

**National Commission on the Future of DNA Evidence**  
**PROCEEDINGS**  
**Meeting VII**

Ronald Reagan Building and International Trade Center  
Polaris Conference Room  
Conference Center, Concourse Level  
Washington, DC  
September 26 & 27, 1999

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## Agenda

September 26, 1999

- 1:00 - 1:10 Welcoming Remarks  
The Honorable Chief Justice Shirley S. Abrahamson  
Chair, National Commission on the Future of DNA Evidence
- 1:10 - 1:30 Update on Commission Business  
Christopher H. Asplen, AUSA  
Executive Director, National Commission on the Future of DNA  
Evidence
- 1:30 - 2:00 Tom Callaghan  
Federal Bureau of Investigation  
Program Manager, Federal Convicted Offender Database  
Question & Answer (Discussion)
- 2:00 - 3:15 Backlogged Cases with Potential DNA Evidence: Survey Results  
Dr. Craig Fraser, Police Executive Research Forum  
Dr. Kay Scarborough and Lyndsey Taylor, Eastern Kentucky  
University
- 3:15-3:30 Break
- 3:30- 4:00 Crime Scene Investigation Working Group Report  
Recommendation, Law Enforcement and DNA Evidence
- 4:00 - 4:30 Public Comment

September 27, 1999

- 9:00 - 9:05 Opening Remarks  
The Honorable Chief Justice Shirley S. Abrahamson  
Chair, National Commission on the Future of DNA Evidence
- 9:05 - 10:15 Postconviction Issues Working Group Report and Discussion  
The Honorable Judge Ronald Reinstein, Working Group Chair
- 10:30 - 11:00 Associate Attorney General Raymond Fisher  
Presentation of Publications

*Postconviction DNA Testing: Recommendations for Handling  
Requests  
What Every Law Enforcement Officer Should Know About DNA  
Evidence*

- 11:00 - 11:15 Morning Break
- 11:15 - 1:00 Working Lunch  
Mike Sheppo  
President, American Society of Crime Laboratory Directors  
Database Sample Retention Issue Discussion
- 1:15 - 1:45 Research & Development Working Group Report  
Dr. James Crow, Working Group Chair
- 1:30 - 3:30 Legal Issues Working Group Report and Discussion  
Professor Michael Smith, Working Group Chair
- 3:30 - 4:00 Public Comment

**Welcoming Remarks by  
The Honorable Chief Justice Shirley S. Abrahamson  
Chair, National Commission on the Future of DNA Evidence**

CHIEF JUSTICE ABRAHAMSON: Good afternoon. And I want to welcome the Commissioners to our September meeting which will be today until about 5 and then we will begin again tomorrow with tentative adjournment about 4 p.m. A lot has happened since the Commission has last met and we will hear about these developments. And we have a full agenda of people who have made the effort to come here and discuss a variety of matters with us.

So, we will start as we do all these meetings with again introducing ourselves and then we will move on to Chris Asplen, who will update us on all the working groups and all the other matters. So I'm Shirley Abrahamson, Chief Justice of the Wisconsin Supreme Court and Chair of this Commission. Chris?

DIRECTOR ASPLEN: Chris Asplen, Executive Director of the Commission.

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

COMMISSIONER SANDERS: Darrell Sanders, Chief of Police, Frankfort, Illinois.

COMMISSIONER SCHECK: Barry Scheck, Co-director of the Innocence Project, Cardozo Law School, New York City.

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

COMMISSIONER CLARKE: George Clarke, Deputy District Attorney, San Diego, California.

COMMISSIONER THOMA: Jeff Thoma, Public Defender for the County of Mendocino, in California.

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

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

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

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

COMMISSIONER CROW: James Crow, Emeritus, Professor of Genetics, University of Wisconsin.

CHIEF JUSTICE ABRAHAMSON: Can we be heard? Is that all right? All right. If we cannot and you want to hear us, raise your hands, okay? Chris?

## Update on Commission Business

*Christopher H. Asplen, AUSA*

*Executive Director, National Commission on the Future of DNA Evidence*

DIRECTOR ASPLEN: Okay. Some Commission updates and some logistics and some program notes. First of all, we do ask and we have been asked by our AV person to speak directly into the mike when you do speak so that we can also get this recorded.

Secondly, as you can see, the gentleman to my left is a sign language interpreter who is available for anyone who may need that service. However, rather than have him stand here for the entirety of the next day and a half, after this initial introduction he will retire to the back and anyone who may need his assistance, please just let him know and then we will have him stand up here for the entirety of the next day and half. Okay? Thank you.

In terms of today's meeting and tomorrow's meeting, we will necessarily have to be a bit flexible and we may need to change a few things around in terms of the agenda due to the unavailability of certain Commissioners and other folks over the next day and a half.

This afternoon we will have a discussion on laboratory funding issues, which was originally scheduled for tomorrow, with Commissioner Clarke and Commissioner Ferrara. We may also discuss a little bit of the Crime Scene Working Group recommendation today, depending how time goes. However, the full Crime Scene Working Group discussion will occur tomorrow, including an update of the computer and Internet training, will have to occur tomorrow when Chief Gainer can attend.

As you can see from the agenda, we have Tom Callaghan here from the FBI to talk about some database retention issues from the FBI's perspective, to explain their position on that. While it may appear as though it would fit better the following day, both Tom and Steve Niezgoda need to fly out immediately after this meeting to travel and speak elsewhere. So, we as always appreciate your indulgence and your flexibility with the agenda.

As you know, as you have received in your introductory packets, the publications on postconviction recommendations and the law enforcement pamphlet are officially approved and published.

And, we have the first shipment of both publications at NIJ and they will be made available through the NCJRS service. However, Commissioners, if you contact us directly for the number of copies that you may need, we will get them out to you as soon as we can. I hope that you are as pleased as we were with them in the office. We're really thrilled with the way they came out.

Tomorrow we will be presenting them to Associate Attorney General Ray Fisher, officially, who will then forward them to the Attorney General with a few remarks by Mr. Fisher tomorrow. But at this stage let me say a word of thanks, specifically to NIJ and their commitment to getting these done in a timely fashion, for their commitment to the volume that we've been asked to produce.

We will print probably a million copies of the law enforcement pamphlet so that we can essentially saturate the law enforcement community with them, recognizing the importance of the issue. But NIJ -- and I say that as an outsider as I am only detailed to the National Institute of Justice -- their commitment and the quality of their work was really phenomenal in getting to this stage and being able to have these today and I greatly appreciate their efforts in that regard.

In terms of other business of the Commission, we will be extended for, officially for two years, this Commission. However, the bulk of that time, bulk of that extension is really to kind of close things up, get the final publications approved, published and out the door.

In speaking to the Chief Justice on a number of occasions, we really target the completion of the meeting and deliberation portion of this Commission, really next spring.

We anticipate that in terms of the issues that are out there right now, that are on the table, we believe that by spring we can have those substantially finished and deliberated on and beyond that it will be a matter of publishing those reports that need to be published, et cetera.

So, if you hear that we have been extended for two years, please don't feel like you are going to be meeting for the next two years. But again the bulk the work we anticipate will be finished by next spring.

The Commission is also continuing on its way from a staff perspective to speak at various and sundry conferences and training opportunities. Chief Justice and I will be speaking on behalf of the Commission at the Promega meeting at the end of this week and, as many of you may know, Dr. Crow has been asked to be the keynote speaker for the conference and to open the conference up.

So, the Commission will have extensive representation at the Promega meeting. Also, Dr. Forman and I will be at, in London at a conference called the --

DR. FORMAN: First conference on DNA Identification on the New Millennium.

DIRECTOR ASPLEN: On the New Millennium, right, that's it, in which Dr. Forman will be speaking about a number of issues, including Commission recommendations, the effect that they have had on the federal process and also talk about the development of the different technologies in the context of federal funding and resources and some of the Commission's recommendations.

I have participated in a number of trainings, a number of police departments and things like that and as has Dr. Forman just got back from a matter in Suffolk, Suffolk Law School, with Professor Scheck and I believe Dr. Reilly was there also.

So, we continue to kind of get the word and some of the products of the Commission out there through a lot of traveling in areas like that.



Let's see. Another minor note for the Commissioners, if any of you get paged, need to use a phone, right out this door here there's a bank of telephones right around the corner for your convenience if you need to do that. That's all I have right now.

CHIEF JUSTICE ABRAHAMSON: And we'll hear from the working groups as we proceed. Right? Okay. Mr. Callaghan, are you ready?

## **Federal Convicted Offender Database Question & Answer (Discussion)**

**Tom Callaghan**  
*Federal Bureau of Investigation*  
*Program Manager, Federal Convicted Offender Database*  
*Question & Answer (Discussion)*

DIRECTOR ASPLEN: Tom, would you like to speak from here, or would you feel more comfortable sitting up here? That's fine. For those of you who don't know Tom, he has a Ph.D. in microbiology from Case Western University. He was a DNA examiner from Penn State police where he was the lead implementer of Pennsylvania's CODIS program. He's been a DNA examiner with the FBI now five years.

He's presently the program manager of the Federal Convicted Offender DNA Program. You all received in your packets a letter from Don Kerr regarding the bureau's position on sample retention and I asked that a representative from the bureau come and talk a little bit about that for our consideration as we will be discussing that rather extensively tomorrow.

CHIEF JUSTICE ABRAHAMSON: And Jan Bashinski has a letter, too.

COMMISSIONER BASHINSKI: Yes, which I just delivered to you today.

DIRECTOR ASPLEN: And if you don't have Jan's letter, that will also be, that probably is being photocopied right now.

CHIEF JUSTICE ABRAHAMSON: Dr. Callaghan?

DR. CALLAGHAN: Thank you. First I would like to thank the Commission and Justice Abrahamson for the opportunity for the FBI to speak on our opinion as far as the destruction of convicted offender samples. And I would like to thank Mr. Asplen personally for juggling the schedule so that I can testify in Denver tomorrow morning.

I would like to call the Commission's attention to the letter, dated July 23rd, from Donald Kerr. In that letter he states that the FBI is opposed to the destruction of convicted offender samples after analysis. And the FBI is opposed for the four following reasons:

One, all 50 states have DNA databasing laws. Only one state requires the destruction of samples after analysis.

Two, there would be a tremendous difficulty in regenerating or retyping databases after the samples have been destroyed.

Number three, destruction of samples would affect the quality assurance of the DNA database. And four, DNA databasing has occurred for ten years and there has been no record of misuse of any sample in a DNA analysis database.

I would like to address each of these points individually. One, all 50 states have convicted offender database laws. Only one requires sample destruction. This state, I understand, has not however, destroyed any samples because it is undergoing retyping of the entire DNA database.

This brings us to point number two, the difficulty in reanalysis of DNA's databasing samples. Although it's theoretically possible to re-collect samples from all the individuals in a DNA database, logistically this would be very difficult for a number of reasons.

The first would be locating the individuals who had been released. The second would be locating the individuals who had been released who no longer reside in that state. This is because of a jurisdictional nightmare as far as getting what would probably be called convicted sample warrants to be issued in another state so that the sample could be collected.

Law enforcement already has a large burden. This burden would probably be put on parole and probation systems of the states. The second aspect of this retyping of analysis, if it would be, why should we go ahead and do it and if it's going to be difficult, it would also be very expensive.

States have shown that it is more expensive to collect a DNA database sample, to collect a blood sample than it is to analyze a sample after it is collected.

One of the problems with DNA analysis or one of the problems DNA analysis experienced is funding. When it's more important or more expensive to collect a sample than analyze it, it would be appear not to make sense to destroy that sample. Why would we want to retype? Retyping is, may be necessary because of the future advances in DNA analysis.

In trying to address this point, I read the meeting minutes from the last two meetings. And a number of times it was stated that the 13 core STR are okay for DNA databases. And that's correct but we're talking here about the technology that's used on crime scene evidence. RFLP technology revolutionized serological analysis and showed us the potential for DNA databasing. PCR-based testing allowed DNA analysis to be done on a much broader spectrum of forensic evidence.

One of the difficulties in current DNA analysis is resolving mixtures. When mixtures cannot be resolved, the entire mixture profile would be searched against the database, generating a lot of hits that would have to be further investigated.

There may be markers in the future that are discovered that are far more discriminating and therefore mixtures would be much easily, much easier to resolve and to profile, not associated or only associated with one individual could be put in the DNA database and searched.

The third point as far as the difficulty in retyping would be the consistency. The national DNA database will only work if all 50 states are complying and using the same markers.

In the future if states or other jurisdictions are faced with the logistics of localizing the convicted offenders, obtaining their blood samples and all the expenses that go along with that, there may be a point where some states would not want to do this or refuse to do this and we would have a point that we currently have, some states do RFLP and some states do STRs.

All states are moving towards STR analysis but there could be a time when neighboring states would have different DNA techniques. This would be detrimental to our national program.

I mentioned quality assurance. Sample destruction would affect the quality assurance of a DNA database. Errors in DNA databases are unacceptable but mistakes can happen.

Retyping of a confirmation hit, that is, when a DNA database hit occurs, going back to the original sample and retyping that sample and confirming the accuracy of the identity of the individual prior to the name being released to law enforcement would identify mistakes that happened.

If mistakes did happen, that individual's name would not be released to law enforcement. That takes care of the convicted offender who had been mistyped or a mistake occurred.

But, what about the evidence, what about the piece of evidence from the crime scene? If a mistake had occurred, it would be possible to go back and type, retype all of the samples drawn on that day or all the samples analyzed on a particular day and it may be possible to link a DNA profile from a piece, from a crime scene to someone in the database that had been mistyped. So the evidence would still be able to be used.

The fourth point as far as no record of misuse, 50 states have DNA databasing laws. All 50 states restrict the use of the samples that are collected. Forty-nine states do not require sample destruction. Forty-six states restrict the use of the DNA information collected and 32 states have criminal sanctions for improper release.

In over ten years of DNA databasing, over 750,000 samples have been collected and to date not a single misuse of these samples has been documented. I would like to thank the Commission for the opportunity to speak today and I would be open for any questions.

CHIEF JUSTICE ABRAHAMSON: Mr. Scheck?

COMMISSIONER SCHECK: You stated in your testimony that it is more expensive to collect the sample than it is to do the typing. What data do you have to support that? Please tell us in its entirety.

DR. CALLAGHAN: I believe that was presented here by Dawn Herkenham for, that it would cost \$67 to collect or \$69 to collect a blood sample and that it was approximately \$50 to have that sample typed.

COMMISSIONER SCHECK: Well, that, you're alleging that this is one statistic from New York state as opposed to, that's the only data you have?

DR. CALLAGHAN: That's the only data I have, yes.

COMMISSIONER SCHECK: Can I have a -- Dr. Forman --

CHIEF JUSTICE ABRAHAMSON: Push the microphone up.

COMMISSIONER SCHECK: Dr. Forman mentioned another figure to me of a 28 dollar collection. Could I ask that you clarify? She just told me that on Friday so I was just curious what it is.

DR. FORMAN: That \$28 is based on information that I got from Dr. Amanda Strozer from genetics and IVF. And that's based on an analysis that they have done for the State of Louisiana collecting buccal swabs at the booking, source of booking for Louisiana arrestees.

So they identified that it could cost them \$28 in manpower and reagents and equipment to collect those samples from people who are already in custody.

COMMISSIONER SCHECK: And that was the presentation that was made to us at one of the earlier meetings, I think; she's the same individual, correct?

COMMISSIONER ASPLEN: That's correct.

DR. FORMAN: She's the same individual but I don't think she cited a price, at that point.

COMMISSIONER SCHECK: Right. And that's a private individual. Okay. And what is your estimate, so that's the only basis for that?

DR. CALLAGHAN: That's the only estimate. If you would like, I would, I can state that there would be a significant cost of re-collection of those samples.

COMMISSIONER SCHECK: Well, I mean, but you're saying it cost more than typing. What is your estimate at the FBI for typing a sample with an STR?

DR. CALLAGHAN: The FBI currently does not do, for a database sample, we don't do that. I don't know what the cost is for a crime scene sample. I don't know what that number, that figure is.

CHIEF JUSTICE ABRAHAMSON: Dr. Crow?

COMMISSIONER CROW: Aren't you discussing the cost of doing it once you have the person in hand, what are the costs likely to be if you have to hunt around and find the individual from whom you get the sample? Surely my guess is that must be considerably more than anything we're talking about now.

COMMISSIONER BASHINSKI: I would like to make a comment based on our experience in California. We surveyed our client agencies because we are in a position of trying to reimburse our local agencies for sample collection costs and the costs ranged from less than \$30 all the way up to \$75, depending on where the sample was going to be drawn and whether they would have to hire a private phlebotomist or have people on the staff.

And that is merely the cost of actually drawing the sample. It doesn't cover the costs of sample collection materials or, more importantly, locating the person, running them down and getting them to where they can be tested, which I think would turn out to be by far the largest cost to law enforcement although probably difficult to quantify, at this point.

COMMISSIONER SCHECK: Does the FBI have a position as to how long you think you would, once a sample is collected, right, how long would you recommend that the sample be kept; is it your position that it would be indefinite or would you be open to the idea of something like a fixed term that --

DR. CALLAGHAN: I would say it would be indefinite until the, a fixed term of, uh, I can't give you a date but I would think that a 50-year term, if this individual is incarcerated and then would later get out after serving a 30- or 40-year sentence, we would probably want to have his DNA profile in the database. And in that period of time new technology may have come along.

COMMISSIONER SCHECK: Now, what is, you raised the issue of new markers to resolve mixtures and other things like that.

DR. CALLAGHAN: Yes.

COMMISSIONER SCHECK: All right. And, well I really have two related questions. First of all, how long do you estimate that it would take to implement given the current spending levels, STR is on a state and local level and a national level, typing everybody in the database and using it to type new cases, nonsuspect cases, about how long do you envision this technology, the implementation time?

DR. CALLAGHAN: There are a lot of issues there. As far as typing database samples, I would think that in the next three to five years with sufficient funding all convicted offender samples collected in the U.S. could be analyzed. With regard to typing nonsub cases, I would like to see that happen as soon as possible.

It is when you start typing nonsub cases that the real power of DNA analysis can be seen. But that would, I can't speak for state and local law enforcement laboratories on how they would go about doing analysis but there would be a significant cost and also a cost and time delay in training the individuals to do the analysis, the extraction of the analysis.

COMMISSIONER SCHECK: No, I quite agree with you that the power is in the nonsuspect cases, but I guess what I'm trying to get is, does the bureau have some notion as to what is the time frame for our basic commitment to STR technology; would you not agree it is something on the order of the next five to ten years this system is going to be the one we're using?

DR. CALLAGHAN: Yes, I would expect that for at least the next five years, that for the next five to ten years STRs would be the CODIS core loci.

COMMISSIONER SCHECK: Bear area right. And so what you're telling is that you anticipate it would be useful to add other markers, I anticipate markers that have fewer base pairs, right, to run in parallel to the STR in future years?

DR. CALLAGHAN: Right. It could be or it could be additional STRs as yet unknown. When the human genome project is finished, there may be STRs out there that are far more polymorphic, more discriminating, that would be able to be analyzed. That is something I would like to see --

COMMISSIONER SCHECK: Sure.

DR. CALLAGHAN: -- as far as mixture analysis goes.

COMMISSIONER SCHECK: But you're saying it's going to be running parallel with the core system between the next five to ten years is a fair statement?

DR. CALLAGHAN: Yes, I would say that's fair statement.

CHIEF JUSTICE ABRAHAMSON: Yes, Chris?

DIRECTOR ASPLEN: Doctor Callaghan, can you give us I guess somewhat of an idea of how many states currently use their database samples in a confirmatory capacity once getting a hit before they then go out and get a warrant for arrest or as you say release that name?

DR. CALLAGHAN: I don't know how many. I believe Florida does it. I don't know how many other states that do that. But I believe Florida confirms that hit. I don't know whether that's prior to the release of the name or not. But that is something that the FBI plans to do when there is a federal DNA database program.

DIRECTOR ASPLEN: So, it will be part of your protocols, if you will?

DR. CALLAGHAN: Yes, it is or will be.

CHIEF JUSTICE ABRAHAMSON: I gather that the position is to retain indefinitely the samples?

DR. CALLAGHAN: Yes, it would be.

CHIEF JUSTICE ABRAHAMSON: Now, do you have a position on any restrictions that you would place, such as they be retained in a governmental office rather than in a private lab.

DR. CALLAGHAN: I believe that they should be maintained the way the evidence would be maintained in the crime laboratory. I realize that some laboratories will hire contractors to do the analysis. When that is done, it wouldn't be necessary to give the name along with the sample. A

number could be issued with the sample and that way the identity of the individual could be maintained.

CHIEF JUSTICE ABRAHAMSON: You'd limit the use of this sample?

DR. CALLAGHAN: Yes, I would certainly limit the use of the sample to the CODIS core loci. As far as the identity of the individual is concerned, there was some discussion as to, previous discussion I saw in the minutes as to the need for research to be done as far as identifying different markers and generating frequency databases. And I think that would be a valuable use.

CHIEF JUSTICE ABRAHAMSON: In your presentation you said that several of the states had criminal penalties for abuse of these samples. But you don't have any knowledge of it being used?

DR. CALLAGHAN: No, I don't know what those penalties are.

CHIEF JUSTICE ABRAHAMSON: All right. Professor Smith?

COMMISSIONER SMITH: I was just trying to play out your point about the undesirability of having different systems in adjacent states and together with your point that in order to avoid that, sample retention might be necessary because some states would change their methods. But does that mean that if any states destroy samples after typing that we run into that difficulty?

DR. CALLAGHAN: I think that it would be difficult because that state in order to change their database would have to go back and collect those samples.

COMMISSIONER SMITH: And so presumably that state would have to operate its database on the 13 STRs. So if Wisconsin started to comply with this law, this problem would immediately manifest itself, wouldn't it?

DR. CALLAGHAN: As far as the old samples go.

COMMISSIONER SMITH: Right.

DR. CALLAGHAN: Right.

COMMISSIONER SMITH: Thank you.

CHIEF JUSTICE ABRAHAMSON: What does Wisconsin do, do you know, Norm?

COMMISSIONER GAHN: We don't want to go there.

CHIEF JUSTICE ABRAHAMSON: I withdraw the question.



DR. BASHINSKI: It's my understanding that Wisconsin does do the post-hit analysis. We certainly do in California. And I think it's common practice among database states although I can't specifically name others, other than Florida, Wisconsin and California.

COMMISSIONER SCHECK: Doctor, what would you think if after the institution of a technology that you thought would be in place for quite some period of time, if there were retention of the samples for some fixed period of years to make sure that the technology was, the bugs were out of it, so to speak?

I mean, for example, if you wanted to get through to two or three of these STR loci and put another two in after some experience with it after two or three years, you could do that but then after a fixed term, when it would be destroyed; in other words, in Wisconsin I think everybody believes it would be foolhardy to destroy all the samples collected before you put them into an STR database.

COMMISSIONER SMITH: Yeah.

COMMISSIONER SCHECK: Right? In other words, making the destruction tied to the implementation of a new technology as opposed to keeping them indefinitely.

DR. CALLAGHAN: I guess the idea here is how do you ensure that once an individual is released, if they would commit another crime and the technology had changed, their sample would be in the database.

The fact that we are databasing samples and those people are incarcerated for the period of time that the technology is current, someone, it would be difficult to commit a sexual assault from a prison but when that person is released, there may be a sexual assault that's committed and if the technology has changed, their sample wouldn't have been analyzed and in the database. So I think our point is --

COMMISSIONER SMITH: It would be there but it would be there with the old technology.

DR. CALLAGHAN: The old technology.

COMMISSIONER SCHECK: Right, but let's put it this way. Let's say that you have the STR technology out through year eight, okay, and then eight years from now, the jurisdiction, you develop two or three different markers five years from now.

It would be within the, it would be legal in every state including Wisconsin that had a destruction statute that as soon as the new technology kicked in that you would be, as somebody came out of jail, you would take a new sample from that individual and then get their profile upon release. That's not so hard, is it?

DR. CALLAGHAN: The sample already exists and it would go back and could be retyped.

COMMISSIONER SCHECK: But you take my point, yes?

DR. CALLAGHAN: I understand your point, yes.

COMMISSIONER SCHECK: And that's a practical way of ensuring that right after somebody leaves, you would have them on the latest, most up-to-date technology. If you added five markers, somebody's on release and --

DR. CALLAGHAN: And if that technology changed five or ten years down the road, we wouldn't have them.

COMMISSIONER SCHECK: Well --

DR. CALLAGHAN: But if we collected the sample once and maintained it indefinitely, we would always have them.

COMMISSIONER SCHECK: Well, you would have them on the STRs and whatever additional ones existed at the time of their release?

DR. CALLAGHAN: That's correct. This becomes a problem with once, once a technology is accepted and if that technology has changed or a different loci or added or different technology is used, it would require maintaining the proficiency test of the previous technology so that samples could be -- this can happen now in RFLP.

These are things that I deal with every day on the telephone. A case will come in and the state will run STRs and they will run STRs and the person is exonerated. The suspect is excluded. They then have the choice to make, do they go back and try and do RFLP and search their state database on RFLP and if they do that, they can then search the national database on RFLP on that sample.

So, there are more crime scene evidence and there is more convicted offenders in the national database with RFLP than there is with STRs. And maintaining proficiency tests for multiple programs and talking about going back and recutting becomes a logistical nightmare. If the case comes in and can be processed and put on the national database, that's the easiest way to do it.

COMMISSIONER SCHECK: Well, of course that's true but that is because there was this gigantic error to use RFLPs in the first place in this fashion. We all know that. But, let me ask you this.

DR. CALLAGHAN: Well, I think we have a chance here. If that was gigantic error, we have a chance here to avoid that gigantic error, and that is to maintain the samples indefinitely.

COMMISSIONER SCHECK: Well, come on. I mean, let's put the issues directly.

CHIEF JUSTICE ABRAHAMSON: Barry --

COMMISSIONER SCHECK: You're not seriously maintaining that when RFLP was first used, would you not concede that it was widely understood that that would not be the basis for a national database, it would have to be a PCR-based test? No?

DR. CALLAGHAN: I was not involved in those discussions, when those decisions were made.

CHIEF JUSTICE ABRAHAMSON: I think we're moving away from the basic topic.

COMMISSIONER SCHECK: Can I just ask one final question?

CHIEF JUSTICE ABRAHAMSON: Let's just give Chief Hillard a chance and we'll come back to you.

COMMISSIONER SCHECK: Oh, I'm sorry.

COMMISSIONER HILLARD: Let me get a question or two in real quick. I heard you state that you want to maintain this database indefinitely.

DR. CALLAGHAN: Yes.

COMMISSIONER HILLARD: And I think I have heard your answer to that but I'm somewhat, I somewhat disagree with you. You know, I think there should be some type of time limit on this. The next thing is, can you give me the categories that the FBI would specifically mandate? Is it going to be violent crime, is it going to be the property crimes or what crimes are we talking about?

DR. CALLAGHAN: I think that that's something that far as the FBI is concerned, Congress will decide what those, those offenses would be.

COMMISSIONER HILLARD: What recommendations are the FBI going to come up with then?

DR. CALLAGHAN: Violent, violent offenses to include kidnapping, assaults, attempted kidnapping, attempted assaults. All violent federal crimes are we are asking for to be included now.

COMMISSIONER HILLARD: And I heard you say something about 50 years, am I correct?

DR. CALLAGHAN: Well, that was in response to a question. I wouldn't, I would, I don't know how long the average person spends in jail for a variety of crimes but if an individual is released and would die, we would be talking about exhuming a body to get a blood sample for an old case. So, I would think indefinitely but 50 years I think is something that could be discussed.

COMMISSIONER HILLARD: I would like to put this on the record, just in case. By being superintendent of the Chicago Police Department, the second largest police department in the country, I am in, I don't quite agree with you when you say maintaining this evidence for an indefinite period of time.

I really do think there should be some limitations on it and we need to be very specific. You know, because not only law enforcement but other organizations and other professions have misused and abused things such as this and I think we ought to be very clear on how we're going to go about this in order to make this, this work for everybody.

COMMISSIONER SANDERS: Madam Chairman, I don't really have any questions but are we going to debate this now or are we going to get into --

CHIEF JUSTICE ABRAHAMSON No.

COMMISSIONER SANDERS: -- a debate later?

CHIEF JUSTICE ABRAHAMSON: No, no, it's just to gather information.

COMMISSIONER SANDERS: We don't need to make our statements in support --

CHIEF JUSTICE ABRAHAMSON: Right, no.

COMMISSIONER SANDERS: -- and say all those things that I said the last three times? I can read the same thing.

CHIEF JUSTICE ABRAHAMSON: Right.

COMMISSIONER SCHECK: The ACLU is a knee-jerk organization. Do you have that down?

CHIEF JUSTICE ABRAHAMSON: Jan, did you want to have some comments?

COMMISSIONER BASHINSKI: Well, I don't know because this might qualify as debate but I would say that it was not at all clear when we started the database that RFLP was not going to be the national standard.

In fact, it was considered the national standard and although we knew that PCR was in the wings, nobody knew until fairly recently what the loci were going to be that PCR was going to be applied to. So that's just a comment I would like to make.

COMMISSIONER SCHECK: I won't respond to that. I could, uh --

CHIEF JUSTICE ABRAHAMSON: Barry, wait, just a minute. Go ahead.

COMMISSIONER THOMA: I just have one question, Doctor. Do you have any recommendations regarding storage? We have heard some testimony regarding crime scene storage and it becoming a problem when it is kept literally indefinitely with regard to these database samples that you want to store.

DR. CALLAGHAN: Well, the database samples I would be talking about would not be the original. If it was an eight or ten milliliter test-tube of blood, it would be an aliquot from that. There are ways to maintain blood samples on pieces of paper where it's dried out.

COMMISSIONER THOMA: On a card?

DR. CALLAGHAN: On a card or in a small one or two micromillimeter test-tube with an O-ring and they could be frozen and stored in that way. So, I think storage is a concern but I believe that if states know about this, they can build the facilities to store these samples. I don't think it would be that great a burden to store these samples.

CHIEF JUSTICE ABRAHAMSON: Dr. Callaghan, you know that there has been talk about the possibility of getting samples from arrestees. And, what's your feeling about that?

