

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

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

## Contents

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

## Commission Members:

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

## Agenda

Sunday, January 16, 2000

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

Monday, January 17, 2000

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

*Rockne Harmon, and Jeffrey Thomas*

11:00 - 11:20 Break

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

12:30 - 2:30 Working Lunch

Criminal Cases Review Commission of the United Kingdom

*Howard Matthews, Head of Operations*

*Angela Flower, Case Review Manager*

2:30 - 3:30 Postconviction Working Group Report & Discussion

*The Honorable Ron Reinstein*

*Working Group Chair*

3:30 - 4:00 Public Comment

4:00 Adjourn

**Introductory Remarks**  
*Chief Justice Shirley S. Abrahamson*  
*Chair*

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

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

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

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

CHIEF JUSTICE ABRAHAMSON: All true.

[Laughter and applause.]

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

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

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

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

CHIEF JUSTICE ABRAHAMSON: My PR man.

MR. CROW: I've been introduced.

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

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

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

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

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

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

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

## Update on Commission Business

*Christopher H. Asplen, AUSA  
Executive Director*

9 MR. ASPLEN: Thank you.

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

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

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

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

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

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

17 copy for every member of the Commission. Without knowing

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

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

20 has done, and I think people like it.

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

22 having the folks from the Criminal Case Review Commission

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

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

25 relatively short notice.

1 I would also like to mention the members of our

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

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

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

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

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

7 also.

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

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

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

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

12 trip to London and the forensic sciences service

13 international conference on human identification, I think it

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

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

16 Commission is doing, was the international response to the

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

18 that the Commission put forth.

19 We went to talk largely about future technology

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

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

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

23 they told us to talk about.

24 However, at the end of my presentation there were

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12 MS. COLLINS: Before we get started, I have passed  
13 around a handout of what you are going to see. We will go  
14 through this as quickly or as slowly as you want us to do  
15 so.  
16 Let me set the stage before we get started. It  
17 has been a while since we met before the full committee, but  
18 we have had an opportunity to meet with the working group a  
19 couple times. So I have made a lot of progress, I think, on  
20 some of the early work with the Commission, developing their  
21 brochure and that sort of thing.  
22 Let me tell you a little bit about what I am going  
23 to show you today. Today is a very early stage to this  
24 whole process. It is referred to as a prototype. It's not  
25 an alpha version; it's not even very close. It is just to  
1 give you an idea visually of what this might look like.  
2 These are contained as well in your handout.  
3 A lot of the information that is in here  
4 originally came from development of the DNA brochure. As  
5 Chris referred to, there are going to be two CDs. There is  
6 going to be a beginning level CD and an advanced level. We  
7 chose those words very carefully because of all of the  
8 issues with all the different titles that are involved with  
9 it.  
10 The plan currently for the DNA evidence collection  
11 course is there will be four hours total for computer-based  
12 training. There will be two modules. The beginning level  
13 module will be approximately an hour and a half long,  
14 consisting of five lessons. The advanced level module is  
15 two and a half hours, and it will consist of five lessons.  
16 That is what is projected to be done at this point in terms  
17 of the information and the feedback that we got not only  
18 from the Commission, but also the DNA working group.  
19 This particular technique that we are using is  
20 referred to as the instructional systems design methodology,  
21 the way that it is set up.  
22 The objectives address topical knowledge and  
23 skills that would be required by what we would consider a  
24 first responder. This would be a first responding law  
25 enforcement officer to a crime scene and also the person  
1 responsible for collecting, preserving and processing the  
2 evidence.

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

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

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

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

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

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

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

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

22 MS. COLLINS: It is very detailed.

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

24 put it.

25 [CD-ROM demonstration.]

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

5 You will become familiar with the use of CODIS.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

18 CHIEF JUSTICE ABRAHAMSON: Barry.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7 CHIEF JUSTICE ABRAHAMSON: So there is a need.

8 MR. ASPLEN: Yes.

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

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

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

## Research and Development Working Group Report

*Dr. James Crow*  
*Working Group Chair*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3 I have the impression from Paul that Virginia

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

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

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

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

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

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

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

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

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

22 are in the sextillions or quintillions now.  
23 It seems like we are backpedaling a little from  
24 NRC II. Can't we make a stronger statement about uniqueness  
25 than what is said here?  
1 MR. CROW: I'm sensitive to this. The real issue,  
2 as we all know, is that uniqueness is a scientific question  
3 and we really want a political solution to it.  
4 I didn't talk about it now, but it is in here.  
5 What the FBI advocated is if you ask if the probability is  
6 less than the reciprocal of the United States population and  
7 then put in some fudge factors taking care of the  
8 uncertainty -- and these are large fudge factors; they are  
9 factors of 10 in 2 different cases -- that if the  
10 probability is so small that it's less than the reciprocal  
11 of the population of United States and you are rather sure  
12 of that, then there is every reason to say that person is  
13 unique.  
14 To get a group of statisticians to make this  
15 statement is something quite different. I think what has to  
16 happen is that some political or legal group has to just say  
17 that if the probability is less than such and such we will  
18 call it unique and make that as a political statement.  
19 MR. GAHN: Could we make a stronger statement as a  
20 Commission about uniqueness?  
21 MR. CROW: Maybe the Commission could. Just don't  
22 ask my working group to do that.  
23 MR. GAHN: If we were to survey all the crime  
24 labs, shall we say, in the country, I suspect most of the  
25 ones that get a match with the 13 core loci are calling it  
1 source or source attribution.  
2 MR. CROW: The 13 loci has a probability of about  
3 2 trillion. That is 3 or 4 or 5 orders of magnitude smaller  
4 than the world population. It is what almost any of us  
5 would call unique but we don't want to say it.  
6 MR. GAHN: Maybe this is an area we could look at  
7 again and that the Commission should decide. We still seem  
8 to be on the fencepost here with this uniqueness issue.  
9 MR. CROW: I would like to pass it on to the  
10 Commission as we have done with everything else that is  
11 hard.  
12 [Laughter.]  
13 MR. SCHECK: With all respect, Norman, I think it  
14 is a strategic error looking at it from the point of view of  
15 prosecutors and judges. The numbers, no matter how you  
16 express it, likelihood ratios, frequencies, everything else,  
17 are overwhelming, particularly in a case where there is any

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

9 CHIEF JUSTICE ABRAHAMSON: Thank you.

10 Jeff, you have been very patient.

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

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

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

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

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

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

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

20 I have to agree.

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

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

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

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

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

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

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

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

10 Chris.

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

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

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

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

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

9 this.

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

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

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

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

3 [Laughter.]

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

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

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

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

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

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



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

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

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

15 MR. CROW: Yes.

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

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

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

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

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

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

11 MS. FORMAN: People or organizations.

12 CHIEF JUSTICE ABRAHAMSON: People or  
13 organizations.

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

15 [Recess.]

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

## Laboratory Funding Working Group Report

*Dr. Paul Ferrara  
Working Group Chair*

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

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

5 MS. CROUSE: Thank you very much.

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

11 [Laughter.]

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

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

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

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

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

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

9 In between there is included submission of the

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

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

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

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

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

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

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

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

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

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

76

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

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



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

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

1 obviously are amenable to it, but every case -- I'm  
2 averaging 30 items per case right now -- is being examined  
3 scrupulously and individually and by itself with no other  
4 cases being opened.  
5 So on one hand, how can we increase throughput of  
6 forensic science laboratories? That's what the working  
7 group is really trying to do. Where are the bottlenecks?  
8 What is it going to cost? Will money help, and how should  
9 that money be spent?  
10 There are a lot of different things. A private  
11 laboratory can run, and is doing it now routinely, 10,000  
12 convicted felon samples per month based on considerable  
13 experience. With 35 DNA examiners, they are capable of  
14 running approximately 8 to 10 cases per month.  
15 MS. CROUSE: I want to make one quick point.  
16 Barry, I saw your eyebrows come together when I said  
17 sometimes we run samples that don't work. The samples that  
18 don't work are all documented and put in our file folders.  
19 MR. SCHECK: What strikes me is that this is the  
20 right bottleneck, because this is really where the rubber  
21 meets the road, being able to screen the samples in an  
22 intelligent way. The onus of this really just can't fall on  
23 the lab people.  
24 What we might want to recommend or what I think  
25 really needs to be done in this area is that we have to do  
1 training to develop the expertise among the detectives, the  
2 police officers and the prosecutors. Because this is really  
3 the training.  
4 In other words, we know the answers ahead of time.  
5 It's in all the other recommendations that NIJ has put out.  
6 You want a team approach. You have to have information  
7 about what is relevant and what is not relevant. You have  
8 to have the personnel there that are going to say, okay, in  
9 this case a vaginal swab is all you need, but in other cases  
10 it may very well not be. But you need to have a process in  
11 place where this kind of information is done.  
12 One of the things we had discussed at the project  
13 that Bob Genslin (phonetic) and Jim Peterson were doing was  
14 the blind proficiency test. What I had been advocating and  
15 I know Bob Genslin somewhat supported is that the kind of  
16 testing that has to be done -- and it's not just for  
17 laboratory personnel -- is the ability to read and  
18 understand and screen the samples.  
19 In other words, you don't have to do all these  
20 samples, but you have to learn how to decide which things to  
21 test and which things not to test in order, and that is

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

1 make the process work efficiently.

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

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

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

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

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

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

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

14 CHIEF JUSTICE ABRAHAMSON: Chris.

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

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

## Public Comment

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

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

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

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

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

13 CHIEF JUSTICE ABRAHAMSON: Thank you.

14 Anyone else?

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

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

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

22 Go ahead.

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

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

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

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

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

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

20 CHIEF JUSTICE ABRAHAMSON: Woody.

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

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

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

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

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

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

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

11 [Laughter.]

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

16 CHIEF JUSTICE ABRAHAMSON: Ron.

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

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

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

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

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

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

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



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

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

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

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

8 CHIEF JUSTICE ABRAHAMSON: Chief Gainer.

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

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

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

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

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

15 CHIEF JUSTICE ABRAHAMSON: Barry.

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

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

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

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

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

2 Chief Gainer.

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

6 CHIEF JUSTICE ABRAHAMSON: Chris.

7 [Laughter.]

8 CHIEF JUSTICE ABRAHAMSON: A good chair delegates.

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

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

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

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

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

8 chart that out?

9 CHIEF JUSTICE ABRAHAMSON: Paul.

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

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

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

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

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

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

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

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

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

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

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

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

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

10 MS. BASHINSKI: That's critical.

11 CHIEF JUSTICE ABRAHAMSON: Norm.

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

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

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

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

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



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

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

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

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

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

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

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

1 Any other public comment?

2 [No response.]

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

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

**Introductory Remarks**  
*Chief Justice Shirley S. Abrahamson*  
*Chair*

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

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

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

12 Go ahead. CODIS. I apologize, Lisa.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12 CHIEF JUSTICE ABRAHAMSON: Ron.

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

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

24 CHIEF JUSTICE ABRAHAMSON: Paul.

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

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

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

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

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

5 [Laughter.]

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

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

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

7 MR. CROW: Yes.

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

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

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

18 CHIEF JUSTICE ABRAHAMSON: Chris.

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

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

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

14 MR. FERRARA: That's correct.

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

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

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

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

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

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

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

17 Okay, Michael. You have been sitting patiently.



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

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

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

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

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

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

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

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

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

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

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

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

4 which is currently being pursued.

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

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

what he presciently described years ago as inchoate DNA database.

3 First, Ed's remarks.

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

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

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

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

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

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

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

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

23 variation of the theme of founded or reasonable suspicion.

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

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

1 reasonably clear that if you interpose a magistrate or judge

2 and you have some particularized showing of the nature of

3 reasonable or founded suspicion, and you use carefully

4 circumscribed procedures, that sort of compulsory

5 identification procedure can probably pass constitutional

6 muster.

7 I have been talking about situations in which you

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

9 situation in which you indirectly obtain the sample? For

10 example, going to a hospital or an academic institution

11 which has already collected the sample.

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

13 distinguish between two situations. We are not talking

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

15 institution and instigate the collection of the sample.

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

17 They go to the hospital personnel and request that they

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

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

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

21 What we are talking about is the other situation.

22 They have already collected the sample for their own

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

24 the police?

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

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

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

3 on probable cause or founded suspicion, but rather a

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

5 subpoena is logically relevant to the subject matter of an

6 ongoing legitimate criminal investigation.

7 That is the issue that turns on the question of

8 the applicability of the Miller case which is discussed on

9 page 8. When we were talking about compulsory

10 identification procedures, I said there was some

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

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

13 division of judicial sentiment. The division of judicial

14 sentiment revolves around the extension of Miller to the

15 sorts of cases we are talking about now.

16 Miller is a situation in which the suspect is

17 charged with conducting an illegal still business. The

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

9 CHIEF JUSTICE ABRAHAMSON: Barry.

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

10 Then I would say that the proper procedure would

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

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

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

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

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

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

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

6 MR. IMWINKELRIED: We can certainly flesh out in

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

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

22 CHIEF JUSTICE ABRAHAMSON: Phil.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 therapist/patient privilege?

2 MR. IMWINKELRIED: That's easily distinguishable.

3 Every state has such a privilege.

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

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

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

7 CHIEF JUSTICE ABRAHAMSON: What do you gather from

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

9 if anything?

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

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

the analogy to fingerprinting quite clear is a valid one.

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

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

21 appropriate language as well.

22 CHIEF JUSTICE ABRAHAMSON: Okay. David, where do

23 we go from here?

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

25 uncontroversial part of our report.

1 [Laughter.]

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

3 some legal issues associated with the prosecutorial phase,

4 the trial phase, and pretrial discovery of DNA

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

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

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

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

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

16 Another topic that involves proficiency test

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

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

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

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

1 move on.

2 I'm also going to skip over questions about

3 whether there should be an exception to the statute of

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

5 be exceedingly difficult to draft a statute that created a

6 specific exception for DNA evidence.

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

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

16 banking and more expansive DNA databases.

17 State statutes that provide for convicted offender

19 databases fall into several patterns and display considerable

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

22 federal government in setting up a database.



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

23 accidents.

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

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

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

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

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

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

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

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

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

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

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

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

1 MR. CROW: Yes.

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

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



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

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

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

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

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

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

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

15 [Laughter.]

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

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

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

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

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

18 [Recess.]

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

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

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

25 [Laughter.]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12 Thanks.

