

**National Commission on the Future of DNA Evidence**

**P R O C E E D I N G S**

**Meeting V**

**Hilton Hotel**

**Santa Fe, New Mexico**

**May 7 & 8, 1999**

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## Agenda

FRIDAY, MAY 7, 1999

- 9:00 - 9:10    Remarks by the Chair  
                  The Honorable Shirley S. Abrahamson  
                  Chief Justice, Wisconsin Supreme Court
- 9:10 - 9:30    Update on Commission Business  
                  Chris Asplen  
                  Executive Director
- 9:30 - 10:30   Professor George Trubow  
                  Director, Center for Information Technology and Privacy Law  
                  The John Marshall Law School
- 10:30 - 10:45   Break
- 10:45 - 12:15   Legal Issues Working Group Report and Discussion  
                  Professor Michael Smith, Chair  
                  Professor David Kaye, Reporter
- 12:00 - 12:30   Postconviction Issues Working Group Report  
                  Judge Ronald Reinstein, Chair  
                  Professor Margaret Berger, Reporter
- 12:30 - 2:00    Working Lunch  
                  David Coffman  
                  Supervisor, Florida DNA Investigative Support Database
- 2:00 - 3:15    Crime Scene Investigation Working Group Report  
                  Director Asplen
- 3:15 - 3:30    Break
- 3:30 - 5:00    Research and Development Working Group Report and Discussion  
                  Dr. James Crow, Chair

SATURDAY, MAY 8, 1999

- 9:00 - 9:30 Continued Discussion (wrap-up miscellaneous items)
- 9:30 -10:15 Laboratory Funding Working Group Report and Discussion  
George W. Clarke, Working Group Member
- 10:15 - 11:30 Dr. Pam Collins  
Dr. Kathryn Scarborough  
Eastern Kentucky University  
Internet/CD-ROM Training for Law Enforcement Officers  
(View the PowerPoint Presentation)
- 11:30 -11:45 Public Comment

**Remarks by the Chair**  
*The Honorable Shirley S. Abrahamson*  
*Chief Justice, Wisconsin Supreme Court*

CHAIRPERSON ABRAHAMSON: I'm going to call the Commission to order and start our session today.

The first thing I would like to do is go around the table and, again, reintroduce ourselves, and the tents are somewhere between Texas and Santa Fe, but they will be arriving soon from Kinko's.

So, Kathryn, we'll start with you.

COMMISSIONER TURMAN: Kathryn Turman. I'm Acting Director of the Office for Victims of Crime in the U.S. Department of Justice.

COMMISSIONER REINSTEIN: Ron Reinstein, Associate Presiding Judge of the Superior Court of Arizona, in Phoenix.

COMMISSIONER DAVIS: Joseph Davis, retired Medical Examiner, Professor of Pathology, University of Miami.

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

COMMISSIONER GAHN: Norman Gahn, Assistant District Attorney, Sexual Assault, Milwaukee County.

COMMISSIONER ADAMS: Dwight Adams, FBI Laboratory.

COMMISSIONER CLARKE: George Clarke, San Diego District Attorney's Office.

COMMISSIONER BASHINSKI: Jan Bashinski, Chief of Bureau of Forensic Services, California Department of Justice.

COMMISSIONER SANDERS: Darrell Sanders, Chief of Police, Frankfort, Illinois, past President of the International Association of Chiefs of Police.

DIRECTOR ASPLEN: Chris Asplen, Assistant United States Attorney for the District of Columbia, temporarily assigned as Executive Director of the Commission.

CHAIRPERSON ABRAHAMSON: Shirley Abrahamson, Chief Justice, Wisconsin Supreme Court.

So that brings us to -- we've introduced ourselves. Sheriff Kennard, if you would introduce yourself. Sheriff?

COMMISSIONER KENNARD: I'm sorry.

CHAIRPERSON ABRAHAMSON: Give us your name, address, social security number.

COMMISSIONER KENNARD: I've been to the dermatologist and if it looks like I've been in a fight, that's why. Every year he makes me do this. Sheriff Aaron Kennard, Salt Lake County Sheriff's Office.

CHAIRPERSON ABRAHAMSON: Thank you. The first order of business is remarks by me, and I would immediately say that we've been in operations for about a year and I hope that all of you feel good about the progress we have made in a year.

The working groups have been working. The post-conviction group has brought out their product and is now working on other issues. Today we're going to hear reports from the other, several of the other working groups, and discuss their activities.

So I am very pleased. So we can either look at the glass as half empty or half full, and it depends on whether you're pouring or having the glass poured for you. But at the moment, I think it's half full and we've done a pretty good job at getting there and there's always lots to do and we'll continue to have lots to do. So far, I think, so good.

If anyone wants to offer constructive criticism, they can do it now, or hold their peace and do it later.

So with that, my remarks are really very short. I'm sorry I missed the Dallas meeting. I thought that, from the transcript, it had gone well, and a letter had been sent to the Attorney General with the recommendations from that meeting.

Chris, take it away.

## Update on Commission Business

*Chris Asplen*  
*Executive Director*

DIRECTOR ASPLEN: Thank you, Chief. I think the first most appropriate order of business is a word of congratulations to the Chief Justice, who, by overwhelming vote in Wisconsin, remains Chief Justice of the Wisconsin Supreme Court. So congratulations, Chief.

CHAIRPERSON ABRAHAMSON: It's congratulations to the citizens of the State of Wisconsin.

DIRECTOR ASPLEN: Agreed. And wise they are. I'm going to do a couple of things to try to orient us to what we're doing today. First of all, let me explain to you why you're in Santa Fe, which is a question that has come up a couple of times.

The reason that you're in Santa Fe is actually a couple-fold. Number one, we felt it appropriate for those folks who are traveling from the west coast to get a little closer to the west coast, so that they don't always have to be the ones who suffer the jet lag. Also, in the beginning of the week, we had a meeting.

The National Institute of Justice had a meeting in Albuquerque, the Fourth National Conference on the Future of DNA, and as such, since so many of the NIJ staff and so many of the presenters at both meetings were going to be in Albuquerque, we decided to have this meeting close, also.

We were going to try to have it in Albuquerque, so that you didn't have to make the long drive down, for those of you who did, but there just wasn't any hotel space in Albuquerque.

So hopefully, since you've made the long trek out here, be it flying to Albuquerque and driving here or taking the puddle-jumper from Denver, we hope that at least while you're here you enjoy yourself. It is a beautiful little town and the weather is much nicer than it was two days ago, when it snowed. It snowed just about every day this week except yesterday.

So thank you for everyone who has been able to attend.

I want to give you an update a little bit on some of the Commission business that's going on. As the Chief Justice said, we have forwarded the recommendations on the CODIS issue to the Attorney General, with a cover memorandum signed off on by Jeremy Travis, that addressed the two issues that we talked about at the last meeting, the Dallas meeting.

You may remember that what we decided was not to change the recommendation, but to also make the two points, number one, that the database backlog was a fluctuating dynamic, if you will, and that the Attorney General really needed to understand that, and that what we were not saying was if you give this amount of money, that this problem will go away.

But rather, our point was this is the size of commitment that needs to be made now under the current situation, with a commitment to continued reevaluation of reducing the backlogs as they kind of rise and fall.

The second point was the point of not wanting moneys to be taken from other valuable law enforcement efforts and other valuable DNA efforts and simply shift it so that some other program was suffering as a

result of this. What we were asking for was a new infusion of financial resource by way of commitment to the backlog reduction.

Along those lines, the President's budget includes \$15 million, pursuant to NIJ's request, for backlog reduction and it is still in the budget process at this stage. We have no reason to believe that it won't continue.

Also, the Commission staff has had the opportunity on several occasions to go to the Hill and talk to different Senators about the issue itself and some of the other things the Commission is doing, as they consider legislation on their end. So, again, the Commission is also providing, I think, a significant educational function and resource for the legislators.

Also, in terms of the educational function of the Commission, Lisa and I have had the opportunity to speak at various conferences about the work of the Commission. As I said, we had the NIJ meeting on Monday and Tuesday, where we gave a presentation on the work of the Commission. I've had the opportunity on several occasions to either speak on the radio or on television.

What I have done is I have provided a transcript, and I will make more copies of this for folks who are interested, of the NPR Talk of the Nation segment that I was on with Ray Suarez. It was myself and the President of the ACLU, Nadine Strauss.

I will provide a copy of that transcript for you for two reasons; number one, to get another look into the arguments being made by the ACLU and the concerns that they're expressing, but what is more important to me is that you are comfortable with the representations that I am making when I, in my capacity as Executive Director, go out and talk about what the Commission is doing.

I send these transcripts also over to the Attorney General's office for review by their office. So that what I'm saying, quite frankly, is neutral enough on those issues that there have been no decisions made. Oftentimes, it is just a matter of saying, well, yes, that's an excellent point and that's why the Commission is taking it up. But I want to make sure that the Commissioners are also comfortable with it.

Another thing that I will make available, too, if you're interested, is a videotape of a recent Black Entertainment Television segment that I was on about two or three weeks ago, where we talked about the issue of DNA taken from arrestees. NIJ thought it was a very important program to be part of, and so we did that, and I think it was very valuable.

We had a representative, by satellite, from San Francisco, representing the ACLU. There was also a police chief who was taking the advocate side.

What I said very specifically to them was that if I was to come on behalf of the Commission, they needed to understand it would be purely as an educational function and not as an advocacy position on one side or the other.

So, again, if you're interested in seeing that, we'll provide you a videotape, because we don't have a transcript of it.

The most important thing is that you feel comfortable with the representations that are being made on behalf of your Commission.



The next thing I'd like to do is orient you, to some extent, to what we're doing over the next day and a half and to some of the materials that you have in front of you. We sent you a good number of materials in the mail and we are providing more today. That's because this is an ongoing process, obviously, and we provide them to you as things come in from the various working groups.

What you will be getting today, if it's not already on your chair, you will be getting a copy of the proposed model legislation for post-conviction appeals. You may have read in the USA Today yesterday an article written by Richard Willing in that regard that the post-conviction group met on Monday to develop that based on what Professor Berger had already written.

Professor Berger, true to form, will be joining us today, although this is her vacation. In the meeting on Monday, she said, "Well, look, I'm going to be in Santa Fe anyway. If you would like me to stop by, I would be happy to." So she has been kind enough to give us a couple hours this morning to talk about it and she will be here shortly, I'm sure.

So that is one thing that you will be getting, if you don't already have it. I think you do not have that in front of you.

What you will also be getting is a copy of David Kaye's report on behalf of the legal issues working group, some of the Constitutional issues. As we discussed both at the Commission meeting and then at the subsequent working meeting, which was in Chicago, which I think was a very valuable, successful working group meeting, of which you should have received the report from, the notes from that meeting already. You should have received them about a month or two ago. We sent them out pretty much as soon as we got them, to kind of get you thinking about some of those issues. So that will be, I hope, a good discussion today, also.

We've also provided today -- if you haven't already gotten them, the color proofs of the post-conviction DNA testing recommendations and the What Every Officer Should Know pamphlet are for your review and for your consideration, with the caveat that once we decide which one the Commission likes best, the forces that be at the Department of Justice say, well, that's too many colors or, well, we need to reconfigure it for this reason or that reason.

The contractor that we have used to develop them is familiar with the Federal Government contracts and as such, has made the appropriate changes and the appropriate additions in terms of the appropriate seals that need to go on the publication as a DOJ publication, et cetera, et cetera.

We will talk tomorrow about some editorial changes that need to be made in that particular document, regardless of which of the three we select. The substance in all three is the same.

Finally, what I would like to do is talk a little bit about some materials that you have, but I want to bring to your attention in case some issues arise over the next day and a half in terms of numbers, particularly as they relate to CODIS, the backlog, non-suspect case analysis, et cetera.

One of the things that you received was the CODIS summary report, the survey, 1998 DNA Laboratory Survey. That, I think, is going to be very valuable to us and I will point your attention to a couple of things during the laboratory funding section.

What I also have, though, in my possession is a copy of some preliminary results from the BJS survey. They are very preliminary. They expect the final report to be done in about three months. They were very kind and cooperative to give them to me. However, the caveat is I can't copy them, I can't disseminate them, I can only talk about them in generalities.

So as those issues come up, when we need to, I'll be happy to try to give us some guesstimates on issues like backlog, how many laboratories are doing non-suspect cases, what the policies are in receiving cases and things like that.

Again, the final report will be in about three months. I appreciate their willingness, however, to give us the information that they have, but they did place those restrictions on that.

The other thing that we will talk about is the survey which you should have received that we're going to be asking the Police Executive Research Board to conduct for us, and that is a survey that relates to the number of cases, essentially backlog cases in the police departments, not in the laboratories. Those cases which are not even being sent to the laboratories in the first place.

That is, I know, in the minds of some of the Commissioners, probably one of the most important numbers to get a grasp of; to what extent are we truly utilizing the technology from an investigative standpoint and why are we not doing that.

So, again, keep those things, those resources in mind.

The other thing I have here is the uniform crime report for '97. It's the most recent one. They're always about two years behind. However, when we talk about things like number of arrests in the country, number of arrests for violent felonies, when we talk about the investment of CODIS, I've got those numbers here, also.

Finally, I will talk about we had asked at the last Commission meeting for Commissioners who wanted to send questions, to send five questions that they felt needed to be addressed by the Commission. We received a number of responses.

Fortunately, I think we're on the right track. I was very comfortable with the questions that we got and feel like we are addressing most of them.

One of the issues that came up that had not been specifically addressed was posed by Dr. Davis and that was more specific cost-benefit analysis in the context of the cost of crime in the first place, and Dr. Davis asked whether or not we had any statistics, any studies on what the cost of crime is. That's really the only way we could evaluate the cost-benefit analysis of something like an investment in a database system. We've done that. We've looked -- there was an NIJ study, in fact, that you have a summary of, that you were given today, and we may be getting a full copy today overnighted to us from NIJ.

But, again, we can talk about that issue, also, but I wanted to let you know that that issue had come up and that we're in the process of addressing that.

What we don't have right now is a good recent study on recidivism. It's our understanding that those things are underway, that a study like that is underway, but we don't really have a good one. We have a

lot of anecdotal experience and we have some individual states to go on, but not a comprehensive recidivistic study.

Finally, you will be receiving today a report or a paper from a gentleman named Terry Knowles, from the Kansas Bureau of Investigation, and that is a look at rape investigations in Kansas. First of all, I want to thank Terry for sending it to us. Terry literally called the office out of the blue, having heard about the Commission, and asked if we would be interested in looking at his material.

He is the, I think, Deputy Commissioner or Deputy Director of the Kansas Bureau of Investigation, former FBI agent, Director of the Sacramento office for a number of years, and I think you will find the report very, very interesting. I think you will find it interesting in to the extent to which law enforcement officers do not consider the database in their investigative procedures really at all.

Again, this is not in any way a knock on the State of Kansas and I really applaud their efforts to evaluate how they're using it and to improve it. But what they do is, Terry really puts together a lot of those numbers on victimization, the cost of victimization, and the cost-benefit analysis and law enforcement attitude toward the database. So I commend that to your reading, also.

That is a document that will also not be distributed publicly beyond the Commissioners, only because it has not been officially submitted by Terry to his reviewing committee at the college that he is submitting this for.

So if anyone in the audience would like a copy of it, I'm sure, if you contact Terry, he'd be happy to give you a copy. I don't feel like it's our place to disseminate it beyond the Commission, but I'm sure that you'll be able to get a copy from him directly.

So I hope that orients you a little bit to the mass of material that you have in front of you. I will try further to direct you.

If you need anything, if any of either the participants or the Commissioners or the audience members need anything over the next day and a half or beyond that, Robin Wilson is here, the Executive Assistant for the Commission. Dr. Forman is also here. She is the Deputy Director of the Commission. We will do anything that we can to help you.

That's all that I have at this point.

**Professor George Trubow**  
*Director, Center for Information Technology and Privacy Law*  
*The John Marshall Law School*

CHAIRPERSON ABRAHAMSON: Unless any of the Commissioners want to say anything at this point, we will move into our agenda and call on Professor George Trubow, Director of the Center for Information Technology and Privacy Law at John Marshall Law School.

You have in your packet of materials Professor Trubow's resume. He is well known and speaks widely on the law of information technology.

Chris says you were suggested to us by the American Bar Association. George thinks I suggested him.

MR. TRUBOW: Thank you. Thank you very much, Justice Abrahamson, Committee members. I'm pleased to be here today to discuss DNA in connection with identification, specifically regarding privacy issues in connection with it, which is what I understood the focus to be when Chris Asplen called to ask me to participate.

I also want to thank Chris and the Commission for putting me up front on the agenda. I've got to get back home for some other obligations that I have undertaken, and I appreciate being able to get in and out early.

I'm going to restrict my -- I don't have a written statement for you. I didn't get notice of it until fairly close to the time of being here, and I was busily engaged in this other project that I have to deliver on Monday. So my statement is going to be oral and we can depend on the transcript.

But my perception was what would be most important would be I could summarize very briefly my opinions in connection with DNA and privacy issues, as identified, and the discussion would probably be more meaningful to you, and I'd be pleased to respond to any questions that you might have in connection with the opinions I share with you.

As you could tell from my resume, my opinions are based upon about 30 years experience in analyzing and developing law and policy in connection with personal information, information systems, and privacy. Before I tell you my opinions with respect to three specific questions, let me make some definitional notes regarding terms that I am going to use.

The definitions I am going to give are, I think, of generally conventional wisdom and I don't expect there is anything that's going to be new there, but I want you to understand the context of my comments when I use those words of art.

First of all, at the very basic level, an identifier is anything which identifies a particular individual, and I categorize identifiers essentially of two types. One type is biometrics and biometrics identifiers describe physical characteristics of a data subject, and they are such things as fingerprints, iris scan, the configuration of face and ears, voice. All of these physical attributes are biometrics identifiers and indeed link directly to a data subject.

The other group of identifiers I refer to as behavioral, and these are kinds of identifiers that describe a person in terms of his behavior and what he does. For instance, I would classify his behavior as such things as name and address, occupation, the information in connection with a person's behavior as he exhibits it by transactions in which he engages and a whole variety of things like that, the property he owns, whatever.

I'm going to be discussing identifiers in connection with personal information and I define personal information as any information which can be referred to an identifiable individual. What's important about that definition is that it's not the content of information that makes it personal, it's its reference and if it describes an identifiable individual, then I consider that information personal.

Confidentiality is a word that is used frequently and often not enough, and confidentiality refers to information and if information is confidential, it means that that information can be viewed or accessed by only specific individuals for specific reasons.

Of course, privacy may be one reason that information is confidential. There may be other reasons for information to be confidential, state security might be one, financial confidentiality, a variety of reasons.

Public information, on the other hand, is information which is available to anybody for any reason. If it's public information, then there are no constraints on its distribution or on access to it.

Privacy is a characteristics of individuals. It describes individuals. I summarize it by saying privacy really involves the personal rights one has to exclusive territory and as all of you, I think, know, privacy is not an absolute concept and the individual's rights to exclusive territory and to control information about him or herself depends upon the circumstance. It's very, very case oriented in terms of the values that lead us to decide whether or not, under any particular set of circumstances, an individual is entitled to raise a privilege of privacy.

Security is another word that's frequently used, and that refers to information systems, and if an information system is secure, and that usually happens by technology or those kinds of protocols, it means that information in that system is protected from unauthorized access, alteration, or destruction.

Security implements protocols of confidentiality. So that if information is confidential, then security protocols assure that the information in that system will be available only to those people and under those circumstances described in the protocol. When we talk about personal privacy, then the way they all fit together is that system security assures that confidentiality constraints will be observed, and this, in turn, protects personal privacy when the constraint on access is privacy.

With that as the background, then let me turn to three questions which I believed, in the brief discussion I had with Chris, were responsive to my role here.

What I will do is pose those questions and answer them and that will pretty much complete my statement. Then I'm ready to talk with the members about whatever issues you may want to raise.

The first question, and I'm couching this in law enforcement terms, as law enforcement agencies being the actors involved here, question number one, is it okay to collect, for identification purposes, DNA samples from everyone arrested?

My answer to that question is yes; that it's okay to collect, for ID purposes, DNA samples from everyone arrested.

Second question. Is it okay to keep the DNA code -- that is, the translation into understandable integers or letters, the identifying code -- is it okay to keep the DNA code for ID purposes on record indefinitely?

My answer to that is yes.

The third question. Is it okay to keep a DNA sample for ID purposes indefinitely?

My answer to that question is yes.

Now, there may be policy reasons for limiting any of the answers that I have given in terms of, for instance, if a DNA sample kept for an inordinately long time loses its credibility, well, then it doesn't make much sense to keep it. But my point is so long as a DNA sample is viable, my opinion is that it's okay to keep it indefinitely.

Is it okay to take DNA samples from arrestees? Now, it may be because of public policy reasons, public response, perception, a decision might be made we're not going to take it from very arrestee, we're only going to take it from certain kinds of arrestees or we're only going to collect it after someone has been convicted or whatever the limitations may be.

I simply want to make it clear that from my perspective, my opinion is that it's okay to collect DNA from anyone arrested. I know David Kaye, later on, is going to present a fairly thorough paper regarding legal issues in connection with taking DNA.

But essentially that's my opinion on those questions and I've said what I have to say.

CHAIRPERSON ABRAHAMSON: What do you mean by okay?

MR. TRUBOW: Okay is a summary, Justice Abrahamson, of my perception of law and policy; that the legal constraints are not such nor are the policy constraints such as to make my answer yes infeasible. There's a little wiggle room in there.

COMMISSIONER REINSTEIN: What happens if the defendant who is arrested is later not charged, acquitted, case dismissed against him, do you think that -- what should happen to the sample at that point?

MR. TRUBOW: This is largely a question of public policy with respect to, number one, the record itself of those events and, number two, the ID file; that is, the identification of that particular individual.

Those are separate questions and basically not interdependent. For instance, I have an FBI file that was started when I applied to be a lawyer and had fingerprints taken for the purpose of finding whether I had any criminal record and having had my fingerprints taken, an FBI ident number is assigned to me and there is an identification file on me in the sense of these are the fingerprints of George B. Trubow, and that stands alone, without any reference to any other sort of record that may be in the Federal Government.

Now, to get to your specific question. If someone has been arrested and decisions are made not to charge him, the question that is raised, as a policy matter, is whether or not there is reason to expunge that record or to seal it, out of deference to the individual.

It may be that the record will be expunged or sealed, whatever device may be used, but yet the identifying file will remain; that is, the fingerprint or the DNA code identifying that person could be maintained an ID file for future reference, if it ever became necessary to examine identity and to discover whether or not any sources of DNA on file indeed were the same sources as were produced by new DNA evidence or other biometrics identifiers.

Is that helpful?

COMMISSIONER REINSTEIN: Yes, it is. But to remind me, David Ware, in Great Britain, has said that when somebody is arrested, that they then delete that person's profile from their database.

DIRECTOR ASPLEN: Yes. I believe if that person is ultimately exonerated or not charged, that they are taken out of the database, as I understand it. David Coffman, I see in the back there, he would probably have a better idea of that than I. Is that correct?

MR. COFFMAN: Yes. The policy is that if they're arrested, the samples are taken and analyzed and then once they're exonerated, if they're exonerated, then the sample is removed.

DIRECTOR ASPLEN: Thank you.

COMMISSIONER DAVIS: The sample or the record of the sample?

MR. COFFMAN: The sample and the record, I believe. But the sample is searched a lot of times before the case ever goes to trial.

COMMISSIONER SMITH: I wonder, in your opinion, whether it's okay to do those things, to take and analyze and save from somebody who is arrestable, but whom you do not arrest.

MR. TRUBOW: My opinion goes to arresting someone, because I believe if the legal process is invoked - that is, if a police officer decides to invoke that process by arresting someone, well, then I believe that identification can be taken at that time. Indeed, I would insist it must be taken at that time, to be sure that you can guarantee the identity of the person whom you have taken into custody. I think that's important.

COMMISSIONER DAVIS: Let me ask a question. The reference to fingerprints, the person is arrested, they're routinely fingerprinted. Now, those fingerprints, they're not expunged later if the person is not charged or is exonerated.

Those fingerprints remain in an ID file, that's my understanding. Is that correct in England, as well? I would assume it would be correct.

Now, from my perspective, as a person who tries to identify unidentified bodies, those files are invaluable. We use fingerprint files as part of our identification procedure in aircraft crashes. It doesn't matter they have been fingerprinted because they've been arrested or because it was a civilian fingerprint. A fingerprint is a fingerprint. It's an ID file. It's extremely valuable from the public service.

If we have a similar program set up for DNA, where the DNA records are kept as ID records, similar to fingerprints, I don't see what the public harm is and I can see what the public good is, at least from my perspective.

That brings up another question I would ask. We are concerned about the privacy and the misuse of DNA in these arrestee situations. Actually, in the ID file, DNA as an ID file item, we're concerned about misuse of that.

Do we have a track record that shows that there is a consistent misuse of the fingerprint ID files? I think not and I think the same thing applies to DNA. I don't think there will ever be a misuse and if there is, it would probably be a minor glitch and would be taken care of.

I know the FBI does not like their fingerprint or their reports, so-called rap sheets, they don't like those spread all over the landscape and I don't see them being spread all over the landscape. But it seems to me that we're talking about setting up DNA as a totally separate ID entity, with some peculiar basis of it, whereas if you can identify somebody with a fingerprint or whether you can identify them with a DNA record, identity is identity.

The real question is, is there a potential for misuse to the harm of innocent people of the DNA that is on file in an ID record. I'm not talking about any other type of record, just the ID record, analogous to the fingerprints.

I would like to see that addressed by someone who knows what's going on, because if there is a misuse that is peculiar to the DNA, what is it?

MR. TRUBOW: Let me comment on that. First of all, generally, with respect to the tenor of what you said, I'm in agreement with that and all of my positions that I gave you in those three questions, all of the, of course, were conditioned upon DNA being used for identification purposes.

Now, the thing that makes DNA more sensitive is that when you're dealing with a fingerprint, the only information that you get from the fingerprint is the fingerprint itself. But as we know, DNA, which is a composite of genetic information, may transmit additional information other than the ID information; are these two samples from the same source.

Now, what I understand to be the latest technology, the STR technology, which uses a more limited series of strands, in fact, doesn't have as much genetic material in the profile as prior techniques and doesn't give as much information in terms of predictability regarding somebody's health or whatever else.

This primarily has been the context, I believe, of people's concerns about DNA, that don't travel with a thumbprint, as you know. If you've got my thumbprint, you don't know if I'm susceptible to heart problems or not. But if you get a look at the right part of my DNA, you may get information about that.

But to whatever extent DNA sample is used, and the extent I'm talking about is how much you need in order to make a positive identification, if it is used only for ID purposes, then whatever other information may be available there would only be the result of misuse, as you have pointed out, and I would trust our protocols that should be applied to the agencies that maintain that information are such as to make it clear that they don't distribute that information.



I'd make this final comment. In fact, my own opinion is that law enforcement agencies are extremely protective of information they have. They don't like to spread information they've got. Even when they're supposed to, sometimes it's tough to get it from them. So that ethic has been there for a long, long time, and the experience I've had with law enforcement has not indicated that, as a matter of policy, they're making information available in circumstances where it ought not be.

CHAIRPERSON ABRAHAMSON: Sheriff Kennard.

COMMISSIONER KENNARD: Professor, your three questions put you at direct odds with the ACLU. I don't know if you're aware of that. But we had a presentation and we have in our packet a paper that came from Barry Steinhardt. He is suggesting that we, the Commission, take exactly the opposite stand that you have taken, especially in regard to keeping of the sample.

I guess if there is any suggestions you could give us, and I read from his page, his comment, "In light of the absence of Federal uniform national laws protecting the confidentiality of genetic information and providing relief from genetic discrimination, it is essential that the Commission make recommendations that limit the possibilities for the abuse of genetic information."

You have touched on that already and I guess what we, the Commission, ask from you and other presenters is if there is any recommendations, other than what you've already said, that we in law enforcement have no propensity for using this other than for identification purposes. I have no intentions of releasing any of this type of data to anybody. And you're absolutely right; I'm hard-pressed to release information to anybody unless I absolutely have to.

So we in the Commission I think are struggling or need information that would let us make that decision or recommendation to the Attorney General in regards to, just as you suggest, because I couldn't agree more with your three answers of we need them, let's keep them, and I'm inclined to want to take a sample from every arrestee when they come through my jail.

So if there is anything that you could recommend to this Commission in regards to assisting us in making these recommendations, we would sure appreciate it.

MR. TRUBOW: We have, I think, a lot of examples of access protocols to databases themselves in the criminal history record environment and essentially what your recommendations ought to be, I believe, is that DNA ID records are to be used only for ID purposes under the direction and supervision of the law enforcement authority that possesses that DNA record, and that the DNA information is to be distributed to nobody else for any other reason than identification.

And if it's required to be distributed to anybody else as a result of court order or something like that, then that order should carry with it a restriction against secondary disclosures, anybody passing that information on to third parties.

And the particular protocols that will be put in place in any particular department will be those kinds of things to assure the technology and the procedures that are followed to be sure that nobody who is not authorized, for ID purposes, to examine the DNA file, in fact, examines it.

COMMISSIONER BASHINSKI: Can I ask one question? Back to your earlier discussion about information that's in DNA that isn't in fingerprints, and I'll give you a fact pattern.

You search a DNA databank with four RFLP probes and you find seven out of eight of the bands in a person's sample match a crime scene sample, which is a very strong indication that the source of the sample is a close relative of the individual that is actually in the data bank.

What use, if any, would be appropriate for that information when the individual who, quote-unquote, would match the sample is not in the data bank?

MR. TRUBOW: My answer to that would be it falls in the area of investigative information, which law enforcement authorities use for rounding up suspects whenever they have a crime and not an identified suspect.

I think as you all know, there are a variety of techniques they use to try to identify who might be in a suspect pool, questioning people to find who do you know and who else might have had access to the victim, blah, blah, blah, blah, blah.

And if indeed you collect a DNA sample which indicates that though you do not have a perfect match, it appears that this is the blood line of somebody you do have in your file, my expectation is that your suspect list has been increased and that law enforcement will examine people in that blood line to discover whether or not they have access and all the kinds of things that they examine.

COMMISSIONER BASHINSKI: Would you think that the restraints or constraints that are there, in addition to the use of the material for identification only, would then include that the only DNA information that be in the file would be that which is of value for identification purposes? Because I think that's where there is a big misunderstanding in the public at large, because the actual information that we have in these files really doesn't give you medical information, even now with regard to the RFLP or with STRs.

That if that were a formal requirement in every state's laws, would you think that would be an adequate additional safeguard?

MR. TRUBOW: Yes. I believe that that would be a useful additional safeguard and I also agree with you that a lot of the concern and worry stems from, number one, a misapprehension as to the extent of the information contained in a DNA ID sample and then, number two, concerns in segments of the population about the reliability of the government and whether or not the government indeed can be trusted to properly protect that information.

In those instances, I tend to comment that in terms of government action, at least we have a Constitution and if we're talking about the private world, we have very little protections at all.

But nevertheless, that doesn't mean that many, many people are not concerned about the reliability of government.

COMMISSIONER ADAMS: Could I put a slightly different spin on a comment that you made? You seem to imply that older technologies, like, I assume, RFLP technologies, had more DNA information

and, therefore, had the potential of relating to health issues, whereas the newer technologies, STRs, look at smaller bits of DNA and, therefore, do not hold out to be a health identifier.

When, in fact, forensic laboratories, something that we've all be very sensitive about, forensic laboratories have, from their very beginnings, stayed away from any health-related identifiers with all the technologies that we've used to date.

MR. TRUBOW: I hasten to point out that I am not an expert on DNA technology and just as I -- I don't know how to fix a computer, but, boy, I know a lot about law and policy in connection with what it is computers can do.

So I do not mean to imply that what's there now, in fact, is a big resource of personal health information, but that is what the concern of the public is that, indeed, it may disclose information that would encourage an employer not to hire him or an insurance company not to ensure him or her should that information be used for other than ID purposes.

CHAIRPERSON ABRAHAMSON: Maybe that's the distinction between the first two comments and the third as to samples, because the sample would, right? And the other two would not, is that right?

COMMISSIONER SMITH: It seems to be like holding onto the finger to take the sample. It does seem like a different type of thing.

COMMISSIONER REINSTEIN: Professor Trubow, at the last meeting that we had, I'm going to play Phil Reilly here, since he's not here today, and I agree with you as far as the identification issues.

But the issue is the sample and one of our recommendations is an infusion of money to maybe have private laboratories clear up some of the backlog. So the samples will not always be with law enforcement.

One of the things, I think, that Dr. Reilly talked about at our last meeting was that, let's say, Cellmark Laboratories does thousands of these and then the profile is put into CODIS, but they retain the samples, and let's say five years later, three years later, Mutual of New York buys Cellmark Laboratories or whatever their parent company is, if there is one, and, Lisa, you probably know.

And if Mutual of New York buys that, do they own the samples and shouldn't there be something that Congress does that there has to be some legislation to protect those samples, because otherwise can't they then do anything that they want to with those samples since they own them?

MR. TRUBOW: I think that the answer to all the questions you put is yes. The possibility exists and indeed the law should be precise. When, for research purposes or similar purposes, information is disclosed, a lot of times, we -- but now we're more in the department of looking at an information database than we are an ID database.

But one question, we had the protocols that we were putting in place when we were developing guidelines regarding access to criminal history record information, we recognized that it often would be the case that researchers would want criminal history record information for the purpose of doing recidivism studies and whatever else might be useful with respect to predicting or understanding human behavior in connection with crime and delinquency.

We required that research user agreements be executed and the most important aspect of those were to make it clear to the researcher they were to use that information only for the purpose of conducting this research. It was not to be disclosed to anybody in individually identifiable form.

Now, the one kicker you pointed to is that in the case of DNA, you're giving a sample to somebody and they have the ability to retain some of that. I think it should be made clear that that would be a violation of criminal sanctions to do that and samples should be destroyed or returned to law enforcement authorities.

COMMISSIONER BASHINSKI: The other issue, too, is what information do you provide with the sample and if you're providing coding samples, which certainly we would do if we were ever to send a sample out, there would be no identifying information that that testing laboratory would ever see that would connect that sample with an individual.

Again, these are the kind of prescriptions you would put into your legislation that would constrain the law enforcement agency as to what it could and should release and what it has to retain.

MR. TRUBOW: And let me add another point on the business of the samples. An important utility to a sample is to deal with the march of technology and, of course, I'm most familiar with it in the information environment and what's happened in the electronic digital world, where the technology advances at such a dizzying rate we can hardly keep and every day there is a new revelation of some new thing that can be done using digital electronic technology.

Although that technology with respect to DNA has advanced much more slowly than that, nevertheless it has advanced and I am in no position to predict what, in fact, we may learn as a result of the human genome project and its ultimate completion.

So it may be that new technologies will make it easier to classify or will classify in different ways DNA samples and I think it's important that a sample be there for the new technology to be applied to that sample, and the DNA code index can then be updated and revised.

Also, in the event there should be some challenge with respect to the validity of the DNA code as a result of the testing process, it can be done once again. I believe those are important reasons to keep hold of that sample, for ID purposes and under strict protocols of confidentiality.

CHAIRPERSON ABRAHAMSON: Michael Smith.

COMMISSIONER SMITH: This is a question really for information. Is it possible that if you send the DNA sample out, one of the things you're sending out are the 13 STRs. So in a sense, you are identifying the sample, because a sample can't be unidentified. You don't send a piece of paper that translates the 13 STRs into the record that does relate the 13 STRs to some other than things like name.

But it's different from other kinds of things that can be anonymized. DNA, almost by definition, can't be.

COMMISSIONER BASHINSKI: It's like a blind code. You need to be able to read the code. You need a reference. Otherwise, it's meaningless. For example, if I found it -- if I have this -- take it further. I have DNA information. I'm searching in the data bank and I get a hit, but I don't have the name of the

individual. It means nothing. If I don't have access to the name of the individual that matches my sample, it means nothing.

COMMISSIONER SMITH: It's actually as to the name then.

COMMISSIONER BASHINSKI: Right, because that's what puts it together with the person.

MR. TRUBOW: The DNA code itself is not personal information until it becomes linked with an identifiable individual and that linkage, in this case, would be somebody's name.

COMMISSIONER BASHINSKI: Exactly.

MR. TRUBOW: Or possibly a number assigned to him.

COMMISSIONER BASHINSKI: Or a fingerprint or whatever other thing you're going to use to latch on to that person.

MR. TRUBOW: Probably what it be would be a name.

COMMISSIONER KENNARD: And I would put a little caution on that because as we have problems now, we have -- and it's the undocumented citizens that come across and we make those arrests and there are ten or 15 different names with a set of fingerprints and there may be five or ten or 15 different names with a DNA sample, too.

COMMISSIONER BASHINSKI: But you link -- what you do is you link --

COMMISSIONER KENNARD: We link --

COMMISSIONER BASHINSKI: -- the names to the fingerprints.

COMMISSIONER KENNARD: -- the fingerprint with the name and --

COMMISSIONER BASHINSKI: To the person.

COMMISSIONER KENNARD: And there may be five or ten different names with the same thing. So how do we -- you're right.

MR. TRUBOW: I recall -- you may all be aware that one of the current fad crimes, the thing that's happening a lot today is identity fraud or theft of identity, and I recall being at a meeting once with the first individual, a person named Shaw, who had been the subject of a significant identity theft scenario.

He had spent a lot of personal money and a lot of time finally tracking down the person who had stolen his identity and he was facing him in the courtroom and the person said to Mr. Shaw, "You prove I'm not who I say I am." Because that individual had every bit of documentary evidence that Shaw could produce, a birth certificate. There is a tendency to believe a birth certificate as some sort of protected information. You can get a birth certificate on anybody.

But people tend to assume if I've got a birth certificate in my hand, then it's mine. Well, I can get one on you and carry it around, and so on and so on.

The point was, the one thing that Shaw needed was the biometrics identifier, because one thing he had the other guy didn't have was his fingerprints and his DNA.

I'm also one of those, therefore, who believes that in terms of social benefit, there is a lot to be protected from having good biometrics databases and DNA, and I think it's important one.

CHAIRPERSON ABRAHAMSON: Chris Asplen has a question.

DIRECTOR ASPLEN: Professor, one of the things that the working group on the legal issues identified initially at its last meeting, where we began to address this particular issue, was the comparison between the forensic identity database and the medical databases. The thought was to kind of try to put the forensic database in the context of the medical databases.

The initial discussions were that the concerns about a malicious use of the database are much more legitimate, if you will, in the context of a medical database than a forensic database. Number one, because of the ability, the technological ability to misuse the information, but also the motive. There seems to be more motive and more opportunity on the part of the medical databases.

Are you comfortable with that characterization?

MR. TRUBOW: If I understand by that that you mean that the forensic databases are more secure, I absolutely agree. Medical databases, until recently, were so easy to get hold of. They hang them up on the end of a patient's bed and the only person who can't see the record is the patient. And the medical profession, though it has sharp confidentiality requirements, when it comes to the details of record-keeping, doesn't have a really bright history.

So in that context, I think you're absolutely right, Chris.

DIRECTOR ASPLEN: Thank you.

CHAIRPERSON ABRAHAMSON: Norm.

COMMISSIONER GAHN: Just to follow up a little bit what Chris said. I've always personally felt that my genetic code is in more jeopardy of being misused every time I get my annual physical or, in the local drug store, have my cholesterol checked. I'm not concerned at all about the law enforcement uses of it.

But I think that's a concern that I would think the public would be more worried about is what -- and I think we talked -- spoke at our last meeting and since that time I did have a physical and I did ask my doctor, what do you do with my blood that you draw, and I got the answer that we got, didn't know, or where does it go after you test for my cholesterol and can anyone buy that, and no one has these answers.

