that we should put the money in to get this backlog into CODIS.

And the question that is arising is whether there are in these samples, whether you can prioritize them so that you get the ones that are on the street first or the ones going to be released first, et cetera.

Do you have any views on that versus putting the money into collecting samples now and then testing?

MR. SELAVKA: Yes, ma'am. I would think if the money is available, outside testing goes quickly enough that prioritization becomes moot. In the impact that those samples being populated into CODIS would have, it would be very quick compared to the number of cases that need testing.

I think we will save money in the long run doing the previously selected offenders' samples. Just test them. Don't even bother trying to prioritize them.

There are a lot of missing data links, there's a lot of errors you can make. On the other hand, prioritizing the cases that need to have testing done in a way that tries to get those that will have the greatest probative value most quickly and challenge the database that you now populated with the other money and take the power of the database forward.

I think a little of both. Don't prioritize the collected samples, prioritize the owed samples, and definitely prioritize casework samples.

COMMISSIONER SCHECK: Did you just say prioritize everything? What are you going to do about the owed samples of the people on the street?

MR. SELAVKA: If the people who are on the street and under no supervision at all, you can do the best you can. But the money may better be spent in jails and people on probation and parole. If they are sentenced to time served, we could say they're the priority, but the amount of money it will take to get them may outweigh the benefit.

COMMISSIONER SCHECK: But people -- I guess I'm just confused about this. Why is it that you can't - you have collected samples from people that are on probation and parole, right, and those were the first ones we typed in New York; true?

MR. SELAVKA: Yes.

COMMISSIONER SCHECK: And when we asked them, they said oh, you can't do that but then you made them do it. True?

MR. SELAVKA: Yes.

COMMISSIONER SCHECK: So it's not like you can't do it, it's just that somebody, your point of light or whoever it is in a particular State, makes you do it.

MR. SELAVKA: Let me say how I did it, maybe that would be helpful. Five summer interns. We had to go through it by hand on criminal history records. By hand. So most states will not have this availability and make it happen quickly.

If you have a blood sample in the freezer, I'm arguing test it. Don't bother prioritizing, test it. For those that are uncollected, prioritize them and go after the ones that you know are the low-hanging fruit. Get them first. Everybody gets five summer interns.

COMMISSIONER SCHECK: How much do five summer interns cost?

MR. SELAVKA: Zero. They are unpaid.

DIRECTOR ASPLEN: Were those subsequently tested? How long did it take to test those that you prioritized?

MR. SELAVKA: It's still ongoing.

DIRECTOR ASPLEN: So that wasn't a scenario where we are looking at the cost benefit analysis of testing them immediately like we are in a context of outsourcing. So under that context, we'd still be in that process. With the five interns.

MR. SELAVKA: As I was saying before about the local overlay, this is Federal money being used for out-testing and it's RFLP, it's not a STR model, and it took a while. I would suppose if we had done the prioritization and followed up with STR testing we would have been done by now.

COMMISSIONER SCHECK: We couldn't use the money that we wanted to use to do STR testing, we had to use RFLP testing.

MR. SELAVKA: I'm not even going to touch that. I love the NIJ.

COMMISSIONER SCHECK: I'm not an administrator.

COMMISSIONER FERRARA: Carl, these individuals who owe samples, now the statutes across this country indicate that upon conviction a sample has to be taken, correct? And that is how most of them are phrased.

MR. SELAVKA: New York City says the sentenced offender shall provide. It doesn't say who is going to collect it, it doesn't say ask him, it just says he shall.

COMMISSIONER FERRARA: So what you're saying is the difficulty is with the way the statute is written.

MR. SELAVKA: Yes, sir.

COMMISSIONER FERRARA: And carried out. Not a funding issue necessarily.

COMMISSIONER SCHECK: It doesn't say who should collect it, you mean?

COMMISSIONER FERRARA: The law is inadequate in that it doesn't address one, that the sample should be taken upon conviction, and that who should do it. So the issue is the inadequacy of laws and the collection of samples in at least 49 states because we don't have it in Virginia. It can be done and it can be done right.

MR. SELAVKA: I agree.

COMMISSIONER FERRARA: I don't think it's a funding issue. I think our working group will get into it tomorrow and discover that most of the problem is that the officials in the states are not carrying out their duties, neither the jails or the prison officials. If eventually you shouldn't have anyone on probation or parole who owes a sample. They shouldn't have a sample when they got convicted or sentenced. And once you've done all those individuals you get caught up, you don't have a problem trying to track people down around the street.

COMMISSIONER THOMA: But, Paul, at the very origin what Jan was referring to with RAB1332 that just passed, there is no funding of it. With regard to the actual collection, it doesn't really matter whether it says exactly who should collect it or not. They are not funding whoever could do that collection.

COMMISSIONER FERRARA: No one got funded in Virginia. I collected 175,000 samples in corrections, no one has received one cent. A sample of blood is taken normally upon medical examination when a person goes to a jail or goes to correction. A second tube is drawn at no extra cost and a sample is in the databank. 175,000 samples have been collected without one cent of money for the collection.

So I don't see that money is an excuse. It's a problem of the statute and the way it's written and enforced and carried out.

DIRECTOR ASPLEN: Hold on. We are going to have a entire discussion tomorrow on sample collection, we're going to have another presentation on sample collections, the road blocks to that and then we will discuss it more in the context with our database discussion. That's exactly why we did this so we would engender this kind of discussion, but I need to let Carl go because he literally has to catch a plane.

So if we could save the rest of this discussion until tomorrow I would call back the postconviction folks.

COMMISSIONER ABRAHAMSON: Let's thank Carl.

Conclusion of Panel Discussion on Postconviction Working Group Recommendations and Related Issues

DIRECTOR ASPLEN: At this point in time I would like Judge Reinstein to come up and talk briefly about the judicial recommendations and then we will continue on from there.

COMMISSIONER REINSTEIN: First of all, you all have a handout, the recommendations for the judiciary that are in the recommendations you received by FedEx are a little draft I did and there was a glitch evidently. The most current one is listed at the bottom as draft September 9, 1998, and it has corrections and additions that were made from our last meeting and also from meetings that we had with the Committee.

I really took some of the comments that Jim Wooley made at the last meeting to heart and the recommendations to the judiciary are not meant to be preachy or telling people what to do because I know that was what Jim was saying regarding all of the protocols and recommendations that were made.

But then when I went back to judges on our court and other judges in Arizona and showed them what the recommendations were, they really do want these. They don't regard it as being preachy. Judges really like recommendations. They like whether you want to call it protocol, guidelines, whatnot, they want a checklist of things.

Some of the parts here, I think this goes to all the recommendations. When I list the categories and Dennis listed them and Barry listed them and the like, and it's also in the introduction, that was done specifically because some people felt that a Judge would go directly to the recommendations for the Judiciary and not look at anything else.

We hope that is not what people will do because we really feel there is valuable information on the biological issues and the legal issues that Barry will be doing for judges to pay attention to as well.

But I wanted to give it a touch of reality to the postconviction release process because these cases are really different. I know one of the comments at the last Commission meeting had to do with these are really not any different than the postconviction relief cases, but they are.

Because in most postconviction relief cases you have somebody who is saying we have newly discovered evidence. In these case we don't have any newly discovered evidence. There has to be an order from the court or an agreement between the prosecution and the defense to have the testing be done so that if the test is positive you do have newly discovered evidence to start working off as to whether it's going to be an exoneration, exclusion, whether there is going to be a hearing or the like.

So while an inmate or defendant may not have the right to get back into the courtroom, I think the Court oftentimes will have to use it's inherent power or make a recommendation ultimately to the governor or to the board of executive clemency because of the time bar issues that have been discussed in Dennis', Barry's, and my section.

Also, I wanted to do as far as checklists to recommend to judges the particular orders that they may be facing, that they may have to enter. But only after there is an informal conference where the court should try to foster cooperation between the parties and seek agreements.

And the orders that we talked about are similar to the ones in the defense and the prosecution recommendations; orders to preserve evidence, orders to provide access to evidence, to determine the particular protocol which is going to be used by the laboratory, which laboratory is going to be doing it, who pays for the testing in order to provide enough sample for replicate or subsequent suspect testing if there is enough there to even do that.

So that is basically our recommendations.

DIRECTOR ASPLEN: Questions and comments on the judicial recommendations?

COMMISSIONER REINSTEIN: I tell you what, Dennis mentioned before starting on the categories on the category five, the frivolous one. I recognize also from Professor Starrs' comments as well that there are certain instances where what we regard as a category five frivolous cases, that if there were a tactical decision made by the defense attorney to go for self-defense, the defendant didn't testify because it was arguable for the evidence but that the defendant is now saying he is innocent, that may not be a frivolous case. I think that the door should be opened up on certain cases.

DIRECTOR ASPLEN: Any comments?

COMMISSIONER SCHECK: On that last point, what you might also indicate is especially in instances where the defendant is maybe mentally retarded. There have been a number of cases like that. Especially if the defendant lacks mental capacity.

COMMISSIONER SMITH: Part of the difficulty here is you're looking for some efficiency and some sorting, but it's hard to get away from the need for fact finding in some subset of each of these categories. And it's the fact finding that ordinarily falls to the judge and it seems to me in a way that one of the things you want to be saying is that's so, and here is some sense of how you should do it.

DIRECTOR ASPLEN: It goes back to your previous comment about this is what these are. Kind of explain that better, the purpose behind it.

COMMISSIONER SMITH: Yes.

DIRECTOR ASPLEN: Anyone else?

Hearing nothing, we will move on to Kathryn Turman and the victim recommendations.

COMMISSIONER TURMAN: I guess the most important issue, two things for victims, whether they are sexual assault victims or surviving family members of homicide victims, is the balance that -- well, one of the things we talked about first was that the contact in the initial notification of a request for postconviction vacation would be to have it done by a prosecutor or victim advocate. Preferably from the prosecutor's office, not from the defense attorney. And the balance to be struck is between notifying a victim at the earliest possible opportunity without causing them unnecessary stress if something is really not going to go forward, and not letting them find out through the media or some other public venue.

The timing on that is really very individual to the case and it's important to have someone who knows the victim, either the prosecutor or a victim advocate from the prosecutor's office to talk or Police Department

who worked with the victim. If that is not probable, then working through a rape crisis center or some other or survivors of homicide group. Someone who could provide some ongoing support.

The issue I mentioned that notifying the victim and contact with the victim is important, it's important to have one who is familiar with the victim. Recent studies have indicated that attempted suicides and successful suicides among rape victims and homicide family members is really significant.

And these are people who have been through an investigation, a trial, conviction, a sentencing. And then they have spent probably years trying to adjust and get their lives back together and to all of a sudden have something like this come up can really send them to ground zero in terms of their mental health status.

We also talked about the need to have -- if you have to get a sample from the victim try to as nonintrusively as possible. Allow the victim some choice if possible between the type of samples taken.

After, if the conviction -- the offender is exonerated by testing, then the victim will need some support. It's also important I think to provide reasonable explanations to the victim of what DNA testing is. Many victims don't know a lot about it. Most of what they know is from television, and I think it's important to provide written information as well as in person explanation to victims. To be suggested is a brochure, a sample brochure that can be provided to the victims or their families so that later they have gotten over the shock of hearing this news, that would be something they can refer back to.

DIRECTOR ASPLEN: Thank you, Kathryn.

Any thoughts or considerations?

COMMISSIONER BASHINSKI: Just on page 87 and probably elsewhere you need to make your pronouns gender neutral because there is a lot of discussion here about the female victim, I'm looking here at lines 1428 through 1434. It's probably elsewhere in the document, but I happen to notice it there.

DIRECTOR ASPLEN: Anything else?

Final section of recommendation for laboratory personnel. Is there anything we should say about that?

DR. WORD: Just very briefly it was made clear that the role of any laboratory involved in this is to provide clear and accurate representation with the understanding of the data that has either already been done or is getting ready to be collected through additional testing. And that experts had an obligation to be a consultant. Whether they have already done work or getting ready to do work or being hired specifically as a consultant, that they have an obligation to help the prosecutor, defense attorney, and the Court understand the value and the limitations of the testing.

Most of this chapter is oriented towards a list of questions that need to be considered in selecting evidence in a laboratory.

DIRECTOR ASPLEN: Any questions?

COMMISSIONER BASHINSKI: Very small point. Like on page 94 line 1547, you're talking about experience with particular markers. I'm assuming you mean forensic case experience and if not we

probably should insert that. Making sure that people are accustomed to looking at evidence and not other types of analysis.

DR. WORD: So to elaborate on types of samples, and make it types of forensic samples.

COMMISSIONER BASHINSKI: Yes. Using that particular test on forensic evidence.

COMMISSIONER FERRARA: Also, on page 102 there is another discussion of TWGDAM. If we leave that in, should we put in another footnote that it's DAB now?

COMMISSIONER THOMA: I think so.

DR. WORD: I think we need to leave TWGDAM in since everyone knows about that. And maybe Paul should come in on that, but it seems like having TWGDAM and DAB, the community is certainly used to what TWGDAM is.

COMMISSIONER FERRARA: But TWGDAM doesn't have guidelines any longer.

DR. WORD: But they have existed and they're published.

COMMISSIONER FERRARA: They're superseded by the DNA Advisory Board's standards. Even TWGDAM will tell you we don't have guidelines anymore. So if you just simply say DNA Advisory Board standards and validation with non-probative evidence.

COMMISSIONER BASHINSKI: Do the DNA standards even talk about non-probative evidence in the same way?

COMMISSIONER FERRARA: No, but that is why you're saying and validation of non-probative evidence. Let's just correctly identify the standards we are referring to.

DIRECTOR ASPLEN: Any other comments?

COMMISSIONER CROW: Perhaps you ought to say that TWGDAM has vanished.

DIRECTOR ASPLEN: Anything else?

With that, let's proceed this way unless there is an objection. What we would like to do essentially is to call for a vote on the forwarding of these particular recommendations through the National Institute of Justice to the Attorney General. And what that would mean, however, forwarding them with the changes that have been suggested today that we have listed with the inclusion of the legal issues chapter incorporating the number of things we have talked about, and then those changes would be made, they would be forwarded back to every Commissioner, not just those who are here today, and then signed off on that the changes were appropriately made and sent back.

With that being the understanding, I would ask if we could take a vote at this point in time to again conditionally approve the recommendations for forwarding through NIJ to the Attorney General.

COMMISSIONER THOMA: I don't see any problem with that. Do we know when the next meeting is going to be? How far from now it's going to be?

DIRECTOR ASPLEN: The next Commission meeting is scheduled for February or March. I'm sorry, I don't have it right on me.

COMMISSIONER THOMA: I would agree then.

DIRECTOR ASPLEN: I appreciate the question, just let me explain. We are trying to balance what I think is a legitimate urgency of the issue as evidenced by the conference that was had last week, and that's really the philosophy under which we have been working. At the same time we don't want to sacrifice quality for that expediency which is why we've asked to do it this way so we don't have to wait for the next Commission meeting to actually obtain a vote on the matter.

With that, absent objection, I will proceed with the roll call vote.

MADAM CHAIRMAN ABRAHAMSON: The reason that Chris is chairing this and will take a vote is because I will be abstaining.

DIRECTOR ASPLEN: With that, Professor Scheck, your vote on that matter.

COMMISSIONER SCHECK: I will go for it.

DIRECTOR ASPLEN: Commissioner Reinstein.

COMMISSIONER REINSTEIN: Aye.

DIRECTOR ASPLEN: Commissioner Turman.

COMMISSIONER TURMAN: Aye.

DIRECTOR ASPLEN: Commissioner Gahn.

COMMISSIONER GAHN: Aye.

DIRECTOR ASPLEN: Commissioner Hillard.

SUPERINTENDENT HILLARD: Aye.

DIRECTOR ASPLEN: Commissioner Thoma.

COMMISSIONER THOMA: Aye.

DIRECTOR ASPLEN: Commissioner Davis.

COMMISSIONER DAVIS: Aye.

DIRECTOR ASPLEN: Commissioner Ferrara.

COMMISSIONER FERRARA: Aye.

DIRECTOR ASPLEN: Commissioner Crow.

COMMISSIONER CROW: Aye.

DIRECTOR ASPLEN: Commissioner Clarke.

COMMISSIONER CLARK: Aye.

DIRECTOR ASPLEN: The Chief Justice abstains.

Commissioner Smith.

COMMISSIONER SMITH: Aye.

DIRECTOR ASPLEN: Commissioner Bashinski.

COMMISSIONER BASHINSKI: Aye.

DIRECTOR ASPLEN: And I will add that while Commissioner Gainer is not present, he did leave me a note. He had to go to another engagement. However, he did provide me with his proxy approving them and as such I would add that.

And I would add for the record that I discussed that resolution with Commissioner Wooley who also approved on that basis.

With that, I will thank both you folks for your hard work today, I appreciated it. And most importantly this group up here that sits in front of you for the tremendous hard work that is not over, let me emphasize, but a tremendous effort to bring these recommendations forward. And as a result, I think that justice is going to be pursued a lot more efficiently and in a much better manner in a lot of jurisdictions.

Thank you again for your hard work today, folks. I appreciate it.

(Whereupon, further proceedings were adjourned
to November 23, 1998 at the hour of 9:00 a.m.)

Crime Scene Investigation Working Group Report

MADAM CHAIRMAN ABRAHAMSON: The Commission is called to order on what is going to be our second day. We are going to start with Chief Terry Gainer, who is going to talk about the crime scene investigation working group report.
Chief.

COMMISSIONER GAINER: Good morning. Superintendent Hillard is going to be a little late today. Probably you know there is quite a bit of activity going on in Chicago and in Illinois in the John Wayne Gacy case. But he does promise to try to join us here.

I'm going to report on the crime scene investigations working group. Since the last full Commission hearing we've had two meetings; one was held in Washington and one in San Antonio. We have three more meetings set, and I will talk about those a little bit later.

But let me just try to capsulize what we did in Washington, and then San Antonio. I negligently wasn't there so my partners took over for me. But we will bring you up to date on the good minutes taken there.

In the Washington meeting we sat and tried to figure out the form the subcommittee was going to take, or the working group was going to take, and we decided that one of the best processes would be to do some site visits to see how local police departments, whether they were metro or rural or somewhere in-between, were handling their issues.

So when we met in Washington we started with my own department and Chief Ramsey's department and visited with the detectives. And we had some people come in and talk about crime scene processing, and we went to the lab and our drying room and saw how some of the evidence was being handled in a major city, and I think had some pretty good discussions.

Some of the issues that came out of there identified several issues. None the least of which is the minimum level of DNA competency. The vast difference in DNA understanding among police officers was discussed.

An individual's ability to identify, preserve, and collect biological evidence is dependent on numerous factors, the most important of which we think is training. Training, however, is obviously contingent on size and available resources.

It was concluded, however, that victims or potential victims are not protected equally throughout the country by this technology because law enforcement competency on this issue vary so greatly.

And we even used a recent example in Washington D.C., when we were looking at an older unsolved case there and looking at the crime scene photographs. In the crime scene photographs we saw a toothpick that was at the scene. And it turned out that the toothpick was not picked up and made part of the evidence. In retrospect, we think that the toothpick wasn't there but for, we think, kind of referred to as a gangster pick. Some of the thugs keep a toothpick in their mouth, and that may have very well have provided the saliva and DNA evidence that it would have been nice to have in that case.

But that highlighted to us, at least in Washington, how people just may not have thought, the investigators, the relevance of the toothpick. And I think it was interesting in our working group as we

talked about that, most of the people shook their heads and said, gee, I wouldn't have thought of that either.

So it just, again, highlights what we need to do to educate our detectives and first responders what needs to be done.

We had decided it should be the goal of the working group and hopefully the Commission to establish and promote a minimum level of DNA understanding and competency across the country so that investigative advantages are utilized, whether the victim of a crime lives in downtown Chicago or Washington D.C. or rural Wyoming. But we have a lot of work to do to bring our detectives up to speed on that.

We also talked quite a bit about the old cold cases and thought that the development of guidelines to help law enforcement officers to use DNA and the DNA database to solve old, unsolved cases was an important goal. Given the ability that DNA provides to solve cases with biological evidence that were previously thought unsolvable, police should be educated about the possibilities that DNA and DNA databases hold, as well as the procedure for analyzing and investigating old, cold cases.

I can tell you that the Washington Metropolitan Police Department has had a cold case squad for some time, but in trying to look at their protocols I can tell you that the protocols aren't built around using biological evidence. They are approaching the cold cases in the good old fashion way; go back through them, look at the file, re-interview individuals who may be involved in it. And I'm convinced that they are not yet using the technology that could be developed.

We want to suggest that we would develop guidelines in relatively short order for the Commission's approval.

The next area that's somewhat related to that is the whole training and education. Clearly the training across the United States was discussed and there are significant holes in the way the identification, preservation, and collection of the DNA evidence was discussed. And it ties into the whole dynamic of law enforcement training, education, and resources, and what is available and what isn't.

Based on those type of discussions, again we said we wanted to do some site visits to see how departments who have had some success where it was known to us in doing cold cases training, again irrespective of the size of the department but wanting to be very sensitive to the fact that this is the training issue, the lack of technology, the lack of a mind set in this age of technology is rather universal across the United States and it's not necessarily confined to any one size department.

In that regard, that is a when San Antonio was picked to, again, try to spread ourselves out through the United States and have some different officers come in to talk about what they are doing.

When we met in San Antonio, we began the development of a cold case guidelines and discussed the training and education issues, particularly as they pertain to rural police departments. But I want to continue to emphasize the problem we have in our major cities. Again, I readily pointed out some of the shortcomings in the Washington Metropolitan Police Department, frankly as everybody else in the nation keeps pointing out to us.

Superintendent Hillard has, I think, talked about on more than several occasions about the need even in the places as sophisticated as the Chicago Police Department the need to have these guidelines.

Two officers currently using DNA to solve old cases were invited to the meeting and talked about their efforts. Captain Joe Riga from Buffalo PD and James Caruso from San Antonio PD testified about the procedures they followed to identify cases which may be appropriate for DNA testing and subsequent reopening.

Much of the meeting was spent developing an outline for the guideline, identifying the target audience, goals, and processes to be followed.

Concerning the training issues, Dr. Lee Colwell testified before the group about the state of law enforcement training or lack thereof. Dr. Colwell is from Arkansas, has extensive experience with the FBI. He highlighted the training and education issues in rural jurisdictions. And I wasn't going to spend much time on that here, because that is a handout document, the minutes of that meeting that you may want to peruse.

There were a couple of other issues at the first Washington meeting, and then the second meeting that Chris introduces us to the concept that maybe the document or the instructions, the guidelines, would be developed, we would develop would work very well on a CD-ROM. So that continues to be the thought process that we have to move towards that.

And at the San Antonio meeting there was quite a bit of discussion on the content of the report. And again, since I wasn't there Jan is going to share with us some of the items we brought up on the content.

COMMISSIONER BASHINSKI: I don't have the actual outline, but one thing I would ask Chris is at that meeting we did have a brainstorming session where we created some content or listed the content of a variety of different chapters that we expected to have in our report. So I really can't give you much detail on that, but I hoped that would be -- Chris, would it be possible that that could be reduced to something that could be handed out?

DIRECTOR ASPLEN: It's already been reduced and it's just a matter of putting it in a proper format.

COMMISSIONER BASHINSKI: I think that is very important because it does give us a basis.

One of the large parts of the discussion was the degree to which our work does or does not overlap with the crime scene working group or TWG that NIJ is sponsoring. And Sue Ballou from Montgomery County was at that meeting in part to represent the group.

It was an interesting discussion because we had originally said, well, that group is going to develop a guideline and all we really have to do are some recommendations. And by the end of our discussion I think we had changed our approach and we did think that it was important for this particular working group to come out with something formal.

But I think that the outline that Chris may have -- and you may have some comments on that, Chris -- will be illuminating as to where we are going to go.