13 MR. SMITH: Rock.

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

25 Thank you.

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

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

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

20 MR. SMITH: Dorothy.

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

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

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

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

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

18 That whole issue, I think, needs either  
19 development or qualification.

20 I also had problems on the race issues around page

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

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

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

21 MR. SMITH: Phil.

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

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

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

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

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

16 The cost of acquiring information about a sample

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

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

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

19 DR. DAVIS: Madam Chairman.

20 CHIEF JUSTICE ABRAHAMSON: Yes.

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

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

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

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

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

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

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

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

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

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



1 adopted this summer in Great Britain provides that if the  
2 individual gives written consent to have the sample  
3 retained, then it is retained. Otherwise it is not.  
4 MR. SCHECK: In other words, when you give an  
5 elimination sample, as part of the informed consent  
6 procedure in Britain, if the person says I want to put my  
7 DNA in there for universal screening purposes, they can.  
8 That's the provision?  
9 MR. KAYE: Yes. The Home Secretary said people  
10 were being frustrated by the inability to have their samples  
11 remain on file.  
12 MR. SCHECK: Peculiarly British. That actually is  
13 important to note, because I think when the presentations  
14 have been made in the past we were told that is not their  
15 practice to put it into the data bank. But this is an issue  
16 we have to deal with right now.  
17 So I think we have to do something on these forms,  
18 the informed consent form. The part where there was a  
19 discussion of Schneckloth and Bumpers is all accurate with  
20 respect to what the law is, but it's a bit of a different  
21 area. It's a particularized search: we want to look in  
22 your home or we want to search you here -- here we are  
23 saying we want your DNA, but it's got to be clear. Is it  
24 just for fingerprint purposes, just for elimination, and how  
25 long are you going to keep it? And when does it stop?  
1 That we have found to be a complicated issue.  
2 Right now in New York we are trying to deal with this in our  
3 Forensic Science Commission. I don't know how far we are  
4 going to get. We have a case of a guy that gave an  
5 elimination sample and wants it back, and the Westchester  
6 County Medical Examiner's office doesn't want to give it  
7 back even though by all counts I guess the case is over.  
8 We are talking here about destroying blood sample,  
9 as to whether you can keep the digitalized record in some  
10 kind of a sealed form for later examination. There are  
11 different ways of dealing with it, but this is an issue we  
12 have to deal with.  
13 MR. IMWINKELRIED: There is one line that we could  
14 certainly add to the text. Even with Schneckloth it's  
15 unclear that if a suspect speaks up and says on the one hand  
16 I'm generally giving you consent, but these are the  
17 limitations. For example, a person saying you can look at  
18 the living room, you can look at this one, but you can't  
19 look in the other one. That would be a legally effective  
20 restriction voluntarily imposed, and respect for that type of  
21 limitation is perfectly consistent with the general law.

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

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

10 CHIEF JUSTICE ABRAHAMSON: Are there further  
11 comments?

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

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

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

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

3 Does everybody have a copy of this letter?

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

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

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

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

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

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

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

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

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

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

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

13 That includes issues such as limiting the research

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

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

20 CHIEF JUSTICE ABRAHAMSON: Discretionary.

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

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

6 CHIEF JUSTICE ABRAHAMSON: Phil

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

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

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

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

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

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

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

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

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

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

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

14 MR. SCHECK: That's correct.

15 CHIEF JUSTICE ABRAHAMSON: Jim.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

9 This is definitely a protective act on my part.

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

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

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

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

1 That's B.

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

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

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

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

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

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

21 [Laughter.]

22 CHIEF JUSTICE ABRAHAMSON: Right.

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

25 MR. ASPLEN: With David's assistance.

1 CHIEF JUSTICE ABRAHAMSON: Yes.

2 Barry.

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

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

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

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

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

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

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

15 CHIEF JUSTICE ABRAHAMSON: Woody.

16 MR. CLARKE: How about just the opposite.

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

25 I have no objection to the matter being revisited.

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

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

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

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

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

3 technology change.

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

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

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

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

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

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

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

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

16 The clear majority of states are retaining, right?

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

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

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

24 interest that could be advanced.

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

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

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

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

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

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

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

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

20 Phil.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

24 [Recess.]

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

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



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

14 It was pretty clear that what I was hearing in

15 Birmingham you folks should hear also.

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

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

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

20 [Laughter.]

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

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

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

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

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

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

20 The background to why we exist.

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

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

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

8 them put together.

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

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

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

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

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

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

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

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

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

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

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

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

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

25 The structure we have at the moment.

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

4 A director of finance and personnel.

5 And 13 commission members. They have come from a  
6 variety of backgrounds. Our legislation requires that two  
7 thirds of them should be legally qualified; one third of  
8 them need not be. We have got 13 at the moment. That  
9 equates to 7.2 full-time equivalents, because many of them  
10 are part time, anything between one and four days a week.

11 And they come from all backgrounds. We have Crown  
12 prosecutors; we have got barristers; people from business,  
13 financial directors; somebody from the Serious Fraud Office;  
14 ex-chief constables.

15 They are all appointed on open competition, and we  
16 are just going through a round now. Three years have gone  
17 by, their contracts have expired, and the Home Secretary is  
18 now appointing new commissioners. The old ones are free to

19 apply for their jobs again, but they have to go through the  
20 interview procedure themselves.  
21 Head of operations, me.  
22 Two legal advisers to provide advice to the case  
23 review managers about points of law.  
24 One investigations adviser, an ex-police officer  
25 who advises us on carrying out interviews.  
1 A head of information who deals with all the press  
2 interests in our activity, which, as you can imagine, varies  
3 with the case we are dealing with. When we have high  
4 profile cases, we have to organize press conferences in  
5 large rooms for tens of journalists. When it's not so high  
6 profile, we are left alone.  
7 Forty-three case review staff. They are the ones  
8 who actually carry out the review of the cases.  
9 Case review managers.  
10 We just introduced a new category of case workers.  
11 So you can already see, I think, that the  
12 organization is tipped towards case review. We have few  
13 support staff. Fourteen staff actually support the case  
14 workers, process applications, and carry out the  
15 administrative work for the case review managers.  
16 And then ten management support staff.  
17 I think we are up to a total -- I'll take that  
18 away before you add it all up and I'll get it wrong -- of  
19 about 86 at the moment. We are authorized to go on up to a  
20 total of about 50 case review managers.  
21 Current structure is very flat. There are no  
22 senior managers. The case review managers don't report to a  
23 senior manager who checks their work. I will mention here  
24 how the work is carried out.  
25 The two animals who do case work are the case  
1 review managers and the commission members. For every  
2 application that we have that we review a case review  
3 manager and one commission member are assigned to it.  
4 The case review manager goes out and does all the  
5 work. The commission member makes sure that the work is  
6 done in the right order, the right time, and we are not  
7 chasing our tails pointlessly.  
8 So we have one manager and one member per case,  
9 but that said, when we have very large cases, more case  
10 review managers can be assigned to it. But there will  
11 always be one case review manager and one commission member.  
12 DR. REILLY: Excuse me. What kind of training  
13 does one need to be a case review manager?  
14 MR. MATTHEWS: Case review managers have come from

15 a wide variety of backgrounds. They've all got some  
16 experience in investigation; solicitors, barristers,  
17 ex-police officers, trading standards, social services. Our  
18 chairman is very keen on testing and recruitment, and we  
19 test for analytical skills. That said, there is no  
20 particular background people would have to come from. It's  
21 just the skills that they must bring.

22 When the case review manager and a commission  
23 member have reached a conclusion about a case, which could  
24 be in half a day if it's fairly straightforward, or it could  
25 be in three years, as we've still got cases alive from when  
1 we took them on, their investigations are passed to another  
2 commission member or group of commission members to make a  
3 decision. So the case review manager and the commission  
4 member who investigated the case are not the ones who decide  
5 that it will go back to the Court of Appeal or not. That is  
6 always taken by a separate member.

7 The statute gives us a slight problem because it  
8 says if we are not making a referral, we can decide with one  
9 commission member. If we are making a referral, we need  
10 three. You never know when you are starting is this going  
11 to be a referral or not. So the commission member and the  
12 case review manager will decide whether this is looking like  
13 a referral and call a committee if necessary.

14 Once the decision has been made, the applicant is  
15 given 28 days to respond. I will come later on to the  
16 statistics. We refuse an awful lot more cases than we  
17 refer, and the applicants are given the opportunity to come  
18 back and make further representations before we finally  
19 close their case.

20 Once we finally close their case, some of them ask  
21 for an application form and apply again with the same  
22 grounds, some new grounds, anything they can think of that  
23 might persuade us. They go to the back of the queue, and  
24 the queue unfortunately at the moment is quite long.

25 So we do try to be as thorough as we can. We try  
1 to address every issue that the applicant raises. If they  
2 have a genuine concern about an issue which we know is not  
3 going anywhere, we will explain to them why it isn't going  
4 anywhere so we don't have to do the work all over again when  
5 they reapply.

6 When an application comes in, it's a simple  
7 application form. I've passed around an information pack  
8 which has got an application form in it. If any of you get  
9 criminal convictions in the United Kingdom, you don't even  
10 have to ask for the form now.

11 [Laughter.]

12 MR. MATTHEWS: And we will provide help for people  
13 to fill application forms in. They don't even have to fill  
14 in an application form; they can write us a letter. We do  
15 know that the average reading age of our applicants is  
16 around seven. So we've tried to make the application form  
17 as simple as possible, and a lot of them do get help in  
18 filling in application forms from probation officers and the  
19 police and the prison services.

20 The first thing we do is check that the

21 application is actually eligible according to our statute.

22 The applicant must have been through the appeal procedure.

23 So they must have, if they were convicted in a Crown Court,  
24 applied for leave to appeal to the Appeal Court. They can  
25 have had that leave turned down or they can have been heard,  
1 but as long as they have completed that procedure, then they  
2 can apply to us.

3 We have a wonderful catchall which appears a

4 couple of times called exceptional circumstances. Nobody  
5 can define exceptional circumstances, but if we see one, we  
6 know what it looks like, and we can take an application from  
7 somebody who hasn't appealed.

8 For instance, if we have got two codefendants one  
9 of whom has been to appeal and one of whom hasn't, if we  
10 find grounds to refer the case of the one who had been to  
11 appeal, then we can take the other one as well, because it  
12 would be a waste of time to tell him to go on appeal and get  
13 turned down.

14 MR. SMITH: Do you need an application from the  
15 other one, or can you initiate applications on your own?

16 MR. MATTHEWS: We can initiate applications. One  
17 of the powers we have in the Act which we haven't used yet  
18 because we are inundated with applications is that we can go  
19 out and seek miscarriages of justice. So if something comes  
20 to our attention that we think needs investigation, we can  
21 choose to do that.

22 MR. SMITH: But at this point that is theoretical;  
23 you haven't done it?

24 MR. MATTHEWS: We haven't done it actively. What  
25 has happened is that we have come across investigation  
1 activities or operations that have gone wrong. We may have  
2 one applicant who has been part of that operation. Suddenly  
3 there are 20 more who were arrested and convicted on the  
4 same operation which is now flawed. So we will then go out  
5 and find them as well.

6 We screen for issues now. What we used to do, as



7 soon as a case was eligible, we would stick it in the queue  
8 and it would go to the back, and we had over 1,000 cases  
9 waiting to be looked at by a case review manager.  
10 What we are doing now is looking at those cases  
11 briefly to see if they raise genuine issues that are really  
12 going to need investigation. If they're not, then we will  
13 try and close them straight away. So if we can close them  
14 with a minimum of case worker effort, we will do so. If  
15 not, then they have to go on to wait for a full review.  
16 The sort of issues we are screening out are the  
17 jury was put off because the victim's mother cried in the  
18 public gallery, therefore it's a miscarriage of justice. So  
19 we can deal with that sort of thing fairly quickly.  
20 Then we pass those on to a full review. A full  
21 review is when we assign a case review manager and a  
22 commission member to the case to start looking at it in  
23 detail. That full review process will involve going back to  
24 the original investigation and looking at all the documents.  
25 I will come on to how we actually investigate cases in a  
1 second.  
2 One of the options we have when we are in full  
3 review is that we can appoint an investigating officer. One  
4 of the particular powers within our Act is that if we think  
5 that the original investigation needs investigation itself,  
6 we can appoint usually a police officer from another force  
7 to go in and review the original investigation.  
8 It's not done often. We have done about 15, I  
9 think, in the time of three years. They become very  
10 lengthy. They need careful management. We are responsible  
11 for managing that investigating officer, and we can change  
12 them at any time if we want to. It has to be a careful  
13 decision, and this is one that does have to be made by a  
14 committee of three commission members, to send a police  
15 officer into another force to investigate what appears to be  
16 a problem with their original investigation.  
17 The application profile. What do we get? At the  
18 moment we are getting three a day. When we started we were  
19 getting five a day. That has tailed off now, but it seems  
20 to be remaining fairly steady.  
21 Twenty percent of the cases are ineligible; 20  
22 percent of our applicants over the three years have not been  
23 to appeal. At the moment we don't know how many of those we  
24 send away who then come back again, having sought leave to  
25 appeal and being refused, but it's not many, because we are

1 trying not to send people around pointless bureaucratic  
2 loops. If their conviction was five years old, there is no  
3 way the Court of Appeal is going to allow them to appeal out  
4 of time. So we will try and deal with their case. If the  
5 case is very recent, a very recent conviction, then we will  
6 say go back to the Court of Appeal and seek leave, and very  
7 often they may get it.  
8 Truly ineligible applications are those who have  
9 got an appeal pending. So they will apply to the Court of  
10 Appeal and us just to be on the safe side.  
11 Thirty-four percent then are closed at that  
12 screening point. So 34 percent are raising no significant  
13 issues that are going to go anywhere.  
14 Once they have got through there, we have got 32  
15 percent are in custody and 14 percent are at liberty. At  
16 the moment our policy is that we deal with those in custody  
17 first. So anybody who is in prison, when their turn comes  
18 up we will deal with them.  
19 We have an unfortunate group who were in custody  
20 when they applied to us. They waited so long they have now  
21 got out. So they are at liberty and they have gone to the  
22 bottom of the queue.  
23 We are trying to address at-liberty cases and we  
24 are starting to do that now. The Home Affairs Select  
25 Committee is keen that we should particularly consider  
1 significant at-liberty cases but of course didn't actually  
2 say what significant meant.  
3 The average age of convictions is 33 months. We  
4 have some convictions going back to the 1950s. We've got  
5 obviously ones who have only just come out of Court of  
6 Appeal. So the average is 33 months, and that has come down  
7 quite significantly from when we started.  
8 The average sentence is just under five years.  
9 Again, that belies a big spread. We've got a lot of lifers;  
10 we have a lot of fines: 5 pounds for a parking offense in  
11 1957. Because it's a criminal conviction, we must deal with  
12 it. As you can imagine, anybody who is prepared to pursue a  
13 parking ticket since 1957 is very keen that their case  
14 should be considered fully and will not take a quick and  
15 lighthearted view of any review that doesn't go into all the  
16 details. I think the lowest offense we have is a 3 pound  
17 fine in 1962 for a barking dog in Ipswich.  
18 So why do people apply to us? What are the common  
19 grounds that people think a miscarriage of justice has taken  
20 place?  
21 Confession was beaten out of them, forced out of

22 them; they never meant it in the first place; it was only a  
23 laugh; they should never have done it and they have changed  
24 their mind.

25 Mistaken identification. It simply wasn't them.

1 We've just had a referral of mistaken identification where  
2 an applicant had been jailed for three years for a burglary  
3 on mistaken identification. It turned out three years later  
4 the police managed to check an unconfirmed fingerprint from  
5 the scene and identified it with a known burglar from the  
6 same area. So we managed to get that applicant out of jail  
7 before Christmas on bail.

8 New witnesses or experts. Particularly when  
9 anybody convicted keeps a very close eye on their own  
10 particular crime, if they see a new expert has come up, then  
11 they will want that expert who will cast doubt on their  
12 conviction. Or a new witness who has genuinely come  
13 forward. The defense never found them at the time and now  
14 they are willing to speak.

15 Prosecution failure to disclose. The prosecution  
16 had information that it never passed to the defense.

17 Defense incompetence. Quite popular, defense  
18 incompetence. Just didn't do a good job and the brief was  
19 useless.