And I think there are more really legitimate concerns for the public out there as opposed to what the law enforcement will do with that sample.

MT. TRUBOW: You're absolutely right. Again, we have a constitution dealing with government. We don't have anything dealing with the private sector. And even though there are confidentiality constraints, which you pointed out, I think, is an excellent example of the fact that the confidentiality constraint generally simply means the doctor will not himself tell somebody some medical information he knows

about a patient, but with respect to records and documents in connection with that person, oh, it's a much different picture. And you're absolutely right; they take a lot of blood.

COMMISSIONER DAVIS: Let me comment a little bit about the medical use of blood and fluids from people. Most laboratories, they destroy it, because otherwise they'd drown in a sea of blood. In fact, that's one of our main concerns when we have somebody that we receive from a hospital, is getting the original samples that were drawn when the person first came in for toxicology purposes, because by the time they die, that evidence is lost in the dead body.

But the caution I would put on the Commission is that in our desire to protect law enforcement derived samples from misuse, that we don't push for legislation that's going to throw sand in the gears of the medical profession and the hospitals and laboratories of the United States.

That happens, where one agency, with blinders, looking only at its only little problems, gets a law passed and lo and behold, that law has got a zinger in it that affects other people and other agencies. I've seen this happen.

So we should be very clear that whatever we address in this particular Commission along these lines are not so global that they are going to get into fields of medicine.

We shouldn't be involved in that. We don't know anything about that. It's not our job to start telling hospital laboratories how to do their business or the medical profession how to do theirs.

I'd just add that as a caveat here, that we don't come up with some recommendations that are going to, in the long run, impact negatively upon other professions.

COMMISSIONER SANDERS: Would you not think that we should be allowed to use that as an argument, though, when people say that there's a mistrust of government or law enforcement and they're concerned with misuse? I mean, it would seem to me a logical explanation would be that you should be much more concerned with what happens with your blood when you go to a medical physical than when you get arrested. That seems logical to me.

COMMISSIONER DAVIS: That's a good argument. For those who would argue that we should not do DNA testing for ID purposes, we keep pulling out all these other things. Of course, that applies to so many things that I see government doing. They focus in on this and in the meantime everything else is --

COMMISSIONER SANDERS: Of course, we might be telling them what they should be thinking about doing so that they get better information, too.

DIRECTOR ASPLEN: And I don't think that Professor Smith signed on for the responsibility of trying to address the, I think, substantially more complex issues of the medical databases. We did talk about it, I think, purely in a context of that comparison, not as a foray into specifically substantively dealing with the kind of issues that you're talking about.

COMMISSIONER SMITH: It does link in this way; that is, because of the -- whether it's convicted offenders or arrestees who haven't yet been exonerated or whatever else, there are limits in the way we've been constructing the databases of identity that are available DNA technology to law enforcement.

Let me just say it strikes me as raising the question. If the citizenry is far better protected against misuse of an identity database by law enforcement than by hospitals, then it would be okay or maybe better for there to be essentially a universal ID DNA database that's available to law enforcement, because their protection against abuse would be better than the protections now afforded to what essentially a universal DNA database in the hands of the medical profession.

MR. TRUBOW: If that's a question directed to me, I believe that it's unnecessary for law enforcement to have complete DNA profiles. But I believe that it is very necessary for the potential misuse of DNA profiles in the private sector to be examined by somebody.

I can easily appreciate it's not the charge of this particular Commission, which seems to be very focused and very limited, and I would think that your comments with respect to keeping focused on this Commission are well taken.

On the other hand, putting on my hat as a citizen, I kind of think, boy, I wish the Surgeon General or somebody else would have a commission to look into this question in a broader context. Employment relationships, as well as medical relationships, insurance relationships and things like that, because the potential for misuse is so broad. And I'm unable to say that it has not happened.

CHAIRPERSON ABRAHAMSON: Jan.

COMMISSIONER BASHINSKI: This is back to your question of do we have examples of misuse. It may be it's for the legal group. But every state that has a databank has a law that governs it. Has there been a review of all those laws and have they been found wanting with regard to the sorts of restrictions that we're discussing here? If so, obviously that needs to be addressed.

The answers that I'm hearing, at least with regard to the law that I'm aware of in my state, has laws, criminal penalties for misuse and very tightly constrained uses and CODIS itself, which is the force of some national law, also controls most of those agencies.

Do you have that information from your committee?

COMMISSIONER SMITH: No.

COMMISSIONER BASHINSKI: Have you reviewed them?

COMMISSIONER SMITH: We're suggesting that we don't know -- we don't have examples of misuse by law enforcement.

MR. TRUBOW: I would expect that the laws that would be needed are not on the books. That is, laws that would make it clear that any samples of blood or other tissue material taken for medical purposes not to be used for any purpose beyond the medical purpose, this kind of business, secondary use and that, because here we're not talking about regulating a DNA database that has been established. The example that was brought up is he gives some blood in the routine annual physical that he gets. The doctor gives him a report with respect to what the blood test shows about him, but he doesn't know whether or not a DNA profile was also developed as a result of that and sent to somebody else.



COMMISSIONER BASHINSKI: My specific question was with regard to the laws governing databases; are we concerned about the state of the law in that area, because if we are, that would be something that we should be dealing with.

I don't know if you've reviewed those.

MR. TRUBOW: No, I have not.

CHAIRPERSON ABRAHAMSON: Dawn, state your name, and why don't you come to a microphone, please.

MS. HERKENHAM: Hi. I'm Dawn Herkenham. I work for the New York State Police, but I was formally with the FBI. While there, I did quite a bit of research on state DNA database laws and as you all know, all 50 states have database laws. Well over half of them have very restrictive provisions on who may access this data.

In fact, I think that half copy verbatim the language in the Federal DNA Identification Act of 1994 that restricts access of both DNA records and the DNA samples themselves for primarily law enforcement identification purposes.

There are probably, I'd say, a handful, certainly less than ten state statutes that were enacted very early on, in, say, the late 1980s, maybe 1990 and 1991, that don't have these restrictive provisions. So less than ten of the 50.

Also, I'd mention that a number of the state statutes also specifically provide that only markers used for law enforcement identification purposes can be included in the database. So that not any markers that would reveal genetic predisposition to disease or medical condition could be included.

CHAIRPERSON ABRAHAMSON: Dawn, do you have this in writing?

MS. HERKENHAM: Almost.

CHAIRPERSON ABRAHAMSON: Soon.

MS. HERKENHAM: When I left the FBI, I took it with me. As you may know, a number of states have been amending their statutes to expand the number of offenses that they include, and I know just recently Texas expanded their statute. So I am in the process of updating it.

But I had hoped to make it available to Chris at this meeting and I'm hoping in the next two weeks I'll have that finished. But it's a summary of the state laws.

CHAIRPERSON ABRAHAMSON: Thank you very much.

COMMISSIONER DAVIS: Isn't much of this already included in the ACLU handout? I think it's all covered in here.

DIRECTOR ASPLEN: I think that pertains to the medical. That's not state database. Those are the other ones. Those are the other genetic privacy statutes, not the forensic database.

CHAIRPERSON ABRAHAMSON: Chris can ask one more, but then I wanted to introduce our invited guests, and, although we're going to run a bit late, we'll see if any of them have any questions. We have another two or three, five minutes. Chris.

DIRECTOR ASPLEN: Thank you. If I could just ask one more question that's come up in a couple of different contexts and I think addresses the issue of the potential abuses.

When we talk about taking DNA from arrestees, one of the potential abuses that comes up is the potential for targeting particular groups and racial profiling. And because there is a disproportionate number of minorities in the database system, couldn't law enforcement, as they've been accused of, profiling and targeting in New Jersey, for example, for stops along the highway, there is a concern that that would be done for the purpose of getting individuals' DNA.

What are your thoughts on that particular dynamic?

MR. TRUBOW: My thoughts are that what you're describing, Chris, would be misbehavior by a law enforcement agency and that same misbehavior would lead to fingerprints being collected. The problem is not in collecting the ID. The problem is in the improper behavior on the part of the law enforcement agency in targeting for that first confrontation or arrest.

DIRECTOR ASPLEN: Thank you.

CHAIRPERSON ABRAHAMSON: I'm going to ask our invited guests to just stand, so everyone can see them and get acquainted. There's David Coffman, who has already been talking, and he's from the Florida Department of Law Enforcement. Thank you.

Dr. Pamela Collins, from Eastern Kentucky University College of Law Enforcement.

David Kaye, Professor of Law at Arizona State. Kathryn Scarborough, Dr. Scarborough, Eastern Kentucky University. Robert Spagnoletti, from the U.S. Attorney's Office. And we've met George.

Do any of our invited guests have a question?

DIRECTOR ASPLEN: And, Professor Berger, we did mention you before you arrived. I already explained how fortunate we are to have you here and for you to take some of your free time out to help us out.

CHAIRPERSON ABRAHAMSON: Any other questions from the Commission?

MR. TRUBOW: Thank you. Chris, if I can be helpful in editing the transcript, I'll be pleased to do that.

CHAIRPERSON ABRAHAMSON: Thank you very much.

DIRECTOR ASPLEN: Thank you, sir. Have a safe trip back.

[Applause.]

CHAIRPERSON ABRAHAMSON: We are now scheduled for a break until 10:45. So we're running just about on time.

[Recess.]

## Legal Issues Working Group Report and Discussion

*Professor Michael Smith, Chair*

*Professor David Kaye, Reporter*

CHAIRPERSON ABRAHAMSON: We are convened. On the agenda is Professor Michael Smith, Chair, and Professor David Kaye, Reporter, Legal Issues Working Group Report and Discussion. Did everybody get a copy of the report?

DIRECTOR ASPLEN: They should have. It's this document that has the square on the front of it and it is called The Constitutionality of DNA Sampling on Arrest.

COMMISSIONER SMITH: This will be principally David's moment, I think, but I want to just frame it a bit. I'm glad you got a copy of the notes of our last meeting, the working group meeting. So I won't go through all of that.

But after our meeting in Dallas, we received a copy of the Attorney General's letter to the Chair and took it as part of our responsibility to, in pursuing the questions of privacy surrounding forensic DNA, we ought to focus initially a lot of attention on this arrest question.

We've asked David to do that. In our conversation about it, though, I should say that we also discussed a report to this Commission from our working group in which we would touch upon some of the related issues of capacity to do some of the things that have been proposed and some of the broader issues of privacy that have been suggested.

But at this point, I think we want to focus in on the frame of the Constitutional issues, and David has done that for us. I have not had a chance to read his report, so we're going to look for an oral presentation from David.

MR. KAYE: Thank you, and I guess I want to thank the Commission for giving me the opportunity to catch up on 15 years of Supreme Court cases since I've last taught criminal procedure.

But I'm going to talk today briefly -- well, we'll see -- about the Constitutional issues involved in taking DNA samples on arrest.

I'm going to try to limit my remarks really to that question; not to whether it's a good idea, not to the policy concerns, not to whether it's okay in a broad sense, but just to whether or not it is consistent with the United States Constitution.

If I were to take the three questions that Professor Trubow or the three questions that Professor Trubow raised, is it okay to take DNA from an arrestee, I would say the answer is maybe; is it okay to save the genotypical data from an arrestee, I would say maybe; is it okay to save biological samples, the bottom line is maybe.

I think these are all interconnected questions and it depends on the details of the system that's adopted, on the protections that it provides, as well, and that they're really not separable. But I'm going to try to tell you a little bit of why I come to those conclusions.

The report here, which reflects my thinking thus far, is very preliminary. I mean, it's labeled tentative draft. It has not been reviewed by anybody else, because I just finished it last night.

So it's very much open to revision and I'm hopeful that the discussion here will inform a better draft of it.

The first thing I'm going to try to do or the general thing I'm going to try to do really is discuss a legal framework for evaluating the constitutionality of DNA sampling on arrest, and, primarily, this will involve mention of a number of Supreme Court cases from the United States Supreme Court.

I want to make an important caution here, which is that state constitutions often have their own provision about searches and seizures. Those may differ as interpreted by the state Supreme Court from the United States Constitutional protections under the Fourth Amendment.

Thus far, I've only analyzed the U.S. Constitution. Now, I will say, in the convicted offender data banking cases the courts have handed down, the state courts have generally said that they see no relevant differences. But there are other cases where they turn up. So that's just not been addressed yet.

Having identified a legal framework for you, I want to talk about how that would apply to the arrest situation. I'm going to suggest that will depend on a number of facts and I don't propose to give you a definitive answer to is this constitutional, but rather to alert you to the considerations and the factual information that would determine that answer, and the Commissioners here may know more about that than I do and so I'm more interested, in a way, in trying to give you a sense of how the law approaches this question at a general level.

My approach will, I hope, be non-adversarial; that is, I'm not trying to argue for the ACLU position or for a prosecutorial position. My own background, I've been a prosecutor. I've been in private practice. I've been counsel on ACLU cases for the ACLU. I've consulted for both defense and prosecution on DNA evidence cases.

So I don't have any particular axe to grind here. I'm just a law professor and this is going to be fairly professorial.

What I find the most difficult aspect of this area of the law is figuring out the analytic framework to apply. So I'm going to give you, in essence, the perspective that an appellate lawyer would have if one tried to argue this matter before a court.

Because it takes a little while to kind of lay out that framework, feel free to interrupt me at any point in the analysis, if you have any questions.

Let me start by putting to the side certain things that are really non-issues that might occur to people as arguments against the constitutionality of creating -- of including in DNA data banks samples from people who are arrested. One might think, at first glance, for example, that the Fifth Amendment's prohibition on self-incrimination might apply; we are making someone incriminate himself by donating perhaps a sample. That's a non-issue in the sense that in recent decades, the U.S. Supreme Court has very clearly interpreted that clause not to apply to non-testimonial evidence; specifically, for example, to blood samples in a case, *Schmerber v. California*.

Every court to address that question in connection with DNA convicted offender data bankings has found it -- has summarily rejected that argument. So I'm not going to spend any time on that.

Due process is sometimes raised. There are cases in which the method of a physical intrusion could be so offensive as to violate the due process clause of the Fifth or Fourteenth Amendments. That, however, is clearly not going to be a problem with the kind of sampling that's done to obtain DNA, which is minimally intrusive. So, again, that's an argument that no court has bought in this context.

The more difficult question is the Fourth Amendment. The Fourth Amendment, just so we have it before us, provides that the right -- speaks of the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.

So compulsory DNA sampling on arrest would violate the Fourth Amendment if, number one, it constitutes a search or seizure, that, number two, is unreasonable. It might be unreasonable because the police lack a judicial warrant to take DNA, because they lack adequate information to believe the DNA will help to prove that the suspect is guilty of the crime for which the arrest is made, or because the system of collecting and using the samples unjustifiably invades personal privacy.

Those are going to be the kinds of arguments that one has to address. So first, I want to talk about this question of really the threshold question, is the taking of DNA a search or seizure within the meaning of the Fourth Amendment.

The answer, I think, depends on the nature of the sampling, on how invasive it is. So let me tell you about the legal framework first for answering that question. A very fundamental case in the Fourth Amendment area, on which most cases interpreting what a search or seizure is, turn on is a case known as *Katz v. United States*.

In *Katz*, the government acquired key evidence to convict a defendant of interstate gambling by attaching an electronic listening and recording device to the outside of a telephone booth, public telephone booth. The Supreme Court held that the interception was a search, even though there was no physical intrusion, no trespass, the telephone booth was a public place, and the Court said the Fourth Amendment protects people, not places, and it protected the defendant because he, upon entering the telephone booth, the court said someone who shuts the door behind, the pays the toll that permits him to pay a call, place a call, is entitled to assume his conversation is not being intercepted.

The idea of what material was exposed to the public was important in that case. The public exposure and knowledge kind of issue has been applied by the court to read certain kinds of things outside of the Fourth Amendment in other contexts.

In a later case, *United States v. Dionisio*, the grand jury subpoenaed 20 individuals to give voice exemplars to see if one of them was on the tapes that the government made pursuant to a warrant involving interstate gambling. The Supreme Court reasoned that there was no search or seizure in making someone speak those words, because one's voice was a characteristic that was routinely exposed to the public.

So the question becomes, in the DNA context, is DNA something that is routinely exposed to the public.

In fingerprinting, a number of courts have reasoned that fingerprints are deposited in public places and, for example, the Indiana Supreme Court reasoned that warrantless acquisitions of a defendant's fingerprint during trial did not constitute a seizure forbidden by the Fourth Amendment, because fingerprints are an identifying factor available to the world at large.

Citing this voice exemplar case I mentioned, *Dionisio*, other courts have held that shining an ultraviolet lamp on an arrestee's skin to expose chemicals transferred from stolen money is not a search, because the fluorescent material may be compared to a physical characteristic, such as a fingerprint or one's voice, which is constantly exposed to the public.

Now, we could argue that DNA, as much as a fingerprint, which is constantly exposed to the public, I sneeze, perhaps I drool, in any event, I leave a trail, I suspect. I exfoliate cells from my skin. I leave a trail of DNA just as I leave a trail of fingerprints.

Is that enough to make the collection of that DNA something that is short of a search or seizure?

The fundamental issue, I think, is not exposure to the public. Now, this is sort of my analysis, now that I've exposed you to sort of the legal framework for a minute. The real key question in *Katz* should not be so much what is exposed in some vague way to the public, where there is not really public knowledge of it. It should be what's a reasonable expectation of privacy, which is a phrase that occurs in *Katz*, as well, and do people reasonably expect that the government is going to go around picking up little pieces of DNA and analyzing it.

I think the answer to that is no and that, therefore, one should not be able to escape the notion that there's a search or seizure just by reason of the public exposure aspect of *Katz*.

The invasion of the body is another issue in deciding what a search or seizure is. With blood samples, the Supreme Court has held, for example, in taking a sample of blood for a chemical analysis of alcohol level, in a case of someone who is in an accident, that it could not reasonably be argued that the administration of the blood test was free of the constraints of the Fourth Amendment. It plainly constitutes a search of persons, depends on seizures of persons within the meaning of the amendment.

But what about a buccal swab, what about swiping cells from the inside of the cheek, where there is no invasion and pulling out of blood, is that sufficiently non-invasive to be distinguished from *Schmerber*?

A subsequent case deserves mention here, *Cupp v. Murphy*. In *Cupp*, the defendant was suspected of strangling his wife. The police took fingernail scrapings from him, over his objections. The scrapings contained traces of skin and blood cells and fabric from the victim's nightgown. The defendant was convicted of murder. The case came before the Supreme Court on a petition for habeas corpus and the court reasoned that the removal of the material under the defendant's fingers was a search.

They wrote, unlike the fingerprinting in *Davis*, the voice exemplar obtained in *United States v. Dionisio*, or the handwriting exemplar obtained in another case, search of the respondent's fingernails went beyond mere physical characteristics constantly exposed to the public and constituted the type of severe, though brief, intrusion upon cherished personal security that is subject to constitutional scrutiny.

If scraping or cutting a fingernail to remove dried blood or other debris is a search, then I think so is the scraping inside of a cheek.

What about saliva samples? From what I have read in the press, that's how New York City would propose to obtain DNA samples of arrestees. There is no invasion of the body, there is no active scraping, and said stuff is spit out. Does that make a difference? Well, it's similar to breath sampling, in one respect, where someone breathes out for the purposes of breathalyzer.

The Supreme Court spoke to the classification of breath sampling in a case known as *Skinner v. Railway Executives Association*, which I want to talk about in another context, too, so let me tell you the facts.

The Federal Railroad Administration promulgated regulations that mandated blood and urine tests of employees involved in train accidents and that authorized railroads to administer breath and urine tests to employees who violate certain safety rules.

The breath and urine tests, in some cases, were authorized upon a reasonable suspicion of drug or alcohol impairment and others did not require any showing of individualized suspicion at all.

The Railroad employees alleged this system violated their Fourth Amendment rights and the Court of Appeals for the Ninth Circuit invalidated the regulations, holding that the drug testing required reasonable suspicion.

The Supreme Court reversed. It did not dispute, however, that taking breath samples is a search and the court really perceived no distinction by taking blood by puncturing a blood vessel and having a person expel air from his mouth.

On the other hand, the court did say, did refer to subjecting a person to a breathalyzer test, which generally requires the production of alveolar or deep lung breath for chemical analysis implicates similar concerns about bodily integrity as the blood alcohol test we considered in *Schmerber*.

So is the court saying that it's the location of the air -- in the alveoli -- rather than the mouth that matters? That's what appears in the language of the *Skinner* court.

That seems to me a unidimensional sort of analysis that doesn't help particularly and *Skinner*, I think, does not dispose of the argument then that saliva sampling, which involves no penetration of the body or its cavities, is not a search. So I think that's not an argument that can be dismissed out of hand.

Skin scrapings. I mean, suppose we could get DNA from exfoliating epidermal cells or by having someone press a finger down on a sticky pad that would pull off cells that could then be analyzed.

At this point, are we getting to the stage where we could say the invasion is so different, the level, it's really a surface of your body that's constantly exposed to the public and so on, that one gets into the argument that maybe it's not a search or seizure, at least by virtue of the invasiveness of the procedure.

But there is one further consideration we need to mention before leaving the issue of whether something is a search or seizure, at the outset, and that is the nature of the information that is obtained.



In fingerprinting, there is some dicta, at least in Supreme Court cases, to suggest it might not be a search or seizure, partly because it doesn't involve a level of intrusion of information-gathering of anything beyond identification, and we've already had a discussion about that.

Here, again, the Skinner case is helpful because it considered urinalysis, which also involves not direct invasion, but, again, material like saliva that comes out of the body, and in Skinner, the court observed it is not disputed that chemical analysis of urine can reveal a host of private medical facts about an employee, including whether he or she is epileptic, pregnant, or diabetic.

So the notion then is that there are, I think, private medical facts, the obtaining of which could implicate the Fourth Amendment and make this a search or seizure, not by virtue of the taking of the material, but by virtue of the subsequent analysis.

So my own guess, although I think there are arguments that might be made here, is that the courts will say and should say that taking of the material, unless it is taken in a way that is structured very carefully to make sure there can be no such revelation of private medical facts, will constitute a search or seizure that then needs to be justified under the Fourth Amendment.

So maybe -- and I'll throw this out to the Commission to sort of think about -- maybe if the police collected material, instantly analyzed it with a portable DNA analyzer, transmitted the genotypic information in digital form to the central database, and this may be the future of DNA evidence, a little futuristic, and then destroyed the sample in the presence of the defendant, maybe that would not be a search or seizure. Maybe that would be comparable to other methods of obtaining information.

It certainly seems no less troublesome than shining the UV lamp on the defendant's skin to detect material that might have been deposited from the crime, for example.

COMMISSIONER SANDERS: The only difficulty I have with everything you said about whether it's a search or seizure is every case you cited is reference to the collection of evidence of a crime.

I'm not sure I see how those cases tie into identification purposes of -- for instance, maybe the discussion of what the case law says as to the collection of fingerprints for the purposes of identification, not for investigating purposes, not for testimonial kind of collection of evidence that gets to the individual, but specifically for identification purposes.

It would seem to me like that's where I would argue that that's not a search and seizure in that regard, because every case you've quoted is a reference to the collection of evidence against an individual.

MR. KAYE: Well, I'm pretty sure that if we took a sample of blood, penetrating the skin, that would be considered a search or seizure, even if it were only for identification, because I think the court is concerned with the degree of bodily invasion, as well, and the threshold question of is something a search or seizure depends not such much on the use to which the evidence is put, although that can be a factor if it reveals private information, but more on is there a reasonable expectation of privacy either from bodily invasion or from some kind of collection of information about the person.

I do think the distinction you offer is crucial. Once we reach the level of asking -- assuming it's a search of seizure, is it one that is reasonable under the Fourth Amendment, but I don't want to say that your argument would not, in fact, prevail.

I can imagine a court saying that given the limited use for identification of this material, there is no reasonable expectation that someone could not obtain, in a fairly non-invasive way, some material which could only be used for identification.

COMMISSIONER SANDERS: A furtherance of the argument would be the fact that you've established probable cause and the purpose of the arrest.

MR. KAYE: That is very important.

COMMISSIONER SANDERS: I guess that's why this creates a difference, in my mind.

MR. KAYE: It makes a difference constitutionally, also, for the following reason. Detaining someone requires just -- seizure of the person in order to get the material requires justification. So the Supreme Court has held that it is unconstitutional for police to round up, without probable cause, all blacks in an area because of a crime in which the victim has identified a black as an assailant in order to obtain fingerprints to provide evidence -- not just for identification in that case, but to link it to a crime.

The court held that the basis for the detention has to be justified. It remarked that the fingerprinting wasn't such a problem.

So the more this is analogous to pure fingerprinting, because the technology is circumscribed, the method of invasion is no more significant, the more there is a solid argument that this is not a search or seizure.

Let me move to the second issue, which is assuming that there is a search or seizure, which is likely, I think, that most courts would conclude, assuming there is, is it one that is justified or can be deemed reasonable within the meaning of the Fourth Amendment, or is it unreasonable search or seizure.

Now, here, the difficulty is identifying the proper framework for analysis and the Supreme Court cases, I can tell you, are very confusing on this area.

So I think this would be a great examination question for my students. Here is the answer. First, there is a debate among -- there really are kind of two lines of cases. The line of cases that emphasizes that searches and seizures are kind of unreasonable, per se, if they lack a warrant, based on probable cause and so on, and there are a lot of exceptions to that. There are categorical exceptions to things like a search incident to the arrest.

For example, in *Cupp v. Murphy*, the case I mentioned with fingernail scrapings, there was no warrant, but the police deemed there was sufficient cause to arrest the individual at least by the time the police had observed -- had asked the individual if he could -- that they noticed the material under his fingernail, which was reddish in color, and said can we take the scraping of that, and the next thing they saw, his hands were behind his back, then they were in his pockets, there were jingling noises like keys or coins, and at that point, the court said there was probable cause to arrest.

The police could, to prevent the destruction of evidence, he was scraping the material out, proceed to take a sample. But that failed, the court said, within a well established categorical exception to the notion that there needs to be probable cause and individualized suspicion and a warrant.

So one approach that we have to consider is whether or not DNA collection from arrestees can be analogized or fit into an existing category of searches that are allowable without individualized suspicion, without a warrant.

But there is another approach that the court sometimes uses which seems to be outright balancing of interests. It seems to say that, well, the degree of invasiveness of the search and the intrusion of privacy has to be weighed against the government's interest in searching, including identification, including all kinds of things, and when one does that, that will determine whether the search is reasonable, regardless of a warrant, regardless of a lot of exceptions.

And you find recently statements by Justice Scalia in cases which would say unless there is a well established sort of common law restriction, we just balance. In a way, I think that debate is not a big issue here. The reason is that even if you say you look for a categorical exception, it's always open to argue that there should be a new exception, and that requires balancing.

So I'm just going to talk for a moment about the categorical exceptions that exist and which will require us to turn to balancing anyway and not worry about whether you do ad hoc balancing in Fourth Amendment cases.

There are, I think, two major categorical exceptions that might be applied here. I want to, again, put to the side one that doesn't apply, which is the incident to arrest exception. As illustrated in *Cupp v. Murphy*, that applies where the search, where the police need to search because they need to secure to be sure that the arrestee has no weapons that might then be used against the police, to be sure the arrestee -- to protect evidence from being destroyed, those kinds of limited searches incident to arrest are allowed.

But that's not going to help here, because we're not talking about a search to avoid the destruction of evidence or for weapons. The DNA that the individual has is going to be available for as long as the individual is alive.

All right. So what are the exceptions that are might apply? There are two. There is one that goes under the rubric of special needs exception, and let me -- and the other is one that's not explicitly recognized in Supreme Court cases, but which I think is of great -- is easy to argue for and lower court cases, in effect, recognize it, which I will call an identification exception.

Now, the special needs exception is one that has engendered considerable debate in some of the convicted offender database cases that have come to the courts on Fourth Amendment grounds. The Massachusetts case, *Landry v. Attorney General*, that was decided a few weeks ago, for instance, by the Supreme Judicial Court of Massachusetts upholding the constitutionality of the database for convicted offenders, was one in which, at least the briefs I looked at, argued that this DNA data banking couldn't be fit under the special needs cases.

So what are these special needs cases? The Supreme Court, in a case, *Treasury Employees v. Von Raab*, which dealt with the collection of -- which dealt with drug testing of Customs -- of individuals in the U.S.

Customs Service as a condition for promotion or for serving in certain positions where they carried firearms, the court upheld that and in doing so it made it clear -- well, let me read you what the court said; while we have often emphasized and reiterate today that a search must be supported, as a general matter, by a warrant issued on probable cause, our decisions in *Railway Labor Executives* -- that's the *Railway* case with drug testing I mentioned -- reaffirms the longstanding principle that neither a warrant nor probable cause nor indeed any measure of individualized suspicion is an indispensable component of reasonableness in every circumstance.

As we noted in *Railway Executives*, our cases establish that where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the government's interests to determine whether it is impractical to require a warrant or some level of individual suspicion in the particular circumstance.

Now, *Von Raab* uses this phrase "beyond the normal need for law enforcement," but it uses it, I think, not to define every circumstance in which balancing should be used, but rather to label a whole bunch of cases in which the Supreme Court has held it's okay to dispense with a warrant or it's okay to dispense with individualized suspicion.

What are those cases? They have involved administrative inspections in closely regulated businesses, stops for questioning or observation at a fixed border patrol checkpoint, or at a sobriety checkpoint, routine or random blood testing and urinalysis of employees, student athletes, but not, by the way, candidates for public office, random shakedown searches of prison cells, and even visual, anal or vaginal examination of pre-trial detainees, people who are not convicted.

In each case, the court has considered the importance of the government's interest, the practicality and value of securing a warrant, and requiring individual suspicion and the gravity of the privacy invasion.

Judges have disagreed as to the applicability of the special needs exception in the convicted offender database cases, by the way.

My own view on this is that it is applicable; that this is the kind of situation in which the warrant protection, in which individualized suspicion is not crucial. Why is that? Because we're not asking the question of is there probable cause to think that this individual has committed a crime and that we will now obtain some evidence of that crime by virtue of a search.

The collection of this information is based on quite a different rationale which doesn't require individualized examination, but simply involves identity, the collection of information for certain purposes, where we don't really care anymore whether there is that individualized suspicion, because the information is still useful and valuable, the argument goes, regardless of that.

It can be used to check this individual against the database of crimes in which there is DNA evidence that already exists, for instance, and it can be used for purposes, for purely administrative purposes of having a record of who the individual is, which makes it much more likely administrative search case in which this special needs exception developed.

That case, by the way, *Camara v. Municipal Court* involved housing code inspections in which the inspector would go out to all kinds of premises and an individual who was living in an apartment said you

can't inspect my premises without a warrant, and the Supreme Court said, well, okay, the judges can issue a general warrant to search the entire neighborhood because it's reasonable, they don't need individualized -- they don't need detailed suspicion about that there is a housing code violation at an individual house; after all, this can lead to important discoveries of violations to protect the public health and so on.

So that's the line of cases and I think they can be applied here, and we can talk then about the balance that applies in special needs cases. So now we come to the difficult question, I think, which is, okay, does the balance of interest then justify the search, does it make it reasonable.

So what are those interests? Well, there's the individual interest in privacy and, again, how troublesome that is depends on the method of collecting the data, how intrusive is it, is it blood sampling, is it buccal swabs, is it saliva, is it something else.

The more it looks like fingerprinting, the less the individual interest and the more a government interest will, therefore, trump the individual's interest here.

Well, what are the government's interests, however? The detection and prosecution of serious crime, and that's a compelling interest. But the further question is how much does this arrestee collection and data banking advance that interest.

How useful is it to collect samples from individuals on arrest rather than conviction? With the road block cases, for example, and the stopping of individuals, the court could say that even though there are very -- there's a very small percentage of people who were found at the stops to be driving while intoxicated -- it's about one and a half percent in the particular case before the Supreme Court -- it really didn't matter. After all, in *Camara*, the case involving the housing code inspection, how many housing code inspections actually lead to violations? A very small percentage.

So the argument that very few people on arrest are going to prove hits on the database is not dispositive, or is it? Because part of the argument in these other cases is that there is a deterrent effect to the system, that people will not be as inclined to drive while intoxicated, their housing codes, their houses, the premises will be kept to code because they know they'll be inspected.

Well, is anybody really going to say I'm not going to commit a rape or a murder because when arrested for some unrelated offense, my DNA might be searched.

That becomes much harder to see the interest there as being comparable. The individuals, if they are convicted, can have the DNA typed later anyway, so the question, in a way, becomes or might become what's the marginal value, the extra, incremental value of taking DNA samples on arrest.

Let me point out an interesting fact here, too, where it could actually backfire on law enforcement to start taking samples on arrest. The police, one of the reasons for not worrying about the warrant requirement is that the warrant is designed to interpose the judgment of a neutral magistrate on discretionary subjective decisions. You find that language in a lot of cases, right?

Well, the decision to arrest involves a certain amount of -- a great amount of discretion and indeed subjectivity.

That doesn't mean a warrant is always required, but certainly probable cause is required, and if an arrest is made without probable cause and a search is made incident to that arrest, wouldn't the material obtained in that search be suppressed in a trial?

So one could imagine then an argument being made that, well, we've got a hit now from an arrestee, but it turns out the arrest didn't have probable cause when viewed later by a court, and so what can be done. Almost anything might be a fruit of that illegal arrest.

So there is a real risk, in a way, of DNA sampling on arrest that doesn't occur with DNA sampling on conviction. But my point is more that the interest here, if you really define it narrowly, is the marginal value of taking the DNA samples from an arrestee and not waiting until there is a conviction becomes more limited. Now, it's not to say there is no value. One might, for example, find somebody who is -- find a case in which there is a hit, with an arrestee, and it's a case in which someone else is being tried at that very moment and could be convicted.

So we're not just talking about finding people to prosecute. We're also talking about exonerating the innocent when we talk about using these databases.

But, again, even if that person is convicted, if there is adequate post-conviction remedies, won't the material be discovered upon conviction? Well, again, that's not a full answer, I suppose, because the individual might not be convicted who is arrested, and yet we would still have had a beneficial effect from sampling upon arrest.

So I'm not going to claim there is no government interest or that it's completely minimal, but it is reduced if we already have in play the convicted offender databases and fingerprinting and everything else.

Now, there's another state interest besides the prosecution of crime, or it's related, but comes in in a very different way, and that's identification, having adequate record on somebody. But I think that's better, and that would go into the balance under the special needs test, too, how important it is to have DNA, like fingerprints, for keeping track of who people are.

But I want to treat that a little bit separately because I think one can describe basically an identification exception that we see now and in order to understand that exception, I want to go back to cases that were decided much earlier when fingerprinting first came on the scene and even before fingerprinting, when courts struggled with the question of, on arrest, do people take -- could police take pictures or biometrics measurements to use in the Bertillon system, which existed before measurement -- before fingerprinting, to identify individuals by the sizes of their extremities and things like that.

Those were challenged on Fourth Amendment grounds, as well. Over a century ago, in an Indiana case, an arrestee sought damages from the sheriff for taking plaintiff's picture and including it in the local rogues gallery, and the Indiana Supreme Court held that the sheriff was acting within his legal authority.

Now, why? It would seem, therefore, if, in the discretion of the sheriff, he should deem it necessary to the safe keeping of a prisoner and to prevent his escape or to enable him to more readily retake the prisoner if he should escape, to take his photograph and a measurement of his height, to ascertain his weight, name, residence, place of birth, occupation, the color of his eyes, hair and beard, as was done in this case, he could lawfully do so.

In 1932, in a 2nd Circuit case involving three of the greatest judges in American history, Learned Hand, Augustus Hand, and Judge Swan, the 2nd Circuit applied that same logic to fingerprinting cases, saying that such means for the identification of prisoners so that they may be apprehended in the event of escape, so that second offenders may be detected for purposes of proper sentence where conviction is had, and so that the government may be able to ascertain, as required by the National Prohibition Act, whether the defendant has been previously convicted, are the most important adjuncts in the enforcement of criminal laws.

The slight interference with the person involved in fingerprinting seems to us one that must be borne in the common interest.

So today, most courts take it for granted that fingerprinting on arrest is okay. But the rationale, if you go back in history, had to do with this idea of knowing for sure who the person you have is. It wasn't to compare fingerprints with a data bank of fingerprints to see if the person was involved in other crimes.

So I see the identification exception as really being a purely kind of administrative matter that's important in the administration of law enforcement, but it's a much narrower interest than might exist, and we've talked about the other interest already with DNA databases.

So can the identification exception justify arrestee fingerprinting here?

Well, the thing that bothers me about it is the idea that the police already can take fingerprints, which, in one respect, is better than DNA in identifying an individual; namely, even identical twins have distinct fingerprints. They're not going to have distinct DNA patterns.

So for purely knowing is this person the person who he says or she says he or she is, really do we actually need DNA on arrest, in case the person escapes, to reidentify them later, or those other items that are mentioned by the Kelly Court, the 2nd Circuit.

I think that's a hard argument to make. It's not to say there is not a state interest in identification information for other purposes, for the intelligence-gathering, for linking to other crimes, but that's better analyzed under the special needs case as part of the balancing, and then we have to ask how much the balance favors the government there.

Well, that's the legal framework that I suggest to you makes the most sense in asking the question is it constitutional to take DNA samples on arrest, to analyze them, to store them in a database.

As I say, a great deal may depend on the precise details of the system, how invasive it is of privacy, and how compelling an argument can be made for the benefits of doing this on arrest as opposed to waiting until conviction.

So I leave you at least with my preliminary analysis, which hasn't been run through the work group, hasn't been debated in any other way, so as being that the answer to the question is, well, there are arguments that constitutional lawyers can make on both sides of this question.

I can tell you how I would decide the case on what I know so far, if I were a Justice, which I am not, and I don't know everything that would occur in a brief, but I think this is the way one needs to think about that question.

Questions?

CHAIRPERSON ABRAHAMSON: Thank you, Professor Kaye. That was very helpful.

COMMISSIONER SMITH: We're glad we asked, right?

MR. KAYE: More than you wanted to know about the Fourth Amendment.

CHAIRPERSON ABRAHAMSON: Any questions?

COMMISSIONER CLARKE: Actually, I want to thank Professor Kaye obviously for the wonderful work he's done on this. I almost feel like a Congressman thanking Alan Greenspan.

MR. KAYE: Yes, but the stock market will not go down because of what I said.

COMMISSIONER CLARKE: But I think you took it in a step-by-step fashion very well. I'm going to throw in kind of my two cents. I think there is almost three parts to this, as I was sitting here thinking about it and dreaming back to my days when I spent all of my time on Fourth Amendment issues when I used to work for a local trial clerk.

It brought back a lot of memories of a lot of cases. But one element that I think we will need to look at at some point is there may be statutory enactments. We know there are statutory enactments in terms of the current convicted offender profile databases and there may be, and I'm not familiar with if there is any movement towards that already, actual statutory enactments to declare this is the point of the proceedings at which we want, as a state legislature, or at the Federal level perhaps, samples to be taken.

That may -- well, it will impact, if there is such legislation, obviously, on ultimately judicial decisions on constitutionality and so forth. So I think we'll just have to wait and see if that occurs.

But I think you've distilled it down to the real issues. First of all, is this a search, and that obviously enters into the discussion of is it reasonable versus unreasonable, which will ultimately require an analysis of the methods that are used, just like you said. Is it currently, for example, a blood drawing using an intravenous device or is it going to be something simpler than that, less intrusive, like a saliva collection or even these devices that are, while technically an invasion of the body, the use of these lancing devices that we've heard about, or literally, as I understand it, with little or no sensation on the part of the person whose sample is collected, that a blood sample is obtained and collected in a fairly rapid fashion.

That will obviously enter into the reasonableness versus the unreasonable nature of the search.