One of the things we talked about for our next meeting was that we plan to go to Orange County California because in that jurisdiction there is a very active old cold case unit run by prosecutor's office. And I think at that meeting I will also make some suggestions as to who from our more rural part of California agencies we might be able to bring in to bring some balance to that particular meeting.

Chris, do you have any thoughts about the content of the work?

DIRECTOR ASPLEN: Yes. I have in my hands what you just referred to. Really, what we did was we talked first about, from a substantive standpoint, who were we trying to address. From the standpoint of not just who investigated these cases, but who would initiate these cases.

We talked a lot about the way these cases come into the system. And quite frankly, it's not just a matter of police departments or individual detectives working on their own mission to look into these cases. But oftentimes they're suggestions generated by victims, families of victims. That was the case in Buffalo, New York case that brought our attention to Captain Riga.

Sometimes there are victim organizations, et cetera.

So they can be initiated in a number of different ways. So we had to consider that in the context of how the police departments or how individual investigators are going to deal with those reports, deal with those initiations.

We talked about the introduction and the extent to which an introduction should really include kind of an analysis of why we are in a different position than we were before. Why it is that we should empower law enforcement officers to go into these old cases. We are in a fundamentally different situation now, more dynamic, as a result of the DNA database.

It didn't make sense before to do the DNA testing in a non-suspect unsolved case. Well, now in the context of the database it's a highly relevant proposition, and one worth pursuing.

So we wanted to provide some educational functions there, why things are different and why we should pursue this.

Again, we talked about how cases should be initiated and we talked about the process itself.

Issues that will come up, such as the first thing you want to do is look at your statute of limitations on a particular case. Obviously if the statute of limitations has run and you're in a jurisdiction other than Florida, for example, that still has statute of limitations on cases with biological samples, that is probably a case you don't want to pursue.

We talked and just began to list the different issues and investigative matters that will come up. For example, what is the state of your witness availability, what is the state of the defendant or suspect, if you have any suspect at all, availability. Issues like that.

We also talked about perhaps creating a chapter that talks about the development of a unit, but also recognize the fact that in many departments they are not going to have the number of officers to create a unit, would also need to develop a system that works well as for individual officers, not just departments big enough for units.

We talked about needing to provide a chapter which talks about the contamination issues, the scientific issues. To give you some examples we received. And during the meeting, Robin Wilson presented some of the research that she had done on the state of training and education on some of these issues. And one of the things that we got out of that was some information from some of the national law enforcement agencies.

And in looking at some of their protocols and some their guidelines, they even mentioned in their most recent updates things like plastic bags, packaging things in plastic bags, which we immediately recognized as an area to be looked at and educate law enforcement agencies and updating law enforcement agencies on issues like contamination and storage.

Another example is the issue of using staples in an evidence collection. A new law enforcement officer may well have been trained appropriately on the issue of stapling and the fact that you shouldn't use staples when you're collecting evidence and packaging evidence.

However, if he is investigating an old cold case, he may well get a package that has been stapled. He may well get a package that is a plastic bag. And as such, may not be aware of the old issues, even though he has been trained appropriately to do it in a way that prevents contamination, were other issues. So the need to educate law enforcement officers along the scientific aspect is also important.

Important victim issues. Also, how to deal with victims when you're investigating an old case like that or victims families.

Again, those are some of the substantive issues we began to talk about and began to outline with an eye towards developing recommendations that will allow law enforcements officer, not just to identify, but then proceed in investigating these old cases.

COMMISSIONER GAINER: I think it's no small irony to bring up and not overplay the Gacy case today, that here the department and a lot of people expending the resources to look for victims in a case where the offender has already been executed by the state. And as I understand that issue was brought to light by a retired detective as well as one of the crime commissions.

So you never know where this is going to come from, nor do you know how much of the resources you're going to have to spend giving -- families apparently will have the closure on this case. And even concerning the statute of limitation issues, I think it's legitimate to talk about even if a statute has run on non-suspect cases, whether there is some moral or ethical value identifying the offender that is no different from publicizing sex offender names and lists. So that if you could identify the person who matches DNA in what was previously a non-suspect case for which the statute has run, do we have some type of obligation to do that to alert the people that he was the sexual assaulter.

But that is where we are at on that. We do have, as I said, several more meetings. Jan mentioned 11, 12, January in Orange County; April 9 in D.C.; June 28, 29 at a site to be determined. And Lisa informed us that we've tried to set aside some time in August to perhaps meet.

And, Chris, you also wanted to discuss two other items. One would be the English experience.

DIRECTOR ASPLEN: Correct. Thank you, Chief.

One of the other issues that we talked about was taking a look at the system in the United Kingdom. And since the United Kingdom uses DNA from a more investigative standpoint than the United States does at this stage, we thought that there may be some value in looking at the data that is currently being generated in the United Kingdom about how the DNA database effects the investigative process.

How does the fact that the UK has a more dense database population, that they not only have a larger database but that they apply it in more crimes from a criminal investigative standpoint. How does that change the law enforcement investigative dynamic.

Is there something to be said from the standpoint when investigating a case where there is a biological sample by doing the DNA testing first and running it through the database. Is that a more efficient, effective way to proceed than some of the more traditional investigative techniques. It's not the sacrifice or the omission or the official investigative techniques, but is there a way in a case using this system more efficiently and effectively that we should look at it and perhaps compare it to how we do things in the United States.

Obviously there are significant differences in the system that would have to be accounted for. And as such, what we may consider is some form of comparative analysis taking a look at perhaps Florida, Virginia, California. But we thought there may be some value to that.

We talked to a representative from the research forum, asked them to draw up a proposal for some study like that and see how it changes the investigative dynamic.

We got back a one page proposal. Quite frankly, the numbers came in a little high on the proposal, 85,000 to \$100,000 to do that research.

I think at this stage, if the Commission feels that that is an appropriate pursuit at that stage, to continue for us to investigate the possibility of doing that study, we could go back and talk to the folks in the UK. Talk to Dr. Werrett and see what information they do have and perhaps narrow the scope of the study we want to do and bring the numbers down a little bit.

COMMISSIONER SCHECK: I went over there and toured and attended a number of programs where he presented his data and talked to a number of those people.

One of the things that he emphasized -- and I think it was in the presentation he had in Chicago as well -- is that the number one thing that they focused on was turnaround time.

In other words, it might be very worthwhile to interview the police units that do contracting with forensic science services to see what their satisfaction is and what they did well.

One of the things that we'd be willing to do in New York and -- I'm pretty sure I can speak for the Police Commissioner on this because we were thinking of doing this very idea for less money than you're proposing -- would be to take a unit in the New York City Police Department, identify a precinct where they have a high rate of burglaries, which is the main thing that they are doing so effectively in Great Britain, and try to replicate what they are doing in Great Britain.

In other words, turning it around within two weeks, attacking the scene for biological evidence.

And I'm sure if the Commission is interested in that, the Police Commissioner just last week indicated that he is very interested and excited in doing that kind of program. So amazingly enough, I think I can make that kind of representation.

COMMISSIONER SMITH: Who did the research in England?

DIRECTOR ASPLEN: The forensic science services itself. And really what has happened is, quite simply, they have been going through the process long enough that they are now starting to generate that kind of data. So they are in the stages of starting to analyze the effects of the database system.

COMMISSIONER SMITH: Do we have the product of that research?

DIRECTOR ASPLEN: We don't. Dr. Werrett gave a presentation both to the research and development group and at the conference where some of that information was in fact provided. He has indicated his willingness to get us his presentation materials.

What we would like to do is really see what more they have besides what was presented there, to see what we would have to work with. And then if we decide to pursue that study and create essentially what is a cost/benefit analysis, I think then we can start to look into what kind of potential pilot programs and what kind of analysis we can do here in the United States.

COMMISSIONER BASHINSKI: I have two problems with that. One has to do with the need to have a database. I'm wondering how you would try to replicate the UK experience if you don't have DNA samples from the target population in New York.

COMMISSIONER SCHECK: Well, what Chris was pointing out, the primary benefit is the scene-to-scene case.

DIRECTOR ASPLEN: I didn't mean to infer an emphasize on scene-to-scene.

COMMISSIONER SCHECK: One of the key benefits in terms of the investigation are the linkages from scene-to-scene cases.

COMMISSIONER BASHINSKI: Because I think you're going to be limited in your ability to replicate it because you're really not in the same situation.

The second point has to do with the, I thought, most interesting part of Dave Werrett's talk, and that was the information they had developed about the age of entry people into the life of crime aspect.

I think that data is going to be extremely critical if we are going to ever have a hope of expanding the scope of the database in a responsible way. Because we can provide what really isn't available, hasn't been available as far as I can see here, we don't have that data and it hampers our ability to give informative reports of our effort to plan the database into really a viable effort.

DIRECTOR ASPLEN: Again, I certainly see the Commission addressing a need to essentially address the value of that data in the future. And finding, perhaps, potentially recommending a way to capture all this data clearly is very valuable for a lot of things.

And that would be another benefit of perhaps doing the study in the UK, so that we can not only take a look at the changing investigative dynamic, but also see the benefits of the data they are generating. And see where it improves our data once it gets here.

MADAM CHAIRMAN ABRAHAMSON: Is there any other comments to this?

DIRECTOR ASPLEN: At this stage of the game it's certainly nothing we need to take a vote on. When you get an opportunity, if you would like to talk to me about it. We are not at the point of committing any money to it. What we will do is investigate it further and if you will just let me know individually.

MADAM CHAIRMAN ABRAHAMSON: Thank you, Chief Gainer, for your report. Thank you, Jan.

And I think I've been derelict because I didn't introduce Sheriff Aaron Kennard who has arrived to join us. So let's do that again, if we can, for your benefit although the name tags are here.

Jeff.

COMMISSIONER THOMA: Jeff Thoma, Public Defender from Hennessey County, Illinois.

COMMISSIONER REINSTEIN: Ron Reinstein, Judge.

COMMISSIONER GAHN: Norm Gahn, Assistant District Attorney.

COMMISSIONER FERRARA: Paul Ferrara, Forensic Science.

COMMISSIONER DAVIS: Joseph Davis.

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

MADAM CHAIRMAN ABRAHAMSON: Shirley Abrahamson, chair.

COMMISSIONER CLARKE: George Clarke, Deputy District Attorney, San Diego.

COMMISSIONER BASHINSKI: Jan Bashinski, Chief of Organizing Services, State of California.

COMMISSIONER GAINER: Terry Gainer, Executive Assistant Chief of the Metropolitan Police Department, Washington, D.C.

COMMISSIONER KENNARD: Sheriff Aaron Kennard, Carosella (phonetic) County, vice-president of the National Sheriff's Association.

COMMISSIONER SCHECK: Barry Scheck, New York City forensic sciences.

COMMISSIONER TURMAN: Kathryn Turman.

COMMISSIONER SMITH: Michael Smith, University of Wisconsin Law School.

MADAM CHAIRMAN ABRAHAMSON: Thank you very much. Norm.

COMMISSIONER GAHN: Thank you. I just need to take few minutes to -- Chris asked me to talk about the experience we had in Wisconsin over the past six, seven months.

We recently had our Wisconsin databank up and running, and we had outsourced our convicted offenders samples to a laboratory in Tennessee, and we have currently about 7,000 in the Wisconsin databank. Our last group is in Tennessee now. It should be another 2500 coming back once we get a size, run a size on all the samples.

But with that size for the databank, we have had approximately 12 full hits that came in over a relatively short period of time. I think there were four of them that were from the convicted offender database. We had about 700 case to case hits.

It's been very, very exciting in Wisconsin and we can only imagine what would happen once we get all the convicted offenders into the databank, and also once we get hooked up so that we can have a little overlap with Minnesota and Cook County down in Chicago. I think all those jurisdictions are going to benefit once we all get the computers on the same network.

But just a few things that I've noticed that are as a result of having these cold hits going back so many years, and something which I would hope that the crime scene crew would look at. Questions have come up like, number one, should we do lineups after five years, four years of contact the victim.

Our experience is of course we do, and there is no identification. But there are misidentifications. Then, of course, we have to get a sample from the person who has been misidentified.

What do you tell the victims after five years to come in for a lineup? I have always told my officers I don't want them saying much at all, just get the person to come in. But in a case like this, after five years, I think you have to have some reason. And you may have to go into well, we've got a databank hit. And they don't know. But you should have, as a prosecutor, to just ask the person to come in and do the lineup.

Things are changing here. We have cases, one of the cases on cold hits, we have all the samples for two years in our freezer at the crime lab. When we finally got the hit, the suspect, the defendant is 17 years old when he was 15 at the time. And we are having reserve waiver issues now. A lot of extra work is coming up for prosecutors, things that I never envisioned.

Something else that might be helpful is the first time I granted a search warrant for a cold hit, the amount of work that took and what has to go into a search warrant as far as the AFIS comparison of thumbprints and where everything has been, who did what.

In many jurisdictions we've done that, but I think that might be something you want to include in your work also so people don't have to re-invent the wheel. It was quite a job putting together a search warrant on just how a cold hit is made.

Other questions which I think we need to resolve in your group would be when you have the cold hit, and let's say that there is no ID in the lineup, there would be no confession, which we certainly hope there would be a confession as we have had on a number of cases, and that's all you have.

And I know there is discussion in the community that the cold hit is just an investigative tool.

One of the cases we have, the person was being released the very day. I had the person arrested. Thankfully he confessed, but had he not confessed I was prepared to issue a criminal complaint based upon cold hit.

And I think that is okay to do and I was prepared to do that, but I think that needs discussion in law enforcement. What are you going to do when you don't have a confession, you may have to turn the person loose. But it's something that needs to be discussed.

And I think that is pretty much the experiences we've had here. And it really spawned an awful lot of extra work and issues that you never dreamed would come up. But I'm finding it a very exciting time in my career.

COMMISSIONER GAINER: May I interject? What was the cost of your outsource? And was the total number 7,000?

COMMISSIONER GAHN: Once they are finished, it will be about 10,000. And I believe the contract was let for \$27 per sample. I think is what the contract was.

COMMISSIONER SCHECK: Are these normal samples?

COMMISSIONER GAHN: RFLP.

COMMISSIONER SCHECK: On your cold hits, were those old cases you went and reviewed and sent the evidence?

COMMISSIONER GAHN: What happened was at the Milwaukee Police Department a couple of very astute detectives that we have assiduously went through 1,000 cases of all cases.

And what they did is they prioritized them. They looked at the modus operandi, and even their own institutional knowledge of cases that they knew from a few years back.

They culled those 1,000 cases down to 100 and took all those property inventories and took those 100 cases to the state crime lab. And it's from those 100 that the approximately 12 hits were made.

So I think the police did just a really good job, and hopefully we can go back again through those cases to another level.

COMMISSIONER DAVIS: What was the biological evidence in those cold cases?

COMMISSIONER GAHN: Basically semen.

COMMISSIONER SCHECK: Do you have any notion of the age? Because if I understand it correctly, it sounds like an excellent strategy. You're looking at cases that are back a certain number of years that are unsolved, and then you're figuring that those might be good candidates to get hits on people who are already in jail serving time.

So what were the time frames? In other words, how far back were your four cold hits, how many years?

COMMISSIONER GAHN: The oldest was 1993.

COMMISSIONER SCHECK: And the case-to-case?

COMMISSIONER GAHN: They started with 1993.

COMMISSIONER SCHECK: And case-to-case hits?

COMMISSIONER GAHN: The case-to-case hits are one individual was already charged with sexual assault and was not even convicted with that, he was just charged. But of those 12 complete sent out, three of those they developed a foreign profile from vaginal slides. And that foreign profile matched the foreign profile for the already charged case.

COMMISSIONER THOMA: One thing I noticed, Terry, from your discussion. I know you weren't there in Dallas, but there was a Kansas City formula with regard to working on cold cases after 72 hours, and it seemed to me that that isn't too soon.

In fact, you may get into this type of formula that those cases might be a good idea to get them going, any saliva or any semen that is found in those type of cases. I realize that most police agencies don't have cold cases that are only 27 hours old, but it might be a good idea to think about it.

COMMISSIONER GAINER: I think it's a good point. But even when I was reading the minutes of that, the thing I came to from a police management point of view is why we would transfer a 72 hour case to someone else?

I mean, my first reaction was in the way it was written, the cold case squads were better detectives. And I think one of our educational goals will have to be that the first set of detectives, the first responders need to be as bright about what they ought to do.

But you're right, so if the evidence is there when you get a turnaround time, it shouldn't take another group of people to say, hey, why don't we look at this case from a different prospective.

DIRECTOR ASPLEN: And we definitely anticipate looking into that system. The issue with the 72 hour, quote, unquote, cases, we would hope at this point in time, even before the 72 hours, that there is that identification of potential DNA evidence, and as such what occurs after the 72 hours really isn't DNA specific or DNA generated because it would be worked and identified in the first 72 hours.

But the intent of the recommendations we were talking about are the older cases where they occur at a time when that really wasn't the thought process.

But it brings up another excellent point that I think really encapsulates what we are talking about when we were talking about the minimum standard of law enforcement agencies.

You probably all read about the case in Florida where a fast thinking, well read patrol officer I believe it was, was in the process of following a suspect. Not for the purposes of getting a biological sample from him, but he was a suspect in a number of series of -- I believe they were rapes.

In any event, in the course of following the suspect, the suspect spit on the ground. And the patrol officer was the one who ran over, got a napkin, and gathered up the spit off the ground.

That's the kind of understanding, that's the level of understanding I think that we concluded at that first meeting that every first responder law enforcement officer in the country should have. That should be the level of understanding that every first responder should have, to identify the biological sample like that and collect it.

COMMISSIONER REINSTEIN: The other thing is where I was really impressed by was when Dave Werrett said that in England the most evidence that they got from all the cases were cigarette butts and the saliva from the cigarette butts.

COMMISSIONER GAINER: Just a couple more quick questions I would like to clarify.

Barry mentioned the burglaries that they were doing in England.

Is that still from the perspective that burglaries are a precursor to some more heinous crime?

COMMISSIONER SCHECK: They just have a higher percentage of burglars. Their overall crime rate isn't as bad as ours recently.

But they just investigate burglars. They look for the cigarette butts, they looked for blood in areas of forced entries, hairs, and most importantly they seem to get the most results from saliva. But they really work it and they find those people to go after.

COMMISSIONER GAINER: I guess on the burglary issue I'm thinking back to the Milwaukee experience. It would be interesting if we could walk backwards from the individuals who we identify to the previous criminal history.

So if there is a supposition that the property crime person burglary becomes a rapist, could we take those cold cases, either in your jurisdiction or in Illinois, and take a look at their criminal history sheet and see if they actually have those kind of features. And then, from the detective point of view of someone who is going to do this, go back and look at burglaries in the area for which these people operated to see if we could close burglaries. It would be the reverse.

COMMISSIONER FERRARA: Chief, if I could further this. In Virginia, of all of the cold hits on databanks that we have had on rape and murder cases, 60 percent of those hits, the sample we had was from a burglar conviction of the individual.

COMMISSIONER REINSTEIN: At Promega I think both Dave and the guy from Austria had statistics that showed the crossover on criminal activities between burglary, and I think it was drug cases we had that chart off. That people would later be suspects in second crimes or outside cases. And we got a large number.

COMMISSIONER SCHECK: The only one that didn't cross over was assaults.

But what is interesting is that if you take a look at the patterns and statistics that they've given us, patterns in the UK, are what we all know from Criminology 101, there may be crimes committed in sprees.

But all this frankly argues for upgrading the system so that when type one cases come in, because the other statistics that we are not talking about but is really embraced in this data, is the idea that for what they call the dark side of crime as technologists call it, that when you arrest somebody on first arrest there is a high likelihood that the offender has committed one, two, three other crimes of similar nature that were undetected before that first arrest.

The prospect of typing new unsolved crimes gives you the possibility, gives you, I should say, more than we ever had before at the time of that first arrest you're catching the individual before the prior undetected.

So it seems to me you're looking for areas of crime solving that are unprecedented. In terms of technology, that's it. Because you really would be able to capture all these undetecteds on first arrest. We get past unsolved cases in large numbers beyond the traditional boundaries.

COMMISSIONER BASHINSKI: I have a question for the police here in terms of how well does the way in which the U.S. police investigate burglaries mirror what is done in the UK?

My personal experience is that burglaries are not given a high priority at the scene or in any other respect unless you have the evidence collected and preserved at all the scenes, you're not going to be very successful.

COMMISSIONER GAINER: I think you're absolutely right. Virginia is doing something different, but I thought what the mean experience would be that burglaries do have a very low priority, again. And I was kind of thinking through this.

What I can do is go right back to Washington and do, and it goes back to training those first responders. But a substantial amount of time and effort would go into it, so you're in a cost/benefit analysis here, about do I keep a crime scene search officer on a nickel/dime burglary as opposed to doing something else, thinking that it's a long term investment by investigating a nickel/dime burglary to prevent something worse from happening.

COMMISSIONER KENNARD: Jan, if I may suggest that having worked burglary for nine years when I was a detective, I come in on Monday morning and I have 50 burglars cases. I will deal with those who are in jail, which constitutes two or three. I come in Tuesday and I get 20 more burglary cases. Burglary has a solvability of probably 10 to 15 percent.

If we could get this to the point to where we had the resources, the ability, and the willingness to convince our crime lab people to get serious at the burglary crime scene, and this is exciting to hear that some of these other agencies are gathering evidence and put some of these people behind bars.

Mr. Scheck suggested that some of these people who have been arrested have committed two or three other crimes. In the west we find some juveniles who have committed upwards of 50 crimes before they were arrested.

So we really need to look at the overall picture, because burglary is not a high priority in law enforcement.

COMMISSIONER GAINER: It's a system-wide issue, too. I dare say that if law enforcement started making a lot of burglary arrests, the sheriffs, the prosecutors would have to take a different approach and the bench would, too. Because again, the priority of who is going to get our attention, it would not be priority crime criminals.

COMMISSIONER BASHINSKI: That was our experience. When we were first involved in AFIS and when I was in the Oakland Police Department, we were starting to get hits on burglaries and we would

take those down to the detectives who had already filed the cases. And they were getting angry because they had filed those cases and they had another 25 cases and why were they bringing us these cases.

And I also think if we're going to emphasize something that is going to have a high pay off, we should probably emphasize fingerprints probably even more than DNA. And I don't know that that's being done around the country either at burglary scenes. Not that I don't think we should use DNA at burglaries.

COMMISSIONER GAINER: Well, we throw a lot of powder around at burglar scene to make the victims feel good.

COMMISSIONER SCHECK: That is the question we were all discussing.

But let's just mention something from Commissioner Clarke. That is the idea that -- I don't understand, I don't know how these agents work, how could it work.

In other words, does AFIS have the capacity to look at fingerprints that are taken from burglaries and unsolved burglaries, and then when new people are brought into the system and fingerprinted, do they do a search of unsolved crime?

COMMISSIONER BASHINSKI: Yes. And they hit about 30 percent.

COMMISSIONER SCHECK: Is that done on a state-by-state basis?

COMMISSIONER BASHINSKI: State-by-state.

COMMISSIONER FERRARA: There really is a point that came up yesterday. In terms of the CODIS system, the architecture is ideal. A good, uniform, interconnected system that encompasses every state in the country.

With Automated Fingerprint Identification Systems, given three or four different manufacturers of equipment, two automated fingerprint identification systems between two states can't even talk to each other. There is no national automated fingerprint Identification System except on paper, and the attempts to develop and integrate automated fingerprint identification systems, which it's been a long time in coming.

So one thing we do have with the CODIS system is we avoided the pitfalls of the Automated Fingerprint Identification System.

COMMISSIONER GAINER: But again, in the AFIS system for burglaries in particular, you don't have a transient group of interstate burglars as a rule. So again, it's a cost efficient.

And in some jurisdictions, for example, when we left Illinois, we had developed inter-operability between St. Louis and the databank in Illinois, and we worked very well with the Chicago Police Department which still feeds into the Illinois State Police databank.