20 Retraction of evidence. Witnesses at the original  
21 trial are now willing to retract their evidence, that the  
22 story they made up at the time was a false one. One case  
23 we've looked into recently the witness certainly was not  
24 willing to retract their evidence, but it was in the  
25 applicant's mind that they would.

1 Forensic evidence. Either the forensic evidence  
2 was false, was wrong at the time, or there is new forensic  
3 evidence.

4 Changed evidence. Everybody has changed their  
5 mind. It was all a pack of lies at the time and everybody  
6 would tell the truth if they were only asked again.

7 Breaches of the legal safeguards. Now that we  
8 have acts which dictate how people must be questioned and  
9 handled in custody, it was all done wrong.

10 And it's all a conspiracy from two policemen who  
11 arrested me. One of them is living with my wife, and so  
12 both of them concocted this story to get me out of the way,  
13 to, obviously the entire world is conspiring, the judges,  
14 the courts, and everybody else.

15 Trial was conducted poorly. One where the judge  
16 fell asleep, apparently.

17 There is a new legal argument. We do have a few

18 cases of new legal arguments and we try to deal with those  
19 fairly quickly, because if it's on a legal point, our legal  
20 advisers can address that point fairly rapidly and send it  
21 straight back to the Court of Appeal.

22 One where an applicant convicted in the  
23 Magistrate's Court of an offense that didn't actually exist  
24 as an offense at the time he was convicted of it. It came  
25 in a few days later.

1 Similar evidence. Very popular. The applicant  
2 reads about a case just the same as his where the person on  
3 trial got off, and it was identical, so why didn't he get  
4 off?

5 Once we have got the application, where do we  
6 start? We start by looking at the documents. The applicant  
7 must come to us with something new. We can't refer a case  
8 back purely on the grounds that the court heard all the  
9 evidence but the jury made the wrong decision. If  
10 everything was before the jury and the jury made that  
11 decision, then that is not a miscarriage of justice.  
12 So what we have to check is that what the  
13 applicant is telling us is genuinely new. We look back at  
14 the documents. We get the trial transcripts, which can be  
15 difficult if the conviction is very old. We get summings  
16 up; we get Court of Appeal files, which again can be a  
17 problem because before we existed nobody ever asked for this  
18 stuff. Once the case was finished, once it had gone through  
19 the Court of Appeal, it was put in a basement in London and  
20 nobody would ever want to look at it again. Now we are  
21 sending off requests for ten files a day to a Court of  
22 Appeal who have never been resourced to supply that. So  
23 actually getting the Court of Appeal file can be a problem.  
24 MR. THOMA: Excuse me. Do you have court  
25 reporting at all levels?

1 MR. MATTHEWS: We don't at Magistrates Court; we  
2 do at Crown Court. There is no recording at Magistrates  
3 Court at all.

4 MR. THOMA: Just clerk's notes?

5 MR. MATTHEWS: Yes, if that.

6 CHIEF JUSTICE ABRAHAMSON: What percent of your  
7 cases come from Magistrate?

8 MR. MATTHEWS: It's low, 12, 15, something of that  
9 order. Magistrates Court cases give us a problem, because  
10 if they are old, there is simply no way we are going to be  
11 able to reconstruct the original trial. The memories are  
12 gone; the papers have gone. I think Magistrates Courts  
13 destroy their papers very, very quickly, in about a year or

14 so.

15 MR. CLARKE: What crimes are they?

16 MR. MATTHEWS: In the Magistrates Courts?

17 MR. CLARKE: Yes.

18 MR. MATTHEWS: Occasionally assaults, lots of

19 traffic offenses, parking, speeding. Adulterating wine was  
20 one of them.

21 The Home Secretary, as you are probably aware, is

22 looking at reviewing whether a case can be tried at

23 Magistrates Court or Crown Court and whether the applicant

24 has the choice as to which court he goes to. So we went

25 through our Magistrates convictions and took a quick look at

1 whether we would be able to actually do them or not. Out

2 of, I think, 200 we had 20 or 30 that were going to be

3 impossible. The only way they would be tried again would be

4 to go back to court, and the original evidence had gone;

5 everything had gone. So we haven't actually crossed that

6 bridge yet.

7 MR. REINSTEIN: Has it ever been discussed as to

8 whether or not to limit the cases to just Crown Court cases

9 as opposed to Magistrates Court?

10 MR. MATTHEWS: Not yet. I don't know if anything

11 is going to come out of this Home Secretary's review of

12 either-way cases, but for us it's all criminal convictions,

13 and for the Home Office before us it was all criminal

14 convictions as well.

15 We can carry out interviews. We have very

16 wide-ranging powers. We can do pretty much anything that

17 will further our investigations. We can interview the

18 applicant; we can interview the witness; we can interview

19 the victims; we can interview the investigating officers; we

20 can get judges' notebooks.

21 We can carry out forensic tests. We can either

22 instruct new forensic tests on existing evidence if it's

23 still available, or we can have the original forensic tests

24 reviewed.

25 We can appoint our own experts who we will pay.

1 Experts on anything -- firearms, forensics, medical.

2 And again, we can appoint our own investigators.

3 The powers we have got. Access to documents and

4 material from any public body. That immediately covers the

5 police, the court service, customs.

6 It gets a bit more difficult with health services

7 and our welfare services who are in the public domain, but

8 some of them don't consider themselves to be public bodies

9 as far as this Act is concerned. Because we are fairly new,

10 we are still discussing with individuals when we go to them  
11 that we consider them to be a public body. We have a  
12 discussion about it and eventually they either agree or not.  
13 I think in every case so far they have agreed.  
14 The investigating officer again, and the power to  
15 direct and change that officer if necessary.  
16 Powers to take any steps appropriate in the  
17 exercise of our functions, which is pretty wide-ranging.  
18 Relations with other bodies, with the police and  
19 with customs and excise. They are both assisting us and  
20 probably the subject of investigations. We will be looking  
21 at what they did originally and asking them to help us in  
22 supplying the original material that was part of the trial.  
23 Most of the police forces now and customs and  
24 excise have got particular offices nominated to deal with  
25 our requests, because under section 17 of our Act we send  
1 them a note saying they must preserve everything connected  
2 with the case. Then when we get around to reviewing it, we  
3 will ask them to send it to us. So they take all the  
4 notebooks, all the transcripts, all the physical evidence  
5 and store it for us and mark it that it can't be interfered  
6 with in any way.  
7 Forensic Science Service can be subject to the  
8 same. They can be helping us out by reviewing old material,  
9 or we can be looking at an investigation that they carried  
10 out sometime ago.  
11 The court services running around trying to find  
12 all the old transcripts for us, all the old judgments, an  
13 area that they weren't used to doing before.  
14 Other public bodies. I mentioned health. Medical  
15 records can be a problem because local health authorities  
16 deny they are the owners; it's the doctor. Then the doctor  
17 denies he's the owner; it's the health department. So you  
18 go around and around in a circle until we eventually get  
19 them out.  
20 Social services files, particularly in cases of  
21 intra-family sexual abuse where we are trying to get hold of  
22 the social services file which contains all the details of  
23 allegations of sexual abuse within a family. Social  
24 services are very jealous of giving that information out to  
25 anybody, understandably, and us being a new organization who  
  
1 they are not used to.  
2 Private bodies we have no power over at all. They  
3 don't have to give us anything. We try and get their  
4 cooperation, but there is no line in the statute that says

5 we have the right to see anything that they have.  
6 The new regulations in Scotland do have the power  
7 to get access to private bodies. They have to go through  
8 the courts, but the statute exists to give them access to  
9 information held by private bodies, such as telephone  
10 company. We can't get telephone records unless the  
11 telephone company are minded to cooperate.  
12 At the moment we are putting together some  
13 proposals to revise our legislation, and that will be one of  
14 the areas that we want to try to cover.  
15 After all that, the case outcome.  
16 We decide not to refer a case to the Court of  
17 Appeal. There is nothing in it. And this can have come as  
18 a result of half a day's work because there were no issues,  
19 or it can be many months or years. A single member can make  
20 that decision, or we could have a committee. We may call a  
21 committee because it's a very complex case. It may be a  
22 referral, it may not; it's going to depend on the decision  
23 of the committee. They may decide not to refer a case to  
24 the Court of Appeal.  
25 We will send the applicant the reasons why we  
1 think he's not going to go to the Court of Appeal, and he  
2 has the 28 days to come back and argue the point or bring  
3 any new evidence forward.  
4 We do refer a conviction or a sentence to the  
5 Court of Appeal, and only the committee can do that. Once  
6 we have made that referral, the Court of Appeal has to hear  
7 it. They have no discretion about whether they want to hear  
8 the referral or not. They have to do it.  
9 From a Magistrates Court it goes back to Crown  
10 Court. So again the Crown Court there would have to hear  
11 our referral.  
12 Once the reference leaves us it becomes the  
13 property of the applicant. There is no further involvement  
14 from us once it has left us as a statement of reasons. This  
15 can mean the Court of Appeal gets our statement of reasons.  
16 So they get our reasoning of every issue, why we think the  
17 conviction was unsafe, but the applicant is perfectly at  
18 liberty to ignore all those and go for something else.  
19 What has happened in a very recent case is that  
20 the barrister involved and the applicant were concerned  
21 there was police malpractice. We didn't find enough  
22 evidence of police malpractice to refer it, but that's the  
23 line they chose to follow, and the appeal failed.  
24 CHIEF JUSTICE ABRAHAMSON: How much evidence do  
25 you need, preponderance or convincing beyond a reasonable

1 doubt?

2 MR. MATTHEWS: Our statute talks about a real  
3 possibility that the conviction was unsafe. As you all  
4 know, every time real possibility gets defined a little bit  
5 more and a little bit more, unsafe gets defined a little bit  
6 more.

7 The Court of Appeal has commented they will seldom  
8 see a sentence as a miscarriage of justice unless it was  
9 manifest, unless the judge got the sentencing completely  
10 wrong. It can be severe, but the judge at the time was the  
11 one who knew the circumstances, and the sentence dealt out  
12 in those circumstances, if all the evidence was before the  
13 judge, cannot be a miscarriage of justice. So sentence  
14 referrals are getting a bit fewer and farther between.  
15 So where were we at December? We had received in  
16 three years 2,996 applications. Six hundred and fifty of  
17 those were ineligible. So they are the ones who hadn't  
18 appealed or were in the process of appealing. And we have  
19 closed 752. That means we have reviewed them and reached a  
20 decision.

21 Out of 752 cases we have referred 70 back to the  
22 Court of Appeal. At the end of December, 32 of those had  
23 been heard and 24 had been quashed.  
24 That is a reasonable position for us. We have  
25 still got 1,500 cases waiting to be reviewed now and 1,100  
1 we know of that are waiting for a full review. We don't  
2 like having the queue, but those figures show that we are  
3 referring about right. We wouldn't want every single case  
4 we referred to be quashed, because it might mean we were  
5 missing some that were borderline. Equally, we wouldn't  
6 want every case we referred to be upheld, because then we  
7 would be referring unnecessarily.

8 Similarly, the proportion, 70 cases out of 752  
9 that were closed, is a reasonable proportion, because part  
10 of our task is to improve the confidence in the criminal  
11 justice system. So we are there to sort out miscarriages,  
12 to identify them, and also to improve the confidence in the  
13 criminal justice system and show that it is not as bad as  
14 people had thought.

15 CHIEF JUSTICE ABRAHAMSON: How long does it take  
16 you from the beginning to the end?

17 MR. MATTHEWS: If you average all the cases  
18 together, it takes us 40 working days to close a case, but  
19 those 40 working days can be stretched over three years  
20 because a lot of the time is dead time waiting for  
21 application information to come in. The solicitors who are



22 getting information from the original trial have to make  
23 fresh submissions, and a lot of our time is spent waiting.  
24 Every case review manager carries a caseload of about six  
25 cases.

1 CHIEF JUSTICE ABRAHAMSON: Are the applicants  
2 generally in prison during this time?

3 MR. MATTHEWS: Yes. Once we make a referral, the  
4 solicitor can usually apply for bail, and depending on the  
5 nature of the crime, they may get it or not.

6 MR. SCHECK: How many of these have come to be DNA  
7 exonerations?

8 MR. MATTHEWS: Angela is going to do DNA in a  
9 minute, but we've had about 40 cases so far that have  
10 involved DNA. So after those 752 we've specifically used  
11 DNA on about 40.

12 I don't know how many have been quashed as a  
13 result of DNA, but I know we have some that DNA has not been  
14 the deciding factor; it has been just one of many factors.

15 And we've had cases with DNA evidence where there has been  
16 no referral. We've see the DNA evidence and decided there  
17 was not a miscarriage of justice.

18 CHIEF JUSTICE ABRAHAMSON: How are you viewed by  
19 the prosecution, defense and judges?

20 MR. MATTHEWS: Very well, I think. We have a good  
21 reputation. I would say that, wouldn't I? I wouldn't say  
22 we had a terrible one. We take our time. Our chairman's  
23 guiding principle is that we must do things properly; we  
24 must never rush; we must never push things through for the  
25 sake of getting them through; we must make sure that we  
1 cover everything. When the people you are dealing with see  
2 that you have done a proper job, they're happy and they  
3 don't think we are fiddling about.

4 MR. SCHECK: I've seen the reports in the Bentley  
5 case. Maybe you could describe a little bit for us these  
6 reports. As you said, your purpose is to enhance confidence  
7 in the system. So in a sense what you are doing, whether  
8 you refer one and it's quashed or you refer it and it's not  
9 quashed, you are analyzing what is right and wrong with the  
10 system and you seem to be making suggestions on how to  
11 change things. Is that right?

12 MR. MATTHEWS: We identify, I suppose, where we  
13 have referrals something has gone wrong, and how do we  
14 address what has gone wrong. What needs to be changed?  
15 The issue that has brought this to the fore is  
16 that if we find that there has been police malpractice from  
17 a currently serving officer, we are under a responsibility

18 to get that information back into the criminal justice  
19 system so that the performance of that individual can be  
20 addressed.

21 We could potentially find something systematically  
22 wrong with the criminal justice system. We could find an  
23 area that is not working in principle.

24 MR. SCHECK: What are the remedies if you find  
25 that a prosecutor has withheld exculpatory evidence, or  
1 conversely, that a barrister is incompetent?

2 MR. MATTHEWS: As I say, we have just developed  
3 and it's out for consultation, and I think one or two of the  
4 professional bodies have come back with responses now that  
5 who should we report professional discipline to.

6 If we find a barrister or solicitor or forensic  
7 scientist or a police officer or anybody, how do we get that  
8 information back into the system? How would those  
9 professional bodies, how would the bar association, how  
10 would the office for regulation of solicitors like us to get  
11 that information back into the system that they can act upon  
12 it?

13 We have a clear obligation to report crime. If we  
14 discover a crime, then there is no question. If we discover  
15 incompetence, it gets more difficult because the  
16 organization could obviously say, well, who are we to judge  
17 incompetence on this one particular case or one particular  
18 aspect? So it's a very live issue for us at the moment.

19 We've had a case where we were issuing our  
20 statement of reasons which was very critical of a certain  
21 police force. The statement of reasons went to the  
22 applicant, who immediately went to his representative, who  
23 immediately went to the press, and the first the police  
24 force saw of it was the front page of a national paper  
25 saying that we had branded this police force as incompetent.