DR. CALLAGHAN: The FBI's opinion as far as collecting samples from arrestees for databasing is, at this time that would be, we would be opposed to that. It's too preliminary for that type of testing to be done. There are over 750,000 samples that have been, blood samples that have been collected. Approximately half of those have been analyzed.

And we have a huge backlog in just working cases where we have suspects, nonsub rape cases or no suspect rape cases aren't addressed as they should be at this point.

So, the FBI's position is that the better use of the resource, at this time, is to work the cases that we currently have rather than blood samples from all arrestees.

CHIEF JUSTICE ABRAHAMSON: Professor Smith?

COMMISSIONER SMITH: I don't know if you have done this but I would be curious if you thought through what the resource demands would be of retyping the samples in the event of, one of the events you have described. I mean, that, I don't know but I assume that there's to be a certain amount of resources required to do that. Have you thought about how much resources would be required to do that?

DR. CALLAGHAN: Well, I would say as the program manager for establishing the FBI system, when it's up and running, I have given that a considerable thought. I have no figures as far as expense goes but I do believe that if those samples were allowed to be maintained the way in which they were maintained could cut those costs considerably.

And that's what I was talking about with the patching of the blood as a dried sample or putting them into tubes that, where they could be frozen. Freezing the sample is attractive because that lends itself very easily to robotics. And, so, the handling, human handling of the sample would be minimized.

So, I have given it a great deal of concern and if we can plan now to build a system where retyping would be possible, I think that would be the most cost-effective.

COMMISSIONER SMITH: But it would be, I think, in the hands of the states, wouldn't it?

DR. CALLAGHAN: Yes, it would.

COMMISSIONER SMITH: Certainly well, within, right, okay.

DR. CALLAGHAN: Certainly within the hands of the state.

CHIEF JUSTICE ABRAHAMSON: Cross-examination by Scheck.

COMMISSIONER SCHECK: I have only, this is not, these are only informational questions. So the answer to Professor Smith's question is, you don't have a number on how much it costs to store?

DR. CALLAGHAN: No, I don't know how much it would cost to store or, or reanalyze since we don't know what would we, loci would be --

COMMISSIONER SCHECK: How much does it cost to store something now?

DR. CALLAGHAN: I, I truly don't know.

COMMISSIONER SCHECK: Twenty dollars?

DR. CALLAGHAN: I don't know.

COMMISSIONER SCHECK: And, you would agree, we had a presentation last session about Los Angeles Police Department crime lab and them buying additional trucks and everything else to store samples; you're aware this is a problem in jurisdictions?

DR. CALLAGHAN: I'm aware of the sample storage problem, yes. But, but I'm aware of sample storage being a problem for evidence from crime scenes. I'm not aware that it is a large problem for databasing.

COMMISSIONER SCHECK: Well --

DR. CALLAGHAN: I think that's a big difference.

COMMISSIONER SCHECK: Refrigeration -- I understand, depends on whether -- but refrigeration is refrigeration expense, true?

DR. CALLAGHAN: Yes, although I believe some labs may store samples at room temperature.

COMMISSIONER SCHECK: Well, I would like to see that myself. Now, the question I have for you is this. You mentioned that you recognize that there may even be different decisions made on states as to what technology to adopt and you indicate that there are some states that don't have any restrictions on use of these samples and some states, and even among those that have

restrictions there, the restrictions can be for something like, quote, law enforcement purposes, yes?

DR. CALLAHAN: I'm not familiar with the 50 different statutes from the different states but there are --

COMMISSIONER SCHECK: Now, let me give you a hypothetical since you are a learned man in this area, as I can tell. If, for example, some scientist said that they had a gene or genes that associated with pedophilia or a propensity towards sexual assault or violence and that they wanted to conduct a study on these stored samples to see whether or not this unique database of sex offenders fit within it and wanted to identify it and even actually wanted to look at all of the convicted felons or whatever was designated in the state database to see if they had this particular marker, all right? A, would you consider that a proper law enforcement purpose if all the statute said was for law enforcement purposes, it's not otherwise restricted?

DR. CALLAGHAN: I don't think that I will comment on the use or that hypothetical. I am here to address the FBI's opposition to sample destruction for the reasons I stated.

And for law enforcement use as far as identifying those types of genes and research, I believe that the Commission if it felt it necessary could put some kind of wording into their recommendations, say, for law enforcement by personal identification only or something along those lines rather than sample destruction.

I think that, you know, the use of the sample should be restricted and that's something that the Commission may choose to recommend.

COMMISSIONER SCHECK: But I guess this a classic kind of utilitarianism debate. On the one hand you come in here and you say, well, we want it because it would be easier for us, which I recognize but on the other hand do you not concede that the issue of concern here, the privacy issue and civil liberties issue of concern here has to do with those states that would not so limit the definitions and those states that might choose to pass a statute to authorize research of the nature that I'm discussing? You recognize that's the concern. I realize you don't want to take a position on it --

DR. CALLAGHAN: I recognize it.

COMMISSIONER SCHECK: -- because it would be embarrassing to say that you're for it and, you know, and I'm not imputing that you are, don't get me wrong, but you recognize that's the only reason that some of us here are advocating destroying the samples?

DR. CALLAGHAN: I recognize that issue.

COMMISSIONER SCHECK: All right.

CHIEF JUSTICE ABRAHAMSON: Okay. Are there any other questions or comments? Okay.

COMMISSIONER SANDERS: I was going to say just, just for the record that that, that letter that I read that came from the FBI suggested that that was one of the concerns and I think it points out very adequately that we should be much more concerned with blood samples that are other places and necessarily go out.

So, just because of what Barry just said, the letter addresses it and in the end it points that I think there should be a lot more concern about those other blood samples than about these DNA samples for purposes of identification.

CHIEF JUSTICE ABRAHAMSON: Judge Reinstein?

COMMISSIONER REINSTEIN: Well, I was just telling Jan, last week we put on a conference for the judges on our court and other people in the justice system in Maricopa County. And a person who is the head of the Sexually Violent Person Program at the State Hospital in Arizona, who is a nationally respected person in the area of sexual predators, asked me whether or not they could get the DNA samples for all the people in the SVP program and I said no.

And I think no matter what position we take, there has to be some restriction and it's got to be clear in the law that nobody can use this, these types of samples. I said that if you want to go in and ask these people voluntarily to give samples, that's something totally different but the DNA samples that are collected have to be inviolate. But, I mean, there are people out there, it's clear, that want these samples for research purposes.

COMMISSIONER SCHECK: Yeah, I mean and nothing, if the legislature decided or some governor decided that that fit within law enforcement purposes or the legislature just passed a statute saying that we want to do it, if they're there, you can do it.

CHIEF JUSTICE ABRAHAMSON: Well, that's the arguments for and the arguments against. And --

COMMISSIONER SMITH: Can I just say one thing for the record about the letter, that is not to discuss it now but that I don't think actually that the letter accurately reflects the views or what purports to be issues, the legal issues of the Working Group though it purports to.

CHIEF JUSTICE ABRAHAMSON: That's the reference that you, the Legal Working Group says don't retain, is that --

COMMISSIONER SMITH: It's obviously more complex than that, indeed the-

COMMISSIONER THOMA: I agree.

COMMISSIONER SMITH: It's wrong, so.

COMMISSIONER SCHECK: It's too bad. I thought you took that --



CHIEF JUSTICE ABRAHAMSON: But your position is the same regardless of what the Legal Working Group --

COMMISSIONER SMITH: Right. I don't think that was critical to the -- no.

CHIEF JUSTICE ABRAHAMSON: Thank you. Dr. Crow?

COMMISSIONER CROW: I was just going to ask when we're going to hear from the Legal Working Group themselves, what they are recommending.

CHIEF JUSTICE ABRAHAMSON: They were scheduled for --

COMMISSIONER THOMA: Late tomorrow.

CHIEF JUSTICE ABRAHAMSON: -- late tomorrow. All right. Well, Dr. Callaghan, thank you for coming. Thank you for your report. And you can see this is not going to be a subject upon which everyone here is going to agree.

DR. CALLAGHAN: Yes.

CHIEF JUSTICE ABRAHAMSON: Apparently.

DR. CALLAGHAN: In some ways I wish I was here tomorrow afternoon and in some ways I'm glad I won't be. I will be cross-examined, I'll probably be cross-examined at the same time in Denver tomorrow afternoon. Thank you.

CHIEF JUSTICE ABRAHAMSON: Well, this was just a dress rehearsal then. Thank you.

DIRECTOR ASPLEN: Thank you very much.

## **Backlogged Cases with Potential DNA Evidence: Survey Results**

*Dr. Craig Fraser, Police Executive Research Forum*

*Dr. Kay Scarborough and Lyndsey Taylor, Eastern Kentucky University*

CHIEF JUSTICE ABRAHAMSON: Well, the next item on our agenda is backlogged cases with potential DNA evidence, survey results. And Dr. Craig Fraser is here from the Police Executive Research Forum and Dr. Kay Scarborough and Lyndsey Taylor from Eastern Kentucky University. DR. FRASER: Can we use the overhead?

CHIEF JUSTICE ABRAHAMSON: Sure, whatever.

DR. FRASER: I'm Craig Fraser with the Police Executive Research Forum. And we have conducted a survey looking at backlogs of rape and sexual assault cases for DNA evidence. Our survey included a total of 275 police departments and, well, law enforcement agencies.

You should all have a report but I'm just going to sort of walk through on overhead some of the key findings on both the total sample, which includes large departments as well as smaller departments.

Then Dr. Kay Scarborough from Eastern Kentucky University will give some specific information about small departments and then I'll come back and do a brief summary. Some of the issues that we discovered overall are that a trend is that more and more agencies are moving towards state labs, away from private labs. I think that's not an especially surprising finding but it is something that we found interesting.

Also when there is funding, departments are starting to create in-house labs. Three of the large departments in our sample, the Los Angeles County Sheriff, Albuquerque Police Department and Phoenix as of 2000 will have in-house labs to be able to do their own analysis.

Many of the departments, many of the agencies that we talk with do not have specialized evidence collection techniques or protocols for DNA evidence. They are using the standard sorts of things for crime scene processing when detectives are those responding to the scene that they have for any other sort of evidence.

Occasionally there will be crime scene technicians that have specialized training that will help at those crime scenes and then they may be involved in the decision whether or not evidence is going to be sent forward.

We also as we talked with agencies found that many of the larger agencies especially were aware of the potential of DNA evidence in other cases besides homicides and sexual assaults but those are by far the predominant cases where DNA profiling and testing is used.

We also found that a substantial restriction in the telephone surveys that we did, we asked about whether or not they would send cases forward when there was not a suspect. About half of them said they would not but about half said that they would.

Of the 50, the numbers were actually 22 said they would not submit a profile unless they have a suspect description or a named suspect, 25 stated they submit samples in all cases. Kind of an interesting half and half split on that.

We also had a lot of problems in trying to get them to give us an actual count on the number of rape cases, the rape kits that they had in backlog. There's a lot of different counting. There's a lot of different places where those are stored. Some actually send them off to the state, they're stored there, some have them in police property, some have them in hospital refrigerators.

So, getting an accurate count of the backlogging was not especially easy to do. We also asked them about costs to get an idea of the police department perceptions were off of costs. This just provides an idea of what the range is. You'll see that in some instances, for example, the New Jersey State Crime Lab, the cost was cited to us as \$1500 but you are finding other places, for example, in Miami, Dade, Michigan State crime lab at \$50.

So there is a range of the way departments look at costs. Those that submit to private labs told us that the range is somewhere between 1,000 and \$5,000 to get a sample analyzed.

Just a little bit about the characteristics of the responding departments, just where they come from. You can see that we had a pretty good spread over the country, probably fewer in the southwest than in some other places.

The predominant ones we talked with were municipal police although a number of county sheriffs were part of our respondents and we had a few scattered other departments as well.

The total, as I said, was 275 agencies. Characteristics of the agencies, going a little bit further, in terms of the number of sworn officers in a department. Again, as you know, there are somewhere in the vicinity of 17 and a half thousand police departments in the country. Most of them are departments with fewer than 25 officers, something on the order of 93, 94 percent.

So, we made sure that we have a number of the smaller agencies included here but then we also have a good representative of the larger agencies since they will have many more cases to process. We also looked at the number of civilians in the department to get an idea as well.

Often there is a movement in many law enforcement departments to use civilians as crime scene techs or as laboratory analysts. You will see that most of the departments still have not very many civilians.

Now, again the larger departments do have more. That's where you will get often the specialized expertise to do some of this work. And then again just to give an idea of the spread of population size, you'll see that we've got an awful lot because there are so many departments in the country that are small, ranging to even several that were over a million.

And, the one that was missing data was interesting because we discovered this through our analysis once we had everything entered and it was a county that's not listed in the UCR and they

didn't list their population as well so that's why we have one that's missing. We asked the question about where does your department process DNA evidence.

Again the overwhelming response was through the state labs. A little bit of others out there, some were county labs, some were private labs but again the majority. Now, the no response was interesting. That is predominantly from the smaller sample.

Dr. Scarborough will tell you a little bit about that in detail but what we think is going on there, some small departments have had no real need to process evidence because they have not had cases that would have that evidence that would merit processing.

So, they don't know where they would send it. It's kind of an interesting sort of thing that until they get that, it's not a particular issue for them. We made some comparisons between the large departments and small departments.

Again, the breakpoint is pretty much 50,000 in population between a large department and a small department. We asked them, does your department currently assess evidence to determine whether potential DNA samples might be present?

Again we're talking now about rape and sexual assaults. And, you'll see over all, over all departments about 70 percent said that they did but that is more heavily skewed in the large departments where almost 87 percent said they did assess evidence, whereas the smaller departments, the number that said they did is about 57 percent. There's seemingly a greater awareness of the part of large departments and I think more knowledge on their part about the potential.

COMMISSIONER THOMA: Just so I understand what you're saying, your differentiation between large and small departments is a population, a base population of 50,000 or more, correct?

DR. FRASER: Correct.

COMMISSIONER THOMA: State and county?

DR. FRASER: Correct.

COMMISSIONER THOMA: Okay. Thank you.

DR. FRASER: You've got another one in your packet that I unfortunately seemed to not have with me here. It's out of sequence. The next one I think in your packet should describe their forwarding of cases they think do have evidence on to be analyzed. There there's not the same difference between the large departments and the small departments.

When there is potential evidence, only about 30 percent of those cases seem to be sent forward by large departments; small departments, I think it was about 21 percent, about 22 percent.

So, even though there's more assessment by the large departments of the potential for evidence, the actual forwarding for analysis tends to decrease. The difference between the two tends to decrease.

COMMISSIONER SMITH: But is that in your view because having analyzed they don't send forward improbable cases, or is it something else?

DR. FRASER: We've got some more data on that and there's some reasons we think that's going on. And I'll jump forward to that because as much as anything I think that's, the perception of large agencies are backlogged, that they don't move things forward because they think it's going to take way too long to get it.

COMMISSIONER SANDERS: This report also said something about they don't think, people going to court and doing some other things, they don't forward them either.

DR. FRASER: That's right. That's right. There's an awful lot of cases and we could not get from them very precise details because not only is it a perception of a backlog, there's also a lot of cases that don't go forward because they're not going to be prosecuted. There's an unwillingness to testify. It's unfounded.

And there are times, too, when district attorneys will make a decision about the case. They don't go forward in those instances either. We tried to look at whether departments had a policy governing DNA submissions and I think we found that only about 30 percent of the large departments did, about 22 percent of the small departments have a policy governing submissions.

We tried to get some idea of what percent or some numbers, what percent of the cases reported their agency have potential DNA evidence. And, each agency cited that.

So, for example, you'll see that the bulk of cases here, many departments think that they've got somewhere between 25 to maybe close to 100 percent of their cases have potential evidence.

There are only a few departments that said, gee, we don't think very many of our cases have evidence. That's right here in this, this number.

So, the way we asked the question was what percent of your cases do you think have potential evidence. And again differences, larger departments here generally think that more of their cases have potential evidence, smaller departments tend to say no. And then we've got a fair number here, too, that just didn't know. And we've got the unknowns where they just weren't sure what the evidence was.

Now, the next question we asked was about, all right, of those cases that do have potential evidence, what percent do you send for analysis, okay, of those cases that do have potential evidence what percent do you think, do you actually send for analysis.

And, we had a number of departments here, you can see this 76 to 100 percent, very high, all the way through here, that they're sending everything they think have potential or a high percentage.

So, when they say there is potential, there's a fair amount of cases being sent off by quite a few of the departments, not all of them, mind you, but a number of them look at it that way. We actually tried to get them to give us a number of the rape kits that are not submitted for processing. We asked that very specifically. And 113 departments said they had no kits backlogged.

Again, some of them were many of the small departments, who perhaps had very few rapes reported. Again we're dealing with a number of small agencies that don't typically have evidence that would be sent. We also, on the other hand, had 14 departments that had more than 500 cases backlogged.

And, you can see that each group counts for substantial. So, of the 232 departments -- of the 275 departments, 232 gave us an actual number of backlog. And when we added all those up, it's about 31,000 cases from the sample.

Now, the sample size represents 118,000 police officers across the country and the total population served by these agencies is 46 million. We tried, we were talking earlier today trying to come up with what we thought was a reasonable guess as to what the total number of rape kits across the country backlogged were and our very, very rough estimate is probably in the vicinity of 150,000. That's trying to extrapolate from these numbers based on the large departments, also based on the relatively large number of small departments as well.

So, it's somewhere in that range, again with lots of problems the way everybody counts. The counting is very different from place to place.

COMMISSIONER SMITH: Can I ask you another clarification question of the counting? In this display, where it shows 500 or more, is that of the rape kits in which they've assessed it's likely that there would be evidence worthy of analysis or is that simply a number of rape kits not sent?

DR. FRASER: Total number not sent.

COMMISSIONER SMITH: So, so where they've made judgments that they're not worth sending, that would be part of the 500.

DR. FRASER: It would be. We couldn't find any department that could break that number down for us. So, it could be actually if I take, let's say we take that 150,000, the number that actually might be useful for prosecution is probably a bit less than that. How much less --

COMMISSIONER SMITH: Depends on how good their judgments are and whether it's worth analyzing.

DR FRASER: Exactly, exactly. And, we also asked another question, a series of questions about barriers because again we wanted to know something about what were the reasons, just back on your question, sir, about what were the reasons for nonsubmission.

And, you'll note that what we did is we asked them to rate a number of characteristics from this is a real barrier, this is a very important barrier down to it's not a very important barrier. A one means it's a big, it is a large barrier. A six would mean it's not very important as a barrier at all.

And, you'll see that there's some interesting differences between the large departments and the small departments. Really starting at backlog at the laboratory is perceived here by large departments as more of a barrier, as is the lab guideline restrictions, as is that the department limits the cases.

Each one of those there's a substantially, it's viewed as a more important barrier to submission by large departments than small departments. The one that didn't seem, was the lowest barrier that anybody talked about was the department's waiting for new technology. So it's not a technological question as it is sort of a system flow question.

We also broke down to look at reasons for nonsubmission those with backlogs of more than 50 cases, those with backlogs of less than 50 cases. And, again, the difference now is financial restrictions becomes one. You'll see the difference between this and this. You will also see that the backlog at the laboratory is perceived of by those with lots of cases stacked up as a bigger barrier as well.

And you'll see again the, both the lab guideline restrictions and the department limits cases. I think that as we did some more discussion with them, that's often that question of whether or not there's a suspect profile or it's no suspect in mind yet.

Now I'll let Dr. Scarborough talk a little bit about the smaller departments because there's no many of them in the country and there's some different problems with them.

DR. SCARBOROUGH: Thank you. I'll give you a little background while we're working with the power point presentation. As Dr. Fraser said, small departments compose a or comprise a substantial amount of law enforcement agencies in the United States today. That's over 90 percent.

So we need to take a particular look at them to see if there's anything different going on with those agencies as opposed to the larger organizations. We had 153 agencies that we surveyed and our selection criteria were that the agency had ten or less officers and the population was 50,000 or less.

I want to go through some of the just demographic characteristics of the agencies and then get to the particular DNA questions. Most of the agencies that we survey were municipal agencies, as was with the total sample. County police and sheriffs made up the rest of the sample.

In the pilot survey, we looked at other kinds of law enforcement organizations like campus police, airport police but none of them had any occasion to deal with DNA evidence according to the ones that we surveyed.

As you can see, the majority of sworn officers ranged from two to fifteen, which reflects what Craig said, was very few having over 16 percent, for total sworn officers in an organization. And this is representative of small organizations as a whole in the United States.

We actually see the numbers dropping a little bit to ten officers or less when you look at all of the law enforcement agencies in the United States today. Very few civilian employees in the smaller organizations. You can see, only 70 percent had between zero and 6 and that was usually one or two, if that many.

The jurisdictions that these agencies served were less than 14,000 primarily, which reflects the total law enforcement population nationally as well. The region breakdown for the small agencies was similar to that for the sample as a whole. And the southwest, the reason for the limited amount in the southwest is because there are fewer states that actually comprise that categorization.

We looked at the DNA evidence collection with a specific focus on the rape and sexual assault crimes and then at the state and national offender databases. It's important to realize, too, that you are only talking about the sexual assault and rape cases and what their frame of reference is in small organizations.

The first question that we looked at was whether or not the department assesses evidence to determine if DNA evidence might be present at all. And over half of the organizations said that they did. Consistent with the larger departments, 78 percent of the organizations did not have any policy.

And as far as policy and procedures, they relied on their state crime labs for direction in that regard. Ninety-two percent used the state crime labs and a few organizations used other private organizations for analysis.

What percentage of rape and sexual assault cases reported to your agency have potential DNA evidence? If you look, 30 percent did not know this and between 50 and 100 percent, consistent with what Dr. Fraser said, these organizations have assault cases that have potential DNA evidence. And we found that pretty consistent.

Again when we asked them what percent are analyzed of those cases, you have a substantial amount that's unknown; that would be 35 percent. And you see the percentages decline between 50 and 75 percent. Where they were pretty consistent in the previous question, they dropped tremendously when you're asking them which cases are actually analyzed, dropped from 15 to 7 percent and 16 to 4 percent, respectively.

Asking them again how many completed rape kits does your department have in storage, and frequently in talking with these organizations, they would say -- and you have to understand, we didn't correlate this with criminal activity -- they would say that it had been a long time since they had a rape case or sexual assault case that they had to deal with.



But it's also quite apparent to us that they didn't look much beyond that in terms of the utility of DNA evidence beyond homicide and sexual assault and rape.

In other words, they wouldn't consider or be likely to consider potential DNA evidence as being useful for a property crime. Back to the other slide, you don't have to go back, Lyndsey, but between zero and 2, the mode for that question was zero. Does your department submit samples to your state's offender database and over half said no, they did not, with 38 percent saying that they did.

The no response was their not knowing what their state's offender database was and there's a lot of confusion because we asked them, you see in the follow-up question about the national database, does your department submit samples to the National Offender Database and even more said no, 67 percent and with yes saying 7 percent.

And the no response then was, appeared to be confusion on their part with respect to submission policies and procedures. They know that they rely on their state crime labs but beyond that they don't really have clear guidance as far as DNA evidence collection is concerned.

Although there were consistencies in the large and small departments, it appears based on conversations that we have with these organizations and organizations that we work with on a regular basis, their knowledge with respect to utility of DNA evidence is very limited at this point in time and they don't get very much outside the scope of the rape and sexual assault crimes and homicide.

And I think as Dr. Fraser said with respect to the perceptions of the backlog, they know that they deal with the state crime labs and they know that the state crime labs are backlogged but they don't know much beyond that.

When we look at issues of training, we had another question that we asked just the small departments about training on DNA evidence collection and about a quarter of them said that they had some in basic academy training and 36 percent said that they had some supplemental training, that would be after basic Academy and in-service training to be in-house or provided by another institution.

Six percent said that they had some combination of basic and supplemental training but 23 percent said they had no training at all and 9 percent did not even know.

And individuals that we spoke with in doing these surveys were usually chiefs of police or sheriffs or the investigator in the organization, or other, frequently in the small departments, everyone will be trained as and function as an investigator.

So we feel confident that the people that we talked to were knowledgeable to the best of their abilities with respect to the DNA evidence collection.

DR. FRASER: The sort of summary I guess is the, for large departments the single largest barrier seems to be the perception of backlogs at the state crime labs or the crime labs. Now, that's fed

partly by the limitations by guidelines that seem to restrict to suspect cases. Factoring into that is a general lack of specific DNA collection protocols for crime scene.

That seems to be a bit different now between the small departments and the large departments. Small departments, I think it's a little bit more lack of familiarity with the kinds of cases because they don't have as many of those cases as well as even their understanding there's some backlogs. We didn't pick up that financial concerns was the big barrier.

It's more capacity or systems capacity for the analysis, seems to be the kind of primary problem. Are there questions that either myself or Dr. Scarborough can answer?

COMMISSIONER DAVIS: I have a question here. As you begin your survey of the small departments, did you exclude those departments which when they have a homicide or a rape call in another agency to assist them? I mean, that's very common in Florida, at least in Dade County.

The small department will handle routine materials, routine cases but when the homicide occurs or a rape, then there's a larger department that has the laboratory, the crime scene personnel and they come in and take over.

DR. SCARBOROUGH: And frequently they would ask for the assistance of the state police or another agency. And we understand that that happens but we were just asking them about their individual response as an agency so we didn't ask them about additional assistance from organizations.

COMMISSIONER DAVIS: The question I was wondering, in some of these agencies, they may have answered your questions, albeit they never actually are in the decision making process of what's done with the evidence.

DR. FRASER: That's a real possibility. Again we weren't dealing with homicide. We were specifically only dealing with rape and sexual assault. And yes, there's some small agencies that in those cases will bring somebody in but many small agencies will still attempt to process that themselves. So there is that restriction on what we were asked to look at, which was just rape and sexual assault.

DR. SCARBOROUGH: And I would say we didn't ask them specifically about homicide. That was something they offered to us. In other words, they were categorizing the rape, sexual assault and homicide together and then not looking at it beyond that or handling it a different way.

COMMISSIONER BASHINSKI: I have a question about the demographics of crime in these agencies. You said that 90 percent of the departments are these small agencies. What percentage of the sexual assault crime that's reported in this country would you say is handled by that 90 percent of small agencies?

DR. FRASER: A much lower percent.

COMMISSIONER BASHINSKI: Do you have --

DR. FRASER: No, I don't have, I don't have those numbers with us. Yes, sir?

COMMISSIONER SCHECK: To what extent does your survey take into account the destruction of samples in, particularly in nonsuspect cases where no one is immediately apprehended, how long do they hold them and how many --

DR. FRASER: We didn't ask that specifically but what we know having been in a lot of agencies of different sizes is they'll keep it forever. I mean, in a nonsuspect case, it is rare that evidence that a police department has is going to be destroyed.

The cases, especially a special rape case will be opened, I say forever, there's probably some limitation but police property rooms around the country are burgeoning full of all kinds of evidence. And even on very, very minor cases, there's a real reluctance to destroy anything that might eventually solve a case.

COMMISSIONER SCHECK: So your estimate of 150,000, that applies to, that's the entire country.

DR. FRASER: That's a rough estimate and that would be going back years. That's not an annual basis. That probably goes back quite a number of years.

COMMISSIONER SCHECK: And do you think that that's an understated figure, or, I mean, if they're saving, how many unsolves are there.

DR. FRASER: Well, that's based on what they told us, their backlog. We didn't, we didn't, we didn't put anything specific on their backlog. I mean, we didn't say cases for 1999 or anything like that.

So, when they reported their backlog, their backlog is as far back as, as they count it. And so of the departments that we talked with, which is representative of 46 million, they told us they counted 31,000 cases for those departments.

So, trying to extrapolate from all the rest of the departments that we didn't talk with, especially the small ones, that's where we're getting into the vicinity of 150,000. But again that is in all probability all the cases in their inventory.

COMMISSIONER SCHECK: But you're assuming that they don't destroy them.

DR. FRASER: I'm assuming that but we work with a lot of police departments on a number of projects. We do a lot of studies by going and looking at departments and sometimes when we review a department, we'll review property in evidence and again the practice in the profession generally is don't destroy anything.

COMMISSIONER SCHECK: Did you compare these results, their estimates of how many they have untyped with these general statistics on the number of sexual assaults reported and the number solved.

DR. FRASER: No. Because the numbers don't match in terms of time periods. The question is how far back you would go. So, for example, should we look at the last 20 years of sexual assaults? It becomes a real difficulty making sense of numbers with such different bases.

We did collect data for the larger departments of the number of sexual assaults reported for the last year we could get for 1998 and that seemed, that number compared with the backlog convinced us that the backlog they were counting was not just for 1998 cases; it does go back farther. How far back, that was tough for us to tell.

COMMISSIONER SCHECK: What was the number for the backlog for just one year?

DR. FRASER: Um --

COMMISSIONER SCHECK: I mean for the unsolved, which was one year?

DR. FRASER: We weren't able to get the unsolved for a single year.

COMMISSIONER SCHECK: Then I don't understand your answer.

DR. FRASER: What we did is we took the number of reported rapes --

COMMISSIONER SCHECK: Yeah.

DR. FRASER: -- and looked at that number, which, unfortunately I don't remember off the top of my head. We looked at that number, compared it to the total backlog. And the total backlog for large departments was larger than the number of reported rapes for that same department, whereupon we concluded that when they told us about the backlog, that included cases for previous years. But I don't have a number for you in terms of the degree of that difference. Yes, sir?

COMMISSIONER GAHN: Perhaps some of the police officers can comment on this but my experience is that our police, as soon as the statute of limitations hits they're destroying that evidence. They have so much accumulated. And that's one of the battles we kind of have as prosecutors with our police, to hang on that. But generally my experience has been the police want to get rid of evidence, they want to destroy it, just to make room and usually it's at the statute of limitations.

COMMISSIONER CLARKE: Actually, Norm, I was going to say, that's something we wrestle with in our jurisdiction as well. Police agencies do want to destroy evidence. They have a great desire to generally at the upper level, that is, large departments.

But something that we're having to wrestle with, and other states are as well is particularly with sexual assault crimes, more and more jurisdictions are making versions of those life crimes so that they can serve life in prison, which has the affect of making the statute of limitations in many jurisdictions longer if not eliminating it completely.