But lastly, if we can truly grab a crystal ball and determine what's going to happen, I think you've hit it on the head, it's going to be a public policy question, and you immediately brought -- or when you mentioned, I was thinking immediately of where I'm from, southern California, where we are fairly dramatically impacted obviously by border searches, searches at the border.

But perhaps more importantly, searches that don't occur on the border, where, at 40 miles north of our border, we have what's been declared to be an absolute lawful stop with no suspicion whatsoever of individuals crossing Interstate 5 to determine if there is any involvement of illegal aliens and so on.



And even in the liberal days, I'd say quite liberal days of our California Supreme Court, back in the 1980s, we had no difficulty whatsoever with upholding those particular right of suspicion searches. So I think ultimately that's what -- that's my position -- that's what it's going to come down to and I don't think our courts are going to have a lot of difficulty with that, assuming that the collection is not as intrusive as it may appear to those who don't like having needles stuck in their arm and methods are developed to deal with that particular issue.

I think the only area I really do disagree is the value of arresting collection scenario. Although obviously at this point it's been perhaps nothing more than a little bit above anecdotal, certainly the comments of the Commissioner were at least instructive in terms of determining how often people are out there committing the crimes that, frankly, don't have offenses in their background, they could qualify for collection under the current scheme, what would qualify under an arresting scheme.

At this point, again, we're dealing with anecdotal information more than anything, but hopefully we can obtain more studies or at least greater research determining how many people really are out there that an arrestee collection scheme would, indeed, identify individuals before they commit further attacks, obviously, on the victims in our society.

But I do want to thank you again. I think that's an excellent analysis.

MR. KAYE: May I offer two comments in relation to that? One is, Louisiana, I believe it is, has a statute to go into force in September that does provide for taking DNA samples of sex offenders on arrest. There are bills pending, I believe, in at least one other jurisdiction. We'll see how much they actually do with that authority.

Also, in that connection, the case I mentioned from the 2nd Circuit about finger-printing, the 1932 case, Kelly, the argument was made in that case that it mattered whether there was a statute that approved of the fingerprinting or not, because there wasn't one in the case of Barr, and the 2nd Circuit said it doesn't matter. It's a common law notion that you can take these -- that you can take identifying information upon arrest. We don't need a statute to authorize it and it's still constitutional.

So I'm not saying it wouldn't help to have a statute, but there is some argument about that.

COMMISSIONER CLARKE: It's actually, in a way, dealing with the statutes dealing with, in some states, the admissibility of DNA type. Frankly, in some states, they played a role in the court's decision and in other states, they played no role in the court's decision.

MR. KAYE: And there was another point you had which I've now forgotten my comment about. So I'll move on.

CHAIRPERSON ABRAHAMSON: Sheriff.

COMMISSIONER KENNARD: Professor, this was very well done. I appreciate your efforts in this regard, too. I get back to your special needs exception on page 17, and you suggest here how useful it is to collect samples from individuals on arrest for other than conviction, particularly for minor offenses. As a law enforcement officer, we refer back to the broken window syndrome, where those who are doing the minor offenses are the ones that are going to have a high propensity for committing these other crimes,

and you hit it right on the head, suggesting how are we going to determine what my crime prevention is doing and how can I articulate and quantify how much crime I have prevented by my crime prevention.

It's near impossible to do that, but that doesn't mean we stop doing it. And I believe it's in the government's best interest that we do this with the very issue of the small criminal escalates to the bigger criminal.

MR. KAYE: On Monday, I spoke with David Raritt about providing some statistics from England on just that matter of how much the minor crime collection is helpful in their system.

I'd add only one thing to what you say, because -- and that is, the question on arrest perhaps has to be focused even further to then do people who commit minor crimes go on to commit major crimes, because surely many do.

That is, if -- that argument, it seems to me, is a good argument for expanding the scope of crimes in the convicted offender database, for sure, right? And it's an issue I believe I heard talked about by David Coffman in Florida, that by expanding their database, it's becoming much more effective because they can get into these other crimes.

That's with the convicted offender database. So the question with the arrestee issue is, okay, do you catch enough people in the period between committing -- being arrested for the minor offense and being convicted for a minor offense that could be included in a convicted offender database.

Is that improvement sufficient to justify the invasion or privacy? Now, it might be. It would be helpful, before this is litigated, to try to develop whatever information one can on that point. But, of course, how can you do that if you don't start doing it by arresting people.

So maybe Louisiana, if it does that, but they're not doing arrests for minor matters. They're only doing arrests for sexual crimes.

DIRECTOR ASPLEN: But don't they -- if you are arrested for something, but ultimately cleared, the record of your arrest stays on your rap sheet, doesn't it, in most instances?

COMMISSIONER CLARKE: Unless you expunge it.

DIRECTOR ASPLEN: Unless you have it expunged, and as such, we may well be able to do that kind of study if we look at rap sheets of individuals who are, in fact, convicted and go back and look at how many times they were arrested and when they were arrested.

So it seems to me that between the numbers from the United Kingdom and what could be some studies here in the United States, we could essentially get a good analysis of what the benefit would be.

MR. KAYE: The reason I think that might be very helpful is that you do find in the convicted offender cases, the database cases there, statements from at least the dissenting judges or concurring judges. It's not the case that every judge that looks at these convicted offender databases thinks they're constitutional. Often, one finds in the dissents, or sometimes, statements to the effect that, well, look, we'd never approve data banking in everybody in the population.

Well, I think that's a more open question and something the work group is going to be talking about. But to the extent that one can say this is a problem where it's more likely that when you use this information with a person who is arrested for a minor offense, you will find useful information; that a member of the general public, it becomes much more palatable to judges.

If a defendant can argue that, look, you've picked on me, I was never convicted, you're still hanging on to my DNA. I'm like anybody in the general public, I'm like one of the judges on this court. That argument will carry more weight.

If the answer to that is, well, no, as a class, arrestees do pose more likelihood of being implicated, then the constitutional argument becomes stronger for the arrestee data banking.

COMMISSIONER DAVIS: To add a little note of levity to this, for many decades, we have fingerprinted dead bodies that come in routinely and we get the rap sheets and so forth. One I made a copy of that I use in my police lectures as the focus slide is Mr. Marcus, who was arrested in 1931. The charge on the rap sheet is, and I quote, "general principals."

CHAIRPERSON ABRAHAMSON: Dr. Adams.

COMMISSIONER ADAMS: I guess the only comment I would like to make is to ensure that everyone understands, CODIS has its name for a very important reason. It begins with convicted, and with the DNA Identification Act of '94, it did expressly give legislation that says the national system, as it stands, can only include convicted felons.

And even if Louisiana is to go about and collect from arrestees, they could not be inputted into the national system.

COMMISSIONER SMITH: But I take it you could run an arrestees' DNA against the case samples, right?

COMMISSIONER ADAMS: Not out of the national system.

COMMISSIONER SMITH: You could not? For comparison, we couldn't do that?

DIRECTOR ASPLEN: Can I not check my arrestees against the CODIS base and determine that this guy was just released, a minor offense?

COMMISSIONER BASHINSKI: Not on the national system, and you can't in our state, no. Some states you can, but not in our state. In fact, in our state, you cannot search a suspect -- we can't have a suspect file at all in California right now. We lost that capability.

MR. KAYE: Aren't there two different questions? One is, can you put the arrestee's file into the CODIS database? The answer to that is no. But can you run the crime scene database against the suspect under CODIS?

COMMISSIONER BASHINSKI: We can't.

MR. KAYE: And that could be an arrestee.

COMMISSIONER BASHINSKI: We can't.

MR. KAYE: You can't?

COMMISSIONER BASHINSKI: No, not against our state database. Only at the local level, which there are ways to do it, but state, we can't.

DIRECTOR ASPLEN: But not at the national level.

MR. KAYE: So the answer is that if a local authority said we have someone who is suspected of a crime, who has been arrested, and we have his DNA, could you run it against your crime scene database, samples from crime scenes that are in CODIS, the answer would be no.

DIRECTOR ASPLEN: David, why don't you jump in here?

MR. COFFMAN: Basically, first of all, the way CODIS is set up, let's get this clear first, you cannot send suspect samples or arrestee samples to national.

Let's go down one level. Now you're at the state level. Each state is going to be different, depending on the way their laws read. I know California, they cannot search suspects or even if they were doing arrestees, they couldn't do that at their state level.

In Florida, however, we have a Supreme Court decision at our state level that says we can have a suspect file at our state level. But that suspect file does not go any further.

So it really depends on the state. And to answer your question, in our state, if someone says we have an arrestee and we collected a -- they, for whatever reason, have a DNA sample, we could search the cases within our state, but that's where it stops.

CHAIRPERSON ABRAHAMSON: But if you had a DNA sample and it was coded, you cannot send it to CODIS and find out whether they've got a match?

MR. COFFMAN: Not the way the Federal rules are set up for CODIS.

COMMISSIONER BASHINSKI: Not unless the person is a convicted --

DIRECTOR ASPLEN: How about the DNA that was taken in Manhattan --

CHAIRPERSON ABRAHAMSON: Then how can you get ahead, so that you know who the guy is? I mean, that's the purpose of having the --

COMMISSIONER BASHINSKI: What you do is you search the evidence against the file. You have an unsolved case with no suspect at all. You search that, which isn't related to anybody, against a file of convicted offenders, and then you find out of that pool who may have been responsible.

CHAIRPERSON ABRAHAMSON: Then the answer to the second question is yes.

COMMISSIONER BASHINSKI: For example, I could search the profile. If I had a suspect that I had identified in an unsolved case, I could search the profile in that case against other unsolved cases, but I cannot take that individual's profile and put it in a database in California and search it against others.

CHAIRPERSON ABRAHAMSON: So that if you know that it's me, Abrahamson, I'm not arrested, but my DNA is at the crime scene. So if you know it's Abrahamson, you don't have to search it against anything, because you know who it is. But now you have my DNA. It's not identified.

Can I search it against CODIS?

COMMISSIONER BASHINSKI: Yes.

CHAIRPERSON ABRAHAMSON: Okay.

COMMISSIONER BASHINSKI: But the flip is not true. I can't put you in there to search against all these unsolved cases.

CHAIRPERSON ABRAHAMSON: I understand that, because I'm not convicted.

COMMISSIONER BASHINSKI: So the question I would have is let's say we were able to collect samples from arrestees and suspects in California to search against. Let's say we get a sample, because we have probable cause to believe this person is guilty of a particular case, and we determine that he's not. What's the constitutional status of taking that information, forget the statute in my state, and using that information to check other crimes? This person is an arrestee and there is no necessarily particular probable cause to think that he committed these other crimes.

MR. KAYE: So to make it even more concrete, suppose that you take the suspect's fingerprints on arrest and there is a database, NEFIS, would AFIS take the fingerprint and say we'll run it against it?

COMMISSIONER BASHINSKI: Sure.

MR. KAYE: And then the person is later not convicted. There's two things. One, I don't know of any cases specifically on that kind of a question or on the question of -- but I would think that the assumption remain -- well, with conviction, there is the argument that the conviction lowers the expectation of privacy. With arrest, I think, maybe you can make an argument. My guess is that like finger -- this is the question of retaining it as opposed to returning it, the identifying DNA information.

I guess it, too, turns on the outcome of this balancing test and I guess I'm a little concerned with the argument that this individual, having not been convicted, is now, for legal -- the argument would be -- this is what you would hear the ACLU say, and with some justification, the individual is really like anybody else in the public. You can't randomly pick somebody up and take their DNA and now we have someone not convicted of a crime and you want to hold on to the information indefinitely.

But, of course, you can do it for fingerprinting, the argument goes, so why can't you do it here, too.

COMMISSIONER BASHINSKI: Let me refine this a little more. I have a person that walks into the police station with a severed body part in his hand and he is implicated in four serial murders where he has dismembered people. It's probably going to be five years before that person is ever convicted of a crime that would allow me to put him in the data bank.

Would you say then that I should be able to use his sample to search other crimes that I have no other reason, other than they're just unidentified bodies, to find out if he might have been involved in those crimes?

MR. KAYE: That helps take this from the sort of overall statistical question that we're talking about of are people who were arrested sufficiently distinguishable from the population, to have a higher probability of successful hits, that we feel we can do that much of a minimal invasion of the privacy, to a graphic case where you might think you know this guy is much more likely to be implicated in some other horrible case, and then you might say, well, maybe the balance of interests clearly cuts in favor of the government. That's how I think about it.

COMMISSIONER BASHINSKI: That's a real case.

MR. KAYE: And then you're looking at -- so one is sort of the categorical exception for all arrestees and the other is that, well, maybe some subsets of cases, you -- I don't think the courts will actually go down that line and draw things quite that finely. I think it's likely that a simple rule that doesn't require police discretion of figuring out whom to arrest, whom to take DNA from and whom not, is in some ways perhaps preferable, and therefore, that might be where we'd end up.

But that's a good example which I think the report needs to deal with to put the question in focus of how strong is the government's interest.

CHAIRPERSON ABRAHAMSON: Chief Sanders has been very patient. So you have a question, and then we're going to cut it, but we can come up. Professor Kaye, will you be here tomorrow morning?

MR. KAYE: Yes.

CHAIRPERSON ABRAHAMSON: So write your questions down. We'll come back, or we'll come back at the end of the day, if there is time left, if that's all right, because I want to get to post-conviction issues before lunch. Chief Sanders.

COMMISSIONER SANDERS: Thank you. I'm not sure I've got a question, as much as I've got a frustration. I'm really confused about the benefit now of DNA testing on all arrestees if you can't compare it with any kind of database. With the cost of what it's going to do and this, that and the other, I'm really not sure why we'd even want to consider that.

I guess the second part of that is I thought that case in California, where they had the guy under arrest and they checked his DNA against the database, is suppose it would be able to work on a local level maybe or on the state level, but I thought that's what they did. They had the guy in custody, I can't remember his name, and then they found out that he killed those other four people and they related all these cases, while he was an arrestee. I didn't think it was a conviction.

Let me finish, or I'll forget what I was saying. I know we had a case in Chicago where the guy was arrested reference to a sexual assault, where, if you remember, where the eight, nine-year-old was charged with the brutal murder of the eleven-year-old girl and actually it turns out that the guy that was in custody, and he wasn't convicted, he was in custody, but I don't know where they took the DNA.

But I'm just saying, to me, I thought that's what this was all about, was to be able to -- maybe that's where the search and seizure will come in, because of the fact that if it's strictly for the purpose of identification, then it seems to me that -- I mean, fingerprints are the best way, and at least there we can run it in AFIS. I can arrest you and put your fingerprints in AFIS and if you're wanted somewhere else or you've committed some other crime, or if it's been collected, except for the argument that DNA evidence is easier to collect than fingerprint evidence.

I've been a policeman 30-something years and I think five cases that I've been personally involved in, if we got fingerprint evidence, that we could convict somebody on it. But the way you guys talk about this DNA stuff, I almost thought I was a detective again.

COMMISSIONER REINSTEIN: The DNA Act of '94 was very specific as to what files could be created at the national system or national level. Those files were unsolved cases and convicted offenders.

COMMISSIONER BASHINSKI: But every state is different.

CHAIRPERSON ABRAHAMSON: We'll come back to this. Maybe somebody can type that up, so we're all clear as to what can be matched against CODIS.

Okay. Thank you, Professor Kaye.

[Applause.]

**Postconviction Issues Working Group Report**  
*Judge Ronald Reinstein, Chair*  
*Professor Margaret Berger, Reporter*

CHAIRPERSON ABRAHAMSON: We'll move on to the post-conviction issues working group report, Judge Reinstein and Professor Berger. We're supposed to have some materials. Is this the statute that we're supposed to have? We have a chapter one, background.

COMMISSIONER REINSTEIN: Also, the statute that we handed out earlier in the week, Robin was copying that.

DR. FORMAN: May I suggest a five-minute relief break, for a moment?

[Recess.]

CHAIRPERSON ABRAHAMSON: We're back in session. Nobody is paying attention to me. We're back in session. You have here a proposed uniform statute, from Professor Berger and two of the members of the working group. Judge?

COMMISSIONER REINSTEIN: Well, if you recall, back at the Dallas meeting, we discussed where the Commission wanted our committee to go after we had finished the draft that had been tentatively approved by the Commission on post-conviction recommendations.

I gave various options that we had discussed and one of the first things that the Commission charged us with and gave us jurisdiction, because this was something that the legal issues committee was going to be working on, was to look at drafting a model statute regarding time bars and statute of limitations on post-conviction issues.

So we took that charge and on Monday, we met in Albuquerque, in conjunction with the National Conference on the Future of DNA Evidence, and knocked out a proposed uniform statute. This is very rough. We had almost all the people on the committee there, Kathryn wasn't there and Barry was not there, and things went very quickly without Barry there.

I e-mailed Barry the other day and told him that we had knocked this out. I haven't gotten an answer back from him yet. But Margaret had done some great work on what you have in front of you, the memo, the members of the working group, and then the second page is our first cut on it, and neither of us had a clean copy. So I've got some notes in here and you can just kind of ignore those, but Margaret's copy actually had more notes and she's going to add some things when she starts talking to you.

But, again, this was in answer to the issue of what happens when you have states like Virginia that have a 90-day time bar after conviction, after sentencing, and you had a case where there was no DNA evidence that was analyzed, the DNA really wasn't in existence for forensic ability, the testing in, say, the mid '80s, and now you've got somebody who said, I was innocent and I'm innocent and nobody ever tested the DNA and I'd like the evidence to be tested.

It hearkens back to Barry's most recent case in Oklahoma, where the two fellows were exonerated with DNA evidence, one who -- both of them had been in prison for 12 years and one of them was five days



from execution. So we've heard about those horror stories, and I'll turn it over to Margaret to talk a little bit about the statute.

PROFESSOR BERGER: Thanks. When we looked at the legal issues surrounding this issue, I think we were all impressed by the fact that the procedures out there dealing with newly discovered evidence and getting a new trial or whatnot on the basis of newly discovered evidence just didn't jive correctly with the problem here.

The problem here wasn't really newly discovered evidence at all. It was evidence that had always been in the possession of the prosecution and we want to make quite clear in this statute that we are not talking about going out and collecting new evidence, that you're going to the victim's house and starting a new search.

That we are talking about testing or retesting evidence that has been in the possession or control of the prosecution ever since the time of the original trial and conviction and that what the defendant needs is some mechanism for, first, getting access to that evidence. And frequently, until that evidence is tested, one is going to have no idea of what the results are going to be.

So we wanted to set up some procedure where, in a case where there was an appropriate showing by the defendant that this might lead to favorable results that could either exonerate or really lead to reasonable doubt, that the defendant would have the opportunity to request from a judge access to the evidence for testing.

If you notice that in our first paragraph, we attempted to do that without any time bar in terms of how long has elapsed since the time of the conviction. We did not put in any provisions, and we'll stick that in our comments, for where one makes this new kind of motion. We thought that probably states would like to take care of that themselves, if they adopted this statute, some kind of a version. We know that for some statutes on newly discovered evidence, you have to go back to the trial court, trial judge, if available, and maybe some states would want to have a special person in charge of this.

But that's a detail that we felt that the uniform statute should not deal with.

And then we broke the -- we had two different scenarios, mandatory testing and testing in the court's discretion. We thought that the mandatory testing should be for those cases where we thought that the petitioner would not have been prosecuted or convicted if exclusionary results had been obtained through DNA testing; in other words, a very high standard.

The reason we distinguished between that category and category B, where the court would have to find that the verdict or sentence would have been more favorable if the results of DNA testing had been admitted in the trial, resulting in the judgment or conviction, is because there are procedural consequences that follow, one of which is who is going to pay for the test.

We had discussed this at length in our committee and there was some feeling that the mandatory payment for an indigent defendant or indeed anyone should be limited to those cases where, if the results were favorable, you really would be -- a judge would be able to conclude that there is or would have been no prosecution or no conviction.

That for cases where still you might have gotten a less favorable -- a more favorable result as a defendant, and you really have to relate this to some of what we did in our chapter one with categories of cases, we felt that in those cases, maybe there would be a right to the testing, but that the petitioner would have to bear the cost. Though, again, we have given the court a good deal of discretion in this matter because the court could order, for instance, a state lab to do the testing, which isn't quite the same situation as payment.

We have also added both in the mandatory and in the testing in the court's discretion section, both of which start off "The court may order testing if it finds that," we've added -- you don't have it on this draft -- "after notice to the prosecution and an opportunity to respond, the court shall order testing," are the words. The prosecution has to be notified that this is happening. The prosecution has to have an opportunity to respond and the prosecution really will have an opportunity to request a hearing in a case where it feels that the judge is going to have to do some fact-finding.

We also changed in two, in both of them it says the evidence is still in existence and in such a condition that DNA testing may be feasible, we changed the word "feasible" to "conducted," because we didn't want it to sound as a legal requirement, the feasibility. This is really a question of the state of the DNA, of the state of the evidence, whether one could do DNA testing on it in terms of its degradation and whatnot.

Then as you can see, we have a section on procedures, which provides for this difference in payment for the two different categories, allows the court at any time to appoint counsel for an indigent petitioner, and we put in a fairly broad discovery requirement giving the court, again, discretion, it says "may order" the prosecution or defense to provide all parties and the court with access to the laboratory reports that had been prepared in connection with DNA testing, as well as underlying data and laboratory notes.

That's for the case where DNA testing had been done at the time of the original trial. And now the defendant is really claiming that the technology has advanced so that it's much more discriminatory and retesting might lead to results which, in the past, were considered inconclusive.

We felt that there might be cases in there where if you now looked at the original testing, you would see that it wasn't really inconclusive if all of the underlying data was provided. So for that type of case, we thought that rather than going into new testing, the court should have an opportunity to look and see whether you might be able to resolve this simply by taking a second look at the original test results.

You can see that the court, in connection with any testing that is ordered, new testing that is ordered, also has the discretion to order production of some of the underlying data.

Now, we also added a sentence, a four to our procedures, which would say that if the court orders testing, then the court may, in its discretion, make such other orders as may be needed. We thought that in the comments, we would talk about a whole host of possible things that the court might want to consider, such as splitting samples if there was going to be retesting, allowing the defendant to observe, allowing the defendant perhaps, in some instances, to test on its own in those cases where payment was not going to be automatic, allowing the court to consult perhaps its own experts, special masters.

One of the other things that we were sort of looking at was the possibility of perhaps setting up some commissions within states that could act as sort of advisors to courts when these kinds of issues come up, put in a reference to that.

And which I guess has become more complicated as a consequence of David's presentation this morning, the question of whether elimination samples might have to be ordered from third parties, which I don't know, David, if you have considered at all in terms of search and seizure, but we'd certainly like to have your comments on that.

Somebody who is not a suspect at all, but for purposes of giving meaning to the DNA samples, one might need a sample from. I don't know. Anyway, then we have the section, which really shouldn't have a number, because it really balances that request for testing, the second stage, which is suppose testing has not been done and one has results.

At this point, you can see that we're saying that if the results are unfavorable to the petitioner, the petition gets dismissed, and if the results are favorable, we are really kicking it back to the post-conviction system that the state has. So that we have not, at least at this point, set out a standard in this statute as to what a court would have to find in order to set aside a conviction or grant a new trial or whatever.

That would be governed by the standard in the state's own post-conviction remedy statute and might presumably be different in different states, depending on how they phrase their tests for granting a new trial.

We have not as yet compiled all of the statutes, but from the ones we've looked at, we can see that there really are different standards in different states.

So that's really what we have done so far.

COMMISSIONER REINSTEIN: The other thing that we didn't address on Monday, but I know it's something that we've talked about before, and for those of you who saw the USA Today article earlier this week by Richard Willing regarding our committee's work, Barbara Morgan, who is on our committee, talked about the issue of what's good for the goose is good for the gander, and the statute of limitations on prosecution, of what to do regarding those when you have crimes that the statute has run, but now DNA evidence, the technology has improved so much, that we can go back on those types of cases, and we haven't knocked out anything on that.

The other thing that I know that are issues that we could discuss are the flood gate argument, that just open up the flood gates. I mean, we'd be naive to think that once this comes out, that there won't be a flood of inmates who will be making requests for DNA testing for offenses that really have nothing to do with DNA. Every time there's a new case that comes out, I see a lot of the post-conviction relief requests from our jurisdiction and even though it has nothing to do with the case, it doesn't stop an inmate from filing a post-conviction relief petition on that issue that they've heard about through the prisoner grapevine.

The comment that Margaret made regarding the DNA advisory team, we got into those discussions because we're thinking in terms of, whereas in Chicago or Phoenix or New York, there may be numerous people on both sides of the table, of the argument on this, who are skilled and knowledgeable about DNA, what happens in Ajo, Arizona, or Atumwa, Iowa, when there's no prosecutors, no defense attorney, and the detective may really not have a whole lot of knowledge about this.

Do you set up, in effect, a DNA swap advisory team among the states, within the state, so that anybody could refer to this group of, say, prosecutor, defense attorney, and investigator, a laboratory, expert, a scientist and the like, to take a look at one of these requests and screen it out, as opposed to doing it within this county that doesn't have the jurisdiction, that doesn't have a whole lot available to them.

Anything else?

PROFESSOR BERGER: Well, certainly, we did not want to put in a system that required a judge to hold a hearing in the case of every one of these requests. We contemplated that in, I don't know, a huge percentage of the cases, the court would look at the paper submitted, decide this was a case that had nothing to do with anything that DNA could resolve, and that would be the end of the matter.

CHAIRPERSON ABRAHAMSON: Norm.

COMMISSIONER GAHN: How do you tie in the -- I'm looking under your mandatory testing. How do you tie in the judge to the categories? You know, those categories that you talked about. What concerns me as I read your mandatory testing, that there exists a reasonable probability that he would have been prosecuted or convicted if exclusionary results are obtainable. As I read that and I'm trying to think back over the many years I've -- that applies to every sexual assault I've ever prosecuted and I get a sense that there may be a flood gate opening this up.

I mean, I'm thinking back of -- and what concerns me also is with our new victim crime legislation of notification -- you know, back -- I used to deal with all the post-conviction motions, without notifying the victim of the sexual assault, because I never saw any reason to reopen that and have her keep reliving this over and over again every time they filed this.

This, as I read this, could open up every case I've ever prosecuted, because if I got exclusionary results, I wouldn't charge in the first place, and I do a pretty good job at trial, but I don't think I'll convict if there are exclusionary results.

So this seems to open it up. Am I reading this wrong?

PROFESSOR BERGER: I think that we certainly saw some cases, I mean, multiple assailant cases, and there are cases where we think that you could not reach that conclusion in terms of the evidence in the case, that you still would not be able to get an exclusion; that even if there was an exclusion, that would not be an exoneration.

COMMISSIONER CLARKE: I was struck by the same thing. Every non-DNA case with a sexual assault would be reopenable or actually be mandatory to reopen, by my reading of it.

COMMISSIONER GAHN: And my reading, too. Even every one we've prosecuted on consent issues.

PROFESSOR BERGER: Well, no.

COMMISSIONER GAHN: Well, that's how I would read this.

COMMISSIONER CLARKE: As opposed to the narrowing that occurred in the guidelines, the guidelines were very --

PROFESSOR BERGER: Well, the consent cases we never put into our category one -- our category at all in terms of if the defendant took the stand and testified to and made the claim of consent. I mean, we specified that quite clearly.

COMMISSIONER GAHN: I think we're happy with that.

COMMISSIONER BASHINSKI: But maybe it needs to be here.

COMMISSIONER REINSTEIN: And this is a working first draft and I think our intent was to tie this into the category one and category two pieces.

PROFESSOR BERGER: To cases, exactly.

COMMISSIONER REINSTEIN: The category one cases being the mandatory testing, the category two being the discretionary testing, and not anything beyond that.

PROFESSOR BERGER: Right.

COMMISSIONER REINSTEIN: And the category two is kind of the loose issue that we need to look at.

COMMISSIONER GAHN: That was my initial question. How, when you're reading this, does this tie the judge into the category one? How do we get to that, so that it's meaningful here? Do you see what I'm saying?

COMMISSIONER REINSTEIN: I do, and it's a good question, Norm. I think it's something we need to address. You've got to remember, we did this in about, what, four or five hours.

PROFESSOR BERGER: Three hours.

CHAIRPERSON ABRAHAMSON: But three is where the present state of evidence was going to be inconclusive. So I guess that would come under two, A-2, the DNA testing may be feasible. I assume it would not be feasible if it's going to be inconclusive.

Do you know that ahead of time, whether it's going to be inconclusive? I'm just looking at the categories again.

See, category three consists of cases in which, because of the present state of evidence or technology, testing will be inconclusive.

COMMISSIONER GAHN: I understand. My main concern is that without directing the judge to those category one, to those ones where it seems that this number one, mandatory testing, opens up almost any case without some reference to, now, wait a minute, there is a category -- there is a pecking order that we have developed and it should fit in here.

Otherwise, I read this as being able to open any case.

COMMISSIONER REINSTEIN: That's something we definitely will have to do in the content on the next go-around on this.

CHAIRPERSON ABRAHAMSON: Yes. I understand. It's limited to one and two, though, because three, four and five just drop out.

PROFESSOR BERGER: Right, and we really were planning to tie these comments, the comments to our categories and make quite clear what was intended. We certainly did not want to reopen every sexual assault case.

COMMISSIONER GAHN: Right. Good.

COMMISSIONER REINSTEIN: But as I said before, it will not stop an inmate from filing a petition. It's up to the judge then to have guidance with some recommendations, model statute, whatever it's going to be, to be able to screen out the vast majority of these.

COMMISSIONER GAHN: May I ask Kathryn what your -- under the victim legislation, where we have this notification, how do you see this as a post-conviction as far as notifying the victim of every post-conviction issue that comes up?

COMMISSIONER TURMAN: Well, I don't know any way to get around the state -- I mean, each state statute is different and some states don't even have statutes on post-conviction notification.

But I'm with you. I have the same sort of concerns, that you don't want to unnecessarily sort of raise these issues, but I think that has to be addressed really sort of at the state level.

But I agree very strongly with Ron and Margaret and your comments that it needs to be made very clear what kinds of cases we're talking to, so that there is a mechanism to screen out the frivolous or the ones that just wouldn't be dispositive at all.

CHAIRPERSON ABRAHAMSON: When you talk about mechanism, you're really going to whether this standard there appears to be a reasonable probability is fine enough or descriptive enough or narrow enough or broad enough, whatever language you want to use.

PROFESSOR BERGER: Reasonable probability we took out of the New York special DNA statute, statutes of limitation that uses that phrase. Again, I'm happy to accept other suggestions.

COMMISSIONER SMITH: We need a definition of exclusionary results, which would then give meeting to the reasonable probability.

COMMISSIONER ADAMS: Or exculpatory.

CHAIRPERSON ABRAHAMSON: Right. There's a difference between exclusionary and exculpatory.

COMMISSIONER REINSTEIN: Actually, the glossary of all those things is going to be within the recommendations. I think we've figured that all of those would cover it.

PROFESSOR BERGER: And we thought that there we would refer to the laboratory chapter and explain exactly what that meant.

COMMISSIONER CLARKE: Jan and I were discussing that really at least consider the use of exculpatory as a much broader term, because a lot of inclusions are exculpatory when you reverse what

the evidence is on, like blood on a victim's clothing or blood on somebody else that's inclusionary, which is, in reality, exculpatory, but not exclusionary.

COMMISSIONER REINSTEIN: I'd like to have some comments from anybody regarding the advisability or how practical it would be to do one of these DNA advisory teams, swat teams within a particular states, and really how workable that would be.

COMMISSIONER KENNARD: It would be a good idea, great idea, very workable, especially the smaller states.

COMMISSIONER SMITH: This hasn't been happening anywhere. Is there experience on this?

COMMISSIONER GAHN: I think it has. I mean, I've had a number of cases where Barry Scheck called our office. We have an attorney in Milwaukee, her name is Robin Shellow, and she will come to me and we'll sit down and meet and discuss the case and go over it and call Barry back in New York, and there has sort of been a -- I think it just forms automatically and you'll get the prosecutor who prosecuted the case, get his or her opinion on it, maybe many years -- so there is a process that just naturally evolves when one of these comes up.

Nothing is formal in it, but all the players eventually are there talking and you get the crime lab involved and, say, the detective came in and met with us, well, you go look for the evidence, find it. It just naturally evolves.

COMMISSIONER SMITH: When something happens in Superior or some other place where they don't have the experience, that you guys do it -- are you helping the other parts of the state?

PROFESSOR BERGER: That's what we're concerned with.

COMMISSIONER REINSTEIN: Our issue was that the rural community, where, in 1989, there was a sexual assault conviction or a murder conviction, and the prosecutor isn't there anymore and they get one of these petitions, a judge gets it, the prosecutor gets it, they say I don't know anything about this DNA stuff.

If there is something set up, either loosely or firmly organized, within the state to say we've got a prosecuting agency or that the state prosecutors organization says, yes, we've got this, you can go to this particular group and this is who to call, that type of thing.

COMMISSIONER GAHN: I've had them around and I usually end up getting -- once it gets to the Attorney General's office, and usually they do, somehow they rope me into it.

COMMISSIONER REINSTEIN: Ours is the same, Norm. I mean, every judge in the state seems to end up calling me whenever the word DNA gets used. But if you've got a new judge or you got some prosecutor just gets the petition in or a request or a letter from somebody, should there be something that's formalized.

CHAIRPERSON ABRAHAMSON: Would it make it harder or more difficult for you or easier for you if it were formalized?

COMMISSIONER GAHN: I'm not cheering for anything.

CHAIRPERSON ABRAHAMSON: All right. In the abstract, is it easier for the system, the legal system to work with an informal advisory board than it is to work with a formal one? A formal one, you have to call meetings, you've got to have appointments, who makes the appointments, do you keep minutes, et cetera. Informal.

COMMISSIONER GAHN: My experiences in Milwaukee County is informal is working and will continue to work that way and working well. But I understand your concerns. If this happens up in Ashland County in Wisconsin, will they just take it and run with it alone and not even know anything about this, and that is a possibility. That is.

COMMISSIONER SANDERS: It just seems to me that one of the reasons we came up with this was to help law enforcement at all levels to understand it. I'm just speaking for myself. Anytime that there would be a resource, especially if it was readily available, that you would avail yourself of it. I can't speak to the prosecution end of the judicial system, you guys may be more organized or more formal, but with law enforcement, it would definitely be beneficial for us.

COMMISSIONER CLARKE: I was going to say, my experience with -- the informal seems to work pretty well. Of course, the scary one I was mentioning to Jan is when you get the call the day before and the execution is set the next day, but clearly those jurisdictions that don't have access to those resources, at a minimum, I think they need to be informed about here are some places to turn, whether it's formal or informal, they need to have that information at their hands.

DIRECTOR ASPLEN: It may be the kind of thing that is appropriate for the development of pilot programs. We need to think towards what can we suggest to the Attorney General about this issue. What we could suggest is some programming money being allocated through OJP, through National Center for State Courts or something, but some program that would develop pilot programs to which other states could look to find successful best practices.

COMMISSIONER GAHN: Might I add, just from personal experience, these can take an incredible amount of time and a prosecutor is busy enough, but to go off -- most of the cases are off-site -- searching for them, and if you're going to do a thorough job, you're going to read that case file, you're going to get some transcripts, and it can take incredible amounts of time, just determining whether we should do a retesting, and it's something to keep in mind.

CHAIRPERSON ABRAHAMSON: Kathryn.

COMMISSIONER TURMAN: I think that most victims would feel better when these comes up if they knew there was some sort of formal mechanism. How formal it doesn't matter, but that there is some body, a multiple group of experts who are looking, to sort of weed out the frivolous or the irrelevant. I think that would be reassuring for most victims.

CHAIRPERSON ABRAHAMSON: Unless I hear an objection, I'm going to -- I'm sorry. I should first ask Professor Berger and Judge Reinstein, is there any other information you want to give us or that we can give you before lunch?



COMMISSIONER REINSTEIN: I guess the only other thing is we're going to continue to work on these issues, but I guess Chris can give us our charge, as well as anything else the Commission wants our committee to look to.

CHAIRPERSON ABRAHAMSON: That's a good question that we're going to let Chris answer.

COMMISSIONER REINSTEIN: We can talk about that in our discussion period tomorrow, too.

CHAIRPERSON ABRAHAMSON: Yes, that's what I was going to do. There is a discussion period first thing in the morning. So we've got Professor Kaye on and you for further discussion and comments.

I think this is a good idea about the potential pilot project, if you're interested.

We have a break for lunch. Lunch is going to be right here. It's a working lunch, and David Coffman will speak with us. Then we come back in session at 2:00 and Dr. Crow is being picked up at the airport as we speak maybe.

[Whereupon, at 12:50 p.m., the meeting was recessed, to reconvene at 2:00 p.m., this same day.]

**Working Lunch**  
*David Coffman*  
*Supervisor, Florida DNA Investigative Support Database*

[1:20 p.m.]

DIRECTOR ASPLEN: If I could have your attention, we're now in the working portion of the lunch and we have time later on this afternoon, I hope David is here, because as you can see from his comments already this morning, I think it's crucial to what we're doing.

David has also officially joined the working group recently and is already a tremendous resource in that regard.

He is currently the crime laboratory analyst supervisor in the Department of Law Enforcement at Tallahassee, supervises the State of Florida's DNA investigation database and currently serves as the State of Florida's representative on the CODIS committee. He is also a member of the DNA advisory board.

It's fair to state that Florida is widely recognized as the most successful DNA database in the entire country and that is largely, in part, due to Dave's efforts. His hard work and, more importantly, I think his vision has gone towards how to constantly improve their system.

MR. COFFMAN: Thank you. I want to thank the Commission for allowing me to talk about the program there in the FTLE, and I put at the bottom there James T. Moore. He is our Commissioner and he's been the Commissioner for the last 11 years, and he deserves so much of the credit, because I've talked to my colleagues in other states and other agencies and if you don't have the support of the guy in the big office, wearing the suit, you're not going to go very far. So we couldn't have done what we did without the Commissioner.

I'm just going to give you a quick overview of what we're doing in the Florida. We're not to the point of all felons yet, but kind of give you a brief overview of what we've done, the successes we've had, and since this is the future of DNA evidence, I'm going to tell you some things that we haven't implemented yet, but things that we're looking at, so you can see where we're trying to gather some information and data.

We began collecting from sexual assault and lewd and lascivious acts back in 19 -- our law was passed in 1989. We began collections in 1990. In 1993, we added murder and attempted murder, and in 1995, we added aggravated battery, home invasion robbery, and carjacking.

Now, the aggravated battery, the reason we added that is, in our state, now, this is purely in our state, I'm not saying this happens everywhere, but that is a very common plea bargain in our state for someone who is charged with sexual assault.

What happened was we take a lot of input from the investigators out in the field and they said, look, we think this guy is involved in this sexual assault, is he in your database, and I go, well, no, he isn't. And they go, but he was charged with sexual assault three times in the last five years, and we pull his criminal history and, sure enough, he is convicted of aggravated battery.

So that's why we added aggravated battery. We called about 20 state attorney offices of the 67 and they said, yes, that was true, that that was a common plea bargain in those type of cases. So we added aggravated battery

Our hits pretty much have doubled by that addition of one law. It's really amazing. I'm not saying that aggravated battery in your state is going to yield the same results, so keep that in mind.

Home invasion is pretty obvious and carjacking, we have a very strong psychological profiling unit, they don't like to be called profilers because of the TV show, but actually our profiler in Tallahassee looks a lot like the woman on the TV show. But anyway, she insisted she wanted carjacking on there and she said the reason was that's a confrontational crime. If they wanted a car, they'd go steal a car. They picked a car with someone in it.

So that's why she wanted that added. We have so few of them, it wasn't really an issue to include it. So we went ahead and included that, also.

Currently, when I left my office, we had 167 hits since we began, and that's statewide. So that includes the local hits they made with CODIS and the state, and some Federal.