1 So we have had fairly vigorous discussions with  
2 the Association of Police Officers about how we get that  
3 sort of information to them without breaching our  
4 obligations under the Act that we should not disclose  
5 anything to anybody other than the applicant. What tends to  
6 happen is that we will issue notices to police forces on the  
7 same day, or at least make sure that they are aware of what  
8 is coming.

9 MR. SCHECK: Let's say that you find that there is  
10 a prosecutor that has withheld exculpatory evidence. I take  
11 it that is not necessarily a crime. It could be a crime, in  
12 theory. In the UK would you ordinarily have like bar  
13 associations or disciplinary committees that would

14 ordinarily pass upon those? Are those in existence? How  
15 does that work?

16 MR. MATTHEWS: I'd have to confess ignorance here,  
17 being neither a lawyer nor a scientist, my expertise on DNA  
18 and on the law. I don't know if Angela would know any more  
19 about that. She may be able to answer you in a bit more  
20 detail. As far as our policy goes, we notify the  
21 professional body and their own disciplinary procedures then  
22 take over.

23 If there is nothing further for me, I will hand it  
24 over to Angela who will go through our use of DNA in case  
25 review.

1 [Applause.]

2 MS. FLOWER: Good afternoon, everybody. I'm  
3 Angela Flower, case review manager with the Criminal Cases  
4 Review Commission in Birmingham. My background. I'm a  
5 lawyer by trade and I'm part of the case working staff at  
6 the CCRC where I've been now since 1997.

7 Prior to that I was in private practice as a  
8 solicitor in England, and I was aware of DNA profiling,  
9 having encountered it in a number of cases but only to a  
10 limited extent. Since working at the CCRC I have become  
11 acutely aware of the power of this fascinating technique,  
12 although I can't pretend to have done anything more than  
13 scratch the surface of understanding its many complexities.  
14 I would like to look at the way in which we have  
15 used DNA profiling in case work since we started up at the  
16 commission. DNA profiling comprises a very small aspect of  
17 our work. We use a multiplicity of other forensic  
18 scientific techniques, but today I want to look at a few of  
19 the cases where DNA has been a real issue.

20 It is quite difficult to categorize the types of  
21 case, but I think they fall into three loose categories:  
22 Those which are pre-1989 where DNA profiling  
23 wasn't available at the time of the original trial. The  
24 problem we have in those cases is that very often the  
25 original exhibits will have been destroyed. So to some

1 extent we are at the mercy of the retention and destruction  
2 policies of the original investigating police forces.

3 The second category, post-1989, we are looking to  
4 obtain results in cases where early profiling attempts have  
5 failed or were inconclusive, or perhaps to explore a  
6 particular aspect of a submission, such as a new theory or  
7 alternative scenario.

8 The third category is a miscellaneous hodge-podge

9 of stuff that applicants send in to us, which includes  
10 anything from requests for recalculation of statistics,  
11 challenges to the database comparisons, the way in which the  
12 random occurrence ratio is stated, although that is not so  
13 much of a problem since the UK case of Adams, which seems to  
14 have put some order and discipline on the way in which  
15 scientists now express this evidence in court, and that has  
16 alleviated a lot of the concerns.

17 We also get applications from applicants who  
18 obviously have no understanding of what DNA is. For  
19 example, in consent rape cases we have applicants insisting  
20 that a DNA test will prove their innocence when in actual  
21 fact it won't prove anything of the sort.

22 The first case I would like to look at today is  
23 the case of X. I will be referring to all the cases that I  
24 am going to touch on today by an initial to preserve privacy  
25 and anonymity for our applicants.

1 This is a good example of how DNA can be used in  
2 some of the older cases.

3 In this particular case it appeared that the DNA  
4 issue was going to be quite clear-cut and simple, but it  
5 soon became very complex. We had to take some unexpected  
6 steps and we got some quite unexpected results.

7 It is also, I think, a good illustration of the  
8 fact that our commission is prepared to make every effort  
9 regardless of expense so long as it is reasonable to obtain  
10 the best evidence possible in order to evaluate the safety  
11 or otherwise of a conviction even after the death of the  
12 applicant.

13 The brief facts of this case are that it occurred  
14 back in 1961. A couple in a car were kidnapped by a lone  
15 gunman. The male victim was shot twice in the head and  
16 killed, and the female victim, who I will refer to as V, was  
17 raped, shot and left for dead, but did manage to survive  
18 albeit paralyzed from the waist down ever since.

19 So what led to his arrest? First of all, the gun,  
20 the murder weapon, was found hidden under the seat of a bus,  
21 wrapped in a handkerchief. The bullets and cartridge cases  
22 that were found at the crime scene were actually fired from  
23 the murder weapon. That was demonstrated by ballistics.

24 Two cartridge cases fired from the gun were found  
25 in a hotel room. We knew that X had occupied the hotel room  
1 on the night of the murder.

2 He was arrested two months later. After quite a  
3 long police chase, it took them two months to track him  
4 down. It was a nationwide manhunt.

5 The evidence against him at trial was that he was  
6 linked to the gun obviously, the hotel room, and the crime  
7 scene by the ballistics evidence. He was identified on an  
8 identification parade by the female victim, but only after  
9 she heard him speak. He shared the same blood group as the  
10 killer rapist. And as a result of that he was convicted and  
11 executed by the state by hanging in 1962.

12 Just to briefly look at the forensic evidence that  
13 was available at the trial. After examining the items from  
14 the crime scene, a scientist was able to state the blood  
15 groups of the parties. He examined the female victim's  
16 underwear and was able to say that the killer was a glucose  
17 secretor.

18 Just to sum up the groups that we knew, male  
19 victim, female victim, X and the killer rapist. As you can  
20 see, they have the same profile.

21 Glucose secretors at that stage were about 35 to  
22 40 percent of the UK population. So it was hardly  
23 compelling evidence, and that is all that was available with  
24 the techniques that were around in those days.

25 Since the execution, X's family has mounted a  
1 campaign to clear his name. There have been several books  
2 written, several TV programs and films have been made. The  
3 solicitors have submitted numerous petitions to the Home  
4 Secretary. The case has been reinvestigated twice, and in  
5 1997 the CCRC received an application to review the  
6 conviction.

7 You can just look now at the relevant crime scene  
8 exhibits and stains. There were a lot of tests carried out  
9 on various items that had been left over from the original  
10 investigation, but these are the ones that we are concerned  
11 with for today's purposes.

12 The victim's underwear was stained with a mixture  
13 of vaginal fluid from her and seminal fluid from the killer  
14 rapist. The slip, or underskirt, was stained with blood  
15 from the female victim, and the handkerchief wrapped around  
16 the gun contained stains of unknown type and origin. It  
17 wasn't possible at the original trial to say what they were  
18 or where they came from.

19 After the trial, the underwear and slip were  
20 destroyed as a potential health hazard, but cloth samples  
21 were retained and kept in storage by the metropolitan police  
22 forensic science laboratory. The handkerchief was retained  
23 and stored by the original investigating police force. so  
24 although this man's conviction was almost 40 years old, we  
25 were lucky enough to be able to find some of the original

1 physical exhibits.

2 Between 1991 and 1995 the solicitor's for his  
3 family requested DNA profiling on the remaining exhibits to  
4 see whether they would yield any fresh evidence. That  
5 request was eventually granted, after extensive negotiations  
6 with a number of various public bodies and authorities, in  
7 1995.

8 This is a photograph of the cloth as it was in  
9 1995. You can see that it is extremely small. It's about  
10 10 millimeters by 10 millimeters before it was cut, and that  
11 is pretty much all we had to go on.

12 This is a photograph of the cloth from the  
13 victim's slip. It's slightly dark. It takes a while to  
14 come up. You can just see the original blood stain on the  
15 fabric.

16 We don't have a photograph of the handkerchief,  
17 but it's an ordinary gent's white cotton handkerchief, and I  
18 couldn't see that it would be very interesting to you to see  
19 a photograph of that.

20 The attempt in 1995 to obtain DNA profiles. We  
21 used the standard STR analysis, 6 point STR. These were  
22 tests, by the way, that were carried out by the victim's  
23 family's solicitors at their expense rather than by the  
24 commission because this, of course, was before we came into  
25 being.

1 The fabric was then cut into four pieces for  
2 extraction. Unfortunately, one of the scientists dropped a  
3 piece onto a non-sterile rack, so it was viewed as  
4 potentially contaminated and excluded from the 1995 tests.  
5 The fabric yielded 40 microliters of extract  
6 containing DNA, of which 20 microliters were tested; 20  
7 microliters were frozen and stored.

8 The first test was negative, and in view of that,  
9 no attempt was made to test any other item. At that stage  
10 the forensic science service in the UK were predicting major  
11 advances in DNA profiling, and a view was taken that it  
12 would be sensible to wait for the advances of science and  
13 see what could be done.

14 So our investigation then starts in 1997. This  
15 was an enormous case. The original documentation filled  
16 several boxes in several rooms in several police stations,  
17 and that was because of this nationwide hunt for the killer  
18 between the time of the commission of the crime and the time  
19 of X's arrest. So there were vast quantities of  
20 documentation to read, a number of witnesses to be traced  
21 and interviewed, a number of scientific tests to be

22 conducted. For example, ballistics, forensic linguistics,  
23 psychological and psychiatric analyses, and other  
24 document-based matters.

25 There were six CCRC investigators put onto this  
1 case as a team, and the case logically split into about five  
2 or six areas. So one of us managed to deal with each one  
3 and then keep in contact with the others and see how things  
4 were going.

5 The whole investigation took over two years.

6 Our preliminary inquiries revealed that there had  
7 been a massive nondisclosure to the defense. There were  
8 gross irregularities in the interview process, and there was  
9 a great deal of fresh evidence, and the early indications  
10 suggested that conviction may well be unsafe.

11 We therefore made a decision to pursue the  
12 question of DNA profiling further, but that was only after  
13 consultation with the forensic science service and X's  
14 family, because they were unhappy with our proposed use of  
15 the 20 microliters of stored extract, because if that  
16 failed, there would be little or no material left for any  
17 future attempt.

18 We negotiated with them and reached a position of  
19 compromise. These were the few sources that we had  
20 available to us from the original material in 1997, the 20  
21 microliters that had been frozen and stored, the remains of  
22 the cloth and fluid, and the small piece of potentially  
23 contaminated cloth that had been excluded from the 1995  
24 test.

25 We had the cloth sample with the blood stain from  
1 the slip and we had the complete item, the handkerchief.

2 The DNA profiling techniques that were recommended  
3 to us by the FSS in 1997 were short tandem repeats, the  
4 second generation multiplex, which had already failed in the  
5 1995 tests. So we didn't see any point in that; enhanced  
6 sensitivity STR, which they call ESSTR; mitochondrial mini  
7 sequencing, and mitochondrial full sequencing.

8 Looking firstly at the enhanced sensitivity,  
9 ESSTR, that's a research technique which had not been  
10 validated for forensic case work. It's a modified version  
11 of the standard STR technique, and the modification is that  
12 the number of times the template DNA is copied is increased  
13 to make the analysis more sensitive.

14 I believe that this was first used in the  
15 identification of the Romanov remains, the Russian royal  
16 family, by the forensic science service in the UK in about  
17 1994-95. The results in that case are generally regarded, I

18 believe, as being quite compelling, and therefore ESSTR was  
19 the technique of our choice for these tests on this very  
20 small piece of remaining material.

21 Two typical concerns identified with ESSTR were  
22 that contaminant DNA can be copied up and generate an  
23 erroneous profile and that the template DNA is small and the  
24 balance reaction is altered, and the net effect of that is  
25 artifacts produce confused data and hinder clear  
1 interpretation.

2 The effect of both of those concerns is to exclude  
3 the true source. In view of that, we took the view that  
4 there was little or no risk to X that this would operate to  
5 his disadvantage; if anything, it was going to exclude  
6 rather than include him.

7 Looking at the ESSTR results, the cloth from the  
8 victim's underwear, the stain had two components, seminal  
9 and vaginal fluid, which were successfully separated  
10 although traces of each remained in the other. So there was  
11 a major and a minor element to each fraction of the stain.

12 The major profile from the seminal fraction was a  
13 male, and it gave a result at 4 out of the 6 STR loci. The  
14 major profile from the epithelial fraction from the female  
15 had a result at 6 STR loci. So we had a complete clear  
16 profile.

17 There was also evidence of DNA from the third  
18 source, and we thought that could be contaminant; it may be  
19 the female victim's lover because we know from what she said  
20 to the police that they had sexual intercourse about 54  
21 hours prior to the rape.

22 The two profiles from the underwear being split  
23 there. The color shading indicates what we say is the  
24 identity of the contributors. It's blue for the victim,  
25 yellow for the rapist, and green for the unknown trace

1 profile.

2 Looking at the profiles from the handkerchief, we  
3 didn't know what the stains were, but the scientists thought  
4 they were probably nasal secretion or sweat. It was a male  
5 profile, and we got a clear result at all 6 STR loci. That  
6 is a color representation of the stain on the handkerchief.

7 The cloth from the slip, we thought it was the  
8 blood stain from the female victim. Again, it was shown to  
9 be female, with clear results at all 6 STR loci. You can  
10 see that that is represented there in blue for the victim.