So, consequently if there's a six year statute of limitations and the law enforcement agency may have a policy of destruction after seven, all of a sudden now that policy doesn't make sense because in essence the person can be usually prosecuted for a life crime now if they commit a forcible sex crime and consequently there may be no period of time safe to destroy that evidence.

COMMISSIONER THOMA: And that's a good point, the Frazier case that our Supreme Court just decided let's the state of limitations go back retroactively, too. So, it's a dangerous area.

COMMISSIONER HILLARD: What I would like to do is ask Commander Cronin, who is the commander of forensic services for the Chicago Police Department, to expound on our policy. Tom, are you back there?

COMMANDER CRONIN: Yes, sir. I'm Tom Cronin, commander of forensic services in Chicago. We likewise are having the same problem. When we have, in fact, Superintendent knows, I just did, in my budget asked for some more freezer space. When you have the postconviction cases, especially, up until several years ago we used to destroy evidence for misdemeanors.

It was after three years we could destroy it because statute of limitations up, for felons except for homicides was 7 years. And we just can't do it now.

We have just taken over the old Sears Roebuck warehouse on the west side, a huge, if anybody was from Chicago and knew the old Sears building at Homeland and Arlington is now going to be our storage and the state has now, since the state does all our analysis, they're saying now, we can only keep it for so long, you have to take it. And so we have an incredible amount of problem of where to store this stuff and how long.

Like we say, once you have your three strikes you're out, you got, you have people who are going to be incarcerated for life. And 25 years from now they decide they want now the analysis done. As we see now in our very first cases of DNA where we have now looked at postconvictions and some people have been released, prisoners are saying well, 25 years from now the technology will be much better, maybe the discrimination will be much better, maybe there can be some doubts so maybe I can get out for a new trial.

So, we have just got to find something to do if we're going to say, if we're going to extend the length of prosecutions, which some people have also talked about, we've got to find some storage spaces because we're keeping stuff forever and we're going to have to.

COMMISSIONER SANDERS: It's been my experience that with the, especially with the IECF and traveling within the departments throughout the nation is what Craig said was right. There, the evidence lockers are overflowing with evidence that the people don't want to get rid of.

And everybody is talking about coming up with money with how to enlarge the storage capacity and all that other stuff. Though a court orders you to destroy evidence for lesser, less serious offenses, I don't know of hardly anybody except maybe the big agencies but I can't imagine a

small agency anywhere getting rid of the evidence in a serious crime. And that's after adjudication.

COMMISSIONER CLARKE: One of the greatest concerns is less with law enforcement, more with the courts. Because as the holders of much of this evidence, they frankly I think at least in our experience destroy the evidence more than law enforcement does.

DR. FRASER: Well, I think that's true. Phrase phrase part of the problem is just the lack of good tracking systems for evidence and what's there. Now, we're starting to see some of that now but there's real problems of even always being able to easily say here's all the things we think the statute of limitation is up on, we would like to get rid of this.

It's just very difficult because we don't -- the technology is changing dramatically, the bar coding and some other ways of doing that but most of the systems in place in most departments doesn't allow much precision in taking a whole group of evidence, moving it forward with the court saying can we get rid of this now. Yes, sir?

COMMISSIONER SCHECK: I would make this suggestion to you. I just instinctively feel that the notion that there's 150,000 untyped rape kits extant is conservative, is extraordinarily conservative if your assumption is correct that people aren't throwing away the unsolved rape kits.

I mean, shouldn't there be a way to just go to NIJ or something and get statistics on the number of reported rapes versus the number of cleared rapes for even five years or ten years? I've got to think that that number of reported but unsolved rapes is much in excess of 150,000. I can't believe it isn't.

DR. FRASER: Intuitively I think you're right. What we're going on is what they told us in terms of what they had backlogged and then trying to extrapolate that.

COMMISSIONER SCHECK: But there's, but they're with the tracking, I mean, I have to tell you, I spend a lot of time rummaging around evidence lockers in courts in every jurisdiction and I don't think those guesstimates are, as you say, based on much hard data.

COMMISSIONER SMITH: Is it your experience working with the departments that rape kits are pretty uniformly done in a sexual assault case?

DR. SCARBOROUGH: I would say for the small organizations, I mean, it's reflected in the fact they don't have any policy and they rely on the state crime labs for guidance in these matters. But there's a lot of variety with respect to how rape kits are processed and submitted, et cetera.

DR. FRASER: Probably a little bit more consistency in large departments that have the policies.

COMMISSIONER SMITH: Consistency that they do it?

DR. FRASER: That they do it in larger, larger agencies.

COMMISSIONER SCHECK: Is there a distinction between rape kits being performed at hospitals versus rape kits being acknowledged as received in evidence in agencies?

DR. FRASER: We think so because when we were trying to get counts on the number, sometimes they said well, we don't have those, those are kept at the hospital.

COMMISSIONER SCHECK: Yes. I would really commend that to your attention because what we've found at the Innocence Project is that there are many cases, one jurisdiction for example is Delaware, where when we track it back we can't find it in the court, we can't find it in the crime lab, we can't find it in the police property clerk's office, when we go back and we can at least get slides from the hospital, which are perfectly good for doing the testing.

So if we're thinking about how to instruct a policy for some initiative, which I would strongly favor, of going back and typing over some period of time unsolved rape kits, you know, we should think about the hospitals because I've just got a feeling that there's, in terms of the estimates they're giving you, that that's big undercount here.

DR. FRASER: There may very well be and I think that what you're saying is very important because of the lack of standardization even from department to department. There's just no one way to do that. That's why the toughest question we asked was how many do you have backlogged.

And it was difficult for us even in the phone interviews where we can probe for them to go back and count, those that we used it from a factor to try to get more, those are tough numbers.

COMMISSIONER SANDERS: You still have to overcome the problem, when you say reported rapes as well, I mean, how it's reported and how it shakes out is a major difference sometimes.

DR. FRASER: That's right.

COMMISSIONER SANDERS: You might have a better job, well, no, that wouldn't do you any good with convictions but I mean, unknown suspects, but, I mean, it's, that thing would have to be dissected in several different ways, I would think, so that you would get your mind around exactly what you're talking about. Because a lot of rape kits aren't going to be done just because of what the investigators find or the responding officers.

I mean, some of them are reported a week later, two weeks later. I mean, there's a lot of things that go into consideration and so I don't know how you would match the number reported with the number of rape kits.

COMMISSIONER SCHECK: Didn't Bob Ganston and Henry Lee do a big study of sexual assault collection kits for NIJ about two, three years ago that may have some of these statistics? I remember --

DIRECTOR ASPLEN: That was before my time at NIJ. It's entirely possible. We could at least have --

COMMISSIONER SCHECK: I have feeling that there are some good numbers out there.

COMMISSIONER SMITH: We should look, we should look, we should ask for what numbers NIJ has and to dice them also.

DR. FRASER: One other set of numbers, too, that's important to look at is not just the uniform crime reports but the national victimization survey --

COMMISSIONER SMITH: Right.

DR. FRASER: Because that again gives us some idea of, we weren't able to get those numbers but it's, I was a little surprised that it was as low as it was. But again that's what they told us, the department's telling us, that sort of, and it was interesting because obviously we had some that thought they had an exact number because we got not all rounded off numbers.

Some gave us rounded off numbers obviously, others gave us exact counts, 7 or 58 and you hope that if they're giving you those that they have some knowledge of exactly what's there.

COMMISSIONER SCHECK: Because I can tell you, we've used this number before here and it's in the record but in New York City when we stopped the destruction after five years, we counted out 12,000. And that's, that's, in other words, a snapshot of five years of unsolved sexual assaults in the City of New York of 12,000. It's just five years.

COMMISSIONER SMITH: And do you know how many rape kits there were?

COMMISSIONER SCHECK: I'm telling you, it's twelve thousand.

COMMISSIONER SMITH: Twelve thousand rape kits?

COMMISSIONER SCHECK: Yeah. In a safer, you know, I asked him, he stopped it and we outsourced them. So we'll see what happens but that's 12,000.

DR. FRASER: But New York City accounts probably for 10 percent of the rapes in the country, would be my guess. I'm picking a number but it's probably a very large number of the total rapes in the country.

COMMISSIONER SCHECK: I don't know.

DR. FRASER: We can find that out.

COMMISSIONER SANDERS: Another reason for me not to go to New York.

DIRECTOR ASPLEN: Just to kind of look back as to how we got to this point, you may remember that in our meeting in Albuquerque we kind of decided that we would just look at rape kits and rape cases. Our original intent was to kind of take a broader view at what quote-unquote the potential DNA evidence was not being processed.



So this was the easy one. You know, we did it this way with the thought towards this was a relatively finite proposition that would be easier for us to kind of get our arms around. And, obviously it, even this issue is incredibly difficult.

COMMISSIONER SMITH: As we were.

DIRECTOR ASPLEN: Right, right. I have another question. Did you get an idea of the extent to which agencies are aware of CODIS in general and the use of the database to solve crimes in general?

DR. SCARBOROUGH: We only asked them, really asked them in a pilot test about CODIS and --

PARTICIPANT: I did not experience that at all.

DR. SCARBOROUGH: No, there was not any awareness. There were fifteen pilot tests.

DIRECTOR ASPLEN: There was not any awareness of the database in general.

DR. SCARBOROUGH: No.

DR. FRASER: Well, that's in the small agencies.

DIRECTOR ASPLEN: Right.

DR. FRASER: There's more awareness in the larger agencies. It's not something that they automatically know but there's more awareness that there is a national database on the part of many of the larger agencies.

COMMISSIONER HILLARD: But doesn't the large agencies or the small, the medium size agencies have any type of training for the specific, the detectives, the crime scene investigators?

DR. FRASER: I'll ask my colleague back there. Terry, do you remember, were there some that cited specific trainings?

MR. DWARNIK: Good afternoon. My name is Terry Dwarnik. I'm a research fellow with the police executive research department, on loan from Calgary, Alberta, Canada. What we found was that many of the larger organizations have formal trainings in place for the detectives but in general the formal training was for the crime scene technicians in terms of collection.

DR. FRASER: So it tended to be more for the crime scene specialist, not for detectives generally, Terry, is that right?

MR. DWARNIK: That's correct, yeah. Most of the formal training in the telephone interviews that I conducted was given to the crime scene technicians themselves.

COMMISSIONER SANDERS: That's what caused us to do this thing, is because we assumed that, right?

DR. FRASER: And I think what we found out confirmed the need for that.

CHIEF JUSTICE ABRAHAMSON: Good. Any other questions or comments? Do you have -- I see none. Do you have any other things you want to tell us?

DR. FRASER: No, ma'am, other than we found it a very interesting piece of research to do.

CHIEF JUSTICE ABRAHAMSON: Good. Thank you.

DR. FRASER: And difficult.

CHIEF JUSTICE ABRAHAMSON: Thank you very much.

DIRECTOR ASPLEN: Thanks for the information.

COMMISSIONER SANDERS: They're having a sidebar over there, Your Honor.

CHIEF JUSTICE ABRAHAMSON: Right. I know.

COMMISSIONER SANDERS: Without us.

CHIEF JUSTICE ABRAHAMSON: We'll question them closely if we can get their attention. Where's Christopher? We're scheduled for a break soon. Take it now?

DIRECTOR ASPLEN: Yeah, why don't we take it now.

CHIEF JUSTICE ABRAHAMSON: Let's take a break now. Can we give them more than 15?

DIRECTOR ASPLEN: Sure.

CHIEF JUSTICE ABRAHAMSON: All right. More than 15. Why don't you stay close, 25 to 25, okay? Good.

(There was a break in the proceedings.)

## Crime Scene Investigation Working Group Report

CHIEF JUSTICE ABRAHAMSON: We are back in session, despite the golf, and we are going to talk about crime scene investigation in the Working Group but Chief Gainer is not here. Kay Scarborough is going to help us out. Is Kay in the room?

DIRECTOR ASPLEN: Yeah.

CHIEF JUSTICE ABRAHAMSON: There you are. Sorry. And then Chris Asplen will fill in also. So, Kay? Thank you, by the way.

DIRECTOR ASPLEN: Yeah, so everyone knows, this was, Kay was attending this meeting for the purpose that she served about a half hour ago. She's doing this at my request, kind of off the cuff, given the fact that Chief Gainer couldn't be here today.

COMMISSIONER THOMA: Did you say Terry was going to be here tomorrow --

DIRECTOR ASPLEN: He'll be here tomorrow afternoon, yeah.

DR. SCARBOROUGH: I'm going to give you a brief overview of the computer-based training project and tell you where we are right now with it and what we project for the future, at this point.

Most of you know that this was a larger project that was funded by the Office of Science and Technology to develop computer-based training for law enforcement with a focus on small and rural agencies but not exclusive to those, in other words, these computer-based training modules would also be able to be used by medium and large departments as well.

Since we started working with the Commission, we have met with the Criminal Investigation Working Group on a couple of occasions as subject matter experts to help us identify the target audience and what they felt the substantive content of this computer-based training should be.

And, I can tell you that the brochures that have been developed through the Commission are the outline for the beginning part of the computer-based training module. And based on what we learned in the surveys, too, from the small organizations, and I think the medium and large organizations as well, this is exactly the kind of information that they need.

And approaching it from just the information, dissemination standpoint is the direction in which we need to go as far as the training and technical assistance are concerned. Because there are a lot of inconsistencies with training, I think you know because we deal with various state post commissions, and different agencies have different training requirements and mandates, it's been difficult for us to come to consensus with respect to who this would be for and what the content would be.

We tried to decide actually what we should call the first module or the first part of the module and initially decided it would be first responders and then we decided that we would just move to

a beginning and advanced module based on what the subject matter experts said. And so that's the fact that we've taken.

In our last meeting a few weeks ago the subject matter experts, that being the criminal investigation work group, approved both the outline for the beginner, which, like I said, is based on the brochure, and the advanced component of the computer-based training module, which has certain sections that are just more developed in the beginning based on what we felt individuals that we're dealing with DNA evidence would need beyond just the initial crime scene preservation stage.

Understanding that because of the differences in law enforcement organizations you might be talking about a uniform patrol officer, you might be talking about a detective, you could be talking about a civilian evidence technician, too. Our primary target would be law enforcement officers but certainly this could be used in other kinds of organizations that did employ civilians to work in these areas.

Initially a concern that was raised at the last meeting of the Criminal Investigation Working Group was whether or not the computer-based training would be able to be used in the medium or larger departments, say roll-call training.

And we decided then that it would be advisable to us at that point to break it up within the computer-based training module so that it could be used at roll-call with a facilitator if need be.

The initial project was designed so that individuals could use these computer-based training modules in a remote location to make training easier for the small and rural agencies but through the development of the project and working with actually the subject matter experts, we have determined that we can make it user-friendly for everybody, which is a real plus as far as the training is concerned.

Following the last meeting, the subject matter experts were asked to give us any additional information as far as bibliographic references were concerned or specific guidelines that they would have included in the computer-based training module and we have just received those.

So now we're in the process of attempting to assimilate that information and prior to our next meeting with the subject matter experts we have to meet with the advanced systems technology who we're working with for the instructional design system.

And then after we do that we're going to meet again with the subject matter experts to go over one more time before they actually do their work in terms of developing the computer-based training module. And then certainly they will be involved in the review process from the flowcharts to the alpha version to the CD before it is disseminated.

We feel confident that especially in light of what you said as far as your two-year extension is concerned that this will be done before that and optimistic that this project will likely be completed in the spring of next year. So we feel very good about that.

A couple of points that I wanted to raise. Based on what we learned in the survey and our experience with training that are particularly informative to us or at least something that causes us to think about especially with regards to the training is the notion that the backlog in the labs is apparently problematic for all agencies no matter what the size is.

And so that has an effect on officer's attitudes with respect to submitting evidence. Although the smaller agencies don't have as many occasions to do this for the rape and sexual assault crimes, because they don't have as many as the large organizations that are more highly populated, the question remains as to whether or not they would if in fact they had the opportunity to do that.

And then the next question is would they consider DNA evidence collection for other kinds of crimes. Based on our experience through that survey and anecdotal evidence from our working with organizations that the knowledge level is minimal, at this point, with respect to DNA evidence and consequently collection procedures.

Small organizations get a fair amount of training as far as criminal investigation is concerned but nothing specific most of the time with respect to the DNA evidence collection.

So, if we train those officers using your recommendations as a guideline and all these officers start collecting DNA evidence, the question is what are the organizations going to do with respect to property and evidence in terms of how long they're going to keep it and where they're going to keep it and then with respect to the crime labs what are we going to do about the increase in the backlog because that's likely to happen.

You know, if we're talking about working with private labs, if we could cut some of this off I guess initially, we have to develop relationships law enforcement agencies do with the state labs if we're going to work within that kind of process. And I know sort of points were made with respect to working with hospitals as far as the DNA evidence collection and things like that are concerned.

It seems relatively clear to us at this point, we have to ensure that the officers, A, know about DNA evidence and know how to maintain control of the crime scene and collect it, et cetera, before we can start suggesting that they work with other agencies to deal with evidence in a timely and efficient manner. That's all I have.

CHIEF JUSTICE ABRAHAMSON: Any comments or questions?

COMMISSIONER DAVIS: I'm going to make a little comment on this. I hear a fear that people know too much, may overburden the system. Well, the other side of the coin is if people know a lot, the system will eventually be forced to change to accommodate the advance in knowledge. So, knowledge is very good for people, for this.

The second thing I would like to comment a little bit about, and that is that I receive in the mail maybe once or twice a week a throw-away CD-ROM disc from different companies, especially AOL and a bunch of these others. Obviously they're cheap as dirt. It costs them nothing to reproduce and send those out by the millions.

And I could see two types of CD-ROMs coming out of your endeavor, one that fits the requirements for state police standards and training Commission training, high level, very intense, proper, whatever the buzz words are for the educational process but I can also see the advantage of a very inexpensive freebie type, mailed out to all the law enforcement agencies in this department or that department or not agencies but to individual law enforcement officers. Let's face it. We may say the department doesn't have a PC but everybody in the department has one at home if they got kids.

And, as I was looking at this brochure, for example, this cut-out part here listing the various things that might have evidence on it, I could see a little throw-away deal with pictures and illustrations of this and how to handle it, et cetera, where it would be very advantageous for just the rank and file officer to have. And if he wants to throw it away he can or give it to his kids for a school project.

So you leave out the blood and gore for that. And, that's just a comment I have to make on this because I see great advantages in spreading the word and this is one way to do it.

DR. SCARBOROUGH: If I could, I appreciate your comment. You raise an important issue for us. We're still in the, I guess the discussion phase about how that computer-based training would be distributed and certainly NIJ has some, will provide us with some guidance in that regard.

COMMISSIONER DAVIS: I could see the advanced one, the one that is going to be used for police training per se, I could see that being very carefully engineered and orchestrated to fit in with all the police standards and training, academies and the way they do things.

But, I could also see a popular version that would be of great help at the various, very lowest level, not only to the officer but the kids and his family at home. And, politically, from a standpoint of voter support, it's a way of getting the word across.

DR. SCARBOROUGH: As far as the design of the computer-based training right now, we could go two different ways, having a part A and a part B, like you are distinguishing it, or having two CDs. One would be the beginning and one would be the advanced. But you raise another important point with respect to standardization because there's not any.

And we deal with various state post commissions and state training agencies and here because we struggled so long with standardization of training and law enforcement, this could be a turning point for us in that you're in a unique position here to present that as a standard that agencies could recognize because we can't get the computer-based training accredited by every law enforcement agency or even accepted for training.

I can take it in my state and have it go before the Kentucky Law Enforcement Council and they could approve it for in-service training, which they're mandated now 40 hours every year but we can't do anything like that on a national level. We can, though, offer that as a standard using the International Association of Chiefs of Police, the National Sheriffs Organization, the National Center for Women and Policing, those that have input into decision making as far as training is

concerned and you can set a precedence for that. We've never been able to do that before but certainly this is an opportune time to try something like that.

CHIEF JUSTICE ABRAHAMSON: Any other comments? Thank you very much.

DIRECTOR ASPLEN: Thank you. Kind of along those lines before we start the discussion on the recommendation, I met with representatives from the Law Enforcement Television Network, which produces 24 hours a day, 7 days week training on a limited network for law enforcement agencies.

It goes out to about 3,000 different agencies of one sort or another. And we talked about turning the basics of the pamphlet into a five-minute roll-call session for their network. They do a lot of that. They do a number of five-minute roll-call sessions and they also do larger or longer, more in-depth spots of about 40 minutes.

So, we're considering that possibility also, where we would, again this would be something that would be used in a roll-call fashion but would simply be used over the television network that the police department has. So, another way to get the word out.

### **Recommendation, Law Enforcement and DNA Evidence**

If we could now move to the recommendation, which looks like -- thank you. No, the law enforcement, yeah, that one. This, the recommendation on law enforcement and DNA technology, the front page has defining the issue and there's a single page; the back has the actual recommendation on it. This recommendation was originally, the original concept was that it would accompany the pamphlet and address some other issues.

This discussion came up at the Santa Fe meeting as to how to do this and the idea of a summit meeting, wherein the Attorney General would convene a meeting of law enforcement representatives to discuss, to analyze the issues that we're obviously talking about here but to really bring that home to the law enforcement community in a more tangible way.

So, in talking with the crime scene investigation group, we drew up this recommendation which, as you see, defines the issue to some extent and then on the second page makes a number of recommendations, including that the pamphlet be disseminated in a very wide range. But if we could at this point in time talk about any changes, amendments you would like to make to that particular recommendation that would go to the Attorney General, as the other two recommendations have, the CODIS backlog recommendation and the arrestee recommendation, this is the one that would go up next. It has been approved by the Crime Scene Working Group but is obviously subject to the approval of the Commission.

CHIEF JUSTICE ABRAHAMSON: Has this been distributed before?

COMMISSIONER SMITH: Yeah; yeah.

CHIEF JUSTICE ABRAHAMSON: Okay. Why don't we start, yeah, why don't we start on the first page on defining the issue. Any suggestions or changes?

COMMISSIONER THOMA: Just one comment. Having been at the meeting where we discussed this and I think it Terry or Darrell at that meeting brought up the point, while we could always do more, I think pitting it in the context of more resources need to be devoted as opposed to presently things are inadequate or not done properly because of a lack of education. Because what those two law enforcement people, and Terry, I think you were at the meeting as well, I don't remember whether you mentioned this as well but it puts them in a tough position with regard to present cases when you're talking about future advancements.

You can say we want to do more, we want to devote more resources but it puts them in a tough position when you're saying right now they're being trained inadequately.

So, and, Darrell just walked in now. I think that if anything the phrasing, they had a little problem with the phrasing of the resources being inadequate now as opposed to let's devote more resources to it in the future and leaving out the fact that there are problems that exist because of inadequate resources.

CHIEF JUSTICE ABRAHAMSON: Second full paragraph, first sentence would be need to be increased, maybe, education resources.

COMMISSIONER THOMA: And I thought that's what we agreed.

COMMISSIONER SANDERS: That's what we agreed to, yes, we did. That's what we agreed to.

CHIEF JUSTICE ABRAHAMSON: No problem.

COMMISSIONER THOMA: Boy, I'm starting to sound like a law enforcement person just because I was just sticking up for my friends here, you know.

COMMISSIONER SANDERS: The newspaper identifies you as a prosecutor.

COMMISSIONER THOMA: Right, right. That's scary enough, isn't it?

CHIEF JUSTICE ABRAHAMSON: The majority of law enforcement has, does that sound good?

COMMISSIONER THOMA: Do you see where I mean Darrell, that second paragraph?

CHIEF JUSTICE ABRAHAMSON: Yeah.

COMMISSIONER SANDERS: I think I'm reading the wrong --

COMMISSIONER THOMA: Here.



COMMISSIONER BASHINSKI: Just change the sentence that the Commission believes that more educational resources need to be devoted to training. That's what it should say.

COMMISSIONER CROW: Or you might say not keeping up with the rate of change of the subject matter itself, just not --

COMMISSIONER SANDERS: That the awareness thing as Dr. Scarborough and them pointed out, a lot of the smaller agencies don't know about and that's what we're suggesting, is resources need to be committed, not that they're doing a bad job now.

COMMISSIONER BASHINSKI: In which case you want to substitute the word awareness for understanding in the second sentence.

COMMISSIONER SANDERS: I would think just so, so it doesn't make it sound like they're not doing what they're supposed to be doing.

COMMISSIONER THOMA: We just want to devote more resources, which is the whole key to what our recommendation is anyway.

CHIEF JUSTICE ABRAHAMSON: Why don't you just say the majority of law enforcement has limited awareness of the convicted offender, would that, Jan, is that okay?

COMMISSIONER THOMA: I think that's closer to what they would prefer.

COMMISSIONER SANDERS: Now, is that, that's an understanding that everybody understands that the majority of law enforcement comes from small agencies because it's, you know what I mean, that's --

CHIEF JUSTICE ABRAHAMSON: Maybe we ought to say that.

COMMISSIONER SANDERS: To me because if not, because that's where the problem's at.

COMMISSIONER BASHINSKI: Well, the large agencies aren't as aware as they might be.

COMMISSIONER HILLARD: Well, we got some problems with the large agencies --

COMMISSIONER SMITH: Making this problem look less serious than it actual is, be careful not to tone this down too much.

CHIEF JUSTICE ABRAHAMSON: Well, we want to keep it serious but not --

COMMISSIONER CROW: Not pejorative.

CHIEF JUSTICE ABRAHAMSON: Not pejorative.

COMMISSIONER THOMA: And I agree but I think the point is the crucial need for the devoted resources, not to point out how badly --

COMMISSIONER SANDERS: Other thing we talked about, you don't want to offend us.

COMMISSIONER SMITH: Oh, I understand.

CHIEF JUSTICE ABRAHAMSON: Right.

COMMISSIONER THOMA: Right.

COMMISSIONER SANDERS: And if your language is too strong, you're going to offend us and what we were hoping, we could do it in a way like this thing, something that was a tool and what we said to them is we know we're not giving you the tools that you need so therefore this is our recommendation.

COMMISSIONER SMITH: But the point of it is somehow the benefit to all of us that's not being achieved at the level it could be achieved if there were adequate training and so forth. It's not that their inadequate.

COMMISSIONER THOMA: Right.

COMMISSIONER SMITH: It's that the benefit to us isn't sufficiently realized.

COMMISSIONER THOMA: That's the point.

DIRECTOR ASPLEN: Chief Sanders, in terms of noting the issue as it pertains to smaller departments, what I thought when I heard the prior presentation was that on the second page under the recommendation page, we could actually bullet out as maybe a D, including that as a specific issue that needs to be addressed, would be the education of smaller departments.

That might be where that concern might be appropriate, to just include it in the number of specific issues that should be addressed.

COMMISSIONER SANDERS: I would think that that's correct. The only thing that concerns me was as we talked, remembered in past meetings that DNA's only been here ten years. A lot of people still are not, they're not knowledgeable in what it can do, what it can't.

And as I told you what's going to happen is the more we're successful we are with this, then the more that the smaller agencies are going to want to use it for burglaries, because they don't, as you've already heard this afternoon, the homicide rape case is not there but we all have a lot of burglaries.

And, that's the number one priority in most of the smaller jurisdictions, is property crime. So that as we make them aware of this, that's the downside to it, I guess. If you think you got a load now, just wait.

COMMISSIONER SMITH: It's not really a downside, is it? I mean, a load is a load is a load.

COMMISSIONER SANDERS: Well, if you're concerned with backlog and Jan and them is talking about the numbers that they got coming in now, have you ever thought about how many residential burglaries, just use residential burglaries, not alone business, that occur in this country in instances where you could collect DNA evidence.

COMMISSIONER SMITH: So your point is that the state labs, certainly --

COMMISSIONER SANDERS: Yes, will be overwhelmed.

COMMISSIONER SMITH: -- the large departments, huge demand, doesn't have capacity to handle small departments demand on the lower level crimes?

COMMISSIONER SANDERS: That was the reason we had the discussion was that therefore we would have to encourage everybody that's made aware of this to work out with their laboratories what would be submitted and what would not because if not, they won't be able to get in their laboratories. You think our evidence lockers are full now.

COMMISSIONER SMITH: Okay.

COMMISSIONER BASHINSKI: But does that change our recommendation?

COMMISSIONER THOMA: No, no.

COMMISSIONER SANDERS: No, it doesn't change our recommendation. No, I'm just saying we need to be aware of that so that we don't lose sight of the fact that we got to work out those arrangements about what will be submitted and make that as part of the educational process.

COMMISSIONER THOMA: If anything on the recommendation I think the only additions, what Chris pointed out and we did talk about the smaller agencies needing it in particular but I don't know that we necessarily need to add that as a --

COMMISSIONER BASHINSKI: No, I was going to say that I don't know that we, have we identified that that's totally so, is that we --

COMMISSIONER HILLARD: You know, one of the things that I want you to get into, Darrell was talking about offending, offending us in law enforcement. Well, you could offend us all you want to but we still have to move on to the next level.

One of the things that you must realize, this is not only the one topic where we don't get consistent and ongoing training. We got a lot of other topics out there, too, not only small departments but large departments.

You know, you got to really, I'm telling you, we, we have to move ahead and put in the strongest language as possible, when it comes down to this, you know. No, offending us, no, but the thing about it is don't forget the large agencies, 13,500 plus.

And I bet you -- and I got Tom Cronin back there and he can verify what I'm saying -- we could go through each and every one of those young officers and there would be a certain percentage, a large percentage, who have no clue whatsoever what DNA is about, you know. And you got New York, you got Chicago and you got, don't forget about the major city chiefs.

You know, that's one of the things that they, they have a lot of clout when it comes down to this project that we're trying to do, when it comes down to training. And we got to move ahead, Darrell. It's not just the small departments; it's the large ones, too. We're lacking big time, I mean big time and I can truthfully say that.

COMMISSIONER THOMA: So if I'm to understand, we don't need to change the recommendation but I still think it wouldn't hurt to just change a little bit of the terminology with regard to defining the issue on the second paragraph.

DIRECTOR ASPLEN: Yeah. What I'm hearing is that we just need to change the tone of it, not the message of that second paragraph.

COMMISSIONER THOMA: Right. And I'm just speaking because I know not everyone from that group is here but I'm just kind of reporting back what we decided.

DIRECTOR ASPLEN: Yeah, I think we could certainly do that.

CHIEF JUSTICE ABRAHAMSON: Third paragraph, that's the comparison of United States and the United Kingdom.