But then to expand that we started conversations with Gary, Indiana, and we started our conversation with Milwaukee to see. But sometimes that is happenstance that we all happened to be using the NEC foundation for that.

COMMISSIONER SCHECK: When you do a database search, is it like the DNA databank where you say, all right, let's do it maybe on latents taken from the scene, and you're looking. Does it have scene-to-scene hits?

COMMISSIONER GAINER: Yes.

COMMISSIONER SCHECK: In other words, we have the same prints. Would you be able to do them, like, run a set where you would have a latent from the scene and it's a partial so it only has four points of identification not six, which I guess is generally required. But you calibrate the system to say, well, run them and if something hits four points but not six, then you can go back and you can do a DNA analysis on that particular case if you had any crime scene evidence. Am I missing something?

COMMISSIONER GAINER: You're talking about solvability and probability.

COMMISSIONER BASHINSKI: But the likelihood that you're going to have the level. The whole point of what I was saying is the likelihood that you were going to have the same process to the level to collect all the potential types of evidence is very low.

It's higher that you would have the process such that latent prints could be collected. It's a high pay off, relatively, about the collection and an analysis.

So that's why I would suggest one.

COMMISSIONER GAHN: I will suggest one thing, Barry, like you said in New York. I will go back and initiate a pilot project in the Metropolitan Police Departments where we do it on a case-by-case basis.

I would be willing to pick out some areas there and train the officers properly, collect the evidence, and see what we come up with on a case-to-case burglary just to produce.

COMMISSIONER SMITH: If nothing else, it would help you get a sense of the possible payoff of doing DNA analysis on burglary evidence. Because the England's experience may or may not fit our experience.

COMMISSIONER BASHINSKI: I think it does if you have the capacity to analyze it on those scenes. But I don't see most agencies having that capacity at this time.

COMMISSIONER KENNARD: Most agencies are not going to come in and start collecting samples and storing them on a burglary. It just isn't done. A detective or a deputy will go to a scene on a burglary, spend an hour, and has done its case.

COMMISSIONER FERRARA: In Virginia, as we expanded our DNA capabilities, we opened the door, sort of, to the law enforcement agencies as to the types of offenses that we would accept.

Of course we started with violent crimes, but now law enforcement agencies all over the Commonwealth of Virginia, they have biological evidence at the scene of a burglary would submit it to the laboratory.

And I think, as Jan stated, it's going to be a while before on a national level forensic science laboratories have the capacity to do that, but I think that should be our goal.

COMMISSIONER GAINER: But in Virginia at their burglary scenes are they giving it a detailed homicide-type view, or are they only picking up the biological if it's pretty obvious?

COMMISSIONER FERRARA: Yes. They will see blood on a broken glass entry. Certainly I don't think the search for biological material is as in-depth as it would be on a murder case or rape.

COMMISSIONER KENNARD: Do they vacuum a specific room to try to find hairs?

COMMISSIONER FERRARA: No. I hope not, because that would cripple me. I think there is a cost/benefit there that you reach a certain point.

But we are finding a lot of burglaries, aside from blood, the burglar goes in the freezer, gets a soda, takes a drink, leaves it out. Well, it's relatively easy to swab that can. And in fact, our first cold hit, I'm using the new STR databank. It was a burglar of all things.

COMMISSIONER CLARKE: I was going to say if you took the cases and compared them to the number of cases, whether sexual assault or homicide where identity is in issue, it's probably a factor of a hundred to one, if not in fact hundreds. So I think the laboratories would be hard pressed to perform work on more than a fraction of those cases.

COMMISSIONER SCHECK: That may well be true, but you have to be strategic.

I'm very impressed with the way that Norm's people went out and strategically sought out cases where they knew they would get the most return in terms of using the DNA.

That is what we are really thinking about. You want a targeted area where you do this. I mean, what Chief Kennard is saying about the numbers of crimes, your status shows juveniles. When they start typing juveniles, they got hits across all the crime categories. That was one of his major findings.

And if you look at the criminology studies of criminals, these are interviews that are done with offenders where they ask him on a confidential basis, what else did do you? Some of them, it's pretty impressive. Still, it's a very, very high rate.

So when you break into that system at some point, you're going to be docking into the crime rate. I think you can do this strategically, with your last. The end is not to overwhelm everything.

MADAM CHAIRMAN ABRAHAMSON: Mike, are you going to talk?

COMMISSIONER SMITH: No. I'm just learning so much here.

COMMISSIONER FERRARA: Just one question I guess of the working group on the crime scene investigation. I noted that you had a nurse on the working group.

In the train of law enforcement officers, crime scene investigations specifically for DNA, I think we all recognized and addressed the criticality of that.

However, I can't emphasize how fruitful in Virginia our cosponsoring of training of sexual assault nurse examiners has been in the recovery of quality samples in the most common and most fruitful type of crime in which the DNA is applicable. And that is specifically rape cases.

So I didn't know if your working group was going to delve into that. I assume as much, because you did actually have the same nurse and I strongly recommended it.

COMMISSIONER BASHINSKI: We didn't really discuss it, but I do know there are a number of training programs around the country. We have one in our state as well. It obviously needs to be a part of the report. It needs to be emphasized. I don't think we have to create, I guess, create anything for it.

MADAM CHAIRMAN ABRAHAMSON: I'd just like to make two comments.

One, I gather there will be developed guidelines for the old unsolved cases. But when I asked about guidelines for yet uncommitted crimes, and I was told that there is a crime scene TWG that is going to do guidelines for the crime scene and so we are not going to overlap in that sense with them. So I just want to -- Dr. Rau, you're shaking your head no.

DR. RAU: We are not going to overlap.

MADAM CHAIRMAN ABRAHAMSON: So I just wanted to point that out so maybe you're all aware of it.

The second thing I wanted to point out was that we are trying very hard so that not only the Commission but that these working groups have a wide variety of people who are directly or indirectly involved in the subject, as well as people who might be or should be interested in bringing that perspective. So the point you made about the nurse confirms that.

And again, if you think any other people or interests or concerns or expertise should be added to these working groups, please talk to Chris so that we have them represented and we get the benefit of their expertise.

So those are the two points I wanted to make. Anything else?

COMMISSIONER KENNARD: May I make one comment? May I ask the Chief here, the Superintendent's not here, but in reading your report, he's suggesting that he has a vision of the near future providing raw recruits for DNA training.

I'm also chairman of the post council in the State of Utah. The first thing I'm going to do is take back to our council that this should be included in our training.

Did he have any idea or suggestion from this working group to what level this basic training of this working group included. 8 hours, 16 hours, was there anything in regard to this? Because this is critical.

COMMISSIONER BASHINSKI: We did talk about that and we did talk about it being somewhere between four to eight hours of training. And this is biological evidence in general, it isn't just DNA so to speak. Recognizing, preserving, not contaminating. Those are the main issues.

MADAM CHAIRMAN ABRAHAMSON: I think this was a very truthful and helpful discussion, and thank you Chief and thank you, Ms. Bashinski.

We are running late but we are going to take the break now, come back around 10:30, and then Dr. Sozer will make a presentation. But we left extra time in here so that we are in good shape, Chris says.

(A short break was taken.)

MADAM CHAIRMAN ABRAHAMSON: Before we move on to Dr. Sozer, Professor Berger had an interesting suggestion I'd like to pass on to the entire Commission.

She has been listening, she says that there are a variety of interesting topics that have been raised that would be or might be good topics for research for law students or law graduates, sociologists, criminologists, law enforcement research, and that we ought not to lose them.

Each of the working groups might try and keep such a list and publish that as part of the working group's report so that they would be available to those interested and might even have part of a website such a list as they come up and give bibliographical materials if we have them. So Chris, Lisa. All right.

DIRECTOR ASPLEN: We will do that. We will look into that.

MADAM CHAIRMAN ABRAHAMSON: Good.

Chris, if you would introduce Dr. Sozer, and then we will move to the other side of the table again.

Road Blocks to CODIS: High Throughput Collection and Accessioning of Convicted Offender Samples

Dr. Amanda Sozer Associate Director, Fairfax Identity Laboratories

DIRECTOR ASPLEN: As we mentioned earlier yesterday, this meeting was designed in a way that addresses some of the concerns that were raised at the last Commission meeting in our attempts to address the backlog reduction issue.

As such, we asked Dr. Amanda Sozer to come and talk to us about the issues of evidence collection, prioritization, et cetera, and some of the roadblocks that occur in that dynamic with an eye towards any recommendations that the Commission could come up with to help develop pilot programs that would, in fact, facilitate better coordination, more effective use of database sample collection and analysis.

Dr. Sozer received her undergraduate degree from Rikers University and a Ph.D. In biological sciences with a specialization in genetics and emphasis in biotechnology from the University of Tennessee, Oakridge Graduate School of Biological Sciences.

She began working with forensic DNA testing in 1990 at Cell Mark Diagnostics. She is currently the associate director at one of the major private DNA labs in the country, Fairfax Identity Labs, and is actively involved in collection and analysis of CODIS convicted offender samples from a number of different States.

So with that, thank you, Dr. Sozer, for being here.

DR. SOZER: Thank you for inviting me here today. Can everyone hear me? Okay.

I came today to share with you some of the difficulties encountered in the collection and accessioning of samples for CODIS.

When I talk about collecting samples, I don't only talk about putting a needle in someone's arm or taking a buccal swab, but actually trying to identify who you need to collect, actually obtaining the sample, and completing all the required paperwork to maintain the chain of custody and identify that sample.

When I talk about accessioning of samples, I talk about receiving the samples at a laboratory, logging those samples into a computer system, verifying the samples, and preparing the samples for testing.

During the talk today I'm going to tell you about the experience that our laboratory has in collection and processing of specimens for testing. Then I'm going to talk about the specific -- I'm going to go over the specific steps of processing a sample for CODIS testing.

I'm going to talk about the difficulties associated specifically with the collection and accessioning of those samples and I want to say that to my knowledge I don't think that this topic has ever really been formally addressed before this meeting.

Unfortunately I don't have exact numbers on how prevalent some of those roadblocks are. I can tell what our experiences are with the States that we have dealt with, especially Ohio and Louisiana. And if you would like, I would be happy to get some exact numbers at a later date and present those to you. I'm going

to conclude my talk by presenting some suggestions and ways to streamline the collection of samples for CODIS testing.

Now let me start by telling you a little bit about what our laboratory has experienced then, so you know where we are coming from.

Our laboratory started DNA testing in the early 1990s. We were actually awarded the first DNA only state contract for paternity testing. So we were the first private laboratory to be doing DNA only testing for paternity.

We currently test about 40 to 50,000 samples per year for paternity testing. We do that by RFLP, by PCR, we check blood samples and we also collect buccal swab samples.

I think what's important with this is that when we are doing the testing, we're involved in the collection of samples and the receipt of those samples into our laboratory.

We do collections in a variety of different ways. We have mass collections where people all come to the same location, maybe at little variations in times, and they are collected en mass and the samples are shipped to our laboratory.

We do collections in accordance with court proceedings, too, so we have our employees at court taking samples when people are done seeing the judge. We coordinate with jails and prisons for jails and prisons to collect samples for us and send us samples to our laboratory.

And we also coordinate with jails and prisons to send our own employees into those facilities to collect the samples and send them to our laboratory. So we have specimens coming in from a lot of different locations.

In addition to our paternity testing work, we also do work for State agencies in conjunction with CODIS. We do this for a number of different States.

We do work for Ohio currently. We primarily receive and log in samples that they've collected in Ohio and they come directly to our laboratory for accessioning and resolution. We receive approximately 18,000 samples from Ohio.

We are currently working with the State of Kansas in doing RFLP testing on convicted offender samples that they were unable to process in their laboratory.

We were recently awarded a contract with the state of Florida to do STR analysis on their specimens that they had previously tested by RFLP.

And finally, we have a contract with the State of Louisiana crime laboratory to get their DNA lab on-line for STR testing. In addition, we provide assistance in getting their CODIS program started and running by next year.

Louisiana is very unique. They had a law that was passed very early on in the CODIS testing that was rescinded because of lack of funding. They have come back and they are one of the last States to have a law passed about rules and regulations for collection of samples.

And when they wrote their law, they wrote it very broad. So they are not only collecting samples from convicted offenders, but on arrest.

So this brings into light a whole new array of issues. And actually, the more we started working with Louisiana and the more I started talking to other States about what do you do in this situation to try to learn from other States, I realized that some of the problems that Louisiana will encounter in collecting samples upon arrest are really not that different than other States encounter now in collection upon conviction.

So this is when I really became aware of a lot of the issues. So why don't I start by going over the steps for processing specimens in general. One little line may take a whole week to do, so they are very short.

But first you need to ascertain which individual is to provide a sample. And usually this is mandated by the State's law. You need to get that individual to whatever collection location you're going to be collecting that sample at, and I will go into these in more detail.

You need to identify that individual and you need to collect a specimen from that individual.

Then you need to ship that sample to whatever laboratory you're going to use, and you will need to get that information into some type of data management program and verify that that sample is in fact a valid sample to test.

These are the areas that I'm going to talk about today. The remaining areas have been addressed, sometimes in great detail, but with a lot of research, with a lot of new automation techniques, and those would be to test and analyze the sample, to upload the profile into CODIS. And then into addition to that, you're going to need to search your database and do data management, including expungements, which the top issues can effect the expungements greatly, and what to do when you have a hit.

So why don't I go through each of the first initially steps, step by step. The first thing that you need to do is ascertain which individual is to provide the sample. As I said before, usually you identify which offenses and this would be mandated by the law.

You want to make sure that you don't collect from individuals with other offenses, and this actually is a big problem. Carl outlined yesterday that very often criminal records are not well maintained, and bottom line is that people who should not be collected are collected.

So you're collecting extra samples and those samples will come into a laboratory and you have to do something with that sample.

The other problem they can have is that you may duplicate samples. People say, oh, I'm not really sure it's been done or not, so they will do it again, then you have a second sample. Now you have selected a sample again that comes into the laboratory that you have to do something with. And each time it this happens, it's a tremendous amount of manpower that goes into resolving these issues.

I can give you some numbers. In Ohio I think that the duplicate samples that they get in are probably relatively low as compared to some other States, and there may be a variety of different reasons. It may be that they are just starting their program. They started collecting samples for a little over a year now. The

longer you collect samples the more duplications you're going to get. So they have about a 4 percent duplication of samples.

In Florida they say it's about 10 percent that they duplicate their samples, and 2 percent of those samples - when the samples coming into the lab they look for duplicates. 2 percent get by. They have a different corrections number, they have a different name, they have a different Social Security Number, they have a different date of birth.

So there are a large number of samples that go all the way through the testing process and it's not until they put them into their database that they realized they have duplicates. So I think in some States it's even higher.

COMMISSIONER SMITH: What percent are individuals not covered by the statute?

DR. SOZER: In Ohio I probably have the best feel, and it may be less than 1 percent. But even a very small number of people that are there and shouldn't be there, it's a tremendous amount of work. Someone has to request that that sample be expunged, someone has to research that, someone has to physically get the sample, destroy the records, destroy the sample, and it's a tremendous amount of work. So even a very, very small amount of samples really can translate into a tremendous amount of work.

You can go into a collection facilities where they have, by mistake, 20 samples or 30 samples in one day taken that they shouldn't have. It's lot of manpower.

COMMISSIONER SMITH: When you say somebody has to request the expungement, somebody other than your own personnel?

DR. SOZER: We don't know. When samples come into a laboratory sometimes you don't know why they are there. Someone will have to identify that that person was collected. Maybe it will be the individual themselves who say according to the law I shouldn't be collected, and they will talk to somebody in the department of corrections. So there may be four or five letters that are associated with that sample before it's expunged.

COMMISSIONER BASHINSKI: Is that because you are getting the sample directly and it's not going through the law enforcement agencies? They are not doing any screening, right? You just get everything.

DR. SOZER: Right. For Ohio we are taking everything. And actually we report back to -- Ohio had a very new program. We report back to Ohio on who has been collected and then they will go back and verify that everything has been done correctly. So there is one more step. But actually, if we were the testing lab initially, you will bring us samples in and look the samples up.

COMMISSIONER BASHINSKI: Do they have thumbprints?

DR. SOZER: Yes.

So you identify which individuals need to be collected from. And then the next step is you need to get those individuals to a collection location.

There are a variety of different places that someone can be collected, that that sample can actually be taken.

You can do it upon arrest, and this is what is -- again, these are not convicted offenders yet, but down in Louisiana there are many different Sheriff departments where individuals can come through, so there are many different locations where there will be collections.

Some will come in multiple times. They will come in this Friday in that jail, and next Friday they will come in at another jail. And there is a tremendous problem with collecting duplicate samples.

And the third problem is correct identification on arrest. You're not really sure who this person is when you're arresting them. Again, these are issues that transcend, actually, through a whole variety of different collection locations, they're just really accentuated upon arrest.

The next place that you could potentially collect people is at the time of sentencing. Very often people will be arrested, they will go into court, they will be either put on -- I'm not an attorney so I may not always be using the correct term -- they will be put on probation, they will be let off for time served while they were in the county jail, and they will walk out of the courtroom.

And once they are out of that courtroom, once they are out of some facility where you have great control over someone, it's very difficult to get someone to come back in. And actually it will go down to this area down here during probation, and I will talk about some of the issues.

You can collect a sample while at intake, so if they are sentenced, convicted and moved on. A lot of States have intake units where people stay for about a week where they have medical screening, psychological screening, and you can collect sample there.

And that seems to be a very efficient place to collect specimens. They are a small number, and there is a lot of record information that is maintained. And I think the States that I've had that can take while people are at intake have a good collection record and a small number of errors.

You can collect people at the prison while they're incarcerated, and there are a whole list of problems with this. For example, in Texas people are moved in the middle of the night and you don't know where they're going to be moved to and you don't know when they're going to be moved.

And this is actually a problem that we see in paternity collections. We do collections for the State of Texas. We'll have a phlebotomist ready to go in, will call the day before, is the inmate there. Yes, he is. We have to call the next morning, but they're moved in the middle of the night to prevent the association of gangs. So it's very fluid in the State of Texas.

In many of the department of corrections, the nursing staff can't help in the collections. They've taken an oath that they will not do this. So you need to send someone else to go in to do the collections, and I will talk about the collections in a little bit.

You can collect them from the local jail. Again, there are a large number of local jails, each run differently in different areas.

You can collect upon release. Again, this can be difficult, but I think that they have -- when do you something like this you do have a fairly good collection rate. Again, you're looking at records and people are very careful about what they are doing.

Then you can collect on probation or parole. And this, in my experience in the States that we've deal with, is almost impossible to do. It's extremely time consuming.

You have to be able to identify who this person is. This person has no reason to want to go give a sample. You can send him a letter, you can send them a court order, please go get a sample. And very often this is the area where you have a lot of miscollections where someone will send their brother, send their uncle, send their best friend in to do collections.

You can have someone go with them to the collection sites, but then you have a parole officer who spent their whole day driving across town to the local lab to give one specimen.

So this is really very high. And again, if you have the wrong person go in for a draw, even if it's less than 1 percent of the time, when you're talking about millions of samples that we need to collect, that is a big, big issue. It's really a big issue to resolve these problems.

COMMISSIONER GAINER: Doctor, when you talk about the problems, except for misidentification on these probation ones and maybe upon release, are you really talking about administerial cost effective profit margin problems?

DR. SOZER: All of those, right. You're talking about logistic problems. When somebody says oh, it only takes ten minutes to do this. We say ten minutes times one billion, that's a tremendous amounts of time.

So I'm going to talk about some solutions to this so I don't want to only be the bearer of bad news.

It's also hard to quantitate, because you have a lot of different departments involved. You have department of corrections, you have the crime lab, you have probation departments, you have the courts. You call up and talk to somebody for ten minutes over here and you talk with somebody for ten minutes over there, and they send a letter over here. It's a tremendous amount of time. And when you go between departments it's hard for someone to say it's this many dollars over here.

COMMISSIONER GAINER: Are you using, for instance, in Ohio the 4 percent duplication? Are you using that as your blind efficiency testing?

DR. SOZER: We actually do. They are logged in and we know that they have been tested before.

We get duplications in for two reasons. You will get duplications in because the first time the sample came in the chain of custody isn't adequate, the thumbprint was not adequate. This is actually a big problem I think in a lot of states where you can't read the print so you need to go back and recollect that specimen.

We will have problems with paperwork. We will get samples in from well-meaning people who just don't send any paperwork besides a name on the tube and you just get a tube in like that.

And I think Ohio is very good about responding immediately to this, calling back the collection location saying this is unacceptable. And usually they kind of come and go in spurts. You will get some samples in, Ohio notifies the collection agency, and then it stops.

COMMISSIONER SCHECK: Which states have you been dealing with people on parole or probation? How frequently is that actually?

DR. SOZER: That from our lab, none. We are not getting any samples in that I know of. We get a few samples in from Ohio from smaller locations, but the main information that I have gotten from this is from Florida and Kansas.

COMMISSIONER SCHECK: So these are things you have been told about?

DR. SOZER: These are things that I've been told.

COMMISSIONER SCHECK: In those instances where somebody comes in and gives blood or a buccal swab for someone else, do you know if they're criminally prosecuted or if there is any of that.

DR. SOZER: I don't know. And actually Cindy Schuler (phonetic) is running the CODIS program in Kansas. She said that all of their missamples have come in from those types of situations. They're usually when the parole officer doesn't understand how important it is to identify this person, the parole department is given a kit, and the parole officer will give it to the parolee and say, here, take this down to First and Main and have your sample collected, and give the kit to them.

Again, it's an educational problem that is ongoing. You can educate people today and have new staff next week. And so it's an ongoing problem. But that has been the area that they have had the most problems.

Actually, they have sent people from their forensic labs into the facilities to have these samples collected initially to make sure they're done properly.

COMMISSIONER SMITH: Do you know if any of those jurisdictions whether the parole agents themselves collect the samples?

DR. SOZER: I think in -- somebody else may be better off to answer that question. I know that there are some areas where they will do buccal swabs, I believe, at the parole office. And then those samples will be sent. And I thought it might have been California.

COMMISSIONER BASHINSKI: No.

DR. SOZER: Okay. Very often when you have people who are not involved in the end product in the collections, and we see this in a lot of wide variety in testing, we see it in paternity testing where people take in the initial information and don't understand how important it is or people doing intake collections that when it says fill it out correctly, that means fill it out correctly. That means everything is correct.

And when they don't have that understanding and if it's not accurate, you almost wish you never even got it in the first place because it takes so much longer to resolve an issue. And very often it ends up that you have to get another sample collected.

COMMISSIONER GAINER: Just one more question. Based on that 4 percent, if you're using it for blind proficiency, have you had zero error rate in that? Do you ultimately match up the 4 percent.

DR. SOZER: They haven't gotten as far as testing. The reason why they're collected, at least in Ohio, from my feeling of when we look at when they come in, is when they have moved from one prison to another prison. Usually we don't get duplication from an inmate in the same prison. It's when they move to a different prison that we get it.

When you talk about when people say oh, we get them in twice, you can use them as blind proficiencies, that is a good use for those samples coming in.

But there is also a lot of investment in the collection process. And if you're talking about 10 percent of duplicates and 10 percent of the time you have to identify these as a duplicate sample, it won't go in the database the second time, we won't run it but we will compare it, at some point it's really not a cost effective measure.

Some of the duplicates that we will get into are acceptable duplicates where the first time the sample was not acceptable for testing, the second time they will come in and it will actually replace the first sample.

We talk about the identification of the individual and the collection of the specimen. And I've just listed that the collections can be performed by a number of different agencies and very often in a state a number of different agencies will perform collections at a different time.

The department of corrections can do that, the crime laboratory actually can do that. This is what Kansas did. They actually send someone in from the crime lab to collect the samples, so they understood what you needed to get for the end product.