11 Just to summarize the preliminary ESSTR results.

12 We have the underwear showing seminal fluid with 4 point



13 comparison, vaginal fluid with 6, the handkerchief with 6  
14 points nasal fluid. You can see by the color these two  
15 match at the corresponding STR loci, and the slip bloodstain  
16 which matches the vaginal fluid on the underwear.  
17 Represented another way, on the colored shading  
18 you can now perhaps see the distribution of the staining and  
19 what is attributable to each of the parties.  
20 This piece of evidence was particularly  
21 significant because it established a link between the  
22 handkerchief and the underwear that had never been made at  
23 the time of the trial. It simply wasn't known whether or  
24 not the person who put the handkerchief around the gun was  
25 the same person that committed this crime.  
1 So the seminal fraction of the staining on the  
2 underwear definitely originates, according to DNA evidence,  
3 from the same male individual who left the staining on the  
4 handkerchief.  
5 All this was very interesting, but it didn't give  
6 us any ideas as to the identity of the rapist. So we had to  
7 look around for some comparison sources to see what we could  
8 do with these profiles. The potential options to us were X,  
9 who was deceased, his brother who is still alive, his  
10 mother, the female victim, and the male victim who is  
11 deceased.  
12 We spoke to X's mother and brother, and they both  
13 agreed to cooperate in the provision of saliva samples for  
14 DNA profiling.  
15 Looking first at X's brother, who I am going to  
16 refer to as B, he's not an ideal comparison source because  
17 his nuclear DNA will be unique, but some features will be  
18 broadly similar to the nuclear DNA profile of X, and we  
19 thought that some useful information could be gleaned from  
20 that.  
21 When we looked at a comparison between the  
22 handkerchief and B, you can see that there is a full match  
23 at 3 STR loci, a partial match at 2, and no match at 1. The  
24 scientist's view provided that that is moderate support for  
25 the proposition that B's brother contributed to the staining  
1 on the handkerchief and the underwear.  
2 Moving on the X's mother, again she is not an  
3 ideal comparison source, but some features of the DNA will  
4 be similar. So we thought it was worthwhile running a test  
5 to see what we could gain from that.  
6 When we look at the handkerchief and the mother,  
7 you can see that there is a partial match at all 6 STR loci.  
8 The scientists' view of that was it was strong support for

9 the proposition a brother of B and the son of M contributed  
10 to the staining on the handkerchief and the underwear.  
11 At this point we needed to get a comparison  
12 profile from the female victim. This obviously is a  
13 sensitive issue and one that I know your commission has  
14 considered and investigated in great detail. This lady had  
15 obviously been traumatized by what happened to her, and it  
16 was a very difficult time for her when we had to make the  
17 approach. But she was a lady of great common sense and  
18 courage, and she made an informed and very brave decision to  
19 assist us in this case.  
20 She agreed to provide the saliva sample. Her  
21 nuclear DNA showed to be identical to the profiles from the  
22 blood stain on the slip and the epithelial fraction of the  
23 stain on the underwear. So that goes some way to  
24 authenticating those items, because there had been great  
25 problems with the continuity of these exhibits and how they  
1 had been stored, and we anticipated all sorts of problems  
2 with people saying how do you know where these pieces of  
3 material came from? They've been on a file in an unmarked  
4 envelope, and they could be anything or have come from  
5 anyone.  
6 When we look at the underwear, the slip, you can  
7 see that the profiles are entirely consistent with the  
8 history of the crime. We've got a perfect match to all 6  
9 STR loci.  
10 The probability of a match, scientists tell us,  
11 would be something in the region of 1 in 300 million. So  
12 it's a fairly compelling statistic.  
13 We then needed to look at corroborative profiles,  
14 because the FSS in the UK tend to duplicate their results  
15 when they can; that is, to conduct a second test from the  
16 same source to confirm the results. In this case there was  
17 insufficient material from the small piece of cloth from the  
18 underwear, so in an attempt to obtain corroboration, we  
19 looked at the other sources.  
20 There was the 20 microliter pellet that had been  
21 stored and frozen. We got the family's consent to go ahead  
22 and test that, but unfortunately it had degraded in storage  
23 and there was no result.  
24 We then managed to have a look at the extraction  
25 liquid retained after the 1995 test, and lo and behold, we  
1 managed to get a clear result at all 6 STR loci, which now  
2 improves the quality of the profile that we had before,  
3 which only had 4. And that matched the handkerchief and  
4 also matched the underwear.

5 Again, just a graphic representation of what we  
6 already know but with the additional profile, the extraction  
7 liquid, with a result at all 6.  
8 We still didn't have a direct comparison source  
9 from X himself, so we looked at the possibility of  
10 alternative reference samples. The only thing we could  
11 think of was that he had sent a couple of postcards to his  
12 mom back in 1961, and they were used at trial for reasons I  
13 won't go into. We thought that perhaps his DNA could be  
14 detected from the saliva on the back of the postage stamp.  
15 There was a partial profile on stamp 1 with a  
16 result at 2 STR loci, and stamp 2 gave a partial profile  
17 with a result at 2 also. They matched the 2 corresponding  
18 STR loci on the handkerchief. That's a very common  
19 combination and was of little evidential value. I think the  
20 figure that the scientists gave us was only 1 in 14, which  
21 wasn't particularly useful.  
22 Then we had a complication in that stamp number 2  
23 yielded a second partial profile with a result at 5 STR  
24 loci, and that was inconsistent with any other profile in  
25 the case. That could have been contaminant. We don't know  
1 who licked and fixed the stamp onto the cards. It could  
2 even have been the postmaster. Possible explanations and  
3 options are quite many and varied.  
4 At this stage the STR results couldn't be taken  
5 any further without exhuming the remains of X. So we  
6 decided to investigate the possibility of mitochondrial DNA  
7 testing. The same exhibits were tested, and I will run  
8 through this very quickly.  
9 This is a profile from the handkerchief, the  
10 staining on the underwear, the female fraction. We couldn't  
11 get a stain profile from the seminal fraction with the  
12 staining on the underwear. We got one from the blood stain  
13 on the slip and one from stamp 1.  
14 Apparently it's very difficult to obtain  
15 mitochondrial DNA from semen, especially when it's old or  
16 degraded.  
17 The same comparison sources, the brother, the  
18 mother, and the female victim, who had already provided  
19 their saliva samples, and we have that sequenced.  
20 When we looked at the handkerchief and B, we had a  
21 perfect match on the mini sequence, but that is only a  
22 screening and elimination technique that forensic science  
23 service use, and so we moved on to a full sequence.  
24 The full sequence was confirming the mini sequence  
25 by 380 positions at duplication and 225 positions which were

1 taken from a single extract, and therefore they are  
2 unconfirmed, but the total of positions that were confirmed  
3 was 605.  
4 Looking at the underwear, the slip and V, we've  
5 got a perfect match there on the mini sequence, and in view  
6 of the compelling STR results, we made a decision that there  
7 was no point in going ahead to a full sequence.  
8 The rarity of mitochondrial DNA profile, the  
9 sequence is uncommon and unlikely to occur more often than 1  
10 in 100 in the general population, and the FSS advised that  
11 that was moderately strong support for the proposition that  
12 mitochondrial DNA on the handkerchief came from X or a  
13 maternally linked relative, but that relates to the  
14 handkerchief only, not the underwear.  
15 So with the mitochondrial DNA technique we have no  
16 link between the handkerchief and the underwear, and there  
17 is no information as to the identity of the killer rapist.  
18 We then asked the genetic statistician to consider  
19 whether or not the STR and mtDNA results could be combined.  
20 He said that they are mutually exclusive. One can't be used  
21 to increase the evidential link with the other; the combined  
22 results can't be expressed numerically, but they provide  
23 strong support for the proposition that the DNA on the  
24 handkerchief came from a full brother of B.  
25 Looking at the standard levels of support that we  
1 use in the UK -- I don't know if your system is the same --  
2 what happens is it is expressed as two alternative  
3 propositions on a scale of 1 to 6, and the times more likely  
4 is converted into the level of support, going from weak or  
5 limited to very strong, and being left to the discretion of  
6 the scientists when it is particularly compelling.  
7 At this stage we took further advice from the FSS,  
8 and they told that if a matching reference sample was  
9 obtained from X, then the STR random occurrence ratio could  
10 be as high as 1 in 6 million and the mitochondrial DNA  
11 results could be confirmed. If the reference sample didn't  
12 match, then X could be eliminated as a source for the  
13 staining on the underwear and the handkerchief.  
14 So we were advised to apply for an exhumation. It  
15 could be possible to extract DNA from his bones, teeth and  
16 hair, and given the results in the Romanov remains case,  
17 which is exactly what they did there, the scientists said  
18 they were cautiously optimistic that this could be done.  
19 Just a bit of background. This gentleman was  
20 executed in 1961 and buried in a prison yard. He was then  
21 exhumed and reentered in a family burial plot in 1966. His

22 aunt was then buried on top in the same grave in 1977, and  
23 the family owned the exclusive burial rights to the plot.

24 There are two ways that we can get an exhumation

25 order in the UK. The first is by coroner's warrant, which

1 can only be issued to redetermine the cause of death. There

2 was no issue to how this gentleman died. He was hanged.

3 [Laughter.]

4 MR. MATTHEWS: There wasn't any prospect of that

5 being granted.

6 The other way is by Home Secretary's license,

7 which is usually used to remove remains from one location to

8 another. These applications were apparently quite common in

9 the UK after the abolition of capital punishment, because

10 everybody who had got a relative buried in a prison yard

11 wanted to take advantage of the system to have remains

12 removed to consecrated ground.

13 The procedure is actually quite complicated. You

14 have to get the application together, get the consent of the

15 next of kin, get the consent of the burial authority, and

16 then submit the application to the Home Office

17 Constitutional and Community Policy Directorate, who

18 hopefully grant the license to exhume.

19 This is an extreme step and not one that we wanted

20 to take lightly. We consulted the family. Obviously they

21 were very distressed by this prospect, and they raised a

22 number of interesting and valid points, which included the

23 privilege against self-incrimination extending to X's

24 remains. If he is not alive to waive the privilege, then

25 his remains should not be disturbed.

1 As he was originally interred in quick lime, it

2 was unlikely that there would be anything left.

3 And ESSTR is a research technique and can't be

4 relied on in legal proceedings.

5 We, of course, had to take a view on each of the

6 matters that they had raised, and we found that the

7 privilege against self-incrimination was inapplicable

8 because he had already been convicted.

9 We spoke at length to a pathologist, who confirmed

10 that quick lime is used to dehydrate flesh on a corpse and

11 has no effect on bones and teeth.

12 We interviewed the original prison officer who was

13 present at the execution, the burial, and the first

14 exhumation, and he told us that there was a full skeleton at

15 the time the remains were transferred in 1966.

16 As the interment was in a zinc lined hermetically

17 sealed coffin, there was every reason to suppose that the  
18 remains were still quite well preserved, and the FSS said  
19 that they had full confidence in ESSTR as a result of the  
20 Romanov remains case and there was no reason why we  
21 shouldn't make the application and go ahead.  
22 Despite the objections raised by the family, the  
23 application was submitted in 1998. But then the burial  
24 authority withheld its consent due to the absence of consent  
25 of X's family. That left us in a position that even if a  
1 license was granted by the Home Office, then our exhumation  
2 would have constituted actionable trespass, and as a  
3 nondepartmental public body, we can't really be seen to be  
4 committing unlawful acts, and therefore the application to  
5 exhume was suspended.  
6 The family's current attitude is that the  
7 objection to exhumation is not absolute, and if the Court of  
8 Appeal were to express a view that it should be carried out,  
9 then their objection may be withdrawn.  
10 Just to conclude that. On the one hand, we seem  
11 to have significant evidence suggesting that X's conviction  
12 may be unsafe. On the other, we have significant DNA  
13 evidence which tends to suggest that his conviction is safe.  
14 That can't be confirmed without an exhumation. So X's case  
15 was referred to the Court of Appeal in 1999, and the outcome  
16 is awaited.  
17 It will be interesting to see how the Court of  
18 Appeal deal with the question of the DNA evidence. That is  
19 referred to in our statement of reasons. There is an old  
20 common law case in the UK called Robinson, which I think  
21 goes back to about 1914, which says that the crown cannot  
22 improve its case on appeal. The defense don't have to rely  
23 on grounds identified by the Criminal Cases Review  
24 Commission.  
25 The advances of science are generating this type  
1 of situation on an ever-increasing basis. So hopefully when  
2 this case is heard, the Court of Appeal in the UK will take  
3 the opportunity to make some statement that will clarify  
4 matters for us for the future.  
5 That is the end of Mr. X. If I can just quickly  
6 run through a few other examples of how the CCRC has used  
7 DNA profiling in more recent cases. It won't take anything  
8 like as long.  
9 Mr. Q illustrates the point that DNA evidence can  
10 provide a reason for declining to refer a case. It is one  
11 of our Northern Ireland cases.  
12 In 1995, a female victim, a German student, was

13 camping when she was approached by two men, Mr. Q and Mr. A.  
14 One man raped her and one man assaulted her, but she  
15 couldn't say which one was which.  
16 There was a single large semen stain on her  
17 clothing from the rape. They tried the old quadraplex test,  
18 which looked at, I think, 4 of the STR loci, and that  
19 failed. So there was no forensic evidence at court with  
20 respect to this matter.  
21 Q denied the rape or any offense, blaming A, and A  
22 admitted the assault, blaming Q for the rape. The evidence  
23 at trial was that the semen couldn't be attributed to either  
24 but it must have come from one of them.  
25 When the jury heard that A had admitted the  
1 assault, understandably they convicted Q of rape.  
2 The application to us was that contemporary DNA  
3 profiling of the semen stains would show that A committed  
4 the rape and not Q.  
5 The outcome was that we got a partial profile  
6 which excluded A as a source, included Q as a source, and  
7 although the random occurrence ratio was very low, only 1 in  
8 720, we declined to refer the case to the Court of Appeal.  
9 The case of Mr. O. This is an illustration of how  
10 physical experts can yield fresh evidence and how a  
11 preposterous defense can gain credibility.  
12 The facts of that case are that it's a conviction  
13 for armed robbery in 1997. Three men were involved, all  
14 wearing balaclavas. One was dropped at the scene, and Mr. O  
15 and several other suspects were arrested in the vicinity  
16 within about an hour.  
17 In his first interview with the police, Mr. O said  
18 that he wasn't involved. He was released pending result of  
19 forensic examination of footwear impressions at the scene,  
20 which matched his shoes, and in his second interview, when  
21 this was put to him, he made no comment.  
22 About 18 months after his arrest he wandered over  
23 to the police and told them that he had been approached by A  
24 in the street just before the robbery. A had bullied him  
25 into exchanging shoes, and so A must have left the footwear  
1 impressions at the scene.  
2 At trial, of course, we had the evidence that A  
3 wasn't one of the original suspects; O was tried alone;  
4 there was the footwear impression, and the adverse  
5 inferences that the jury were told they could draw from his  
6 failure to mention in interview that he had been forced to  
7 exchange shoes with A.  
8 Our investigation was quite interesting. After

9 his conviction, as a result of what he told the police about  
10 A, a marker was put onto A's PNC, or police national  
11 computer file, to the effect that if he was ever arrested  
12 for another recordable offense, a saliva sample was to be  
13 taken from him and entered into the database and run against  
14 the DNA profile taken from the balaclava.

15 By the time we started investigating A's  
16 conviction this had actually occurred, and we discovered  
17 that A's DNA profile did match the saliva on the balaclava.  
18 That was insufficient in itself to justify a referral, so we  
19 looked at the trainers. That yielded 2 profiles,  
20 unidentified female and A. There wasn't any DNA relating to  
21 a present, and on the basis of that the case was referred to  
22 the Court of Appeal, and we expect it to be heard in the  
23 next couple of weeks.

24 Has everybody had enough? I've got about 5  
25 minutes to go.

1 MR. SCHECK: What is a balaclava?

2 MS. FLOWER: It's a woolen helmet with eye holes  
3 cut that you often see terrorists or criminals using.

4 The case of Mr. C. This is perhaps an  
5 illustration of how DNA evidence can support a defendant's  
6 account of his movements.

7 The facts here was that it was in one of our  
8 Newcastle nightclubs just before DNA evidence was introduced  
9 into case work. There were two fights going on in the club  
10 at the same time, although in different areas, which is not  
11 uncommon for Newcastle on Tyne.

12 A female victim, sadly, was struck in the neck by  
13 glass and bled to death in fight number one. C said he was  
14 only involved in fight number two, so he couldn't have been  
15 anywhere near V.

16 The evidence against him at trial was that S, who  
17 was V's boyfriend, was standing near to her when she was  
18 attacked and had bloodstains on his shirt. In addition to  
19 the blood from V, he had C's blood type on his shirt.  
20 Although that was only 30 percent of the UK population, the  
21 jury heard that C had a severe cut to his finger caused by  
22 glass, because he had been interviewed by the police after  
23 they checked the attendance records at local hospitals. On  
24 the combination of that, C was convicted of the murder of  
25 this girl.

1 The submission to us was that if the blood on S's  
2 shirt was not from C, then that lends support to his account  
3 that he was not involved in fight number two.

4 The outcome was that DNA profiling showed that the



5 blood on the shirt didn't derive from C, S or V, and coupled  
6 with the discovery of some undisclosed material, this formed  
7 the basis for referral to the Court of Appeal.