COMMISSIONER REINSTEIN: What Darrell said, I understand that the labs are going to be stressed if you increase the types of crimes but, you know, when we talk about us as being the Commission of the future of DNA evidence, I think that in conjunction with the lab funding group and recommendations that come out of that, that we should be recommending that for the future there be state and federal funding to solve residential burglary cases, that we don't just talk about homicide and sex cases.

I think the goal should be that we get to the level that they have in Great Britain when they are solving car thefts and burglary cases because that, I mean, I think that's the future for law enforcement.

COMMISSIONER SANDERS: Well, for the record, please don't misunderstand me.

COMMISSIONER REINSTEIN: No, no, no.

COMMISSIONER SANDERS: I never suggested because if you were at the meeting, I'm jumping up and down and saying as a chief in a small agency this is what I need, I need to be

able to do this. And then how do you say to the people in my community because you're not getting raped and murdered we can't use this technology to benefit you? So I agree with you wholeheartedly, so, if I --

COMMISSIONER REINSTEIN: Right, oh, no, no, I meant that when we come up with recommendations and as far as the lab funding group that the training be read in conjunction with the need for funding, not just for homicide and rape cases.

COMMISSIONER SANDERS: Yeah, right.

COMMISSIONER REINSTEIN: But for everything.

DIRECTOR ASPLEN: Yeah, Judge, I think the other kind of important dynamic to realize hear, and Dr. Forman and I have heard this on both the state legislator level at the national conference of state legislators and in the federal government.

One of the things we're hearing is that in terms of financial support for DNA related propositions, be it backlog reduction, be it more money for nonsuspect cases, it's that law enforcement has not put this on their list of priorities.

The way it was phrased to us by somebody at the National Council of State Legislatures was listen, law enforcement comes to us with a list of their top five wants and we give them their top three or four. When this issue comes up to that level, then we'll know that we should give them that money.

Now, obviously it's not that simple but I think the point is the more we educate and the more that we get law enforcement to use it more, and we will create some, you know, somewhat of a larger nonsuspect backlog by doing this but by raising the issue in that regard, it then kind of bubbles to the top of the priority from a funding perspective.

COMMISSIONER REINSTEIN: Well, I think what law enforcement doesn't understand as far as if you're not on the Commission, I mean, because it was surprising to me is how far Great Britain has gone and that how great a tool this can be for property crimes and that education and training needs to go out there because I think then it will bubble to the top and say, see what a great tool this is for law enforcement.

COMMISSIONER THOMA: And Ron, I think in general in terms on the third paragraph, that's what we're saying, especially if you look at the final sentence.

COMMISSIONER REINSTEIN: Right, yeah, yeah. I think that's important. And as far as funding goes, one of the things we're looking at in Arizona is to take the tobacco money, some of the tobacco money, and it's a lot of money, we're talking, you know, hundreds of millions of dollars, there's a fight over that money within the states but maybe some of that can go to the labs.

CHIEF JUSTICE ABRAHAMSON: Barry?

COMMISSIONER SCHECK: One of the things I would add because I think both chiefs are right about this point, that I think you have to add in here some strong language about state and local governments giving adequate funding to increase the capacities of laboratories because they could, to do it.

I mean, what the data showed from your survey is that the reason that many law enforcement officers are giving for not submitting it is that they're told by the laboratories that they have backlogs or it's not within their case guidelines, et cetera.

I mean, to be totally frank with you, I've been saying this from the first day of this Commission, I think it's a national scandal that there is not adequate resources to use this as an investigative tool.

And it, and I think there's a lot of demagoguery on the state and local level about crime, you know, which does not include some effective measures to fight it and you don't give people on the street the tools to do it.

So I'm not at all convinced that it's the lack of training or that cops don't know that DNA can help them per se although they obviously need training to use it effectively and collect it properly but I think that the state legislators are just dropping the ball here.

COMMISSIONER HILLARD: Well, I think one of the things, too, is when it comes down to people like myself and like Darrell, when we get ready to go in for the budget, the last thing that we think about, you know, me, I would think about until we turn it over to the state was the forensic lab. And now with the advent of DNA, that's one of the main, our main topics. And not only do the rank and file have to be educated, I'm glad to see you got the summit there.

Bring those chiefs and those sheriffs and those association chiefs in and tell them what they need to do in order to move ahead. I'm looking at 488 homicides right now, as of yesterday, and I hope I don't hit 700 like I did last year, you know, but like Darrell said, he's more concerned about burglaries. I'm more concerned about homicide and then the rapes.

CHIEF JUSTICE ABRAHAMSON: Well, as I -- I'm sorry. Go ahead, Norm.

COMMISSIONER GAHN: Just one comment. I think I briefly talked about this in Santa Fe and I don't know where this fits in but one thing that concerns me, we seem to be leaving or not fully addressing the victims. And, the reason I bring that up is because we have had some great success in Wisconsin with, you know, our case-to-case index and identifying rapes from back five, six years ago.

You know, when the police bring in a case that is charged today, we have a victim witness advocate who then works with the victim from that point on once you charge a case. But so often now it's back to the police are the ones who are going out and finding the victims from four, five, six years ago.

And there's a range, quite a range of responses by the victims of sexual assault. And, if you are pushing the envelope like we are in Milwaukee, I'm issuing criminal complaints, warrants for arrest based on genetic code, hoping to save the statute of limitations and some day those will come up but the police then go out and contact these victims, let them know what's going on.

And again sometimes you get the response, oh, good, how wonderful, sometimes leave me alone, this is all over with, sometimes the person is married and doesn't, and it depends how you contact that victim now, whether by phone, whether -- I think we have to address also or somewhere bring in how victims are going to be approached as we get more and more of these cases because right now the victim witness advocates per se aren't involved with them.

It's back to the police and how they're going to contact them in what fashion, what are they going to tell them because oftentimes your victim would say I'm done with this, I'm over it or I've never received any type of therapy and she could be a mess. And I've seen it. I've seen it. It's an issue that has to be addressed, I think, on handling of these victims and reopening these old cases.

DIRECTOR ASPLEN: I think we were very careful to address that in the postconviction document but, you know, I think you're generally right.

CHIEF JUSTICE ABRAHAMSON: Put a couple of lines in.

DIRECTOR ASPLEN: Yeah.

CHIEF JUSTICE ABRAHAMSON: Or we could do it and turn over the page on recommendation. The recommendation is that the, two-fold, that the Attorney General hold a National Law Enforcement Summit to in effect educate. We don't want to use a condescending word and "discuss" I don't think is powerful enough.

So, have to get a better, words, get better words in there to discuss such DNA issues as financial resources. There we could put local and state funding, national, local and state funding; training, and the identification of preservation and collection, and then using DNA to investigate and solve old unsolved cases. We could put in the special needs of both the small and large law enforcement departments.

DIRECTOR ASPLEN: Well, you're the judge.

CHIEF JUSTICE ABRAHAMSON: I mean if that's what you want, put something in there, but, and that would be the summit and that's the way of getting the word out. I think that was the goal. And the second recommendation is to distribute this as a starter.

DIRECTOR ASPLEN: We could include at a minimum, I think we should include the victim's issue as a particular concern to be addressed here. I'm not sure that that's adequate and that there aren't other things that we, that we, you know, that we can and should do.

CHIEF JUSTICE ABRAHAMSON: Sure.

DIRECTOR ASPLEN: But that's, I think it should at least be included.

COMMISSIONER THOMA: At least as a start we could use that as D within the context of the summit.

CHIEF JUSTICE ABRAHAMSON: Yeah.

COMMISSIONER SANDERS: Right, right. When I was talking earlier about the small, I don't necessarily think you have to bring it up because I think the Superintendent's exactly right about all the law enforcement.

What I was concerned with is coming from a small agency, I see documentation and things in print that are suggesting that I'm not doing my job, then I'm not going to be responsive. That's what I was talking about, the small agency.

CHIEF JUSTICE ABRAHAMSON: The small agency.

COMMISSIONER SANDERS: But the knowledge and awareness of DNA, certainly I think the Superintendent has very well described the fact that all of law enforcement may fall into that category. The thing that I would think that we have any way of addressing is, for instance, is the thing we've got Kay and them doing in Kentucky about developing that CD-ROM. My agency's small enough that I can make them spend an hour watching it. He's got 13,000 cops. There's no way he can use that.

I mean, so his method of deployment, whether there's other ways of doing it, I would think that would be a big concern as well. So if we were going to break out resources allocation in that regard, then I would be for it but I don't think we need to say that small law enforcement's got this problem and large has got that.

I just think that the awareness, we need to make all of law enforcement aware but I just didn't want to suggest that if we say it in a certain way, I'm telling you small agencies, you'll turn them off, they will not be responsive. And that's what I was concerned about.

DIRECTOR ASPLEN: I think what I see doing as I kind of re-look at that paragraph is, quiet frankly, putting it more on the state, the local, state and national funding agencies, and putting it on them saying that they haven't provided the resources that really empower law enforcement, enable law enforcement to do these things. And I think if we do it that way, I think that they shouldn't be offended, we can make a good point.

COMMISSIONER BASHINSKI: Also with regard to the victims, the Crime Scene Working Group was talking about going back and coming up with protocols for looking at old unsolved cases. And I think we had discussed in that context the victim issues.

And I think your point, Norm, is that we should maybe increase that aspect of that particular thing that we're still working on and I assume we're going to continue to address, because I think that's where it really belongs, to be considered in detail.



COMMISSIONER CROW: Suggestion just about writing but we could and should make the point I think that DNA technology is changing much more rapidly than most other aspects of crime investigation and it's not being, in some sense, it's hard to keep up with.

CHIEF JUSTICE ABRAHAMSON: I can keep up with it unless there's continuing training.

COMMISSIONER CROW: Yeah, training and more money.

DIRECTOR ASPLEN: Quite frankly, my biggest concern about this recommendation is that probably the biggest issue is the nonsuspect issue. And I don't think that this document really adequately forcefully enough addresses that.

So one of the thoughts is while it can be included here as we have it in, I guess A, I guess the next question is what can the Commission do aside from this document.

And we've included it in, in the other two recommendations. We've included something about nonsuspect analysis but we've never done anything just on nonsuspect analysis. And, given what we know about it and given today's presentation, the question is, what recommendation do we make, what form does that take, how do we address the real core issue, which I don't think this does and really wasn't intended to do that strongly.

COMMISSIONER SANDERS: That's what I thought. I thought this was to address the one concern we had, which was the awareness and education of law enforcement referenced to DNA.

DIRECTOR ASPLEN: And I'm not suggesting --

COMMISSIONER SANDERS: I mean do exactly, do something along the same line with nonsuspect cases because that's, first off, you got to have a favorable influence on policy decisions. It's going to create the local agencies to even put resources to it because you know there are some in law enforcement that say I'm worried about the crime that's going on right now as far as they don't want to get into cold cases. So nonsuspect cases are, you know my feeling about CODIS, I think we should sample arrestees and put everybody in CODIS and it would help us all.

CHIEF JUSTICE ABRAHAMSON: And all of us, too.

COMMISSIONER SANDERS: Exactly. Me too. I'll volunteer to go first. For the record, Your Honor, the U.S. won the Ryder Cup.

CHIEF JUSTICE ABRAHAMSON: Pardon me?

COMMISSIONER SANDERS: I said for the record the U.S. won the Ryder Cup.

DIRECTOR ASPLEN: U.S. won the Ryder Cup.

CHIEF JUSTICE ABRAHAMSON: I was worried about that.

DIRECTOR ASPLEN: God bless America.

COMMISSIONER DAVIS: Let me ask a question in reference to funding and support for laboratory services. And I'll put this question to Terry over here, Terry Hillard, chief in Chicago. When you prepare your budget, your budget is based upon your perceived needs, the officers, the employees within your department and so forth. The state laboratory, which you must depend upon for your DNA analysis, is a totally separate agency.

So as you do your budgeting, you're focusing in on your immediate needs, not their needs. And that to me is one of the areas that may lead to problems of getting adequate funding.

In your department, you're right there, you can go in and beat on the local people who are the ones who pay your bills and so forth and so on and sell them of what your needs are. But how effective an argument can be raised for raising the laboratory services, say creating more laboratories, decentralizing laboratories, putting DNA laboratories around as opposed to, say, some big central laboratory that everything goes into and then gets lost, how, how can some concept be developed to emphasize the need for more laboratory service for DNA for the chiefs, the small departments, the large departments and so forth.

The chiefs have got the clout in their community but it's hard for them to exercise that clout when it's over at a state lab in some other jurisdiction.

And, I don't know the answers to this. I'm sort of just asking a rhetorical question here and hoping that maybe it will stir up something that might open some avenues of thought towards better funding for these laboratory services.

COMMISSIONER HILLARD: Well, you know, it's ironic that you bring it up because this last Thursday I had a meeting with Sam Nolan, who is the director of the state police and before I guess when Terry Gainer was the director of the state police, Sam was in charge of the state crime lab.

And he told me something that was very interesting this past Wednesday, that when that the specific crime lab of the state was built in the City of Chicago and we turned all our personnel and the duties over to the state, that it was inadequate at the time.

And one of the things that we did this past Wednesday was get a partnership together. And you're right, the chiefs do have a lot of, a lot of clout. And one the things that we are putting together is a legislative package over to Springfield and try to get more monies and more personnel for that crime lab. Because 92, 94 percent -- Tom, correct me if I'm wrong but 92, 94 percent of the work that's conducted over at the crime lab over in the City of Chicago comes from, from the City of Chicago, at that state lab.

He is down big time when it comes down to personnel because once he, take, for instance, when it comes down to firearms technicians, they stay with the state two or three years and then they go elsewhere. They're hired away.

And there's an internship with the University of Illinois, Chicago. But, he and I came up with an initiative this past Wednesday, he and his assistant and a couple of my folks to put on an initiative, a legislative initiative when he gets ready to go for his budget and I will be there to support it. Right now we have I think it's close about 1800 backlog of CSAs and 500 of those, those cases are from Inglewood, I think.

A couple of meetings ago I told you about the four patterns we have in the City of Chicago when it comes down to serial killers. Now 500 of those CSAs come from Inglewood. And we just believe that if these cases could be worked and analyzed and processed, that we might be able to declare one of those patterns.

And, it's been a problem. When it comes down to, like I said before, when it comes down to forensics, we don't have a lab. Tom and them do a very limited amount of things that we consider a forensic laboratory.

Then we give it to the state. And, but I think with the meeting that we had this past Wednesday, that we're going to be able to help him big time and come down for him to securing monies and additional personnel for his state crime lab.

COMMISSIONER DAVIS: That pattern may be perhaps a, something that if this idea of having a national meeting, what you develop and what others along the same line develop may be the way to go in terms of getting the political clout to get these laboratories funded because no legislator, no funding agency is going to say, well, let's see, we think that there ought to be more funding here. They can only respond and they can only respond to very concerted pressures because they're getting pressured from everybody for funding.

COMMISSIONER HILLARD: Well, the International Association of Chiefs of Police, Major City Chiefs, the Sheriffs Association, those are the folks that's going to have to go to the state legislatures and to the federal people to secure this funding, you know. And, but, I don't, I don't know.

I know that the Major City Chiefs, which I attend three times a year, and I'm new at this, I've been here 17 months and I can truthfully say it has not been on the agenda, you know, a main topic on the agenda for Major City Chiefs. And this is something that we need to bring up, you know, come October.

We got an IAC Peterson, and Charlotte Maclinberg (phonetic) and MCC, you got the NEI, which is the National Executive Institute, which the FBI is in charge of. It needs to be brought up to those three or four organizations and the Sheriffs Association.

COMMISSIONER SANDERS: The only thing, to the flip side of that, is that downstate that's as soon as we got outside of Chicago, like in my district we need polygraph examiners. The state police are the ones that operate it, that's part of their lab, they're down polygraph operators.

So, so Sam's telling me that he's got to make these decisions. We can't get our drug screens and tests turned around in time to come back so that when you think about it, this Commission has

focused certainly rightfully so on DNA but I'm just saying that when you get outside of this Commission and you go back to Frankfort, Illinois, there's other things to be concerned with and quite frankly except for knowing what's possible with DNA, I wouldn't be excited about it.

I would be standing up, jumping up and down for more money for doing the drugs and turning them around so that we don't have to turn people loose and the same with our polygraph examiners.

So in my mind it's a very complex problem and it's just one segment of the problem that they have in the labs for funding because we can't get drugs back. I don't know about anybody else but we can't get our drugs back, our drug tests, not our drugs, we can't get our tests done for court.

CHIEF JUSTICE ABRAHAMSON: Barry?

COMMISSIONER SCHECK: That's why having gone to state legislatures for some people on this Commission and asked for money, I am telling you that you can't just say, well, let's have the police chiefs do it, let's have this group do it. I mean, Dr. Davis is right.

I think in many jurisdictions the labs have a separate budget from the police, right, and I think that's good, to be frank, I think it's good to have an independent crime lab budget. But in order to build a political consensus that the many millions of dollars that are necessary to type nonsuspect cases and complete the databank be done in as soon a time possible because I couldn't agree more that it's, it's, you know, it's a violation of equal protection for victims that this technology is not available and we have serial rapists and serial killers in major cities.

If you want to get that coalition in shape and you want to eliminate a lot of the knee-jerk opposition to DNA databanks, and it is knee-jerk where people go, oh, my God, that is Brave New World, you'll destroy the blood samples.

I mean that's my message to you, destroy those blood samples, whatever marginal costs you think it's going to make in re-collection at some time forward, you're going to eliminate a major stumbling block in state legislators.

When you go to a state legislature and you say I want millions, I don't want just a little bit, I want millions for this enterprise, because that's what it's going to cost, many, many millions of dollars to get samples tested on just homicides and rapes much less burglaries, seven to ten days after the crime is committed, which is what Great Britain does, that is a gigantic commitment and you need a big political coalition.

And the problem, to be totally frank, with law enforcement watching this over a decade, is that there's tunnel vision and people only know what is the small little thing that's getting in the way of their laboratory, their funding on day one and you don't have a vision. The idea of this Commission is that people are supposed to step out of it a little bit and have a vision.

CHIEF JUSTICE ABRAHAMSON: Jeffrey?

COMMISSIONER THOMA: Thank you. I really, truly appreciate Dr. Davis's concern and Superintendent Hillard's got a good point about the coordination of efforts with regard to laboratory and the police agencies.

But, I think in that this is the Crime Scene Investigation Working Group, and really our emphasis is other than laboratory funding, that perhaps, though this is a crucial concern, I don't know that we necessarily need to change this recommendation to include that, not that it would, you know, literally be something we wouldn't be interested in doing but I think with regard to this Working Group that work on this project, what we're talking about is the education in the field and perhaps the Laboratory Funding Working Group would be more appropriate to discuss that, that issue.

Though I, really, Superintendent, I mean, I understand that having worked in San Diego with my friend Woody here, that coordination is a crucial component that we need to work on.

COMMISSIONER BASHINSKI: I would --

CHIEF JUSTICE ABRAHAMSON: I'm sorry, you're right to get us back on the focus with this recommendation and, but, in A is developing the financial and other resources, you don't mind having that as a part the recommendation?

COMMISSIONER THOMA: No, absolutely, because --

CHIEF JUSTICE ABRAHAMSON: Okay.

COMMISSIONER THOMA: -- that's part of it.

CHIEF JUSTICE ABRAHAMSON: All right.

COMMISSIONER THOMA: To let people in the field know that we can use DNA for these type of cases, that that education is going to help us think along those lines to use our efforts elsewhere.

COMMISSIONER BASHINSKI: I would read A to include all funding and resources and I think it's appropriate because law enforcement can't use technology --

COMMISSIONER THOMA: Yeah, right.

COMMISSIONER BASHINSKI: -- that nobody can afford to provide to them. So, it's inclusive. It's there even though it isn't explicitly --

COMMISSIONER THOMA: Yeah.

COMMISSIONER BASHINSKI: -- stated.

COMMISSIONER THOMA: And I think the Chief Justice added national and state funding, which I think is a nice way to put it. We can't just do it as a national effort because we got to look at the local effort as well.

CHIEF JUSTICE ABRAHAMSON: Yeah, all right. We're going to train, bring, yeah, I'm sorry, Jim.

COMMISSIONER CROW: I'm sorry. I'm fine-tuning.

CHIEF JUSTICE ABRAHAMSON: Go ahead. Well, that's what, this has to be done is fine-tuning. We can do that over the evening and bring this back tomorrow.

DIRECTOR ASPLEN: Yeah, bring it back tomorrow.

CHIEF JUSTICE ABRAHAMSON: Tomorrow, just to get the broad outlines. Go ahead, Jim.

COMMISSIONER CROW: We want to write this so we can't possibly insult anybody.

CHIEF JUSTICE ABRAHAMSON: Right.

COMMISSIONER CROW: Which is what we're trying to do. I would suggest on the fourth line of the third paragraph that we say something besides prosecutorial. Is there a word that includes, because DNA is used both to acquit, as to --

COMMISSIONER BASHINSKI: Adjudication maybe?

COMMISSIONER CROW: Maybe adjudication. Is that, something that includes both prosecuting and defending.

COMMISSIONER SCHECK: Well, why do you think prosecutorial is insulting?

CHIEF JUSTICE ABRAHAMSON: Well, because you're the one that is using it to get people off.

COMMISSIONER CROW: Yeah. It's your business to get people off.

DIRECTOR ASPLEN: I'm not opposed to doing that. I think the point was, it was developed as -  
-

COMMISSIONER THOMA: Right.

DIRECTOR ASPLEN: I mean, this use as an exonerative tool is relatively recent. And I think the point was that in the beginning our concentration really was on just a prosecutor, just using it in the courtroom.

COMMISSIONER CROW: Yeah.

DIRECTOR ASPLEN : Maybe how about this, developed as, developed something about courtroom application, center it around the courtroom application.

COMMISSIONER SCHECK: Why don't you just say it was not utilized, it was, DNA, well, while DNA has developed, has been utilized as an investigative tool in the United Kingdom, it was used primarily as a tool only at the prosecution stage in the United States after a suspect, and just make that, say it in English.

COMMISSIONER THOMA: No. As it stands, it is correct.

COMMISSIONER GAHN: It is absolutely correct as it stands here.

COMMISSIONER THOMA: It is absolutely correct.

COMMISSIONER GAHN: Absolutely correct.

CHIEF JUSTICE ABRAHAMSON: Well, you can add it in the last sentence, as a result of the -- use of DNA as an investigative tool -- full potential as a crime fighting tool and is a tool for exoneration.

COMMISSIONER SANDERS: Well, I was going to say, of course my good friends here might disagree but I would think that the way it's worded would be more well-accepted because people are, they're thinking that's what it's used for, to prosecute people and they're going to support that. If you start getting into the --

CHIEF JUSTICE ABRAHAMSON: Freeing the innocent.

COMMISSIONER SANDERS: Freeing the innocent, exactly.

COMMISSIONER SCHECK: I'm not insulted by this. I mean, it's a measure, I mean.

COMMISSIONER SMITH: There's thicker skins than we thought all around.

COMMISSIONER CLARKE : Yes. No, Barry, I'm insulted you're not instituted.

CHIEF JUSTICE ABRAHAMSON: Okay. We'll leave that to try.

COMMISSIONER CROW: Yeah. Sometimes you're sorry for bringing something up.

CHIEF JUSTICE ABRAHAMSON: Okay. So, my, what I hear is that the second paragraph is going to be, the emphasis will be slightly changed to indicate that it's a question of rapid changes and increased education. And we have to put in funding.

COMMISSIONER THOMA: Rapidly evolving is what you want.

CHIEF JUSTICE ABRAHAMSON: Pardon me?

COMMISSIONER THOMA: Rapidly evolving.

CHIEF JUSTICE ABRAHAMSON: Rapidly evolving, right. And on the actual recommendation that we are going to add something about victims. And there was a disagreement as whether we should put in something about talking about the special needs of small and large departments.

COMMISSIONER SANDERS: I personally don't think it needs to be broken up. I mean, I think you address law enforcement as law enforcement.

CHIEF JUSTICE ABRAHAMSON: All right. All right. And we'll try and rework that and then this would be, I would think but we'll test it, readily accepted by the group and calling for education, in effect. Right? I see a lot of nods but we'll take an official vote tomorrow, okay, when we see the exact language.



## Public Comment

Now, we've got a bit over but I hadn't seen people lining up for public comment but I will ask for, open this up for public comment. Please if you would state your name and affiliation.

MR. DERIENZO: Sure. My name is Paul Derienzo. I'm a writer with In These Times magazine and with Pacifica Radio News. And I can't pass up a public comment and since no one else here I figured I would take the opportunity.

After listening today and considering some of the things I've heard about DNA and how little really the public knows or understands the breakthroughs in this technology, what is being done, does your group consider at all how it is going to not just educate the police enforcement and law enforcement agencies and people in the state legislatures but the everyday people out there what DNA means for them and the new DNA technology means for them and how it's going to change their lives in the future and if there's any plans to deal with educating the people at large.

For example, most people don't know about the situation in England and the tremendous gap there must be between what people in England would accept and what people in the United States would accept. Thank you. I just put that to all of you and see, ask that question in general. Thank you.

CHIEF JUSTICE ABRAHAMSON: Go ahead. Jeffrey?

COMMISSIONER THOMA: Just at the local level, I talk to high schools in my own county. And it's one of the most interesting topics to bring up to students, is they're very interested to see what the future holds in this area. It's been an interesting topic of discussion. But I don't think anything formally is being done and I, I do think that that would probably be a good idea.

DIRECTOR ASPLEN: I think by nature of the Commission itself, we've gone a rather far distance in that regard. Every meeting that we've had has, just about every meeting we have had has been followed by probably a front page article in USA Today. The number of times that either the Commission's work has generated a newspaper article somewhere or an Internet article has been amazing to me.

And I think that you would find the same circumstance tomorrow. As I understand, USA Today is going to run something tomorrow on the publications that we're putting out there. And every time that happens, you get a broader impact and you get more people understanding the impact that the forensic application of DNA has.

The other thing that we're doing is we put every transcript from our meetings on the Internet. They remain on there, will remain on there for the life of the Commission. And I think we will even expand some of the other things that go on there, including the recommendations, et cetera. The publications themselves will also be available on the Internet.

These, both the postconviction and the pamphlet will be on the Internet in electronic version for download for whoever wants it. So, it is hoped that the Commission itself has that function, that it does in fact serve the function of educating the general public also.

COMMISSIONER CROW: Chris, may I make the suggestion that these minutes be destroyed after 50 years?

COMMISSIONER SCHECK: Well, just, I hope it's not destroyed too quickly because I want to put on the record that on February 15th of next year, we have a book coming out, being published by Doubleday called Actual Innocence, which discusses not only the DNA exonerations but in one chapter it discusses the DNA databanks.

And the one point that you should focus on and I heard it in your comments as being a little off, what's remarkable to me about this Commission is that in the two years we've been here there's a consensus on the issue that we need money for the things we're talking about today, typing nonsuspect cases and getting the databanks working and we don't want to take this money and put it into taking DNA from everybody at arrest. And even the FBI said that today.

Now, that is a judgment that comes from really understanding the technology. But if you go out into the world out there, the first thing Geraldo Rivera is going to ask you is, well, why do you oppose taking DNA from people at arrest? And it is not an understanding of what it really takes to get this system working. So, we have a lot of outreach to get across here.

DIRECTOR ASPLEN: And if I could just follow-up on that.

COMMISSIONER SCHECK: You're going to buy my book, you're going to distribute it, is that the follow-up?

COMMISSIONER REINSTEIN: Can we get a free copy?

DIRECTOR ASPLEN: Signed, signed copies.

COMMISSIONER SANDERS: Autographed copies.

DIRECTOR ASPLEN: That really was a large part of the point of the Commission in the first place. If you look at how issues like arresting testing could have gone, and still may in some smaller jurisdictions, that the existence of the Commission I think and the open discussion on it and bringing these cases to light and the effect that we have had, I know we have had effects on different state legislatures and we're having an effect on the national legislature.

I think the Commission has really fulfilled that part of its purpose also, to deal with those big, broad policy issues in a very proactive way, in a way that reacts to the technology and an understanding of the technology rather than a misperception of the technology.

COMMISSIONER DAVIS: Let me just make a comment.

CHIEF JUSTICE ABRAHAMSON: Joe?

COMMISSIONER DAVIS: Reiterating a letter that I sent to Chris some time ago. I agree that the problems out there are so immense that just to go to give blanket endorsement to DNA on arrest, we just don't have the facilities and the money in this country to do it.

But on the other hand, should there be somewhere in the United States a jurisdiction that does have the money and does have the laboratory or support to do this, that we should not say they shouldn't.

I think they should be encouraged do it if they can and then look upon what they do as a demonstration project. In other words, they should, whatever they set up should be analyzed very carefully to see what the cost benefit of this is over time. And, in fact, my whole approach to everything is I don't agree, I don't like big, huge programs, I always like to see a demonstration project first, test it, see how it works and then if it does we can expand.

CHIEF JUSTICE ABRAHAMSON: Well, our commentator touched on a very important point that we should continually keep in mind, I think, and we appreciate that. Thank you.

Any other comments? Hearing none and since the time is past for public comment, I will close the public comment. We will be in recess until tomorrow, same place, at 9 a.m. Right? Anything else they have to know?

DIRECTOR ASPLEN: Anything else they have to know?

CHIEF JUSTICE ABRAHAMSON: Robin, Lisa?

DR. FORMAN: You can leave the materials here.

CHIEF JUSTICE ABRAHAMSON: Pardon me?

DIRECTOR ASPLEN: They can leave the materials here.

CHIEF JUSTICE ABRAHAMSON: Oh, good. Thank you. All right. We are in recess.

(Conference adjourned for the day at 5 p.m.)

## Opening Remarks

### *The Honorable Chief Justice Shirley S. Abrahamson Chair, National Commission on the Future of DNA Evidence*

CHIEF JUSTICE ABRAHAMSON: If the Commission would come to order, please. We'll start out with the Commissioners introducing themselves. I'm Shirley Abrahamson, Chief Justice of the Wisconsin Supreme Court and Chair. To my left is --

DIRECTOR ASPLEN: Chris Asplen, Executive Director of the Commission.

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

COMMISSIONER REILLY: Philip Reilly, Shriver Center.