We have had over 287 investigations aided and I always tell people the reason that number is different is one of our hits ended up linking 12 investigations. So that number is going to be bigger. And I'm not always informed of how many others they linked to it, so I put the plus at the end of it.

Also, we're pretty proud of this, a few years ago, in 1997, October 1st, 1997, the statute of limitations on sexual assault was lifted in Florida. There are certain stipulations, such as you have to have reported the crime within 72 hours and things like that, but basically we have solved approximately four sexual assaults and one of them was literally a week after the statute of limitations ran out, and the individual just got out of prison.

So there were other groups pushing for this, also, but this seemed to be just what it took to put it over the edge, and so they did get rid of the statute of limitations for sexual assault, which we're really pleased about, because it's very frustrating to know that someone is out of prison and you've linked them to a sexual assault that they committed within the first month the last time they got out of prison, and there is not a thing you can do about it.

I thought I'd give you a breakdown of the hits by year, because as your database grows, your hits are going to grow, and I think this shows it.

We had three hits in 1992, five in '93, four in '94, then 19 in '95, that's when we added aggravated battery, '96 we had 32, '97 we had 30 -- you'll see another slide. We had a law that went retroactive, and so we went from getting about 6,000 blood samples a year to we got 28,000 that year.

So collection efforts hampered our analysis efforts and it's important to realize that you have to collect and analyze the samples to solve crimes. Just collecting them and not analyzing them doesn't do anything.

We had 63 in 1998 and so far this year we've had ten. Now, actually, our hits have dropped off a little bit this year, mainly because we're converting to STR and we have so many people in training, not as many cases are currently being worked, but we expect that to change by next year.

Here's just some -- the first correlation are kind of looking at the data I did when we started making hits was I checked to see what the crimes that we were matching, what the offenders -- why we had their blood in the first place, what was the collection crime that put them in our database.

As you can see, for sexual assaults, it kind of goes down to the most common collection crime was a sexual assault, but aggravated battery was fairly high, also. Lewd and lascivious, homicide and home invasion.

Homicide is pretty much across the board, oddly enough. We have actually assisted in the homicide case where the individual was in prison for homicide, but that's mainly due to the fact that they usually keep them in prison when they're convicted of a homicide. So it is a deterrent.

Burglary -- and keep in mind, this shows that we can have burglaries across the board with all the different crimes. However, that number is not as large as it would be. If you look at the British system, they have a lot more burglaries that they're solving, but the fact remains that our crime labs can't possibly work all the burglaries that are out there right now. We're trying to get to that point. We don't want to give up and say you're never going to be able to work all the cases that need DNA, I think we should always be aspiring to that, but this shows the correlation that just a few burglaries, for whatever reason, were analyzed in our lab, just to demonstrate that.

Now, then what I did is I looked at the criminal history of these individuals that we matched the sexual assaults and homicides and I wanted to see what their prior criminal history was. Eleven percent had a prior firearms possession. By the way, when I looked through all these criminal histories, there seemed to be about five or six major crimes that they all had. There weren't really that many unusual ones intermingled in there, so I put the top five or six.

Also, you mathematicians out there that are good at adding, this does not add up to 100 percent, because some of them have all of them, all of them in their criminal history, so it does that up to more than 100 percent.

Thirty percent had a prior drug charge, 34 percent had a prior grand theft charge, 34 percent had a prior robbery charge, and 52 percent had a prior burglary. So there is that burglary connection again.

Interestingly enough, with the six crimes that we collect for, only 18 percent have only those types of crimes in their criminal history. So we're missing a lot of people.

Now, I was -- at the PERMEGA meeting, I presented this data and I was asked a very interesting question, and I proceeded to work with our Department of Corrections and it's taken me a year -- no -- about five or six months to get the results from them.

But someone -- I was asked have you compared how many people are in the prison system for burglary, how many have prior violent offenses that we collect for, and, in fact, some of the data I just downloaded today from my e-mail. They finally got some information back to us.

Fourteen percent of the people in our probation and in our prison right now for burglary have had a prior homicide in their criminal history. Nine percent of the convicted burglars have had a prior sexual assault.

Thirteen percent have had a prior aggravated battery. Remember, in my state I include that because that sometimes translates into something else. Nine percent had prior lewd acts.

So that gives about 45 percent total, people in prison for burglary had these other offenses, which isn't that far off in the 52 percent I'm seeing with the crimes that we're connecting to sexual assaults and homicides.

So there does seem to be a correlation that they just don't do one type of crime. There is a propensity to do others. Currently, we're collecting about 600 samples a month. Total samples collect thus far is 56,000 and we are current with DNA analysis. We have a DNA result of some sort on every offender now. We're converting to STR, so our STR backlog is about 53,000, but we have some DNA result on all these people.

I think we were caught up for about three months before the correlations were picked, and then an instant backlog.

Now, future plans for expanding the database collections. We want to add burglary next legislative session. We think we have the numbers to justify that. Additionally, if we add the burglaries, our law makes it to where you go retroactive. We'll get 42,000 samples the first year along, just burglaries. That's not include the seven to 8,000 we're already getting.

Thereafter, there's about 16,000 a year that occur thereafter. Then we want to move to all felons. We would get -- if we did all felons today, we'd get 150,000 samples immediately. Then there is 43,000 per year thereafter. Now, the longer we wait, like if we add burglary and go about it slow, that number is going to drop. That 150 is if we did it today. But obviously, if we catch the burglars, we're getting 43,000 of those. So it's going to drop correspondingly.

Recidivism rates, I told -- I just went blank -- Chris -- excuse me -- I told Chris that I'm getting closer and closer to dropping the ball with these presentations, because I was actually in the back of the room typing up slides from questions that were mentioned on the Commission, because we happened to have some answers to some of those.

Recidivism rates in Florida, basically what I did is I asked our prison system how many people enter the prison system each year. That includes prison and that includes community control.

We have 115,000 offenders that enter the Florida corrections system each year in some way; 43,000 of these offenders have never been in the Florida corrections system before. So that's a pretty constant number, about 40 to 45,000 have never been in our system at all.

Now, it does not mean they weren't in somebody else's system, but it does mean they weren't in our system.

So what this translates to is a 63 percent recidivism rate for all types of offenses. I haven't asked them to break it out by offense, because I don't want to tick them off. I don't want to lose my contact at Department of Corrections. But I'm hoping to write an article or a journal article and ask some specific questions and they'll get it for me, but what we're doing now is they're writing these queries for us that we can easily input different results.

But that is very similar to the 67 percent for sexual assault recidivism rate that's been quoted several times from different studies. But this is for all crimes and only State of Florida offenders.

These guys are -- most of them, it's kind of frightening to know that most of these individuals -- and these are convicted sex offenders, by the way, this pie chart.

Most of these guys are out on the street. They're not in the prison somewhere. If you look at it, 46 percent are on probation, four percent are in local jails, which, even though that's confined, they usually don't spend as long a time in a local jail, and then 12 percent are actually on parole.

Now, I'm going to air some dirty laundry in our state, because it's really been a problem for us since the very beginning. With so many agencies involved in blood sample collection, it has just been a huge task to get these samples collected. We're getting 100 percent of the samples of the people who are going through prison. In fact, I always say we're getting 105 percent, because we reject a bunch because they send us -- you know, we're not entitled to this guy, you need to take it -- you know, we destroy the blood.

So they give us more than we should get. But at the probation level, we're just not getting them at all. And this shows the breakdown.

We should have received 4,828 samples in fiscal year '97-98, and we only received 1,300. In the first two quarters of this year, we had only received 685.

Now, I will say that in the third quarter of this year, because of some letters that we have sent out, and I'll mention that later, we have collected 672 since January. So we are making progress in the collection of these probationers.

Here's the breakdown of the submitting agency types. The green is blood samples that were collected from the prisons and 1996 shows the big year where we got all the retroactive individuals.

The red is probation and then juveniles is yellow. And so we are making improvements in all those areas. To improve blood collection compliance, we need to do several things, legislative changes.

Unfortunately, every time we make a legislative change, it makes the problem worse. Actually, we're getting very good compliance with probationers in quite a few counties and our probation offices -- you know, the areas that we're having a problem said if you will court order it, if you could just say that they need to court order it, then we could collect the blood, because some of the sheriffs are saying we can't collect the blood unless we have a court order that puts him in our custody to do so.

So what we do is we listen to them and we did require a court order and immediately a memo went out from Department of Corrections and it was faxed to everyone and some of my buddies in the probation program faxed me a copy that said stop all collections of probationers unless a court order is accompanying it.

So it actually killed the counties that were in compliance. So we actually went backwards. Every time they mention legislative change, I just go, well, how are we going to mess it up this time. So that's been a real problem. But right now the law reads that if the individual is not going to prison, that the blood sample must be collected before he's released from the custody of the court.

Now, that could mean he's escorted over to the jail by the bailiff or they have some sort of mechanism in the courthouse, as it stands now, but this legislation has been effect for about eight months. We have yet to receive the first sample from the courthouse.

It's just -- it's hard. We've got so many agencies, it's hard getting these people to do it. And the thing is, if you find a county that you can get to comply, like I always pick on Dawn Herkenham, because she and I are friends, but I might say Dawn Herkenham is my contact in Tampa and she believes in this program and she collects all those blood samples, and in a year and a half, I notice the blood sample compliance dropped off totally and it's picked up in metro Dade all of a sudden, where we never get any samples.

I call and I find out that Dawn has taken a job in metro Dade and Tampa is now gone. So it's a constant battle. I'm going to mention that later, but what these people have to do is make this part of your policy. Don't just say, yeah, we'll do it for you. Write it into their policy. Sheriffs, these community control, juvenile detention centers, this has to be part of their written policy that they do and it's not dependent on someone's enthusiasm that's in the agency.

So we hired a training liaison. We have someone full-time, that that's all they do, is hit hot spots in the state when they drop off, go down, rah rah, here's what we can do for you, send us samples, it goes back up for a while. But it's just frustrating, because if we lost that person, our -- our blood sample collections went down when she was on maternity leave. I mean, that's how weak the base is for probationers.

Also, this has been very productive. Periodic compliance correspondence. We used to do this once a year and we just sent out a letter that said, hey, you're not doing 100 -- no one was doing 100 percent, so it was an easy letter to send out. You just mail merge it.

But we sent this letter out, you get some people calling up saying your numbers are wrong, we are doing it, you know, and then we wait for the next year and nothing changes.

What we did this year, because we've made this contact in our Department of Corrections, is we can actually give them hard numbers of the number of people that should have been collected at the county level and DOC, Department of Corrections, has actually given us an Excel spreadsheet that has the people's names and Department of Corrections numbers, so we can actually compare it to who we do have and we send out a letter that not only gives them the percentage of their compliance, but gives them a list of names that we need, that weren't collected.

So there is not any more arguments that your numbers aren't any good or that type of thing.

Also, we send the spreadsheet that shows percent compliance, it shows all 67 counties on the same spreadsheet. So good old-fashioned competition does a lot, too, because Palm Beach does not want to be upstarted by Broward or Jacksonville does not want to be put behind the eight-ball with Orlando. So you get kind of some competition there and just to let you know, our blood sample collection has gone up 45 percent since this letter went out.

We're talking this went out April 1st. Our average blood sample collection is 600 a month. We got 919 in April and the excess was all from local level jails. So we're going to do this on a quarterly basis now, because we've already got the template in place.

In our state, when I first started this in 1989, we said that -- the law said FDLE will analyze these samples and provide the blood collection kits and these guys all have to go through a sheriff sometime, so the sheriffs will collect it.

Well, this is what we have found out, who all needs to be involved to get this done.

We have reception centers in the Florida where the prisoners go through before they're farmed out to the prisons. We have the prisons and probation and parole. They're all different entities. County corrections, we have the sheriff and the county jail, and, also, something that's sweeping over the State of Florida is private jails, where it's not run by the sheriff anymore. It's run privately, and it -- well, let me watch what I say here. From my perspective, on my project, it's a nightmare, because what happens is if you don't put in their contract and in their bid specs of what they will do, they will not do it.

So we have a great collection compliance here and all of a sudden it stops and my -- you know, Dawn is still over there, so I know she still believes in the program, and it's like, whoops, we forgot to put it in the contract, so you'll have to wait two years before we can start collecting again.

So I have been -- we've been sending out little mailers and calling people that says, look, if you're considering doing private contracting, put one little statement in there that says private contractor must adhere to the laws of the State of Florida. That ought to cover it, I mean, I would think. But anyway. So that's a real problem.

The Circuit Court judges need to be involved, Department of Juvenile Justice, the State Attorneys, and the Clerks of the Court. We talked to the Judges Association, and this was from our Judges Association, they said, look, don't talk to us, talk to the -- they were saying talk to the clerks. I will sign whatever they put in front of me. They keep everything going, running smoothly, and they said they'd do it.

So the clerks have really helped us a lot and we appreciate the judges' candor, that they are the ones that can get this going.

COMMISSIONER SANDERS: Question. Are you telling us that there are private jails being run or private collection facilities?

MR. COFFMAN: These are county jails that used to be run by the sheriff, are now being run by the private sector, under the -- I don't know. I just know that they exist and they've been there since 1994. They've been popping up all over the state, privately run correctional facilities. It's physically still in the same plant that the sheriff owned, but they didn't have the manpower to run it, so they got a contract to run it, and, yes, they are privately run at the direction of the sheriff, but if they don't put it into their contract, they can't make them draw a blood sample for our purposes.

In fact, are you from Florida?

COMMISSIONER SANDERS: No. I am a sheriff and I find it hard to believe that there are privately-run jails.

MR. COFFMAN: Yes. There's private-run prisons.

COMMISSIONER SANDERS: I've never heard of it.



MR. COFFMAN: Right off the top of my head, Dade County, Florida, if you want to call your counterpart there and ask them how it's working, but they have a private-run jail.

COMMISSIONER SANDERS: Sheriff Berry, is he from -- where is Sheriff Berry from?

MR. COFFMAN: I don't think Sheriff Berry is in Dade County, but I'm so bad with names, I'm not going to attempt that. But we have 67 counties. But they do exist.

Three steps to a full statutory compliance is we need to get the judges to order the blood collection at the time of sentencing.

The offender reports for the blood, for blood sample collection prior to release. So if the offender comes in and they go time served, there needs to be a mechanism that they know this is on the docket, they have a contract nurse, if you're a bigger county, that you would have the case load, or the bailiff takes them back to the jail, which is what happens in Cecilia Krauss' area. They physically take them back to the jail to have blood sample drawn and then they're released from there.

Then blood samples received and analyzed for the DNA database. But this is what we have to do. These guys are out there committing these crimes again and these are the very people we're not collecting, and it's a problem, I would say, in most of the country. I think Virginia has a real good handle on their collections, but they're organized differently than we are. They are kind of part of that system.

Common obstacles we've been told to compliance is that, well, the judge fails to order at the time of sentencing, and, in conjunction with this, the state attorney doesn't request it. That's another issue. The state attorney needs to request it.

Requires going back to court if you don't -- if the judge doesn't order it at the time. Resistance from the county jail, that they're concerned about liability; he's technically been sentenced and why they have him back in their jail, they're worried about that. Funding concerns, I've actually even had a county that would probably spend about \$25 a year in mailing, saying that they could not do it because of the mailing costs.

So I wrote them a check for \$75 and I said this will cover you for the next three years. Of course, they tore it up and they still don't send bloods.

Lack of sufficient medical staff. We have some pretty small counties. Actually, our smaller counties are the ones that are all gung ho on it. I mean, when I went -- we visited every county before this started and a very small county in our state, I mean extremely small, I was describing what we were collecting for and he said -- he goes, well, hang on a minute. He goes, Billy Ray, come here, and a guy came out that was sweeping the back room and he goes, didn't we get you for showing yourself in the park? And he goes, no, no, no, that was six months ago. He goes, okay, never mind. Sent him back. He was going to go get the blood sample from him right then, let me carry it on back to the lab.

But in that county, they're at full compliance. They've sent us six samples in the last six years.

And we have resistance from probation officers. Actually, the probation officers themselves are very supportive and I don't want that word -- it kind of sounds negative, I couldn't think of another word, but it's just time constraints. Our probation officers, I don't know if your states are the same way, they are so

overworked and have all these new legal changes and predator registration and all this. It just doesn't get done because they just don't have the time or the manpower.

So that's why we want to get it done in the courthouse.

What have we learned since we started?

Well, sharing information between criminal justice agencies is crucial and in our state, we're probably not much different than any other state, our prison system database does not talk to the FDLE database, does not talk to the court database. They're all different systems.

You can't really get the information to just connect. So that's a real problem in our state. But what we've done is we've gotten criminal history access for our DNA database staff. We can actually go into the criminal history and if any of you know how that is, that was a tall order, and it's run by FDLE, but it -- you know, I had to sign all sorts of forms and training and whatever just to be able to go in there, but they gave us the ability to change one area of the criminal history and it's to check whether a DNA record was on file or not.

So in our state, we have the DNA record on the criminal history, so we don't get a lot of repeat blood draws, because these guys are repeating. You know, before we started doing this, we had 40 percent of the bloods we got we had already had before. Now we're down to about five percent and it's normally a name change or something like that.

Also, we have a criminal justice network called CJNET in Florida that is an internet within the State of Florida and it's linked up to 600 law enforcement agencies and criminal justice agencies in the state. That includes prison, the state attorney's office, police departments, sheriffs, everything.

Now, this is the future part of my talk. What we're hoping to do is we're hoping to put on CJNET the database of names information on the offenders that we have and develop an interface where they can do a name search or plug in the Department of Corrections number to see if the inmate has already been collected or not.

The reason we're doing that is because the criminal history record, because of the two agencies not talking with each other, their computer records, about 40 percent of the files are not marked and it doesn't mean we don't have them. It means that the name was slightly spelled different or there was maybe an error in the Department of Corrections number. So we want to do that.

We also post on our CJNET any hits that we've made between cases, so local law enforcement can go on there and see that maybe these cases that were linked here, maybe it has a similar MO to a case that's in their jurisdiction and maybe they can submit that case to be analyzed, that they may not have done it before.

Also, we do have access to the corrections inmate database, the DNA staff does, and so we can check records of when someone went through the system and that type of thing. Agencies involved must make sample collection part of their policies, which I already hit on that, and we're sending out the periodic status reports.

Now, I'm going to go into another future aspect of it. The second part of the equation is not just collecting the database samples. We have to work these cases out there and we have to move to work all cases that have DNA typeable results.

We need to work more cases without suspects. We need to work -- more non-violent cases need to be examined, such as we don't work those burglary cases for the database, because they could be linking to other sexual assault cases or violent crime.

Additional personnel, though, is going to be needed to get this accomplished in most crime labs. Additional funding, obviously, because the PCR and STR process is not cheap. Also, in a lot of areas, additional space. Just because even if you went with double shifts, one of our labs is already doing double shifts and they can't -- their desk is literally about this big, it's three foot. They have the three-foot cubicle, with no side walls. It's just a flat one against the wall and they have three foot of space to work in our Orlando lab. We're just swamped for space -- or starving for space.

Identify -- this is something I'm going to tell you about the State of Florida. It's been shown in several states, it's about 67 percent of violent offenders repeat their crime. The average number of sexual assaults per offender is about nine, and that means there's people with a lot more and people with a lot less.

In Florida, this is the uniform crime report, we had 13,224 forcible sexual assaults in Florida last year, in 1997. We received statewide, this includes county, city and FDLE, 3,755 serology service requests. Now, any of you who work in a crime lab knows that it's going to be something less than that, because sometimes you get multiple submissions on one case.

So we're not working all the cases that are out there. Now, before I go any further, I am not trying to say that there are 10,000 cases that we haven't worked for DNA. Not all those would have evidence that could be tested. A lot of these are reported months and months after the crime occurred. A lot of these, the investigator has deemed that this case is not going to go any further.

So I'm not trying to say that, but what I'm saying is there is a difference and I have called local sheriffs and local police departments and just asked them, are you withholding cases that, in an ideal world, you would have sent to have DNA done on them, and they said yes. The range was between 20 and 60 percent.

So we would probably say we're guesstimating 30 to 40 percent of cases that need DNA done on them are not being done. So we're thinking in Florida that we have about 2,000, 2,000 cases that have evidence that need to be looked at and it's not being submitted because they're worried about bogging our system down.

I mean, I asked them, I said, are you not sending them because we've told you not to, and they go, well, no, you haven't said that in the last two years, but you did for the first 30 years of your existence, don't send cases without suspects. So it's re-educating them. But they told me, they're not stupid, if they had the cases going to trial and they need results in six or eight weeks, they don't want to send you the 400 they have in their refrigerator that they know has to bog us down. So they're choosing not to send them.

So we're trying to come up with a way to alleviate that problem.

Possible solutions.

We could keep current case work acceptance and analysis policy, keep that the same. Work with local law enforcement to identify sexual assault cases that are not being submitted and find out why. I mean, a more formal study, rather than just me calling up and asking.

And we need to -- we could -- on these cases that are not being sent to us, we could limit the analysis on these cases initially to only the sexual assault kit; in other words, do the blood standard and the cotton swabs from the rape investigation, because looking at the sexual assault kit only is better than not looking at the case at all.

Limiting the type of material to examine, such as a blood standard and a cotton tip swab would allow streamlining and potentially automation of the technique, and that's what we hope to do.

Search the DNA profiles against the database to aid in the investigation and if no semen is identified, the contributor may -- the law enforcement contributor may want to submit the remainder of the evidence using the current case acceptance policy.

So that's the pilot that we've proposed. We're going to identify about 250 cases that local agencies have not sent us, all sexual assault.

The analysis of these cases would be performed using existing funds and we're going to use database funds, because we have found a way to cut our costs, but I don't want to say anything about it because I'm afraid the vendor will up their price. No, I'm kidding. But we can fund it from our database resources to work these cases.

We could use existing crime laboratory resources and each region could perform the pilot, or we could utilize the DNA database staff and a case work staff for the initial pilot and then roll out to all regions when the manpower for the new case load is addressed.

Because what we want to do is we want to use this to maybe get legislative support to double the crime lab staff for DNA or whatever it would take.

Now, this -- by the way, this -- I was in a leadership class within FDLE and this was my class project. I didn't have any idea that they would like it. So that's why I'm presenting this. We are proceeding with this.

But I had two options. We could have the case work lab do the pilot. There's pros and cons.

The pros are there is less training required for the crime lab analysts, because they're already currently trained. It would also provide crime laboratory analysts valuable experience in the interpretation of mixtures using the new technology in a more simplified case, such as a sexual assault kit. So that's the pros.

The con is they already have their court commitments and they already have their existing case load to maintain and if they could do 250 more cases, they would have done it already. So that's the con side of it.

We also suggested having the DNA database perform the pilot and what we've proposed is all of our crime laboratory analysts have the same educational background as the case working analyst. However, only two of my analysts have case work training. So the other analysts would have to be trained in our case work training program.

So the pros is the database -- we're used to streamlining and automated techniques. It's funny.

You get into the mind set of doing automation and ways of streamlining and the ideas just keep coming once you see the benefit of it, and some of our case working people, they're not used to that, and it's sometimes threatening to think of automation and streamlining. So I think that's a pro in the database looking at this, because we can bring new ideas and new ways of looking at things that they hadn't considered.

Also, we don't have any court commitments or rush cases to take focus off the pilot and we hope to be through with the pilot long before any of these cases ever went to trial, because we don't want to do this permanently. We just want to get the pilot for justification.

The cons are most of the database staff at this time would require more extensive training to become case work qualified and, also, the database would only want to be involved in the pilot; therefore, we'd still need to implement, in case work labs, if the results warranted, because we don't want to become another case working lab. We want to continue with what we're doing, because we think we're doing good work and quality work.

So these were the two suggestions, and basically we decided on a hybrid of both. The Tallahassee case working lab is going to do the pilot and because the database is located in the same facility, we're going to assist them with their automation. We'll do their PCR setup, their post-amp setup, run it and give them back their information, but they do all the extraction and that type of thing. So it's kind of the hybrid of the two ideas.

Benefits of this approach is being able to examine more sexual assault cases, at least looking at part of the evidence; apprehending sexual offenders earlier in their career and preventing future assaults; and, using the results of this pilot, if positive, to obtain more crime laboratory staff and special agents to focus on violent crime.

Basically, I just want to acknowledge the people in my section.

I have four crime laboratory analysts, four forensic technologists. We have a computer programmer, which we would not be able to get this data from the prisons, if we didn't have one assigned to us, and Lonna Kay Kravit is our liaison with the local law enforcement.

Do you all have any questions? I didn't see anybody chewing, so is this legal?

DIRECTOR ASPLEN: David, if you could, given the discussion we had this morning about the need to understand what would be the value of taking DNA at arrest and needing to kind of quantify it in order to justify it legally, which is kind of what we talked about, would your system in Florida enable us to look at those numbers and look at your database records and to get an analysis of that, if we could get somebody to do a study on that?

MR. COFFMAN: Sure. I think we have the access to all the pertinent information sources to get that. You brought up something that is interesting. I'm kind of on the fence right now about arrestees. I was adamantly opposed to it about a month ago and then I do see the benefit, but my point is I think there's several -- you don't start climbing Mt. Everest. You know, you learn how to rock climb gradually, and I

think we should all aspire to all felons. But I do see the benefit of all arrestees, and I want to give an example of a case, if I could.

I've heard people say that maybe there is no need at all to work a case where someone claims consent in a DNA case. Well, I don't know about in your state, but in our state, that became the most common defense once DNA was established, is to claim consent.

And just recently, we had an individual who -- and keep -- this is kind of in support of doing all arrestees, in a way. You could look at it this way, or in support of doing all DNA cases, whichever way, but you've got to do one or the other.

This individual -- we just, two weeks ago, made a match to a rape/homicide/mutilation case. I mean, it was a really, really heinous crime in south Florida. The individual that we connected to, it was connected through a case-to-case match in our database.

When we started looking at the case that it matched to, they had a suspect in that case and he had claimed consent. However, he had claimed consent on four crimes, on four different sexual assaults over the last five years and for whatever reason, the jury always believed him.

So he never was convicted. We never got his blood sample. If they had not worked the case with consent, we would not have solved this rape/homicide/mutilation case.

We have several instances like that. So it's like you either need to make the effort to work all cases or, in our situation, if we were doing all -- well, no, that wouldn't have worked even with all felons, because he was not convicted. So it's like all arrestees, all cases.

There's about 6,000 cases in Florida, but it would be about 500,000 arrestees, so I'm not sure what the answer is, but that's an example that I think we can't be too focused in saying, well, just because there's a suspect, it automatically means you don't have to work it. You don't know how many other cases you could solve.

And that would be dependent on your state. If you're collecting all felons and you get the individual for something else, then your problem is solved, but that's just an example that hit close to home recently and I thought it was a good example of something we don't want to forget about.

Well, I appreciate the opportunity to speak to you guys. I'm enjoying this, this is my first Commission meeting, I'll be sitting in on it, I'm enjoying it a lot and learning a lot, too. Thanks again.

[Applause.]

DIRECTOR ASPLEN: Why don't we take a break for about ten minutes and then we'll go back in session.

[Recess.]

## **Crime Scene Investigation Working Group Report**

*Director Asplen*

CHAIRPERSON ABRAHAMSON: We'll call the Commission to order and we'll let Dr. Crow have some lunch and what we'll do is move into something we were scheduled for tomorrow, and that is crime scene investigation working group report. Chief Gainer is unable to be here, but Chris Asplen will lead that and work with the members of that Commission in discussing their report.

DIRECTOR ASPLEN: Thank you, Chief. We'd like to do a couple of things today, the first of which is to go over the pamphlet that you have all received, the different -- three different proofs, and to get a sense for, number one, what needs to be edited substantively, and we're already aware of a couple things, but then also get a sense for which one you think would work best out in the field, if you will.

As usual, sometimes we -- we probably need to understand the caveat going into it that you may select one that the Department of Justice doesn't allow us to print, for some reason, because it's got too many colors or something like that, but we will try to abide by the Commission's wishes as much as possible. So we'd like to do that and then afterwards discuss a couple of other issues once we've completed that.

So to give you a little background on the pamphlet, this is one of the deliverables that Chief Gainer spoke about at the last meeting in Dallas. This was something that the working group decided was crucial to develop as we worked towards establishing kind of a standard level of competence among all law enforcement officers on this particular issue.

It was designed, by nature, of sitting together with the working group and identifying what needed to be included in the document, what kinds of issues needed to be included, but also the approach that needed to be taken and kind of the way in which it needed to be written. We had to be very careful to write it in a way that law enforcement officers would appreciate and would essentially kind of be drawn to read, and we wanted to make sure that it was not scientifically technical. We wanted to make sure that it was not legally technical and didn't say too much, simply because we wanted to make sure that they did, in fact, become interested in it and take a good long look at it.

However, what the working group talked about was also just as important as the document itself, making the point on behalf of the Commission that this is -- that it's not as much about the document as it is about the dissemination of the document. By that, I mean striving to get something, this document being the something, out to every law enforcement officer out there.

And when we talk about what can the Commission do, what actual recommendation does the Commission make to the Attorney General, the thought was that something like, Attorney General, here is a pamphlet that we believe is important to go out to every law enforcement officer in the country and explain the dynamic of the value of the first responder on the scene and the value of these issues, and then ask her to promote that proposition, ask her to promote that this does, in fact, go out to every law enforcement officer in the country.

So the two issues regarding the pamphlet are, number one, what are the particulars of the pamphlet that need to be considered and changed and then, number two, how do we communicate the issue, the real issue to the Attorney General, and how do we express the point of we need to strive towards a standard level of competence on DNA issues among all law enforcement officers across the country.

For those who have had an opportunity to review it, and I think it was sent to everybody, what comments do you have in terms of things that you feel need to be changed or edited or amended?

COMMISSIONER BASHINSKI: I have several things, but I'm not going to burden this group with that discussion. But I did send you some minor things. So I don't really think I need to talk about those here, right? You're talking more about the general content.

DIRECTOR ASPLEN: The general content. And I will throw out a couple of things that have been suggested to me that need to be considered. One example is the use of the phrase six cells, and I apologize that --

COMMISSIONER BASHINSKI: That was one of mine. Yes. I wouldn't --

DIRECTOR ASPLEN: A couple of people have mentioned that we really need to change that to a few, and not be that specific. Another issue is -- and it's from a broader context -- is how do we prevent -- no -- how do we encourage the judicious use of this and discourage law enforcement officers from just picking up everything and flooding the laboratories and essentially getting over-excited about the proposition, because there is a concern on the part of the laboratory personnel involved in this that that is what will happen.

COMMISSIONER SANDERS: I didn't think the purpose of this was as much for the collection as it was for bringing all law enforcement on the line or on the same page as to how important DNA evidence is and how important it is to how they adjust their containment as first responders, and it would seem to me that to address the concern that you have would be through the training of the evidence technicians themselves and the collectors of the evidence, because those first responders are not going to be collecting the evidence.

What this thing is supposed to is to suggest to them that as they approach a scene, that there is new evidence and where it can come from and all those things, to help them contain, so that it's not contaminated.

That's what I thought the purpose of this pamphlet was and that the evidence technicians themselves are the guys you're going to be concerned with as to making them understand what they deliver, they don't deliver. Collection, in my mind, is not the problem. It's the submission of it.

I would think that you should be able to do that with some sort of protocol as to what the labs will accept or won't accept.



DIRECTOR ASPLEN: That's certainly true that that was the anticipated purpose of it and it still is, but I think the thought from the laboratory personnel was that it was still going to encourage that dynamic of having them collect a lot of things that may be out of excitement over the possibilities.

Because especially considering the extent to which a lot of times your first responders are also your evidence collection personnel.

COMMISSIONER KENNARD: Chris, let me add to what the Chief has said. I like this idea. I would intend to add this to my field officer's manual. You've hit it right on the head. Many of the first responders, if they don't collect it, they're going to be preserving it. They're going to be another eye to make sure that when that crime lab does get here, did you get that piece of glass, did you get whatever, and this is a very valuable piece of evidence that we could use in our training to make everybody -- I mean, yes, the crime lab people need to be trained in how to gather it and preserve it, but it does not hurt my people, because it may be in the next six months, this guy that was the first responder is now going to be transferred to the crime lab.

COMMISSIONER SANDERS: Chris, I still say the protocol as to what the crime labs will accept, it would seem to me, I mean, that would be the way to address it, because they're not going to be submitting all DNA evidence that's collected no matter what the crime is. If there is only -- you know what I mean?

It's like this thing, though, I'm telling you, the collection, to me, is you would want to encourage it, I think you should, and collect everything you can, because you never know what's going to turn out to be evidence or what's going to be important or those kind of things, when and where.

But the fact that it's collected does not mean that it's going to be sent to the laboratory, I don't think. So all I'm saying is I can see where the lab would be concerned that everything we pick up we're going to send to them for them to do an analysis on, but I would think you wouldn't do that except in certain cases or you would -- it would be up to the laboratories to establish what they will accept and what they won't accept.

COMMISSIONER BASHINSKI: Were there specific things on this list that people reacted to more strongly? For example, I don't want every baseball bat sent to me to see if there's the perpetrator's DNA on the handle or probably -- probably every toothpick. But most everything else on this list are normal ordinary. In fact, I was suggesting we add another one, and that would be a used condom, to tell people that the victim's DNA could be on that condom, if it's found in this person's possession.

Were there other things? I mean, what kind of specific concerns were raised?

DIRECTOR ASPLEN: I'm not terribly sure that there were specific objections to anything that was here. I'll give you an example. Paul Ferrara, who got the document and looked over it for us, suggested that in the evidence collection and preservation section, that something was included to the effect of investigators and lab personnel should work together to determine the most probative pieces of evidence and establish priorities.

COMMISSIONER BASHINSKI: Yes.

DIRECTOR ASPLEN: Which is exactly what you're saying.

COMMISSIONER BASHINSKI: Yes. That's a perfect addition.

COMMISSIONER SANDERS: That's what I meant to say. I just forgot to say it.

DIRECTOR ASPLEN: It's great. The great thing about it is to hear it from the law enforcement representative and the laboratory side and that both are comfortable with it.

COMMISSIONER BASHINSKI: I remember voicing the same concern when we created this list.

COMMISSIONER CLARKE: I would echo what Chief Sanders said, also, about the collection. I don't know that we want to discourage evidence collectors, as opposed to the prioritization of what's been collected, and then submitted to the crime laboratory for analysis, and there's a lot of different models we know around the country in terms of prioritization and they're essential.

Otherwise, a laboratory, especially a laboratory like White's, ends up getting what may be 100 samples, when there might be only five that are probative, should be probative.

So that prioritization level, to me, is much more significant than trying to pare down what the evidence collector gathers.

DIRECTOR ASPLEN: So are you comfortable with Paul's addition to the document?

COMMISSIONER CLARKE: Yes.

DIRECTOR ASPLEN: That helps that concern.

COMMISSIONER BASHINSKI: Yes.

DIRECTOR ASPLEN: I'd just give you another example of the kinds of changes that have been suggested to us. Adding sunlight to the enumerated environmental factors.

COMMISSIONER BASHINSKI: Yes.

DIRECTOR ASPLEN: That are included in the section of what is DNA, in the paragraph that starts "Forensically valuable DNA can be found on evidence," et cetera.

COMMISSIONER BASHINSKI: Yes. That's very appropriate. If we're going to talk about minutia, I think under contamination, the last sentence is misleading the way it's worded. PCR process can distinguish DNA from different people. What it can't do is tell you -- I would reword that to say the PCR process will copy whatever DNA is present in a sample, whether it is from a

suspect or from another source, rather than say it can't distinguish between, because actually you do use that test to distinguish between DNA from different people.

Also, plastic bags don't generate moisture, they trap moisture, I think.

COMMISSIONER SANDERS: It would seem to me like that's not supposed to be an all-inclusive list anyhow. Just examples of things that are inspected. Are you going to list everything?

DIRECTOR ASPLEN: No. The example that Paul gave was the example of having it in the police vehicle. Not just the heat, but he said the actual sunlight itself is a real problem. And I think it's, yes, not meant to be an exhaustive list, but I think he felt that one was important enough to include, given the recurrence of that particular problem.

COMMISSIONER SANDERS: I can see where that would be more important under evidence collection and preservation. If he's saying by leaving it in direct sunlight in a squad car is going to deteriorate the DNA or something, I just don't see why it's a big deal to -- cops, first of all, aren't going to read all that stuff. So all you're doing is trying to give them food for thought, so that we have a sense of these are the kinds of things that have an impact.

COMMISSIONER BASHINSKI: Right.

COMMISSIONER SANDERS: I would have never excluded or included sunlight.

COMMISSIONER BASHINSKI: I think it's one that's important.

DIRECTOR ASPLEN: Another example of a specific editorial request from Paul was on the elimination samples section at the end. The second paragraph, when investigating the rape of a sexually active woman, it may be necessary to collect and analyze the DNA of any recent consensual partners. He suggested that we put in parentheses within 72 hours, within at least 72 hours.

COMMISSIONER BASHINSKI: It just says that may be 72 hours.

COMMISSIONER SANDERS: It's defining recent as the last 72 hours.

COMMISSIONER BASHINSKI: I wouldn't do that.

DIRECTOR ASPLEN: Okay.

COMMISSIONER BASHINSKI: Because you could be looking at clothing, sheets, anything else, 72 hours is not necessarily the main issue. It just says may.

DIRECTOR ASPLEN: Okay. General consensus around this table that it's okay the way it is.

COMMISSIONER SANDERS: I kind of like Paul's idea, though.

CHAIRPERSON ABRAHAMSON: This was a very good, informative pamphlet for everybody.

COMMISSIONER GAHN: Chris, I have just -- under the evidence where you have the half-bend Danner mask and the source of the DNA, generally, if it's Danner mask, chances are it will be saliva.

COMMISSIONER BASHINSKI: Yes. The mask.

DIRECTOR ASPLEN: On the mask.

COMMISSIONER BASHINSKI: On the mask.

COMMISSIONER GAHN: I would put saliva, also.

DIRECTOR ASPLEN: And include it at the end there.

COMMISSIONER GAHN: No. In the box, you see what I mean?

DIRECTOR ASPLEN: Yes, at the end of the box there.

COMMISSIONER GAHN: Put saliva there. The only other thing after reading this, and just something to think about, and I see -- and just knowing, you know, dealing with the police daily on every level, and I see where it says wear gloves, change them often, you go through all the stuff they should do.

Do we want to have something in here to just let the officer know that still this isn't to take away their common sense or creativity and get the job done, they're at the scene. What I'm saying is that because they don't have gloves or anything, you get there and all of a sudden -- I think we talked about this last night at dinner -- the storm clouds are forming, the rain is about to come, the blood is gone, it's okay to go in and take your McDonald's napkins from the front seat or your car and swab that stuff. You know what I mean? You still -- common sense, you do what you have to do at that crime scene and if you have to get creative or -- this isn't to take away from that.

Sometimes they'll get to a scene and may not have all -- are we constricting them or even intimidating them thinking that they've got to have all this. It's just something to think about. Do we want to have something in there about common sense on that scene?

DIRECTOR ASPLEN: In the collection aspect.

COMMISSIONER GAHN: Yes.

DIRECTOR ASPLEN: Or preservation.

COMMISSIONER KENNARD: Good point, because if we get them to where they're really afraid of this, then --

COMMISSIONER GAHN: That was my -- when I read the whole thing.

COMMISSIONER SANDERS: That's kind of what happened in the O.J. Simpson trial, where the officers thought they were doing the right thing by going into the residence and bringing the sheet out to cover the bodies. I mean, they introduced trace evidence and contaminated the whole crime scene.