8 Again, that is one where we are awaiting the  
9 result.

10 The last one I want to mention today is the case  
11 of J. I find this one particularly interesting. Again,  
12 it's not resolved, but I can't wait to see what happens with  
13 it.

14 This is in 1986, again before the advent of DNA  
15 profiling.

16 A family of five were discovered dead in a house,  
17 a mother, father, daughter and her two children. All had  
18 died from gunshot wounds fired from a rifle. The facts were  
19 that there were only two possible scenarios. Either the  
20 daughter, who had a history of mental illness, had killed  
21 her family and then shot herself, or J killed all five  
22 victims. He was the brother who stood to inherit the family  
23 wealth.

24 Initially the police thought the daughter was  
25 responsible, but a couple of days later they found a  
1 silencer for the rifle in a box in a cupboard in the house.  
2 When they examined that, they found there was blood present  
3 due to backspatter, and that was the same blood group as the  
4 daughter.

5 She couldn't have shot herself with the silencer  
6 attached to the rifle because her arms weren't long enough  
7 to have positioned the rifle into her chin to blow her own  
8 brains out. She couldn't have shot herself and then removed  
9 the silencer and put it in the cupboard, for obvious  
10 reasons, and the only other evidence against J at trial was  
11 an alleged statement of intent to a former girlfriend he had  
12 said that he wanted to bump off his family to inherit the  
13 money.

14 The submission we had received was that because at  
15 trial the prosecution claimed the blood on the silencer  
16 derived from the daughter alone, that was very damaging. It  
17 could have derived from two or more of the victims, not  
18 including the daughter, and it could have been an erroneous  
19 blood grouping at the time as a result. This would show  
20 that the daughter could have shot the four victims with the  
21 silencer on the gun and then removed it and killed herself.  
22 So we are awaiting the result of that. The FSS  
23 are attempting a new analysis called STR SGM Plus technique,  
24 and the blood in the silencer is being examined to see  
25 whether it is from more than one source so it can be

1 separated and profiled.  
2 Just a note about STR SGM Plus. This examines 10  
3 of the STR loci, which generates random occurrence ratios in  
4 the region of 1 in 1 billion. It has been used in the UK  
5 now for about six months by the forensic science service. I  
6 think there are plans to replace the 6 loci profiles in the  
7 database with 10 loci profiles so that the UK database will  
8 eventually run on a 10 point STR.  
9 I was speaking to the chief scientist at the  
10 forensic science service last week. He was telling me of a  
11 case in Bolton, in Lancashire, a few weeks ago where the DNA  
12 database identified a hit on comparison with a crime scene  
13 stain, as a result of which a suspect was arrested and  
14 charged with, I think, a sexual offense.  
15 The random occurrence ratio based on 6 point STR  
16 was 1 in 37 million. CPS thought that was low and asked for  
17 an extension to 10 point, and that excluded the suspect.  
18 And the FSS are currently conducting research into the  
19 situation.  
20 There are a number of implications for this, not  
21 least of which that everybody in the UK who has ever been  
22 convicted on 6 point STR profiling will want to apply to us  
23 to have their convictions reviewed. I think it is a quite  
24 worrying phenomenon, and I shall be glad to hear what the  
25 FSS have to say about this and how and why it's happened.

1 That's really all have to say today. Thank you  
2 very much for your attention. It's a great privilege to be  
3 your guests here in Washington, D.C., and to meet you all.  
4 I would like to take this opportunity on behalf of the  
5 Criminal Cases Review Commission to wish you all the very  
6 best of work in your future endeavors.

7 [Applause.]

8 MR. CROW: Are these 10 loci included within the  
9 database?

10 MS. FLOWER: I don't know if you use the same 10  
11 loci in your 13 on CODIS that we use in the UK.

12 MR. CROW: The six are. I know that.

13 MS. FLOWER: It's the same 6, because we make  
14 comparisons against your database.

15 MR. SCHECK: Has anything comparable ever happened  
16 before, 1 in 37 million? How many other loci was he  
17 excluded on, more than one?

18 MS. FLOWER: I don't know. I'm still waiting for  
19 a report from the FSS to find out why this happened. It  
20 could be that there was some mistake made when the original

21 test was done. It could be that it's gene mutation; it  
22 could be a close family. I don't know. As soon as we know,  
23 I will put something on the e-mail to you so that you are  
24 aware of it too.

25 CHIEF JUSTICE ABRAHAMSON: Something must have  
1 been suspicious to ask for a review with 1 in 37 million.

2 MS. FLOWER: Apparently our crime prosecution  
3 service thought it was quite low.

4 CHIEF JUSTICE ABRAHAMSON: Thank you very much.  
5 Thanks to both of you for coming and for giving us that  
6 interesting talk.

7 We are back to the Postconviction Working Group  
8 report and to the retention of the sample base.

9 Ron, what had you planned for the hour? I'm  
10 trying to see how much time we've got.

**Postconviction Working Group Report & Discussion**  
*The Honorable Ron Reinstein*  
*Working Group Chair*

11 MR. REINSTEIN: We discussed this at the last  
12 Commission meeting. The work group has not met since the  
13 last meeting. Based on the discussion that we had,  
14 Professor Berger went through it and prepared the draft that  
15 is in front of you.

16 The only other thing is Rock's comments this  
17 morning regarding the first paragraph. He believes that we  
18 shouldn't subvert the orderly process of the legal system.  
19 Based upon all of the cases that we have heard  
20 about initially, why the Commission was started, and the  
21 work of our work group, we felt that a model statute would  
22 be beneficial. So we took the lead of Illinois and New  
23 York. We are open to any discussion on it.  
24 Otherwise, I think from what Chris had mentioned  
25 this morning to me, it is up for approval today whether or  
1 not the Commission wants to approve a model statute or  
2 change the wording again.

3 CHIEF JUSTICE ABRAHAMSON: Norman.

4 MR. GAHN: Ron, when you talk about forensic DNA  
5 testing of any evidence, did you talk about any probative  
6 evidence?

7 MR. REINSTEIN: No.

8 MR. GAHN: I am looking in the third sentence  
9 under Request for testing. It says "any evidence." It  
10 seems a little broad. I think if we say "any probative  
11 evidence." There is a pecking order to the evidence.

12 MR. REINSTEIN: I don't have any problem with that  
13 at all.

14 MR. SCHECK: Norm, the reason we phrased it that  
15 way is that by definition under mandatory and even  
16 discretionary testing it has to be probative evidence,  
17 because it has to be biological evidence that can meet the  
18 legal standard that it will create a reasonable probability  
19 there wouldn't have been a conviction. It has to be very  
20 exculpatory. By definition it has to be probative.  
21 The reason we didn't use the phrase "any probative  
22 evidence" there is, as the rest of this indicates and as the  
23 report we just heard indicates, we didn't want to limit it.  
24 In other words, we didn't want to say you can only look at a  
25 vaginal swab, because it could very well be blood on a  
1 silencer of a gun or a stamp. There is no limit these days  
2 to what we could do.

3 I think just as a drafting matter we think that  
4 refers to probative evidence, but we didn't want to limit  
5 its scope. That is the reason behind it.

6 MS. BASHINSKI: I have a question about the  
7 definition of exculpatory. I know we all know what we mean.  
8 There is very good verbiage in the report about category I  
9 cases, and so forth. But we have an Innocence Project type  
10 statute in California. I am sitting around the table with  
11 six lawyers and I can't even explain to them exactly what  
12 the criteria should be, because they aren't used to thinking  
13 about the cases in the same way that you are.

14 I am wondering if there is a way to identify. For  
15 example, one of the statutes that I'm aware of says  
16 something about identity having to be an issue, which is an  
17 Illinois statute, I think. So there are two things. One,  
18 identity is an issue, and two, the piece of evidence you are  
19 looking at would definitively resolve the issue as to  
20 whether or not the person was or wasn't the perpetrator. In  
21 other words, a more explicit statute about what does this  
22 mean.

23 When you just read exculpatory results, obviously  
24 if the person were exculpated, they would never have been  
25 convicted or prosecuted. The question is how is that  
1 defined and is that clear to everybody reading the statute?  
2 I may be stating the obvious, but it sure wasn't  
3 obvious to this group of people that I was talking to as to  
4 under what circumstances is it mandatory.

5 MR. SCHECK: I'll readily concede. When the  
6 Illinois statute talks about identity, it also talks about  
7 you should get a test if there is non-cumulative evidence of  
8 innocence. A test could generate such a result, which is a  
9 somewhat lower threshold than this. It has the advantage of  
10 simplicity.

11 I readily concede that it is not evident to many  
12 who read this what the difference is between the mandatory  
13 testing standard and the court's discretion standard. That  
14 has been debated back and forth.

15 If you just look at the mandatory testing  
16 standard, I think that is about as clear as you can get in  
17 the sense that whatever you are testing, looking at the  
18 evidence as a whole there has to be a reasonable probability  
19 of a different outcome. That can't be a hard standard to  
20 apply, because that is virtually the standard for vacating a  
21 conviction with newly discovered evidence in virtually every  
22 state.

23 MS. BASHINSKI: Again, I'm not a lawyer, so I

24 don't know. Looking at how much trouble we had to go to  
25 define all this in that postconviction review pamphlet, if  
1 you could come up with some way that gets the spirit or  
2 intent of that into this legislation, because that document  
3 won't be available.

4 MR. SCHECK: Sure it's available.

5 MS. BASHINSKI: It will be available, but it won't  
6 be part of this. It's an independent document which may or  
7 may not be referred to by people interpreting a statute like  
8 this.

9 MR. SCHECK: I would imagine actually it would be.  
10 If experience serves, NRC I, NRC II, things of this nature  
11 are relied upon by the courts. I would even imagine that  
12 any legislation that would be written on this subject by a  
13 state or federal government would probably want to make  
14 reference to our Commission recommendations with respect to  
15 the categories of cases. That would be a wise idea.  
16 Reasonable lawyers could differ on how you define  
17 these standards. I'm not sitting here telling you that this  
18 distinction between mandatory testing and court's discretion  
19 testing -- we went through a lot of formulations. You could  
20 cut that a number of different ways. The basic thrust of  
21 this is that there is a category of cases that are probably  
22 best embraced by I and II where you should give the inmate a  
23 shot to prove innocence with a DNA test.

24 MR. REINSTEIN: I'm really hesitant to over-define  
25 legal terms like that, especially when you talk about a  
1 model statute. If a state wants to do that, they can do it.  
2 If you look at the definition of "reasonable doubt," every  
3 state struggles with it; every court struggles with it. I  
4 think it is as simple as you can get, and you let the  
5 individual states have at it if they want to define these  
6 words.

7 MR. SCHECK: I think it should be clear to anybody  
8 who is looking at the legislative history of this that the  
9 thrust of this -- I should mention about Rock. We should be  
10 clear. The one point he made we talked about, and that is  
11 he's saying, well, in many states you don't make a motion  
12 based on newly discovered evidence. Technically speaking,  
13 that is one that you would make before the appeal is  
14 exhausted, and in some states you would have a remedy of  
15 habeas postconviction. The time limits on habeas in most  
16 jurisdictions are as draconian as the other ones.  
17 If you wanted to really make this even more  
18 complete in the background, we could talk about the federal  
19 postconviction standards, which are one year for everything

20 other than a capital case and six months for a capital case  
21 that begins to run on April 26, 1997, and they are over by  
22 April 27, 1998.

23 Frankly, if you wanted to talk about the time  
24 limits more in the background, it's even worse. Rock, let's  
25 just be clear, is against the idea of not putting a time  
1 limit on our thing. The committee considered that at great  
2 length and we rejected it.

3 MR. REINSTEIN: I honestly didn't understand, at  
4 least from Arizona's standpoint, what Rock's argument was,  
5 but I guess it has to do with what happened in Virginia and  
6 some of the other states.

7 MR. CLARKE: I can embellish on it, if you like.  
8 First of all, I think we discussed some of these things at a  
9 full Commission meeting. The draft was prior to that. I  
10 think that is actually one of the topics we discussed a  
11 little bit.

12 It's my strong feeling there has to be some  
13 requirement of due diligence. We have encountered it in our  
14 own state, not repeatedly, but enough to be concerned, where  
15 an individual in fact in his defense holds back. If this  
16 were to read literally "at any time" without some qualifier  
17 like due diligence, these could run on ad infinitum.

18 MR. SCHECK: We discussed this at great length.  
19 There is a requirement here that the evidence has never been  
20 previously subjected to DNA testing or was not subjected to  
21 testing which is now requested which can resolve an issue.  
22 It is clear from the description of it in our report we are  
23 only talking about situations where there wasn't a very  
24 informative test done the first time.

25 MR. CLARKE: I'm talking about timing of the  
1 request.

2 MR. SCHECK: I thought you were talking about  
3 somebody that comes in with more than one request.

4 MR. CLARKE: Not at all. In other words,  
5 particularly an individual sentenced to death. It's in his  
6 or her interest to wait until the last minute to bring this  
7 up without any limitation in terms of diligence. I think  
8 there has to be a due diligence requirement, and that may be  
9 perfectly legitimately brought up ten years later. Absent  
10 that type of showing, there is no limit, and it can be  
11 brought on at any time.

12 MR. REINSTEIN: That's what Judge Webster brought  
13 up at one of our earliest meetings. We discussed that at  
14 length.

15 MR. SCHECK: We've rejected it for a number of

16 reasons, the so-called latches argument. If you begin to  
17 look behind in these things and start saying, well, in this  
18 death penalty case was the client who wanted the DNA test  
19 being advised by the lawyer not to have the DNA test, for  
20 whatever reasons? Or we are dealing with people that are  
21 indigent, that are stuck in penitentiaries and may not know,  
22 frankly, what is available?

23 One very good example I was mentioning to Rock is  
24 Kevin Green. Kevin Green is the marine that was exonerated  
25 by the DNA data bank testing of Mike Jacobs. Kevin had at  
1 one point attempted to get a DNA test. He hired a lawyer,  
2 gave him some money, it never happened, and he basically  
3 spent his time trying to stay alive in San Quentin. He was  
4 trying literally to stay alive.

5 He's as smart a guy as you will find. He never  
6 wrote to the Innocence Project, never wrote to anybody else  
7 to pursue it and was lucky that this prosecutor was looking  
8 at that serial murderer rapist.

9 I think you have to get a perspective. We are  
10 talking here about people, realistically speaking, from 1981  
11 or 1982 through 1994, when DNA testing began in earnest on  
12 cases of this nature, which I think would be a reasonable  
13 date to agree that it became commonplace in appropriate  
14 cases. In 75 percent of these cases where you could even  
15 come close to meeting the fairly rigorous standard that a  
16 test would make a difference in the outcome the evidence  
17 samples are lost.

18 So to start litigating over latches in this  
19 context and what the reasons for it would be one way or the  
20 other is probably a game not worth the candle.

21 CHIEF JUSTICE ABRAHAMSON: Let's let Phil get into  
22 the conversation.

23 DR. REILLY: I just have a minor technical  
24 drafting question that you can edify me about. Given the  
25 fact that it may not be clear what evidence is in the  
1 possession of the prosecutor, should a model statute like  
2 this specifically include a provision for searching for  
3 evidence prior to requesting testing, or is that just  
4 assumed and is not an issue?