COMMISSIONER SCHECK: Barry Scheck, Co-director of the Innocence Project, Professor of Law, Cardozo Law School.

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

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

COMMISSIONER THOMA: Jeff Thoma, Mendocino County Public Defender, California.

COMMISSIONER SANDERS: Darrell Sanders, chief of police, Frankfort, Illinois.

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

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

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

COMMISSIONER DAVIS: Joseph Davis, retired Medical Examiner, Dade County, Florida.

COMMISSIONER CROW: James Crow, retired Professor of the Genetics, University of Wisconsin.

COMMISSIONER WEBSTER: William Webster, partner in the law firm of Milbank, Tweed, Hadley & McCloy, former Director of the FBI.

CHIEF JUSTICE ABRAHAMSON: Well, thank you. And we are in our second day of this September session and I would like to remind everybody to speak directly into the microphone because this session is being recorded. And again, if anyone in the rear cannot hear us and wants to, raise your hand. You know, we'll try and do better.



**Postconviction Issues Working Group Report and Discussion**  
*The Honorable Judge Ronald Reinstein, Working Group Chair*

CHIEF JUSTICE ABRAHAMSON: The first item on our agenda today, and we will again be making some changes in the way we deal with the agenda, is the Postconviction Issues Working Group report and discussion, Judge Reinstein, Working Group Chair.



COMMISSIONER REINSTEIN: Well, first of all, we have three members of the Working Group here, Dennis Bauer -- well, you guys want to just introduce yourselves?

MR. BAUER: I'm Dennis Bauer, Deputy District Attorney in Orange County, California.

PROFESSOR BERGER: I'm Margaret Berger, professor of law, Brooklyn Law School.

MR. CURRAN: Kevin Curran, Federal Public Defender in the Eastern District of Missouri, St. Louis.

COMMISSIONER REINSTEIN: And there may be others that come shortly. At the last Commission meeting in Boston, we presented what you have in front of you, Uniform Statute for Obtaining Postconviction DNA Testing. And we had some discussion about it. There were some requests to go back to the drawing board and make some revisions. And we have talked over the e-mail and yesterday we met after the meeting. And Barry is on the committee as well. And, Margaret, do we have that handout yet?

PROFESSOR BERGER: I don't recall it coming.

CHIEF JUSTICE ABRAHAMSON: Okay. The revisions that we worked on worked on yesterday evening are coming but as far as to remind you, this was to try to develop the uniform statute and the recommendation in effect, that, for states as well, we've divided into mandatory testing, discretionary testing.

If you recall, in the recommendations that we have, we have categories one through five and mandatory testing would be a category one type situation and section B, court discretion would pretty much be category two. But we worked on some things that, requests that Barry had made at the last meeting and we went through that yesterday evening.

We've also got revisions regarding payment, if the court's got word of the test or whether it's going to be discretionary, appointment of counsel, mutual discovery and any additional orders and to that I'll let Margaret address that in a second, as far as preservation and preservation orders and the like. And then we've got an extensive comment to the uniform statute, that, the Commission's notes to that.

There were issues that were raised regarding, Dr. Ferrara I think asked us to put in something that the laboratory must meet the standards of the DNA advisory board. We thought that we would have some discussion on that as to whether you would want to have it that way or the other one would be what, ASCLD standards?

PROFESSOR BERGER: Perhaps, I don't know. I think the technical people should advise us.

CHIEF JUSTICE ABRAHAMSON: Right.

COMMISSIONER SCHECK: I don't think there was any objection to just making it advisory.

CHIEF JUSTICE ABRAHAMSON: I'm sorry. I couldn't hear you.

COMMISSIONER SCHECK: I thought that we were sort of in agreement that meeting the standards of the DNA advisory board was sufficient as opposed to ASCLD.

COMMISSIONER REINSTEIN: That's fine. And then I think Woody in Boston mentioned that the discovery should apply to both sides. Now, our original draft does provide in C3 that the court may order, the prosecution order the defense to provide all parties and the court with access to the lab reports and such.

And if there was something in addition that we're missing, you know, we're happy to address that. But, I'll let Margaret explain to you, when we have the revisions in front of you, what we went through last night. Anything you want to add at this point before we get there?

PROFESSOR BERGER: No. Maybe I would just add that the standard that we discussed last night and had the most difficulty with and which we are going to offer you an alternative language for is the testing in the court's discretion, B, where at the moment it provides a reasonable probability exists that the petitioner's verdict or sentence would have been more favorable if the DNA testing results had been available.

We were looking for language that would allow a court discretion to provide access and also to perhaps provide for payment in cases where the evidence even if favorable would not really exonerate the defendant.

For example, we were talking about two hypotheticals in particular. One was a situation where at trial one of the pieces of evidence introduced against the defendant was a bloody shirt found at the defendant's home with suggestions by the prosecutor that this was the victim's blood. If you now had DNA testing and that showed that it was not the victim's blood, obviously that does not exonerate the defendant, does not prove that he could not have committed this murder.

On the other hand, pending on how that evidence had been introduced at trial and the use of the prosecutor had made of it in closing arguments and whatnot, it certainly might have played an important role in the jury reaching the verdict it did.

That was the kind of case where we thought a court should have discretion to say that testing should be done and discretion to decide who would pay for such testing.

Another hypothetical that we were talking about yesterday was a gang rape where at trial evidence was introduced in the days of ABO testing that in terms of the evidence available the defendant could have been one of the people who participated in the rape.

Now, if testing were done it might turn out that all one is able to determine is that there's a mixture and that only true profiles come out clearly, even though there's clear evidence that four people participated in this rape. The profile of the defendant might not be one of the people.

Again, the court would really have to decide on the basis of this and this possibility, this is before testing has been done, whether this is a case in which testing should be done, who should pay or whether this is a case where the likelihood of getting any conclusive evidence is so low the court would still not want it done.

Finding a formula that covers the, you know, thousands of different possible variations of what is there in the non-A category where one is really talking about evidence that would probably nowadays simply have not even led to an indictment is, is very difficult and. So we are, I don't know where it is but we are going to give you yet another version of B to consider.

COMMISSIONER REINSTEIN: Dennis, Kevin you have anything you want to add?

MR. BAUER: I think some of the concerns that we had kind of paralleled what may have been a misstatement on today's front page, and that was that what I was personally concerned about was that it didn't look like what we were trying to do is create a new category which would use DNA that really or DNA evidence which really was not going to result in an exoneration or even, probably not even result in a judge granting a new trial just to open up the issues to review other evidence, other non-DNA evidence.

And then what that would look like or would be, perhaps, in effect, would be to eliminate all statute of limitations on all postconviction appeals or habeases, using DNA as the vehicle although I think it's up for discussion whether or not by creating a special statute for DNA that we are in effect going down that road anyway and have to be prepared for the fact that that's probably what would be the movement in the future at any rate. So that was my concern in this discussion over what we do with the second category or whether we in fact create even a third category.

COMMISSIONER REINSTEIN: Kevin, anything?

MR. CURRAN: I viewed it as an access issue when we got to these or access to the evidence issue. I think when we sit in the committees and talk about it, we forget about some of the practicality of this kind of litigation. I think first of all it's limited because we're talking about if there's biological evidence that's there, so I think when we talk about floodgate arguments, I still think we have to temper it, with, yeah, this has to be existing.



What we talked about last night was even in a situation where there may be some existing biological evidence but it's not a class, you know, it's not an A category, it's not I'm just plain done, well, if it excludes, then, you know, we have to reset the whole case.

That's one link in the chain. The discussion for me centered around, well, do we let, you know, the defendant to either come up with resources to pay, you know, let him go and have a test because that could change the view of the conviction. You know, where you have biological evidence, a bloody shirt, maybe there was some other nonbiological corroborating evidence that may change the judge's and the prosecutor's mind about the integrity of the conviction.

That probably is something we should have talked about quite awhile ago. We tend to look at these cases, as I call them slam-dunks, where there's biological evidence to be tested, then the person reveals should be released or he should get a new trial. There's a small sort of gray area where that might have some impact on the integrity of the Commission.

So I think we looked at and talked about this sort of, you know, when does the defendant or when should the court be allowed to have discretion within access to testing.

CHIEF JUSTICE ABRAHAMSON: Yes?

COMMISSIONER REINSTEIN: Reason reason and Barry, you want to define the access issue that you faced as far as the problems?

COMMISSIONER SCHECK: Yeah. I mean, I think that you have to recognize now that we're at a point where our technology has made evidence which sits in the prosecutor's office or in the courthouse or in the police department that originally was used to convict somebody, with a scientific test can be made exculpatory.

Now, not every -- the best example I can give you is hair. What we found in the 65 postconviction DNA exoneration cases is that 31 of them involve microscopic hair comparisons where the testimony at trial was there was hair found, pubic hair, head hair at a rape homicide or at a rape case that was attributed to the defendant, that is to say they said it had similar or matching or however they wanted to define it, microscoping characteristics and also saying it excluded other people.

And, what we now have is this capacity to do mitochondrial DNA testing on the shaft of the hair and we're finding that the microscopic hair comparison evidence is highly unreliable in many of these cases. In fact, take a look at 31 out of the 65 cases, it was wrong, and it wasn't just wrong, I should urge you, on the issue of saying this hair is consistent with the defendant who turns out not to be guilty, they have been wrong in excluding in some instances the real perpetrator. We're excluding the victim as being the source of the pubic hair that was attributed to a defendant.

So, there are many cases now that come through our docket. I have one right now pending in Louisville, Kentucky that the prosecutor and I are trying to get together on but it's a mask case where there are two rapes involving a man with a mask and in the second rape there's no eyewitness identification but there's other circumstantial evidence. But the victim pulled the

mask from the face of the perpetrator and all that's found in the mask are hairs that were microscopically matched to the defendant.

Now, the mitochondrial testing for at least two of five hairs have shown it's not his. You know, whether or not a judge in the first instance would have granted an application to test the hairs in the first instance, I don't know because human nature is such that when you look at some evidence in a case and you say, well, let's just assume the DNA when it comes out in favor of the defendant, I don't know if I'm going to vacate this conviction.

And, that's human nature because, you know, until you see the test results when you have a heavy docket and you've got a zillion other things to deal with, you're not necessarily going to say, well, let's do a full scale reexamination of this case, which I think is appropriate.

And, unfortunately, it's not unfortunate, it's necessary, the way we originally wrote this, and I think it's correct, is that first we want to get at the cases where there must be a test because it would be dispositive and you know that if the test comes out in favor of the defendant, the conviction must be vacated.

But, what about those other cases where it's going to be exculpatory but not necessarily dispositive unless you do further investigation because the truth is once you get one of these pieces of evidence that, you know, was not as originally believed, and then all of a sudden you begin to look at the rest of it? And frankly sometimes these cases just fall apart, other times it could just be that it's, there may be other explanations for why a hair or why a, you know, the blood got there but it's not going to be sufficient.

Now, it's not, the idea here is to give somebody a right of access without necessarily having, you know, without repealing the statute of limitations, as Dennis is expressing the concern, because you're still going to have to in the final analysis with a DNA test result that's exculpatory and any other evidence you can produce meet the very high standard that's required for vacating a conviction based on a proof of innocence, which is a high, high standard and understandably and justifiably so.

So, that's what we were searching for, language that would permit somebody to get exculpatory evidence without necessarily in the first instance meeting the very, very high standard that's required to vacate.

COMMISSIONER REINSTEIN: What you have in front of you now are the changes that Margaret has typed up this morning and that was to B1, the testing in the court's discretion to substitute a reasonable probability exists that testing will produce exculpatory evidence from a reasonable probability exists the petitioner's verdict or sentence would have been more favorable if the results of DNA testing had been available at the trial leading to the judgment of conviction.

And then C4, specific preservation order, that when a petition is filed when a proceeding is instituted that the court shall order, that the evidence be preserved during the pendency of the proceeding, not forever but just during the pendency of the proceeding and that if there is

intentional destruction of evidence after such an order that it may result in sanctions, including criminal contempt for a knowing violation.

So, those are the changes that we came up with. If any other members of the Commission have additional things that we didn't cover, let us know. Yeah.

PROFESSOR BERGER: And we would also add a C5 -- I'm sorry, I didn't get to type it up -- which is that if the court orders testing, it must select a laboratory that satisfies the standards of the DNA advisory board.

COMMISSIONER REINSTEIN: Okay. And then keeps what now is C4 and C6 that there can be additional orders in the court's discretion.

PROFESSOR BERGER: Right.

COMMISSIONER REINSTEIN: Jeff?

COMMISSIONER THOMA: Ron, with regard to the amendment B1, I think it's a little too limiting perhaps because, in fact, from your own state the Tyson case in a capital setting, for example, you might have mitigating evidence, for example, evidence that shows that the person isn't substantially involved in the underlying felony and would mitigate the sentence as opposed to a death, not making a person eligible for death or making the sentence otherwise more appropriate, to be life without possibility of parole.

So the original wording actually is probably more appropriate for that circumstance where it, even though it's not completely exculpatory, it would crucially just change or modify the sentence from death to life without parole. And I think that's key.

COMMISSIONER REINSTEIN: Professor Scheck?

COMMISSIONER SCHECK: I think, though, that maybe we could take care of that in the comments because by definition exculpatory evidence does include evidence which introduced at the penalty phase would mitigate the sentence.

In fact, the case Brady versus Maryland, most people don't realize, is a case where evidence was withheld at the penalty phase in a death penalty case. That's how Brady came into existence. It wasn't a case that dealt with evidence that exculpated the defendant from the guilt or innocence judgment. So I think that's covered.

COMMISSIONER THOMA: Right.

COMMISSIONER SCHECK: But you're right, that it's probably worth picking up in the commentary.

COMMISSIONER REINSTEIN: If the original provision came directly from the Illinois statute?

COMMISSIONER SCHECK: No, the New York statute.

PROFESSOR BERGER: It's more New York, yeah.

COMMISSIONER THOMA: I prefer that wording, if that matters.

COMMISSIONER REINSTEIN: Oh, so you prefer the original to this?

COMMISSIONER THOMAS: Yes.

CHIEF JUSTICE ABRAHAMSON: We -- yeah.

MR. BAUER: To not substitute at all?

CHIEF JUSTICE ABRAHAMSON: To not substitute.

COMMISSIONER REINSTEIN: You have to talk to your colleague over here.

COMMISSIONER SCHECK: Jeff, this one is a lower standard than the other one, believe me.

PROFESSOR BERGER: What about putting in a "or" you know, in B?

COMMISSIONER SCHECK: You're just worried about the penalty phase aspects?

MR. BAUER: Yes, yes.

COMMISSIONER SCHECK: I think we can cover that in the commentary.

MR. BAUER: Okay.

MR. CURRAN: Why don't you all put an alternate clause in?

COMMISSIONER REINSTEIN: Well, how would you phrase it?

PROFESSOR BERGER: Leave B1 and then add or if a reasonable probability exists --

CHIEF JUSTICE ABRAHAMSON: Either.

COMMISSIONER REINSTEIN: Yeah, either, either is fine.

PROFESSOR BERGER: Could I add one thing?

COMMISSIONER REINSTEIN: Yes; yes.

PROFESSOR BERGER: I mean, Barry said this but I think I would like to stress some more that I think what's really important to realize about this statute is that it only deals with the access to the evidence situation.

And I think that's really what it does, that's the problem with existing law, that it uncouples the vacating of the sentence, either deciding to grant a new trial or to grant whatever it is that the court would do, completely from the question of access.

That would be a totally second phase that this statute does not deal with, that all this says is there must be testing and if the results are favorable to the defendant that the court will hold a hearing. And everything that follows after that really is dependent on the state standard for setting aside a conviction granting a new trial and you know, is, is not the concern of this committee.

So, that this is only giving the defendant an opportunity for testing, which in the B situation, in addition, the court has obviously discretion about and also has discretion about payment for the testing.

CHIEF JUSTICE ABRAHAMSON: Well, the second part under procedure after testing results are obtained doesn't read that way when you read it. You don't think that --

PROFESSOR BERGER: You don't think that the sentence --

CHIEF JUSTICE ABRAHAMSON: Why hold a hearing unless it's possible that you have upset the conviction?

PROFESSOR BERGER: Well, possible but I think whether or not it has to be done, no, it says shall make such orders as is required by the jurisdiction's rule or statute regarding postconviction proceedings.

So, you know, it was our assumption that that imports back into the process the standards of the state for doing that.

CHIEF JUSTICE ABRAHAMSON: And what about notwithstanding any provisions of law that would bar such a hearing as untimely?

PROFESSOR BERGER: Well, that was solely to remove the time limit in states that for newly discovered evidence would then bar any such hearing regardless of, if somehow or other the defendant managed to get something tested, it simply would be untimely to consider. That was the only point of that.

So that really I'm, I'm not being quite right when I say that this statute deals only with access. It does in addition remove the time bar on applications based on a new trial on the basis of newly acquired evidence.

COMMISSIONER REINSTEIN: This is to provide an exception to the states that have the time bar that where your only avenue is executive clemency.

COMMISSIONER GAHN: Ron?

COMMISSIONER REINSTEIN: Yeah.

COMMISSIONER GAHN: Under A3, what would, the evidence was never previously subjected to DNA testing or was not subjected to the testing that is now requested. What would that be?

COMMISSIONER REINSTEIN: Well, I think that's a good point because originally I had a question as to whether that creates a loophole for just even the slightest difference in testing.

COMMISSIONER GAHN: Testing, right.

COMMISSIONER REINSTEIN: The intent was and I can't remember if it's in the comment, was that, you know, it never was objective testing. Of course that's a given but if they have something that just everybody recognized it wouldn't make a difference at all, does that, you know, open up the door to it, I think we need to close that off. Here we have another member of the committee, Charlotte Word, Cellmark. Dr. Word, welcome. And that's, Norm, that's also the same in, it's A3 and B3, I believe.

COMMISSIONER REILLY: Why not phrase it in the positive rather than the negative saying or is proposed to be subjected in a manner that is substantially likely to yield new evidence or new information?

COMMISSIONER GAHN: What I'm concerned is this is for DNA testing and it says or was not subjected to the testing that is now. Well, if DNA was never done, this is a hearing to use DNA, what is the testing that is now requested, it would be different?

COMMISSIONER REINSTEIN: Oh, we were talking about variation from PCR, different type of PRC testing as opposed to any DNA testing at all.

PROFESSOR BERGER: Yeah, I think we were really talking about a case where the technology at the time the original DNA testing was done was not sensitive enough to produce a conclusive result of any kind and you now had the possibility that with something else out there such as, I don't know, mitochondrial hair analysis you could now get something that you had not been previously been able to get.

COMMISSIONER CLARKE: Presumably, something like a DQ-alpha case, later how STRs could resolve.

PROFESSOR BERGER: Exactly.

COMMISSIONER REINSTEIN: But if somebody came up with a, you know, a couple more loci of STR does that really open the door to allow to you have? I mean that was a loophole that I was concerned about.

COMMISSIONER GAHN: It shouldn't. I mean, do we need it? But, but if you say there was a prior DQ-alpha and now STRs but number three says the evidence was never previously subjected to DNA so it was subjected to DNA.

CHIEF JUSTICE ABRAHAMSON: Or, or.

PROFESSOR BERGER: Or, or.

COMMISSIONER REINSTEIN: Or, or, or.

PROFESSOR BERGER: Two different categories.

COMMISSIONER GAHN: Or was not subjected to the testing. Okay. All right. So that's the, it maybe PCR as opposed to R.

COMMISSIONER REINSTEIN: Yeah.

COMMISSIONER REILLY: But it does still seem, the second half of that does still seem so broad as to invite potential abuse or frivolity.

PROFESSOR BERGER: Yeah, okay.

COMMISSIONER GAHN: Well, what if you had like a six probe RFLP match and now someone says, well, I want the 13 core loci done?

COMMISSIONER SCHECK: Our guidelines, the substance of our guidelines say that test, that case should not be done. We're very clear on that. In other words, there's that big thick book, I mean, says don't do it.

COMMISSIONER CLARKE: Actually maybe that would be resolved in a comment.

COMMISSIONER REINSTEIN: Yeah, uh-huh.

PROFESSOR BERGER: Yeah.

COMMISSIONER THOMA : And I think the way Margaret explained it is as simple as we need, that it wasn't discrete enough to make a determination at that time and the technology could do so now.

COMMISSIONER REINSTEIN: Well, yeah, we could easily make that.

PROFESSOR BERGER: Okay.

COMMISSIONER SCHECK: Maybe we should mention DQ-alpha.

PROFESSOR BERGER: Yes. It would make it somehow --

COMMISSIONER SCHECK: And we should specifically refer to our comments.

COMMISSIONER REINSTEIN: Michael, at the last meeting you raised something that your worry was that the inference in the comment was that going to trial would make it more likely that the results would be exculpatory; you had a concern about that, do you remember that?

COMMISSIONER SMITH: I'm glad you remember that. Was it a good comment, do you think?

COMMISSIONER SCHECK: We were trying to figure out what it meant.

COMMISSIONER REINSTEIN: Your note to me said Ron, I put my point badly. I'll try again.

COMMISSIONER SMITH: Okay.

COMMISSIONER SCHECK: Were you concerned about pleas? I thought you were concerned about pleas.

COMMISSIONER SMITH: I was concerned about pleas but I don't think that's what that comment was about. And I can't resolve this now with the new technology available to me. I'll think about it some more.

CHIEF JUSTICE ABRAHAMSON: I think that there's difficulty hearing when several people are talking so we'll just slow down for a moment. And, so, Michael, do you have any other comment about more exculpatory?

COMMISSIONER SMITH: Not at this moment.

CHIEF JUSTICE ABRAHAMSON: Okay. Good, Judge Reinstein, move on.

COMMISSIONER REINSTEIN: I don't have anything else. As far as the comments that were made at the last meeting, I think we've addressed them. I think Barry and Woody raised an issue regarding Youngblood, regarding if evidence has been destroyed, that Youngblood still applies. I think Woody, you raised that?

COMMISSIONER CLARKE: Well, I think that was in the context of a statute's not going to take the place of existing, particularly United States Supreme Court law in that area and I think it simply shouldn't create any right not already recognized.

COMMISSIONER SCHECK: In fact I think actually Woody what we agreed on, the reason we put in this business about preservation orders, if I recall at the last meeting you and I agreed that Youngblood was still going to be the law and our colleagues from law enforcement, particularly I think Chief Gainer and yourself were upset about the instances where somebody would destroy the evidence after the court had been told that it was going to be subjected to testing.



So, that's why we threw in this provision that if you knowingly destroy evidence after it's been ordered, that the court has the remedy of criminal contempt, which may be self-evident but that's about the only remedy you're going to get in those situations.

In other words, if they intentionally destroy the evidence before the test is done, Youngblood is still the law and you ain't going to get your conviction vacated because you can't prove that the test would have come out in your favor. And so the only remedy is to punish the person who purposely destroyed the evidence.

COMMISSIONER CLARKE: Although Youngblood may actually call for a further sanction.

PROFESSOR BERGER: Yeah.

COMMISSIONER CLARKE: But not the statute.

PROFESSOR BERGER: Right. Well, I did put including criminal contempt because I can think of a case maybe where they destroyed something but forgot to destroy something else and so there is a hearing. And in such a hearing I would assume that maybe one could draw an inference from the intentional destruction of the other evidence. I mean, I think it's a possibility.

CHIEF JUSTICE ABRAHAMSON: Any other comments on this?

COMMISSIONER CLARKE: I've got a couple. On, it would be at the bottom of page one on procedure and it's just a word comment. Instead of using the term unfavorable, I think it might be better to state something like not favorable. And the reason is I think using the term unfavorable implies that there was something inculpatory about the further testing results.

CHIEF JUSTICE ABRAHAMSON: Okay.

COMMISSIONER CLARKE: As opposed to not helpful. But not favorable I think probably does describe what we're after.

COMMISSIONER REINSTEIN: I agree. What was the second one?

COMMISSIONER CLARKE: The second one is on the comment on page two and we've spoken about evidence under the prosecution's control but I think it should be clear or court's control because a lot of these cases, the evidence is not in the prosecutor's control anymore. I think it's a fairly neutral comment but it clarifies that it extends to all evidence, frankly.

COMMISSIONER REINSTEIN: That's good.

CHIEF JUSTICE ABRAHAMSON: Tell me what line that's on.

COMMISSIONER CLARKE: That's on page two and I think about six staff lines down, maybe seven lines.

CHIEF JUSTICE ABRAHAMSON Okay.

COMMISSIONER CLARKE: In the prosecution's control and just adding or courts.

COMMISSIONER REINSTEIN : Page one of the Commission's notes.

COMMISSIONER CLARKE: And then the only other comment I have is the reference to the more than, this would be the same page as, that is the first page of the comments about ten lines down, reference to the more than 60 inmates. The only reason I think that might be subject to deletion is it's going to be out of date.

COMMISSIONER REINSTEIN: Yeah, hopefully.

COMMISSIONER CLARKE: And just leave the comment with reference to the inmates whose convictions have -- just without putting a number on it.

CHIEF JUSTICE ABRAHAMSON: Since there was reference to the headline, tell me what would be a correct headline relating to the statute of limitations.

COMMISSIONER SMITH: Do we have a journalist on the Commission?

CHIEF JUSTICE ABRAHAMSON: Pardon me?

COMMISSIONER SMITH: Do we have a journalist on the Commission?

CHIEF JUSTICE ABRAHAMSON: A lawyer didn't write the headline or a judge, so, of course, scientists, so.

COMMISSIONER REINSTEIN: Well, the intention is not to open the floodgates, put it that way.

COMMISSIONER SCHECK: You know, the journalist is going to tell you that he didn't write the headline, so.

CHIEF JUSTICE ABRAHAMSON: I thought that too, right. There's something about striking a balance between the need for finality and doing justice.

COMMISSIONER SANDERS: That won't sell.

CHIEF JUSTICE ABRAHAMSON: Appropriate cases, too long. Because I'm still disturbed or questioning about that, so you get the right regardless of the statute of limitations, that a jurisdiction might have on limiting review of a conviction, and by review I mean postconviction remedy and everything else, regardless of that you still can get testing, right?

Just drop the statute of limitation on testing but after it's tested and after you have a conclusive DNA result, that it wasn't this guy, right, fine, or at least feeling good, and there's a statute of

limitations in the jurisdiction that you can't open up this conviction with newly found evidence, does that still apply under this rule.

COMMISSIONER SCHECK: Well, no, we're not saying what should or shouldn't apply. Obviously we would hope that the jurisdiction would do it. I mean, we're trying to be very careful here in the sense that I think if you look at Herrera versus Collins, interestingly, the primary reason that Justice Renquist said that we have to be worried about finality and justify the 33 states that have statute of limitations of six months or less, is he made the telling point, in my judgment, that if you come in with the usual evidence of newly discovered evidence of innocence, a witness recantation or a new witness and you vacate the conviction, and then you're going to have a new trial 20 years later, and who is to say that that new trial is going to be any more of an accurate fact-finding than the first trial, which is you know, really I think the core idea, wouldn't you agree, Margaret, behind finality?

And, at the very beginning of this Commission, somebody asked the question, it might have been, I remember Judge Webster was there for that discussion, as a matter of fact, somebody said, well, is DNA unique -- it was you, Norm -- you know, are we going to rewrite everything? Well, what's unique about DNA and unique about the testing is that when you got a test result on these kinds of pieces of evidence it is accurate and it will potentially permit a more reliable fact-finding than the trial 20 years earlier. That's what's unique about it and that's its unique power.

And so in this limited way we try to recognize it and give the evidence, the exculpatory power that is its due but at the same time I suppose states are going to have to decide for themselves whether they're going to hear these cases obviously.

And it's in the legal discussion in our book, I think that the Constitution of the United States compels hearing such case, that if you can put on proof of actual innocence of this kind, then I think that the statute of limitations doesn't apply. And just so you don't think that this isn't a relevant exercise, we have right now under the Death Penalty Reform Act a one year statute of limitations on writs of habeas corpus in federal courts.

So that starting on April 26, 1996, if you didn't make an application for writ of habeas corpus on the grounds, for example, of actual innocence, all right, and that, and one year has passed since April 26, 1996, and it's now April 26, 1997, came around, and you didn't get your DNA testing, now you have your DNA testing, and it, you say proves that you're innocent, okay, then the question has come up in the federal courts now in quite a number of cases if you have a colorable claim of actual innocence will that statute of limitations bar the writ from being heard.

Every federal court that's addressed this issue has either said yes, we'll hear it and it would be unconstitutional not to or they've said it's a real good issue and I don't want to deal with it so I'm just going to look at the evidence and see whether you are innocent or not, then they say you're not innocent so don't bother. But everybody knows that this issue is coming and it's going to come from these kinds of cases.

So I have a certain amount of confidence that if we get to the evidence and we get the test as this statute permits then some state court is going to hear it. I agree that it would be nice to put in this

statute that the states should repeal their statute of limitations if there's evidence of innocence but that may be beyond our scope. That was our reasoning.

CHIEF JUSTICE ABRAHAMSON: Dr. Reilly?

COMMISSIONER REILLY: If I could ask a general question of the committee. I'm just curious whether there was any discussion of the possibility that as we move forward in time there will be many other advances in science outside of DNA analysis raising postconviction issues with equally powerful evidence and whether or not the focus on a particular form of scientific evidence is to invite a different set of problems in the future.

COMMISSIONER REINSTEIN: We talked about that over beer last night. I think Dennis raised that, didn't you?

COMMISSIONER SCHECK: We have, in fact if you look at the Illinois statute, the Illinois statute talks about new scientific tests that could provide a proof of, material proof of innocence.

COMMISSIONER REILLY: Although it's not immediately relevant in another forum in which I work, that is the impact of genetic information, impact of genetic information in health care and insurance, one of the things I have been most troubled by is the evolution of very focused statutes at the state level that seem to, on the one hand, greatly elevate the power of genetic information as compared to all other medical information, that's one point, and secondly exclude from consideration many other facts that could be as relevant to the issue of insurance underwriting or whatever it might be.

So, I do have a lingering concern about which direction a statute like this might take us in the future, one to in a sense focus DNA, focus on DNA and exclude other important science or invite a proliferation of statutes that would not be helpful.

COMMISSIONER THOMA: Well, I think this is, if I may, this is our province, is with regard to DNA. And I think if a newer science is developed, I think there's literally an equal protection argument that can be made by those people that are subject to whatever new testing comes through.