I think the more that you put in here that causes them to think, the more difficult it is. But I would think a cop that's capable of thinking that quick to do it isn't going to care what this thing says. He's going to do it because he knows that's the right thing to do. And those that aren't, when you put that in there, all of a sudden, people are starting to think, now, wait a minute, what am I supposed to do, that kind of thing. That's just my experience, because I couldn't believe they covered those bodies.

COMMISSIONER CLARKE: Could you think of another example?

CHAIRPERSON ABRAHAMSON: There isn't one.

COMMISSIONER KENNARD: But, also, think of the opposing part of that. When we, as law enforcement officers, get lambasted because we haven't done just that, we have not covered this body that's being so offensive to all these people because we're trying to -- and the Littleton, Colorado was a prime example. They've taken some shots because of their slowness and their thoroughness in doing the crime scene and there have been some families that are very, very angry because of just what you suggest, Chief, that why didn't you at least cover the body.

We got covered when we took down a guy that was holding hostage and he came out and we took him down and we didn't cover him for quite a while.

COMMISSIONER SANDERS: I guess the only thing -- of course, we don't want to debate it, because then we'll get sidetracked, but there's a difference between taking a sterile blanket from a squad car and covering somebody, it doesn't introduce trace evidence from the crime scene itself, that's all I'm talking about, is that common sense thing. Somebody thinks it's common sense because they've not been exposed to it. All they care about is covering the body, they're not thinking about the investigator that's going to collect the evidence that's going to be analyzed and then there's going to be a court battle about whether it was tainted, it wasn't tainted, all that stuff.

That's all I'm saying. This thing is only intended, I thought, to give them food for thought and suggest to them, hey, here's the greatest thing since sliced bread. Does anybody know what was greater before sliced bread? Sorry. You know what I mean? That's what it was about, so that they would pay attention to it, because I've traveled all over the State of Illinois, when I talk about DNA, people, police administrators look at me like they don't know what I'm talking about.

Well, most of the time, I don't know what I'm talking about, but I have a comfort level.

COMMISSIONER KENNARD: So why don't we indoctrinate this into a training -- I intend to indoctrinate this into my training manual and have it part of my field officer's manual, to whatever degree, and if it means having a disclaimer, fine.

COMMISSIONER SMITH: It almost looks a little bit like a control manual.

COMMISSIONER BASHINSKI: Let me ask a question. Don't most of your officers have gloves for other reasons now, for biohazard protection?

COMMISSIONER KENNARD: Well, some do, yes.

COMMISSIONER BASHINSKI: Matter of fact, don't you issue them and require them to wear them under certain circumstances?

COMMISSIONER KENNARD: It's just kind of a standard procedure. We have the gloves and instead of giving --

COMMISSIONER BASHINSKI: Exactly. So you already have barrier protection as a part of the normal --

COMMISSIONER SANDERS: Also, a lot of them carry a glove pouch on their belts in conjunction with their magazines.

COMMISSIONER BASHINSKI: I guess what I'm saying is I don't think we're suggesting something here that's beyond the normal tools that the officer is going to have today that he wouldn't have had a few years ago.

COMMISSIONER KENNARD: I move adoption of this one, if that's what you're looking for, Chief.

CHAIRPERSON ABRAHAMSON: I'm looking for it.

COMMISSIONER BASHINSKI: Second.

DIRECTOR ASPLEN: I'll take it, with the editorial changes that had been made. Yes, I guess that would be the appropriate way to do it.

CHAIRPERSON ABRAHAMSON: I think that is. So let's take it in terms of the substance of the information given. How many favor that? Do we need a roll call? How many favor the adoption of this?

[Show of hands.]

CHAIRPERSON ABRAHAMSON: Anyone opposed?

[No response.]

CHAIRPERSON ABRAHAMSON: So all present have voted in favor of that. Do you have a preference? Not that we have the final word as to what you like. I know that the Chief and I were talking about it beforehand.

COMMISSIONER SANDERS: The thing I suggested was that if you're trying to catch the law enforcement officer's eye, this one here, whatever law enforcement officers should know, you see that. On this, even though it's unpared, it's a lot better than this one. What I get from it is DNA when I'm scanning. If I was looking at something that the Chief passed out to me to read, if I saw this thing, I wouldn't even know --

COMMISSIONER KENNARD: I don't know that I got a black one.

DIRECTOR ASPLEN: Robin, can you give -- the Chief, he's got one. A couple people have said that. I think that's something we could certainly adjust without any problem.

COMMISSIONER REINSTEIN: Maybe we could --

COMMISSIONER KENNARD: I'll amend the motion to include this one. You're probably right, something that would be eye-catching to a law enforcement officer.

CHAIRPERSON ABRAHAMSON: General consensus seems to be that the black brochure is better, although there has been a suggestion to lighten up the blue on the front, first page.

COMMISSIONER KENNARD: And the one argument against this, Dr. Davis here had mentioned in some of the articles that we have been getting out, it's tough to mimeograph or copy some of these things that are so dark.

COMMISSIONER BASHINSKI: Right. This needs to be much greater contrast and a lighter background.

COMMISSIONER KENNARD: If somebody wants to mimeograph it, this thing here needs to be lightened up, so it doesn't get caught, because it does not mimeograph well.

DIRECTOR ASPLEN: What we'll do is we'll go back to the folks who developed this for us and talk to them and see if they can't lighten it up for those purposes and lighten it up and make sure you can read the inside cover there.

COMMISSIONER TURMAN: Chris, if you're talking about multiple colors, have you seen that What Every Law Enforcement -- about the civil protection order? It's five colors. ICP did that.

CHAIRPERSON ABRAHAMSON: And I gather the general consensus is the preference for this, the black one, with lightening at least the text stuff.

Okay. Anything else on crime scene investigation? What else?

DIRECTOR ASPLEN: The other thing that we need to do in conjunction with that is, and we've learned quite a lesson here with the first recommendation that went to the Attorney General, we can't just send this to the Attorney General and say here's a pamphlet for your consideration.

What needs to occur is some sort of action, request for action. She needs to know what it is that we want her to do.

As I said earlier, my impression is what we want her to do is to take that that pamphlet and promote its dissemination. So I guess the issue is how do we communicate that aspect of it to her. Again, talking about the issue of establishing a standard level of -- or moving towards or working towards a standard level of competence among all law enforcement officers in the country, recognizing that some citizens are protected more or less based upon the knowledge of their particular police department of this technology.

So the issue is how do we do that.

COMMISSIONER BASHINSKI: How do you normally distribute materials that you want to have this kind of wide dissemination? What's the normal route?

DIRECTOR ASPLEN: We print a whole bunch of them and we advertise it and let people know who -- and start sending it out pursuant to a mailing list and then pursuant to requests.

I think the bigger issue is how do we define the issue. Do we want to say that we believe that we should work toward a standard level of competence on these issues across the country.

COMMISSIONER BASHINSKI: Baseline level of understanding.

COMMISSIONER KENNARD: The training issue for public safety for law enforcement.

COMMISSIONER BASHINSKI: Understanding and awareness. The very basic level for everyone.

DIRECTOR ASPLEN: And that this is one method of doing that. Tomorrow we're going to talk about more specific actual law enforcement training with the folks from Eastern Kentucky and we'll do more of that tomorrow.

CHAIRPERSON ABRAHAMSON: And this is part of that, it seems to me.

DIRECTOR ASPLEN: Yes, part and parcel to it, absolutely.

COMMISSIONER SANDERS: So we're saying raise the level of awareness.

DIRECTOR ASPLEN: Correct.

COMMISSIONER BASHINSKI: And understanding.



CHAIRPERSON ABRAHAMSON: It's part of the training.

COMMISSIONER TURMAN: I think you have to tie it -- for her, you have to tie it -- I mean, she's got so many priorities, you have to tie to an event, something, some campaign or something that is fairly concrete. She's got all kinds of priority issues.

CHAIRPERSON ABRAHAMSON: Is she talking to law enforcement officers somewhere?

DIRECTOR ASPLEN: I'm sure she is.

COMMISSIONER SANDERS: I just think if you're just trying to communicate, then there's different ways. She can go through major city chiefs, she can go through the IACP, as far as having workshops and things, I think the eye-catcher for her is to say that we have identified this as a basic need for raising -- if your eventual goal is to go towards raising the standard, we've certainly got to make sure that everybody in law enforcement knows about it and we think that this is the first step towards that.

COMMISSIONER BASHINSKI: I don't want to keep bringing population that Los Angeles case, but Woody and I and others have sat on an awful lot of panels and attended a lot of conferences where the issue was raised how are you training your officers, what are we doing. Now we've found out there was a problem, which really wasn't as much of a problem of collection as it was a lot of other things, but now that we've found out there was a problem, what have we done.

I don't know if there's any other cases or other examples. Maybe in your lab's experience, you see court cases being overturned because of -- do we have any other examples? Otherwise, we're probably going to have to go back and beat that dead horse maybe.

COMMISSIONER SANDERS: But we talked about that. Remember, we talked about it, we don't want to get into the position of where we're suggesting that the mandated training for law enforcement, because everybody is going to get defensive and we're going to have all the post organizations, all the curricula people, everybody is going to be upset with it.

This is saying we think that there is not enough, for lack of a better word, public awareness of what DNA is, what it can do in the law enforcement community, and we want to raise that level of awareness.

Now, whether that's toward the eventual goal of raising the standards and all that kind of stuff, you might want to make it part of that, but I'm telling you, you come out of the blocks with a statement like that it's training, that we need to be able to train, and everybody that I know in our profession is going to be upset with it.

COMMISSIONER BASHINSKI: I didn't mean that there was mandatory training. I mean, the question is asked all the time, how have you modified what you do in order to address what was brought up as an obvious problem, and this is one example of how you'd modify what you do.

COMMISSIONER CLARKE: Or turning it into a positive thing.

COMMISSIONER KENNARD: Right. You've got post councils. I think every state has their post council, that this, in a positive note, could go to them. They're screaming now for additional help, what can we add to that curriculum, without changing and mandating this, send it to every state's post council.

COMMISSIONER GAHN: Chris, why don't we -- you could tell what actually happened in reality. How many years was DNA a prosecutor's tool? And that's what it was. It was the prosecution and the police weren't even brought into the loop, because it was the police -- it was the counties who were playing the tab, we were doing admissibility hearings, the local cops weren't concerned about that, and it was a prosecutory -- but now with the advent of the data banking, the law enforcement community has become more involved and we realize that there was a lack of -- that understanding or that -- of what it was, and there was a void in the law enforcement community.

This is what's going to bridge that void now.

DIRECTOR ASPLEN: Let me make this suggestion. Why don't I try to come up with a rough draft this evening of the one or two-page recommendation that would accompany this pamphlet and if we could get that done at this particular meeting, that would be wonderful, rather than have to wait to approve that later, and we'll do that. We'll identify the issue and the problem and talk about the benefits and see if we can come up with the appropriate thing.

COMMISSIONER DAVIS: Let me ask one question. The pamphlet is a good idea, too. But over the past couple of years, I've probably thrown away several dozen compact disks from AOL asking me to subscribe and Microsoft to use their product, et cetera. I get those in the mail all the time.

Apparently, that must be cheap, because otherwise they wouldn't be throwing them out all over the place. I'm wondering if, in addition to something like this, eventually, all law enforcement officers could receive a compact disk in the mail. They're less apt to throw out a compact disk than a brochure.

DIRECTOR ASPLEN: There are two ladies in the back of the room smiling and nodding their heads, because that's what we're going to talk about -- that's the kind of thing we're going to talk about tomorrow, not just internet training, but also developing some CD-ROM capacity for that exact issue.

COMMISSIONER SANDERS: But, remember, we talked about, too, the reason we went to this first is because even when we were talking about mandated -- I mean, electronic reporting of crime, there are some states that don't have it. So we thought this was the quickest most efficient way to get the information to everybody that could use it.

COMMISSIONER DAVIS: I would agree.

COMMISSIONER SANDERS: That's why we did it. But we did talk about the CD-ROM.

COMMISSIONER DAVIS: I was thinking of a supplement.

COMMISSIONER BASHINSKI: We're really talking about another level of training for the person that's actually collecting the sample. This is really for the person -- anybody who might be happening on or responsible at a crime scene, but tomorrow we'll talk about a broader training program that would get to more specifics.

CHAIRPERSON ABRAHAMSON: One more topic.

DIRECTOR ASPLEN: One more topic, and this is kind of a catch-all, if you will. What I want to do is just kind of lay out and identify some resources and talk about some numbers as we work through towards identifying and addressing the non-suspect analysis issue, if you will.

You have all received your CODIS DNA laboratory survey and the CODIS information that's contained in there. I think there would be great benefit to really taking the time to review some of the information that's in there.

If, for example, you take a look at case work, in table 11, and you take a look at things like total number of unsubs tested, and the numbers are very small. Again, I don't want to go through all of it. I just want to kind of identify it as a resource for us to kind of orient ourselves to the problem as we look to the future of dealing specifically with the non-suspect case issue.

Again, table 11, case work by state and how the individual states are doing it, if you take a look at the end of that and you look at total number of unsuspect cases analyzed, that's on page seven of table 11, the total in 1999 was 7,590. Now, those are just the cases that have gone to the laboratories in the first place. So that's just one part of the dynamic, one part of the issue. We haven't even considered those cases which are still sitting in the police evidence lockers, because they have been told not to submit them or because they haven't thought to submit them.

Given the investment that we're making in the database system, that's a number that I think we're looking at that says that doesn't make much sense in terms of how we're allocating our financial resources and to the extent to which we are or are not.

So that's one kind of dynamic to consider.

COMMISSIONER ADAMS: You're saying because the number is so small, is there justification for going ahead with CODIS and the backlogs and all that.

DIRECTOR ASPLEN: No, I don't think it's a matter of is there justification. It's where do we put our efforts, where do we put our resources in terms of really taking advantage of the investment that we've made in CODIS.

COMMISSIONER ADAMS: I don't think you can use these numbers right now as what the real number is. Look at the spike in 1999 versus '98 and '97. That spike is a result, I think, of

laboratories, like my own, which used to not even accept unknown subject cases because we didn't have the time to invest the energies to look. Now, with CODIS, we've got to take the time to work with them, and a lot of states work in the same realm and I think that's why these numbers are going to greatly increase over the next few years.

DIRECTOR ASPLEN: And I don't mean that any of the numbers we're looking at right now are going to independently or thoroughly reflect the situation. Again, I'm just kind of throwing this out as indicators to look at later on down the line as we start to analyze how do we focus our investment in the non-suspect case analysis.

COMMISSIONER BASHINSKI: I would argue that we do need to do exactly what you're saying, Chris, because even though, yes, we're now accepting suspectless cases, we still don't have enough resources to analyze that huge great unknown out there and we need to focus the spotlight, even though it's an uncomfortable thing to do, on the fact that we are investing a lot of money in the data bank, which we should continue to do, but that if we don't also and additionally invest more in this other side, we won't get the payoff that we would otherwise have expected.

You can just look at that from Florida's data, because if you look at how many cases they've analyzed, they have a huge amount of success. California, by contrast, we've analyzed a lot of suspectless or offender samples, but we don't have the resources to analyze a lot of cases, so we have had much less success.

COMMISSIONER ADAMS: I don't disagree. I was hearing, though, Chris, that because these numbers were so low, that we shouldn't be as concerned with them as we should be. Maybe we shouldn't be as concerned with them. I'm saying those numbers are artificially low.

DIRECTOR ASPLEN: Right. Then I wasn't being clear. Then I wasn't being clear. The point is how low they are and I would even agree with you that they are artificially low. So yes, I wasn't making myself clear.

To give you another example of something that's going to come down the pike that we're going to be using, and the reason I'm doing this now is because I think it is such a complex issue that we kind of need to start thinking about it ahead of time.

The BJS survey that a number of laboratory folks here filled out, the 1998 national study of DNA laboratories, should be completed in about three months and it addressed a wide range of topics, and this is the one that I mentioned earlier today is something that I've been asked not to reproduce and asked to only speak in generalities about.

But I think the preliminary numbers are very reflective of the situation. To give you an example, one of the questions was what types of DNA case submissions will you accept, an important question. The preliminary results that are coming in under any criminal case, just about 50 percent would accept any criminal case.

About 16 percent would accept all known suspect cases. When we asked -- when you look at unknown suspect cases, you only get about 20 percent of laboratories that will accept all unknown suspect cases, and then the number goes up a little bit, to about 25 percent, that will accept certain unknown suspect cases. So that's the acceptance policy. I think those are important kind of telling statistics in terms of the criminal justice system's utilization of the investigative power of DNA.

COMMISSIONER BASHINSKI: But it's reflective, obviously, of the resources of the laboratory to respond to this.

DIRECTOR ASPLEN: Absolutely. Right. And the question is, how do we, as a Commission, address the resource issue. We need to define the problem first, if you will.

Then there are a lot of questions here and I don't want to spend too much time on it.

Another interesting question that comes up as we look at kind of the status of investigations, does your laboratory routinely maintain the outcome of criminal cases involving DNA evidence analyzed by your laboratory. That issue has come up in the cold case issue and where do we get our numbers in terms of what is still an active case or what is not, and whether or not the laboratories can be valuable in that regard.

About four percent of the laboratories routinely maintain the outcome of criminal cases.

The other issue, and it's one I think David alluded to a little bit in Florida, the issue is does your state criminal -- do your state criminal history records indicate whether a DNA sample has been taken. Twenty-three percent have that kind of connection between their database and their criminal history record. Again, a significant indicator of the coordination or lack of coordination of those systems.

DR. FORMAN: About.

DIRECTOR ASPLEN: Yes, about. There really was a point after the 23, so I was being general.

Does your laboratory have a program for looking at inactive, closed or previously analyzed cases? About -- about half of them do, they say. However, in terms of where that's generated from, looking at the inactive cases, they're generated generally in this fashion.

About half of those are by request by the specific agency. So if the law enforcement agency is proactive enough to request it, they will do it. There are some cases where DNA was not tested before, about a quarter, prior method tested was a different method tested, they will sometimes do it. So, again, those are some of the kinds of issues that this survey has addressed.

So as soon as I get that on my desk, I will forward it to you. Another part of the dynamic in all this, though, is the issue that I mentioned earlier that Dr. Davis brought up. From a cost-benefit analysis, what are the costs of crime. If the Commission is going to consider how much we

should invest in the analysis of non-suspect cases, that has to be measured against what it costs for crime.

There was a study done by the National Institute of Justice in 1996 where the costs of -- for type of crime in the United States were as follows, based on 1992 statistics. The tangible cost for a single rape was \$5,100. What NIJ did in that particular study was they added to that intangible costs, similar to what they do in civil courts and considering a lot of those issues.

The intangible costs were 81,400, for a total of \$86,500 a crime, a rape. Murder came out to be \$2,940,000. Robbery with injury, 19,000; assault, 9,350; burglary, 1,400.

Now, if you multiply those out across the number of crimes, that's a pretty significant number. I will make that -- I will make the whole study available to you, but what I'm reading from can be found in that KVI report that you mentioned, that I mentioned earlier today, where they look at the Kansas response to the rape investigations.

Now, the other dynamic that needs to be added to this question that the working group looked at was really what may be the biggest issue, and that is the number of non-suspect cases that are not even going to the laboratory. Everything we talked about so far are those cases that have gone to the laboratory.

The big question mark and what we don't have any data on is the issue of what are police not submitting in the first place and why are they not submitting it.

We don't have the data on that. As such, we have gone to the Police Executive Research Forum and asked them to develop a survey that they would exercise relatively expeditiously, we hope, and they estimate about three months.

It looks like -- it's called a potential for crime solution through DNA evidence, and you should have all gotten that this morning.

What PERF would do is they would set up a telephone survey and then a number of written surveys and then they've identified who they would target, but they would ask the following questions; when evidence is submitted for DNA processing, where is it sent; what types of cases are submitted; what is the cost of the submitting agency; how many cases with potential DNA evidence are not submitted; what types of cases are not submitted; what types of evidence do these cases have; what are the reasons for non-submittal; does the department have a policy governing DNA submission; and then could we get a copy of that.

It was recognized, when we spoke to the folks at PERF, that you're going to kind of get three types of responses. One will be a response which will be rather specific and they can go back and they can count the number of cases that they're not doing. To give you an example, New York City could tell us right now that they are -- that the number of rape cases, just rape cases that are not analyzed is in excess of 10,000 cases, 10,000 non-suspect DNA cases that aren't being analyzed.

So if you just kind of start with that proposition, you realize that this number is going to get pretty big.

But this will be a way for us to start the process of analyzing that issue of what are law enforcement agencies not submitting and why aren't they submitting it.

The other thing that they would consider doing in this report is using the rape scenario or rape cases to kind of specifically kind of play that scenario out and look at rapes more specifically because it will be easier to assume that you would do DNA in most rape cases, although I use the word most and that's a very loose interpretation of the dynamic, but that may be the best kind of case to look at.

Does this sound like the kind of thing that should be pursued, this questionnaire and trying to get a handle on that number? This was brought up at the Dallas meeting. This was in response to the questions raised at the Dallas meeting.

COMMISSIONER BASHINSKI: It does. I just have a question about the budget. You've got \$41,000 in indirect costs which are not part of the total. So this study is going to be an \$82,000 study?

DIRECTOR ASPLEN: I'm sorry?

COMMISSIONER BASHINSKI: The total cost.

DIRECTOR ASPLEN: The total would be --

COMMISSIONER BASHINSKI: Is that a typo?

DIRECTOR ASPLEN: I have to believe that that's a typo, quite frankly.

CHAIRPERSON ABRAHAMSON: That's more than the total.

COMMISSIONER BASHINSKI: And it isn't included in the total. So that's -- I'm just --

DIRECTOR ASPLEN: We haven't even spoken to them since we got it. Our concentration was on the elements themselves. We will certainly talk to them about that.

The other big reason to do this is to enable us to also look at the -- what we talked about at the Dallas meeting, in the context of the arrestee question, whether or not we should take DNA from arrestees. Remember, we talked about kind of the third area of analysis is what are the logistical issues, what are the practical issues of trying to collect DNA from individuals who are arrested.

The point being with the numbers that we're looking at preliminarily that are not getting done now, with the non-suspect cases that are not getting analyzed, what would the effect be of taking DNA from arrestees.

The hypothesis is that there is the potential that it would be do more damage than it would be good at this stage of the game.

COMMISSIONER ADAMS: I like David Coffman's analogy of climbing Mt. Everest versus step-wise.

DIRECTOR ASPLEN: And we look toward the recommendation to the Attorney General, if that's ultimately what we decide, that is a tremendously, tremendously important point to make. And I will tell you that it's not just on the Attorney General's level. We have had a number of inquiries from individuals in individual states wherein state legislatures are considering taking DNA from arrestees, and we've gotten calls from laboratories with people saying my state is considering doing this, however, we've got all these other backlog problems and while we recognize that it's an attractive proposition for the legislature to consider this, we're terribly concerned that it's going to be another unfunded mandate and if this passes and we don't get the appropriate financial backing, it's going to be worse than if we didn't do this at all.

So the states are also looking for some guidance as to how to react to the suggestion that DNA be taken from arrestees. Surely, from a logistical practical standpoint, not in consideration of the constitutional and other issues.

COMMISSIONER DAVIS: You raised a very good point, unfunded mandate. The recommendation would be do not pass legislation along these lines that are unfunded mandates and then let people go ahead -- I wouldn't put anything -- I would not like to see anything done that would put the squelch on people who want to do this kind of stuff from doing it. I think we ought to encourage this. Let's encourage climbing to the top of Mt. Everest as fat as we can and if there is somebody who's got the rules and the resources to do it, have at it, let them do it, and not try to say because we can't do it here, here and here, therefore, nobody can do it, would be wrong.

I think our whole approach should always be to encourage the doing.

DIRECTOR ASPLEN: So I think as a Commission, I think what the group was talking about was trying to find a way to communicate that, again, and thus, the reason we're going through all these is because I guess it makes the point pretty clearly ultimately.

CHAIRPERSON ABRAHAMSON: Did you want approval of this?

DIRECTOR ASPLEN: Sure, I'll take approval of pursuing this course of action in terms of the survey.

CHAIRPERSON ABRAHAMSON: They do survey -- surveys before, so that this is going to be scientifically correct.

DIRECTOR ASPLEN: Yes, that's what they do. It's the Police Executive Research Forum. This is exactly the kind of work that they perform as their function.



COMMISSIONER GAHN: How long will it take them to do it?

DIRECTOR ASPLEN: They tell me about three months.

COMMISSIONER GAHN: And when we are told the answer, basically you're looking for a number? I mean, we know that there is a substantial case load of unsolved cases throughout this country out there that are not in any case index and nowhere close to being there. We know that already. Why do we want to do this to tell us something we already know?

DIRECTOR ASPLEN: Because I don't think we know how big that number is and I think how big that number is is really important.

COMMISSIONER GAHN: But I think you can estimate fairly well how big that number is. I think that Mr. Coffman could probably -- it's fairly substantial. In Wisconsin, I could tell you, in Milwaukee County, I could tell you.

CHAIRPERSON ABRAHAMSON: What would your guess be?

COMMISSIONER GAHN: In Milwaukee County, I can tell you, we had 2,300 cases, unsolved, non-suspect cases, just sexual assaults. We looked at 6,000 police inventories. We only culled that down to about 150 cases that we sent to our crime lab. We have thousands. But we did a very systematic selection to go and that's why I think we have those successes we talked about in Albuquerque.

What concerns me about all of this, especially this morning when we talked about this arrestee stuff, let me tell you what happened just a few weeks ago in Wisconsin.

I'm not saying that I think that people in Wisconsin should ask a question of me, because I'm very small person, I'm the COG there, but I went into work and all of a sudden I hear on the news these legislatures and people from our Attorney General's office saying we are introducing legislation to take DNA samples from all convicted offenders, all felons.

Now, our data bank is just sex offenders and we still have this awful backlog. We're still outsourcing. And I called the crime lab, Dirk Jansen, who you heard, some of you, in Albuquerque, and I said what do you know about this. He doesn't know anything about it.

And what I'm worried about is these legislatures and people get all wound up on this tough on crime and it sounds neat, but we've learned lessons from our convicted offenders; for how many years did thousands and thousands of samples and still today sitting in freezers unanalyzed.

And now someone in Wisconsin wants to multiply that by 12. No funding for it. What I'm worried about now is some legislators who want to get on the tough on crime bandwagon and say we're going to take it from all arrestees. I think as a Commission, I'd like to put the skids on this. We've seen -- this should be put on the back burner for quite a while, just all the issues. This is a monumental task of arrestees. It is monumental.

As a Commission, I think we should just stop that, put the skids on it and make a recommendation that now is not the time to discuss it. Maybe a year from now, but right now, we have too much going on in our backlog already that we have to work on.

CHAIRPERSON ABRAHAMSON: So your position would be that you don't need these numbers.

COMMISSIONER GAHN: I don't think so. We know it. We know it's out there and I think we know it's large. And whether we know it's real large or kind of large or pretty large I don't think makes any difference.

COMMISSIONER BASHINSKI: If you want to get funding and you want to get someone's attention, you're going to need to tell them how large and you're going to need to have solid data to back that up.

I think that's what we're trying to do. I think we're trying to say there is something we need to do here, nobody can afford to do it, it's going to cost a lot of money, and we need to set priorities as to how to get there.

COMMISSIONER SMITH: I have a couple questions. One is it seems to me, if I understood your remark a moment ago, these are actually diametrically opposed points, and it raises the question which I think might be worth our considering.

In order to accomplish a bunch of the things this is trying to accomplish, it needs to articulate a vision about how the nation gets to where it should go. It seems to me that sort of making good points about the sort of foolishness of some of the courses proposed by others isn't nearly as effective as putting forward really kind of attractive notion of how we could actually do it.

I think that's hard, because the numbers are big, and so it's how are we going to do that and respond about what that's going to cost. I think we have a hard time, but if we don't do it, the other things I think are not worth much.

So I'm skeptical about the value of the cost-benefit analysis. First of all, because I don't think the sorts of cost-benefit analyses you're talking about hold up very well to examination, but, secondly, because I don't think people make decisions that way.

This is my experience that tells me those things and I worry about us investing an awful lot of time.

I'm sort of sorry to bump them there, but it's on my mind.

CHAIRPERSON ABRAHAMSON: What would you say about this PERF proposal?

COMMISSIONER SMITH: Well, I don't know as much as other people around the table about those questions, but I'm inclined to agree with Norm about it. There's nothing wrong with somebody doing that, but more important than how to do it would be to figure out what we think

given our sense that it's very large, what we affirmatively put forward so as to draw attention and money to the next steps that need to be taken.

If that helps fine, but I don't see how that helps, frankly.

COMMISSIONER DAVIS: One of the reasons I was so much interested in this cost-benefit is that practically every piece of propaganda that we have in this country for movements for this and movements for that has got a fiscal note attached. Somebody comes up and says it's costing us this and this and this and that and that, and to me, it's part of the PR program. We are faced with a very large PR problem in this country in reference to the future of DNA. The people who are going to pay for this are the taxpayers and they're going to have to be brainwashed, if you want a better term, propagandized, taught -- educated, maybe that's the more polite way -- as to the benefits of this and every possible way that we can show the benefits, I'm for.

Now, in terms of DNA arrestees, if Sheriff Kennard, in his district, has found a way in which he can do DNA on every one of his arrestees, and find the money locally to pay for it and they do it, I don't think we, as a Commission, should say that shouldn't be done.

I'm all for demonstration projects. If he can come up with a way of doing it and it works, that's great and I'm all for that. And I'm worried when I hear people say, well, it's too big a problem. It's like the medical examiner system in the State of Florida. In 1956, when I started, it was too big a problem, but after we demonstrated it and gradually worked on it, and now 40 years later we've got the system, but if we didn't start off by doing things in the beginning where we could do it, we wouldn't be anywhere -- well, we wouldn't be where we are today.

CHAIRPERSON ABRAHAMSON: Chief, and then Ron, and our time is flying. Go ahead.

COMMISSIONER SANDERS: My only question is why did you select PERF? You're saying they're going to represent 40 percent of the population and we're still going to be doing a guesstimate on the other 60 percent of the population.

DIRECTOR ASPLEN: We obviously can't survey every law enforcement agency in the country. They felt like they could do a decent study based on that, a basic representative study based on that.

We can't survey every law enforcement agency.

CHAIRPERSON ABRAHAMSON: They're doing a telephone survey of non-PERFs. That's number three.

COMMISSIONER SMITH: Is it more important to do that or to find out what's going on with the failure to get the samples over from probation and parole, because that also could be surveyed, and it seems to me that it's sort of obvious that if we have excess capacity to make contact with people whose DNA we want, then one can at least put forward a proposition that that capacity could better be directed to getting it from the people who owe it to us, to get out and get it.

Why should we -- if we don't have probation and parole officers capable of finding probationers and parolees, why should we have the police do it?

COMMISSIONER BASHINSKI: But they're not mutually exclusive.

COMMISSIONER SMITH: No, but there are important differences. I think we discussed in previous meetings about the value of the two. Maybe we don't have those views anymore, but initially I thought we agreed that the value of getting probation and parole owed samples in and tested was high, very high, and that as a national issue, that was an important thing to do.

So there's a whole bunch of things that lead me to say that there is some value in this Commission focusing attention and suggestions of investment on those things.

COMMISSIONER REINSTEIN: Before, we were talking about in terms of the pamphlet about public awareness and about law enforcement awareness of these things, and I think that we have to seize on the opportunity to educate the public that this is really the most exciting investment in criminal justice, forensic science, and the justice system in the last ten, 20 years, and that the possibilities for crime-solving and eventually crime prevention are limitless and you seize on the proof in the pudding argument, using Great Britain, the number of cold hits they get per week. I know they only have one laboratory and they're able to centralize everything, but when the public hears about what's being done in England and now I guess in other parts of Europe as they expand over there, it's so essential to get that message out.

I agree with Joe, I think that you've got to not limit what some jurisdictions can do. And I was talking to Sheriff Kennard, I guess, because of the resources that they have, not just in the lab, but through the university in Utah, they've got this genome project there, that they actually -- he says that they don't have a backlog there.

COMMISSIONER DAVIS: They can do 10,000 cases at the drop of their hat. That's nothing to them.

COMMISSIONER REINSTEIN: If we could ever get California to get there, when they get funding and resources, then we can really get this problem knocked. But I think the only way you do it is by exciting people with what is being done in some places and what can be done here.

COMMISSIONER BASHINSKI: I think you have to define the whole problem, because your data bank and building it up isn't worth anything if you aren't also working at the cases.

So however you can, I just don't think we should leave out a part of the equation and I would disagree that people don't make decisions based on those dollars, because legislators and their fiscal analysts do.

COMMISSIONER SMITH: Anybody can make a decision on the basis that a rape was worth \$7,000. It's just not what people think about.

CHAIRPERSON ABRAHAMSON: I'm going to have say we have a break now and then we're going to do Jim Crow's report. I don't think that we're focused yet on PERF, at least from my hearing of the discussion, and I don't know if we'll come back to it tomorrow or the next time, but we'll put it in a broader focus, instead of a discreet topic.

DIRECTOR ASPLEN: I think we can talk about it tonight and think about it over -- and talk about it tomorrow morning and see how we get to the issue.

CHAIRPERSON ABRAHAMSON: All right. Good. So we'll take a break, let's make it ten minutes, come back, then Jim Crow is on.

[Recess.]

## **Research and Development Working Group Report and Discussion**

*Dr. James Crow, Chair*

CHAIRPERSON ABRAHAMSON: The Commission is back in session. And we have a very important announcement about dinner.

DIRECTOR ASPLEN: Very important dinner announcement. For those interested in going to dinner, meet in the lobby at 7:15. We have reservations at 7:30 at La Cassa Senna, a half a block from the plaza. It's a very old Santa Fe style restaurant, ten minute leisurely walk, at most.

The other thing I would add is that at 5:00, we'll be breaking here. However, we are then going to stretch for a few minutes and then go to the next room over, where we're going to have a demonstration by an NIJ grantee on some of the technology that he is developing. It won't be more than 20 minutes, on a video camera that he is using to detect biological components, and I think you'll find it very interesting. It's truly futuristic.

CHAIRPERSON ABRAHAMSON: Back to dinner.

DIRECTOR ASPLEN: Back to dinner. Casual dress for dinner.

CHAIRPERSON ABRAHAMSON: Okay. We are now ready for Dr. Crow, who is going to talk about the research and development working group report, with discussion. Jim?

COMMISSIONER CROW: I want to note that I'm glad that Lisa is here, or at least I thought she was here -- yes, she is. There are likely to be technical questions that she's in a better position to answer than I am. The committee was chosen for technical expertise, with my exception. I was selected for whatever reason they did, but not for technical expertise.

There are likely to be some legal ramifications that come up and, again, she has given thought to that.

What I want to do, though, and perhaps for CODIS, too, I'm not going to say anything about CODIS, but that still leaves quite a bit to talk about. I would like to pretty much go through the report and if you'll permit me, I guess since I have the floor here, you have to permit me, I'll approach this historically and say some things that most people know, but think it's nice to have the history of this as a way of judging what the future is likely to be. We can use it as a guidance to future extrapolation.

So to go back to the very early days, the earliest methods were blood groups. I find it interesting. Blood groups were discovered in 1900. They were discovered by three different investigators, each of which named them one, two, three and four, which was fine, except two and three were interchangeable between two of these groups. So hospitals that used different systems of blood transfusions had what was then called transfusion confusion. Now that's been settled in an unambiguous notation.

Another curious thing about this to me, the methods must not have been very good in the earlier days of the century because the theory of how these were inherited was wrong, turned out to be wrong, and yet it lasted 24 years. It finally took -- and it took a population geneticist to clear this up. He analyzed data from soldiers in World War I that enabled the proper analysis of this.

And it's interesting to go to the old literature. There are certain kinds of matings that can't happen under the correct hypothesis, but which can happen under the wrong one, and the number of those substantially diminished in 1924, the year the correct hypothesis was worked out. All of which tells you what you already know, that the methods were not really very reliable back in those times.

Then by 1950, new blood groups kept being discovered. By 1950, there were a dozen or more of these. Still not enough, though, to be used for inclusive purposes or not at the moment at that time at least, and blood groups were used primarily just for exclusion.

Then in the '70s mainly, then people started thinking of using DNA to give inclusive probabilities, such as probabilities of a match, and this was all pretty well worked out, very well worked out, for paternity cases, again, using blood groups, but it was not -- we're dealing here in probabilities of the order of one in a thousand, which is all right for paternity testing, at least it was accepted, but in forensic work, we demand a stronger criterion than that.

The DNA methods suddenly appeared in 1985 with Jeffreys, who just found these what we now called VNTRs, and the discovery that you could use DNA itself was really a remarkable thing.

Most of us that are old enough to grow up before we knew what DNA was, we knew what DNA was, but we didn't know what it did, it's totally remarkable to find out that something as simple as DNA could, in fact, be the gene. But it's not simple in one sense; it's astonishingly long.

If I put all the DNA in a -- well, there are three billion bases of DNA. The amount of DNA in a single cell may be a yard or so in length, and if you like to play these kind of games, if you ask how long the DNA in your body would be, if stretched end to end, it would go to the moon and back a great many times. I haven't calculated exactly how many.

It reminds me of what Francis Krig said. He said imagine how short, in fact, you must look to a DNA molecule. Anyhow, it's these three billion bases that really makes this so powerful, once you could analyze all three billion of them or even one percent of them, which would still be definitive for any two individuals.

But what we have to be content with, less and less each year though, is a sample that's not very big, but our ability to sample the DNA gets bigger and bigger each year and it's growing very rapidly right now.

The first to be used were the RFLPs or VNTRs, as they're usually called in these circles. They have many advantages. You're acquainted with them, I think. There are many alleles at each locus. There are not very many loci, it would be nice if there were more, if we were going to continue to use this. They are -- the large databases are available, thanks to many people, and

summarized in these big volumes by the FBI, but there are disadvantages, too, and one of them was the necessity for binning, which always led to statistical difficulties and disagreements, and the limited number of loci, as I said before, and then single bands can be ambiguous.

A single band may be a homozygote or it may be one of two in which you didn't see the other one, and they're time-consuming, especially when radioactive methods were used. They've been largely replaced now, so that the time is no longer in months or weeks, but now in days, at most a week.

Then came what's getting to be and soon will be, in a couple of years, I suppose, almost universal, those that depend on the polymerase chain reaction.

I wish somebody that I had more respect for had discovered the polymerase chain reaction, but I guess you have to take them where you find them. Anyhow, he made this maybe the nicest discovery in molecular biology in years and years, just a way of taking a very minor amount of DNA, in principal, a single molecule, and expanding it to large enough amounts that they can be analyzed by ordinary laboratory chemistry.

What this does is do pretty much what happens in the cell anyhow, and what Cary Mullis did was simply confine this to a part region and you amplify the region that you're interested in.

So with the coming of this, then the tide has changed very rapidly in the direction of getting more and more systems that use the PCR.

The first one to use it effectively was the DQ alpha system or DQA. That has some advantages of being fast and is still being used and may be able to continue to be used for a while for that reason. There is about a five percent chance, or maybe, to say it the other way around, about a 95 percent chance of exonerating an innocent person who is wrongly accused by just this one test, so it provides a very quick, somewhat dirty, but very quick way of getting an answer of an exclusion source.

Then there are five more loci added to this that make the polymarker system. That has a total discrimination capacity of about one in 4,000. We really want more than that, more precision than that for forensic purposes.

So the STRs have finally come into this. They are essentially like the VNTRs, except the individual units are smaller and the number of units in a locus are smaller. That matters because PRC, at the moment at least, can only be used for relatively small molecules, and that means that the older VNTRs were not amenable to that. But the STRs are.

So there is no necessity for binning, because the number of types is discreet enough. There are always problems and I guess I should -- I'm enough of a biologist to know that no statement really holds up universally. But for the most part, you can avoid any problems of classification of individual alleles.