Some states say that it's just the agency responsible for the care of the individual. Whoever has that individual under their care will be responsible for collecting that specimen. And actually that is what Kansas does now. If they are on parole, it's the parole office, in it's the local jail, the local jail will be responsible for the collections. The crime laboratory assists in that, but the agency is the primary person involved.

Then some states will contract out and have a contractor come in and do the collections. Sometimes this may be a legal lab or hospital. In fact, Kansas uses that also, where a hospital will have kits and people can go to the hospital and get collected. Other people may send in independent phlebotomists to go into the prison to do the collections.

I think that this is something very similar that has been in paternity for a long time. We just send someone in and we may have five or six individuals in that prison and we will collect them all on that same day.

But again, it's a lot of time for someone going to the prison, get through the door, collect the samples, go home. It's a tremendous expense.

Some things that you have to keep in mind. Is this the correct individual. Is this the individual who you think they are. Is all the paperwork complete and accurate. If it's not, if you have an SID number or your corrections numbers and you're missing one digit, that is a tremendous problem. You have to get back on the phone when the sample comes in, why is this a digit off, should it be this, should it be something else.

And again, people don't understand that when we say paperwork needs to be complete and accurate, that means it needs to be complete and accurate. That doesn't mean that it's just complete because you have written something in the line. It really means that it's accurate.

You need to make sure that a sufficient sample must be obtained. Sometimes this is hard. In some of the prisons they will use force to get the sample. In Kansas they will send a team of 12 individuals that will hold the inmate down and hold the arm behind the back and collect a sample. 12 people to collect one sample. That is very inefficient to do that.

The sample must be identified properly. That means that the information on the paperwork, whatever that submitting paperwork is, needs to match the information on the tube. Again, this can be a training and conceptual problem for some people to understand what that means.

And the chain of custody must be maintained. That means when collected, you seal it up. When the samples get to the laboratory for testing, they need to be accessioned and put into the computer and received and they need to be -- let me backtrack.

First the samples need to go from the point that they were collected to the laboratory. So places go by U.S. mail, sometimes they are hand carried in, sometimes they will go by some overnight carrier. Usually it will depend on how urgently the sample needs to be tested. This is a big expense also. When you talk about shipping a sample overnight at \$15 a package you don't want to do that all the time.

Hand carried is time. Again sometimes these things are hard to evaluate because it may be another department who says, well, we just send somebody over to the laboratory every time we have a specimen. That may be two hours, three hours of time to send samples in.

Verification that the sample is received by the laboratory is also important. You want to make sure that the samples you collected were received. The samples that weren't collected were never received, so you don't have other samples coming in to the laboratory that were not collected.

So nobody is sending in any other samples. And this is important. We see this in paternity testing, where samples are collected at a draw site and we are a lab and there is a lab in Richmond that gets the same type of packages that we do. We have to be very careful. We actually track our specimens when they're collected, and say that we know that we are getting this tracking number, this tracking number, this tracking number, and this tracking number, and they don't end up in some other lab. There are a lot of labs in the United States that do testing, but they don't have to worry about it.

The samples come in, they just bring them all in. They open them up and two days later they say this doesn't look right. We need to make sure that what you have collected actually gets to the agency, so there needs to be talk back to the individuals who scheduled the collection.

We need to accession and verify the sample. You need to make sure that there were no signs of tampering. You need to make sure that the paperwork is consistent. You need to look for duplicate samples. You need to verify that the samples should be tested.

Very often fingerprints are verified and if there is any problem with any of these, the submitting agency is contacted, and usually that can take multiple phone calls and multiple weeks to resolve an issue. Why was

the sample collected. Well, I'm not really sure. That person is on vacation for two weeks. We will get back to you.

Florida actually has a computer in their lab where they can go back and look up records for the Department of Corrections and in fact when we were down in Florida at a CODIS meeting a few years ago, I picked up on that and we now started to do that for paternity testing, or on-line with some of the agencies, where we can pull up on a computer, so we don't have to go through voicemail. You don't have to wait for somebody to call you back. You don't have to wait for something in writing, you can download it off of a computer. But if you have a problem with any of these, it's extremely time-consuming. We talked about the time for testing a sample can be minimal compared to the time for resolving any one of these issues.

Let me kind of summarize some of the roadblocks and problems that are associated with collecting and accessioning samples for CODIS. The individuals are hard to locate to get them to a collection site. It's very time consuming to bring someone in. The paperwork may not be complete and accurate, so you go through the whole thing again. You have just done it once. Now you have to do it again.

It may be difficult to determine if the sample has already been collected on this individual, because of poor record maintenance. Any verification that you do can be very time consuming. When people say I was talking at the CODIS meeting last week and they said that they just wanted to run our samples down to our fingerprint guys and I was standing next to someone. This kind of comes from being in a private lab. My eyes opened up and I said, you just run them down? That is ten minutes down. It's ten minutes back. It's ten minutes there. That is 30 minutes. We could have just put that whole sample through the CE in the time that you've just verified the fingerprint on that. So it's really very time-consuming. So what can we do about it?

I have some suggestions. My suggestions are to talk about collecting samples for CODIS. That the individual should be properly identified, collected, and tested one time. You can put duplicate samples in and there are always going to be duplicate samples for QC, but not at high numbers. Let's get them in once. Let's get them right. And let's get them in the database. Let's make sure that our collections are done rapidly with the proper chain of custody and accurate and complete paperwork. Again, we are doing it right, we are doing it fast, and we are doing it once. This is a lot easier said than done, so we are going to need to do something about that.

My recommendation is that funding should be made available for the following. We need to have funding for good education, continuing education of the training of the Court and the correctional personnel. Then we need to develop some type of instrumentation for rapid identification and collection of individuals. And I don't think that this is very far off.

We need to have this instrumentation that will be readily available for courts and it will involve minimal human intervention to operate this collection.

And I'm saying that this is not far off because when we went into Louisiana and we look at some of these prisons and this was a big issue, where you're going to have people coming in multiple times. People saying that they're not who they are. A lot of collections.

We started looking at this machine, here. This is what is used down in Louisiana. The Live-Scan AFIS machine, where they go in, their fingerprints are taken. You know that they are good fingerprints, because the machine tells you if they're good or not.

The information goes in to the central agency, and you come back out with the suspect's rap sheet. There is supposed to be a very nice picture of someone here, and it's been taped out. But based on their fingerprints, you know who they are, you can see who they are, you know their name, you know any information that you have about them. And hopefully soon in Louisiana we will know based on what they were arrested for, if you should take a sample or not.

If don't need to take the sample, you won't take one. If you do need to take a sample, you will. You won't have people sitting with a list that says is this the right crime or is this the right crime for collecting a sample.

And I don't think -- these are very big machines that people use and they are very expensive. And in Louisiana they are in all of the major sheriffs departments where all of the bookings are taking place and they are in the major department of corrections.

But I don't think it's very far off to have these all on laptops where you can take a fingerprint and you can identify who your individual is. And we are not far off from machines that will take a finger prick for you. The Laser Lance-It by Transmedica. Stick your finger in and you can get a sample.

And what I would like to see, my envisionment of these collections is a machine where you can put your finger in, you can read the fingerprint, you can identify if you need to take the sample or not based on the fingerprint, based on the computer records of the crimes that you're going to take a sample for, based on if the sample has been collected or not.

And if you do need a sample, a sample would be collected. The information will come out on the card, and no one will touch that. It will all be done automatically. And I don't think that this is very far off.

Now I heard this morning that there are problems with interacting between States, but I think that the same principle that was applied to identifying the core STR loci why there were two companies that both had products that could be used, where guidelines were set so that these companies are working together, I think that the same thing could apply to AFIS, and identify what information you need and how this information could apply to someone else.

COMMISSIONER SCHECK: Are you suggesting that the blood go on the card?

DR. SOZER: On an FDA card.

Are there any questions?

COMMISSIONER REINSTEIN: When I saw that Laser Lance-It, how much does one of those cost?

DR. SOZER: The last time I looked, they are probably about \$3,000. It's kind of ballpark.

And I think once you start, the more you buy, the more you use, the less expensive they could be.

But if you start thinking about how much you're going to spend, think about how many people you miss by not getting them in courts. If you have some piece of equipment, I know -- I think in -- actually in Washington D.C. one of my neighbors works for a company that designs these. And he said, oh, we are just getting these new computers in all of the police cars and they can identify information on a car or vehicle or on a driver right while they are there. This isn't far off.

But if you think about the time that you spend for a parole officer to spend a day not doing anything else, for the most part, but taking this person to get their sample collected, these could pay off for themselves when you talk about the numbers, talk about the times that samples come in and they're not right.

COMMISSIONER GAINER: I would at least point out on the fingerprint identification card it may be debatable how well the technology is there, but I think we're a long way off. We have been talking about getting there for a very, very long time. Now the in-car computers that are not much different than this, you can do a name check and license check and some of those things.

But the automation of driver's license information and fingerprints. And we have been talking about it for a long time. NCI C2000, it was all supposed to be there.

And I suggest, and I think the Sheriff would affirm, that if we see it before our mandatory retirement days, be happy.

DR. SOZER: I was down in Louisiana, there when they are doing the bookings, they are reading the fingerprints and these are coming back, the information is coming in a couple of minutes. And yes, they go down and yes, there are problems.

COMMISSIONER GAINER: On the large scan they come back in a couple of minutes?

DR. SOZER: Yes.

COMMISSIONER FERRARA: With respect to Ohio and Louisiana and your work there, how do you, Fairfax Identity Laboratory, assure the law enforcement agency, the citizens of those States, that the samples that you have in your laboratory are protected with respect to all the private genetic information that is derived.

DR. SOZER: You're talking about information associated with that sample, or are you talking about the sample itself for other testing?

COMMISSIONER FERRARA: Both.

DR. SOZER: Sure. And these are the same issues that occur in State labs and in any other private labs. We have policies and procedures that we follow, that we enforce strictly, and security measures that we have.

And we are in the business of doing this type of testing and not in the business of giving these samples to or the information to anyone else.

There are some very -- you say, oh, it's a paternity testing lab. Paternity is a very, very private matter. And a lot of the other issues that are associated very often much more private than some forensic cases. So we were very well trained and very acute following these procedures.

COMMISSIONER SCHECK: In that connection, do you retain samples or DNA extracts from the cases that you type?

DR. SOZER: Let me say something else. The other issue with private laboratories is storage. And when we are done testing a sample, I don't want to store that sample. I don't want to store the records. It costs money to store records. I don't want to store the sample. It costs money to store the sample.

Everything goes back. Everything will be back to the submitting agency or to the agency that is contracted with us. In fact, this is very different than paternity testing. Usually in paternity testing we'll keep some of the records. In our CODIS work they all go back.

It's a tremendous amount of work to try to copy those. It's a tremendous amount of work to maintain those records. So those all go back. So ultimately there won't be anything left in the laboratory.

COMMISSIONER SCHECK: What goes back? Do you send both blood sample --

DR. SOZER: Whatever the agency wants. Each State will work a little bit different. You may send the original blood tube back, you may send any extracted DNA back. All records, all radiographs, all computer printouts will go back also.

COMMISSIONER FERRARA: With respect to the samples, however, let's take Ohio for example. If they are collecting samples themselves or let's say you're doing the work for a State laboratory or the State has collected the samples.

The samples, when they come to you, therefore, are they not free of any personal information at all?

DR. SOZER: No, they do have personal information.

COMMISSIONER FERRARA: So those States are providing you samples with personal information? If they did not, would that not be an additional safeguard against the improper dissemination of any --

DR. SOZER: I would say if they did not, that would be -- you know, you have States that are coming on-line with DNA testing. You have States that have a lot of work to do. And I've just talked about a big problem in getting samples in, getting them right, triaging samples when they come into the lab. That's a tremendous amount of work for a lab to bring on-line.

So the State that's just coming on-line, like the State of Louisiana that is just coming on-line with testing, that is a big new area that someone needs to challenge that a laboratory like ours is used to doing. We are used to receiving samples in, we are used to examining those samples, and I do not feel that there is any issue about confidentiality.

COMMISSIONER SMITH: The procedures that you've put in place, the rigorous need for that, I don't know if this is answerable, but I wonder what sort of breaches to those protections do you worry about?

There must be something because of the need to put the restrictions in place. But for myself anyway, being in a different business, I can't offhand think of who it is that would be coming in your place of business looking for this stuff.

DR. SOZER: Actually, nobody comes to our place of business looking for it.

COMMISSIONER SMITH: Would you lose anything by having no restrictions on it then?

DR. SOZER: I don't know if I'm following exactly what you're saying.

COMMISSIONER SMITH: Basically what the market is for the information that you're retaining.

COMMISSIONER GAINER: Insurance.

COMMISSIONER SMITH: Is there any evidence that you know of that the insurance companies come by the lab themselves?

DR. SOZER: We have tremendous amounts of samples that we receive in for paternity testing, and our lab isn't the biggest laboratory, and I have never heard of this from any laboratory.

We are very protective of the samples we get in. The samples, we maintain confidentiality, we maintain privacy. The samples are destroyed under a sample storage policy that maintains confidentiality and privacy.

COMMISSIONER SMITH: So you aren't aware of any attempts to breach these protections.

DR. SOZER: No, I'm not.

COMMISSIONER FERRARA: The reason I raised the question is that you can call, we have members of our own Commission who have expressed concern about outsourcing samples particularly, and what protections that there were available to precluded that.

DR. SOZER: I look at a contracting laboratory as just an extension of the forensic laboratory and they -- you know, we are governed by the contract, we're governed by what the forensic laboratory asks for, and are very well versed in handling many samples and maintaining confidentiality of those samples.

COMMISSIONER GAINER: To your knowledge have you received any subpoenas of any sorts on paternity information from a criminal investigation?

DR. SOZER: There are times when individuals will come for a paternity test and they are not the correct individual. So they will -- someone will send their friends in to give a paternity sample and this is discovered.

And there may be a criminal action brought against the individual who we have a sample for. Before we talk to or discuss the case with anyone, before we answer any question, I'm sorry, I can't admit or deny that we have any case in-house and I will be happy to take your name and number and that is the end of the conversation.

We will contact the agency who submitted that sample, and very often the agency will say, yes, I forgot to tell you we are prosecuting this individual for fraud and we're bringing criminal prosecution against this individual.

And sometimes we'll get paternity cases that are cases of incest and they say, oh, this may go on to criminal proceedings.

But there are always very strict policies and procedures that are in-house for discovering any information from the laboratory.

COMMISSIONER GAINER: Is your paternity information aggregate so that you could search an unknown case against your paternity cases.

DR. SOZER: An unknown convicted offender?

COMMISSIONER GAINER: An unknown suspect case.

DR. SOZER: The convicted offender database and the paternity database are two separate databases.

COMMISSIONER GAINER: I follow that. Just out of curiosity, is your paternity database, is it searchable?

DR. SOZER: Our paternity database, is it searchable for a certain profile? Yes. On our DNA View, paternities are done either by PCR or by RFLP, and on one of the features, I believe, and I don't really know if we've ever used it, that you can search your entire database to see if anyone in your database could be the potential father of this child. And it was for statistical analyzes when they say your database is so large can anyone else be. So one could make a database of all your samples. It would take a very, very long time, and potentially go in and you would have a lot of matches.

COMMISSIONER GAINER: But what you're saying is it's not set up now, but in theory one could come in and run an unknown sample against it.

DR. SOZER: In theory one could, but it's not set up and it would take a lot of time to do that.

COMMISSIONER CLARKE: Do you have the same kinds of markers in both databases? DR. SOZER: No. In RFLP we don't do all of the same genetic markers. PCR we do, but the analysis is done in two separate -- it's done very differently.

COMMISSIONER CLARKE: So I guess what I mean is the paternity cases are tested using a certain set of markers, right.

DR. SOZER: The paternity cases are tested differently, so they are kept separately in a laboratory. Some of the probes are the same. They are analyzed differently. At least for RFLP we use two different imaging systems. We use the digitized for paternity and we go into DNA View, we use RFLP scan and we go into CODIS Life for convicted offenders, and for PCR we may utilize the 310, we will go into DNA View for paternity, it will go into databanks for convicted offenders if it's on the FM Bio it will be done on the FM Bio and it will go into DNA View.

So it really is two different types of analyses. And once samples are in the laboratory for testing, they may be, you know, they are only identified by numbers. The numbers may be the crime laboratories so they are only identified as batches by numbers. And then paternity, they have a whole differently numbering systems.

COMMISSIONER BASHINSKI: But you don't have any criminal history or record information available to you?

DR. SOZER: No.

COMMISSIONER BASHINSKI: Just the number which is another major issue I think.

MADAM CHAIRMAN ABRAHAMSON: As I understood the question and response, could we use the paternity data for somebody who is a suspect or an offender. And I gather that they are very different and they are not compatible. But I'm not sure I understand, is your answer either an affirmative clear yes or clear no?

COMMISSIONER GAINER: I think you heard it exactly right. It was neither a clear yes or a clear no. I mean, if I came in with a warrant, with an unknown sample and said run this against your paternity, notwithstanding you wouldn't like to, notwithstanding you might run to the court to try to stop me, theoretically could you?

DR. SOZER: You could do that anywhere.

COMMISSIONER GAINER: As it's set up, absent trying to redo your system.

DR. SOZER: You're going in and you're asking me to re-run a particular sample.

You could come in with a profile on paper, you could say it's these alleles and these alleles and these alleles, and say okay, now put them into your database and run them against a paternity case and I could do that also. I could go into Paul's lab and do that or I could go into California and do that.

COMMISSIONER GAINER: We would do it in ours. The difference between the public and private is I can run my sample against my lab. The issue I'm just trying to get at from a civil libertarian point of view was what likelihood would law enforcement have to come in and search your files? Technically, if we could do it, aside from the legal issue?

DR. SOZER: I don't see it any different at a private lab.

COMMISSIONER FERRARA: You couldn't, Chief, in Virginia. I'd say no, it's against the law.

COMMISSIONER GAINER: That is why I said legal issue aside. I was wondering if the way, the technical way paternity information is stored is some individual way where it's not aggregate, where it's too cost prohibitive to search.

COMMISSIONER FERRARA: Amanda, aren't there some common loci?

DR. SOZER: Yes. But what I was saying is that actually in our lab, and it could be different at any other lab, that the actual set gel that is run is a little different, the amount of DNA, they are done separately. We have forensic analysts that will do CODIS work, we have other individuals that will do paternity work.

COMMISSIONER SCHECK: So if I understand this, when you do the analysis for CODIS for a jurisdiction, after you finish you will send back all the extracted DNA, all the biological sample, and all the paperwork. Don't you keep something? Don't you keep a profile?

DR. SOZER: Profile, we keep some minimal. For example in Kansas we have a checklist of what we sent out. We sent out this document, this document, this document, these are the individuals that reviewed it. But after a while it gets very expensive to keep files.

COMMISSIONER SCHECK: In your computer, for example, do you have a DNA profile that relates to some identifier, be it the name of the inmate or the inmate number or something.

DR. SOZER: We would have on our computer program the inmate, or the inmate number that came in on a particular -- in a particular batch, and that would be maintained. But the information goes back on disk.

COMMISSIONER KENNARD: You would have no way of verifying if you were going to court to prove that what you sent to them is what you have on file and it's the same?

DR. SOZER: You know, we thought about that. We said we are going to send these records back. And you start talking about a million samples, if you talk about 50,000 samples and each sample has seven pieces of paperwork on it and you need to copy that, and we felt that it was most cost effective if they have questions about something that they have done, they can send the file back to us.

COMMISSIONER KENNARD: Don't you have a file, as Barry has mentioned, a profile that could relate what you have done with what you sent back to them so that if need be you could relate to a court of law that you did what you said you did.

DR. SOZER: If we are the custodian of records, those records were sent back to the submitting agency, and we can testify from our records that are housed at the submitting agency.

COMMISSIONER BASHINSKI: I think one point is that -- I'm assuming that Ohio does this the way that we do it, is if you do get a hit, that's always something that is verified first, at our labs, by redoing the analysis of the samples we have on hand and then by obtaining a sample ultimately from the individual that you may have hit on to verify that is the exact same profile.

So the ultimate testimony is probably from that last match to the second sample that is drawn from the individual. And you use the database only as a pointer, indicate to go to that person.

COMMISSIONER SCHECK: But in terms of in contrast when you do a paternity test, I take it that you're saving samples, you're saving a whole document, you're saving much more.

DR. SOZER: Right. For paternity tests the samples go -- may go back to an attorney, the samples may be back to a child support office.

COMMISSIONER SCHECK: You don't save the extracted DNA?

DR. SOZER: We do for a period of time, then it's discarded. We have a sample storage policy, then it's discarded. We don't save things indefinitely.

COMMISSIONER CLARKE: There are also two different scenarios. You may go to court on the paternity case where testimony may be needed, as opposed to CODIS tool, which is really just investigative as I understand it. You would never go to Court on a CODIS hit.

COMMISSIONER GAINER: You will.

COMMISSIONER CLARKE: In terms of a prosecution?

COMMISSIONER FERRARA: Our experience has been on cold hit cases either the prosecution or the defense is required to subpoena both the person who ran the original convicted offender sample, as well as the individuals who did the casework samples.

COMMISSIONER CLARKE: Don't you require an independent reexamination, though, independent test?

COMMISSIONER FERRARA: Then we do an independent re-test. But even despite that, you have to bring in the person who ran the convicted offender's sample in the first place.

COMMISSIONER CLARKE: For what purpose?

COMMISSIONER FERRARA: I don't know, but they get subpoenaed.

COMMISSIONER CLARKE: By defense.

COMMISSIONER FERRARA: Both the prosecution and the defendants will attack the integrity of the original databank, despite the fact that we have this re-analysis.

COMMISSIONER CLARKE: So it's used for a duplicate test basically.

COMMISSIONER FERRARA: It is. What I'm pointing out is that indeed we are getting our databank people or our contract laboratory person has to come and testify in a case.

COMMISSIONER CLARKE: Because that is not really the intent of the CODIS system, is it?

COMMISSIONER FERRARA: No. It's just lawyers.

I'm sorry I said that.

COMMISSIONER GAINER: I'm just trying to get -- maybe this one little bit of clarification.

In labs that do paternity testing, do they generally index their paternity results or not?

DR. SOZER: Generally index, what do you mean by that?

COMMISSIONER GAINER: In a CODIS fashion so it could be searched with little or no effort, or they're doing it for research purposes or analytical purposes.

DR. SOZER: Let me clarify. When I say can we search our data, you asked me theoretically could we do that. And I can say yes, I would. And then if you would say little or no effort, I would say no, I can't.

COMMISSIONER SCHECK: I think you said before in a paternity test you have a profile of the paternity contributor, you would run that against your database to see if you have seen that individual before.

DR. SOZER: No. I said theoretically you could do this. You said theoretically, barring this, this, this, this.

COMMISSIONER SCHECK: Don't you do that as a matter of course when you get into the logistics of the Court when you get into the frequency of the profile.

DR. SOZER: Right. We have a database and then we do look up frequency, but we don't update that database on a routine basis. We don't have all of our individuals in that database. So I can't just go in and search the database.

In fact, it would probably be easier for me to go to a CODIS lab and search. I could do that. And if you said I have a choice between a paternity lab and searching or go to a CODIS lab, I would go to CODIS, because they are all there. The data is much more readily available there than it would ever be.

COMMISSIONER GAINER: But is the size of the databank now greater in a paternity bank than it is in CODIS?

DR. SOZER: The size. It's a tremendous amount of work to make a database. It's a tremendous amount of work to culminate all these frequencies that one may have. Frequently allele sizes are then purged off the computer because you don't have enough disk space for all these -- all this information.

You see how much equipment goes into CODIS, how many computers go into CODIS, you don't have that for paternity.

If one were to go back and retrieve all of that data somehow, I don't even know if it would be possible, yeah, right now you probably would have more DNA data for paternity cases than do you for CODIS cases.