And, such a statute as this would help them anyway. And really we can't go much further than where we are with this. I'm satisfied with this working group's proposal, actually, so.

COMMISSIONER REILLY: Well, I wasn't speaking in criticism of it particularly but wondering whether perhaps in a comment there might be some general, one or two sentences indicating an awareness of this issue. Perhaps it doesn't exist.

MR. CURRAN: The answer is you don't know what's coming. The initial, I think one of the first meetings we talked about putting language in there will be more advances in DNA, I think one of the scientists in the group said wait a minute, you know, we don't know what's coming. I think you're talking about other types of scientific tests that might not go to DNA.

COMMISSIONER REILLY: Exactly.

MR. CURRAN: Type of lab analysis or something that comes up. I guess it was very easy for us to say DNA is in the title of our committee but I don't know, maybe, makes sense to put a comment in. That was scientific advances, the statute, you might want to amend it but it's tough to say what's coming.

PROFESSOR BERGER: Yeah, I must say I guess I feel rooted enough in the adversary system in the notion that you do better when you're focusing on a very concrete problem and know its implications.

I think I would feel uncomfortable putting in a comment sort of not knowing. And in addition really we have had sort of ten years of DNA to get to the point of understanding the implications of some of what's happened.

Now we're talking about something that we don't even know what the technique is. It hasn't had a chance to develop. We don't know the future, either, in terms of the law or the science. I think we would need to wait.

MR. CURRAN: There are people that are exonerated without DNA evidence and, you know, there's another group of inmates that are on death row, whatever, so we've got to limit it on both ends, because DNA is in the title of our committee, I guess that's why.

MR. BAUER: The answer to the question is we have considered it, talked about it from the meeting up until last night over bratwurst and calamari. And I think that what we have concluded is as has been alluded to that we've been left with the fact that we are without a crystal ball and that we've been stuck with the topic that we are dealing with and so we haven't put any extra disclaimers on there for whatever the future will bring us.

COMMISSIONER SCHECK: I mean, I'll give you the one example if you want it. The photographic enhancement of fingerprints, we've cracked some cases, you can take a bloody fingerprint that previously could not be read and now with digital enhancement of the fingerprint you can compare it, put it in the AFIS system and find the real perpetrator or exonerate somebody because there weren't enough ridges.

So that, that's an example, all right, if you want one. But, I mean, I agree with my colleagues, we've discussed this a lot, I mean we're the DNA committee and DNA is by far the most powerful tool to both, you know, convict people, find guilty parties and exonerate them that we have. And it's, you know, this is a unique development.

I mean, you know, one thing to keep in mind is there are only two states that have these statutes, New York and Illinois, right? The two, there are 65 people exonerated now with postconviction DNA testing, 62 in the U.S., three in Canada. Which two states have the most exonerations? New York and Illinois, 12 in Illinois, 7 in New York. And the fact that there are court avenues of, to get it, I don't think is a coincidence.

COMMISSIONER CLARKE: Well, at the same time, though, there's also states that don't have limitations such as our own and frankly a statute like this while more directed, I don't think is going to impact California much, for instance.

COMMISSIONER SCHECK: Well, there's a lot of courts where we can't get access to the evidence in California, so, I think.

COMMISSIONER CLARKE: Because we don't have any bars.

COMMISSIONER SCHECK: Well, you do.

CHIEF JUSTICE ABRAHAMSON: Well, you're about two different things, statute of limitations and access to the evidence. So, any other comments on this? Now what is the committee's proposal then; does the committee want this court -- this court --

PROFESSOR BERGER: Yes.

CHIEF JUSTICE ABRAHAMSON: My head's on tomorrow already -- this Commission to recommend this to the Attorney General for recommendation to the states? What is the proposal?

COMMISSIONER REINSTEIN: Well, I didn't know whether you wanted us to go back and take the comments that were given today, you know, come up with a cleaner copy but --

CHIEF JUSTICE ABRAHAMSON: Ultimately, what's the proposal?

COMMISSIONER REINSTEIN: I thought that was our charge, to come up with a uniform statute that states could utilize in amending their statutory provisions.

COMMISSIONER SCHECK: We were going to refer this also to the, what's the name of the organization, the National Committee on State and Local Government?

CHIEF JUSTICE ABRAHAMSON: Oh, Uniform Laws Commission?

COMMISSIONER SCHECK: Yeah.

DIRECTOR ASPLEN: I think that the form that this could take is a matter of recommendation to the Attorney General that the Attorney General and the Department of Justice acknowledge and distribute this to the individual states, to the appropriate agencies and the appropriate legislative bodies, Supreme Court, et cetera, in the individual states, the Bar Association, et cetera, but essentially publish this as model legislation and have it distributed through the Department of Justice to the appropriate entities.

CHIEF JUSTICE ABRAHAMSON: Jeff?

COMMISSIONER THOMA: And if you're looking for a different headline, I think the point of it is, is that we're relaxing the statute of limitations in those unique circumstances in which DNA

might have a more favorable result for a convicted inmate. It's too long of a headline but relaxing in unique cases is what we're talking about. We're not talking about every single person or a great majority of appellate or habeas cases.

MR. BAUER: And I think they've kind of just focused on one issue when we've done a lot bigger, taken on a lot bigger task. And I'm not a newspaper writer or an editor but I would have entitled this article DNA Commission Suggests Procedures for Claims of Innocence. And that covers our entire task, rather than one narrow limited area which could be misinterpreted, as I think it was in the newspaper article.

DIRECTOR ASPLEN: And I must say that I can probably count on one hand the number of times I've used the words holler at all, for those of you who read the quotes.

COMMISSIONER CLARKE: Holler?

COMMISSIONER REINSTEIN: Holler.

DIRECTOR ASPLEN: Holler, yes, holler.

CHIEF JUSTICE ABRAHAMSON: Well, first the, substitute in B1, now the only difference if my reading is right between A and B, the only difference is in one, in A and B, is that correct.

COMMISSIONER REINSTEIN: Yes, that's correct.

CHIEF JUSTICE ABRAHAMSON: So two and three are the same between mandatory and discretionary testing. So the difference is between a reasonable probability existing about a different result and reasonable probability existing that tests will produce exculpatory evidence. Right?

COMMISSIONER SCHECK: Right.

CHIEF JUSTICE ABRAHAMSON: Okay. And, what is the working group's recommendation between B1 and the substitute B1? Go ahead.

PROFESSOR BERGER: Yeah, well, one proposal was to put both in --

COMMISSIONER SCHECK: Right.

PROFESSOR BERGER: -- with an "or" between them so that courts would have a choice of standards because I think there's disagreement as to which one is the more lenient standard in different kinds of cases.

CHIEF JUSTICE ABRAHAMSON: We could have an "and" connecting that.

PROFESSOR BERGER: No, or.

COMMISSIONER SCHECK: Or, no, an or, or.

CHIEF JUSTICE ABRAHAMSON: It would have to be --

PROFESSOR BERGER: It's or.

CHIEF JUSTICE ABRAHAMSON: -- 1A or 1B in there as a choice. I'm just trying to --

COMMISSIONER SCHECK: Oh, okay.

PROFESSOR BERGER: A would remain the same.

CHIEF JUSTICE ABRAHAMSON: No, B.

COMMISSIONER SCHECK: No, it would be one little A and one little B.

PROFESSOR BERGER: One, you would have or A or B.

COMMISSIONER SCHECK: We take that as a friendly amendment to do that. I think that's fine.

COMMISSIONER REINSTEIN: Yeah, I think that's good.

CHIEF JUSTICE ABRAHAMSON: So you wanted an either/or there depending on what the state wants to do.

PROFESSOR BERGER: Right, right.

CHIEF JUSTICE ABRAHAMSON: All right. And then my understanding is that under C one, two and three remain the same, that you will add C4, preservation order, will add as C5 that if testing is ordered that it be done by a DNA approved lab.

COMMISSIONER SCHECK: Or a lab that meets the standards.

CHIEF JUSTICE ABRAHAMSON: Right. And, then the additional orders become six --

COMMISSIONER REINSTEIN: Six.

CHIEF JUSTICE ABRAHAMSON: -- to the proposal, okay. And then my note, if my notes are correct, in the second line of procedure after testing results are obtained, if the results of the postconviction DNA testing are not favorable rather than unfavorable. And, then there were some changes in the comments about the evidence being under the court's control.

COMMISSIONER THOMA: So just adding after prosecution's or court's control, is that what you said?



CHIEF JUSTICE ABRAHAMSON: I had one other but I can't read my notes.

PROFESSOR BERGER: We were going to put in a comment about, explaining what was meant about the situation where testing had been conducted but not of the kind that is now being sought to indicate, that that's the cases where something, where the testing would now be able to be more discreet in the situation where previously it had not been --

CHIEF JUSTICE ABRAHAMSON: All right. Any other changes? Pardon me?

COMMISSIONER BASHINSKI: To take the number of inmates out and just say --

COMMISSIONER THOMA: Just strike more than 60, I guess.

CHIEF JUSTICE ABRAHAMSON: Judge Webster?

COMMISSIONER WEBSTER: I'm sorry to be asking this question so late into the discussion but I have been mulling in my mind something that started with something that Barry said about exoneration as distinguished from some more helpful evidence and we use the substitute language that will produce exculpatory evidence.

I wonder if we wouldn't be better advised to require a higher standard than just exculpatory, maybe substantial exculpatory evidence, something that points clearly to innocence rather than inject an ambiguity in the trial because some piece of evidence that was used by the prosecutor turns out to be not as reliable because of some DNA activity. That to me is not as strong a reason for ignoring the statute of limitations or going beyond it.

We've always required some colorable proof of evidence in *Stone v. Powell*, and the other cases, what do we want to say there, is my question, any form of exculpatory evidence or exculpatory evidence that significantly points to innocence.

COMMISSIONER SCHECK: Well, I think that to be clear about it, we're saying a reasonable probability exists that testing will produce exculpatory evidence .

COMMISSIONER WEBSTER: That's the original language.

COMMISSIONER SCHECK: Right. That's the language we have, that this is not, we don't believe that this part is repealing the statute of limitations. This is really more of an access issue because at the end we're saying that when you, you know, then, then the state, I think that was actually Judge Abrahamson's concern, she was concerned about let's say you get evidence that shows he's definitely not guilty, are we saying the court can still choose not to hear it on statute of limitations grounds and we're actually leaving that open to the states.

So, this is really not designed as a statutory, I would agree with you if we were just talking about repealing the statute of limitations, this is really --

COMMISSIONER WEBSTER: That was a bad choice of words. I was thinking about postconviction remedies and the standards.

COMMISSIONER SCHECK: Right. I think we need this and at this level. And I agree with you about exactly what it requires because of getting access. And getting access has really been the terrible problem here. And, and, you know, if a court has the discretion under this proposal not to pay for it, to make the defendant pay for it, if it thinks it's not a particularly compelling case, and then somebody literally has to pay for it.

So, which I think would happen. And we're trying to get into those cases where, you know, it's pretty good evidence of innocence but people are resisting it. Because the truth of the matter is in these cases that you either get prosecutors consenting right away because they go oh, why not, or they're never going to consent because something else is going on. All right? And, so this gives us the opportunity for a judge to say, well, I'm not saying I'm going to dismiss this case yet but maybe it's going to be helpful.

We'll at least give you access to do the test; it doesn't mean we're going to do anything else afterwards. So that was the thinking.

COMMISSIONER REINSTEIN: And the court may never even see a petition because once they do the testing, you may not have any results.

COMMISSIONER WEBSTER: Right.

COMMISSIONER REINSTEIN: And even if they do the testing and it's favorable, it may not be favorable enough depending on whether a judge then looks at the whole scope of what the relief is that's requested, that they may just deny the relief to begin with.

PROFESSOR BERGER: Well, and I do think we wanted to leave open the possibility that there truly might be some cases where this would not be exonerative evidence but it truly would have led to reasonable doubt and acquittal. And I think that's a group of cases that one can't simply ignore. It's still going to be in the judge's discretion to take a look at that transcript, which I think our comments make quite clear, and look at the, what role that evidence played in the case, what other evidence there was, what the defendant said, what the defense was, all of those factors and the court is simply going to have to use its discretion then and decide whether to go further.

CHIEF JUSTICE ABRAHAMSON: I'm going to, if we can, just bring a halt to this discussion. We'll come back to it and look at it again because we're expecting Associate Attorney General Raymond Fisher in a few moments, in accordance with our schedule, at which point we're going to talk with him and present to him our booklet on postconviction DNA testing and the pamphlet and that these are in response to Attorney General Reno's requests. But I would like to, before he comes, if we can, look again at the recommendation of the National Commission on the Future of DNA Evidence, relating to law enforcement and DNA technology, remember we did that yesterday and we had some suggestions?

And, if you look at the first page, the second paragraph has been changed somewhat in focus but not in substance. Commission has identified the educational resources made available to law enforcement agencies that have not kept pace with changing technologies.

The local state and federal funding is inadequate to enable law enforcement to use DNA technology in an investigative capacity that maximizes its potential. Law enforcement needs more training and resources in how to properly identify, preserve and collect DNA evidence. Greater awareness of the existence and effectiveness of convicted offender DNA databases must be achieved.

Currently the knowledge that exists is usually contingent on the nature of particular departments, limited training budget. There is, however, clear evidence that when law enforcement officers are made aware of the utility of DNA databases, they rapidly employ it in their investigations. Does that meet with approval? I think it captures what was said. Where are the other changes, is it in --

DIRECTOR ASPLEN: On the actual recommendation itself, we added to letter A, local state and federal level, and we added letter D, educating victims about DNA technology issues. I would also suggest, you notice at the bottom there's a kind of that, it's really just a tag paragraph.

The thought was that we should set something up indicating that there were other considerations in that the Commission's working on other matters. I would suggest that we just eliminate that paragraph if you will, because we can communicate that, NIJ can communicate that to the Attorney General in a way that really doesn't take away from the impact of this recommendation. We can do that in any other number of get-backs or updates but I don't think it needs to be done here. That's all right.

COMMISSIONER BASHINSKI: I have one other comment that I should have made yesterday. In C where it says using DNA to investigate old unsolved cases, you may want to rethink old. I mean, I think just unsolved cases in general because the focus on old cases, that then raises a spectre, well, you know, we're not paying attention to the new ones.

DIRECTOR ASPLEN: Would it be appropriate to say using DNA to investigate and solve unsolved cases including those, something including those old cases previously thought unsolvable, it's using solved too many times but something like that?

COMMISSIONER BASHINSKI: Yeah, I understand what you're saying. I do want to point out that the older cases need to be worked on but I wouldn't want to make that an exclusive statement.

COMMISSIONER REILLY: And unsolved cases regardless of their age.

COMMISSIONER SCHECK: But I guess, Jan, I think the reasoning is that in A when you say developing resources necessary to use DNA technology in nonsuspect cases, I thought those are unsolved.

COMMISSIONER BASHINSKI: They are but --

COMMISSIONER SCHECK: I mean those were sort of like the new unsolves and this one was designed to catch up with the old unsolves.

DIRECTOR ASPLEN: I think Dr. Reilly's suggestion cures that problem.

COMMISSIONER SCHECK: Uh-huh.

DIRECTOR ASPLEN: I think including regardless of their age really takes care of that rather nicely.

CHIEF JUSTICE ABRAHAMSON: I wonder if in one we could say that the Attorney General hold a law enforcement summit to focus on DNA issues relating to law enforcement personnel, because, just to discuss again is we want to focus on these issues.

COMMISSIONER REILLY: And certainly to my mind seeing it for the first time the phrase relevant DNA related has a rather limpish ring, no offense to my colleagues.

CHIEF JUSTICE ABRAHAMSON: No one ever called me a wimp. All right.

COMMISSIONER REILLY: Forgive me.

CHIEF JUSTICE ABRAHAMSON: Okay. Can we do that? Is that all right?

COMMISSIONER REILLY: I'll get in trouble.

CHIEF JUSTICE ABRAHAMSON: We'll strike the last paragraph. Fine, okay. Do you want to talk about this with him or just mention it?

DIRECTOR ASPLEN: He already has a copy of the original draft. This is not substantially different. He won't address this. We should probably take an official vote on it.

CHIEF JUSTICE ABRAHAMSON: Okay. Those in favor of, as revised the last few moments of this recommendation, say aye.

PARTICIPANTS: Aye.

CHIEF JUSTICE ABRAHAMSON: Any opposed? Then it is unanimous by the Commissioners present. All right? Okay. We should -- why don't we --

DIRECTOR ASPLEN: But not go anywhere.

CHIEF JUSTICE ABRAHAMSON: Yeah, don't go anywhere is the instruction. But, you may stand up and you may get coffee but not beyond those confines so that when our guest arrives, we are here.

(There was a break in the proceedings.)

**Associate Attorney General Raymond Fisher**  
**Presentation of Publications**

***Postconviction DNA Testing: Recommendations for Handling Requests***  
***What Every Law Enforcement Officer Should Know About DNA Evidence***

CHIEF JUSTICE ABRAHAMSON: The Commission is back in session and wants to welcome Mr. Fisher, Associate Attorney General. He is the third ranking official in the department in charge of civil litigation in the Office of Justice Programs.

Mr. Fisher, it is a great pleasure that we take this opportunity to present to you the first two publications of the National Commission on the Future of DNA Evidence. It is the Commission's belief that these two documents will have a significant impact on the use of DNA evidence in the criminal justice system in several ways.

The first publication, excuse me, is postconviction DNA testing, recommendations for handling requests. This booklet offers a method of analysis for those cases in which DNA technology may be applied to determine innocence of individuals who have been imprisoned for years. It may also serve to confirm the reliability of the original conviction and resolve lingering doubts and questions of doubts.

The pamphlet, *What Every Law Enforcement Officer Should Know About DNA Evidence* -- and this will be made available to every law enforcement officer in the country -- this pamphlet will help educate police officers about how to identify, preserve and collect DNA evidence so that technology can be used to identify the appropriate suspect earlier and with greater reliability.

Together the two documents fulfill a request made by the Attorney General at the Commission's first meeting. At that meeting Attorney General Reno requested that the Commission not wait until the conclusion of its tenure to offer its recommendations.

Rather, recognizing the urgency of several issues relating to the use of DNA evidence, the Attorney General asked that we present our recommendations as they were developed so they could be implemented in an effective and expeditious way. The Commission believes that the education of law enforcement to use DNA as an investigative tool more effectively in the use of DNA evidence to exonerate wrongfully conflicted persons are two of these urgent issues.

I would like to take a moment to recognize and offer my thanks and the thanks of the Commission to the members of the Postconviction Working Group. Their commitment to this project has been evident from its inception.

Indeed they were working before this Commission first met. Since that time they have traveled to and from various parts of the country, attended not only their Working Group meetings but also numerous Commission meetings. They have spent untold hours of their own personal time developing these recommendations and they have sought the counsel of and review of hundreds of prosecutors, defense attorneys, judges, scientists, academicians and victim advocates.

The work of the Postconviction Working Group produced not only an excellent publication but also a process of which practitioners can be confident. While the members of the Working Group and Commission are listed in the publication, I would like to publicly recognize those members of the Working Group that are present today, Dennis Bauer, who is at the head of the table, prosecutor from Orange County, in California, Kevin Curran, who is also at the head of the table, federal public defender of St. Louis, Missouri, and, now, I'm sorry, I left there, they'll get it, Charlotte Word --

DIRECTOR ASPLEN: Charlotte Word, yeah.

CHIEF JUSTICE ABRAHAMSON: -- of Cellmark Diagnostics. Have I forgotten somebody else? Ah, there, it is. And particular thanks to the Commissioners who worked with this Working Group, Barry Scheck; Judge Reinstein, the Chair; Kathryn Turman and Charlotte Word, who is also on the, a commissioner member.

Judge Reinstein led this group admirably. It's a group whose work is not quite finished but perhaps it will continue on in its successful manner. What else have I forgotten? I'm not finished yet. I'm just through the Commissioners and the Working Group. And, great thanks, of course, go to Professor Margaret Berger, who has been the reporter and writer for that group and Professor Berger is, as we all know, professor of law at Brooklyn Law School.

Now what have I forgotten, anything? Good. But, Chris has been shy when he wrote a part of this for me, and he did not say that we should thank Christopher Asplen, Executive Director of the Commission and Dr. Lisa Forman, the Deputy Director. Both have worked very hard and have brought these projects to fruition. And, the full membership of the Working Group and the Commission are listed in the publication.

So, with those introductory remarks, we do present these publications to you. And there are many more copies. They're outside. You can bring your own truck to take them back. Mr. Fisher?

MR. FISHER: Thank you. Well, I appreciate the opportunity to be here and receive both of these excellent publications on behalf of the Attorney General, who I think you all can appreciate would have loved to have been here herself. I want to thank Justice Abrahamson for being the dynamic and charismatic leader of this organization, surely has been a great supporter of Department of Justice initiatives and a collaborative partner with us on a number of occasions.

And I see some familiar faces here, Bill Webster, who is a good friend and has also been very supportive, Chief Hillard from Chicago, who was a kind host to me when I was out there some time ago last year. Before I came to the Justice Department, I was a practicing civil litigator in Los Angeles for 30 years. And that had something to do with the civil litigating aspects of my tenure at the Justice Department but really what perhaps was one of my most challenging and fun assignments was serving for two years on the Los Angeles Police Commission and before that on the Christopher Commission as Deputy General Counsel, when I became familiar as a layperson with the rather intimate side and problems of law enforcement.

And, so, when I came back here to the Justice Department, I have had occasion through the COPS office, which is under my oversight and supervision, to spend a lot of time dealing with local law enforcement issues.

So I have a personal appreciation both through my own eyes and through the eyes of the Justice Department for what it means to have collaborative partnerships with people such as yourselves, experts in the field, in such an important area as the evolving science of DNA.

These two documents, as Shirley just said, really address two important aspects, different aspects of the judicial system. One is, of course, improving law enforcement's use of DNA in the investigative or the front end of the process. And, Barry Scheck is an expert on some of the problems LAPD had with that portion of the process.

So, I'm happy to see that there is, in fact, effort to educate local law enforcement on the proper front-end uses of DNA evidence. The other, of course, applies and deals with the issues of applying DNA science to the appellate process, the back-end or postconviction part of the judicial system. Both advance, however, the same goal, the determination of truth in our criminal justice system.

These publications represent a proactive approach to integrating technology into the crime-solving aspect of law enforcement and a commitment to improving our judicial process. And for all of your dedication, your hard work to date and your ongoing commitment, I want to offer the profound thanks of the Justice Department, the personal thanks of the Attorney General and my own personal thanks. A few years ago the Attorney General read about a case in which DNA evidence was used to prove the innocence of a man who had been wrongly in prison.

The Attorney General asked the National Institute of Justice to research how many similar cases might exist. The result, as you know, of NIJ's research was the publication of *Convicted by Juries, Exonerated by Science, Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*. This publication tells the stories of 28 men proven innocent by DNA technology long after they were sent to prison.

We now know of more than 65 wrongly convicted individuals who have been released as a result of DNA technology. And there are stories at least once or twice a month about similar circumstances where people serving on, some on death row who are being exonerated by the use of current DNA technology. Your publication, *Postconviction DNA Testing, the Recommendations for Handling Requests*, strikes a critical balance.

While the recommendations encourage the use of DNA testing when that testing may be determinative of truth, they also recognize the value of finality in the criminal justice system. The five-category framework of analysis encourages prosecutors to agree to DNA testing when exclusionary results would exonerate an individual. However, the recommendations discourage the filing of a DNA-based appeal in those cases in which DNA testing would be frivolous.

Most importantly, the recommendations provide information necessary for all participants in the system, prosecutors, defense attorneys, the judiciary, laboratory personnel and victim advocates

to make decisions based on an accurate understanding of the technology's abilities and limitations.

Let me take a moment to commend the process you used to develop these recommendations, something that Shirley already adverted to. By bringing together on both the Commission and the Postconviction Working Group representatives from the National District Attorneys Association, the National Association of Criminal Defense Lawyers, Victim Advocacy Groups, the scientific community, academia, and the judiciary, you have created an approach to these cases that all aspects of the system can embrace.

It is significant that while one of the publications being issued today addresses the need to quickly identify those cases in which mistakes have been made, your other publication strives to improve law enforcement's ability to identify the right perpetrator quickly and accurately through DNA technology, in other words, to avoid the mistakes. Recognizing the crucial role of the first responder, your pamphlet, *What Every Law Enforcement Officer Should Know About DNA Evidence*, provides information necessary for the proper identification, preservation and collection of biological substances that may yield valuable DNA evidence.

Recognizing that evidence not identified at the crime scene may not be collectable at a later date, the publication provides numerous examples of evidence that may contain valuable DNA. Similarly, recognizing that evidence not properly collected may lead to confusing or inaccurate results, the guide explains the danger of contamination and offers suggestions to prevent it.

I am extremely pleased that the National Institute of Justice has committed to distributing this document to every law enforcement officer in the country. The Attorney General and I look forward to your further recommendations regarding how we can teach and how we can empower law enforcement to use DNA evidence to solve crimes even more efficiently.

Let me close by saying and address the relationship between these two documents. It is my hope the widespread dissemination of the one, the one I've referred to as the front-end or the investigative stage of the process, starts us down a path toward eliminating the need for the other, or as I have called it the back-end or the postconviction part of the process.

By committing ourselves to more accurate and effective investigative processes through the use of DNA technology, we work toward the elimination of the tragedy, the real tragedy to the individuals involved and the tragedy really to our whole justice system, the tragedy of wrongful convictions. On behalf of the Attorney General, myself and the rest of the department, I again thank you for your efforts and we very much look forward to continuing to work with you and for your further recommendations.

And let me just say that I had the experience actually about four years ago, five years ago now of sitting on a Superior Court jury in California where DNA evidence was presented as part of the proof. And it was a fascinating experience. It was before the Simpson trial and so we were sort of guinea pigs I think for presentation.



It was not the high-tech presentation that saw at the Simpson case. But, it was a fascinating if somewhat daunting experience to sit as a juror and listening to this novel kind of evidence, growing up with Perry Mason and fingerprint kind of concepts, to have the prosecutor and the defense attorney go through the charts, the elaborate charts and try to make sense of what this all meant. But obviously the science has and the articulation of it in presentation has grown since that time but there is so much more to do.

And at the Justice Department one of the things personally I am working with the Office of Justice Programs, NIJ on, is to from our end make sure that we pursue as rapidly as possible the effective use of DNA because, as I said just now, and I believe so strongly, it is so important to our justice system to make sure that we do not have people wrongly convicted where there is a technique that's available to prevent that from happening. It really shakes, I think, the confidence of people when we see stories about people who have been condemned to death row and to find out that they can be exonerated, in some cases very conclusively by DNA evidence.

So, I commend what you are doing. You are really, as you all know but I would like to acknowledge it, engaged in something that is critically important to all of us. I would also like, and then close, to take the opportunity to introduce three members of the Justice Department who are here and acknowledge Chris Asplen, who is detailed from the Justice Department to your Commission. Chris has done a marvelous job and I appreciate the applause you gave him before. It's well deserved. Chris, we do thank you.

In addition I would like to introduce my deputy, Ivan Fong, who is very much involved in the scientific side of what we did at the Justice Department from the Associates Office, Alexa Revere, who is standing, guarding the door back there and who is another one of my deputies and works with the Office of Justice Programs.

And then it's a real pleasure for me to introduce in addition on his first day at work, Dr. Don Prosnitz. Don, why don't you stand up. Don is our, the Department of Justice's first and new chief science and technical advisor.

We have finally at the Justice Department decided we better catch up with where things are going. And Don comes to us from the Lawrence Livermore Laboratories, where he has been chief scientist. And we're delighted to have Don on board. He will be advising the Attorney General, the Deputy Attorney General and myself on science and technology matters. He is not a lawyer, he is a scientist, and it's time we got some scientists involved in what's going on at the Justice Department. So Don, we're glad to have you on board. Thank you all for letting me be here.

CHIEF JUSTICE ABRAHAMSON: We'll take a break now.

(There was a break in the proceedings.)

CHIEF JUSTICE ABRAHAMSON: We are back convening. Now, I thought that after talking to several of the Commissioners and the Working Group that we would have additional comments, if any, on the proposed uniform statute, that Professor Berger would then put in the commentary

that seemed to reach a consensus here, that it would then be circulated to the Commissioners for further comment and put on the Web site for further comment and be brought back at our next meeting for resolution. Does anybody object to that process? Judge Reinstein?

COMMISSIONER REINSTEIN: No, that's fine.

CHIEF JUSTICE ABRAHAMSON: All right. Then that will be the process. Do you need any further instructions, Ron, or Margaret Berger or anyone else?

COMMISSIONER REINSTEIN: No.

CHIEF JUSTICE ABRAHAMSON: Okay. Yes.

COMMISSIONER SCHECK: I just want to raise one point that Chris had mentioned and Dr. Forman, and that has to do with funding, that I think that there has been, it might be useful to get a consensus of the Commission that there's a lot of funding that goes into the DNA Identification Act that federal monies that go to crime labs on the state level and that there has been some view that monies that go to laboratories for, at the federal level could not be used for postconviction testing.

CHIEF JUSTICE ABRAHAMSON: I don't know anything about this, Barry.

COMMISSIONER SCHECK: Yeah, but I just, I just wanted to --

CHIEF JUSTICE ABRAHAMSON: Well, why don't we raise that with Chris --

COMMISSIONER SCHECK: Why don't we raise that when he comes back.

CHIEF JUSTICE ABRAHAMSON: -- and then talk to the Justice Department about that and bring back any information we have on that. Norm?

COMMISSIONER GAHN: Yeah, just over the break I was still thinking about this and I just wish when you revisit that area for going into the comments about that A3 and B3 when you talk about or was not subjected to the testing that is now required. I know the example that you gave was, well, there was something not as discriminatory in DQ-alpha, now you want this but I've always been operating under the impression that PCR is PCR and that is the testing. And now if you're going to break it down into different genetic, we're going to look at let's say someone had DQ-alpha/polymarker -- says, well, no, I want G1SAD level or I want STRs. To me I thought PCR is PCR and that testing was done PCR, maybe not the genetic markers someone wanted done. And I think that has to be just addressed add clarified a bit. More do you understand what I'm saying.