5 In other words, should it begin by saying that a  
6 convicted individual should have the right to request a  
7 search prior to the testing?

8 MR. SCHECK: I'd like to see it, but the way we  
9 tried to cover it was under the section on preservation  
10 order where we indicate when you first come into court and  
11 you make a motion that that triggers an obligation not to



12 destroy the evidence and to go look for it.  
13 DR. REILLY: I understood that, but I have two  
14 small problems with it. One, it seemed to be out of order  
15 in the logical sequence of events, and secondly, even with  
16 the preservation order, that might be construed to pertain  
17 only to that which the prosecution knew was in its  
18 possession.  
19 I'm talking about misplaced or mislabeled  
20 evidence. I would want to bolster for the sake of the  
21 applicant the right to search. It seems to me little harm  
22 is done in adding that. Maybe it's not necessary. I posed  
23 it as a question for that reason.  
24 MR. SCHECK: That's a good point.  
25 MR. REINSTEIN: Maybe the committee could put  
1 comments where it has structure of the statute.  
2 DR. REILLY: Often the comments to a statute get  
3 lost over the years the statute stays.  
4 MR. THOMA: Judge Reinstein, I think he was  
5 talking about the order in which that procedure is last. I  
6 think it's covered, but I think that point might be well  
7 placed within discovery, whether discovery should be there  
8 or not or somewhere else.  
9 MR. REINSTEIN: The preservation order?  
10 MR. THOMA: And discovery.  
11 CHIEF JUSTICE ABRAHAMSON: They want, I gather,  
12 something that would say the defense can come in and say,  
13 what evidence do you have?  
14 DR. REILLY: I was trying to give it a little more  
15 chance to the applicant to push the system to look a little  
16 harder. As time goes by, people change, things get  
17 mislabeled or get lost. It seemed to me like the request  
18 for an inventory, if you will, should precede the request  
19 for the test.  
20 MR. REINSTEIN: You are just saying that the  
21 defendant could make a request of law enforcement, the  
22 court, for --  
23 DR. REILLY: A best efforts full inventory of  
24 existing evidence.  
25 CHIEF JUSTICE ABRAHAMSON: That is subject to DNA  
1 testing.  
2 DR. REILLY: Right. It was an argument for the  
3 sake of completeness.  
4 MR. REINSTEIN: Barry, when the Innocence Project  
5 does it, you use a search, right?  
6 MR. SCHECK: No. What Phil says is important. If  
7 you look at our protocols that we gave you, and I think it

8 is even in the recommendations, we have a lot of trouble if  
9 we make an application or a request to search and then we  
10 can't get an answer. Then somebody orally says, well,  
11 that's destroyed. We have forms that say put this in  
12 writing, and then they refuse to put it in writing. Then we  
13 wind up going to court trying to get them to look.  
14 In quite a few of these cases, I think close to 20  
15 or so, initially people say we can't find it, and then they  
16 find it. That happens repeatedly. Even in the Kevin Green  
17 case they couldn't find it. People just move. These cases  
18 are 15 or 20 years old. They just move things around, and  
19 who wants to bother going to look for it?  
20 You're right, basically.  
21 DR. REILLY: That's a rare moment.  
22 CHIEF JUSTICE ABRAHAMSON: Savor it.  
23 [Laughter.]  
24 MR. THOMA: We have testimony regarding Los  
25 Angeles Police Department and their situation with how much  
1 evidence they have and where it's kept and how many more  
2 trailers or whatever they need.  
3 MS. BASHINSKI: Barry, wouldn't you, though, at  
4 the same time you are asking for this preservation  
5 -- because you don't know at the time you ask for a  
6 preservation order what there is to preserve. Could you not  
7 then go in at that same time and say preserve it, and, oh by  
8 the way, conduct a search? Is that what you are suggesting,  
9 adding it to that part?  
10 MR. SCHECK: That's what I think Phil is  
11 suggesting.  
12 MS. BASHINSKI: I don't think you can do it any  
13 sooner.  
14 MR. SCHECK: Right.  
15 MS. BASHINSKI: You have to go to court.  
16 MR. SCHECK: You have to make a showing that there  
17 is something that you know is out there. In other words,  
18 there is a vaginal swab, there is a handkerchief, there's  
19 something that, given the record in the case, if it exists  
20 it's probative or potentially probative. If you were to  
21 redraft this, one would say that you have a right to go to  
22 the court for an order for them to look if they refuse, and  
23 obviously not destroy it.  
24 MR. REINSTEIN: I guess under preservation order  
25 you could put search for all evidence in the prosecution's  
1 possession and control that could be subjected to DNA  
2 testing and it must be preserved during the time of the  
3 proceeding and the state shall provide a list of all

4 evidence available for testing.

5 DR. REILLY: For example, it would be very  
6 interesting if that list didn't match the original list in  
7 the trial.

8 MR. CLARKE: What happens is the evidence gets  
9 fragmented.

10 DR. REILLY: I'm not suggesting nefarious acts.

11 MR. CLARKE: In fact prosecution and law  
12 enforcement will have most of it and the court will have  
13 some of it.

14 MR. REINSTEIN: Prior to DNA, the prosecution may  
15 have used X, Y and Z, but they decided not to use a bed  
16 sheet or comforter that there might be biological evidence  
17 on. The prosecution just didn't need it.

18 MR. CLARKE: I think it should cover all three,  
19 because all three may have the evidence or a portion of it.

20 MR. THOMA: Actually, the U.S. Supreme Court in  
21 Callis v. Whitley covered that really well in an area with  
22 regard to exculpatory evidence, basically the prosecution  
23 and any of its agents, because they realized that exact  
24 point that Woody brings up. By its very nature in trial  
25 it's going to be separated.

1 MR. SCHECK: Some of it is never going to be used  
2 and it goes back to the police lab.

3 MR. CLARKE: I was going to say prosecutors'  
4 offices would have the least of that evidence generally.  
5 It's going to be law enforcement or the court.

6 MR. SMITH: And the court is not an agent of the  
7 prosecution.

8 CHIEF JUSTICE ABRAHAMSON: I think that if the  
9 group wants that kind of inventory provision, it should be  
10 put in separately, because it should be on motion that it be  
11 done, and at a time. Because otherwise you've got it at the  
12 tail end, and I don't know where it fits with your motion  
13 for mandatory or discretionary testing. That is one thing.  
14 The second thing is we still have, I think, a  
15 division of the house on whether there should be any statute  
16 of limitations here. That's the "at any time." I hate to  
17 mention the word statute of limitations, but that's what it  
18 is.

19 MR. CLARKE: Do we have a division?

20 CHIEF JUSTICE ABRAHAMSON: Is there a division?  
21 Woody is not divided, right?

22 MS. BASHINSKI: Again, I'm not an attorney, but  
23 because I work for the attorney general's office in  
24 California I know there is concern, particularly with regard

25 to the death penalty situation, that there be some time  
1 frame prior. For example, if there has been an order for  
2 execution, some reasonable time prior to that order that the  
3 request has to come and not necessarily at the eve.

4 I don't know how you do that or how you put it in  
5 there, but that was definitely a concern expressed by our  
6 appellate attorneys.

7 MR. CLARKE: And it becomes more egregious with  
8 those cases where either prior DNA or serology has been done  
9 so an awareness already exists on the part of both client  
10 and appellant counsel that this evidence at least existed  
11 and may or may not continue to exist, and it may have  
12 probative value.

13 MR. SCHECK: I think we've covered that in terms  
14 of prior DNA testing.

15 I know one of the cases that your people are  
16 concerned about, but I think this is really a misplaced  
17 concern. It's just another example of the depth of the  
18 concern about executing people faster and distorting the  
19 rest of the criminal justice system.

20 You are going to put statute of limitations into  
21 this kind of a thing because there is a fear that some  
22 people just prior to execution will give one last request to  
23 have another sample tested that could take, if you did it,  
24 48 hours, and therefore we are going to spawn a whole series  
25 of court challenges by many people who have been  
1 incarcerated for decades, who could prove their innocence  
2 with samples disappearing. I just don't think this is  
3 right. We have too much experience with this.

4 MR. CLARKE: At the same time, the writ of habeas  
5 corpus requires that you show due diligence. In ten years  
6 there may be diligence. That's not a problem. All that I  
7 think should be in there is that the application reflect  
8 that the person was diligent. There may be valid excuses  
9 for a 15-year delay, but I don't think a defendant should be  
10 able to just raise it and then diligence becomes a  
11 non-issue. It should be an issue.

12 MR. SCHECK: I disagree. Frankly, I think it's a  
13 constitutional problem. No matter what you want to say  
14 about the issue of diligence, you really have to cut to the  
15 chase and ask yourself this question: There is a guy  
16 sitting in jail and the DNA will prove him innocent, and you  
17 want to keep him there for the rest of his life because  
18 you're going to make a ruling that he didn't apply within  
19 somebody's definition of due diligence, and Lord save us  
20 from the definitions of due diligence that I've seen across

21 the United States and these courts.  
22 You go tell that to Clyde Charles who was told he  
23 didn't have due diligence after seeking a DNA test for nine  
24 years in Angola prison and he was in there for 19 when the  
25 DNA exonerated him in 2 months. You go tell it to some of  
1 these people. I think it's a very, very bad idea for what  
2 is really, given all that we have been talking about, an  
3 extremely small number of cases.  
4 By the time you get to the number of cases where  
5 you are going to meet the standards, where it would be  
6 probative evidence that could prove innocence, and in 75  
7 percent of these cases the evidence has disappeared, you are  
8 talking about total in the United States maybe 100 to 150  
9 cases per year, and individuals can either face death or  
10 life imprisonment.  
11 There comes a point in time where you just have to  
12 stop listening to the attorney general that is pissed off  
13 about Robert Abadon litigating the Cooper case because it's  
14 just another thing that they want done and say let's do some  
15 justice in America. How many more people do we have to get  
16 out like this? I love you, but I really have no patience  
17 for this.  
18 MR. CLARKE: You have a funny way of showing it.  
19 [Laughter.]  
20 MR. REINSTEIN: Our work group discussed this over  
21 and over again and this was what we came up with.  
22 CHIEF JUSTICE ABRAHAMSON: Jim.  
23 MR. CROW: It seems to me as if Phil's point sort  
24 of got lost in all of this. I should think the two of you  
25 could simply find a clause or whatever that would take care  
1 of that point.  
2 MR. REINSTEIN: I think there are two issues. One  
3 is adding something regarding an inventory and the other one  
4 is the statute of limitations.  
5 MR. THOMA: I think the inventory search doesn't  
6 change the face of what the law is. It should be accounted  
7 for, obviously.  
8 Madam Chief Justice, I call for a question.  
9 MR. CLARKE: I have one more item with regard to  
10 the model statute.  
11 CHIEF JUSTICE ABRAHAMSON: One of the things I was  
12 going to do was suggest that we bring this back, bring in  
13 the discovery, what I labeled the discovery issue. This "at  
14 any time" is a recurring issue that we have had that has  
15 divided the house. At least why don't you all think about,  
16 since it is coming back, having alternative provisions

17 relating to the timing? I know there is strong feeling that  
18 there not be any "statute of limitations" and then there is  
19 strong feeling that there at least be, if not a time period,  
20 due diligence.

21 You are going to have this debate in all the  
22 states that care to adopt this, and maybe you should just  
23 face it and put some commentary on it.

24 MR. REINSTEIN: My concern is not so much for the  
25 capital defense. In most of the states, they usually have a  
1 lot of attention drawn to them as far as capital litigation  
2 goes, but it's the other ones --

3 MR. SCHECK: Texas. Most of the calls I get for  
4 tests on the eve of execution come from Texas. Texas and  
5 Florida.

6 MR. REINSTEIN: What I'm saying, Barry, is that  
7 one of the things we talked about in the committee was the  
8 person from Mexico who can't speak English, can't read. He  
9 got his first shot at a public defender in postconviction  
10 relief early on before DNA was in existence, or even if it  
11 was, the guy just totally missed it, and then he hears from  
12 a cellmate or some counselor at DOC about this DNA thing.  
13 He comes in years later, and it wasn't his fault because the  
14 guy can't even read. That was the big discussion; it was on  
15 those people.

16 CHIEF JUSTICE ABRAHAMSON: Anyway, I want you to  
17 think about that. You can put all the arguments pro and con  
18 in terms of diligence and the need for lengthy times and no  
19 time limits. So we have got those two points.

20 Woody, you've got another point?

21 MR. CLARKE: There are a limited number of cases  
22 where there has been secret either DNA or serology testing  
23 done, and I think the provision should have a requirement  
24 that in those instances, which are not numerous but they are  
25 usually in significant cases, that that be revealed in the  
1 application for postconviction DNA testing, and discovery  
2 provided if it hasn't been previously discovered, which  
3 would be the norm when secret testing was done.

4 CHIEF JUSTICE ABRAHAMSON: You want the defendant  
5 to reveal his or her secret testing.

6 MR. CLARKE: Correct.

7 MR. SCHECK: That has never been contemplated.

8 The secret testing problem is on the other side. What about  
9 the governor of the state of Virginia revealing the fact  
10 that a guy was eliminated?

11 One final point on this. We've been through this  
12 with the committee. We've only debated this for two and a

13 half years. It's not a committee of defense lawyers; it's a  
14 committee of prosecutors and crime lab people and everybody  
15 else who have been looking at this. It also is  
16 unconstitutional. You might give that some thought.  
17 The question I pose to you, Woody. I think the  
18 United States Supreme Court, even this one, is going to rule  
19 that you can't have the statute of limitations stand in the  
20 way of somebody who could prove innocence with a test like  
21 this. This issue is going up, because the reality is that  
22 the federal habeas corpus limitation is one year. In fact,  
23 less than one year. There are lots of people who are coming  
24 forward saying, I'd like a DNA test, because they can't even  
25 get access to a court in the state.

1 MR. CLARKE: I'm with you on that one, Barry.

2 That's not the contention.

3 MR. SCHECK: That is a contention area.

4 CHIEF JUSTICE ABRAHAMSON: All right, gentlemen.

5 I'm going to ask you to do this. Discovery provision;

6 consider secret testing on both sides.

7 On the time issue, set forth this debate in terms

8 of constitutional as well as policy arguments on both sides,

9 which can be done in your commentary and with alternative

10 provisions. I think that is what our model statute is

11 about.

12 MR. REINSTEIN: Thank you, Judge. We will see

13 this again.