But the CODIS cases are in a format that is readily available to do this. So if I were to go to try to search something just in theory I would go to a CODIS database before I went to a paternity lab to try to get information.

MADAM CHAIRMAN ABRAHAMSON: Let me see if I can settle this and move on.

And maybe, Chief, I'm misunderstanding your question from you. I'm going to put it in kind of non-scientific, non-computer terms.

I think what is being asked is can you use this paternity database, in quotes, to do a search.

And I hear you saying theoretically, yes. But as a practical matter, no. Because it would take a lot of work to put that paternity database into a format or form that you could readily search with another kind of sample.

Am I anywhere close to what the responses -- Paul is nodding his head and, Chief, I think that is what you have been asking, right?

COMMISSIONER GAINER: Yes.

MADAM CHAIRMAN ABRAHAMSON: So it's theoretically possible, but as a practical matter it would take a lot of massaging of the data, as some techies say, to get it into a system. Does that satisfy everybody?

COMMISSIONER FERRARA: Yes.

DR. SOZER: Yes. There are a lot of things that are theoretically possible, but not practical.

COMMISSIONER GAHN: I just have one comment. You touched on a number of concerns that Carl told us yesterday. One of the things I have been pondering since yesterday, these time served people that are missing and I don't really understand why. Probably the reason we're missing it is we've talked a lot about law enforcement, we talked about lab personnel, we're leaving a key person out of this, and that's the prosecutor. Because there is no law enforcement person with the prosecutor at the time of the time served, or lab personnel.

So I'm thinking, Chief, maybe in your group you could have just a section on the prosecutor's duties during that phase of insuring to get that sample once the conviction is in or guilty plea is in.

And what we can do is, I think, is prosecutors have been doing this for years for HIV testing. For years and years. We never let anybody get out on time served until there is a condition that you get down to the City health nurse and get your blood tested for HIV so we can make a comparison.

COMMISSIONER BASHINSKI: One can argue that is not crime scene evidence, but one can also argue it's a reference sample, so maybe we can throw that in.

COMMISSIONER GAHN: But also put a section on convicted offender databank and stuff. And I think this would be a part of that.

Weren't you going to talk about that?

COMMISSIONER BASHINSKI: We were going to talk about the new tools that make DNA of value as part of the introduction, and we can talk about that only being effective if you have enough samples from people, that kind of thing.

COMMISSIONER GAHN: Or somewhere, some group I think.

COMMISSION THOMA: And I agree with Norm as well. And I also agree with Jan. I don't know where it exactly fits in. But with this time served scenario with regard to the time between the actual conviction and the time of sentence, if the person is out of custody, for example, making that one of the first things the person has to do. So that when they come in for sentencing, they will want to do everything that is prescribed of them, obviously see a probation officer.

Obviously the person that is in custody you have a lot more control over, but I'm talking about the time served person who is literally on the street at conviction.

COMMISSIONER CLARKE: One example of how it breaks down there, is just a state example of California and a local example of how it operates with time served people or even individuals who are getting out shortly after that.

Our department of health in San Diego County literally had the facilities and personnel to draw blood to comply with our State statute for individuals who are released. And then the new statute was enacted which now requires a palm print instead of a thumbprint and the department of health is not qualified to do that.

So all of a sudden it stops and has stopped since January 1. Well, the effective date of the new statute.

But this is one example of how, as Amanda pointed out, all of these different procedures in place where so many mistakes can be made and the difficulty is because these people are being collected at so many different parts of the process. And it's just crying out for some uniformity in how this process is conducted nationwide.

We're dealing with 50 different jurisdictions, and then you get down to the number of jurisdictions within each individual State, and it's an absolute quicksand and quagmire, frankly.

COMMISSIONER SCHECK: But there does seem to be a certain consensus on when it is best and most efficient to do this.

In other words, you mentioned intake in prisons because that is how we did it in New York. And what we found was that a lot of time and effort went into the thought, how you collect these samples from the convicted prisoners at that point in time. Because you always take blood. Before any of these DNA came along you were always taking blood, for health purposes from prisoners. Now you're just taking an extra blood sample.

And you do it in that fashion, even though you're telling them what you're doing, there is less likelihood there is going to be resistance to it, and equally if you take it at the time of time served sentences.

If you have a certain uniformity initially, that's what I take it you're telling us, there are certain critical points in the procedure. It could be release dates, you said there was another good one where there is a certain chance of uniformity. You really can't get out of jail until you give your sample. And that's easily documented.

And you can focus on those points and suggest procedures along those lines.

DR. SOZER: I think what I was trying to emphasize is that we really need some type of automation, some type of procedure where there is minimal human intervention, some type of procedure where you have correct verification that you have the individual. That this is an individual who should be collected.

When you have technology out there that you can type samples in 30 seconds, but you're talking about collections that can take hours and hours to process.

This is really where a bottleneck is and why there is a lot of resources that are utilized among a lot of different departments where automation really -- I mean, you've got an end down, that's really good. Now you're moving on to the next area, which is the beginning.

And that is really what I wanted -- the take home message that I wanted to say. And that may involve identifying certain key areas where you're going to get most of your individuals.

But I think this is an area where I see really great progress can be made and I don't think it's that long away.

COMMISSIONER SCHECK: One last question. When I was in the UK and watched them doing their STR profiles for their databases and they were visualizing, reviewing the data, they had a not insignificant percentage where they knew they were getting wrong facts. In other words, they were getting certainty, but it was not -- they knew it was wrong and they knew they would have to re-test the sample again.

Are you getting that and in what percentage?

DR. SOZER: It depends on the sample type that you get in. It depends on the age of the sample. But even this is automated. You have programs that will say we have so much percent, we will take peak heights that are within this range. That is tremendously -- that is light years ahead of the collections. It's not even comparable. So to problems associated with collections.

COMMISSIONER SCHECK: It's funny, because Dave was telling us, and I literally saw it. Do you remember when you talked about stress, they literally meant people that were sitting by these computer machines and looking at artifacts and they had to change these peoples all the time because they were going nuts.

DR. SOZER: What I'm saying is in comparison to sample collections.

COMMISSIONER SCHECK: There is no question.

DR. SOZER: We have two people reviewing these independently. You have automation coming through that weeds out a lot, that will say here is kind of a general review of going in. We have two different people reading them. Those two reads are compared.

So there is quite a lot of work. I don't want to say that it's nothing to do this at all. I'm just saying there is a tremendous amount of work that has been spent on technology on the end, on the analysis.

MADAM CHAIRMAN ABRAHAMSON: Barry, if I could just interrupt, because I do want to move on.

Will you be here later today?

DR. SOZER: Sure.

MADAM CHAIRMAN ABRAHAMSON: So if we have time maybe we can bring you back and talk to you about this.

Laboratory Funding Issues Working Group Report

Paul Ferrara, Chair

MADAM CHAIRMAN ABRAHAMSON: We are going to devote the rest of the afternoon to the laboratory funding issues and working group report. We know that some people are going to leave by 3:00 so we have an hour and a half for that time.
So Paul, you're on again.

COMMISSIONER FERRARA: Thank you very much, Chief.

The laboratory funding working group, which consists of myself, Cecelia Crouse with West Palm Beach Laboratories, Steve Masgoda with CODIS FBI, Barry Fischer who is the director of the Los Angeles County Sheriff's Department and president of the America Academy of Forensic Science, our own George Clarke, and finally Dick Weaden (phonetic). The working group has met twice thus far, once on conference call and most recently in-person in Washington.

The role of the laboratory funding working group was to provide the Commission with information as to the estimated costs associated with the reduction of backlogs.

Now, to begin with, let me first define what we mean by backlogs. When we use that term, what we are referring to is the accumulation of samples that are available for analysis, but for reasons of resources cannot or are not being run.

For the purposes of our working group, we divided the backlog into two areas. First that of convicted offender samples, and the other being backlogs of crime scene samples or casework.

For the purposes of this discussion we are confining ourselves to the issue of the reduction of the backlog of convicted offender samples.

Now I have a very short summary of the report which you have in front of you. There is a four page narrative that describes our findings.

It was the consensus of our laboratory working group that, one, the full implementation of the combined DNA index system will allow forensic scientists from all over the United States to develop foreign DNA profiles from crime scenes and victims, and to be able to search a national database of DNA profiles of a recidivistic population and identify the perpetrator.

The working group's ideal goal would be that for a forensic science laboratory all over the country to be able to get an analysis on samples submitted from crime scenes almost immediately upon receipt, develop a foreigner profile, search a databank of that for a match profile and provide the results of that search to the law enforcement agencies. All within a matter of hours or days of the events, the sooner the better. That is the ideal situation.

We determined that two different ways to accomplish the goal of clearing the backlog of some 450,000 convicted offender samples within one to two years of the availability of funds. Now, again when I refer to the backlog for the purposes of this discussion, if you harken back to Carl Salavka's presentation he

talked about collected and owed. We are talking here about collected samples, those that actually exist in laboratories or repositories all over the country.

Steve Masgoda and the CODIS people have estimated that at this particular time we approximate some 450,000 of such samples to be extent throughout the U.S. Keep in mind that's a snapshot, if you will. Samples are being collected all the time, samples are being analyzed all the time.

As an example of that, in Virginia we continue to collect approximately 24,000 samples a year. Since July, we have been running or have had run for us approximately a thousand of those convicted felon samples per week. So at least in Virginia, each year I'm reducing this backlog by approximately 30, 25,000 samples.

But anyway, for purposes of our discussion we centered on a target of eliminating a backlog of some 450,000 convicted felon samples and to accomplish that backlog reduction within one to two years.

The two methods by which we identified to reach this goal was, one, to assist State laboratories which are current in the STR technology to process these samples in-house, and/or outsource the analysis of these samples to qualified vendors for the STR/DNA analysis.

It was our conclusion that the single most effective short term means to enhance, jump start, get the forensic DNA databank program, is through an immediate infusion of \$22.5 million specifically designated for the STR profiling of 450,000 convicted offender samples collected to date nationally at the 13 standard STR loci.

The working group further determined that improvements in the mechanism for collecting convicted offender samples in accordance with State statutes are needed to assure that appropriate individuals are included in the database. Prioritization of these 450,000 samples based upon a sentence or the release dates is not recommended by our working group.

We also determined that a convicted offender database, such as we've described this week, poses no significant risk to the development or release of forensic based genetic information for non-forensic purposes.

We base that conclusion on three factors. One, State laws which preclude the use of these samples for anything other than identification purposes. Two, the 13 standard STR loci at this point are not known to code for any expressed trait. And thirdly, that when these convicted felon samples are coded with an unique number and referred to after receipt as only by that number, that precludes the possibility of personal information being released.

As an ancillary to that, and I think Amanda pointed out that forensic science laboratories like many private laboratories are not in the business of doing genetic research and don't have the resources to do that.

We further determine that the short term costs of this development and implementation of a National DNA databank will, in fact, be mitigated by inestimable long term savings of investigative and judicial time, a decrease in violent crime as a result of incarceration of repeat offenders, and providing closure for those families and victims of unsolved crimes.

Lastly, we felt that State, local, and Federal forensic science laboratories must also develop the necessary resources to train and equip sufficient numbers of DNA examiners in order to be able to process evidentiary samples in a timely and complete manner.

We recognized that this technology will give rise to many more samples and cases, cold cases, postconviction cases, lesser crimes, that will drive the need for more examiners.

This last issue will be the goal of the work of this working group next year, that is how to address the crime scene samples.

And with that, Madam Chair, I will summarize in my report.

MADAM CHAIRMAN ABRAHAMSON: I thank you Mr. Ferrara.

CODIS Offender Database Backlog Reduction Discussion

Legal Issues Working Group Report and Discussion

Michael Smith, Chair

We are going to have lunch at 12:30 instead of 12:15, and we are going to move into the legal issues working group report and discussion.

Michael Smith.

COMMISSIONER SMITH: In sum, since this is easier because of the way Chris has organized this, our working group has met even less frequently than others so we have even less to report. But I just want to frame it appropriately by reference, everything that you approached was preliminary, freewheeling, there was some stats, that was about it.

On the other hand, this meeting is very useful I think because of the frequency these legal issues are popping up and, I think, very quickly.

So let me very swiftly summarize the territory barely covered by our first meeting.

It's fairly clear to us that we must do some work on statutes of limitation and on times for filing of postconviction relief. And yesterday, mainly at the request of the postconviction relief group that whatever thoughts you might have on that be shared with us so that we can go forward with that. So we know that is on our agenda.

There are questions about the admissibility, the law of admissibility covering DNA evidence. And I think we were uncertain in our first meeting just exactly how much use could be contributed to that discussion by this Commission. But Jeff Thoma has been looking at those questions and I haven't had a chance to talk to him about it, and he has a report to make.

COMMISSIONER THOMA: Fairly briefly, I have reviewed the state trial and appellate cases, as well as codes and statutes of the various States, and I intend to have it complete by our next meeting which is December 4th, but I have it pretty well along now.

There are over a hundred RFLP cases with varying admissibility standards with regard to populations statistics. For example, California, just as an example, when a Negus (phonetic) case came out this year and approved the modified ceiling principle, at least for now, with regard to cases in California.

But a case out of Dennis' office actually is about to be in front of the California Supreme Court which probably will decide whether the numbers go beyond that, and I would imagine that they probably will. And also, it's a case that involved PCR as well, it's a small PCR case involved in that statute there.

Regarding admissibility, there are cases out of 43 states, seven states which had previously denied admitting DNA, six of those states have now reversed those opinions by subsequent decisions of either the same level appellate court or the State Supreme Court.

At the trial level there is a great percentage of admissions. I'm trying to get a handle on that, but it's fairly difficult to do. I'm using the help of some district attorneys that I know that are involved, as well as public defenders.

But the reasons for denial are generally concerns over the reliability of a given test, of a given criteria of that and not the science itself. There are very few cases right now that are being denied admissibility of DNA for the science.

We'd also -- I don't mean to go beyond our chair's discussion, but we did also talk about -- going onto a different subject now -- certification of testifying laboratories with regard to what type of proficiency testing, the testing that we might want to decide upon, if any. And I know we haven't reached any agreement or consensus, but it's just one of the vary areas that we are involved in. Again, we are having a meeting December 4.

COMMISSIONER SMITH: The December 4th meeting is as described a little bit by Jim Crow yesterday, in part a product from the sense of both committees that the evolution or development, trajectory of the technology is likely to be raising a set of legal issues not yet before us.

And they have to do with some identifiable trait identification and possibilities that seem to be emerging in the future. There is at least that on the agenda for December 4th between the two committees.

There are some other issues having to do with future speculation which is characteristic of the first meeting of all the groups. For us, I think part of that was we asked questions, we had a discussion, but I'm not really sure we came up with an agenda about what indications, if any, there for the fact finding process upon which we rely ordinarily, from the advances in the DNA area and the challenge that it poses to either this identification testimony and the use of the inherent lie detector on evidence of other kinds.

Now, that was a fascinating discussion, although I do think it probably lies beyond this group's mandate, but that is a question for this group.

Other issues like that, well, there was discussion again I think that led not to consensus that we should take it up, but to discussion whether or not it was learned in the last ten years or so of DNA wars, stuff that we brought to the Court for future reference by those trying to introduce or consider how to consider the admissibility of other scientific evidence.

I think we did not decide this would be a useful exercise for us, but it was on the table, and still is for our working group.

I think the issues which we will be wrestling next are who owns the DNA, who owns the biological samples, who owns the code, how firm are the notions of privacy and confidentiality that surround this area, as practiced anyway, and how likely is it that the principles that are being brought to bear will survive the pressures of law enforcement necessities as they emerge one by one over the years.

I was fascinated this morning to think about the police officer's alert extraction of the DNA saliva from the pavement when the suspect spat. And it just seems to me that we have some conflicts that need to be worked out about our notions of the privacy of the code and the likely law enforcement practices, some of them very efficient, some of the barriers to the collection of DNA evidence in the ordinary course of life.

This is particularly so, because although we haven't considered this very much, I talked a little bit with Lisa about this, the availability of DNA evidence in a sample, biological samples, and DNA code

databases in other realms, other domains, far greater than the database available for CODIS itself for example.

What are the likely pressures to be brought and what law is to be relied upon as the efforts to make use of the databases come on-line. Particularly, I think, we are going to have to deal with those issues when we ask questions, which we haven't yet, about the law that might govern DNA collection efforts.

Are they like the DNA roadblocks that we are talking about, or is there some other way that we should be understanding that kind of attempt to make use of our DNA.

So there is a whole host of issues that I find that rely directly on our agenda. But I also think that if I understood the DNA probe effort our second meeting is likely to be both productive of issues for us, but more productive as to specifying those issues in a way we can attend to them properly.

I think we are in the market for demand from the other working groups on what questions we have directed to us. I think that is all I have to say.

COMMISSIONER SCHECK: I have a question from the report. What are the specifics of this Illinois case where a semen sample is estimated to be a frequency of one in 400,000 in the African American's population and one in 1,000,000,000 among Caucasians and the police were looking for an African American. Where did that come from?

DR. FORMAN: That is a case, State vs. Josenbowski (phonetic). The police weren't looking for anyone, they actually had their suspect in hand. And it was a case where a prostitute accused a police officer of requiring her to perform certain acts so that he wouldn't charge her.

There was a semen stain on her T-shirt. The semen stain was estimated by PMDQ Alpha and D1S80, it was one in 400,000 in the African American population, it was one in one point something million Caucasian population. The police officer was Caucasian and obtained that DNA profile.

MADAM CHAIRMAN ABRAHAMSON: Jim, did you want to add anything further?

COMMISSIONER THOMA: No. Actually I agree with Professor Smith that if we were left to our own devices, literally our working group would go into too many areas. And I think what Professor Smith is mentioning is we could use a little sense of direction since the other working groups are a little more concise in what areas they are going to go into.

For example, the privacy issue I think we have got pretty much a general consensus on but for one person that isn't on the Commission but is in a working group, but I think Bill's points were pretty well taken by most of us.

I think that is an area that we genuinely should go into as a legal issue. I think with regards to certification and with regard to what the issues are in the cases, that is pretty clear. But I think beyond it I agree with Professor Smith. Whatever direction we give that other working groups aren't able to address that are legal nature, we will consider.

COMMISSIONER BASHINSKI: Were you not talking about model legislation?

Some of the problems that were spoken to earlier this morning can be dealt with somewhat by fixing loopholes and problems in existing law.

COMMISSIONER THOMA: It's interesting that you should mention that, and I do agree that that is something that we should talk about.

The one person that I disagree with in our working group actually on the same piece of legislation in California, we had differing opinions as to how it should be implemented.

But I think that genuinely must be an issue that our working group deals with. And because we are doing research on the codes and statutes I think I'm going to look to how --

COMMISSIONER SMITH: We will keep you working hard.

COMMISSIONER BASHINSKI: I would think this issue of expanding the databank to include other offenses which relates to the recidivism data and so forth might be something that you want to pull into that consideration.

COMMISSIONER SMITH: I think that's right. The question of privacy and confidentiality to this newcomer to the field are quite imprecise. The definitions and understanding seem to be fairly imprecise and probably not fruitful.

And therefore, there probably is a need, though I'm not sure we can do it. But if there is a need we probably could come before this Commission to state more precisely and more clearly and persuasively what the privacy issues are, who has them, what instruments of law or otherwise there are available that are appropriate protecting those interests, and what principles, if any, ought to be applied if the claim is made that these interests be overridden.

At least one can imagine certain cases under which very, very powerful claims can be made. And I think if we could be of some use to lay that out to the newcomers so they understand you grew up in this field five or ten years ago, about the examination.

COMMISSIONER THOMA: And our group does focus on that. I think we are going to continue to focus on that, among other things.

COMMISSIONER FERRARA: Can I ask if the group -- I'm hesitant to bring this up and I think it's a good legal issue and it's one I have struggled with in our laboratory.

This refers to something we call low stringency searches of a databank. A crime scene profile is developed at the crime scene. Search the databank under normal moderate or high stringency looking for an exact match. None is found.

However, one can ascertain with a lower stringency search that the sample might be a sibling to the person.

I had this exact case arise and my examiners came to me and said what should we tell the law enforcement agency. And I looked at our statute which says only when a match occurs, may the law enforcement agency be informed.

Based on my interpretation and reading of that statute, I said no. Yet, I have spent a lot of sleepless nights thinking that I was letting somebody --

COMMISSIONER SMITH: But did you report to the law enforcement agency that you had not been able to match it or did you just say nothing at all.

COMMISSIONER FERRARA: No match.

COMMISSIONER SCHECK: But did you conduct a low stringency search in the first place?

COMMISSIONER FERRARA: Yes.

COMMISSIONER SCHECK: Well, isn't that part of the problem?

COMMISSIONER FERRARA: Yes, but the examiner did it anyway.

COMMISSIONER SCHECK: Because, I mean, this was actually brought up in your report in that Massachusetts case. Maybe somebody could tell us about that.

This is the one where I take it there was a DNA databank search, yielded a partial match with the brother or other close relatives, and then a Massachusetts case says that a hit on a close relative could not be used as evidence.

COMMISSIONER SMITH: I couldn't understand what that meant.

DR. FORMAN: I'm not remembering this case.

COMMISSIONER SCHECK: It's written in the report.

MADAM CHAIRMAN ABRAHAMSON: What page are you talking about?

COMMISSIONER SCHECK: It would be the fourth page in and it begins, "Investigative Leads from DNA Databanks Searches." There is a reference to a Massachusetts case so I was wondering where that came from.

COMMISSIONER FERRARA: An Illinois case you mean.

COMMISSIONER SCHECK: It's the fifth page, I'm sorry, "The Interpretation of a 'Cold Hit' and Other DNA Evidence."

COMMISSIONER KENNARD: And it's your second to last paragraph.

COMMISSIONER SMITH: The author of this report is not with us today.

DIRECTOR ASPLEN: This is a condensed version of about a 20 or 25 page report that our note taker took. We can go back and look. It was quite probably Phil Riley who mentioned it, since Phil is from Massachusetts and he may know the details.

COMMISSIONER SCHECK: Just so we are clear on what we are talking about, in New York we dealt with this issue. And I was informed, and I even looked it up myself and correct me if I am wrong, that

CODIS has very stringent guidelines, and in theory the examiner when you search the computer, you're only supposed to look for a hit at X number. What was the number?

COMMISSIONER FERRARA: Well, you mean the full 13.

COMMISSIONER SCHECK: Whatever number it is you're searching for, I can't remember. We actually had a number in our New York guidelines as to how many markers we would look for. And you simply wouldn't report out or do a low stringency search of anything less than that.

COMMISSIONER FERRARA: I don't recall.

COMMISSIONER SCHECK: The problem only arises when you start doing low stringency hits.

COMMISSIONER FERRARA: NRC1 does address that to some extent and recommends against it.

COMMISSIONER BASHINSKI: Doesn't it depend on how your statute is written? For example, ours says the information can only be used for law enforcement purposes. That certainly would be an interesting law.

COMMISSIONER FERRARA: Right. Had my law not been so specific and say only when a match, I would have loved a little wiggle room.

COMMISSIONER SCHECK: I would love that you didn't have it.

It seems to me that the initial statute that Congress passed, as you well know, Paul, is limited to forensic identification purposes only. And the idea is that you shouldn't be allowed to do low stringency searches in the database just because you will be in the same position that you are today where you're getting a hit or at least you're focusing suspicion on a relative of the defendant or relatives who are people who shouldn't be in the database in the first place. And that seems to be a very sad recommendation.

COMMISSIONER THOMA: I was just looking back in my notes. The case that you brought up at the working group at least according to Dr. Gates' (phonetic) notes.

DIRECTOR ASPLEN: That was the Massachusetts then. The Massachusetts was wrong and what I was referring to was Paul's case. I thought that that was also a possibility. Because Paul and I have talked about his case before and the error is probably in the Massachusetts case.