COMMISSIONER THOMA: Norm, if you look at page 37 of the book, there's a specific example of a case, an unpublished decision. And, it's not exactly on point, within the gray, shaded area, it's not exactly on point with regard to your remark but I think it was something that Margaret spoke of earlier and I think it's covered in a way.

And, as Barry pointed out, within the book itself I think it's about explained pretty significantly in my review of it. I only got a couple of days worth of book but I think it is but, if you're not satisfied with it, perhaps we should dwell on it for a while.

COMMISSIONER REINSTEIN: It probably should be referenced anyway in the comments.

CHIEF JUSTICE ABRAHAMSON: I'm sorry. Who's talking now? Go ahead, sorry. Closer to the microphone.

COMMISSIONER REINSTEIN: Yeah, it probably should be referenced anyway. I agree as far as the comments.

PROFESSOR BERGER: Charlotte next to me just mumbled something about the power of the test and I think maybe it really should be put in terms of that, the power of the testing has increased to a point where something that was previously inconclusive can now be resolved in a more conclusive manner and we'll try and put something in there.

DR. WORD: Or something that, something that's conclusive but has a limited power and more testing could in fact produce exclusionary results.

COMMISSIONER SCHECK: There have been many cases, we all know this, where the DQ-alpha is not much better than conventional serology, frankly, and is so much weaker and it's --

DR. WORD: Well, if you have an exclusion, it's meaningful but an inclusion, that's right --

COMMISSIONER SCHECK: No, no, I mean, right, an inclusion, is a PCR inclusion based on DQ-alpha system which has limited discriminatory power particularly when there was more than one sample involved as a potential mixture and then subsequent STR tests or even polymarker tests exonerated the inmates. There's quite a number of those.

But, we all agree that when you have an STR result or an RFLP result at three or four markers, that that's the kind of case that would not be appropriate to retest and in fact, you know, our innocence project, we don't even take them.

CHIEF JUSTICE ABRAHAMSON: All right. Norman, are you satisfied?

COMMISSIONER GAHN: Yes, Your Honor.

CHIEF JUSTICE ABRAHAMSON: Good. All right. Any other comments on the uniform, proposed uniform statute for obtaining postconviction DNA testing. Anything else? All right. Then we'll proceed as we've set forth and Professor Berger will communicate that to Chris for the Web and ask him for comments, fine.

**Working Lunch**  
**Database Sample Retention Issue Discussion**

*Mike Sheppo*  
*President, American Society of Crime Laboratory Directors*  
*Database Sample Retention Issue Discussion*

CHIEF JUSTICE ABRAHAMSON: We would be scheduled now for Dr. Crow's Research and Development Working Group report but Mike Sheppo needs to leave earlier than originally expected and he was going to speak at lunch, through our working lunch. So we are going to, if that's all right, with you, Jim --

COMMISSIONER CROW: Sure.

CHIEF JUSTICE ABRAHAMSON: -- put Mike Sheppo on next if that's okay and we will excuse the Working Group, on the table. Mike Sheppo is president of the American Society of Crime Laboratory Directors and he's going to talk about data sample retention issues. We may very well then break for lunch and continue this discussion. Thank you very much, Mr. Sheppo.

MR. SHEPPO: Thank you, Chief Justice, members of the Commission. As the Chief Justice said, my name is Mike Sheppo. I am the director, the president of the American Society of Crime Laboratory Directors. I also am a bureau chief with the Illinois State Police, Forensic Sciences Command and am in charge of two laboratories or nine laboratories in the State of Illinois, the Chicago laboratory and the Springfield laboratory.

I have two documents that I would like to tender to the Chair, the first one being a document which describes the American Society of Crime Laboratory Directors, our purpose, our structure, the code of ethics of the ASCLD as well as guidelines for the forensic laboratory management practices of the organization.

The reason I bring this with me today is that this document very well elucidates the purpose of the American Society of Crime Laboratory Directors. One of the things that we hold in high value is the public trust that forensic laboratories must have and secondly, the, through the use of science, the ability to solve crimes and thus help ensure public safety. So I will tender that document.

Also, with the permission of the Chair, I would like to read a position summary document that I have prepared on behalf of the ASCLD. This should have been already given to each of the Commission members. I do have additional copies which I will pass around at this point also.

For the record the document is titled the National Commission on the Future of DNA Evidence, American Society of Crime Laboratory Directors Position Summary, Retention of Convicted Offenders DNA Samples. All 50 states have passed legislation for the establishment of DNA databases for law enforcement identification purposes.

The debates on whether to destroy or retain the samples have already occurred in state legislatures across the country. Only one state, Wisconsin, requires the destruction of DNA

samples following analysis and that state has yet to destroy a sample since they are currently transitioning to STR technology and need to reanalyze their convicted offender samples with this new technology.

During the last ten years four DNA procedures were introduced for use in the forensic community, RFLP, DQ-alpha/polymarker, mitochondrial DNA and short tandem repeats, STRs. The retention of convicted offenders samples allows the timely transition to newer forensic DNA methodologies as samples or DNA extracts are readily available at the laboratory.

This process is occurring now with the conversion of RFLP methods to PCR-based, STR methodology. If the DNA samples were not retained, states would need to re-collect DNA samples from those offenders whose samples were previously analyzed with RFLP and then destroyed. Significant costs are associated with the collection of offender samples from 50 to \$100 per sample.

Additionally, the time associated in locating released offenders, if they can be located, would add significant costs to the process and the offender would have to submit to another collection procedure. The convicted offender samples play an important role additionally in quality assurance.

In the event of a candidate match, a possible hit from the CODIS system involving an offender profile, laboratories typically confirm the match by reanalyzing the offender sample. This procedure verifies that specific offender sample was correctly typed during the analysis.

Laboratories could not perform this important quality assurance procedure without retaining offender samples. There is no need, there is no record or indication of misuse of forensic DNA database information. Forensic database samples are controlled by the same physical security measures as any other piece of evidence within the laboratory.

In many states the laboratory agency is forbidden to release offender information to anyone other than law enforcement officers. In the event of an unauthorized disclosure or use of a DNA sample record, 32 states provide specific criminal penalties, felony and misdemeanor for such unlawful activity. Offender samples are also a valuable source for testing new procedures and can be used for validation studies.

This large group of samples gives laboratories the opportunity to evaluate new technologies with varying amounts of DNA. All personal identifying information is removed before conducting these validations.

In summary, the American Society of Crime Laboratory Directors recommends to the Commission that those laboratories authorized under state law to obtain and process DNA offender samples for inclusion in the database be permitted to retain these samples as directed by the individual state legislatures. Retention allows for post-hit verification analysis, for adaption to changing DNA technologies, for enhanced quality assurance and for validation studies after personal identifying information is removed. Respectfully submitted September 27th, 1999, Michael G. Sheppo, ASCLD president.

Madam Chair, I would also like to comment just briefly on what I believe to be the more important points that this summary offers. To begin with, I think the most compelling argument to retain the samples basically deals with the fact that DNA technologies will be advancing, they will be changing over the next number of years. I don't think it's too farsighted to say that these changes could occur as soon as five years.

Presently the Illinois State Police has one of our senior scientists involved in a research project with the Argonne National Laboratories, a DOE facility in Illinois, looking at microchip technology for DNA analyses in a forensic setting. This research is proving to be very promising.

I believe the compelling reason here that changes will occur and that databases will be changed primarily deals with the fact that with the advancements of science, the cost of DNA analysis will go down. Using multiple arrays of chip technology and automation could lead to a significant decrease in cost of DNA analysis. I believe this will happen.

Additionally, I know it's been suggested that analyses in two systems could be run tandemly if, in fact, the technology does change. Presently in Illinois we're faced with that situation. We are presently transitioning to STR technology through training and we are also converting our database from RFLP technology to STR technology. Doing this in tandem is very difficult.

Presently I have four scientists in the Chicago lab who dedicated to RFLP work on cases. This is casework that comes in. It has to be done because we have situations, both in the City of Chicago and elsewhere in the state, where it is compelling to check the database.

As Chief Hillard knows, the Inglewood homicides in Chicago are, is one of the cases that we are working on and we have developed profiles for three different sets of profiles that have actually matched in the database.

With reference to that, these four individuals that are doing this casework and RFLP absolutely are doing nothing with reference to our backlog and essentially are not producing casework. They're simply duplicating what we have already done in STRs.

So to say that we can do this in tandem, essentially what you would be asking me to do is to cut our forensic biology staff in half, if, in fact, at some day in the future we would have to run two systems of DNA.

Additionally, the collection of samples, finding the offenders I believe will be very difficult if not impossible. Offenders will be deceased. Offenders will not want to submit to another collection process. And it will be incumbent upon law enforcement to find these individuals.

As far as the public safety goes, what happens if in fact one cannot retrieve these samples and collect them? I think that is a compelling reason also to retain the samples. Certainly the issues of quality assurance are important but not as compelling.

And, certainly, the fact that the process in the past for the use of a database has not shown any misuse also is a reason to consider the retention of samples; however, not as compelling as the initial statement that I've made. I therefore do ask the Commission to carefully look at this issue.

If in fact it is determined that the databases need more control, then possibly the Commission should consider some federal guidelines, federal law which would in fact make it mandatory that the databases be controlled in certain ways and also penalties be prescribed for individuals that violate these particular guidelines. I thank the Commission for the opportunity to make this presentation today and will be willing to answer any questions.

CHIEF JUSTICE ABRAHAMSON: Well, are there any questions for Mr. Sheppo? Barry?

COMMISSIONER SCHECK: Mr. Sheppo, one of your colleagues from the FBI was here yesterday and I asked him these questions so I'll ask them to you, see if your answers are the same.

MR. SHEPPO: Okay.

COMMISSIONER SCHECK: Let us assume that under one of the statutes that, as you say at the beginning of your statement, says that DNA, these samples can be used for law enforcement purposes.

Let's say that a researcher came to you and said let's strip the identifiers, I want to do research to find a gene for pedophilia or a gene for sexual assault or a gene for violence, and this is a law enforcement purpose and some, whoever is the relevant state actor said, well, that would qualify as law enforcement purpose.

Do you see any reason why that, these samples wouldn't be turned over for that research or for that purpose.

MR. SHEPPO: In Illinois we presently handle the samples as evidence and I do not believe that we would relinquish that control to any individual outside of the laboratory system. Now, if something, if a particular project, a validation study of new technology, et cetera, were being done by our department, certainly these samples could be utilized for that but again that's something that isn't as important as far as I'm concerned as the fact that the technology may change and we will probably have to reanalyze the samples.

COMMISSIONER SCHECK: I'm just trying to, my question was, is that it comes from somebody who is part of the Illinois system. He's got a grant or she's got a grant from some appropriate law enforcement agency to investigate this problem.

I think Judge Reinstein was telling us about somebody like that in Arizona or some researcher like this. Somebody has a research grant. Is there any, any, I mean, do you not agree that that would be in theory possible under the statutes and a use for these samples.

MR. SHEPPO: I think the potential is certainly there. I would agree with you that a scenario like that could occur.

COMMISSIONER SCHECK: All right. And, the only, if one found that to be a particular danger, that, so to speak, or the only way that you can really prevent that would be the destruction of the samples, true; that's something you want to avoid, one outcome.

MR. SHEPPO: Absolutely. But I do believe that controls can be placed on these samples internally and ethically that would disallow such research so the samples could still be retained.

COMMISSIONER SCHECK: Well --

CHIEF JUSTICE ABRAHAMSON: Barry, it seemed to me that one of the purposes of your questioning last time was what kinds of uses of these samples is permissible, right?

COMMISSIONER SCHECK: Right.

CHIEF JUSTICE ABRAHAMSON: And you're just giving examples of various kinds and controls, so, specifically, I don't know that Mr. Sheppo --

COMMISSIONER SCHECK: Well, I think that --

CHIEF JUSTICE ABRAHAMSON: -- would, is in a position maybe to speak for the group as to particular examples.

COMMISSIONER SCHECK: Right. I'm not asking him to come down in favor. I think what I was trying to establish and I think he's agreeing that in, that certainly under these statutes for that purpose somebody came to them with an authorized request to do that kind of research stripping the identifiers it could happen.

CHIEF JUSTICE ABRAHAMSON: Well, as we say in our court, everything is possible --

MR. SHEPPO: Absolutely.

CHIEF JUSTICE ABRAHAMSON: -- in life, so the issue then it seems to me for the Commission is to consider what kinds of research the Commission thinks is valid or acceptable for retained samples, if any, and also a discussion over knockbrats and calamari, but, other food was, a question of whether that's, that's good research.

COMMISSIONER SANDERS: Well, the other thing, yesterday the FBI refused to answer that question that he just asked. When he said he wants to get the same answer, the FBI refused to answer that question yesterday. It seems to me that Mr. Scheck is making an argument for later for closing argument as to establishing the thing.

I think everybody's recognized the fact that there's a potential for it. We talked about it at every Commission meeting we've had we've talked about it and the idea is can we stop that from



occurring short of destroying the sample and I think that we have repeatedly said we think that that could be covered.

COMMISSIONER SCHECK: Well, I'll move on if you all are conceding that this could happen and happen, you think can you deal with it another way but --

CHIEF JUSTICE ABRAHAMSON: That the request can be made clearly can happen. What should be done with the request and where lines should be drawn --

COMMISSIONER SCHECK: Right.

CHIEF JUSTICE ABRAHAMSON: -- is an issue that you are posing to the group and I think the group recognizes it.

COMMISSIONER SCHECK: Right, okay. As long as we're clear it's permissible under the statutes and he would be in a position to resist it even.

COMMISSIONER BASHINSKI: I don't think it's permissible under every statute.

COMMISSIONER SCHECK: Not under every but under no small number of them.

COMMISSIONER BASHINSKI: I don't think is under California's, for example.

COMMISSIONER SCHECK: Well, under no small number. Let me ask you the next question.

Because we all appreciate, just to flesh this out a little bit. Do you have any STRs in your database now in Illinois?

MR. SHEPPO: Yes, we do.

COMMISSIONER SCHECK: How many?

MR. SHEPPO: At present I believe close to 2,000 as of this week.

COMMISSIONER SCHECK: Out of how many are you anticipating putting in?

MR. SHEPPO: We are anticipating putting in about 17,000 between now and the spring and this would be offenders that are being released from the prisons as a priority first.

COMMISSIONER SCHECK: Sure.

MR. SHEPPO: And then we transition into a more aggressive way of getting the other RFLP data translated into the STR.

COMMISSIONER SCHECK: About how many RFLP do you have?

MR. SHEPPO: Offhand I can't tell you. I just don't have that information.

COMMISSIONER SCHECK: But around 2 or 3,000, no more than that, I'm sure.

MR. SHEPPO: Oh, no. There are considerably more than that, yes.

COMMISSIONER SCHECK: More than that?

MR. SHEPPO: Yes.

COMMISSIONER SCHECK: So, I mean more than 10,000.

MR. SHEPPO: I would say somewhere around maybe 3 to 3500.

COMMISSIONER SCHECK: Okay. So --

MR. SHEPPO: Somewhere in that neighborhood.

COMMISSIONER SCHECK: So you're talking about doing 35 STR tests on convicted offender samples, that's what you're talking about here?

COMMISSIONER SMITH: 3500.

COMMISSIONER SCHECK: What?

COMMISSIONER SMITH: 3500.

COMMISSIONER SCHECK: 3500. I'm sorry. Did I say 35?

MR. SHEPPO: After the initial, after the initial samples of the ones that we have in line to do now, yes, I would say about that many.

COMMISSIONER SCHECK: I mean, I guess what I'm really trying to lead you to is that you're woefully underfunded, are you not, in terms of trying to get this done and implement your database. I mean, I appreciate what you're saying about how working in tandem to transition the technology is hard but it's hard because you don't have a lot of resources period to undertake this job, not your fault, you know.

MR. SHEPPO: Well, I wouldn't exactly say that, Mr. Scheck. I, I believe in Illinois we, we have a pretty good basis for completing our project, maybe a little bit behind time. We do have some funding.

There are, though, additional resources that we definitely do need that we are working on, both with the City of Chicago and with our state legislature to, in fact, enhance our abilities to transition our database and particularly we are interested in doing the casework from cases that may not have been analyzed in the past in DNA at all.

COMMISSIONER SCHECK: I know.

MR. SHEPPO: So, we, we see that as something that's very, very important.

CHIEF JUSTICE ABRAHAMSON: Barry, I'm just going to interrupt you because of the time.

COMMISSIONER SCHECK: Yeah.

CHIEF JUSTICE ABRAHAMSON: And let Mr. Hillard and then we'll come back to you.

COMMISSIONER SCHECK: I have no problem.

COMMISSIONER HILLARD: Barry, I can tell you, they're doing a very credible, very excellent job there. We're going to catch up with the rest of the states in a matter of months, hopefully. One of the things that concerns me though, Mike, is the specific retention timeline. Yesterday Dr. Callaghan, he mentioned I think in 50 years and then it went on from there. What timeline have we got for the retention of this, of these samples?

MR. SHEPPO: As far as the American Society of Crime Laboratory Directors, I have no consensus on that at all as to what time line we would want to hold the samples.

If you're asking me a personal opinion, I think it has to be a reasonable amount of time. This Commission certainly could make recommendations as to a timeline, whether that be 20 years, that might be appropriate, or longer.

COMMISSIONER HILLARD: But indefinitely is out of the question, am I correct?

MR. SHEPPO: It depends on how you want to look at this, Chief. The, certainly evidence does have potential and if, in fact, we are holding these samples as evidence, there is good reason to think that you could hold them for longer than 20 years even. But I do see even with reference to storage that this could, you know, eventually turn into a problem as the databases get larger and larger.

COMMISSIONER HILLARD: I know being from law enforcement I should agree with Dr. Callaghan when he stated indefinitely but I don't, I really don't, you know, because I look at some of the problems that we have had in law enforcement and we have had in other professions, you know, and I really just don't, being a law enforcement officer for 31 years, don't trust the system that much.

CHIEF JUSTICE ABRAHAMSON: Norm?

COMMISSIONER GAHN: Mr. Sheppo, I have one question for you. This is the first time that I've seen, unless I'm mistaken that retention, one of the reasons for retention of samples would be validation studies.

The other reasons the FBI agreed with. I'm assuming that if some company comes out with three new STRs, you're talking that type to validate those new STRs, is that what you're talking about?

MR. SHEPPO: Absolutely. Right.

COMMISSIONER GAHN: And when you would do that, when you would do that, you say all personal identifying information is removed, does that include this, the state ID number? I mean, I understand where name, date of birth, all that, but as we do in Wisconsin, then we assign a state ID number. Is that also going to be removed when you would do a validation study.

MR. SHEPPO: I would say yes, absolutely.

COMMISSIONER GAHN: Okay. All right. Thank you, sir.

CHIEF JUSTICE ABRAHAMSON: Mr. Reilly, Dr. Reilly?

COMMISSIONER REILLY: Thank you. My name is Philip Reilly. I just had a couple of questions for you. My sense is from reading documents put before me and from your comments, sir, that the, one of the major if not the major concerns is to not have to rework a large dataset with new technology. You have indicated mentioning one of your own colleagues is at work with the Argonne labs that clearly this is a technology in evolution. Now, we agree so far, right?

MR. SHEPPO: Yes, sir.

COMMISSIONER REILLY: Now, it seems to me that we're both between a rock and a hard place. On the one hand I would think that the last thing law enforcement would want to do would be to set up to accommodate, say, every two years a new development in technology.

At some point it seems as a matter of policy, you want to agree, we have a robust system, we see better systems on the horizon but for some time frame in the future -- and I'll just make up the number and not hold either of us to it -- for five years we want to make do with the system we have because we think it's a darn good system. That would be something we, everybody could want to work to together, right, because it would make a more efficient system.

So, what I'm trying to do is use that fact and if I say something you disagree with, please tell me, to try and work to the other side of the question about length of retention. Could one not at least build an argument that however flawed the current 13 STR standard, if you will, might be one that could stay in place with minor modifications for a length of time and that one could couple something around that length of time to a period of retention.

So that, for example, I can conceive of a system where ten years, ten years from the date of typing an individual, let's say, at parole, one could destroy the sample with very little danger to forcing a state to be bereft of that sample later on because they didn't have it to reintroduce a new technology.

I can see how you would be very opposed to two years. I could see how you would favor 20 but I don't see anything magic in the 20. And if the driving force has changed in technology, I can drift it down pretty comfortably to ten without saying anything about whether it's good or bad, now, I'm not speaking in favor or opposed.

MR. SHEPPO: Okay. Let me address the ten years since that's a mark that you put forth. I believe ten years is probably too short, my own opinion, the reason being you have to look at the age of the perpetrators. Getting those samples I think will be difficult.

If you have an old offender, ten years may be appropriate. With reference to the technology, the premise that in fact we could hold technology in place using this particular STR system for a period of five or ten years may or may not be valid.

Presently, I am not convinced that we will have the through-put using STRs that we had with RFLP. We're finding at least in the early stages over the last four or five months of doing STR casework that in fact the productivity of our scientists is diminished from what they were doing when they were doing RFLP casework. That bothers me.

COMMISSIONER REILLY: I just have one follow-up. Thank you. Just as a follow-up, again I'm searching, since I know there's some disagreement on this issue I'm searching for some common ground here. What if the system works something like this? What if the system said that ten years from the date of parole the typing was, blood was taken for typing, if an individual, if there is no evidence in the individual's record that he has been convicted of another crime, that the sample be expunged?

You know, he's been clean for ten years, you had plenty of time to use the sample to retype, and, there's very, we know most people who are, I think we know, I'm not a criminologist but my understanding is that most people who are going to commit crimes again, profile being mostly young men don't wait ten years to do it.

So the concern about recidivism drops off rapidly after about three to five years. So, I think the criminological argument actually is robust to support a ten year time limitation and it also gives an ample window for new technology.

MR. SHEPPO: Certainly that's a better alternative than destroying the samples after they are entered into the database. So I, I do think that's a possibility and something that the Commission should look at.

COMMISSIONER REILLY: Philadelphia thank you.

CHIEF JUSTICE ABRAHAMSON: Sure. COMMISSIONER Sanders?

COMMISSIONER SANDERS: Sure, Madam Chair, I guess a couple of things. One, I'm thinking about expungement and then you got the costs of associated of going through the costs associated with going through the expungement process. Secondly, we continue to talk about destroying samples that are collected by law enforcement.

I have yet to hear the Commission say anything about the civilian entities such as the hospitals and the insurance companies and all the other people that collect the stuff. The third thing is that we've repeatedly talked about, we talked about convicted felons, that's the only thing that's going into the database right now, though I, I think there should be more than that.

It's one of those things that, to me that the argument is especially with the destruction is that they have articulated so very consistently, everybody that we've heard from, the fact that they need it for the scientific purposes and those kind of things.

And the greatest argument we have against retaining them was as a perceived misuse and a violation of civil rights in people that have already been adjudicated as felons. And I still fail to see the significance.

There's nothing to support the misuse. I still say that the flag, if you were going to run up a red flag it should be with what happens with that stuff and the medical use with the insurance business and those kinds of things. So I just felt like saying that, ma'am.

CHIEF JUSTICE ABRAHAMSON: Well, just let it hang out then, Chief, just let it hang out. Good.

COMMISSIONER SANDERS: Yeah.

CHIEF JUSTICE ABRAHAMSON: Thank you. Yes. Woody?

COMMISSIONER CLARKE: Actually, Mr. Sheppo, I was sitting here thinking, I have a shoe box full of eight-track tapes at home that I don't think I have a way of playing them right now. And with that as an introduction, what I would like to pose to you from a public safety standpoint is next week I convict somebody of forcible rape and they're giving a sample according to law that we have similar to most states across the country, actually, let's say it occurred in Illinois and you profile that sample, using, you know, suing the 13 genetic markers and then enter that sample into your database.

And let's also assume that 20 years from next week my defendant gets out of prison at a young age relatively, young age where he can still re-offend.

So I guess what I'm really asking you to do is to the extent you can at all project into the future where some new technology is being used and ask or if you can answer rather the question what confidence do you have that that profile that you have sitting in your database, you will be able to use at all in comparing that offender sample in a database to new evidence in a case 20 years from now?

MR. SHEPPO: My confidence level would be pretty low, quite frankly, with the 20 year time frame. Ten years certainly I think is possibly reasonable but in 20 years I truly believe science will advance and DNA technology will advance to the place where what we're doing today will be pretty much obsolete.

COMMISSIONER CLARKE: So, in other words, the eight-track tape analogy has some legitimacy in your view as opposed to, trying to think, I guess DVD players can play CDs.

MR. SHEPPO: Right.

COMMISSIONER CLARKE: But eight-tracts that cannot play. So is it a communication problem that you foresee.

MR. SHEPPO: I do. I really do. I think the technology will advance and I think what we're doing today will probably be obsolete just as, you know, looking back, say, 20 years in the past, certainly we could perform some of the techniques that we utilized back then but the information that we got from them really didn't say much.

You know, projecting into the future, I can't say where the DNA technology will go. I think that's difficult to say. What benefit it will be able to provide to law enforcement 20 years from now is very difficult to predict but I would think it's going to be a lot more than simply coming up with a certain probability of some, someone having deposited a particular physiological fluid somewhere at a crime scene.

COMMISSIONER CLARKE: So that you might be in the position of having at least under a sample destruction scenario be in the position of having to maintain double, triple, quadruple and in any event multiple databases, that is different technologies.

MR. SHEPPO: Very possibly. If the sample were still around, though, it could be reanalyzed in the new technology, of course, and entered into a database with that new technology. That's the whole purpose of retaining the sample. Whether or not one would go back and compare to the old technology is questionable.

You know, as I said, with reference to RFLP in Illinois at least we plan on totally phasing out that technique, in the near future as other labs have already done. It simply is not productive for us to continue dual analyses in two systems.

COMMISSIONER CLARKE: Very good. Thank you.

CHIEF JUSTICE ABRAHAMSON: Jeffrey?

COMMISSIONER THOMA: Very briefly, Mr. Sheppo. I think I understand your concern with regard to emerging technology and I don't know whether you have had an opportunity to review Ms. Bashinski's letter to the Chief Justice with regard to California's position?

MR. SHEPPO: I did read it this morning.

COMMISSIONER THOMA: Would you, would your position be interested in merging, that is, to, as a trade-off for a period of time that you would get in addition to ten years, some competence that might allay some other people's fears with regard to what Ms. Bashinski talks about as identification purposes only so that nationwide such a standard as California's, that they

can't be used for any other purpose so that you might get an additional amount of time with regard to retaining the samples but the possibility of them being used for any other purpose is absolutely excluded, which is really the one fear that some of us have.

MR. SHEPPO: Yes. I do think that is a possibility, a real good alternative, actually. The fact that the samples can be used for validation studies is really very low on the list, as far as I'm concerned, for retaining the samples. I can see that as being a minor component of what I'm trying to present today. The main reason is the changing technology.

COMMISSIONER BASHINSKI: I would like to clarify, in my letter we would use a sample for validation of technologies that are for identification purposes only.

So we could, under our statute we can and do use the samples for that purpose but tests to which, which can be applied to the samples are restricted whether they're for validation purposes or for any other purpose to things that are for identification purposes only.

COMMISSIONER REILLY: May I ask one question? This is purely for my factual edification. You state in your first paragraph that debates on whether to destroy or retain the samples have already occurred in state legislatures across the country.

I'm just wondering whether you have any hard factual evidence for that because my own experience has been that there was remarkably little debate about that, and that one of the phenomenological facts about the whole proliferation of state laws has been with some of exceptions how little discourse there was on the subject. So I'm wondering, you must know something I don't know.

MR. SHEPPO: Basically the information that I presented here is from my personal knowledge in certain states there have been debates, including Illinois, California, New York, I believe Virginia, some of the larger states definitely.

I have not gone through all 50 states to see whether or not in fact the records would reflect that in fact there were debates on this subject.

COMMISSIONER REILLY: So to the extent that this represents ASCLD's position, you would say that this sentence is an opinion statement, not a factual statement.

MR. SHEPPO: It would have to be somewhat opinion, absolutely.

CHIEF JUSTICE ABRAHAMSON: Jim, did you have a comment on this?

COMMISSIONER CROW: No, I don't believe so. I might.

COMMISSIONER SCHECK: I have a factual question about storage.

MR. SHEPPO: Yes, sir.



COMMISSIONER SCHECK: Has your group come to any conclusions as to how you would be storing these samples or how much that would cost?

MR. SHEPPO: Storage is relatively minor since the samples are either extracts, as I understand it, or samples of the material put on FTA paper. They are individually sealed. They are controlled with a number and handled as evidence in sealed vault type of refrigeration.

COMMISSIONER SCHECK: But, just so we're all clear, you're saying it's a bloodstain on a car.

MR. SHEPPO: It may be. Again I cannot speak authoritatively for every laboratory in the country as to what laws they have on the books, whether or not someone will be storing whole blood samples. I guess that's a possibility. We are not doing that in Illinois. Jan, what process are you using?

COMMISSIONER BASHINSKI: We actually have whole blood samples and stains and DNA and we have samples going back to 1984. The storage for those types of samples is not, the space is not an issue. Where the space issue comes in is when you're storing evidence.

COMMISSIONER SCHECK: Right, but you're still talking be about freezer space and all that.

COMMISSIONER BASHINSKI: But you can store a lot of cards with bloodstains on them, I mean millions in the amount of freezer space.

COMMISSIONER SCHECK: So you don't have any cost efforts estimates for us?

COMMISSIONER BASHINSKI: I don't think that's a cost problem, do you?

MR. SHEPPO: I don't believe it is a cost problem either.

COMMISSIONER BASHINSKI: It is for the evidence though.

MR. SHEPPO: Absolutely. The evidence can be very, very large and to keep that for a long period of time is, you know, is relatively difficult.

CHIEF JUSTICE ABRAHAMSON: Jim Crow?

COMMISSIONER CROW: Is it feasible to have a law that says that this can be used only for the one purpose?

CHIEF JUSTICE ABRAHAMSON: Is it feasible to have a law for one purpose like validation for identification?

COMMISSIONER CROW: For identification only, yes.

COMMISSIONER BASHINSKI: That's what we do.

COMMISSIONER CROW: Then there seems to be a considerable amount of the objection to saving the material that disappears.

COMMISSIONER REILLY: I think there's a, if I may, I think that there, while I agree with that technically, to me and forgive me if there was some discussion yesterday about this that I missed but to me what's lurking in my mind is the concern that at some time in the relatively near future an issue emerged in the American public about trust.