The number of loci is essentially unlimited. So we could go on and on and on getting more and more, as long as there is a need for it.

With the canonical 13 loci that the FBI has decreed, the average match probability is one in 180 trillion. So with 13 loci, you have all the power that you need. Of course, there are going to be individual frequencies that are going to amount to that, but this is the average probability.

I'm going to come back to this and ask how long this is likely to persist as better and better methods are discovered later, but I'll defer that for a moment.

I want to say a little bit about some population issues -- oh, no -- first, about mitochondrial DNA. That has the capacity for being extremely sensitive. There are -- that is a very small amount of material can generate information. Whereas there's only one copy or maybe two copies of each gene in a cell, there are thousands of mitochondria. So a few cells will produce enough information that can be used.

So the great use of mitochondria is and will continue to be, I think, the capacity to generate information from very small and very unpromising degraded samples.

The Y chromosome, for a while, we didn't get any information from. It was pretty much inert, except for one function; that is, determining males. But if we ignore that capacity, the Y chromosome had very little on it. That has changed enormously in the last year. There are now, the last I heard, more than 150 loci on the Y chromosome.

Most of these are snips, a few of them are STRs, and I'll come back to another property of the Y chromosome in a minute that makes it particularly interesting for a particular purpose, perhaps troublesome for some other reasons.

Now, some of the population issues that I'd like to discuss and the committee is discussing and hasn't fully agreed on. We need to make some -- in our NRC report, we made suggested recommendations for how to handle substructure. As far as I know, that's still pretty well accepted as a way of doing it by using this quantity data, which is a measure of the amount of structure subdivision within the population.

For the four major racial groups in this country, the studies have shown the value of that to be considerably less than one percent, so probably our earlier recommendation of one percent as a safe value to use still stands.

If you're particularly cautious, and perhaps the population is likely to be particularly structured, maybe the .03 is better.

Now, I want to raise something that hasn't been raised generally before. We have now reached the power in these systems that we don't have to worry so much about the possibility of undetected relatives in the population or of the population structure, population subdivisions that you didn't know about.

What I have in mind here is it might be possible, with the amount of power we have now, to just make the calculations on the basis that the individuals are sibs. Now, why are sibs particularly useful or interesting in this regard?

It's because the probability of identity of two sibs is one-fourth, just by the nature of sibs. I'll draw you a picture, you like. But there are small increments beyond this that are based on the gene frequencies, and those increase in gene frequency size, but the one-fourth so dominates this quantity that there is very little difference in -- depending on ancestry, racial group, other kinds of relatives and such.

So I think maybe we'll approach -- I don't think we're there yet, but I think in a few years, we'll approach a situation in which maybe we can say that you measure the two individuals that you're interested in, two samples, and ask what's the probability of a match if they were brothers, and if they weren't brothers, the probability of a match, anything anywhere else is a fortiori less than for brothers, then you have an ultra-safe criterion. Let me emphasize, that makes -- at least that automatically you can stop worrying about undetected half-sibs in the population and by other kinds of complications by population structure.

What kind of numbers am I talking about? With the 13 CODIS loci, the average match probability for sibs is about one in 300,000, and that's not very big. But by going to 21 loci, which is quite feasible now, that becomes one in 600 million and with additional loci it goes up in very rapid proportions.

So I want to suggest that one possibility for the future, I don't know whether this would be acceptable or not, but it strikes me as a rather intelligent approach to the problem, I have friends, and you do, too, who would like very much to get rid of any racial designations in our discussions of this issue and if you don't have to ask what particular race a person belongs to, you make the same kind of calculation irrespective of their race, that has, in some people's minds at least, an ethical and a social benefit.

The original NRC committee, NRC-1, presented what it called the ceiling principle, which was roundly denounced, and has pretty largely been forgotten, but it had a high motive and the principal motive of that was to stop having to take races and other ethnic divisions into account.

Another thing I want to say a bit about is the possibility of inferring racial makeup or ethnicity from DNA samples. That's increasingly possible and increasingly troublesome. Even if we take the 13 STRs that exist right now, it's very easy to find a combination of a half a dozen of those, with the likelihood ratio coming from the white population versus coming from the black population, is 1,000 or 100,000, and so there are cases right now in which you could take a blood sample and just with ordinary STRs state a strong likelihood that that it had to come from a certain racial pool.

I think you'd want to, if you're going to use this for investigatory purposes, to narrow the range of suspects. I think you ought to take advantage of the prior probability of the racial groups; that is, natural frequencies of these, and rate your probabilities accordingly, as a good Bayesian would urge.

There is at least one blood group that's found essentially 100 percent in some parts of Africa and essentially zero elsewhere. It's called Duffy null. So if you find a person with the Duffy allele, that almost certainly means that that person has African background.

I caution you, though, that it doesn't tell you how much, nor does it tell you what the person will look like, because there are people who are very nearly white in skin color and people who are very dark in skin color, who would have -- who would show the same, who would be detected by this, the same way.

But by adding more and more characteristics, it's soon -- by soon, I mean it's just a few years, I think, we'll say a lot more about the geographical origin of a person or the person's ancestors, maybe I should say, from the DNA sample.

I don't have to tell you that this is going to raise ethical issues, that I pass on to the Commission for resolution.

There is one X chromosome locus that's sharply divided between the African population and the rest of the world, but the most interesting in this regard is the Y chromosome. Ordinarily, if we analyzed the variability of a population from ordinary genes, that is, for ordinary forensic genes, we find that maybe 95 percent or more of the population variability is between individuals within a group and very small part of the variability is determined by the mean differences between groups.

That's one reason that's made these things so powerful for forensic purposes, because they're telling you individual differences, which is what you want. The Y chromosome is different. The Y chromosome, more than 50 percent of the variability is between geographical regions, by which I mean Africa, Asia and North America and Europe.

Why the Y chromosome should be different? You might think that it's, of course, transmitted from father to son. Mitochondria are transmitted from mother to all of the children. Why don't mitochondria show this same kind of difference? I don't think anybody knows, but there is a good hypothesis that seems to fit the anthropological literature, and that is that most of the amalgamation that happens is by migration and it turns out that it's the women that migrate and the men stay home, and why I don't know, and maybe this is wrong, but that's about the only explanation one has for this otherwise rather remarkable finding.

It could be used, though, if it were desired, it could be used as a way of racial classification of people.

I emphasize, perhaps I don't need to, but I emphasize that this is going away from the usual directions of forensics, because I'm now talking about loci that are used for particularly for individual phenotypic purposes, whereas for forensic purposes, we try to stay away from discernable traits.

So if these things come into practice, it's because of a change in the emphasis of ordinary forensic usage. Right now, the gene for red hair I think has been analyzed. The gene for color

blind has. So it's possible to detect a sample of blood and say this came from a person with color blindness and that could be used as a way of aiding the search.

Another issue that has -- and none of these are old, but they're coming to the fore business they've become the kind of things one can do a great deal with right now, and these are partial matches. With 13 loci, if they examine all of these loci, it will be the same person almost always, but if they match it, a fraction of these, but not of the others, that probably means they're relatives.

So it's worth asking what the analysis would yield for sibs. Again, I'm particularly interested in sibs because of this particular relationship that they have.

If I take a pair of brothers -- well, what I did, which is get a collection of data from sets of brothers and sisters and just at them from the STR standpoint, the first one I analyzed turned out to be a little better example than average, but anyhow, it had a match at, I believe, five of the 13 loci, and a partial match -- that is, one unit fit and the others not, at another six or seven, and then there was one complete non-match.

But when I did my test of this, it turns out that that particular profile has more than a million times the probability, if it comes from a sib than if it comes from unrelated people, so that would be likely to be very convincing in a court, but especially convincing as a way of identification.

This particular -- you might say, well, father and son share a lot of their genes, too. In this case, you can rule it out, in this particular example, and oftentimes you can, because if the parents -- if these two individuals by both being homozygous for different genes, they can't be the parent of offspring. So in this case, I can say it's a very high probability that they're sibs, zero probability that they're parent and offspring, and a rather low probability that they are half-sibs or less closely related individuals.

That does mean, and it's going to be increasingly true with the CODIS databases, that I'm going to find examples in searching the database of a person who is the brother of the person you want. Then I ask the legal and ethical question. What rights have you to search the brothers of this particular person in order to find the guilty party?

There is the uniqueness question. It's been proposed, but, by no means, settled, or individualization question. The FBI has announced its procedure a year or so ago of how to define, when two samples are unique or an individual is unique. They define it as not finding it in a population as large as the United States, which they took at that time as 260 million.

So if the probability of a match is less than one in 260 million, it's regarded as this individual is unique. Except they hedged, as they ought to have, of course, they made two conservative modifications. They asked not just for the average probability of this happening, but for the 99 percent confidence limits of this happening. That cuts the numbers down considerably.

Then they said pick, of the four databases, whichever one is larger and then they multiplied the whole probability by ten. Where did this ten come from? It's a figure that I think we can justify,

but it doesn't arise out of any theory. It's simply the empirical level of agreement between two individuals from different parts of the world tested with the same sets of VNTRs. And by looking at the data, this is our '96 committee, we decided that a factor of ten pretty well encompassed the range of error that one is likely to find; I mean, a factor of ten in either direction, which is the 100 counting in both directions.

So this means that if you estimate the probability as one in a million, it might be as small as one in 100,000 or as large as one in 100,000 or as small as one in ten million, and that's an empirical measure.

I prefer this to better statistical methods, because this is empirical and it's based on what the actual data look like, and the statistics ordinarily don't take all kinds of errors into account.

The FBI procedure -- that would be to taking 3.9 as ten-to-the-minus-11th and as the cutoff point. So if you calculate your probability as less than that, then you're able to say that to a reasonable degree of scientific certainty, these two samples came from the same person.

Within our committee, there is considerable vociferous criticism of this statement. It's not very good statistics, it's not very good genetics, but it's not intended as being good statistics and not intended as being good genetics. It's a pragmatic agreement that maybe the courts or the forensic community would decide, but it's clearly not a scientific question and, therefore, it's one that I could be a narrow scientist and toss off to other people to discuss.

The FBI procedure does not consider relatives, but they do -- it does -- if you make this same kind of calculation for relatives, you will hardly ever reach the size of the United States population.

So if you think or are worried about the possibility of undetected relatives in the system, then this doesn't stand up very well.

So I really don't know what is going to be the outcome of that, except I think it has actually been practiced in some courts, some of you can help me with that particular point.

Then there is the authority question, at least amongst statisticians, and that is that when the suspect is identified by a database search, the 1992 committee regarded this as an important issue and they said if you find too many suspects by database search, you're increasing the risk of prosecuting an innocent person.

So they suggested what you should do is find your suspect using whatever markers you use for that and then test it for court purposes with other loci.

In our '96 report, we approved of that, but it didn't seem practical because there are only half a dozen loci to use and if you use half of them up in finding the suspect, there are not enough others to give any statistical power.

That's no longer true. With the STRs now, if you used half a dozen to identify the subject, that leaves seven of the 13 and then most laboratories can go beyond that. So I think in the near future, it would be possible to have this kind of a criterion, that as databases get to be large enough, there is a legitimate fear of finding an innocent person too often. Then the numbers will soon be large enough to apply this by about the time the databases get to be large.

However, there is an influential group of statisticians who feel quite differently about this and they say that the way in which you got the subject doesn't matter, that what you do is analyze this particular person, ask how likely that probability is, and calculate accordingly. Then everything is simple. You treat the individual from the database the same as if it were gathered otherwise.

And I don't mind saying privately, this isn't very private, I don't mind saying publicly, but not to my committee, that I think there really is a difference between gathering one individual from the sample of a thousand and finding one individual from a sample of one, and that your probability calculation should take that into account.

But we are wrestling with this and I have on this committee two statisticians, both of which are rather strong-willed, so likely to prevail. One of them -- in one respect, the report will certainly be better because one of our statisticians is a stickler for using the language correctly and about six times he has uprooted me for saying probability when I meant likelihood or likelihood when I meant probability.

Which reminds me of the statement from Pygmalion that it doesn't care what you say actually, as long as you pronounce it correctly, and I'm sure our report is going to be accurate from the standpoint of language because of this one member.

Now, part of our business, a big part of our business is technology projections, and I'll say a little bit about what we think is likely to come up in the next two, five and ten years.

For the two-year period, by two years from now, which we would say is 2002, that the STRs will surely have pretty much dominated the situation by that time. We saw in these surveys that the -- I read it just last night, that the FBI did, as to how rapidly the laboratories are changing over into STRs. That will certainly dominate case applications at that time.

The database will certainly be much enlarged and not only be enlarged, but made more specific, so there would be better data on finer subdivisions of the population. And if we want to understand people from a particular side of the country, we'll have enough data to say something about that.

I think the data are going to be published, but if we have any recommendation to make, it's going to be for the FBI to get busy and publish these data that exist, but are not in public form.

One of the things that will come with larger databases is making the mitochondrial DNA and the Y chromosome more useful. The mitochondria, we can't use Mendelian principles to expand the database by multiplying numbers together.

All the information you have is just the number in the database. So if your database is 1,000, the smallest probability you can have is 1,000 or zero, and it's expedient, therefore, to get larger databases for mitochondrial DNA especially; perhaps also for the Y chromosome, except I don't think it's likely to have quite as much forensic use, except for rather special kinds of uses in which you want to separate two different males. There are times in which -- two different males from different sources.

Of course, Y chromosomes won't distinguish between the male descendents of a single male, but they will distinguish between the male descendents of two different males.

And certainly within two years we're going to have improvements in the collection of evidence and in the isolation of DNA and in the automation and in the miniaturization. There is a group at Harvard that announced that they were -- or at Cambridge, I should say, that announced that they were working on a chip, I guess we could call it a chip, it's the same principal, a tiny unit, that just does STR analyses, the same way you would do them macroscopically, except this does it in a minimum scale. I think Lisa interviewed those people, but my information comes from newspapers.

It's at least possible, in principal, to just miniaturize the use of the existing techniques and by miniaturization, they'll not only become cheaper, because the materials cost less, but faster, and if it works, much more efficient.

This group in Cambridge, at the Whitehead Institute, said they'll have this ready in two years. But I caution you that there is quite a difference in having something that works approximately well in a laboratory in two years and having something that will withstand the rigors of the forensic community in two years time. But certainly in your lifetime, if not mine, there is going to be a miniaturization of the 13 CODIS loci, and that ought to come fairly soon, while the loci are still being used.

Then what can we expect in five years? Well, the genome sequence is going to be complete by that time. In fact, they promised it in considerably less than that. And we'll have much more computerized analyses. I think they will be retained.

And one of the things that's troublesome now is mixed samples with STRs that could be complicated, but they shouldn't be too hard to program. So that machines can do these fairly complicated calculations.

We will certainly have genetic and racial markers for investigation and society has to decide or the forensic community has to decide how to use these identifiers that can identify from a blood sample the racial or ethnic or even phenotypic data that the person has.

There's certainly going to be chips and miniaturization and the chips that are now being used for various kinds of genetic research are immensely impressive. I've enjoyed seeing demonstrations of them. They are also immensely expensive and they have to be specialized for rather particular tasks and I'm not sure that every state laboratory is going to be able to afford the kind of

instrumentation that this calls for, unless there are improvements in the technology itself that makes the instrumentation cheaper.

I think that's a real tradeoff for the future as between these very rare powerful systems that are very, very expensive and something that's not quite as powerful, but not so expensive.

STRs will surely continue to dominate for the next five years and probably longer and the 13 standard loci will presumably be adopted by virtually all laboratories by that time, probably sooner, and most laboratories by then will have a substantial number of additional loci to use for troublesome cases or where you particularly want to do a better than usual analysis.

One thing to emphasize in looking at the new kinds of technologies that are emerging is that some of them simply improve the efficiency of doing what we're now doing; that is, using the same 13 CODIS loci for doing them more accurately, more rapidly, more efficiently, more cheaply, and in a miniature scale.

Others, like snips, involve a new technique and before they become widely used, they would replace or be used in conjunction with the STRs. And if we look a further on, for down ten years, that's a little harder to predict. The investment involved in getting the 13 core loci up and running in many different laboratories is a big investment and it works very well.

My guess is that there will be a very great reluctance to change even for something that's demonstrably better just because of the big investment that's been made in a system that works awfully well and especially works still better with the modifications that are being developed.

We can certainly look forward in ten years to a miniaturization and speeding up in such a way that probably that the investigation can be done right at the crime laboratory and that would, of course, have tremendous advantages in quickly clearing an innocent, for example, but, also, it will shorten the chain of custody and make less likely, therefore, the kinds of errors that can arise in any system where multiple humans are involved in the operation.

I suspect ten years from now that old and new systems will coexist. We're using snips already, which most of the Y chromosome is done by snips, and there are -- and they probably will introduce elsewhere, too. So to just hazard a guess, probably if you look down ten years, we'll still be using these 13 loci, but various others will be added to it, sometimes in the same laboratories, sometimes in other laboratories that specialize in particular kinds of cases.

The last part of our report is a series of appendices, or an appendix with a series of parts, and these are all written by the people who specialize in that particular subject, and I'm neither going to talk about them nor answer questions about them, first, for choosing not to, and the second because of being unable.

But by ten years, we're going to have allele sequences, mass spectroscopy, which brings us into the physical rather than the chemical level, and, of course, direct sequencing.



Most of the people who are making predictions, in the conversations I have at least, think that the most promising among all these are snips. They're here already and probably the technique will improve and I hope the cost of using them. There are snips and snips and they range in cost from very expensive to just expensive for use.

I suspect or our committee suspects really that much of what we'll be using in ten years from now will be determined by what medical research yields in the intervening ten years, because it's bound to turn up interesting things and perhaps useful and perhaps important.

We will sure here, within ten years, of more instances in which animals and plants, or even wild animals, are involved in DNA cases. That raises difficulties and it has simplicities, too. One difficulty is that most of these organisms are likely to be highly inbred and that complicates the genetic analysis. It means that it takes larger numbers to get the same information.

But there is another concern that doesn't exist, though. You don't have to look for markers that are not associated with phenotypes and diseases I don't think any cat is going to sue because its privacy was invaded, but maybe I'm wrong. But in any case, one can get a lot more information by not having to worry about getting traces that are not used as phenotypic markers.

I also want to, if you look at other organisms, you can look at bacteria and protozoa and worms and other kinds of parasites. We all carry our own constellation of parasites, bacteria, viruses, and it's just possible that there would be forensic uses of not of our bone genes, but of the genes of the organisms that we carry. I don't predict this, but I don't predict it not happening either, and it might very well.

As far as our behavior is concerned, we don't have in mind any very specific recommendations regarding research and I think the reason for this is that the research is driving itself. The universities are competing with each other and laboratories and the new techniques are going to be developed considerably faster than they can be put to use.

It's hard to predict what's going to happen with costs. You would like to think there would be economies with more efficiency, but on the other hand, you're discovering new and better techniques, which usually turns out to be more expensive.

But I have heard reports about the cost of doing individual tests coming down, if they can be automated or mass produced or there are economies of scale that have come into this, and I hope those apply to the backlog that I've been hearing so much about in the last day.

Some social issues that came up in our committee, but don't really belong there. We haven't talked about laboratory standards, largely because that's pretty well dealt with in other places in the community. So unless we're instructed to the contrary, I think we won't talk on that particular point.

There are questions about long-term storage, both the technologies and the proprieties, and a question about whether databases can or should be used for research, whether one can invent or make up the required privacy considerations that would permit useful kinds of research.

So far, it's a little hard to think of good questions, important questions that could be answered from a database that wouldn't infringe on the kinds of liberties that all of us take very seriously. But it's a question worth raising.

And one other point that came up in our committee, but it really belongs in the parent body, this is my last, and that is whether scientific questions in general are better handled by greater use of court-appointed experts than is now the case.

Lisa is sitting back in the back of the room, not necessarily eager to talk, but I've offered the opportunity.

DR. FORMAN: But here if you need me.

COMMISSIONER CROW: She's there to answer questions at least. So let me invite them.

CHAIRPERSON ABRAHAMSON: Questions, comments.

COMMISSIONER GAHN: What about the population frequency issue and racial differences? There are obviously cases where other evidence in a case makes one racial category -- that is, a frequency in a particular racial category -- more important than others, and perhaps to the exclusion of all others from the rest of the evidence, and the case indicates the person, the attacker, let's say, was of a specific racial and/or ethnic group.

In that case, or, I should say, that type of case, isn't it important to provide those specific frequencies? I mean, specific to a particular race.

COMMISSIONER CROW: To a particular race, yes. I think that would go on. We do that right now. But everybody knows that racial classifications are fuzzy at the edges and there are always going to be people that either classify themselves differently than their appearance or just by the appearance. In the Hispanics, it's really not a biological classification at all. It's a language classification. And there are always some people, including me a bit, that were using these seemingly rather artificial measures, and yet they're real and they have predictive value and they've been very useful.

One of my reasons, though, it's obvious that I'm enthusiastic about this, and it would be nice just not to have to ask that kind of question, that every individual could be treated as an individual.

If we use more race-specific markers as opposed to just statistical aggregates, if we use more race-specific markers, I think we're going to find more and more cases in which we identify a possible bit of racial ancestry, without it being very useful in telling you what the person looks like or acts like. But maybe more loci would change that.

COMMISSIONER REINSTEIN: Dr. Crow, where do you see court-appointed experts being used most frequently in trial courts?

COMMISSIONER CROW: I don't have very serious ideas about this, but it seems to me that there are likely to be situations in which two experts brought in without a bias being forced on them, let me say it that way, maybe can -- one or two can quickly come to agreement on quite a number of points. Those can be stipulated, and then you go on from there and debate the others.

I doubt that -- well, I think you're in a better position to say than I am. I doubt very much now that the expert would be definitive in the final disposal of it, maybe is the word I want to say.

COMMISSIONER REINSTEIN: I think you can be -- if the judges make a determination, if it's an admissibility hearing, I think that if it's a trial in front of a jury, they're still going to be calling in their hired guns.

COMMISSIONER CROW: You reminded me of what I meant to say and forgot, too. I think if the court-appointed experts have -- initially, it's likely to be an admissibility.

COMMISSIONER REINSTEIN: I would be happy to hear Lisa, who is testifying in my court next week, as my court-appointed expert.

COMMISSIONER CROW: Good. It's clearly the result of our recommendation.

I want to say but just one more thing, then. This report has been in an earlier stage, it's in a late stage now, earlier with regard to the date of the completion, and I do welcome suggestions from any and all of you.

The one question that constantly arises is what level this should be, how technical. We're trying to write the report itself in a way that can be understood by the so-called intelligent layman, but big words do creep in and we'll try to put in a glossary for that.

Then in the technical part of it, that can be as technical as it wants. Now, with our -- as David Kaye will help me remember, in our 1996 NRC report, we had a public version and then a more or less technical version, much longer. The public version was deemed too difficult or too long, so we had a special short version for people with particularly poor attention spans that could be read in a minimum time, and I've mentioned it to David, because he wrote most of that part of it.

COMMISSIONER REINSTEIN: Well, the technical version, when you get into the appendix and you get into these formulae, somebody will need to translate that or say ignore.

COMMISSIONER CROW: Those particular ones are written, as I say --

COMMISSIONER REINSTEIN: Is that Dr. Weir?

COMMISSIONER CROW: Actually, it's me, but some of the formula come from Weir. And if Weir were doing it, let me assure you that they would be more complicated.

Thanks for your attention.

CHAIRPERSON ABRAHAMSON: Any other comments? So what's the working group going to go to now, defining this?

COMMISSIONER CROW: Yes, our next step, and if the Commission wants to give us other assignments -- I took as our main assignment these predictions. If we do that, are we off?

CHAIRPERSON ABRAHAMSON: Any other comments? Thank you very much.

[Applause.]

DIRECTOR ASPLEN: I don't know if there -- Lisa, could you see if Cohen is ready for us?

DR. FORMAN: Let me check.

DIRECTOR ASPLEN: Dave, did you have some comments about the earlier discussion we had that you wanted to --

MR. COFFMAN: Dave Coffman again. I did want to make a statement that it concerns me a little bit, just as a spectator, to hear that we feel like we don't need to do the research to come up with true numbers to get our message across.

I'm speaking not only on the arrestee issue, I'm speaking on the cases that are out there not being worked, because I can just speak from personal experience in Florida that our legislature was totally unaware, they have this idealized view of what's going on in the agencies they're funding and they truly felt like we were working every crime in the State of Florida, first of all, that was being submitted, and that we were working every crime for DNA.

It's great that we all know that that's not true, but we have to do the research to prove to them that that's not true, so they'll fund it.

We were audited in 1995 and the work, the verbiage in the pre-audit report was the auditors were shocked and appalled that not every case, sexual assault case was submitted to the laboratory and that it was worked for DNA.

And out of that audit report came 69 new positions for the Florida Department of Law Enforcement and also some funding for some lab expansion.

So I think if you can show the numbers and do some sort of research, that even though it may not be accurate to the nth degree, I think it's at least an estimate of what the problem is out there and it can help get you funding in your local state, because that's what it did in Florida, and I just felt like I needed to say that.

CHAIRPERSON ABRAHAMSON: Thank you. We are ready to go next door. So we're in recess, until next door, and then tomorrow morning at nine, except for dinner at 7:15.

[Whereupon, at 4:55 p.m., the meeting was recessed, to reconvene at 9:00 a.m., Saturday, May 8, 1999.]

## Continued Discussion (wrap-up of miscellaneous items)

[9:00 a.m.]

CHAIRPERSON ABRAHAMSON: I will call the Commission to order.

What we will do is pick up some matters that were left hanging yesterday. According to my notes, we have three, and we can do any others that any of the Commissioners want.

We have the PERF survey, the arrestee issue, and the law enforcement pamphlet. I think Chris said he drafted up a one-pager as a suggestion and it will be available soon.

DIRECTOR ASPLEN: We're just having it printed and copied right now.

CHAIRPERSON ABRAHAMSON: Okay. So we'll start with the PERF survey. Christopher?

DIRECTOR ASPLEN: When we left yesterday, there was a considerable discussion about the value and benefit of it. I thought, in speaking to a number of Commissioners last night, I think that we may have kind of gelled the issue a little bit.

In speaking to Commissioner Gahn, the concern was that the numbers that would be generated based on the criteria listed on the form that you have from PERF would not necessarily be accurate or reflective of the true nature of the non-suspect backlog, but rather the way to identify a more accurate at least subset of the problem would be to ask law enforcement officers or agencies just about their rape kits or the sexual assault kits that they have in storage and are not submitting and why they are not submitting those.

The discussion around dinner last night was that that may be, again, a more tangible, more accurate number, from which we can, to some extent, extrapolate and say and these are just the rape cases, number one, and these are just the rape cases with kits, et cetera.

But at least what we'd be working from is a base of a more accurate figure. So the suggestion was to go back to PERF and say we're not interested in all of this stuff. All we're interested in is this particular question, concentrate on rape kits, and that would be more accurate.

The other suggestion was that we find a way to capture input from more of the smaller jurisdictions, as PERF concentrates primarily on the larger jurisdictions over 200 or 400,000, something like that. So we would also do that.

There was a suggestion by one of the representatives here from Eastern Kentucky that maybe they could participate in that, also, as that's part of their expertise, is the smaller jurisdictions.

So how do we feel about that?

COMMISSIONER SMITH: I'll second.

DIRECTOR ASPLEN: Are you comfortable with that, Chief?

CHAIRPERSON ABRAHAMSON: Any further discussion? Does that meet your objections, Norm?

COMMISSIONER GAHN: I think it will give us a more meaningful number.

CHAIRPERSON ABRAHAMSON: Hearing no further discussion, we'll take a vote. Those in favor, say aye.

[Chorus of ayes.]

CHAIRPERSON ABRAHAMSON: Any opposed?

[No response.]

CHAIRPERSON ABRAHAMSON: It's unanimous of the Commissioners present. So that's PERF. So that will be written and finances will be redone.

DIRECTOR ASPLEN: Yes.

CHAIRPERSON ABRAHAMSON: The next issue I've got is arrestee; that is, the issue is Attorney General Reno wanted our views on getting DNA samples from arrestees, and that raises two issues at least; one, legal, and, two, practical. Right?

DIRECTOR ASPLEN: Or one practical and two legal.

CHAIRPERSON ABRAHAMSON: That's probably the correct order. So we are scheduled to send her a letter by August 1.

DIRECTOR ASPLEN: Correct.

CHAIRPERSON ABRAHAMSON: We heard a discussion about the legal issues from Michael Smith and David Kaye yesterday and it would be my suggestion, but it's open to discussion, that the letter indicate that we are studying the legal issues, but that in light of the big backlog of convicted persons, the perhaps lack of samples from those on probation and parole now and that we have, and maybe by then we'll know, large numbers of non-suspect cases that haven't been tested, that as a practical matter, dealing with arrestees at this time is impractical and that it's just simply too much money and not enough workers.

So that's what I would propose the letter might be.

COMMISSIONER REINSTEIN: The only thing I would add is what we talked about regarding Sheriff Kennard, if there is a jurisdiction that doesn't have a backlog and really doesn't have a large number of old samples, that would impact negatively on the laboratories, that they should feel free to go ahead and get -- or they shouldn't feel constrained by our statements.

CHAIRPERSON ABRAHAMSON: On the practical level, but at the legal issue, the Commission has to reach any decisions or recommendations.

COMMISSIONER DAVIS: I'd like to add a little addition to that, and that is that any jurisdiction in the United States that does inaugurate a program of this type, it should be viewed as a demonstration project, studied as such, the results analyzed, and then the results disseminated by whatever agency is best equipped to disseminate such information, such as NIJ.

CHAIRPERSON ABRAHAMSON: Chief?

COMMISSIONER SANDERS: I thought the -- I guess maybe I just had the sense that the consensus was that we all thought that it was probably a good idea, that we thought we should prioritize. The same with the legal issues.

Just my feeling is that you should, in command, you should command and beg forgiveness, not ask for permission. I firmly believe that the message that we should send to the Attorney General is that we believe that that's where we should be going and that eventually that that's where it's going to wind up and that's where it ought to wind up.

I would just ask that we word this letter in some fashion to prioritize those things, identify the things, that it's really not very practical to do immediately, but it is something that we should be working towards.

I also think that there should be some consideration with the legal issues as to how we can enter the information in the database or actually access the database. I just believe that this is an opportunity for us to identify offenders that we ought not pass up on. My concern is that if we write the letter to where we're saying that it's just something that should be happening, we're encouraging other people to do it on their own, then I don't think we're doing what we should be doing as a Commission, in that I honestly believe that it's something we should be working towards.

I had the sense, listening to everybody yesterday, that we all kind of thought it was a good idea, we just didn't think it was doable right now, and even if we decided we wanted to do it right now, it would take us a couple years to implement it, just because of the complications of hiring and training the people and doing all that stuff. But I would hate to see us send a letter to the Attorney General that was weak-kneed in any way and with reference to where we'd like to see this thing to eventually.

CHAIRPERSON ABRAHAMSON: Jan.

COMMISSIONER BASHINSKI: I'm not sure that we've established a consensus that that's where we want to go, although I happen to think it's a good idea.

I think the problem -- what you're suggesting is that we should talk about addressing the national legislation, because CODIS requires convicted samples. Is that what you're saying? So somehow that ought to be one of our missions.



COMMISSIONER SANDERS: Actually, what I'm saying is that in the priority things, that we've got things set up and the backlog is the most important thing, and how are you going to do a good job with this other if you don't, but to somehow send a message that we don't think that fingerprinting or DNA testing of all arrestees is not important, I think, is the wrong message.

That's not the message I want to send. I understand I'm only one vote, but if that's how it goes, then I certainly will just vote no and be happy.

DIRECTOR ASPLEN: If I could, from a procedural standpoint, I think one of the things that we hope to accomplish by kind of breaking out the two or maybe even really three issues this way was to kind of send the initial statement which raises the level of discussion on the practical implications. It also has -- and it gets a recommendation to the AG by the August -- and an important one -- by the August deadline.

What it also does, however, I think, and I'm sure that Professor Smith and Professor Kaye would appreciate this, I think it then gives some time to further the analysis of the other two issues, which are kind of the pure legal issues and then what are the other privacy considerations, how do we ensure the privacy of the system.

So I'm not sure that by making a statement today of noticing the concern about the financial commitment to arrestees necessarily excludes the ability to later, if the Commission decides to actually advocate for taking DNA from arrestees in the future, because I don't think that it was intended that that issue be decided today.

CHAIRPERSON ABRAHAMSON: We have another problem. We don't have as many Commissioners as we ordinarily have and we have no one here from the defense side.

COMMISSIONER SANDERS: That's great.

CHAIRPERSON ABRAHAMSON: Strike that from the record. So as a procedural matter, we have that problem. But we shouldn't put anything in the letter that would indicate a pregnant negative that is we're saying that that shouldn't be done, because I don't think that is a consensus yet.

COMMISSIONER CROW: I think this is repetitious, but I think we shouldn't say too much about the future, two years and hence. I'm worried about the attack that is almost certain to come from other groups about this issue, the fact that you've got this backlog, we've got to take care of that first. It lets us sort of off the hook.

COMMISSIONER SANDERS: I guess another thing is seeing that the question has been offered to the public for debate and Commissioner Safert's comments and the Attorney General directing us to respond to it, I mean, to me, it seems like we just do an injustice if we don't say -- and maybe I'm just in the minority, but I believe that it's important.

I believe that eventually it's going to happen and that it ought to happen and if all it is is for identification, then maybe it's not nearly as important, but I'd like to see it. I just, in my mind,

cannot accept the fact that I have a chance to run her DNA, when I've charged her with criminal damage to property, and find out that she murdered somebody in California, that just -- my mind can't get around that.

To me, everything that was said yesterday about the numbers of people that commit smaller crimes and then eventually go on to the more violent crimes, it seems to me like we're saying to ourselves we know that if we could identify those people early on -- at dinner, I used the case of Jeffrey Dahmer. You mean to tell me that if we could have found out, we might have saved 15 or 20 people from dying, and how do you get your mind around that, and that's the problem I have. That's why I feel so strongly about that, the arrestees and the fact of being able to compare them against the database.

COMMISSIONER CROW: I guess I agree with everything you've just said.

CHAIRPERSON ABRAHAMSON: Norm.

COMMISSIONER GAHN: I think the way you could couch the letter to address that issue -- but I still think we have to be somewhat -- or it would be prudent to be a bit neutral on -- I mean, we can say that that issue is out there of arrestees and it's something that -- it is going that way and eventually -- we know that. Arrestees are going to be taken, it's going to evolve into that.

But it's not going to do you any good unless all your states have their case index up to date. Unless you have all those unsolved, non-suspect cases into a case index, what sense does it take to run anyone, an arrestee, unless that backlog is up to date, and that's how I think we should present it.

Yet, we're not discounting arrestees, but the practical aspect is that until every non-suspect case is in the case index, every foreign profile is in that index, at that point, we want to get all the arrestees and then run them against that.

CHAIRPERSON ABRAHAMSON: Michael.

COMMISSIONER SMITH: I don't disagree that we might very well end up where you say we will shortly, but I'm not sure that that's the best solution to the problem that you raise. One of the things that we haven't fully discussed, I sense a reluctance to discuss it, is that if we take that point of yours, which I do, then we have, I think, no particular reason substantively to want to limit our ability to check a crime scene DNA sample to a databank of arrestees.

Jan hasn't been arrested yet and I'd hate to have to arrest her just to get her in the databank, if the most expensive databank is what we really want.

So I have a feeling we ought to discuss that issue more frontally before settling on a policy of arrestee collection, which will be a tremendous commitment of political and financial resources, when another course might be better.

COMMISSIONER BASHINSKI: Certainly we would agree that we need to discuss these issues much more fully and philosophically.

COMMISSIONER SMITH: It's hard to disagree.

COMMISSIONER BASHINSKI: That's right.

CHAIRPERSON ABRAHAMSON: Chris indicates that we will have to, at least if we answer the Attorney General's letter, we will have to deal with the privacy and the legal issues in greater depth, so that all we have to do is say, at this time, the practical stuff.

COMMISSIONER SANDERS: A no, yes and a maybe.

CHAIRPERSON ABRAHAMSON: Which will fit the discussion yesterday, with the yes and the maybe.

COMMISSIONER SMITH: Are you contemplating a letter now and a full response in August, is that what you're suggesting, or is it a letter in August and a full response in the year 2000?

CHAIRPERSON ABRAHAMSON: Mine would be a letter by August and the fuller response afterwards, because I just don't think you're going to be ready.

COMMISSIONER SMITH: That's great, if we can do that.

DIRECTOR ASPLEN: I thought you might like that scenario.

CHAIRPERSON ABRAHAMSON: I just don't see it. Now, I'm trying to be practical, having gone through the post-conviction. It just takes a while for these things to sift and winnow through the Commission and looking at drafts, and I thought the last one came out very well.

COMMISSIONER SMITH: I'm delighted to hear that.

CHAIRPERSON ABRAHAMSON: Well, that's my view. I don't know that's the Attorney General's view and I don't know that's the NIJ's view and I don't know that's the Commissioners' views, but I'm trying to be practical. We're almost into June, from my perspective, and that doesn't give us -- June and July doesn't give us very much time. So I'm just trying to be realistic, I think.

I'm hoping the Attorney General will be pleased with the first step and that is one that's immediate, but the others are, from my perspective, longer-ranged, but we'll see.

COMMISSIONER SMITH: How are we going to find out how the Attorney General feels about this? Can we do that in the relatively near future?

DIRECTOR ASPLEN: Well, I think so, for a couple of reasons. Number one, we already -- since we have sent up the first recommendation regarding the CODIS backlog, I don't know if that has

actually hit her desk or not, it has hit everybody else's desk up the chain, but when that occurs, we can anticipate some kind of response in that regard.

If we send this letter and/or a letter and recommendation, again, I think that that should probably generate an opportunity to gauge whether or not she is, in fact, pleased or not.

But the other thing I think that would be of value for us to do, and we could do this before August, is to send a gentleman named John Bentivoglio, who is her Chief Privacy Officer and who is really the one that suggested that the Commission take on this role, send him our preliminary reports, the report that Professor Kaye has already written, et cetera, keep him continually informed, so he can also communicate the progress to her.

CHAIRPERSON ABRAHAMSON: If that would be okay with Professor Kaye, that would be a good idea.

MR. KAYE: That would be fine. I've already made some revisions and I will e-mail them out.

CHAIRPERSON ABRAHAMSON: It's a work in progress, right?

DIRECTOR ASPLEN: And we have a very big draft stamp that we put on everything.

CHAIRPERSON ABRAHAMSON: Good.

DIRECTOR ASPLEN: If I could ask this question. This morning, in discussions about exactly what procedure to follow with this particular recommendation, it was suggested that we actually do both and send a letter through the National Institute of Justice, as we did the original CODIS recommendation, but also a letter from the Chief Justice directly to the Attorney General, saying we have received your request of us and the first response, given the work we've already done on the backlog issues, indicates to us that the first statement needs to be made regarding the financial infrastructure, laboratory infrastructure, so we really take two paths up to that point, if that's acceptable.

COMMISSIONER SMITH: That's good.

DIRECTOR ASPLEN: And as I understand it, the letter and the recommendation would include that, number one, there is no position at this time regarding whether we should or we shouldn't; however, we will address that issue more thoroughly in the future.

Secondly, that the case -- that in any event, for those states or local agencies that are considering doing this, the case index must be up to date if the individual states want to pursue it, that that should be a minimum standard, and that any attempt to do arrestee testing must be accompanied by appropriate full financial support. We can't have this being done under unfunded mandates.

And that the letter should be used to highlight the convicted offender backlog, highlight the offender backlog and the non-suspect case backlog. Does that accurately reflect --

COMMISSIONER SMITH: The language of "should" and "must" and all of that just strikes me as a little foreign to what we were talking about yesterday, and I'm not sure --

COMMISSIONER BASHINSKI: I wouldn't use "must" at all. I'd say should be considered.