COMMISSIONER GAINER: But a relative could be appropriately in the database though.

COMMISSIONER SCHECK: No. The idea behind this, just so we are all clear about this, is you get a match of an individual with let's say four markers for the sake of argument, and the person is excluded in the fifth. What that tells an investigator is let's go look for siblings. Because the siblings could be the perpetrator. And that it is, in my judgment, an improper use of the databank.

COMMISSIONER SMITH: I guess what I'm thinking, although I obviously have to think some more about it, is that although this is the step, that's meeting of the intent at the time of CODIS' inception.

I think what Jim Crow is telling us is that there are going to be other ways in which this kind of technology will be brought to bear or made to be brought to bear it's going to be much harder to say that.

Unless the CODIS statute means we can't do it that is the end of it, it's hardly going to be an issue to be concerned about the development on -- I forget the term -- for identifiable traits.

But identifiable traits are much more like this, aren't they, than a hit. So it seems to me that territory is opened up. We are going to have to explore it and look for principle.

MADAM CHAIRMAN ABRAHAMSON: Now is not the time for us to decide whether that is correct under the statute incorrect interpretation of the statute, and what the next step will be. So the issue it seems to me is can you or should you, should the law permit this kind of, quote, sibling non-match. Don't debate that that's an issue.

COMMISSIONER SCHECK: Well, if somebody wants to make it an issue, it's an issue. We are not writing on a clean slate here.

As Paul well notes because he was on that commission, there was a recommendation and then the Federal legislation was passed. And similar issues, which I think you should explore because they were troubling, have to do with CODIS.

As I understand the statute and regulations and what the thinking initially behind it was, limits what you could put into the databank and what you can't put into the databank. It doesn't prohibit in theory local law enforcement from creating it's own mini databanks in other ways.

And in addition, I guess the biggest contradiction of all is that the various States -- I think you should address this -- in various States, most States -- in fact, I don't know of one where there is an exception -- if you want to get biological evidence, you want to get a blood sample from an individual for purposes of criminal investigation, a search warrant, meaning probable cause or reasonable cause, however you define it. But that one example of the police officer surveilling the suspect, to pick up the DNA that is left, that raises more problems for me than it solves. I mean, as I understood the story actually, it wasn't even a cop.

COMMISSIONER GAINER: It was a police officer.

COMMISSIONER SCHECK: But you could surveil somebody and if you want the DNA from somebody you could subvert the warrant by just surveilling somebody and taking the DNA.

COMMISSIONER SMITH: Are we encouraging that by the restrictions we place?

COMMISSIONER GAINER: I guess I would hold from the law enforcement's point of view that the legal look that we are going to look at this is going to be a very conservative one.

Barry, are you saying there is an expectation of privacy when you spit on the street?

COMMISSIONER CLARKE: I think that would be expectoration of privacy.

COMMISSIONER KENNARD: What about the drug dealers if you search the garbage.

COMMISSIONER SCHECK: Look, I would be the last to say that because I'm suggesting frequently to law enforcement that they do this to get clues, right.

COMMISSIONER SMITH: To do this just to create a database of people.

COMMISSIONER SCHECK: I mean, I see a problem here. I'm not going to answer this one, but I see attention between on the one hand where there is a clear warrant requirement, and on the other hand organized surveillance of somebody to collect DNA data. Do you want to just take it all from the community.

COMMISSIONER CLARKE: Literally in Canada the only way they can obtain a sample is by that method.

COMMISSIONER SCHECK: Before they amended the statute in Britain it was the same thing.

MADAM CHAIRMAN ABRAHAMSON: I'm assuming these are the kind of issues that you're going to raise.

COMMISSIONER SMITH: And these are the kind of issues we are going to put to rest.

MADAM CHAIRMAN ABRAHAMSON: That was my next point. I'm assuming also that you will explore that issue, probable cause, privacy, surveillance techniques to avoid or evade subpoena, et cetera.

And I'm assuming that that is what your report will do is lay out these issues and lay out a discussion of this and that you will not be the United States Supreme Court or any other Court in final determination of the issues. But if I am wrong, and you are going to do that and make a decision, let me know.

COMMISSIONER SMITH: Absolutely. You will be the first to know should that decision be raised.

MADAM CHAIRMAN ABRAHAMSON: But I'm assuming that you will have all these considerations of law enforcement, privacy.

COMMISSIONER SMITH: I think we definitely have.

COMMISSIONER GAINER: I was going to say at least Paul's dilemma raises a police issue for me that I'd like our group to look at. And that is the interpretation of a lab's record in the answer to a question what is a match and what isn't. If that means that police officers have to be more clever or more clear in asking a lab person what is a match or what isn't a match.

That's a new issue for me and I haven't looked at it that way, that a lab director was making some type of subjective determination as to what he would disclose to the police officer.

MADAM CHAIRMAN ABRAHAMSON: Or what he is allowed to disclose under the law if I understood Paul. But at least advise you.

COMMISSIONER GAINER: But in this case, Paul himself and I suspect his legal staff made a determination. Now in the Illinois system where the lab director would work for me directly, the State Police hopefully that would be bumped up to my level to make that decision or my general counsel.

COMMISSIONER SCHECK: Then you would have talked to the lawyer and the lawyer would have told you that it might be unauthorized disclosure of the information, and you're also aware that.

COMMISSIONER GAINER: That may very well be true, but at least I'm saying there is a difference from a law enforcement perspective whether I as the law enforcement officer who has sent the sample and asking for the information is at least having a fair read from my perspective of who is making the call on the law.

COMMISSIONER SCHECK: He is not telling you any different.

COMMISSIONER GAINER: I would not know that.

MADAM CHAIRMAN ABRAHAMSON: You're saying, Chief, that what the information you're getting is not how you would interpret that. You would say you would think no match meant absolutely not even a hint.

COMMISSIONER GAINER: That's correct.

MADAM CHAIRMAN ABRAHAMSON: Right.

COMMISSIONER SMITH: There are other ways of talking to investigative officers.

MADAM CHAIRMAN ABRAHAMSON: And maybe what you're suggesting is there is a different response in a different dynamic when the laboratory part of your operation, versus a laboratory that is either governmental but not part of your operation or non-governmental.

COMMISSIONER GAINER: That is part of it, yes. But even making sure that the investigator is framing the question properly to any lab technician.

I mean, again I hadn't thought through the process of whether I have a low stringency answer, a medium stringency answer, or high stringency answer. I have to educate my people to ask better questions.

MADAM CHAIRMAN ABRAHAMSON: If they can under the law.

COMMISSIONER SMITH: This is Barry's point.

MADAM CHAIRMAN ABRAHAMSON: Any other comments?

COMMISSIONER CLARKE: Just a comment on low stringency search because they go on every day in fingerprints. Because generally when a fingerprint search is made, the results are an order list of candidates and then the examiners start going through this list to decide who may be related to this case and who isn't.

COMMISSIONER SCHECK: But those are all people whose fingerprints are in the system for some reason, that has been determined by law that they lost their expectation of privacy in fingerprints.

Now what you're asking for here -- some people may want to do it, I'm firmly opposed to it -- is for the lab to give you information based on a low stringency search, which is like a dragnet. It says let's go for the relatives of the convicted offender as opposed to the actual offender.

The answer to your question is this offender X's DNA profile? The answer is no. What you're really looking for is if I have a low stringency search, tell me about his brothers and cousins.

COMMISSIONER CLARKE: Of course there are people in there who are perfectly innocent and never been arrested. People like myself. All licensed individuals in the State of California are in the database.

COMMISSIONER SCHECK: For DNA evidence?

COMMISSIONER CLARKE: No, I'm talking about the fingerprint database.

COMMISSIONER DAVIS: What is the entry level for CODIS? Isn't that an arrest just like a fingerprint?

COMMISSIONER BASHINSKI: No, convicted.

COMMISSIONER DAVIS: So if the brother is a convicted felon and he is in CODIS and a low stringency search brings up the brother, I don't see the issue of privacy.

COMMISSIONER SCHECK: The issue is this. You're looking, you have a DNA profile of crime scene evidence. Let's say, for the sake of argument, whether there is 13 loci or something that you're looking at. And you look at it and you don't get a hit. No one in the offender database matches the DNA profile in the crime scene.

If you run it, though, and you ask the computer instead of giving me back everybody that hits on 13, get me back the names of all the people that hit on ten or on eight.

Then you may get, for the sake of argument, eight names. And what you look at is you say here are eight individuals. It would be a good investigative lead to say these eight individuals may have a sibling, because they match on so many of the loci they are likely to be perpetrators, let's go look for them. That is the investigator's strategy that is being proposed.

The problem with that so far, at least as far as the Commission looking at this is concerned, is that is a bad idea ethically and in terms of privacy interests because these other people shouldn't be targeted.

You learn something about DNA of my siblings when you have my DNA. And these are people whose profiles are not in theory supposed to be in the system at all.

COMMISSIONER GAINER: That was a different dilemma. Is that what your problem was?

COMMISSIONER FERRARA: Right.

COMMISSIONER GAINER: What Barry just described?

COMMISSIONER FERRARA: Exactly.

COMMISSIONER GAINER: Even I could be offended by that, I guess.

COMMISSIONER SMITH: It depends on how pressing the investigation is.

COMMISSIONER FERRARA: If this was a high profile case.

COMMISSIONER GAINER: Like Jon Bennet Ramsey or something?

COMMISSIONER FERRARA: Good example.

COMMISSIONER DAVIS: Or the World Trade bomber.

COMMISSIONER FERRARA: This gives me an awful lot of angst, and I'm still not sure about that decision.

MADAM CHAIRMAN ABRAHAMSON: So again, assuming that this is the kind of issue that you're going to raise as a legal issue and put the various considerations down why we all can see them.

COMMISSIONER SMITH: And we will be back with a decision.

COMMISSIONER THOMA: And privacy has really been in front of us.

MADAM CHAIRMAN ABRAHAMSON: Welcome with us, Superintendent. We watched you on TV.

COMMISSIONER HILLARD: I just heard talk about Jon Bennet Ramsey, but it's public record so I guess I can go ahead and talk about it.

You know this case that we had here this summer with this 7, 8, 11 year old. I have worked with that case for a long time and finally the DNA came back from the State lab.

The DNA came back and we look at the blood, the blood indicates it was male who did it. After the state lab went through their procedure and talked to the Superintendent, they called the chief of detectives and said we don't have a match, but what we would suspect is you need to look at a brother, a sibling, okay.

They do some more investigation and they come up with a brother Floyd. Floyd has been convicted of two other homosexual assaults in the State, but that was before we started registering our sex offenders. He is supposed to register, but he hasn't come in to register.

So we go in and look for Floyd. Get a search warrant, it's his DNA. How does that play on the scenario you're talking about? Is that okay?

COMMISSIONER SCHECK: I think what you did is okay and for this reason. That at each step of the way you had a specific predicate. In other words, you looked at a crime scene sample, you had a sample suspect, you had somebody in custody so you're matching those two.

It's you matched on more loci than you ordinarily would expect. And this would be a frequent development I think in sexual assault cases where family members might be within a universe of suspects.

So you're proceeding from that specific case forward and developing leads using proper means at every point, satisfying probable cause at every point. You already had probable cause to suspect individual number one who you eventually excluded. So that seem to be following a very sound and traditional and sound law enforcement motto.

The other issue is doing universal searches which can create fragments. So it's a different proposition. It sound to me like because you proceeded from the crime scene evidence it meets all the safeguards that previously have been.

MADAM CHAIRMAN ABRAHAMSON: Rather than using CODIS.

COMMISSIONER FERRARA: I agree, Barry. As a matter of fact in actual practice in a situation like that, without having any statute hanging over my head, we have done just that. Told the law enforcement agency this ain't the guy, but you better look at his sibs.

And when they do, once they develop probable cause to get a blood sample to make the identification.

So the situation here with, dealing with databanks, as Barry has articulated, is somewhat different.

COMMISSIONER GAINER: Forgive me now. In your case, then, if Paul's technician through error in breaking his own rules ran the low stringency, let's say he was outside the scope of that, and in order for Paul to solve his dilemma as we just laid out he would go back to law enforcement and not mention the low stringency. But he can go back and say I have no match. But you know what, I would look at relatives. That would make you feel better? I'm trying to get the distinction.

COMMISSIONER SCHECK: It's sort of like we accidentally broke into the apartment and we conducted the search without a warrant or without probable cause, but we may have some useful information and you may want to take it and run with it.

COMMISSIONER GAINER: There is a difference, if it was illegal.

COMMISSIONER SMITH: Barry is coming to our meeting on the 4th of the December.

Can I ask a question? One of the questions that came up, and maybe somebody will have anecdotal evidence or a story we could sort of follow, I just wonder whether there is anybody who knows of efforts to develop probable cause search warrants for DNA samples in the custody of medical facilities, for example, where probable cause has been established apparently for the search, but the DNA had been collected previously by a non-law enforcement agency.

COMMISSIONER BASHINSKI: We have PKU samples collected in California and on more than one occasion, but I don't know how many, for the purposes of identifying a deceased person.

But I can see it being for other purposes as well. But for the purpose of identifying a deceased person, I have gone after those samples to be reference samples for comparison with remains that have been found. And there probably were legal proceedings around that.

COMMISSIONER SMITH: Any other things that we talk about, peoples memories to be used?

COMMISSIONER SCHECK: I did the same thing. In the Woodward case we got the PKU sample from the infant to conduct DNA tests to see whether or not there was a genetic disorder such as osteogenesis. And when I called the people in Massachusetts lab, I was very, very worried that they wouldn't object to turning it over.

COMMISSIONER BASHINSKI: But they objected.

COMMISSIONER SCHECK: Eventually I suggested a court order would be a good idea, they said yeah.

MADAM CHAIRMAN ABRAHAMSON: Dennis Bauer.

MR. BAUER: We had a case where we suspected there was a problem with transfusion blood, so we had a search warrant to get the identity of the donor of the transfusion blood and were able to identify that the transfusion blood was the source of the problem.

MADAM CHAIRMAN ABRAHAMSON: Thank you.

MR. BAUER: If I could add something, though. One of the things we are very interested in is the ability to get a search warrant for third party exclusion purposes.

COMMISSIONER FERRARA: This may be a little beyond that, but one of the other difficulties I have had is when the defense and/or the prosecution has asked that the known blood sample of a rape victim be examined for the presence of drugs to establish an impairment. And I refused both sides. But you can start thinking about this stuff that comes up.

COMMISSIONER SMITH: Keep yourself awake at night.

COMMISSIONER FERRARA: Yes.

MADAM CHAIRMAN ABRAHAMSON: They keep awake during the day because they actually happen.

Is there any further discussion? Then we are going to close that. But we are going to have a lunch that is going to be a working lunch, with Paul talking about the laboratory funding issues working group report.

But we have to know whether any of you are going to leave before 4:00 o'clock so that we don't lose people because one of the suggestions is going to be how we are going to handle CODIS.

COMMISSIONER REINSTEIN: I will leave about 3:30, 3:45.

COMMISSIONER DAVIS: My plane leaves at 5:30.

COMMISSIONER GAHN: I have to leave.

MADAM CHAIRMAN ABRAHAMSON: Anyone else? Thank you.

Paul.

COMMISSIONER FERRARA: The Hotel, for a lot of us, we have to check out at 1:00.

MADAM CHAIRMAN ABRAHAMSON: For those of you who have not checked out, you have until 1:00 to check out so if you would check out. Who has to check out.

Several of us. So if you would check out and come back and have lunch, would that be all right? Check out as promptly as possible.

(A short break was taken.)

Any discussion of the Board and did everybody get what is recommended here? Those recommendations, did we all get that?

DIRECTOR ASPLEN: Yes. They should have.

MADAM CHAIRMAN ABRAHAMSON: Why don't you summarize the proposed recommendation.

COMMISSIONER FERRARA: The proposed recommendation, the draft you have in front of you, to summarize it succinctly, recommends an appropriation, an infusion of \$22.5 million to specifically be designated for the DNA analysis at 13 STR code core loci of those, of the approximately 450,000 convicted offenders samples currently preserved in forensic laboratories waiting analysis.

MADAM CHAIRMAN ABRAHAMSON: Okay.

Chief Gainer.

COMMISSIONER GAINER: It strikes me number one as a great idea. But I think we owe it to make some hypotheses about outcomes other than cleaning up the backlog. So you get into some verbiage at the end of this, but I don't think it's beyond the realm of possibility to say we believe with 450,000 databases that we are going to have this many hits based on past experience. Which can be converted, if you also use some of the stats that exist on recidivism about crimes prevented and that we would make estimation on cost savings.

I think that is what makes this attractive and we ought to aggressively make those estimates based on past experiences.

COMMISSIONER FERRARA: I agree. The only reason we didn't is there is two sides to this. There are two things that make hits. One is a database to search, and the other is the ability to run the crime scene samples.

I didn't want to infer that just the development of a databank by itself would produce hits. We all know in this room that that also entails running the unsolved crime scene evidence.

Now, if that unsolved crime scene evidence, and there is obviously tens of thousands of those nationally, we can anticipate tens of thousands of hits. But I didn't get into it here again because I'm only addressing one side of the equation.

COMMISSIONER GAINER: Again I would just submit that if we did nothing different other than have a bigger database, we anticipate this outcome. If we then improve incrementally, 10, 15, 20 percent, that each offers different things, variables that you can control, I predict this outcome. I just think it sounds a lot more practical. Frankly \$22 million in the life scheme of Federal budget seems insignificant.

But I think it's a lot easier to wrap your hand around if we're bold enough to say if you give me this, this is what I can deliver with it.

COMMISSIONER SCHECK: Projecting data.

COMMISSIONER GAINER: But I think there is some experience. If we took -- I don't know, I'm reaching here a little bit -- but we can reach in England and bring it back here. But if we just took the hit experience we had for instance in Wisconsin, Florida, Illinois, Pennsylvania where we've seen some of our hits and did some extrapolating, it's fair to make some estimates.

COMMISSIONER SCHECK: I don't think you can make that. I doubt with the small number of hits you have in those jurisdictions that you could extrapolate.

COMMISSIONER FERRARA: With our current experience we would underestimate I believe because of the relatively -- compared to the UK, relatively small amounts of data.

We've seen figures of approximately -- and our experience in Virginia is we are at the point of a hit for every 500 samples. Now, if I extrapolated that, and I'm not sure I could, that would come out to, tell me, 90,000. One in 500 would be --

COMMISSIONER GAINER: Again, I'm not certain what the numbers would be. But assuming there is some logic to having a database, we are making some statement about the value of it. So just from a cost/benefit analysis you can't say let's spend \$12 million on 450,000 and I don't know whether it's going to be any good or not.

And again, whether you low ball and say it's 400 cases or 500 cases, I submit to you that go to any victim's right groups or rape groups whether they think prevention or solving 400 rapes is worth \$22 million.

COMMISSIONER SCHECK: I agree with you, except that my problem with this, as some of you know, is that you rejected the requirement for prior authorization, number one. Because it still seems to me that all the data that we've seen in the last few days and since we last looked at this really aren't referred to in the Federal policy.

Now my judgment about what Federal policy will be is that you want the state and local governments to do things that they wouldn't otherwise do, that would be internationally interesting in terms of developing that it's more efficient.

And it seems to me that what is really disturbing in what Carl presented are the so-called owed samples. We know that the owed samples are the people that are on parole and probation, people on supervised release. The people that it seems that the law enforcement authorities in the State level and local level can't seem to get in any organized way.

And it seems to me they are the highest priority for the simple reason that they are the people out on the street who are most likely to be committing the crimes, who you will be able to match to the new cases coming in.

So in terms of crime prevention, all right, and in terms of getting the most hits as you type new cases, it would seem to me that getting those samples in first should be the highest priority. Secondly, the people that are about to be released from jail.

So my feeling is that in terms of this money, it's most appropriately spent on that.

Now in terms of typing these old collected samples, we are talking about people that already have been in jail that have been convicted of felonies, they're in for some substantial period of time. And as Paul pointed out, the only way we are going to get hits on those people in substantial numbers is if we go back and type the old unsolved cases.

I mean, that's what you're going to get from these people. The old unsolved cases because they have been in for five or six years.

COMMISSIONER SMITH: Do we know how many of those 450,000 have been released?

COMMISSIONER BASHINSKI: Certainly the majority of ours have because they have been typed before released.

COMMISSIONER CLARKE: It really isn't rejecting prioritization. Prioritization is a wonderful goal as Carl described it.

I think we are dealing with the realities of 50 jurisdictions and the problem inherent not just in finding out who is going to be released and who is next. It would be wonderful if that information was accessible, but it just isn't.

But consequently the question is with that situation as it is now do we seek to try to correct that situation, which again involves 50 jurisdictions, or as Carl recommended yesterday do which attempt -- not attempt, but perform an immediate infusion of a substantial number of samples that can be done relatively quickly, certainly much faster than dealing with the 50 jurisdiction problem. And then create a database that will resolve in matches and involves individuals who are clearly out on the street as Jan pointed out in a fairly large number.

So I think it's dealing with the practical aspect of it as much if not more than the ideal goal.

COMMISSIONER SMITH: I don't know if this introduces a different subject, but it strikes me that given some of the discussion this morning about the difficulties of doing this properly where you have a population that is not in a facility, I think investment in developing successful experience of doing that is an independent value. That is, if we don't attend at all to that now, we are going to miss the opportunity to develop the capacity to do that which is going to be critically important shortly.

So maybe I'm missing it, but I can't think why an all-or-nothing or either/or proposition on investment makes a hell of a lot of sense.

The prioritization, if that's what the answer I'm signifying is, because it seems to me there are two categories of people because we want to type right. As a task we need to develop testing for, and the evidence that we don't have that capacity is very upsetting.

COMMISSIONER CLARKE: Sometimes you have to stop the hemorrhaging before you operate on the patient.

COMMISSIONER SMITH: But not always.

COMMISSIONER FERRARA: I think it might be informative to also keep in mind, based on experience, Virginia's experience is a good one, instead of most of our hits coming from entering a foreign profile found at the crime scene and searching the database and making a hit, more times than not on that first search a hit is not made.

However, as we produce and enter profiles of newly convicted felons who are going to serve 20 years or 10 years or 50 years or life, most of our hits are occurring there where we find out that that individual or those individuals have committed old, cold, unsolved cases.

So it's not like there is no gain to be had from running the samples of somebody who had just been convicted.

COMMISSIONER SCHECK: That goes the other direction.

COMMISSIONER SMITH: Right. They are out on the street before they were placed in to get the sample.

COMMISSIONER FERRARA: These are crimes they committed before they got convicted of the crime for which --

COMMISSIONER SMITH: Were they on probation or parole when they committed the crime for which they got the hit?

COMMISSIONER SCHECK: That stat was just telling us that where you're really getting the hits are the new people in the system and if we made a concentrated effort to get the people on supervised release we may have gotten them on some of those cases.

COMMISSIONER BASHINSKI: It seem to me you can have two tracks. You can be working on the obvious doable, get the databank, and still pursue a parallel track of trying to develop technology strategies, whatever you want to call it. I like that Laser Lance-It. That costs about what an intoxalizer costs. We can fit that in every sheriff's office in the State and solve half of our collection problems. So why couldn't we talk about two things or three things?

COMMISSIONER FERRARA: Do the samples you have got first.

COMMISSIONER BASHINSKI: But is it either/or? Go for all.

COMMISSIONER FERRARA: While trying to track down the old samples.

DIRECTOR ASPLEN: There is nothing that would prevent this group from doing both, to recommend to the Attorney General both tracks. And very simply there are two parts of this equation. The one part of the equation is the database sampling that needs to be done. However, the other half of the equation is getting them in on time.

And as such, what we could do is simply develop a recommendation that says along with reducing the backlog, what we need to do is we need to provide money for pilot programs which would encourage that kind of operation among agencies, would encourage the faster collection of samples and getting them into the system more quickly in that regard.