## Public Comment

14 CHIEF JUSTICE ABRAHAMSON: I'm moving along  
15 because some of us have to leave to catch planes, and we  
16 want to get to the reworked draft of convicted offender  
17 database sample and public comment.  
18 As I did yesterday, I will ask, since it's 3:30,  
19 if there is any public comment that has to be made now, or  
20 can it wait a few moments?  
21 MS. CONLEY: It can wait.  
22 CHIEF JUSTICE ABRAHAMSON: Fine. I appreciate  
23 that.  
24 There has been a redraft of the "therefores." Did  
25 you change anything on the first page?  
1 MR. ASPLEN: Changed a few matters pursuant to  
2 Professor Kaye's suggestions.  
3 In paragraph number 3 I have eliminated the word  
4 "necessary" in sentence number 2 and the word "security" at  
5 the end of "control."  
6 Under the privacy concerns area, I have included  
7 profile at 13 STR loci used in the CODIS system.  
8 I have changed "DNA contain significantly." I  
9 have included "more sensitive information."  
10 Those are the only changes I've made there.  
11 MR. SMITH: Is the last sentence a holdover from  
12 the preceding draft?  
13 MR. ASPLEN: The last sentence is a holdover from  
14 the preceding draft. Professor Kaye suggested the  
15 elimination of that. The only reason I kept it in was  
16 because a couple of the Commissioners seemed to think that  
17 it was a good idea to state those.  
18 MR. SMITH: It can't be that Professor Kaye  
19 thought it was a bad idea.  
20 MR. ASPLEN: In fairness to him, I have his copy  
21 of what he wrote.  
22 MR. KAYE: I recall what I was thinking. There  
23 were two thoughts. One is, and this is perhaps the more  
24 significant one, that when you read these last two sentences  
25 of the paragraph together, it creates a certain impression.  
1 It says that whole sample DNA contains significantly more  
2 sensitive information about an individual. The specter of  
3 genetic behavioral research and behavioral profiling has  
4 become a theoretical possibility.  
5 It sounds like the sensitive information is  
6 something relating to behavioral profiling, and it is much  
7 more than that. It is genes that may be linked to cancer



8 and other matters that someone would not want revealed. I  
9 thought the easiest way to deal with that is just to  
10 eliminate the one sentence that gets more specific rather  
11 than write a whole bunch of sentences.  
12 The second point is, why single out that research  
13 unless you think it's not a valid research to undertake?  
14 It just seemed to open a can of worms that didn't  
15 need to be made explicit.  
16 Finally, it is a theoretical possibility that this  
17 research will be undertaken regardless of any of these  
18 samples. Behavioral research is done all the time by  
19 behavioral geneticists.  
20 So it doesn't quite get at the right point.  
21 MR. CROW: I agree. Let's take it out.  
22 CHIEF JUSTICE ABRAHAMSON: Which one are you  
23 taking out, the last one?  
24 MR. CROW: The last sentence of the first page.  
25 CHIEF JUSTICE ABRAHAMSON: So it would end "while  
1 the nature of digitalized DNA profile at 13 specific STR  
2 loci used in the CODIS system present few opportunities for  
3 manipulation beyond its intended uses, whole sample DNA  
4 contain significantly more sensitive information about an  
5 individual."  
6 MR. CROW: That's good.  
7 CHIEF JUSTICE ABRAHAMSON: Any other comments on  
8 the first page?  
9 All right. The second page.  
10 "Therefore, public trust in a DNA database system  
11 must be maintained by the continued analysis of and  
12 attention to relevant privacy considerations. Given the  
13 relatively early stage" --  
14 MR. ASPLEN: I did not include it, but I would  
15 include "stage of development."  
16 CHIEF JUSTICE ABRAHAMSON: "Given the early stage  
17 of development of the DNA database, engendering public trust  
18 is particularly important. The issue of sample retention is  
19 one which raises many of those privacy matters and as such  
20 should be continually evaluated. The Commission recommends,  
21 however, that in no later than five years a formal  
22 evaluation of sample retention issues should be conducted by  
23 a broad-based representative body. Sample retention even  
24 with continued analysis of privacy issues should be  
25 conditioned on the following:  
1 "First, all states should adopt criminal penalties  
2 for the misuse of DNA records and samples. Currently only"  
3 -- blank -- "states have passed such legislation.

4 "Second, research on database records or samples  
5 should be limited to that which is directly related to the  
6 use of DNA evidence for identification purposes unless the  
7 individual's whose DNA has been taken give their formal  
8 consent."  
9 MR. CROW: Let's take out the apostrophe.  
10 CHIEF JUSTICE ABRAHAMSON: On "individual's,"  
11 right.  
12 Any comments?  
13 MR. THOMA: Just one grammatical. "Sample  
14 retention if recommended" within the last sentence of the  
15 first paragraph. It is not necessarily so that sample  
16 retention is going to be recommended by any such body.  
17 MR. SMITH: In the "meanwhile."  
18 MR. THOMA: Oh, you mean current sample retention.  
19 That's fine. I withdraw that.  
20 CHIEF JUSTICE ABRAHAMSON: You want to be put in  
21 "meanwhile, sample retention even with continued analysis of  
22 privacy issues should be conditioned on the following:"  
23 MR. THOMA: I will withdraw that. Now I  
24 understand.  
25 CHIEF JUSTICE ABRAHAMSON: Any comments?  
1 Phil.  
2 DR. REILLY: To the extent that the dynamic of  
3 informed consent would be taking place with somebody still  
4 in prison, there is a strong line of thinking to suggest  
5 that a consent process is not valid under those  
6 circumstances, that you can never get truly informed consent  
7 to research from a prison population. That is a  
8 well-known body of literature within bioethics. I'm not  
9 saying I support it; I'm just saying it's there.  
10 Second and separate comment. Would it be  
11 inappropriate -- I'm not sure myself -- to add to the last  
12 paragraph a sentence that says something like this: Efforts  
13 to use convicted felon databases in behavioral and genetics  
14 research should not be undertaken at this time.  
15 MR. CROW: I don't like it. I think this is well  
16 enough alone. I agree with your sentiments, but I don't  
17 think we should be saying it here.  
18 MR. SMITH: It sounds a little bit, Phil, the  
19 other way, doesn't it? It sounds like we're trying to hide  
20 something.  
21 MR. CROW: I'm afraid that too much talk about  
22 many of these things just generates the opposite of what it  
23 is intended to do.  
24 DR. REILLY: Fair enough. I appreciate the

25 responses.

1 [Laughter.]

2 CHIEF JUSTICE ABRAHAMSON: Jan.

3 MS. BASHINSKI: We have the term "forensic" in  
4 here. I don't know if it matters at all, but did you want  
5 to add "forensic identification"? I think this is fine.

6 MR. CROW: There may be identification other than  
7 forensic.

8 MS. BASHINSKI: I think it ought to be confined to  
9 the forensic identification uses for which the samples were  
10 collected.

11 MR. ASPLEN: That was part of the conversation  
12 that we had before.

13 CHIEF JUSTICE ABRAHAMSON: We've added "forensic  
14 identification."

15 Paul.

16 MR. FERRARA: Jan makes a good point. We talk  
17 about DNA database system, but implicit in that is obviously  
18 we are talking about forensics DNA.

19 MS. BASHINSKI: I think it makes it consistent.  
20 Are we taking out that last clause on the last  
21 page? Did we say informed consent is going to be taken out?

22 MR. FERRARA: Just the apostrophe "s" after  
23 "individual."

24 MS. BASHINSKI: The clause is still in.

25 MR. ASPLEN: The clause is in.

1 CHIEF JUSTICE ABRAHAMSON: I think it's then "have  
2 been given." "Individuals" is plural.

3 MR. ASPLEN: "Individuals have."

4 CHIEF JUSTICE ABRAHAMSON: Any other  
5 communications on this?

6 I had suggested to Chris, and I don't know what  
7 his response is or what yours is, that if the group is ready  
8 to adopt this, I would suggest we might consider not  
9 communicating this until after we communicate it to the DAB.  
10 It's a matter of courtesy and politeness.

11 MR. SMITH: You can talk to yourself about it.

12 CHIEF JUSTICE ABRAHAMSON: Yes, I will, and Paul  
13 too.

14 MR. CROW: Why don't we appoint the two of you to  
15 bring this up at the DAB.

16 CHIEF JUSTICE ABRAHAMSON: We'll talk about this.  
17 We are going to.

18 MR. SCHECK: Handle it however you want, but they  
19 already know about it, right? It's all public.

20 CHIEF JUSTICE ABRAHAMSON: Yes, they will. It's a

21 matter of courtesy.  
22 MR. ASPLEN: It's a matter of formal transmission  
23 to the Attorney General at this time or not.  
24 CHIEF JUSTICE ABRAHAMSON: I propose that if it's  
25 adopted, we don't make formal communication. I always think  
1 you can talk to people and listen. We may have something  
2 that we haven't considered.  
3 I would like a motion, Judge.  
4 MR. REINSTEIN: I move that we adopt the wording  
5 of the final draft where we came up with the changes at  
6 lunchtime.  
7 DR. REILLY: Second.  
8 CHIEF JUSTICE ABRAHAMSON: There is a motion and a  
9 second.  
10 Those in favor will say aye.  
11 [Chorus of ayes.]  
12 CHIEF JUSTICE ABRAHAMSON: Any opposed will say  
13 aye.  
14 [No response.]  
15 CHIEF JUSTICE ABRAHAMSON: That's how I get  
16 unanimity.  
17 [Laughter.]  
18 CHIEF JUSTICE ABRAHAMSON: So this is adopted as  
19 drafted.  
20 Phil.  
21 DR. REILLY: Is there going to be public comment  
22 now?  
23 CHIEF JUSTICE ABRAHAMSON: Yes. It is now open  
24 again for public comment.  
25 Sara.  
1 MS. CONLEY: I'm Sara Conley. My public comment  
2 is in two parts. The second one is much longer than the  
3 first.  
4 The first one. I am getting to commit my second  
5 outrageous public act. The first one was committed in  
6 Berlin in 1989. I made copies of the Federal Advisory  
7 Committee Act for the members of the committee.  
8 Each person is to get two pieces of paper. One is  
9 the Federal Advisory Committee Act and the second is a  
10 schedule that the Global Criminal Justice Information  
11 Network gave out in their briefing books about the schedule  
12 of their meetings and their working groups about six months  
13 in advance, and the contact person for those working groups.  
14 I just want to say one thing about the Federal  
15 Advisory Committee Act. I read it. The word "public"  
16 appears between 8 and 11 times; "interested person," 2; "all

17 interested persons," 1; "any persons," 1; "citizen" is zero.  
18 I would like to refer you to section 32 on page 1  
19 about definitions, and on section 10(b) and (c) on the  
20 requirements of what should be made available to the public.  
21 That concludes my first part.  
22 The second part is rather extensive. If anyone  
23 has to leave or you want to terminate me --  
24 CHIEF JUSTICE ABRAHAMSON: I may terminate me.  
25 Dr. Crow will take over.  
1 MS. CONLEY: Okay.  
2 Public interest is the issue in matters of DNA  
3 samples and the length of retention of the samples, whether  
4 compelled or not, whether in a forensic setting or a  
5 research setting, and the attending privacy issues.  
6 Within the last two years I have had several  
7 experiences as a volunteer in research studies. The first  
8 involved an extramural NIH funded study which is ongoing.  
9 I signed two informed consents on my first visit.  
10 One was for release of medical records and the second was  
11 for the taking of a blood sample.  
12 I put restrictions on the blood sample because of  
13 the vague wording in the blood sample informed consent. The  
14 restrictions I put on the sample was no genetic testing.  
15 Those vague words were "genetic testings may be  
16 done," but under questions from me, I would not be told  
17 when, if ever, genetic tests would be done, would not say  
18 which, if any, genetic tests would be done. If genetic  
19 tests were done, I would not be told of the results.  
20 When I said I would not put restrictions in the  
21 blood sample if I would be given the opportunity to consent  
22 to any genetic tests and be given the results, I put the  
23 restrictions on the use of the blood sample as no genetics  
24 to be conducted.  
25 I only learned where the blood samples would be  
1 stored when I asked.  
2 I then asked for the research protocol, which was  
3 sent to me in a few weeks. I was hoping to see more  
4 specific information regarding genetic tests, but the  
5 research protocol was no more informative than the informed  
6 consent on this matter.  
7 Therefore, I let the restrictions stand.  
8 It was only upon receipt of the research protocol  
9 that I learned it was a multicenter study.  
10 At a subsequent visit, I then commented to one of  
11 the study administrators that it was unfortunate as a former  
12 genetic researcher I could not remove the restrictions on my

13 blood sample due to the absence of options to consider  
14 giving consent it provided with prior knowledge to what  
15 genes and/or alleles would be tested for, if any, and I  
16 would be told the results.  
17 The administrator then asked if I would  
18 communicate my position to one of the medical doctors. I  
19 agreed.  
20 This is where it really gets interesting. She  
21 ushered me into the doctor's office where she was sitting at  
22 her desk working on her laptop. It was only when I was  
23 leaving that I commented that I didn't mean to interrupt her  
24 work, at which point she informed me she was taking notes on  
25 my conversation.  
1 After this experience and the receipt of the  
2 research protocol, I then asked for the contract with the  
3 pharmaceutical company where the blood samples were stored.  
4 I told her that I should have been told this before my  
5 talking with her, and I then requested a copy of the  
6 contract.  
7 I called her the next day and asked that I wanted  
8 her notes on our conversation that "you deleted" from her  
9 laptop. By that, I do not mean just push the delete button.  
10 She told me she had interviewed a lot of research  
11 volunteers and some other comments, all of which was  
12 irrelevant.  
13 As of this date, I have not received a copy of the  
14 contract between the storage site, that is, the  
15 pharmaceutical company, and the particular site where my  
16 blood sample was taken.  
17 The second study was an intramural NIH funded  
18 study beginning within the last two or three months. On the  
19 basis of my experience with the extramural multicenter  
20 study, I requested a copy of the informed consent be faxed  
21 to me before my first visit. Which was done, and it was  
22 much more informative than the other blood sample informed  
23 consent of the extramural NIH funded study.  
24 In that it was for genetic tests. It mentioned  
25 the disease conditions that they were interested in, but not  
1 the specific genes and/or alleles they would be testing for.  
2 At my visit I did request a copy of the research  
3 protocol before I would sign an informed consent. Since  
4 this study was for genetic tests for genetic diseases, as  
5 one would expect, this genetic test research protocol was  
6 very specific. So I made a list of questions and I asked to  
7 speak to the principal investigator.  
8 The principal investigator came in. I asked

9 several questions, one of which was, were the samples going  
10 to be kept on site? And the answer was yes.

11 Referring back to the informed consent, which was  
12 still unsigned by me, figuring that I was "among my kind,"  
13 that is researchers in a research lab, I queried what was  
14 his rationale for the language in the informed consent that  
15 the results of the genetic tests would not be communicated  
16 to me.

17 I received the usual "you won't be able to  
18 interpret the results." He then asked me if I was familiar  
19 with two of the three genes of interest. I was familiar  
20 with one of the three.

21 I then commented that I felt this language was  
22 unwarranted and my lack of familiarity with two of the three  
23 genes as of that day did not mean that I would not be  
24 familiar with the two or three genes a few months from now.

25 By the way, this was a small study with four  
1 co-investigators, all of whom walked by one at a time during  
2 our discussion.

3 The bottom line is I did sign the informed consent  
4 with no restrictions. I did not ask how long the blood  
5 samples would be retained only because they were not going  
6 off site, and I assumed, perhaps naively, that I could  
7 request a termination date later.

8 There are informed consent forms just for DNA  
9 samples, and I think this Commission should develop informed  
10 consent for DNA samples for forensic research or other  
11 research studies.

12 Thank you.

13 MR. ASPLEN: Thank you, Sara.

14 MR. CROW: Anyone else from the public who has a  
15 comment?

16 [No response.]

17 MR. CROW: It has been moved we adjourn. Is there  
18 a second?

19 [Motion seconded.]

20 MR. CROW: It doesn't call for a vote.

21 MR. ASPLEN: As always, thank to the Commissioners  
22 and to the DNA Commission staff.

23 [Whereupon at 3:50 p.m. the meeting was  
24 adjourned.]