COMMISSIONER CROW: Have you got it in there that you don't want to discourage both the communities from experimenting with this?

COMMISSIONER SMITH: Well, we don't want to encourage them either.

COMMISSIONER CROW: That's right.

COMMISSIONER SMITH: Maybe we don't want to say anything either way.

CHAIRPERSON ABRAHAMSON: Since we haven't decided anything on privacy.

COMMISSIONER SMITH: We are split at this point about that.

COMMISSIONER SANDERS: I can't imagine that individual states listen to anything we said anyhow.

COMMISSIONER SMITH: Can we adjourn?

COMMISSIONER SANDERS: No. The Attorney General cares what we say, but I can't imagine the sheriff in Salt Lake City is going to make his decisions based upon what this Commission recommends, until there is legislation that requires it, I would think.

COMMISSIONER SMITH: I'm not so sure I agree.

CHAIRPERSON ABRAHAMSON: Well, we'll see.

COMMISSIONER SANDERS: Yes, we will.

CHAIRPERSON ABRAHAMSON: And that's fine, because we don't bind them, you're right, Chief, and that's good.

Between Christopher and myself, the letter will incorporate the views of the Commission, of course, but I'm like the advocate, as the judge, you don't like to use words like "must" or "should" in talking to the Attorney General. I prefer the Federal Government might consider or think about. So I just want to assure you that it will be in that kind of tone.

DIRECTOR ASPLEN: It's an interesting relationship. When I write something as a prosecutor, then it comes back with the appropriate judicial amendments. Rest assured.

CHAIRPERSON ABRAHAMSON: It will state the Commission's view, but it will be couched in words of "you might consider, Attorney General." And these are recommendations. They are not orders or instructions and she is not bound by them.

All right. That deals with -- is that a general consensus? Do we agree on that approach for the moment? And we'll try and make sure that it does not indicate that we are either opposed or favor arrestee, and this is not the time to do it.

All right. I see a lot of nodding of heads at the table, so I will view that as a consensus. Not the Chief's head, but he remains silent, so I accept that as a general affirmation.

You want a vote on this. All right. Mr. Asplen would like a vote on that. Do you have a list of the Commissioners here? Okay. So if I -- well, we can start with Mr. Crow, Dr. Crow.

COMMISSIONER CROW: Aye.

CHAIRPERSON ABRAHAMSON: Chief Sanders.

COMMISSIONER SANDERS: Aye.

CHAIRPERSON ABRAHAMSON: Thank you. Ms. Bashinski.

COMMISSIONER BASHINSKI: Aye.

CHAIRPERSON ABRAHAMSON: Woody.

COMMISSIONER CLARKE: Aye.

CHAIRPERSON ABRAHAMSON: Norm.

COMMISSIONER GAHN: Aye.

CHAIRPERSON ABRAHAMSON: Mike.

COMMISSIONER SMITH: Aye.

COMMISSIONER SANDERS: Aye.

COMMISSIONER REINSTEIN: Aye.

COMMISSIONER TURMAN: Aye.

CHAIRPERSON ABRAHAMSON: Aye. All right. Thank you.

Now, are we ready for our next issue on the law enforcement?

DIRECTOR ASPLEN: Yes, we are. When we left yesterday, we talked about what would accompany the pamphlet to the Attorney General to kind of define the issue and try to make the point that it is less the pamphlet than it is the effort to communicate the information to every law enforcement officer, to try to create a national competency, if you will, on these issues.

This is something that I typed last night, after dinner, and a little bit this morning. As such, any comments are very welcome and I take offense at nothing. So why don't you take a few minutes to take a look at it and then see what we need to do from there.

My guess is that the actual recommendation needs to include more.

COMMISSIONER REINSTEIN: Chris, I think the only comment that I would have is that I read through the Kansas report from Terry Knowles and it struck me as really being indicative of what probably goes in most of the country and it's a really good shot at the United States system as compared to the British system as far as, you know, we use it as, like we say here, a confirmatory tool and not for its capabilities, whereas in Great Britain they use it as a really strong investigative tool, a comprehensive tool throughout the whole system.

I think this sends that message. I don't know if we could even send it stronger.

COMMISSIONER SMITH: Chris doesn't know how to deal with a favorable comment.

DIRECTOR ASPLEN: Thank you. And if you have suggestions as to how to make it stronger, if the Commission would like.

COMMISSIONER REINSTEIN: Well, you might point out the contrast between Florida and everybody else. I guess Florida has three times as many hits as Illinois, which is the next closest.

DIRECTOR ASPLEN: The first draft actually listed Florida specifically. We could certainly go back and do that.

COMMISSIONER DAVIS: Chris, on your beginning paragraph, you say oftentimes the most important person to the evidence collection process is the first responding law enforcement officer, but then we don't get into why that's important.

The first responding law enforcement officer is not the officer who collects the evidence. That is the officer who makes an observation and exercises judgment as to the preservation of the scene, the boundaries and the preservation. So there ought to be something in there that officer should be trained to think of DNA evidence in setting up the perimeters and in protecting the scene.

DIRECTOR ASPLEN: You'll notice at the top of the second page, I kind of start into that a little bit and I've got examples in parentheses, but I think you're exactly right. I think it's more appropriate up at the beginning.

COMMISSIONER DAVIS: To sort of set the tone why the first officer, because otherwise it's lost.

COMMISSIONER GAHN: Another reason for the first officer, too, which you can decide whether you want to add or not, but what we are experiencing in Milwaukee County, a lot of questions by the victims about DNA and even our victim witness people who tell us lots of questions by victims about it, what is it, what can it do, and right there at the sexual assault treatment center.

The more knowledge they have, the more information they give, and then give a reason why we're requiring you, victim, to do this, to go with us, not to drink this, not to change this. The more they know about DNA and what that technology can do, the more they can inform the victims, and I think that it's an issue you may want to put in.

DIRECTOR ASPLEN: And I think it's an issue that this Attorney General will be very sensitive to.

COMMISSIONER SMITH: That means that the responding officers need to be thinking about this, too.

COMMISSIONER CLARKE: Actually, the responding officers are sometimes the collecting officers. Not quite as much in sexual assaults and homicides, but if this extends to burglaries, they will be the evidence collectors.

CHAIRPERSON ABRAHAMSON: I'm really sensitive about talking about a lack of training, severely lacking. I think that's -- I think we could state it more positively, that additional training or --

COMMISSIONER SANDERS: We could say because it's emerging technology, too.

CHAIRPERSON ABRAHAMSON: Exactly. Something that does not --

COMMISSIONER SANDERS: Requires.

CHAIRPERSON ABRAHAMSON: Thank you. It's on the first paragraph, last sentence, and on the third paragraph, second sentence.

COMMISSIONER BASHINSKI: There is a need for increasing --

CHAIRPERSON ABRAHAMSON: On new technology.

DIRECTOR ASPLEN: How about the training has not kept pace with the technology application.

CHAIRPERSON ABRAHAMSON: Something like that, yes.

COMMISSIONER BASHINSKI: I would -- I'm on the second page in the recommendation, or maybe I'm going too far too fast, I don't like the word "standard."



CHAIRPERSON ABRAHAMSON: Right.

DIRECTOR ASPLEN: I agree 100 percent, yes.

COMMISSIONER BASHINSKI: Baseline maybe.

DIRECTOR ASPLEN: Yes. I struggled with that.

COMMISSIONER BASHINSKI: Baseline is the word that comes to my mind.

DIRECTOR ASPLEN: We could say benchmark.

COMMISSIONER BASHINSKI: Yes, something like that. Also, rather than competence, awareness, understanding, something, competence is fine, but the standard really --

DIRECTOR ASPLEN: It implies a formal standard, and I don't think that's what we're talking about.

COMMISSIONER BASHINSKI: Right.

DIRECTOR ASPLEN: What we're talking about is an awareness.

CHAIRPERSON ABRAHAMSON: You wouldn't say first step, because I'm sure there are a lot of steps. I would say one step.

DIRECTOR ASPLEN: I feel like I could use a little more guidance on the standard issue. I'm not clear.

COMMISSIONER BASHINSKI: Development of a baseline level of understanding or awareness, either one, among all law enforcement agencies.

COMMISSIONER SANDERS: I was going to say that you could -- I think standard, when you say develop a standard along that line, makes it sound like you're going to set up --

DIRECTOR ASPLEN: Right, right. Yes.

COMMISSIONER SANDERS: But at the same time, could you not word it in such a way to say that in keeping with levels of competence in law enforcement, that we need to do this with DNA. I guess what I'm saying is because we all have standards. We just don't want the Federal Government setting them.

DIRECTOR ASPLEN: Right.

COMMISSIONER SANDERS: But to keep pace with those standards or -- I mean, there is a standard. You want everybody to be at a certain level of competence. You just don't want to say that we propose the Federal Government sets that standard.

CHAIRPERSON ABRAHAMSON: You may not need anything. That you promote the development of competence.

COMMISSIONER CROW: Or high level.

CHAIRPERSON ABRAHAMSON: Or high level.

DIRECTOR ASPLEN: High level, there you go.

CHAIRPERSON ABRAHAMSON: Because you want to get away from mandatory.

DIRECTOR ASPLEN: That takes us out of that, right. That takes us out of that.

COMMISSIONER SANDERS: My god, the fights we had over that.

COMMISSIONER TURMAN: Chris, I just know, from my experience with working with the Attorney General on a lot of different things lately, I think she will like this and she'll like the brochure, but she's going to want to know specifically what we want her to do. She's very specific, she's very concrete, and just some generic thing of saying we recommend that you promote the development, she wants to know how, what kinds of options, what we recommend, and leave it up to her handlers.

CHAIRPERSON ABRAHAMSON: So there must be a Chief of Police national organization, right?

DIRECTOR ASPLEN: There's an international, yes.

CHAIRPERSON ABRAHAMSON: And there is a national sheriffs organization. And then there are, within the state organizations, in our state, the police chiefs have an organization and the sheriffs have two organizations in our state. So it seems to me we start with the national and ask them to disseminate to the state.

COMMISSIONER SANDERS: Like the international, they have a state association of chiefs of police. So every state that has a chiefs organization belongs to what is called -- I mean, I think Kathryn is right. If you just said that our recommendation is that you take necessary steps to ensure that dissemination to all law enforcement officers in the United States, we'd recommend the utilization of the international association of chiefs of police, the national sheriffs association, FOP, the IPA, whoever you'd like -- the IACP, the national sheriffs would help you, but at the same time, if you really want to get them out quick, get the FOP to buy into it. They've all got national organizations.

CHAIRPERSON ABRAHAMSON: And how many.

DIRECTOR ASPLEN: Actually, I think it's in the VCR.

CHAIRPERSON ABRAHAMSON: I'm going to recognize Dr. Rau for assistance.

DR. RAU: I would like to intervene at this point. We are developing, as you know, a set of guidelines for crime scene investigation. The draft of it is almost finished and we probably will publish it this year.

We sent each of the members of the Commission a copy of the draft and --

CHAIRPERSON ABRAHAMSON: This conflict in any way, Dr. Rau?

DR. RAU: Well, it's very basic guidelines, although we're not supposed to use the word guidelines, we use the word guide now, it probably will be out this year.

COMMISSIONER BASHINSKI: It's not a conflict with this, because this is much more specific about DNA.

DR. RAU: Right, but it includes DNA in the collection.

COMMISSIONER SANDERS: The thing is this was intended to go to all police --

DR. RAU: No, I'm not talking about -- you mean the brochure. No, no. I'm talking about -- if you're talking about making recommendations, you may want to take that into consideration.

COMMISSIONER SANDERS: I thought that's why Chris' letter said as a first step, because we were thinking this is something we want to get into people's hands as quick as we can.

DR. RAU: No, no. This I grant you, I support.

COMMISSIONER BASHINSKI: But do you also want to include in the letter, following up on what Dr. Rau said, that we are -- describe the other things that we are also planning to --

CHAIRPERSON ABRAHAMSON: That's a good idea. Good.

DIRECTOR ASPLEN: We'll talk about the training and --

CHAIRPERSON ABRAHAMSON: And we have a working group that's dealing with the subject and this is just one step.

DIRECTOR ASPLEN: And important enough to do a meeting. We didn't want to wait until the rest of the work was done to get this stuff in.

COMMISSIONER REINSTEIN: And I don't know how specific you want to get, based on what Kathryn says, does she want to know, for example, that the statistics that came out of that Kansas report, that the clearance rate has remained steady over, what, the course of eight years, at 50 percent, and England is 77 percent, and some states like Kansas are as low as 41 percent.

So how important it is to get this to an investigative stage as opposed to a confirmatory stage and why you need to get that out to the people on the street.

I was just really surprised that that clearance rate has been so steady over that long period of time, despite all the efforts that are being made. But I would expect that with CODIS now, hopefully we'll see a slight --

DIRECTOR ASPLEN: Kathryn, do you think that if we talk about it in terms of you should first contact the heads of these national law enforcement organizations and discuss the problem or the issue with them and make available to them the pamphlets?

COMMISSIONER TURMAN: I would suggest recommending to her that she pull together the heads of these agencies for a meeting, pick their brains about the best way to do this, and kind of go from there.

But as I said, she'll want to know specifically how many copies at some point or maybe you can say that the decision about how many copies and how it will be disseminated will be based on her meeting with these organizations.

You may want to give her the option of -- I think it would -- I would recommend that she hold a meeting with the heads of these law enforcement agencies.

COMMISSIONER SANDERS: That sounds like something that she would do. In Kansas, with that great solution staying the same, as you said, once they've been arrested, with CODIS, it won't be unless he is convicted. You understand what I'm saying? Unless he's a serial rapist, we're not going to clear more. We're not going to get cold hits necessarily until they're convicted.

That's why I'm telling you -- we've got to get around this.

COMMISSIONER BASHINSKI: I would suggest you had the post -- if there is an organization of police training, post organization, because that would get it into the grass roots pretty fast.

DIRECTOR ASPLEN: We'll do a lot of thinking and we'll talk to the other agencies and see what other agencies they think should be included in all this, also.

CHAIRPERSON ABRAHAMSON: Maybe a training association.

COMMISSIONER TURMAN: Also, Chief, has the ICP -- you know, they're doing -- we talked - - they're doing a summit this year on victims issues that we're funding. Have they done one of their summits on the DNA evidence?

COMMISSIONER SANDERS: It might be appropriate. The trail that they were following was more victim-related, as you well know, domestic violence and those kinds of things. So certainly there could be something that they would do and I'm sure that they would do a workshop if somebody from Chris' office wanted to put something together and do it at the conference in Charlotte.

COMMISSIONER TURMAN: That would be great.

CHAIRPERSON ABRAHAMSON: That is a good idea. An education program on that. You might even put that in for discussion purposes.

COMMISSIONER TURMAN: I'd say, in her meeting, she should discuss the dissemination of the brochure, but also try to get from them ideas on how to incorporate training on DNA evidence into their own organizations.

DIRECTOR ASPLEN: Dr. Forman just passed me a note asking an excellent point. If especially the law enforcement representatives of the Commission would want to participate in that meeting --

COMMISSIONER SANDERS: Oh sure, be happy to.

CHAIRPERSON ABRAHAMSON: Don't say we're in favor of --

DIRECTOR ASPLEN: While I have you here.

CHAIRPERSON ABRAHAMSON: It's a joke. You can say whatever you want.

COMMISSIONER SANDERS: I've already called and told her what I -- I said I just can't get Her Honor to go along with it.

CHAIRPERSON ABRAHAMSON: I think that's a very good idea.

DIRECTOR ASPLEN: yes.

CHAIRPERSON ABRAHAMSON: Any other suggestions about this? You will redraft this?

DIRECTOR ASPLEN: Yes.

CHAIRPERSON ABRAHAMSON: Okay.

DIRECTOR ASPLEN: And we should probably get a vote on that, too. That the recommendation would include the components that we've talked about.

CHAIRPERSON ABRAHAMSON: What's your time on this? Because maybe you could just send it to everybody, fax it to everybody, and they can send back any other suggestions they have on it.

DIRECTOR ASPLEN: Since we're this far, this won't take long.

CHAIRPERSON ABRAHAMSON: Do you think you can fax it to everybody and we can approve the final draft? But we should have a vote, as Christopher suggests, on this in concept, but then you can -- and if you don't fax it back, we assume you have agreed. We'll take a vote on it, that we will send a letter to Attorney General Reno regarding this pamphlet. It will be a letter drafted by Chris, incorporating the suggestions we've made here.

The letter will be faxed to all of you. You may make additional suggestions. If you don't respond, we assume you approve it and unless your fax back or letter back indicates total disagreement and you want it held, we will then send it out, because I assume everything else is of a technical nature.

Is that agreeable, does everybody understand that? Okay. Jim, do you agree?

COMMISSIONER CROW: Yes.

CHAIRPERSON ABRAHAMSON: Chief?

COMMISSIONER SANDERS: Aye.

CHAIRPERSON ABRAHAMSON: Ms. Bashinski.

COMMISSIONER BASHINSKI: Aye.

COMMISSIONER CLARKE: Aye.

COMMISSIONER GAHN: Aye.

COMMISSIONER SMITH: Aye.

COMMISSIONER DAVIS: Aye.

COMMISSIONER REINSTEIN: Aye.

COMMISSIONER TURMAN: Aye.

CHAIRPERSON ABRAHAMSON: Aye. Okay.

DIRECTOR ASPLEN: Thank you, folks. All right. We are at that. I think our next stage -- are we done? Anything else that should come to discussion now? We have time at the end, too, of the agenda.

COMMISSIONER REINSTEIN: Are we going to do the cover of the post-conviction?

CHAIRPERSON ABRAHAMSON: This, too, would be just a recommendation, because the final word will be in NIJ. Which do you like?

COMMISSIONER REINSTEIN: I'm not a design specialist, but I think that our committee, the last time, we liked these two the best.

CHAIRPERSON ABRAHAMSON: The two that are hung up.

COMMISSIONER REINSTEIN: This one. I don't think very many people liked this. Margaret, I know, liked this one the best because it had recommendations for handling requests highlighted. Lisa, what were you saying about this as far as not being up-to-date?

DR. FORMAN: That's like DNA from 1989. There could be data that, if the Commission agreed, that if there was a cover or an illustration that suited everyone from all -- the illustration of the cover.

COMMISSIONER BASHINSKI: This is a similar design, is that what you're saying?

COMMISSIONER TURMAN: Right.

COMMISSIONER BASHINSKI: I agree with you, and this looks like Chicklets anyway.

COMMISSIONER CROW: This is the one thing that's not going to change.

CHAIRPERSON ABRAHAMSON: There seems to be at least a growing number who prefer the dark blue and green.

DIRECTOR ASPLEN: I'm concerned that it may not pass Dr. Davis' reproduction test.

COMMISSIONER DAVIS: Yes. When I make copies of things to pass around the office, I always like to -- or I don't like to get or send out a copy of something that has no identifier as to its source, and I always like to copy the front page and staple it to the back of whatever I send around, so that people know where it came from. Just try to make it in such a way that it will go through the average copy machine and be legible. That's all I care.

I don't care if it's black or green or anything, as long as it's legible.

COMMISSIONER REINSTEIN: How about having this as a cover, but then the next sheet has it in white.

CHAIRPERSON ABRAHAMSON: Right, then you can copy that.

COMMISSIONER REINSTEIN: Sometimes they do that in publications.

CHAIRPERSON ABRAHAMSON: That's a good idea. So if the front page doesn't copy well, it should have the same thing on the first page that can be copied. I think that's good.

COMMISSIONER REINSTEIN: But at least this is something that somebody will see on their desk and pick up and then for copying purposes --

COMMISSIONER SANDERS: That's a great idea. You don't think they'd pick this up, too?

COMMISSIONER REINSTEIN: I think so.

COMMISSIONER TURMAN: Well, you could put the white background, but the banded pattern is what Lisa and I are reacting to.

COMMISSIONER DAVIS: Who is this going to go to?

COMMISSIONER SANDERS: Lawyers.

DIRECTOR ASPLEN: Lawyers, judges, victim advocates.

COMMISSIONER SANDERS: I would think they'd be more attracted to this. These guys have got the critical eye. They know what it is. Everybody else is going to look at it and say, hmm, this is interesting, let me look at that, because I didn't know this was from '89.

COMMISSIONER DAVIS: Let me comment about publications. People who -- at the printing level, the final level, the front cover, the design of the front cover, if it has an illustration, that person who is creating that front cover arranges the illustration to fit the cover format, which oftentimes includes reversing. So make sure that if you have any illustrations on the front cover, that no one switches them around to fit the format. I've seen that happen repeatedly.

COMMISSIONER CROW: Of course, there are two ways to show the DNA molecule, one of which is right and one of which is wrong. But one of my Japanese friends went through Watson's textbook and approximately half of the DNA molecules were printed backwards.

CHAIRPERSON ABRAHAMSON: Which may be your explanation. So I gather then, do most of you favor this dark blue? Chief, you like the DNA bands.

COMMISSIONER SANDERS: Yes, ma'am.

DIRECTOR ASPLEN: I believe that the dark blue will be less expensive than the other one because of the number of colors involved, but what I can say is that I will carry your concerns and considerations as I travel through the trials and tribulations of the Department of Justice printing process.

COMMISSIONER REINSTEIN: Well, no matter what, Chris, those are the two, depending on what the other considerations are.

DIRECTOR ASPLEN: We will endeavor to get one of the two.

CHAIRPERSON ABRAHAMSON: We are now done with that.

DIRECTOR ASPLEN: Thank you.



## **Laboratory Funding Working Group Report and Discussion**

*George W. Clarke, Working Group Member*

CHAIRPERSON ABRAHAMSON: We are now going back and taking up the laboratory funding working group. Woody, Lisa and Chris will present this.

DIRECTOR ASPLEN: I think at this point in time, mostly Woody, because when we found out that Paul Ferrara could not attend, when Woody got here, I asked him if he would please present the report from the lab funding group. So he spent last night developing a PowerPoint presentation on it.

COMMISSIONER CLARKE: It was easier than writing it down on a tablet. I forgot how to use a pen.

[Pause.]

COMMISSIONER CLARKE: This is pretty scary when a lawyer is about to talk to you about laboratory funding involving science. As I've told Lisa many times, I went into law because I didn't like science or math, so something really went wrong somewhere.

DIRECTOR ASPLEN: Folks, why don't we take this opportunity to take a five or ten minute break, then we'll come back and start back up.

[Recess.]

DIRECTOR ASPLEN: Okay. Under the headline of "things happen for a reason," because we had this little unscheduled break at this time, I thought I'd go back to my room and get the rest of my things that I haven't already put into my car and check out, rather than like I was going to do at the original scheduled break time.

Well, I get to my room and they're already cleaning my room and the woman is just about finished and she is literally dumping my trashcan into the cart trash. What do you think was in the trash can? My plane ticket.

So because of this little break, I do, in fact, have my plane ticket that I otherwise would not have. So things happen for a reason.

COMMISSIONER CLARKE: Chris, I knew that was going to happen. I knew that's what was going to happen, so that's why we had these technical troubles.

Again, this is the danger of lawyer venturing into science, but what I'm going to try to do and give you a few visuals to help, I am going to plead that Lisa and Chris help me, because unfortunately, Paul Ferrara, our chair, and Cecilia Krauss, couldn't make it to the meeting here.

So you're in my hands, but fortunately we have to other individuals that were there as well.

So what I'm going to try to do over the next 20 minutes, maybe 15-20 minutes or so is give you some of the highlights of what our laboratory funding issues working group has been dealing with and then hopefully solicit your guidance for our future efforts in that regard.

You're going to see CODIS at the top of most of these slides at the beginning because that's actually a good deal of what we've been dealing with, as you know, initially, especially with regard to backlog issues and so on. We know that technology is in place.

We have the technology currently to deal with obviously the collection of samples from convicted offenders, storage of those samples, profiling of those samples, we know even the current technology exists to profile, and type of 13 core loci that CODIS has described. And lastly, we know the architecture, as the FBI has described, as far as CODIS is concerned, for input of that data, storage of that data, and searching of that data currently exists.

So that's, in many respects, the good news about where we are currently from a technology standpoint.

Unfortunately, there are only a few jurisdictions, I think, we think, that are successfully employing this existing technology, and we'll get into a little bit about the reasons for that.

But the reasons, I should say, with regard to the areas that those jurisdictions are successful, and we've heard how Dave Coffman, for example, in Florida, has described to us yesterday a jurisdiction that's doing relatively well in that regard, as is Virginia and a few other jurisdictions that are able to collect these samples. They are able to database -- that is, in the sense of profiling those convicted offender samples that they do collect and are able to make forensic matches and to help investigations in that regard.

So we see some jurisdictions able to use this existing technology under their statutory frameworks in their individual jurisdictions, so we know it can work fairly well.

But what are the problems that we've identified?

The problems are obviously backlog samples, samples that have been collected, but are sitting there and are not being profiled. Obviously, if they're not being typed, they're not being entered into CODIS databases. They're not being entered into even local or state databases, as well.

There are, as we've also found, tremendous collection difficulties, for some of the reasons that I'll describe to you in a little bit, and obviously there are tremendous difficulties with case work laboratory resources. Laboratories actually conducting case work in criminal cases.

A, first of all, case load problems, not enough analysts, not enough funding to deal with those cases themselves, which strains even more their ability to deal with convicted offender sampling, convicted offender profiling, and ultimately entry into CODIS itself.

What are some of the suggested solutions?

And we dealt early on and have obviously made the recommendation to this Commission, which passed that recommendation on to the Attorney General, to deal with these backlog samples, and we identified that approximate figure, in large part, due to much of the effort from Steve Nasgoda and Dawn Herkenham, from the FBI at that time, trying to identify how many samples we're talking about, and that number that was described to us was in the area of approximately 450,000 stored, but backlogged -- that is, not profiled -- convicted offender samples, and at an approximate figure of \$50 per sample, we came up with that figure of \$22.5 million, of which I think it's \$15 million, as Chris described, is in the current budget that hopefully Congress will pass to help deal with this backlog of samples.

So that's the approach that we took fairly early on.

What about sample collection? And I want to get into some of the difficulties that we've identified.

In my view, a good portion of that difficulty is the fact that, first of all, we have 50 states, although some of those states deal with that well, such as Florida, where there is a lot of consistency, I think, in terms of sample collection and some of the other states, like Virginia, as well, there are many, if not most, or by far the majority of states that not only have their own state system, but they deal with a system such as we have in California, it was 58 counties.

Well, those 58 counties deal with this whole issue differently. There is very little consistency amongst the counties in our state in terms of collecting those samples.

Now, the sites that those samples can be collected obviously have a great deal of impact on the success of collection. Our State Department of Corrections, like many prison systems across the United States, relatively speaking, deal with collection fairly well. They have the individual in the prison, the person is going to be an inmate in that prison for usually a substantial period of time, at least long enough to collect a blood sample, and the individuals are in place who can collect those samples, either phlebotomists, medical personnel, and so on.

Where the system we've identified breaks down, to a larger extent, is when, A, an individual doesn't go to prison, that is, has been convicted of a qualifying crime, but isn't sent to prison. They're sent to local custody, so the jail systems, and they can deal with it somewhat well, because they, again, like prisons have individuals who are qualified to take these samples. But I think the biggest breakdown that we've all talked about is the probation situation, where the individual comes to court, either as someone who has been in custody, but is released on the date of sentencing, or just hasn't even been in custody on the date of sentencing, and the question becomes what do you do with those individuals, what are the various locations that those individuals can be dealt with.

Our experience, and I think I mentioned this earlier, I don't believe I've mentioned it to the Commission, has been unfortunate. We had a system in place, and I'm talking about individuals who are not placed in custody at the time of sentencing, where, as a condition of their release, they're ordered to depart to -- I'm sorry -- to report to our local department of health to give a sample for CODIS purposes.

The unfortunate problem was this worked okay, I think about half or maybe a little more than half, which is not obviously our goal, but in terms of the way the system was working, it wasn't too bad, would show up, individuals at the department of health would then take their sample and they would actually take a fingerprint. I think it was a thumbprint that was required.

Our state legislature passed a new statute effective January 1st of last year, however, that required, in the giving of a known sample for CODIS purposes, that a palm print be given, as well. Our department of health personnel are not qualified to give palm prints and they immediately stopped taking any samples whatsoever. Now, that's an example of some of the difficulties procedurally when -- and I think as was identified yesterday, including by Dave Coffman, legislatures may have good goals in mind, but they pass legislation that somehow unbeknownst to them ends up torpedoing, to a large extent, the collection procedure.

So consequently, our individuals who go to county jail and stay in custody, those samples are fairly well collected.

The individuals who are released on the day of sentencing aren't collected at all and that continues to today, and obviously that has tremendous ramifications on the success of the system.

The structure of each individual state, I think, also impacts this procedure tremendously. If it's a state laboratory system, wherein all samples are directed to state laboratories, there is a lot more consistency, I think, whether in Virginia or Florida, where many of those samples are going to the state system, that's to be contrasted with some of the larger states, like our own in California, where Jan Bashinski's laboratory, in general, is doing DNA case work for our smaller counties.

Our larger counties don't use that process. We have our case work done by individual police departments, sheriff departments and so on. I think that impacts the collection process, as well. It leads to a lack of uniformity and a lack of consistency in collection of samples, reference of those samples to the state laboratory system, and then ultimately profiling of those samples and entry into the various databases.

The questions that we want, frankly, to solicit your advice on, if possible, and hopefully this will generate some of your guidance, are with regard to those problems and those questions that arise and how to improve this system, where does the collection responsibility fall, where should it fall; what are the sample types that should be taken. Obviously, we're familiar with blood, we're familiar with saliva samples, and there are other samples obviously available as well.

When should these samples be collected, what's the time in the process, what's the site, the actual physical location where it should occur, how should the samples be stored, how should data management be handled, who should be responsible for handling that data management and obviously funding, if not the most critical feature, as well.

There are various sites that this collection can take place.

It could be in the courtroom. An individual literally could be walked from the courtroom into a back room where there is an individual that can take the sample, whether it's a blood sample taken by qualified medical personnel or it could be something less than that.

Obviously, the courthouse itself, somewhere in some general location, in some instances, courthouses literally have jails attached to them. So that's obviously another potential site. Obviously, individuals who qualify can be transported to other facilities for the taking of those particular samples.

So those are some of the questions about collection. Some of the other possibilities are obviously different time periods in the criminal process itself. The previous ones I described to you are all based on sentencing, but obviously there are previous times, as well.

There's arraignment. Obviously, an individual is not convicted of a charge at that time, but that's certainly a time in the criminal proceeding and, as we have discussed, as well, arrest as well.

One benefit, at least as we discussed, and one major benefit of the arrest, in terms of just the collection process, is it's a fact or a time period, rather, where there are procedures in place already; namely, fingerprinting. Fingerprinting goes on at that time and we know from the experience of the last many decades that that process seems to work fairly well. It's an identifiable site. Police personnel are familiar with it. They know about the process of fingerprinting. So at least it does exist as an analog that we could use in terms of collection of evidence, in many respects.

As far as the samples themselves, blood obviously is in common usage and we've discussed how there are procedures in place to work well in terms of automation with no blood samples.

With mouth swabs, there are certain failure rates and while they may be less intrusive, while personnel may be able to take them, and we know from experience some police personnel take good mouth swabs, others don't take good mouth swabs, so there is a greater risk of not obtaining the information that's needed for CODIS purposes.

As I think I may have mentioned yesterday, some of these laser technologies were discussed in our working group as far as simplifying that process and literally having an individual convicted of a crime or arrested, if that's the time cite that's ultimately used, literally puts a finger inside a little machine that I think costs about two or \$3,000, and it automatically does a little laser pricking of the skin, deposits the blood on a card, and the process is basically done, very quickly.

So those are, again, some of the other sample processes that can be used. Data management, and, again, we brought up the question of responsibility, but there's a lot of aspects to managing this data and the individuals who have to be involved in that process.

Obviously, the courts need to be involved, they are beginning the process, because they've convicted an individual of a crime, now that individual is either committed to state prison, committed to local custody, granted probation in the sense of being released, the court is triggering that event.

There are corrections that are involved, whether at the prison level, where responsibility will lie to collect samples from those individuals, whether at the local custody level.

As Dave pointed out yesterday, Dave Coffman, even private facilities. We have our own in San Diego. Literally, private contractors who bid on contracts to then run private jail facilities. Then what do you do with those individuals? They're obviously at a different level, as well.

Law enforcement, probation and laboratories. All of those various groups have to be involved in dealing with this data management, because without proper data management, obviously this process won't work.

Now, I had to throw this slide in for you, because as I was going through the research and development working group materials, I hearkened back to this slide and I show it to prosecutors around the country, warning them to never open any of these books.

And I tell them that I've studied this for some time and I recognize the equal sign, I'm satisfied I'm know what that means, and this little symbol down here, I have a couple friends at work who have watches with that on it. But that's the extent of what that formula means to me.

Model programs were a good deal of the emphasis of our discussion at our last meeting, as far as using model programs to create models that can be successfully used in this country.

Those model programs, we felt, had to look at these various items; what can be the site of collections, who are the agencies; that is, the particular personnel involved in successful creation and institution of programs that can provide these CODIS samples and ultimately allow for a proper CODIS system to work in terms of databases and database searchings; what procedures should be used, what are the best procedures that we can see now and shortly in the future to collect samples; what about data networking.

If I'm an end user, if I'm a law enforcement officer investigating a serious crime in my jurisdiction, how can I find out whether a suspect I have, for example, has given a sample in the past, or how can I find out, how widely can I search to help investigate this crime when I have biological evidence at this particular crime scene; what are the forms that need to be involved in dealing with this process, and obviously, extremely importantly, what type of training is necessary to be able to make these type of programs exist.

We know that there is currently an inability to type all cases.

That's simply a fact of the current not technology, but current devotion of resources in terms of laboratory personnel and funding laboratory space and so forth.

So we know, as a result of that, that not all cases are submitted for DNA typing. Obviously, that's a good portion of the emphasis on the survey that PERF will be performing, that we discussed at our last working group meeting, as to help give us guidance about the number of cases that are out there.

We know that of those cases, and I'm talking about all cases with biological evidence, many of them likely will end up in pleas of guilty. That's the way the criminal system works, for a variety of reasons. Not all of which are lack of courtrooms, although that's a huge consideration, but defendants plead guilty despite the availability of courtrooms.

Either they can obtain a better sentence by plea bargaining or they plead guilty, asking the court to give them a better sentence, despite the fact that there is no plea arrangement between both that defendant and the prosecution agency involved, and there's many benefits to a defendant in trying to minimize their exposure.

But we know also there are insufficient resources to do suspect cases and obviously it becomes even more exacerbated with non-suspect cases, and in many cases we know requests aren't even made. The evidence is seized, it's collected, it's forwarded to the crime laboratory or forwarded to the police agency in terms of storage in the property room, but the request isn't made for DNA to be done, again, for a variety of reasons.

Some of the statistics that we dealt with at our last meeting, one of them, I think, is very instructive, I'm not going to get into all of them, but I think this one, in many respects, was some of the most instructive.

From 1997 statistics, from the Bureau of Justice Services or Bureau of Justice Statistics, that there are approximately, although that doesn't look like an approximate number, over 230,000 convicted sex offenders who are either in prison or on probation.

Now, that's not per year. That's the approximate number at that time in 1997. About 80 or almost 90,000 are in prison and a little over 100,000 on probation. That's just sex offenders. But the difficulty is -- not the difficulty -- the important point is the recidivism rate we know is high amongst those individuals.

So that those individuals who are either released from prison or are on probation, which makes them subject to the commission of new crimes almost immediately, that those are the individuals we need to be concerned about.

Now, that figure of \$87,000 is an average cost for a forcible rape that was identified yesterday.

Obviously, that's a soft number. Nobody would claim that that's any number that we can all rely upon.

But it is, to some extent, instructive. One of the things we talked about was comparison of that cost with the cost of case work, and we spent a good deal of time at our working group meeting defining what constitutes a case for DNA examination purposes, and we came up with some various numbers to hopefully act as guides.

One of those was that in a typical case, there are approximately 15 samples. Now, that might -- at least struck me, as a consumer, to be a little high, but it incorporates controls, because those

represent samples that the laboratory has to devote time and money to to be able to test those controls as well.

We figured it at an approximate level of 60 cases per analyst per year, that using these various math systems, including the cost of reagents, we came up with an approximate cost of \$2,200 per case in terms of the analyst time, the laboratory's expenses, the cost of reagents and so on.

That approximate figure apparently is fairly consistent with other estimates that other laboratories have made, as well. And then we made the comparison, going back to 1997 again, and just taking reported sexual assaults, again, based on DJS numbers, that of those approximately 100,000 reported sexual assaults in this country, multiplying that by 2,200, you come up with a number of about \$220 million.

I think I made the remark that that's not all that many F-16 fighter jets in one year, but nonetheless, it's a substantial figure. Then ultimately we made this comparison. For whatever value it has, we felt it had value. That was to compare that \$220 million of typing all of those reported sexual assaults, I'll have a caveat to that in a moment, comparing that to the approximate cost of those sexual assaults in terms of the costs to the society, the costs to the victim and so on, in particular.

We found a rather glaring number obviously, \$220 million versus an approximate cost of obviously something in excess of \$8 billion.

So I think it could at least point out that the significance of these statistics and so on.

Now, what are the realities or the caveats I mentioned?

All sexual assaults are being profiled? No. We don't need to do that. Even of the reported sexual assaults, those that have biological evidence, which are high in sexual assaults obviously, because of the common transfer, but nonetheless, they can't all be profiled even with biological evidence. There has to be this process of prioritization.

Now, that goes on at many levels in different jurisdictions, probably without a lot of consistency, but it deals with how important is this case. Now, some jurisdictions, in our working group meeting, we found out literally type all rape kits in all cases. That surprised me. That doesn't go on in my jurisdiction. We actually weed out a good portion of those, where we know a case will be involving an issue of consent and that, therefore, DNA results in that case, frankly, won't be helpful at all.

We weed those out. Some jurisdictions do not.

But the realities of today, we agreed, are obviously, for the necessity or prioritization, deciding which cases need DNA typing and of those cases, which samples within that case require DNA typing. Again, it's really deciding the level of service.



Which crimes should DNA typing be provided for, which cases within those crime classifications should this service be available for, what about suspect versus non-suspect cases, and as far as those non-suspect cases, what's the extent, as we mentioned earlier about the survey, we're hopeful of having that information provided to us through use of that survey. And it's decision-making about what crimes.

Now, ultimately, I'm hopeful that our working group will be able to come up with some figures about at what level of service -- let's take the level of service of sexual assaults and homicides. What I would say fairly commonly is what we're doing now. What's the cost of being able to perform that work on those cases? And then extending that to include cases like burglary, obviously, more along the British model, what's the cost nationally of doing that, so that we can get a better idea and present to you better approximations of what's involved.

So that, hopefully, in a nutshell is basically where we are and now hopefully you can provide us some guidance on where you think we should be headed, as well.

Now, if there are any questions, I'm going to divert them to Lisa. No, I'm kidding. I'm kidding.

CHAIRPERSON ABRAHAMSON: Well done.

COMMISSIONER DAVIS: You say you put that all together last night?

COMMISSIONER CLARKE: Well, you know, I started writing notes, and then I thought, you know, it's faster just to type it. So the good news is PowerPoint is very user-friendly. If I could do it like this, you know it's user-friendly.

COMMISSIONER BASHINSKI: Woody, on your last slide, the one comment I have when you're talking about extending things to burglary, you're now talking about another part of the infrastructure system that has to be considered, and that is the capacity of the police to collect evidence and process those crime scenes. Many, many agencies don't even process burglary scenes for fingerprints, much less DNA.