There is nothing at all that prevents this group from recognizing both issues which are both significant issues and dealing with it that way. The cost of this particular one is 22.5 million. Do we have to put a dollar figure on the other one or not, I don't know. But there is nothing that prevents addressing appropriately both issues.

MADAM CHAIRMAN ABRAHAMSON: I was just phrasing this question somewhat differently, but I think it boils down to the same.

Namely, if we recommended that money be put into a backlog, how do we know that in a year that theoretically when this backlog is going to be finished, that we don't have another backlog?

So my question is for my information, how many states are now keeping up with the current convicted offenders so that they are collecting and putting it in.

And my other question is I understand that this will ultimately be a new system, the STR. Now many states, or some, are doing it with RFLP. So how will it fit in Wisconsin for example? Not that Wisconsin is the world, but it's a good place to start.

COMMISSIONER SMITH: A good place to live, too.

COMMISSIONER GAHN: How this has been, we are just about finished up our -- as Paul wrote me a note saying RFLP with a question mark, and I said I don't want to get into that now.

But the simple fact is that Wisconsin legislature or whatever funds are available, we have to make a conversion of our whole database to STR. It's as simple as that.

In other words, all the samples that we have tested have to be tested again. And I think that's just what we are talking about today and if I just use the Wisconsin experience we've had, where you can look at both ends of this and you can say, well, we want to look at all the old unsolved cases and get them in.

And what I believe the prudent thing to do here is this. We already have all these samples of convicted offenders. Let's test them. Let's not let anything derail that if that money is available for that.

And the reason I say this is this. There is some semblance of control, the release the prosecutors have over those unsolved cases. We have no control over those thousands and thousands of convicted offender swabs or blood.

But there is something we can do while those are being tested, outsourced, or whatever. We still can filter out our cases, those where we have suspect modus operandi that we can work with and do something with the police and prosecution and even the crime net people.

But we have no control over those thousands of samples. And it would be a shame to micro-manage this and try to look for people who would just get released and people who aren't when we already have all these samples.

Good Lord, let's get them in and get them tested because then when we do put in those unsolved cases we have this huge amount to run those against. And consistent with the Attorney General Reno's philosophy that started this, every time you fill up that databank with a profile the chances of someone who didn't do the crime being looked after, gone after, incarcerated, decreases.

COMMISSIONER THOMA: If I may speak to this. I agree with you in theory, but I don't know if we can do it all. But the Chief Justice's comments are very succinct. With regard to what we are collecting now we could be creating a new backlog if we don't use a prioritization system. And I think we need to discuss

that with regard to all the new cases that are coming in, with regard to prioritizing those people that are being released or about to be released along with those that we already have, and somehow do it in that manner.

If we are to do it all and do prioritization, I'm all for it. But I don't know that we can do it all.

COMMISSIONER FERRARA: But if we could, and we think our working group makes this possible for \$22.5 million, eliminate these 450,000 samples within one to two years, then you're essentially current and then you start from the samples on a first in, first out. So that is why we say in our body of our report if a commitment is made to analyze all current convicted offender backlog samples in less than one year, prioritization would become moot.

COMMISSIONER BASHINSKI: Because then you have a manageable work load, and is that really the way we are looking at it. We are going to convert 45,000 RFLP samples, another 86,000 in the freezer. We know we can keep up with our ongoing work load, it's how do we ever catch up without something like this.

COMMISSIONER THOMA: How did the backlog occur if you couldn't keep up?

COMMISSIONER BASHINSKI: Because there were new mandates and because we don't have any funding to do the backlog for a long time. There was no database funded, but samples are being collected.

COMMISSIONER FERRARA: These samples have been collected over the last nine years, and quite frankly until the forensic science community centered upon the 13 core loci, I know I didn't even seek the funding to run mine because I didn't want to have the money to run them when I didn't have the technology available at my disposal. Today we do. And only today.

MADAM CHAIRMAN ABRAHAMSON: Is that RFLP.

COMMISSIONER FERRARA: No, everything is strictly all STR. We dropped RFLP totally. All of our old RFLP databank, which we stopped building at 10,600, have all been re-run. And of course that is inherent in our recommendation that all those go to STR and nobody else.

MADAM CHAIRMAN ABRAHAMSON: So Virginia would have no backlog?

COMMISSIONER FERRARA: Virginia will have no backlog regardless of those recommendations. I have funding for the reduction of my backlog of 150,000 samples in three years.

MADAM CHAIRMAN ABRAHAMSON: And Wisconsin will continue to have a backlog because you're putting it under RFLP.

COMMISSIONER GAHN: Yes. We will need at least ten thousand samples re-analyzed for STR's.

COMMISSIONER BASHINSKI: We have about 45,000 that we need converted. But we have been planning on that. We knew about that.

COMMISSIONER SCHECK: When you're talking about backlogs now let's define the term because unfortunately it doesn't make a lot of sense to me. We are talking here when you say backlogs you're only talking about collected samples?

COMMISSIONER FERRARA: Correct.

COMMISSIONER SCHECK: I would say that the most important samples which are legislatively authorized but not yet even typed are the owed samples. Which, Paul, did you say and was Carl saying that that is as many as the collected samples? If you're making rough estimates I realize you don't have. But there are as many people who owed samples which haven't been collected yet for testing who are on the street for sure, as there are these collective samples that have not yet been tested.

COMMISSIONER FERRARA: I don't know that.

COMMISSIONER SCHECK: What is the number? Do we have any notion of what that would be?

COMMISSIONER FERRARA: Of the owed samples, no.

MADAM CHAIRMAN ABRAHAMSON: Dr. Crouse, you are the recorder in this room.

DR. CROUSE: Yes.

What Carl said yesterday was restricted to New York, Massachusetts, and then an idea of the backlog. In New York he said it was about half, collected was about 7,000, owed is about 3,500. In Massachusetts is 2,500 collected, but 11,500 owed. In the U.S., the guesstimate was, I guess, 600,000 collected and over a million owed.

COMMISSIONER SCHECK: So if there are more owed samples of people on the street, do you want to be able to go out there and get these parole officers and probation officers and everybody else, get them to get the samples now, so that you can when a new case comes in, you can immediately type them and prevent them from committing crimes.

If that is not the first priority here and proper Federal function, you've lost me. I really believe that the impetus for this is that we have all these collected samples, some substantial number, not all of them, but some substantial number of them are probably the least important to type because then people who are in jail for substantial periods of time you are not going to be able to do anything useful with them unless you type the old unsolved cases.

The old unsolved cases, why isn't that a major priority? These are the samples that are, as we speak, being destroyed, right. Because in many states they just throw them away after five years, they are being lost, they are not being preserved.

I mean, these are the, you know. By the time the money is authorized to get through these I don't think that we have a fair answer to the Chief Justice's question. There will be another backlog of new incoming cases, too.

DIRECTOR ASPLEN: If I could just address that briefly. Part of the theory here and the Chief Justice recognizes a fair dynamic that is at work here. The bottom line is that the backlog changes every single day. It goes up, it goes down, it goes up, it goes down depending on what individual States are doing in terms of testing, what individual States are doing in terms of what offenses are included in their statute.

As soon as Texas passes legislation saying they are going to include burglaries, boom, we are back up again. But just because it's kind of a moving target doesn't negate of the value of infusing the system with 450,000 plus samples.

The bottom line of the theory here is that by doing that, by relieving the pressure of 450,000 samples from the laboratories who were never assigned to do this, would now be able to do exactly the kinds of things you're wanting them to do. And that is go back and analyze these other cases because they don't have to do those now.

There is another dynamic here, and that's a matter of the practical ability for Federal funding to effect this dynamic. The bottom line is I think it would be infinitely more difficult for Federal funding to go in and effect every one of the particular laboratories and try to find a way to help them gear up like that, as compared to the practical effect of reducing the backlog.

And the bottom line is number one, it's got to be done anyway; number two, from a prioritization standpoint we can't get away from the fact that in most places you can't do it. You cannot prioritize the current backlog samples. You just can't do it.

COMMISSIONER SCHECK: I find that so hard to accept.

MADAM CHAIRMAN ABRAHAMSON: Does anyone else want to say anything?

COMMISSIONER SMITH: Just a question, the \$22 plus million that is produced would go to whom to build what capacity, or what is it actually going to be spent on?

COMMISSIONER FERRARA: It would be spent on the analysis of those 450,000 convicted felon samples at approximately 50 dollars per sample.

COMMISSIONER SMITH: Like contracting out to people doing the analysis rather than building to capacity at the lab.

COMMISSIONER FERRARA: Either/or.

COMMISSIONER SMITH: It seems to me it matters which. If you go that route and you hold on to Barry's concern, building a capacity, I mean, if taking care of the backlog is treated as a professional building opportunity, that's simply different than clearing the backlog by expenditure of \$22 million.

I'm not sure of that, but if it was to be contracted out, the analysis, rather than build the capacity to do analyses it would make a difference.

COMMISSIONER FERRARA: That's why we indicated that for providing the funding to laboratories to do it in-house, that laboratory would have to demonstrate currency in the STR technology at this time, so that they could -- it's entirely conceivable for a State forensic science laboratory to run 50,000 STRs a year in-house, as well as outsourcing. It's just strictly that we want all of this to be done within the next 12 to 24 months. Not wait for a lab to develop that capacity.

COMMISSIONER SMITH: If the capacity building dimension is part of this proposal, and if there is any interest or any thought of plausibility to the suggestion made this morning that there is some

technological advances possible, to grab that, rather than trying for the purpose of collecting samples from non-compliant populations. Then it seems to me I'm back to where we were earlier, that there was some combined investment capacity building is called for. Not if I can prioritize all the cases. It's because you have two related but different capacities that are insufficient today, both of which need replacing.

DIRECTOR ASPLEN: It was never intended, I think, that this proposal that deals solely and specifically with backlog, was ever to the exclusion of all these other things.

This working group still has a tremendous amount of work ahead of it. And part of that is how do we get the laboratories to the point where they can do all the things that we're asking them to do. This working group extends the life of the Commission.

And the next step is to deal with the other comprehensive improvement of the laboratories and what is the best way to enable them to do that. And along with, again, the possibility of pilot program funding for the prioritization collection. So this is not an exclusionary proposition.

COMMISSIONER SMITH: But just to finish it, if I understand correctly, there is not one but two or many backlog problems. And to the extent that we were talking about the owed as a backlog problem, it seems to me important to recommend that that's also a backlog problem. And it may be that a planned investment which embraces both has substantive political and economic advantages that we should pay attention to rather than focus on only one backlog problem.

DIRECTOR ASPLEN: I think that to some extent that I did somewhat anticipate it, if for example a way we could deal with that is extend the time period for what we consider included in the backlog and say six months to a year. By nature of providing this funding, what that will do is encourage the collection of those samples so that they can be included in and tested.

COMMISSIONER KENNARD: Which would increase your backlog.

DIRECTOR ASPLEN: That would, no doubt about it, absolutely.

COMMISSIONER KENNARD: So you have a temporary fix of a one, two, three year grasp on these people, you increase the capacity by that suggestion, which is going to put it on the local agencies to make sure that that capacity is going to be funded after.

DIRECTOR ASPLEN: But the difference is number one, you only do the testing once. Once the guy is in the database, he is in. So you don't have that recurring issues. And number two, it's got to be done anyway.

COMMISSIONER KENNARD: But you have over a million that are owed that you haven't even addressed yet, and we are going to collect another billion or two if we do it right.

COMMISSIONER FERRARA: But those owed are not a laboratory funding issue. These are collection and State logistical issues, not laboratory funding.

MADAM CHAIRMAN ABRAHAMSON: But it will be.

COMMISSIONER KENNARD: It will be.

COMMISSIONER FERRARA: It will be, but meanwhile if we do nothing, we will have nothing. If we do these 450,000 samples and, Chief, I'm hesitant to put a number on it. I can tell you that tens of thousands of cases will be solved upon completion of those 450,000 samples. People who are out on the street now are among those 450,000. 175 of those 450,000 are in Virginia and we have been collecting those samples for nine years. The average sentence is six years. So it's not like this is a population of samples that there is no way on God's green earth these people aren't committing rapes and murders today. And the longer we wait and try to collect samples, the more rapes and murders will occur.

MADAM CHAIRMAN ABRAHAMSON: This is not the first time this group has visited this issue and the concept of prioritization has come up before. Let me just see if I can somehow summarize it.

We have collected samples across the country. And maybe not all States have collected samples, right? Some do, some don't, right?

COMMISSIONER FERRARA: That's correct.

MADAM CHAIRMAN ABRAHAMSON: And since they are collected and they're sitting, it's relatively easy to just get them and test them and put them into CODIS. And that is why we have the funding issue because the labs presently don't have enough funds to do it and they're either going to have to increase their own capacity to do it or they are going to outsource to do this.

And this backlog apparently includes samples that have been tested but will not be able to be put into CODIS because they are under a different system, in Wisconsin for example.

COMMISSIONER SMITH: Is that right? Or is it 450 plus something?

MADAM CHAIRMAN ABRAHAMSON: That is a good question. I would like to state the facts. Would 450,000 include Wisconsin's backlog that is not in STR?

COMMISSIONER GAHN: It should not.

COMMISSIONER BASHINSKI: I think that is a 600,000 figure.

MADAM CHAIRMAN ABRAHAMSON: So because that is the 250,000 that are already in CODIS under RFLP, so we are now dealing with 600,000, okay. And that is one issue.

And if I heard the speakers correctly for the last two days, they are saying that for that 600,000 to put priority is too costly and too difficult, and why. Because you're going to complete them within a short time, within a year or two.

Am I summarizing that correctly?

And when we talk about backlog, we have, it seems to me, if I understand this, that we have to have a cutoff date that is as of -- and you can pick the date today, what is today, November 23 1998. Everything collected before this date is backlog. Everything collected after this date is not.

I mean, and if you put the date April 15, 1999, as backlog, then Paul would indicate you will encourage law enforcement corrections to collect because then it will be a Federal expense. Right so far?

COMMISSIONER FERRARA: Yes.

MADAM CHAIRMAN ABRAHAMSON: I don't know where it all leads, I'm just trying to get a baseline of information that we are all working on.

Now the other sense, if I understand the conversation, is we have a million uncollected offender samples. And the question is maybe we should put the money or ask the money be put to collect and test those. Or try and propose both backlog, as we have used the term, and collect the future.

Now, if I stated the issue, I'm trying to get us all focused. Maybe I was the only one that wasn't focused and all of you were.

Did I state it right?

COMMISSIONER SMITH: You stated all that correctly. The one thing I think is missing from it is our sense of what the backlog of owed would be two years out if we don't focus on it now. Because it's a million, but rising fast.

MADAM CHAIRMAN ABRAHAMSON: That is I think the issue I raised initially. That in we say the backlog is as of today, everything. Now the question is will the new ones be collected, and if so will the labs work on it so that we don't have two years from now a two year backlog.

COMMISSIONER DAVIS: Let me ask one question here. Paul has a very good handle on what is going on in Virginia and I'm the type of person that can't visualize concepts, I have to see it in sort of a visual form as an example.

If you could take the State of Virginia and break it down into all of these things that you're talking about with the numbers plugged in and here is the population of the State and here are the numbers and here is what can be done and this is what will be done, and this is the model, then, for the entire United States. Then I can understand it. And I think you might be able to do a better job of selling it to Janet Reno.

COMMISSIONER FERRARA: Thank you. And would that that were true. Virginia doesn't have owed samples. Virginia passed a law in 1989, the first statute, and said upon conviction samples will be drawn and samples were drawn. There are no owed samples.

COMMISSIONER SCHECK: That's why you can say if you do your backlog of collected samples you're going to get the people on the street. But that is not true for our jurisdiction.

COMMISSIONER FERRARA: That is why I'm trying to explain why you can't really use Virginia as an example here, because although I might point out that that certainly constitutes 1/3rd of the 450,000 samples, which incidentally are going to be run with or without this funding.

COMMISSIONER SCHECK: If I can articulate one alternative proposal. My alternative proposal is simply that I'm assuming that there is a comparatively finite amount of money that can be put into the implementation of CODIS and that you have to look at it as a system-wide investment. I mean, I understand that it would help the certain lab per se issues, but you can't overlook what is going on and the failure to collect owed samples of people on supervised release.

So my proposal is pretty simple. I would recommend to the Attorney General that whatever amount of money is going to be provided for CODIS backlog typing, whether the municipalities and the States decide to outsource them or do them internally, whatever it was, that keep prioritizing them. That if you come in with a program in the state of New York, California, wherever it is and you say here is your program for typing owed samples for people out on the street who haven't been typed, we have a program for prioritizing if they can. People getting first out on to the street, right. If you can present that, you get more money.

If you tell me that you have absolutely no ability to figure out who is getting out of jail and who is on supervised release and finding and getting samples, if that is a logistical problem that your criminal justice can't solve or won't promise to solve or put money into it, you won't get as much as money.

COMMISSIONER THOMA: In fact, if I understand Paul correctly, he's saved us somewhere in the area of \$8,750,000 of this 22.5 half million. And if we took that amount or a bit more and put it into a program such as Barry is explaining with a prioritized grant situation for these. And I speak for California, we have an incredible amount and we are going to have a bigger one as of January 1 exponentially.

COMMISSIONER BASHINSKI: Our figures are that we have 56,000 unanalyzed samples from violent offenders that remain to be analyzed for STRs. That is a backlog.

We have 45,000 RFLP profile DNAs that have to be converted to STR. We anticipated 36,000 or so are owed, are people who are in prisons who weren't sampled on intake or on release, and people who should have been sampled at the local jails who haven't been sampled. We estimate that is about 36,000 and we don't know for sure what that number is.

And we know that we will be getting about 3,000 a year which we will keep up with as an ongoing STR.

So what are we saying, 125,000 would be the backlog. But the owed isn't as many as you might think because we have been collecting samples since 1984.

COMMISSIONER SCHECK: That is California and Virginia are the exceptions to that.

COMMISSIONER DAVIS: As I understand it, then, there is a captive audience that is really captive, they are in the jails, they are in the prisons. And before they are released Virginia, and if I understand correctly, California also.

COMMISSIONER BASHINSKI: It used to be before they were released, now it's on intake.

COMMISSIONER DAVIS: They are right there, you don't have to find them.

COMMISSIONER BASHINSKI: They will be sampled, no problem.

COMMISSIONER DAVIS: But what we are talking about, what Barry is concerned about, are the people who have been through the system, yet as far as actual incarceration but are now out under some sort of governmental control.

COMMISSIONER SMITH: Well, they have felony sentences that don't begin with prison sentences. That is it a very large number.

MADAM CHAIRMAN ABRAHAMSON: That is probation.

COMMISSIONER KENNARD: A lot of them serve jail term never make it into prison.

COMMISSIONER SCHECK: Willy Horton.

COMMISSIONER BASHINSKI: Is your law retroactive? Ours is in some offenses and in some they aren't.

COMMISSIONER DAVIS: But before they go on probation somebody has them in their hands, they are right there. Why aren't they drawing blood from them when they are sitting there?

COMMISSIONER CLARKE: Well, in reality their last touch may be in Court when they are sentenced and they may be released in a few hours. And many of them don't have to report to their probation officers.

DR. CROUSE: I'd actually like to answer Dr. Davis' question.

We had a meeting about four weeks ago with the laboratories in Florida, and the frustration level is very high. Because those rules are there, they should be enforced. Keep in mind there are two types of laboratories in the State of Florida, CODIS laboratory and caseworking laboratory. The caseworking people are "give me your tired, your poor." And the people in the CODIS laboratories are give me the money to get the backlog done.

In Metro Dade or Miami Dade I guess it's now called, out of every 100 individuals who are given time served, ten samples are collected. Only ten percent. And they are right there. The prosecutor is there, the judge is there, everyone is there. They have the system in line to take these blood samples. They are not getting taken.

So the people up in Tallahassee are saying let's get the backlog done, but what I'm hearing is we are not going to give you that money unless you, as the person in the laboratory, can show that you can get these samples into your laboratory.

But there is this huge chasm between what one person can do that is sitting in a laboratory trying to get the samples analyzed and the other person is sitting in the caseworking laboratory trying to figure out what importance this is to him and why they're not collecting. It's a very important issue.

And money, something should happen to try to get this system together.

COMMISSIONER THOMA: And if I don't misunderstand Barry's suggestion, that is the essence of it. To work on the prioritization of these people that are.

And I appreciate Jan's figures. I think they may be conservative with regard to what is owed, just because of the same situation with regard to out the door. And Woody knows about this as well. I'm not saying they're inaccurate, I'm just saying perhaps conservatively.

But I would think some amount of this money or a greater amount of money should be concerning itself with some type of prioritization system, some kind of carrot out there for the collection of those persons that aren't being collected.

COMMISSIONER DAVIS: In the comment I heard Dr. Sozer talk about the difficulties of getting a collection from people who are already out on the street. It sounds to me like if your going to prioritize, we ought to also prioritize the collection basis. In other words, get these systems set up.

I'm not concerned about the person who is already out on the street. It's too late. The barn door -- they have escaped. But while they are still in the clutches of the Court, that is the time to get the blood drawn.

Now once they walk out of the courthouse, then you compounded the problem of getting them back and getting that sample. So what is the cost, what is the benefit of making sure that these samples are done?

I'm appalled when I hear about Florida. I thought Florida was doing a good job until I heard this. Now they are doing a number on us. They are not doing their job.

MADAM CHAIRMAN ABRAHAMSON: The Judge wants to comment.

COMMISSIONER REINSTEIN: First of all, I didn't realize when we are talking about the 450,000, that it's really 300,000 plus the Virginia ones. So I think that's important.

I think that every single one of those should be tested, and then we should clear up that backlog. But at the same time, at least where I am, it's not that difficult to get probationers back in. I think in my jurisdiction if I cut an order tomorrow, within 30 days I can get virtually everybody on probation in for testing. Now that is just having them come in there. I can get them in on a Court order because they are on probation and I can set the terms of probation.

But the problem that, I guess, is what exactly is that going to do to the lab, and just the mechanics of getting it done once they are on probation.

Every single person I think in most jurisdictions at the time of sentencing has to give a fingerprints on the sentencing order. And you can do the same thing with some type of machinery. Everybody who I sentence has to go three floors up to the probation department after they leave my Court. If they don't, they are in violation for probation and we will bring them back in because our probationer to probation officer levels are very manageable. And they do know their probationers and they can see them and that isn't true everywhere.

But I think as many of those samples as you can bring in, that we should do that just to build up the database. But I agree that whatever backlog we have should be taken care of.

COMMISSIONER BASHINSKI: The big issue after the order to take a sample, is whatever agency is going to draw the blood, there is a cost here. They either bring in the contract phlebotomist and we have some on staff, or they use another thing like buccal swab. And there are technical reasons why those slides aren't being accepted by most of the labs now.

So we invested for those 36-some-odd thousand samples we've got sitting out there, it's a million dollars for the local agencies, \$30 a blood draw just to pay to have the blood drawn, never mind the cost of the analysis. So there is a real legitimate local cost here.

COMMISSIONER THOMA: There is that cost, but let's talk prioritization again. I agree with you, the cost is there. But those are the people that are out on the street that we really do need to have analyzed probably in a higher priority than those that need --

COMMISSIONER BASHINSKI: I'm identifying for you what I think the cost is, and it's real and it's significant.

COMMISSIONER CLARKE: I'm not sure we are disagreeing.

MADAM CHAIRMAN ABRAHAMSON: Right.

Mike.

COMMISSIONER SMITH: One of the difficulties about treating this as a competition between two ideas is that one of the ideas is very complex. That is, it's not in the hands of a laboratory, it's not as if you can grant funds and accomplish what is both work.

It's rather that it's sort of a shocking and unacceptable thing to accept that we are unable to put our hands on a million plus people who represent high risks in our communities. And as a clue, we are don't have the DNA information that we are entitled to.

Both parts of that proposition are not acceptable. Now the Judge is right. There are a lot of jurisdictions why this fantasy is simply wrong. We put our hands on them and we draw the blood with some type of technician or if we do what we do with this new technology, it seems to me pretty important for this Commission not to accept that we are going to live with the idea that we can't find or type our probation/parole people. That's a terrifying prospect. Not acceptable.

So it seems to me we need to have a way of investing in technology if that's the issue because we can't afford the technicians to come to Court or invest in strategies for bringing people in to demonstrate that we can put our hands on these probationers and parolees.

But to give up, throw our hands up in despair and say they're gone, it's too late, that is not acceptable.

COMMISSIONER REINSTEIN: In virtually every jurisdiction I think for somebody who is on intensive probation who are the closest people going to prison, they really do have low case loads I think in almost every jurisdiction by statute. Whether it's 25 to 1 or 25 to 2 and you can get these things done quickly. It's just the cost factor is something else.

COMMISSIONER GAINER: I guess there is one other comment I'd like to throw in there, maybe just for the record and nothing else.

When we talk about things that we have control over, the backlog of the 450,000, and the things that we have less control over and can get control, a million and some people, it also seem to me that the backlog equation that we have control over is the failure to process non-suspect cases.

So it's one thing to build the CODIS file, and I think Barry mentioned this in the beginning. I think there is more we ought to be held more criminally liable because of the terrifying -- and I don't mind using that word -- backlog of non-suspect rape cases.

So if we were somehow making a move where we were going to lay out a couple different priorities, then either I would want to have some confidence that we are going to get back to that or that ought to be listed there before we say, gee, I know there isn't enough money but we have an awful lot of non-suspect rape cases that are sitting and not running against any database.

COMMISSIONER FERRARA: You're right, Chief. And that's certainly something that our working group recognized. But because of the complexities and costs associated with the analysis of how much it will take to get to where we all agree we should be with regards to casework, our group felt that that is a much more difficult intractable problem.

So for a short term, while we are doing that, let's get those 450,000 samples run.

COMMISSIONER GAINER: Then I would refer to Michael's comments would apply in this case, too, that because it is complex it at least has to be mentioned.

And I guess I'd still wish we'd try to get some resolution on this, have some cost/benefit analysis over where I put my money. Because I'm going to have to admit as sitting here as executive, as chief of police, or head of the state police agency, if somebody offered me money to solve one of these three things, I suggest to you I would put my money on non-suspect cases and go to case-by-case before I do anything else.

COMMISSIONER FERRARA: Please recognize that one does not preclude the other. My laboratories have been running unsolved cases, California has been running unsolved cases, Florida has been running unsolved cases.

Still, however, this doesn't mean they are running them all. But while this database is being built, either by outsourcing or being done inside, that doesn't diminish or take away at all the emphasis that we feel is equally important on the crime scene sample. It's just that that elimination of that backlog isn't going to be done with \$22 million in two years, it's going to take ten times that amount of money and five times as much time.

COMMISSIONER GAINER: If I can, just one more thing on this. As I sit here, maybe the rest of you do, I don't know if there is still a bigger payoff even to start ruling away at that. Even if it's a more expensive longer term problem, my gut would be is there would be a bigger payoff to work on those cases. But that is my gut.

COMMISSIONER FERRARA: And one of the reasons why we like the outsourcing idea because that frees up the forensic laboratory staff to work on those unsolved crime scenes.

I mean, we are whittling away. I think all the labs are probably hopefully more than whittling away at that. It's just that short term, again is there is a short term quick fix infusion of funds to do those 450,000 samples.

Now I wonder if our recommendation, aside from the money to do the 450,000, could include a recommendation to the Attorney General to say to the States who are not collecting samples and are not actively pursuing those, however it works, that she ties efforts to collect those owed samples to the amount of funding for running on the backlog.

In other words, don't take the money away, just say the Attorney General says down in California, down in New York, down in Illinois, you should be collecting those samples. You're not following your own law and get on it. And maybe that is the impetus that we need to get the States to collect the samples.

COMMISSIONER BASHINSKI: You're talking about capacity, too. That is what, as Mr. Smith said, I think the laboratories need to be free to work on those cases and/or to develop the capacity to do so. And either way, they develop an in-house capacity or outsource the samples it's going to give them support to build up their own capabilities to train their own people. It's a necessary step, however you use it.

COMMISSIONER FERRARA: Right. When we were doing databanking in-house that was an excellent training step towards our examiners. When we went outsourcing, we were able to take those people -- and I mean, the case work examination staff will double in the next nine months from 14 to 28 examiners.

So we are not ignoring crime scene samples. As a matter of fact, the biggest roadblock to running unsolved cases is the Court dates and the priority of samples that are why a suspect has been identified and charged and is going to Court, and the DNA has to be done on those samples.

So when I'm faced with those two, sadly I have to do the one that is going to Court in preference to the unsolved crime where nobody has been charged, although I find that a very difficult decision to have to make. It's a real dilemma and obviously it should not be an either/or, it should be a both and it will be.

DIRECTOR ASPLEN: Barry, under the suggestion that you made, would those States that have a currently collected backlog, but were not capable of prioritization, would they still be eligible for money?

COMMISSIONER SCHECK: Yes, but I think they should get a less amount. In other words, what I'm suggesting is this --

DIRECTOR ASPLEN: Let me finish, okay. It seems to me the question is would they be eligible for money. And then the next question is would those states that were capable of prioritizing their current backlog and they prioritize it, in an efficient span of time, would they be eligible. I assume, yes, perhaps less so. Perhaps, again, less money would be available to them.

COMMISSIONER SCHECK: What I'm trying to say is that you have a certain amount of money to spend, and if you really look at the whole problem what Paul is saying, and it's true, you have to get a grip on this.

We have cases where people are in jail for 10 or 11 months where the police have already gotten the suspect, they haven't done a DNA test, and then the DNA test excludes them. They spend 11 months in jail, they shouldn't be there.

So the front line capacity isn't there and what offended me, frankly, from the beginning is saying when you have a triage situation, because I associate with what Chief Gainer said, if I have that where you're going to get the most hits and solve the most crimes is what Norman did. You're getting more of your stuff from the scene-to-scene cases.

So I'm saying let's be smart. We ought to have grants, you want to call them CODIS grants that go to the states. To the extent that the state comes in and says I will prioritize, I will get the people that do owe samples, the people on the street, I will do a certain amount of old unsolved cases, whatever package they

want to put through, and however many resources they are willing to put towards what the federal government is saying these are the priorities on how to do it, all right.

And to the extent that they have a plan to fit all these different categories, you give them more money. And the people that are not going to do that, you give them less money.

Because we're not going to solve all these problems. So you have to make smart investments. If you do that, you're going to do much more to solve crime, frankly, than just saying let's take all of this and throw it at this one collected sample backlog and ignore the million that are on the street that we haven't even collected. And then the Chief Justice is right. You do that and two years from now there will be a backlog.

MADAM CHAIRMAN ABRAHAMSON: I don't know. I asked that as a question. I'm glad you all have such confidence in me.

COMMISSIONER KENNARD: In regard to this, this group should be giving the Federal government the priorities if that's what you're suggesting we should come to some sort of consensus as to giving Janet Reno, giving the Federal government so that when these States apply for these grants and they know what the rules are in front of them and they are willing to jump through these hoops.

COMMISSIONER BASHINSKI: If you're going to go through that route, then you have to look at what investment the State is making on it's own.

One State may have the capacity to do the unsolved cases and outsource samples and another State may do it differently and the third may want to put the money in sample collection because they already have resources for sample analysis. That is essentially what your saying.

COMMISSIONER SCHECK: May I say one thing, because I had this unique thing in New York State in terms of our forensic science review board. What's happened in our State is that we passed a law saying you have to be accredited to be a lab in New York. So we forced the municipality and localities to spend an extra \$32 million to get accredited.

Now if you have these CODIS grants up there and you say you want more money from the Federal government, well, then you have to demonstrate to us that you can find the people that are on parole and probation and get the owed samples. If you can't get the owed samples, then you're not getting as much money.

I bet from a political point of view that no State is going to afford -- no one is going to keep their job if they can't get it done. Because as Michael says it's absolutely unacceptable if we can't get the samples from the people who have already demonstrated they committed serious crimes and are on the street. That is really an important issue, a big issue.

COMMISSIONER CLARKE: Actually what it should inspire is taking samples on arrest. The fingerprint systems works on that.

COMMISSIONER SCHECK: That is a civil liberties issue, don't go there.

MADAM CHAIRMAN ABRAHAMSON: That will be a legal issue. That will be discussed later.

Let me see if I can get a census, because time is coming for Norm to leave.

This started out as a proposal from the lab funding working group, and we have to keep remembering that. And from that prospective, Paul, the working task force brought in a proposal that the backlog be funded, tested, put into CODIS. And that makes perfectly good sense coming from that in terms of what is desired.

At the table within that backlog an issue has been raised about prioritizing that backlog and whether that is available or not if it's done within a year or year and a half it may not be worth the effort to prioritize.

In the discussion, some members of the group think that there are other issues for getting samples and testing those samples that are of importance. I don't want to put ranges on importance. So that we have -- a million has been used -- of not collected, owed samples. And that will be important to have a strategy to collect and test.

And we've heard that that is difficult, that many agencies of many States don't have or aren't using that capability.

Chief Gainer, you indicated there is even another area that might be tested and that is non-suspect cases. And those are the two, aside from the backlog that has been put on the table and I'm assuming if we proceeded we might even find other categories that can fall into it.

So I'm gathering that there is some disagreement here as to whether we should just go in on lab funding or whether if we make a proposal to the Attorney General we do it on a number of issues, as to funding for tested samples and putting them into CODIS.

Have I stated the differences here?

Now that I have done that, the harder question is how to proceed. And I suppose that, unless someone has a better suggestion, that I can just call for a vote on how many are just going the lab backlog and forgetting all the rest of it, and that is one way of proceeding.

Another way of saying that is we do the lab funding and add to that other aspects, and that we indicate that a grant proposal ought to be set up with an advisory committee setting forth criteria, taking into account these three categories, plus any other we should come up with. And that funding for all would be required in one format or other, not to be decided in terms here as to the priorities, but at a later stage.

So we just go with the proposal for funding of the backlog, or try and broaden it, funding the backlog and other programs.

COMMISSIONER BASHINSKI: Point of clarification, if it were to be broadened would you also consider increasing the amount, or are we talking about same amount of money split differently?

MADAM CHAIRMAN ABRAHAMSON: I'm not calling for anything. I'm just trying too lay it out here on the table. So you can if you want call for more and whatnot.

COMMISSIONER SCHECK: I think that the only number that is a hard number in terms of costs is the 22.5, what you say cost to type and collect the samples.

So what I would propose in so-called prioritization that then what we are saying is we will get together and make a list. And I don't think that would include many other items than you said, Chief Justice. You pretty much got them all.

MADAM CHAIRMAN ABRAHAMSON: I've only got what you put on the table.

COMMISSIONER SCHECK: I think we could probably reach a consensus as to what the priorities are, and simply recommend to the Attorney General that in terms of CODIS funding we suggest that those States that are willing to do more of these things which we have included are the important crime fighting ingredients in CODIS get more money, and those States that are not doing it get less money. That was the submitted plan.

COMMISSIONER SMITH: That is too much detail, Barry. Because the question of how best they are actually going to go about the business of encouraging good practices on the part of the States is a complex question.

It seems to me that we are better suited to investigating the question and there it would be appropriate to OJT, by what method they in all their experience could get those goals within reach. The rest, we have enough trouble trying to find out what we are trying to do.

COMMISSIONER THOMA: I agree with Michael, but I think it has to be on the table. And it's not an insignificant amount of money to get those that are owed tested and analyzed. And with regard to Chief Gainer's proposal with regard to these non-suspect cases isn't an insignificant amount of money. But the benefits of it is very significant and I think we need to put that into the mix as well.

So I don't think if we spend this money we are looking at a like amount of money that it would take to encourage the rest of them.

MADAM CHAIRMAN ABRAHAMSON: Mike, how would you set forth the goals?

COMMISSIONER SMITH: At the end of the day, a tough question. Because I think I would want to go back to the minutes because I don't know as much as anybody else about this.

But it does seem to me that it's insufficient to state goals with respect to what we are talking about in terms of laboratory funding. And I think your point about the origin of the proposal we have been talking about is you're right, and I think it's part of the difficulty we are having because it's hard to say the laboratories don't need more money. They do.

They need more money to test the backlog case file, they need more money to test the samples that have never been collected.

We need to collect that backlog or develop techniques for solving that problem. We need to do that just as much as we need to solve the backlog.

If all of that is right, then the goals are to solve all those problems better stated than I have and if the federal funding is important for that purpose, I don't know if it's important to punish them if they don't.

I think the real problem is that most of the States would like to do it all, they don't know how to do it all, don't have the capacity to do it all, is something, and be clearer and better than I was at articulating that would be a substantial step towards securing the government assistance in doing that. That is all I want to do.

COMMISSIONER REINSTEIN: I move that we recommended to the Attorney General that the proposal of the lab funding working group be adopted as stated by their report, but also that the recommended to the Attorney General the OJT, if I have the definitions right, that they provide funding after a study.

And it could be done either by this Commission or their researchers, to test all of the or collect all of the owed samples and test those and provide full funding for those of the States.

Now that doesn't take care of the problem Chief Gainer was talking about, which is the caseload samples, but if I understand those things were taken care of either by outsourcing or expansion, that then the labs could get to the casework easier. Am I right?

COMMISSIONER BASHINSKI: You're absolutely right.

COMMISSIONER GAINER: He has a motion. I want to distinguish at least so that I'm not confused that this unsolved caseload we are talking about is not processing gobs of evidence taken from a rape scene. I'm talking about something as simple as all the rape kits that have been collected and are sitting on shelves. Which is not a terribly complicated issue, nor time consuming. This is finite work. Take the rape kit, test it, and move on.

So we should all be concrete on at least the point I was raising. The rapes kits are taken, they are sitting and not being tested. It's finite material.

COMMISSIONER BASHINSKI: Can I ask when you said the study.

COMMISSIONER REINSTEIN: I didn't know as far as cost goes. They figure out what the recommendations should be as far as dollar amounts. I've heard that it's about a like amount to what we are talking about.

COMMISSIONER SMITH: We don't know.

COMMISSIONER GAINER: How about this. What is it to process a rape kit, what does it cost to type it?

COMMISSIONER BASHINSKI: Depending on how you do it. It could be several hundred.

COMMISSIONER FERRARA: If you figure half a dozen samples or more at roughly \$50, you're probably talking several hundred dollars, to say nothing of the -- keep in mind that these convicted felon samples that we are talking about represent the easy part of a forensic DNA examination.

What is very costly to the laboratory is going through the items in a crime scene and properly identifying, collecting, isolating. And then after the DNA analysis is run evaluating the results, quality assurance, writing a report, et cetera, et cetera. So from a cost standpoint for supplies and such, maybe \$500, 3 to \$500. From a forensic scientist laboratory standpoint, \$2,000.

COMMISSIONER KENNARD: I will second the Judge's motion.

MADAM CHAIRMAN ABRAHAMSON: All right. That is on the table.

Chris has perhaps an amendment or suggestion.

Chris.

DIRECTOR ASPLEN: It's really in recognition I think to what Professor Smith, the dynamic Professor Smith talked about in the way it's envisioned this will actually be administered.

My friendly amendment is this. That we send a proposal to the Attorney General which recognizes the backlog containing both the currently drawn and owed backlog as significant and immediate problems in the criminal justice system. And that two goals need to be recognized and need to be achieved.

And that is the reduction of the backlog, the currently drawn backlog, and the prioritization of the samples that are currently owed and will be owed in the future.

And that the Attorney General should allocate funding to the office of adjusted programs for encouraging those two goals.

What would practically happen, assuming the funding occurs, that money goes to OJP. Practically after that, NIJ or whatever is the specific administering body, essentially establishes a group to review, essentially establishes the guidelines to review these submissions that are submitted. And it would be creating an advisory group.

COMMISSIONER SMITH: It wouldn't have proposals. She would have to put out some kind of stimulating document.

DIRECTOR ASPLEN: Right. Is it fair to say you think we should not draft that.

COMMISSIONER SMITH: We should not draft that.

DIRECTOR ASPLEN: Is that a comfortable way to approach it that accomplishes everybody's goals?

COMMISSIONER SCHECK: I would support that, with one issue. In terms of problems I would add old unsolved cases.

MADAM CHAIRMAN ABRAHAMSON: That would take care of Gainer, right?

COMMISSIONER GAINER: Yes.

COMMISSIONER SCHECK: That is very important.

MADAM CHAIRMAN ABRAHAMSON: So it would be reduction of that prioritization of owed and collected there of owed, and then to be owed and the non-suspect, owed non-suspect cases.

COMMISSIONER BASHINSKI: And then the only cost figures we give are the ones that are easily calculated which is the existing backlog, that's a cost estimate for just that piece.

COMMISSIONER SMITH: Federal government can buy the collected, buy the solution. You can't buy the solution to the owed, right, because the Federal government can't go out and buy collectors if it has to develop a capacity elsewhere. Different strategies.

But we would be foolish not to recognize the different levels of complexity involved here and a referral to the Attorney General for these purposes needs to do that, lest they do the same thing we started to do, which is let's do the simple one.

COMMISSIONER KENNARD: Question, if we do not set the criteria you're going to have a Commission set the criteria.

DIRECTOR ASPLEN: It probably would not be a separate Commission, it would be a body that NIJ would pull together just like they pulled together this Commission.

COMMISSIONER KENNARD: To do exactly what we have been doing.

COMMISSIONER SMITH: It may be a lower visibility technical assistance to an agency that is accustomed to putting out requested proposals to States. And then maybe they would do a great job. It seems to me they are better positioned than we are to do that work.

MADAM CHAIRMAN ABRAHAMSON: As long as we leave a goal set for these objectives, which I gather are three.

COMMISSIONER REINSTEIN: I see what Commissioner Kennard is saying.

You're thinking that maybe this is going to delay everything if we have now another commission that has to reconsider everything that we were doing.

COMMISSIONER KENNARD: You're right. He is suggesting that we set up the three criteria for the branch, they're going to set up the ideas and the grant process.

DIRECTOR ASPLEN: Which would have to be done anyway. Under any scenario that's the process going through anyway.

COMMISSIONER SMITH: Details, difficulties.

COMMISSIONER KENNARD: Details of who is going to prove that. Are they going to come back to us and we're going to suggest that that meets our criteria of our three goals?

DIRECTOR ASPLEN: I would not imagine they would come back to this body for that.

COMMISSIONER GAINER: They would take some parameters and some guidance and go from there. There would be a lot of trust in the relationship.

DIRECTOR ASPLEN: We are a product of NIJ also and the Attorney General's office, as that group would also be a product of the Attorney General's office, the Department of Justice, kind of all being on the same team, same goal. And it would have to be done in conjunction with what the Attorney General would send down to them if she agreed and supported our goals.

COMMISSIONER KENNARD: I guess as a boss you're sending me a package, but you're not sending me a whole package, folks. And this is my concern that this is how she would look at it.

COMMISSIONER REINSTEIN: I'm okay with it as long as there is no delay in the implementation of the lab funding working group with all the other things we talked about. I think the recommendations should go in.

I think we will still be doing it. Of course the study shows there is no delay in anything, because they will do it anyway, that happens.

I'm not rejecting what he said. From what you said, there would not be any further delay in the recommendation for funding Paul's committee.

DIRECTOR ASPLEN: Correct.

MADAM CHAIRMAN ABRAHAMSON: Just so we understand. This is only a recommendation. We don't have the money, and I don't know that DOJ, Department of Justice, or NIJ has the money. This is a recommendation.

COMMISSIONER SMITH: They need our recommendation to go to that branch of government for the money anyway. No reason not to start that process if they're waiting on us.

MADAM CHAIRMAN ABRAHAMSON: So if I understand this, we would propose to the Attorney General that she seek funding to initiate three goals. One, a reduction of backlog. And on that there have been some figures put out.

Two, that should be prioritization and techniques for owed samples. That is now owed and those that are going to come to be owed in the future.

And that there be consideration for financing for processing non-suspect cases.

Those are the three objectives we have identified, recognizing there might be others.

That these three objectives have different levels of complexity and different levels of funding issues.

That the assumption has been made here that there is a process in the Department of Justice that if funds are sought, either before or after they are sought and in determining how much to be sought is a process for some group to advise the Attorney General on how to do this and we are not going into those details, but some group will.

Now that's not very well stated, but it's the best I can do at the moment.

I would be very happy for any additions, deletions, or corrections to my nonspecific stated words.

COMMISSIONER SMITH: As an addition, although it's not with respect to the list of issues, but it seems to me it might be useful for the Attorney General and to OJT in the process of this advice, to spell out in some detail our thoughts that you referenced in the list just as this is probably not enough. If I can find the list in this group, it would be fine.

I think you can do that without getting into the business of how they spend the money, describe the probability in a little more detail.

DIRECTOR ASPLEN: We can certainly attach to any well-summarized recommendation supporting documentation. We can attach, you know, Paul's report, we can attach a census of those other issues that were before, including Chief Gainer's concern.

MADAM CHAIRMAN ABRAHAMSON: Prioritization.

Did we capture the essence of the discussion?

Kathryn, you have a question?

COMMISSIONER TURMAN: One thing it would help knowing a little bit when we talk about the money, and I think it needs to be mentioned as part of that package that maybe don't cost a lot of money. But there are some major players that we haven't talked about. The doctors, State Attorney Generals, APPA.

I mean, there are a lot of things that can be done at OJT, the Commission could recommend by having meeting and making presentation to different groups.

And I think if we at least mention that not everything that needs to be done to address these problems costs money. A lot of it is change in how people do business.

And I think if we can document, too, the cost of not doing these things, the cost of crime. They talk about the tangible and intangible cost to a victim of crime being about \$8,000 per crime.

So much of our crime is committed by people that are on probation and parole and they still haven't addressed it. So I think we need to do a much better job and discuss these issues.

MADAM CHAIRMAN ABRAHAMSON: And you raised federalism issue because we have a national, but we also have the States. And States are putting in large amounts of money. It differs from State to State in handling this. So these federalism issues, the carrot, the stick, and all of these non-economic dollar issues.

COMMISSIONER THOMA: I think that is very well stated.

MADAM CHAIRMAN ABRAHAMSON: And we have that down. So have we captured the essence that we can have a consensus on? I see everybody nodding. Does anyone disagree as to the procedure? Okay. Questions, I don't see that anyone wants to discuss it.

So those in favor of this statement of consensus which is going to have to be put down in writing and then circulated to everybody with appropriate additions and deletions, et cetera, Kathryn I assume you will work on that aspect, those who know justice will put in that.

I really would prefer not to restate it, because I have restated it, we'll get the transcript. And this is in principle and you're not bound ultimately as to the exact language until we see it, okay. Anyone? All those in favor.

THE FULL BOARD: Aye.

MADAM CHAIRMAN ABRAHAMSON: Everyone's hand went up or said aye, is that correct? There is no descents. Fine.

Anything else to come before the table? Do you have a timetable monthly or don't you know?

DIRECTOR ASPLEN: To get that out to everyone, given the importance of the issue we can have our end done in two weeks. Let's make it a nice Christmas present to everyone, get this wrapped up and on its way.

MADAM CHAIRMAN ABRAHAMSON: And it's Thanksgiving coming up. All right.

Public Comment

Then we have concluded the CODIS discussion, and at 3:30 there is opportunity for public comment and we will keep that schedule.

(A short break was taken.)

MADAM CHAIRMAN ABRAHAMSON: It is now a few minutes after 3:30. We have had public comments from the audience throughout the proceeding at appropriate times when someone had something specific to add to the subject under discussion.

At this time no one has appeared who wishes to make public comments. Therefore, the Commission's meeting is adjourned.