So I think if you're going to extend that, and I think you should, you're going to have to address that issue, as well.

COMMISSIONER CLARKE: Absolutely. In fact, I think I brought up about the collection. Frankly, in burglary cases, collection is going to be by patrol officers most of the time. Some jurisdictions have wonderful systems where they can investigate their burglaries. The City of San Diego, half of our burglaries are investigated, the other half don't even send a patrol officer out to the scene.

That I'm sure varies nationally from one end of the spectrum to the other.

COMMISSIONER SMITH: I was so gratified to read it, partly because I made remarks yesterday about the need for us to get information and use it on the probation and parole samples and all that, so I was very gratified to read it. My reservation has to do with the risks. The risks

of entering into the economic analysis the way you have, I think there are risks and I think that you don't need to.

COMMISSIONER CLARKE: You mean the cost of a rape or the other side?

COMMISSIONER SMITH: Also, the cost of the --

COMMISSIONER CLARKE: Analysis?

COMMISSIONER SMITH: Yes, because of points like the costs not accounted for. Cost of office and time and all that. It's fascinating work for economists. There fortunately are enough economists to do it. But when they do it, it's like the page you put up here on the board, it doesn't relate to our real questions.

COMMISSIONER CLARKE: Right. I understand.

COMMISSIONER SMITH: And when we try and do it, we make mistakes.

COMMISSIONER CLARKE: Good point.

COMMISSIONER BASHINSKI: On the flip-side, I think we need to do some cost analysis. It's critical if we're going to get support.

COMMISSIONER SMITH: That's fine, but comparing the cost of one thing with the cost of another, down that road lies embarrassment or worse.

COMMISSIONER CLARKE: I think that is a difficult area, I agree with you. You mean as opposed to the more naked costs, so to speak.

COMMISSIONER SMITH: Yes, the naked costs, how much it costs to buy the reagents and how much reagents we need is a thing we can talk about.

COMMISSIONER CLARKE: Sure. I don't think I disagree with you.

CHAIRPERSON ABRAHAMSON: You can't put a cost on the quality of life.

COMMISSIONER SMITH: People try. Economists do, but they monetize everything. They monetize the constitution.

COMMISSIONER CLARKE: Exactly.

COMMISSIONER SMITH: They do it a different way, a more direct and valuable way.

COMMISSIONER CLARKE: You just never know what's going to happen in that courtroom. Thank you.

[Applause.]

MR. WARD: My name is Brian Ward. During the deliberations of the Commission, there has been a discussion regarding the challenges of the backlog and the database, and yesterday Dr. Davis referred to facilities, specifically a facility in Utah, which has extensive capacity to process a database of samples. I'm a member of the genomics industry and biotechnology specifically, and I would like to assure the Commission that these facilities do exist for high throughput of CODIS samples.

For example, at our facility, we currently have capacity to process over 10,000 cases per week and as the Commission is deliberating how to approach backlog and how to make CODIS more available, I'd encourage them not to overlook the contributions of the genomics industry.

COMMISSIONER BASHINSKI: Could I ask you to define cases? Are you talking about things like offender sample, are you talking about paternity which is three samples?

MR. WARD: 13 STRs for CODIS databasing.

COMMISSIONER BASHINSKI: So it's one sample, 13 loci.

MR. WARD: Right.

COMMISSIONER DAVIS: Are you pretty representative of what exists around the United States?

MR. WARD: I think that we're fairly unique, but I think there are other genomics industries corporations that could develop this capacity. Our starting point was as a clinical sequencing facility for related diagnostics for breast and ovarian cancer, but there are a number of facilities that could develop this capacity in the future. We are just fortunate that we have this capacity right now.

COMMISSIONER DAVIS: Is there any industry group that represents your group who can come up with propaganda, if you will, along these lines, educational propaganda, that is? Because there has been talk about sourcing out or out-sourcing rather and yet it's been sort of vague, as out-sourced to where, and who and what. I think now is the time for the industry to speak up.

MR. WARD: I think that the industry is beginning to address those challenges as we speak. It's been a little bit fractionated, but under the guise of some bio industry, we hope that we can actually have a unified --

COMMISSIONER REINSTEIN: And do you agree with the \$50 per sample amount or do you think that with these large numbers, that the amount will go down?

MR. WARD: I think initially the \$50 amount is an excellent starting point and one would always assume that there would be incremental gains with capacity going through, but \$50.

It's not so much the equipment that's required, it's the structure of the informatics to make the system flow through smoothly, so the development costs up front are significant. But they are in place now.

Thank you.

CHAIRPERSON ABRAHAMSON: Thank you. Chris, you wanted to get a sense of the Commission.

COMMISSIONER SMITH: Yes. You will notice -- first of all, I certainly want to thank Woody for stepping in and giving the presentation. I also want to thank Cecelia Crouse for writing this report, which I think is really wonderful and lays out the issues and lays out the discussion that that working group has been having. She is tremendously valuable to the working group.

However, you will notice that it's kind of split up into two areas, the database sample collection issue and the non-suspect case issue. In terms of the sample collection, what you will notice is that we recommend or the working group recommends the development of pilot programs.

We talked a little bit about pilot programs yesterday. The working group saw this as a good mechanism to encourage the development of these different systems, model programs that other states could look at.

Does the Commission feel like that that's the appropriate direction to go? If so, what we'll do is we'll have that group really work up a specific recommendation on that, that would say to the Attorney General we suggest, we recommend that you provide funding specifically for the development of pilot programs in these areas.

And this is not an official vote. This is just I'm trying to get a sense.

COMMISSIONER SMITH: To me, it makes sense. I mean, you've got to start off with individual demonstration projects. We can't come up with something for the whole United States.

DIRECTOR ASPLEN: It's very different than the CODIS backlog situation in that you can't -- this is something which you can't throw a finite amount of money in it and have a substantial effect.

COMMISSIONER SMITH: It sounds like there are different aspects, though, that are likely to be peculiar to jurisdictions. I mean, some jurisdictions, they're going to be essentially management problems within the probation and parole agencies. In other jurisdictions, a lack of site.

So it strikes me as it would be useful rather -- I don't think there is great value myself or best value in a solicitation for pilot programs of a generic statewide kind for the entire process.

It seems to me that the inquiries ought to be more specific than that, particularly on the site and method of collection.

COMMISSIONER CLARKE: I think our suggestion was to look at the model programs.

COMMISSIONER SMITH: I think, so, as a research proposition, to provide Federal funds to give incentives to state agencies to organize themselves to do that which they are charged to do may not be such a good idea, but I may be wrong. How much money do we have to give them to do the job they're charged to do by statute?

COMMISSIONER DAVIS: Didn't we have dinner last night or somewhere in the hallway, there was a little question that came -- maybe it was at this table, I don't know, it all melds into one, but there was a little question that came up one time about -- maybe Jan brought it up -- that some of these agencies at the state level and local level are holding back hoping that Federal largesse is going to come in or their funding sources don't fund because they think that somewhere up there there is a wealth spring of money that's waiting to be sent down, so why should we spend our local money, let's wait and see what we can get out of the Feds.

That may be a factor that we ought to consider in any of our deliberations, because if it's a real factor, it's going to impact negatively on any program we try to talk about.

COMMISSIONER BASHINSKI: You said my point better than I would have said it, and I think it is a very big danger, it's already happened. It certainly has happened with the DNA Improvement Act funds, at least in my state.

But I do think the funding of the sample collection, both the type of sample and an inexpensive, easy to use, reliable means, non-invasive, means that collection would be a very big contribution.

DIRECTOR ASPLEN: It's anticipated that it's really systems development, not funding to do the collection or test it themselves. It's not -- it wasn't anticipated, and correct me if I'm wrong, Woody, that the money would be provided for the actual collection.

COMMISSIONER BASHINSKI: No, but to develop a means of --

DIRECTOR ASPLEN: But rather to develop the systems themselves, which -- and the conversation that you're referring to was dinner last night, in a context of money for arrestees, if we're thinking about the same thing. That there may be a thought that maybe the Federal Government will come up with money to test arrestees and that maybe a statement should be made, don't think that way, because that won't happen.

COMMISSIONER BASHINSKI: Actually, my point was broader, that there are many things in which -- that's one, but just the general doing of the job that you're there to do, the states, if they want to defer to Federal funding, are not going to pick up the responsibility that really is and should be theirs.

COMMISSIONER SMITH: But if the technology developments that you speak of are pressed, then some of the other difficulties that are raised by agencies when I ask them about this become much less impressive. So the Federal involvement in making easier the collection, the actual collection of the sample from the person who is before you, that problem, the help there seems to

me to be both very important, appropriately Federal, and may be a pre-condition for an effective program anyway.

But, also, there are two separate issues here. One has to do with the very large number of people now on probation and parole who weren't essentially put through any process for collecting their DNA at an earlier time and we knew where they were.

Then there is a separate question about how we're going to do it in the future. I think separating those two questions out is important, too. Developing systems for future assurance and ease and efficiency of collection is one kind of thing, but trying to get these agencies to go get the samples that are now owed is another kind of thing.

COMMISSIONER CLARKE: I talked about the owed samples and the difficulty with trying to retrieve those.

COMMISSIONER SMITH: But the extent of that difficulty is we don't know where they are. I think I really feel like this Commission should put a clear message out there that that's not an acceptable condition for us to be in.

And the fact that we might, in the future, be able to collect DNA from offenders who can owe it, at a time when we know where they are, pales a little bit if, after we match it with a crime scene, we don't know where they are.

So the underlying problem here is the lack of operational capacity of probation and parole agencies, for which funding on the DNA side is going to be insufficient anyway.

So I really do think it's important here, more important than recommendations about pilot programs, is a recommendation about getting these agencies to find out where the people are that they're supposed to be supervising, if that's the problem, and in some jurisdictions, it surely is.

COMMISSIONER CLARKE: I think a lot of this represents a large hurdle and one of the comparisons is, for instance, in our community of about three million people, we have about 500,000 warrants of arrest out for people who -- obviously, it's not 500,000 different people, but nonetheless --

COMMISSIONER SMITH: An awful lot of them were aware they were the last time we saw them.

COMMISSIONER CLARKE: That's right.

COMMISSIONER SMITH: I mean, we simply don't bother, right? And not bothering is a problem in its own right, just highlighted by our desire to have the DNA.

COMMISSIONER BASHINSKI: It occurs to me that we have, in a way, an internal PR problem within the system. Just as we want to have police officers aware of DNA, if all the probation

officer and correctional officers had a level of awareness of the importance of following up on these people and getting these samples, we might see more compliance.

I don't know if there is any kind of formal or organized way in which we could address this, but this little pamphlet that we have for law enforcement officers could be given to probation officers. They would understand maybe more why it's important for them to do what --

COMMISSIONER SMITH: Well, the APPA is an organization in its own right and they are understandably in the throws of an identity crisis and sort of midlife crisis, because of a failure to invest in their business by the public purse. So there is an awful lot of activity in that community trying to figure out how to create value. That's a big problem for them.

CHAIRPERSON ABRAHAMSON: What is the?

COMMISSIONER SMITH: The American Parole and Probation Association. And their leadership is aggressive and creative and I have a feeling that a challenge to them to get something done here would be appropriate and if it's not going to issue either from this Commission or through its process, then I think we missed an opportunity.

CHAIRPERSON ABRAHAMSON: That may be a good place to both end and start and maybe for the next meeting we want to invite one of the offices and talk about that.

COMMISSIONER SMITH: That's a good idea.

COMMISSIONER GAHN: And something else, it raises the consciousness there that there is value to be had for their executing this job.

CHAIRPERSON ABRAHAMSON: Okay. Ron, and then we'll go to East Kentucky.

COMMISSIONER REINSTEIN: Mike and I were talking yesterday, next year is their national millennium convention and I think it might be a good time to maybe put on a program in one of their general sessions regarding the work of the Commission and the need for them to have a heightened interest and challenge them to bring these samples.

COMMISSIONER SMITH: And to understand its value and how it's to be used and why we need it.

CHAIRPERSON ABRAHAMSON: I think that's a very good idea.

COMMISSIONER REINSTEIN: It wouldn't take more than an hour.

**Dr. Pam Collins**  
**Dr. Kathryn Scarborough**  
*Eastern Kentucky University*  
*Internet/CD-ROM Training for Law Enforcement Officers*

CHAIRPERSON ABRAHAMSON: Good. We'll now turn to our last substantive section, and this will be presented by Dr. Pam Collins and Dr. Kathryn Scarborough of Eastern Kentucky University. The subject is internet CD-ROM training for law enforcement officers.

You have their resumes before you. Dr. Scarborough is an associate professor in the College of Law Enforcement, Department of Police Studies, at Eastern Kentucky University. She is a former police officer and a Navy Veteran.

Dr. Collins is in the Loss Prevention and Safety Department at Eastern Kentucky University and holds a Bachelor of Science in Loss Prevention Administration and a Master of Science in Criminal Justice, and a Doctorate in Education from the University of Kentucky. She's been an industrial securities specialist and has a lengthy resume that I'm going to read. They both do.

So welcome. And a five-minute break in order to do the technology, but no one is allowed to leave.

[Recess.]

DR. COLLINS: I'm going to let Kay have the microphone, since I can, I think, maybe carry my voice a little bit further than her.

Let me begin by saying thank you to the Chief Justice and the DNA Commission members for inviting us and giving us the opportunity to share with you some of the things that we're doing, and, also, to Chris, he's not here, but I will say that he very politely pointed out to Kay and I that we, in essence, are the only thing that stands between the Commission today and adjournment. So having said that, we'll certainly keep that in mind.

We wanted to just give you a brief overview of a recent proposal that we submitted to NIJ with regard to training and technology and what our intentions are and what we intend to do with that.

The goal of the project, the project that we developed, was simply to look at the development, delivery and evaluation of interactive of alternative technologies to training. And let me just kind of tell you a little bit about who we are and what we do and why did we come to this point.

Kay and I are affiliated with the College of Law Enforcement at Eastern Kentucky University and we also have partnerships with the Regional Community Policing Institute, which is also housed within our university, Kay is the co-director of that, and, also, the third component or the third partner or partnership that's very important is the Department of Criminal Justice Training, and that is the Justice training cabinet that does the training for police agencies throughout the State of Kentucky.



So there is a natural relationship that we have on a day-to-day basis with teaching service, research and training of law enforcement. So the whole objective of this particular proposal was to look at alternative technologies, because the focus of what we do, specifically the RCPI, and

Kay will talk a little bit more about that in a few minutes, is small town and rural law enforcement agencies that are sometimes often remotely located and have difficulty being able to get the training.

And some of the things with that -- and I'm going to turn it over to her in just a minute to talk about why there is a problem or what we saw as a problem over the years of things that we've done with regard to getting technology to these small and rural police departments.

So having said that, Kay?

DR. SCARBOROUGH: We've heard issues the last couple of days with respect to police training and a few things that we know that are very pertinent to this discussion are that 90 percent of the police departments in the United States serve smaller communities and consist of ten or less police officers.

Historically, what we've done with respect to research and training in law enforcement and even looking at the criminal justice system at large has focused on the larger organizations, the metropolitan communities.

Furthermore, we've taken what we've found and done in those organizations and communities and tried to generalize it to the entire law enforcement population and we found that that's not appropriate.

There are unique circumstances in small communities that may not be present in urban communities.

So the reason that we have focused on this area, besides the facts that Pam has already pointed out, is because the smaller organizations have been left out and you could look at here, urban police departments have spent \$144, whereas smaller agencies have spent roughly \$95 to train law enforcement officers.

Consequently, barriers, specifically for the small organizations, have been identified. Some of these still may occur in the urban agencies as well, but we know that these particular barriers, like the distance to the training facilities, the budgetary restraints, the relative content that are specific to the smaller organizations, and the fact that historically in law enforcement we've done the platform-based instruction, some agencies or training entities are moving to more interactive adult-based training now, but most of them still do the 40-hour block, specifically with respect to in-service training, things like that.

We have a pre-test and a post-test, and that's it, and this has been very limited for the small organizations, as well. So our goal has been to try to develop training that would be more useful to the smaller organizations and more accessible, for example, having mobile training that can

actually be delivered to the departments when you're dealing with a small three-officer department, say, you can't afford to send them somewhere for a week, because that means your whole operation will be staffed with two officers, and when you have three shifts, that makes it very difficult.

However, although our focus is with the small and rural departments, what we have been developing and will continue to develop will also be useful to urban agencies, as well, especially with the model that we're going to talk to you about specifically with respect to DNA.

DR. COLLINS: What I want to do is just briefly go over what are you going to do in this project, but let me just point out very quickly, you'll notice this line here. This is our feeble attempt at DNA strands. So I changed it, I had a whole different PowerPoint picked out, and I said, wait a minute, there's a tie in there that I think I could use for this.

Kay and I have been working on the development of this probably about six months ago looking at some of these issues and some of the things that we continually came up with and in writing the project, we came up with three things that we wanted to be able to do with this research in the development phase. And part of the way we wanted to move with the delivery of it was what kind of technology -- and I heard some of you talk about technology here, but what kind of technology is out there that we could take this training to the police officers in these small communities.

So one of the things that we came across was computer-based training modules and we have a working example that we'd be more than happy to show any of you who would be interested after we finish. We won't do it now, but just to show you what some of that might look like in terms of -- and it's just on a CD technology.

And what we do in proposing this project is curriculum development around a particular subject matter, and we'll talk a little bit more about how we do that, and then just digitizing that concept into a computer disk that we would send out.

The delivery of this, we've got a three-pronged component to it, but the delivery of it is what I would call hybrid deployment system, and that means that we're going to use obviously a control group, where we have our training group, but in addition to that, we're going to use an off-site, distance learning site, and one of the things that we have with the Regional Community Policing Institute is a relationship with the Hazard Police Department, not to be confused with the Dukes of Hazard or anything like that, but I will say this, and Kay didn't know I was going to say this. Kay has officially become a duchess of Hazard as part of this. So she has the key to the city. So it's a really good relationship between the two.

But we have identified a community that we're going to work with and what we'll do is using a regional development center that we have in Kentucky, we'll use that as our server site, if you will. So the hybrid gets into play where you have a CD, but within the CD are embedded hyperlinks to web sites.

For example, under the DNA component, we could put the DNA Commission's web site, for example, that they could go to, if they wanted to, within this training.

And then the evaluation will be three-pronged. We'll have the control group, as I mentioned, in which we'll have a standard platform-based instruction, augmented by video using a community policing model of instruction, and then we'll have a rural distance group, which is Hazard, that I mentioned to you, and then we're going to use the individual user. We want to take a look at, okay, what if we were to just mail these out, something you talked about yesterday, you're talking about the AOL and all those CDs you get.

So what would it be like if we could just mail these out from the Department of Criminal Justice training along with accompanying educational materials to support that and what would happen for that officer in that location. So we're going to do pre-test and post-test and evaluate those kinds of components when we look at the project.

And then the fourth thing that we're going to do, I don't have up here, but the fourth thing that we're going to do is then have a six-month pre-assessment, where we come back in and we look at -- we survey some of the supervisory comments about with regards to training or application. We talk with the officer and try to get to attitudinal issues, as well as competency issues, on that subject.

So the development, Kay is going to talk about this, we have basically three levels of the development process.

DR. SCARBOROUGH: Not to exclude the urban departments, we wanted to ensure that we had different levels of training that could be identified; in other words, what could be appropriate for an individual user could be self-identified. We would have pre-tests for each individual so that they would know where they should be trained and consequently tested.

We have other subjects that we are addressing in this project, but the beginning, intermediate and advanced levels would enable it to make it more broad-based so that our focus would not only be on the small and rural for purposes of this particular CBT, but would be useful to everybody.

Some discussion has occurred with respect to who actually will be collecting this evidence and some feel that the first responders won't necessarily do that, but it's absolutely imperative to ensure that they know how to protect the crime scene and at least know what kinds of evidence will be useful with respect to the DNA.

If you look back at the number of small organizations that we have, that first responder will be that evidence technician and everything else. That person is a generalist. So he or she will have to know the whole range, not only to be able to answer those questions for the victim, like you discussed earlier, but to know how to protect the crime scene, how to collect the evidence, how to transport the evidence, et cetera.

So when you put it in those terms and realize that those numbers are very significant with respect to numbers of agencies, to have the three levels would be extremely useful, especially for the DNA.

DR. COLLINS: And, again, I've already mentioned some of these. These are the partnerships that we have already established.

We also would like to mention that within the State of Kentucky, through the collaborative efforts of these different agencies, we've developed what we call TAC-STAR, but it's the Technical Assistance Center for small town and rural law enforcement, and, again, trying to get at those issues of the rural and small police departments and what kinds of things do they need, how is that different from a larger urban area.

So I just wanted to reemphasize the partnership, again, that we have.

Now, let's talk about this. What I've put up here is just to give you an idea. We have a chart that we went through that showed implementation and tracking and time line, but this is kind of an example of how we broke down different partners. Now, I've added the DNA component here. One of the things that I wanted to say to the group was that we come here more with, I think, a lot more questions than we do with obviously findings of any sort, because we're looking to this agency to guide us or direct us in the kinds of people we should be working with, and we have some suggestions as we get through that.

But this is just to show you the model that we reviewed. Curriculum development, we, at the university, would take the lead on that and then we turn to what's called a subject matter expert, a SME. So that's where we are going to rely upon this community or this group to point us to those kinds of folks to provide the curriculum development, to work with us closely on that.

Then the computer development, we're going to be using a subcontractor, a private vendor to help us with the computer-based training module, the actual technology that goes into that, and that just kind of shows you how we broke down the different subjects of this particular project.

Then a SME, as I said is -- and I mentioned before, we have four subjects, DNA is one of those, but we also are doing officer ethics, and school safety, and survival Spanish.

We're going to be simultaneously developing those CBTs under each of the different categories.

And this is just kind of an outline of what we want to do. I don't know that it really has any relationship to this group necessarily, just some of our own planning into how we would go about developing the different modules.

Then Kay is going to talk a little bit more about project planning and development model.

DR. SCARBOROUGH: In our efforts with respect to training and technology in law enforcement, we've come up with a very simplistic model and we think it has relevance to your

discussion with respect to the recommendations that you're going to make to the Attorney General.

This just puts it in very simple terms as to how we approach the big picture with respect to getting the kind of information that we need to, to law enforcement.

You all are already at the information dissemination stage with your brochure and I think some of the comments that were made by the Chief are extremely important and we found the same to be true. At this stage, we're not in a position to prescribe the kind of training that you need, but we certainly want to make the information available.

The information dissemination stage actually has two components to it. One is to provide the general information on the DNA like you do in the brochure. But the second component is getting the support from those critical decision-makers who have an impact on designing the training and approving the training, like you mentioned with the International Association of Chiefs of Police, and I have a couple of other organizations that I think would be certainly supportive or be key in your efforts with respect to opening law enforcement's eyes as far as the training is concerned.

The training would be the computer-based training that we're proposing to do for you or other kinds of training that may be appropriate. The curriculum that will be developed then will also be platform-based instruction, would also be available, too, for those individuals or agencies who could not use the CDs for the training.

We've found that the technical assistance phase is always the most vague for us because we develop that based on primarily what we learn in the training.

What more do these agencies need, what more do these officers need? A couple of examples that I might give you would be the development of a 1-800 number for the technical assistance, where agencies could call in with questions about DNA evidence collection or perhaps site visits by teams of officers and other experts to organizations that would be able to give them some advice, to include, of course, lab personnel and various individuals that would have input into the whole notion of what is appropriate as far as the DNA evidence collection is concerned, because as we've seen in here, everyone has a very specific focus and if we don't communicate amongst ourselves to tell each other what our needs are, then we can't get the best product that we need.

So the technical assistance phase that we have been using in other projects has been very beneficial to us in this regard.

So when you are discussing the recommendations that you would make perhaps to the Attorney General, along those lines, this model we thought might be useful to you in that regard, although you all have to do this by August the 1st and certainly wouldn't -- I don't think you'd be able to complete all of that between now and then. Still having foresight with respect to future work might be beneficial to you.

DR. COLLINS: Let's see what else we've got. Let's see. This kind of again shows how that DNA CBT module might be developed, working with crime scene investigation.

These are the things I guess that kind of brings us to the discussion point, if we could. Is this the last one here?

DR. SCARBOROUGH: I think the next one.

DR. COLLINS: Why don't we just jump to that, because of the time. But this is really what we'd like, to have discussion and maybe have you -- I'm sure you maybe have some thoughts on what we've said, but -- or any questions that you might have.

But here is where we think we're at, here is where we're at right now.

What's the time line? You obviously have a particular time line that you've got to follow. We certainly do, as well. What's the impact of the minimum standards on the substantive content for the CBTs? We haven't talked a lot about it here, I don't think, but we can address that, if you want to, law enforcement approval training, both informal and formula. We have a system in Kentucky where we'll have to go before the Kentucky Law Enforcement Commission to get approval of curriculum before it can ever be taught in the Academy.

Then what is the next step? Where do we need to be?

DR. SCARBOROUGH: And if I could add a little bit to some of this. The minimum standards, the part of the discussion you had earlier this morning, but in a logical thought process, to think about how those are going to develop and what kind of impact that might have on what you want to present as training initially might be useful.

With respect to the law enforcement approval of training, this is more long-term, but it's an issue that's very pertinent to us. Because most of our training has been traditionally platform-based, it's very easy for us to account for the hours, 40 hours equals 40 hours. When you're dealing with computer-based training it's more difficult and not many training entities have dealt with that yet.

This is something that we are prepared to deal with with respect to the State of Kentucky, because of this project right now, but that's going to be an issue that's going to come up for us in the future.

And the informal approval of training speaks to that second part of the information dissemination with respect to getting that critical support of those decision-makers in law enforcement that have a definite impact on what training looks like and what training is approved and issues such as that.

DR. COLLINS: So I guess at this point, Chris, this concludes what we wanted to share with you about the project and really just open it up to any kind of discussion or questions you might have.

CHAIRPERSON ABRAHAMSON: To what extent are computers available to small police departments?

DR. COLLINS: Well, this continues to be an issue. In this particular case, we have taken the position that assuming that they may have one computer for the whole department, so part of what we'll be doing is with the deployment method is taking laptops out to the community.

But one of the things, and Kay can respond to it, as well, but one of the things, in talking to some of the representatives from the National Institute of Justice, there is a -- I guess an interest on their part, because this is an issue that comes up a lot and the response is, well, at some point -- what was the analogy we gave yesterday, climbing Mt. Everest. At some point, you have to say this is where we want you to be, and so we're going to have to start moving toward that.

Now, in our particular project, I guess we have built in the fact that we don't think they will have the computers they need. Now, in Kentucky, we have regional development centers that have those kinds of things. We also have community colleges that have those kinds of things. So we're --

CHAIRPERSON ABRAHAMSON: What about videoconferencing?

DR. COLLINS: Again, we would rely on our -- in Somerset, Kentucky, it may not have relevance to you, but we have a regional development center and in that center there is a teleconferencing capability. So, again, police departments would have to go either to their courthouses or to their community colleges for that kind of technology.

COMMISSIONER DAVIS: When it comes to computers, there's two kinds. There is the computer that belongs to the department, which is already programmed for certain departmental uses and so forth. But then there is the individual home personal computer. Now, I don't know how frequently those -- or how those are spread around Kentucky, but if Kentucky has got teenage kids, there must be one heck of a lot of those out there.

I would suggest that you take a look at what the families are of these police officers in these rural areas.

DR. SCARBOROUGH: That is part of the individual user or part of the component, because some of these might be individual users through the agency or they may be individual users at home, that may or may not have internet access. Certainly, some folks may have the computers at home, but may not have internet.

COMMISSIONER DAVIS: If they've got teenagers, they've got everything.

DR. SCARBOROUGH: One thing that I'd like to point out with respect to what we know about computers and small agencies or even large agencies, not a lot, especially with respect to the small agencies, though, in another project that we're involved in, we're going to be doing a national needs assessment of small agencies to find out what their capabilities and needs are to hopefully better define the methods for training.

DIRECTOR ASPLEN: Dr. Forman pointed out that in terms of teleconferencing and such, that the technology, in the recent exhibit, there were a number of them, about 200 or something, that were less than \$1,000, the point being that technology is moving very rapidly, which will make it much more accessible in the future.

The other thing, to clarify, for you folks and anybody else out there who may misunderstand, in terms of the Commission recommendations, the only recommendations due to the Attorney General by the Commission by August 1st are regarding the issue of taking DNA samples from individuals arrested. So all the other issues that we have are a bit more --

DR. SCARBOROUGH: So you may be able to get through all that.

DIRECTOR ASPLEN: But I think it's also important to emphasize your time line, your April time line, everybody always wants everything yesterday. There is a particular urgency in this regard, though, because the key to success of this is going to be the Attorney General's ultimate promotion of it and, as such, we need to assure that that occurs before change of Administration, quite frankly. So it would be of particular urgent nature that the time line that is set is actually met.

DR. COLLINS: I guess in this case, we have not solidified the order in which we're going to do these, but certainly we would entertain --

DR. SCARBOROUGH: A changing order.

DR. COLLINS: Yes. We don't have -- we're not working directly with any other groups, and we would be open to that.

COMMISSIONER GAHN: I came in a little late and I don't know if you -- is this going to be an interactive type?

DR. COLLINS: Yes. Adult interactive multimedia. It's a computer disk that they would use.

COMMISSIONER GAHN: The only other --

DR. SCARBOROUGH: It has the potential to be, but it doesn't have to be interactive, if it won't support it.

CHAIRPERSON ABRAHAMSON: I'm sort of sorry that the Chief of Police and the Sheriff -- but both just could not stay and be here for today's session. But I would hope that we would communicate with them and maybe you already have about this, but -- and is anyone else here from the crime investigation work group?

DIRECTOR ASPLEN: Jan is on that group.

COMMISSIONER BASHINSKI: I'm on that group. I noticed that you didn't talk about it, but you've listed that you'd be working with the group, because I think that's important. We've



already collected a lot of information and we can point you to -- in terms of the content of curriculum and so forth.

DR. SCARBOROUGH: And that's exactly the kind of assistance that we need.

DIRECTOR ASPLEN: As soon as we can, we will schedule a working group meeting and schedule a lot of time for you folks to go through and kind of outline the issues that we think need to be addressed.

COMMISSIONER GAHN: But I suspect your goal is that this would be something that would be used at every police training academy for the new officers coming on and part of -- made part of the curriculum of the academy.

DR. SCARBOROUGH: I would say to you that the reason that we have the three levels would make it -- because there is a difference between the basic academy training and the in-service training. This project was designed with in-service training in mind, but because we have the basic, intermediate and advanced levels, it would be useable at every phase of training for the officers.

DR. COLLINS: And in order for us to do this project, we will have to get sign-off by the Kentucky Law Enforcement Commission to be able to integrate that into their training.

DR. SCARBOROUGH: Which is our training approval body for the state. And most post Commissions or training entities have similar approval processes and agree relatively well.

COMMISSIONER DAVIS: Let me ask a question about the politics of these training commissions. Is there any feeling out there that the people who make the decisions as to what's acceptable for training and what's not acceptable for training, that they may be, say, devoted to centralized or already established training centers and that the concept of sending out a disk, like AOL mails out to everybody in the country, is an anathema to them. Is that a consideration?

DR. SCARBOROUGH: I think that's something that we have to deal with just by virtue of the fact that we're trying to use technology and the training varies so much from state to state.

For example, we have a Department of Criminal Justice training that trains all of the officers, with the exception of the Louisville, Lexington and the Kentucky State Police. I was trained at a regional academy in the State of Virginia. So there is so much variation that we're not really sure what we're dealing with, but garnering the support of International Association of Chiefs of Police, the National Sheriffs Association, the Association of Law Enforcement Trainers, and another one, in my mind, that would be critical to you all would be the National Center for Women in Policing. They have a two-fold mission, and that is increasing the number of women and supporting them in law enforcement, but their second initiative is with domestic violence and sexual assault.

So to include them in on this, because they work very much with the Violence Against Women's office. So getting their support would be certainly beneficial, as well. And the National

Association of Black Law Enforcement Officers and the National Association of Women Law Enforcement Executives would certainly be in positions to give you input and give you ideas about how best to disseminate this information, as well.

CHAIRPERSON ABRAHAMSON: So what is our next step? Are you going to work with the crime investigation work group?

DIRECTOR ASPLEN: I think the next step is to set up a meeting, working group meeting, where we kind of help you get an idea of the kinds of things that we think should be addressed.

DR. SCARBOROUGH: The parameters and issues that we talked about with respect to the guidelines for competency that you all were discussing and how it would seem very logical that that relates to whatever training that will be developed.

CHAIRPERSON ABRAHAMSON: An interesting project.

DIRECTOR ASPLEN: It's exciting. It's an exciting opportunity.

CHAIRPERSON ABRAHAMSON: In Wisconsin, the technical colleges do police training, too, so you've got the academies and the technical college. I don't know if that's prevalent across the state.

DR. SCARBOROUGH: In Ohio and Indiana and South Carolina, I believe, but with the variety as far as the states are concerned, to try to get any kind of standardization, and I think you all discussed that very readily this morning, is real difficult because of the differences in the states and the agencies and communities.

CHAIRPERSON ABRAHAMSON: But these national groups could be helpful.

DR. SCARBOROUGH: Absolutely, because the representation is from all of the states and generally these folks are the decision-makers, chief executive officers that have the last say.

CHAIRPERSON ABRAHAMSON: On behalf of the Commission, we want to thank you both for a very interesting presentation.

DR. SCARBOROUGH: Thank you.

DIRECTOR ASPLEN: Thank you very much.

[Applause.]

DIRECTOR ASPLEN: If I could perhaps get a copy of your slide presentation.

DR. COLLINS: Yes. We're going to do that and, also, as I mentioned before, we'd be more than happy -- we have the demo of -- it's a global positioning system. It's about patrol operations and

it's really unrelated to DNA, but it does show the concept of computerized training. So if anybody would like to see that, I'd be happy to pull that up after.

CHAIRPERSON ABRAHAMSON: They're kind enough to duplicate their disk and Woody Clarke will duplicate his disk and both of these will be given to our reporter so that she can use them, if that's okay.

Does that lead us to the public discussion? Unless there is something else that any of the Commissioners want to raise.

## Public Comment

DIRECTOR ASPLEN: If I could just draw your attention to -- you received, at some point in time today, a one-page reference guide to what the folks in the Inspector General's office are doing in terms of their audit of the CODIS. They've been kind enough to remain and if you have any questions about what they're doing, please stop by and talk to them about it.

CHAIRPERSON ABRAHAMSON: And if they'd like to make a statement during the public session, that would be fine. We are now open to any public discussion. Go to a microphone and state your name, please. Thank you.

MS. WALLACE: My name is Marcia Wallace and I do work with the Justice Department, Inspector General's office. We are just beginning an audit, we started last week. We worked with Steve Nasgoda at the FBI last week.

Since we are beginning the audit, I know some of you are from the laboratory environment, we'd be interested in anything that -- any guidance you could give us on parts of CODIS that would be beneficial for us to look at.

Our focus is very narrow. We're looking at the overall implementation of CODIS. So any comments you have would be appreciated.

We might look at the grant end of it, but, again, from a program based aspect.

CHAIRPERSON ABRAHAMSON: Thank you. And you're from Denver?

MS. WALLACE: Yes.

CHAIRPERSON ABRAHAMSON: Are there any other public comments? We've heard from some people during our sessions, but speak now.

[No response.]

CHAIRPERSON ABRAHAMSON: Hearing none.

DIRECTOR ASPLEN: Chief, the issue of the next meeting needs to be addressed.

CHAIRPERSON ABRAHAMSON: Yes.

DIRECTOR ASPLEN: It was tentatively scheduled -- is tentatively scheduled for the end of July. A number of people have indicated that they may be taking well deserved vacations around that time and will not be available.

I personally feel very pleased about the progress that was made, especially this morning, in terms of generating things that do need to be forwarded to the Attorney General.

CHAIRPERSON ABRAHAMSON: How do people feel about the end of August, before Labor Day?

DR. FORMAN: We have one meeting scheduled for that already, a working group meeting.

MS. WILSON: The next full Commission meeting was tentatively scheduled for September 25 and 26.

DIRECTOR ASPLEN: Full Commission?

MS. WILSON: Full Commission.

CHAIRPERSON ABRAHAMSON: That's a Saturday and Sunday.

MS. WILSON: We thought that was going to be the last meeting, so we were going to have a three-day meeting.

CHAIRPERSON ABRAHAMSON: May I suggest, again, that we send out calendars and people mark the dates they can't come and we should try and meet between now and the end of September, at the latest. Is that agreeable?

COMMISSIONER SMITH: It's more than agreeable. I'm just wondering whether that means we're not going to meet again before the submission to the Attorney General.

CHAIRPERSON ABRAHAMSON: That is, because we will submit the letter concerning the practicality. And that, in effect --

COMMISSIONER SMITH: That satisfies the obligation.

CHAIRPERSON ABRAHAMSON: Yes. We are viewing it as satisfying the obligation, at the moment. By the time we are told it's not satisfying the obligation, it will be September.

DIRECTOR ASPLEN: I will tell you it will be very difficult to do that on time, by the time we get filings done that we need to get done in advance, get it through the system. The likelihood of is being able to meet in July, any sooner than what is currently scheduled, is very slim.

CHAIRPERSON ABRAHAMSON: Okay. We should put that down as potential dates and see what the number of people who can come.

DR. FORMAN: That's Sunday and Monday.

DIRECTOR ASPLEN: And any idea where? Boston. Actually, I have to be in Boston the 27th through the 30th.

CHAIRPERSON ABRAHAMSON: There we go. We got one.

COMMISSIONER SMITH: If it were in September, is that Boston, also?

DIRECTOR ASPLEN: It could be, I suppose.

COMMISSIONER BASHINSKI: When is the next legal issues working group? I still have a June 7th meeting in San Francisco.

DIRECTOR ASPLEN: We have one on the sixth in San Francisco.

CHAIRPERSON ABRAHAMSON: Why don't we send out calendars anyway, then we know what the numbers are. Then we should meet when we get the maximum numbers. That's okay?

DIRECTOR ASPLEN: Yes. It sounds like we may just be jumping to the September meeting, but that would not be a horrible thing. Obviously, the working groups will continue working also in generating their reports.

COMMISSIONER GAHN: And, Chris, will you let us know when you have the working group for the development of the Kentucky University people?

DIRECTOR ASPLEN: Yes.

COMMISSIONER BASHINSKI: That's probably going to be -- there is a working group meeting scheduled the 28th and 29th of June, I think.

DIRECTOR ASPLEN: In Washington.

COMMISSIONER BASHINSKI: In Washington.

CHAIRPERSON ABRAHAMSON: okay. That's very important, because these working group papers are the context of the Commission meetings.

COMMISSIONER BASHINSKI: Is that the right date, the 28th and 29th of June?

DIRECTOR ASPLEN: For the next crime scene group.

COMMISSIONER BASHINSKI: I have the NIJ crime scene group.

MS. WILSON: Yes.

COMMISSIONER BASHINSKI: And that's in Washington? We don't know where. Somewhere coastal and cool. Monterey.

DIRECTOR ASPLEN: I'm sure we'll get the government rate a lot in Monterey.

CHAIRPERSON ABRAHAMSON: Anything else to come before the Commission? Chris?

DIRECTOR ASPLEN: The only thing I would have is my continuing thanks to, first of all, all the Commissioners for taking their time out, not just here, but the working group meetings and the individual work that they do, but then perhaps most of all to Robin and Lisa. This doesn't happen without Robin and Lisa.

CHAIRPERSON ABRAHAMSON: Agreed. Robin, Lisa, anything else to come? No? Okay. With that, the Commission meeting is adjourned and it's 11:45, on my watch.

[Whereupon, at 11:45 a.m., the meeting was concluded.]