Even if we pass a law that says you can only use these samples anonymously for validation studies, at bottom what it is, is a statement that the society agrees to have law enforcement hold whole DNA on individuals for an indefinite period of time. And as the Chief here pointed out, there may be very powerful reasons for so arguing and they may hold the day but there will be sectors of our society who do not see it the same way.

And I think it is this Commission's job to find a common ground. That is why I asked my question about whether there had been adequate public debate in the nation's state legislatures about this issue because I actually fervently believe that is not the case.

And I think as a Commission we run the risk of tripping up on ourselves and failing our charge if we don't adequately, adequately address the issue of trust.

And it may be that we will all come out where you think we should be but I think we are have to confront it and say we in effect believe in law enforcement's ability to be the custodian for these samples for a long period of time and to treat them with the finest integrity and if we so believe, that's fine with me. But we have to confront the issue and make a statement about it.

MR. SHEPPO: One thing I should say on that comment, we do already hold in custody as evidence samples of blood with reference to DUI, toxicological studies, et cetera, so that presently is going on. These are samples that also could have the potential, as we are discussing here, to be abused in some way. Certainly there's no track record, to my knowledge, that this has occurred and the nation's laboratories hold this as evidence and take proper custody of it and track it very closely.

COMMISSIONER SANDERS: I think the point, Michael, or the difference is, is like when you hear the genetic profile and the potential for what you can find out about people is what scares the hell out of everybody.

MR. SHEPPO: Yes.

COMMISSIONER SANDERS: And the most remarkable thing that Barry said yesterday that resonated with me is the fact that unless we stand to gain an awful lot by keeping these things, is it worth what it is going to cost us for the issue. I mean, for the issue to be debated at all, to me that's a very tough, very tough question to settle on.

But, that's what we're talking about. It's not like our DUI stuff because with DUI blood you're not, I mean it's, you understand what I'm saying, it's the potential for what could happen with this thing.

And the reason Barry keeps asking everybody that same question is he wants to suggest is this, could this be conceived as a legitimate law enforcement issue with this research stuff and if you do, do you open the door for it. I mean, that's really what everybody is concerned about, I think.

COMMISSIONER SCHECK: Yeah.

MR. SHEPPO: I see what you're saying but the one thing about the toxicology bloods, they do contain DNA also and you can analyze them just like you can analyze bloods that are used primarily for the DNA data bag. There's no difference between the two.

COMMISSIONER SCHECK: Just so you understand, I mean, you may not, you know, ultimately agree, it's a cost/benefit analysis but one of the things, Dr. Crow, we were discussing in the technology group, right, is that you want to take a bloodstain and analyze it to develop predictions about phenotype, does this person have red hair, does this person, we already know we can do a lot of racial profiling with this.

Nobody likes to talk about it because it scares the hell out of the public but you can take a bloodstain, you can look at certain polymarker things and you can say ah, this is probably from a Caucasian, this is probably from a Hispanic.

Now, it is not going to be too long from now, in fact, as Judge Reinstein was reminding us yesterday, it's already here, that people are going to say the next law enforcement purpose is that we can make a prediction about susceptibility to violent, certain kinds of violent behaviors.

Now, when we say what's so special about these sets of samples as opposed to any other set of sample that an insurance company might get you, and, you know, I'm very concerned about the insurance companies, and, you know, I wish we could address it but that's not our Commission.

This is a very unique set of samples. These are people, as a researcher you're saying where else can I get blood samples from violent criminals if I want to study the proposition what is it, is there anything genetically that leads people to predisposition towards violence. These are a bonanza. And if you keep them around, the argument goes, somebody's going to want to get them.

And even though, Dr. Crow, in the original DNA identification act statute on a federal level, I know because I sat in the room when the draft was hammered out, we thought we dealt with this issue by saying you can only use the samples for forensic identification purposes.

And we then specifically defined that to mean for a linkage in a criminal case and for identification of lost bodies. But the states have not necessarily seen fit to follow this in their statutes and leave open, quote, law enforcement purposes or in Massachusetts they say charitable purposes or research purposes.

And, you know, that can be the door through which well-meaning people in the future want to use these for certain purposes. And my fear is that, because I debate this with my ACLU friends, all right, you will never win the argument that when it comes to saying what are they going to do with these samples, all we have is the statute that says you can only use it for law enforcement purposes and otherwise we're going to arrest you, right? Well, let's say, somebody's going to just say the new law enforcement purpose is to look at these behavioral characteristics.

CHIEF JUSTICE ABRAHAMSON: I think the Chief set forth that balance --

COMMISSIONER SCHECK: Yes, he did.

CHIEF JUSTICE ABRAHAMSON: -- very well. There was one other hand up and it's Michael Smith so he can have the last word. But we're going to I think come back to this when you're up later in the afternoon. Is that right?

COMMISSIONER SMITH: It's true. My point was only, although I think it's with such resignation. You know, the confidence I have, the trust I have that we will get to this afternoon, you know, I don't know.

CHIEF JUSTICE ABRAHAMSON: We're running really quite on time. Go ahead.

COMMISSIONER SMITH: I know. It was only that the law enforcement is only one of the players. That is, these are the creatures of state legislators. And my confidence in law enforcement is very high and my confidence in state legislatures varies.

CHIEF JUSTICE ABRAHAMSON: Okay. Well, with that we will come back to this when we deal with the legal issues. Now, the plan is we're going to have lunch and we're going to get back here at about 1 o'clock.

And, Chris is going to give you instructions. That will put us on schedule, with approximately a half hour for Dr. Crow's report on Research and Development Working Group and then we will go into the legal issues, which we have here, for about two hours. Okay? Chris, where do we eat?

DIRECTOR ASPLEN: Lunch is being served in Hemisphere B room.

COMMISSIONER REILLY: We have to take an airfare?

DIRECTOR ASPLEN: Go out the door, take a left down the hallway it's past the amphitheater on the right-hand side? I'm sorry, yeah, take a right, go down and, it's past the amphitheater on the right-hand side, right?

CHIEF JUSTICE ABRAHAMSON: And the magic words are beam me there, right?

DIRECTOR ASPLEN: Yeah, you can leave your stuff in this room.

(There was a break in the proceedings.)

CHIEF JUSTICE ABRAHAMSON: If the Commissioners would come to the table, we will continue on. All right. We'll start again. Just one comment. Requests for the proposed draft of the uniform law have already been made by a number of publications and groups, so, that will be done by Margaret Berger and so we can expect, at least hope that we get constructive comments on that and I think that's good. And we want to welcome Chief Gainer, who will be with us as soon as he gets off the phone. Oh, there you are. All right.

COMMISSIONER CROW: He's ahead of that.

CHIEF JUSTICE ABRAHAMSON: Good. Thank you for coming. No problem. Okay. We're up, wait, instructions for getting out of town, quickly.

DIRECTOR ASPLEN: Yeah. We'll do this now in case anybody has to leave a little bit early. For those of you who need to get to the airport and you want to take the Metro to the airport, which is certainly an efficient way to do it, go down the main hallway past the lunchroom, take a left outside to the courtyard and follow the signs. It's a dollar-thirty during rush hour, a buck-ten regular. You take the blue line to the yellow line. It's as easy as can be. If you want to take a --

CHIEF JUSTICE ABRAHAMSON: You can take either the blue or yellow, is that accurate? Either blue or yellow.

DIRECTOR ASPLEN: Thank you. Thank you. Leave it to me, right.

COMMISSIONER BASHINSKI: You lost me at the lunchroom, Chris.

DIRECTOR ASPLEN: Huh?

COMMISSIONER BASHINSKI: You lost me at the lunchroom. What was the next thing?

DIRECTOR ASPLEN: Oh. Take a left outside to the courtyard and there will be plenty of signs out there for the Metro. Given the confusion if you would like to take a cab, cabs run regularly off of Pennsylvania Avenue out front. If anyone prefers to call for a cab, we can arrange this. There's an extra fee of 75 cents a minute if they're sitting out there waiting for you but they do run regularly. Pennsylvania's big drag. Okay.

## **Research & Development Working Group Report**

*Dr. James Crow, Working Group Chair*

CHIEF JUSTICE ABRAHAMSON: Okay. With that we turn to Dr. Crow for a report on the Research and Development Working Group. Jim?

COMMISSIONER CROW: Fine. Let me start by saying that when we talked about 50 years in the future, I decided to look 50 years in the past. And if we go back 50 years, which I do, and many of you do, at that time there were 48 chromosomes that had not been counted correctly. Seems crazy now. Actually, it was more like counting strands of spaghetti than counting discrete objects. But also we didn't know that the gene was DNA. The prevailing opinion was that the gene was protein.

It was in 1953 that it finally, finally got straightened out to most people's satisfaction. And it wasn't until 1985 that this very deep scientific discovery was made practical from the standpoint of forensic use, had quite a long time delay but once it got started it increased exponentially.

All of this is to say that any predictions for 50 years in the future are totally useless and predictions for ten years in the future are troublesome.

The job of our subgroup has been prediction and not prescription. So, we have tried to make predictions as to what's happening within the next ten years but they're based mostly on the kind of things that are available now and are likely to be refined in the future.

One thing I think is pretty clear, and that is that the 13 core loci are here to stay for a while. They will be superseded by better things but that doesn't mean that they will be replaced because the laboratories will have tooled up to use these 13 loci and they don't want to change even to something that's better. They don't want to change from something that works very well just to get something that's better.

So I think we can expect, at least we say so as a group, that we can expect the STR 13 core loci to be around for the next ten years, which is our period of time to look at this.

There are essentially two kinds of technical improvements worth talking about, there being two kinds. One is those that will simply make the 13 loci easier to use, more effective to use, more rapid, more automated, more robotics. Those things are almost certainly going to come within the next ten years but they'll use the same 13 core loci.

There are also going to be new systems that come and they're already here in many cases. The, I'm thinking about the same kinds of things that could be used, additional STRs, I think we can expect that pentanucleotides will come into the picture more than in the past.

They have two kinds of advantages. One is that there are a larger number of alleles per locus and the second is that the people who work in this field tell me that they're less prone to stuttering than the repeat of shorter lengths. So I think we can predict there will be more pentanucleotides.

COMMISSIONER SCHECK: Could you define what those are a little bit?

COMMISSIONER CROW: Yes. They're repeats of five units. Most of the ones that are now used are repetitions of four units and the fives just turn out to be a little bit better. And if they had been discovered first, they would probably be the ones that would be in use. I think there are, I think in two years those would be added to a lot of the kits that are available.

There is also, the one that Promega puts out right now has one pentanucleotide in it along with the 13 core loci and a sex-determining locus. What's coming up already here, we'll certainly have more emphasis on the Y chromosome and the Y chromosome will use SNPS, which is, which means single nucleotide probes or polymorphisms. That, the idea is not new, the DQ-alpha is already such a thing. But the widespread use of these is new and will undoubtedly increase in the future.

The last time I looked at this, which is a few weeks ago, there were 150 of these things on the Y chromosome. So that means that the Y chromosome is going to become just as useful as any other chromosome and it will have specific uses, especially with mixed samples from rapes. Having a Y chromosome arm will make it much easier to distinguish how many different males contributed to this.

Mitochondrial DNA is here already. We heard from Dennis Bauer. He had his first case based on mitochondrial DNA this past week. One, one disadvantage of both the Y chromosome and mitochondria is that these were essentially single unit things. There's no exchange of parts, no scrambling that goes on. And that means that the amount of information you have is simply restricted by the size of the database.

And so there will be pressure, and I think it will happen, to increase database sizes for mitochondria and the Y chromosome to the extent that it's used. Mitochondria has the advantage that it traces the female ancestry, so that means you can't always tell people apart but you can tell whether they are descended from the same female.

The Y chromosome has the same both important attribute and deficiency in that it traces male ancestry. We've seen, the newspapers have had quite a number of interesting examples of what has been transmitted by way of the Y chromosome.

We can certainly, I think these new markers will mainly be SNPs and they can be and can be and will be popularized a great deal in the next few years. It's already happening. Most people who are involved in the research in this area as opposed to forensic practice are using SNPs all the time and they'll clearly come out in medical research. The genome project, which is due -- well, the year in which it's due changes every year. I think it's clear that the reason that the target date changes is not because the science changes, it's because the definition of completeness changes, that is, relaxed a little bit from time to time.

So we're going to know, it's a very large substantial fraction of human DNA very soon and this will certainly pick up genes. The latest estimate I saw of the number of genes was 140,000. When I was starting to study genetics, we estimated it at 10,000 and the number keeps going up

and up. I say that partly to emphasize the point that we really don't know and it's a guess, guess right now.

There will be much more integration of computers into the analysis, even from mixed samples, which are troublesome things to do statistically by hand, at least, and computer programs can do this more effectively.

Robotics will come into the act sooner or later and I think probably sooner. I think you can also expect to find much more studies of nonhuman DNA plants and animals, will enter into this, and also within the human DNA, we have DNA that not only comes from our genes but we have the DNA that comes from viruses that we carry so it would be possible, could be right now for some cases to identify quite a bit about a person in terms of what particular disease it carries, and of course, their normal viruses as well as the abnormal ones.

Mostly this sounds like a gee-whiz science fiction stuff right now but my conviction and a very strong one is that we have always been surprised at the past. When new developments start developing, we say it's going to happen in ten years, it turns out to happen in five years.

And there are a lot of things right now that could be done very soon to the satisfaction of a hospital laboratory but, of course, we demand much more higher, much higher standards for forensic use.

So, it's a question of not predicting when something is theoretically possible but predicting when it's developed to the point that it would be acceptable by the forensic community. I don't want to talk too long but I want to say a few more things.

CHIEF JUSTICE ABRAHAMSON: Go ahead. No problem.

COMMISSIONER CROW: So far no problem but I'm not really wound up yet, for sure.

CHIEF JUSTICE ABRAHAMSON: Tell it to me on the plane going home.

COMMISSIONER CROW: One thing that's happening and will continue to happen is the gathering of population data from more and more different populations. American Indians, for example, have been a problem. Their tribal structure means that there are many different subsets of the population compared with the larger, with the larger groups.

One point that our committee is interested in and I personally am strongly interested in is this. Whenever we make a calculation for the probability of a match or a likely ratio, that's based on some assumptions. And we think they're pretty good assumptions but they're far from really established to the point that you would like to have it. It's clearly not true that the United States population is one panmictic, random unit.

So, using just strictly Harvey Weinberg ratios, clearly can't be exactly correct although it could be a remarkably close approximation, likewise the achievement of what we call the linkage equilibrium, equilibrium between genes and independent chromosomes, that's, supposing



somebody asked about the topic, one would expect it not always to be correct even for genes that are on independent chromosomes.

This is all a prelude to saying that I think that our methods that are being used right now are really quite good but they're not as good as you would like. What can we do to make it better? Here's one idea that I think may catch on.

If we were worried about the fact that the population of people that we're looking at contain relatives unknown to us who is looking at them or that they come from a small subset of a population, which means they're partly related. Essentially I'm saying the same thing. If we don't know that, is there something we can do about it?

Well, one way is this. We can increase our standards slightly. It only takes a few more loci to do this, and make the process sufficient to distinguish among, between sibs, between brothers.

One thing that I think is obvious but I'll try to explain it without waving my hands too much but if you have two parents and two brothers that are children of those, those, those brothers are going to share one-fourth of their genes irrespective of anything else that's happening, just by the laws of Mendel.

So it means that there's a factor of one-fourth that comes into the resemblance of brothers; that's not true for any other degree of relationship.

Now, this one-fourth is augmented by smaller numbers that depend on the frequency of the genes in the population but this means that for the most part this factor of one-fourth slightly augmented is quite robust against most of the things that we would worry about in the assumptions that I was mentioning earlier. If we could separate brothers, we could certainly separate anything that's less related than brothers.

So, how much, how much more would we need? Oh, one other point about that. The 1992 committee, though, was strongly criticized for its ceiling (phonetic) principle, and I think it was properly criticized, but the aim of the ceiling principle, and it is a very laudable one, and that was to have a procedure that made it unnecessary to distinguish among racial or individual ethnic groups. By the use of sibs we come pretty close to accomplishing that.

The value of this system depends mainly on the loci that you're using, having a large number of alleles. So that's part of the explanation for my personal enthusiasm for pentanucleotides to be added to the list. Right now with 13 core loci we can separate sibs from each other. The probability of two sibs matching is about one in 300,000.

What I'm trying to say here is that probably many courts would be more convinced by a robust, certain kind of an explanation, free of assumptions, of one in 300,000 than they would be one of 300 million when you're not quite so sure of your assumptions. So, to me this can be an important step.

If we want to go up to the kind of levels that are traditional probability levels, the VNTRs (phonetic) and then STRs, if we go up to 21 loci, we're down to an average match probably of one in 300 million, which ought to satisfy almost anybody.

So I think, I think our committee believes and I certainly do personally that I'm willing to trade a small probability for a higher probability that's made with much more certainty. So, I really hope this will catch on. And it's essentially a part of our report.

One other point that comes up, and the FBI has gotten into this, and that's the question of defining what individualization or uniqueness means. And what the FBI did was say they could take, we asked for a probability that has the following properties. We take the population of the United States or rather its reciprocal and they would say if two people have a probability less than the reciprocal of the population of the United States, they're probably the same person. Then they introduced a number of factors of safety.

They put in an arbitrary factor of ten, which came from our 1996 committee report and they introduced confidence limits, a fairly elaborate calculation but simple in principle. Whether that will catch on I don't know; we don't know. It has been used a few times. It's also been strongly criticized because it's based on the more naive assumptions of strictly Harvey Weinberg and linkage equilibrium proportions and composition of a genous structure. And whether these conservative modifications that were built into that take care of all of the doubts that a person can have, that's an open question and I think that it will remain.

My guess -- this can only be a guess -- is that, of course, this is not really a scientific question, and maybe the courts or some other influential group will decide that if the match probability is much less than the reciprocal of the United States population, it will simply declare that this is unique and make it a legal or a formal definition that hasn't much scientific basis but can act, but can be a basis of procedure. It's not the first time in the history of society that things like this have been done.

A few other points. Right now it's already come up around the table. We could take a drop of blood or a sample of blood and oftentimes determine the geographical origin of the person.

We can even do it from the 13 core loci with certain probabilities, not too impressive in most cases but with the addition of the kind of things that could be looked at in the breadth (phonetic) sample and one could. There are, there are genes that have a very high frequency in persons of African descent and very low otherwise and vice versa.

So, the recognition of the geographical ancestry of a person is almost certain to come with increasing knowledge. To my taste much more interesting, and much more acceptable, really, would be of the finding of individual traits.

I don't know what the state of the art is now but it must surely be changing rapidly and the genome project is going to produce this willy-nilly, a gene for eye color, for hair color, for baldness, skin pigment, the kind of things we obviously think of are not very far in the future as far as being discernible from a blood sample. But I would emphasize -- and I think everybody in

the room knows but let me emphasize anyhow -- that, that in order to do that, you're looking for traits that are not part of the 13 core loci.

So if you try to do something like this with a database, you would have to do it with probes other than the kinds that are now, that are now being used.

I think we will also begin to learn things that are based not just on the presence or absence of a DNA type but on the amount of expression of the genes produced by that DNA. That's a field that's advancing very rapidly right now, just the study of the gene expression. And we're going to find that it's possible to distinguish people on the basis not just what genes they have but how strongly this gene exerts its process.

The view of our, of this subgroup on sample retention, it certainly was not, certainly we did not have the kind of detailed discussion that's been going around the table here. And perhaps a discussion was not needed but the viewpoint of the group is that samples should be retained, there are enough things that you can do with this that are worth preserving and that the best way to avoid abuse is by making abuses illegal rather than trying to make them impossible by withdrawal of the samples. Whether the -- let me state this. Whether our Working Group would have reached this same conclusion had we all participated in the discussion today, I'm not at all sure of.

One other thing, two other things, then I'll end. The, we are impressed by the tremendous amount of attention that's been given to technical and statistical aspects of DNA forensics, that exceeds virtually anything that's happened in the crime scene up until now, the identification scene.

Even fingerprints have not been subject to the kind of statistical rigor although I don't think that we seriously doubt them right now. But I'm wondering if it isn't possible that the kind of really meticulous care the DNA has had will not have a salutary influence on other sources, ballistics, handwriting, all the other things that are considerably more dubious but which could be made more precise by the same kind of attention to statistical minutia that the DNA has had.

The group also has talked some -- we're getting out of our area pretty quickly -- that, about witnesses. There's a feeling within the group that there's a real place for expert witnesses not brought in by either the prosecution or the defense so that a person would be free as a witness to give evidence on either side of the issue or both sides of the issue, I probably should say, rather than being more or less constrained, as the adversary system calls for, for presenting just one point of view. We commend this to the Commission as a possible study but you're doing it already. So that's just one more piece of advice to people. It's already happening.

What about universal databases? There's no strong advocacy of it anywhere but I will point out to all of you here that the country of Iceland is now in the process of getting everybody DNA typed and whatever the results of that are, it's a place for us to look at and see what that's led to, what have been the social problems, what have been the gains.

There are certainly going to be some goods coming from it; almost certainly it will create problems and I, for one, will watch that with great curiosity.

As far as our report itself, we have it, after this read, written, it's undergoing quite a number of modifications, most of which are stylistic, though, not content-wise, and I hope in the next month or two that we will have approved by e-mail, mainly, a final working that can be turned over to the editors and then finally subject to all your approval.

COMMISSIONER SCHECK: Would it be possible to send e-mails if it's substantively in place but not stylistically? I would love to see an e-mail of it. Is that possible?

COMMISSIONER CROW: You know, what I can do for anybody I think is simply send the latest version of the report. That's probably better.

COMMISSIONER GAHN: Yeah, that would be great.

COMMISSIONER BASHINSKI: That would be great.

COMMISSIONER REILLY: Could it just be uniformly distributed?

DIRECTOR ASPLEN: Sure.

COMMISSIONER GAHN: Realizing it's a draft but --

COMMISSIONER CROW: Yeah. Well, since I'm trying right now to do some revisions, the next week or two is tied up for me but within a month or so I think I could circulate the next edition of the draft and I think we should do that.

DIRECTOR ASPLEN: Sure.

COMMISSIONER CROW: We clearly welcome the input of all of you or anyone else, for that matter.

CHIEF JUSTICE ABRAHAMSON: Any comments, questions? One, circulating the draft will be good, familiarize everybody. Phil?

COMMISSIONER REILLY: Just a footnote. I happen to be fairly involved with what's going on in Iceland. So I have the statute. I have been in touch with the people and talked with them and I've continued to paraphrase some for them.

COMMISSIONER CROW: Well, who did you write it out for? I heard a lecture by the man who --

COMMISSIONER REILLY: Kerry Sevrenson (phonetic)?

COMMISSIONER CROW: Yes.

COMMISSIONER REILLY: Yeah, I was with him just a few days ago, so.

CHIEF JUSTICE ABRAHAMSON: The next meeting will be in Iceland.

COMMISSIONER REILLY: You could do worse.

CHIEF JUSTICE ABRAHAMSON: I know. It will be fun.

COMMISSIONER SCHECK: They have very good records, too, right? Excellent records.

COMMISSIONER CROW: No, the Iceland people have been much more zealous in maintaining their, or assiduous in maintaining their genealogical records than most of the rest the world has. So you can combine the modern DNA technology with unusually good record keeping.

COMMISSIONER SCHECK: Aren't they being paid for it, though?

COMMISSIONER REILLY: Well, we could get in a long discussion about it but basically there's a, it's a major source of income to the government of Iceland, is over a hundred million dollars.

CHIEF JUSTICE ABRAHAMSON: Who provided the money?

COMMISSIONER REILLY: Roche.

CHIEF JUSTICE ABRAHAMSON: Roche, okay. Well, that's not bad. It beats taxation, said facetiously.

COMMISSIONER REILLY: Interestingly, the law does not compel the taking of DNA. The law basically licenses out the health records and then each individual must consent to have his DNA drawn. But I just asked Kerry this. About thus far 99 percent of the citizens approached are giving their DNA on the spot.

CHIEF JUSTICE ABRAHAMSON: Norm?

COMMISSIONER GAHN: One question, Doctor, just from what you said. Do you believe that there's a possibility that down the road there may be a turn from the, to these traditional noncoding genetic locations you look at and a turn to using these medical diagnostic or viral DNA or phenotypic expressions in the forensic setting, be going that way?

COMMISSIONER CROW: Oh, I think we're going that way, yes, willy-nilly. Of course, I still think the main identification will be these 13 core loci and modifications therefrom.

COMMISSIONER GAHN: But hasn't one of the selling points all along been we're looking at noncoding areas --

COMMISSIONER CROW: Yes.

COMMISSIONER GAHN: Then why go and get worked up about it?

COMMISSIONER CROW: Well, I emphasize it over and over again, that these loci are deliberately chosen not to be associated with those traits.

COMMISSIONER SCHECK: Is that true, Norm, the STR?

COMMISSIONER CROW: It's not absolutely true.

COMMISSIONER SCHECK: It's not true, is it?

COMMISSIONER CROW: There's one disease locus, probably you know about it but the VWA is really, it's part of a gene. It's Von Hildebrand's (phonetic) blood syndrome, coagulation syndrome. This is not the business part of the gene but the theoretical possibility of finding a believer of this that has the correlation with the disease state exists. Not A very useful correlation, I suspect.

COMMISSIONER SCHECK: So, DQ-alpha is definitely?

COMMISSIONER CROW: DQ-alpha, very much, oh, yeah. So although this is an ideal, that's not absolutely achieved. That may be one reason why maybe you might want to replace one locus of the 13. There are some others, though, that are not so satisfactory for other reasons.

COMMISSIONER SCHECK: One of the, following up on Norm's comment, just to make it clear, would it be fair to say that if you were to look at the science profiling, which is, for lack of a better phrase, au courant, you, I mean, you know, is a booming industry in law enforcement, I'm talking here about looking at the modus operandi or the characteristics of a crime or crime scene and trying to make a prediction of a profile of who the person is.

I mean, what you're talking about here is that, that we can use these genetic techniques to build, to create a form of profiling in an investigative sense from crime scene evidence.

COMMISSIONER CROW: I think so. Of course we're talking about the future and what's here now.

COMMISSIONER SCHECK: Yeah. Part of it is here in terms of race and disease states and, you know, obviously where we're going, I mean, there's physical disease states, private medical facts as well as psychological profiling that could arguably be done from this.

COMMISSIONER CROW: Well, it's troublesome but it's a real possibility. Presumably it would be used to narrow the search for suspects.

COMMISSIONER SMITH: Well, actually you'll hunt wiser.

COMMISSIONER CROW: Yeah.

## Legal Issues Working Group Report and Discussion

*Professor Michael Smith, Working Group Chair*

CHIEF JUSTICE ABRAHAMSON: Which, if there are no other questions will move us into -- was that a good segue -- into Michael Smith and the Legal Issues Working Group report.

COMMISSIONER SMITH: Well, I was a little worried when I saw the amount of time set aside for this report because we are at a stage in our work which is heavy on drafting and a little bit light on the final product for presentation to you.

So I thought what I would, I'm reassured by management, though, there's no really escaping revisiting the retention issue.

CHIEF JUSTICE ABRAHAMSON: Right.

COMMISSIONER SMITH: And I think, so, I'm not worried about filling the time. Let me sketch two things, right? One is you have seen products which are maturing. There's really no point, I think, in my circulating the most recent draft of the work that we've done on arrest because it hasn't changed much since the last time you saw it.

But we have pushed forward a report that speaks more broadly across a host of issues, some of them having to do with the prosecution phase, others having to do with various aspects that have come up with the sampling. And I want you to see that so that will be circulated again pretty soon.

But, finally we're doing a report which we variously characterized as a cover report or a binding report for these two, and that's one which is opening up territory that we haven't really fully worked through ourselves but I want to sketch a little bit for you now.

Could we visit just for a second, though the topics covered in the second of the reports that we've talked about in the past. That's the reporting which just as a matter of a legal analysis we've explored law relating to the compelling of suspects to submit to DNA extraction, the acquiring of samples or records from medical providers and laboratories and other persons other than the suspect or the individual himself. It's important territory, as we saw a little bit from today's discussion.

Mass screening, we've done some work, really not a lot, I think, but some important work on the admissibility questions and the novel scientific questions that Jim just touched upon. We have also now put in a section discussing the use of efficiency test records from labs.

We have a brief section dealing with statute of limitations on the prosecution side. And then there are these, the issues about databanking and databasing of DNA and DNA records from typing.

Now, a lot of this is being discussed in the context of other working groups. It seems to me we can't, till I get you our report, we have some difficulty, I think, putting our full voice into that discussion.

But then finally, I'll circle back to that. The arrestee databanking issues we have in a separate report but also deal with again the omnibus (phonetic) report, partly because the question of retaining samples and retaining records of the typing of arrestee DNA samples is possibly a different, though clearly a related topic to the topic of retaining the DNA, the whole DNA samples of convicted offenders.

So, the trouble is with this topic, right, it tends to keep opening a bit. So, we decided in our last meeting, and I think usefully that we ought, that a part of our obligation to the Commission and possibly of the Commission to the larger society is to open up these topics in ways that permit a, as informed and who-headed a debate about that, discussion about them in the body politic as we can manage because they're likely not to go away, they're likely to get sharper under certain conditions that are plausible and the contribution of this group might turn out to be more on the side of illumination and explication of issues that need resolution than in offering resolutions to satisfy us in this particular 1999 period. We may be wrong about that but that's the rationale that's led us to open up our deliberations quite a bit.

Let me try just to sketch the opening if I may. The way we start I think is to ask what's at stake here because as the discussion today I think dealt more usefully than in the past, the interest in public safety is heavily implicated in these questions.

Let's take the fundamental one. The arrestee databasing issue is a tiny point on a spectrum of questions. That is, the more inclusive a searchable identification database is, the more useful it is for the excluding or including of individuals in an investigation based on evidence found at a crime scene. And it's hard to imagine any other statement that that be true about. The more inclusive, the more useful.

So, having said that, I mean, our debates and discussions about this tend to focus on the breakpoints in inclusiveness. But if you look at it, you know, we start with some specified, very serious sexual offenses, we go to violence, felony offenses, we in some jurisdictions go to all felonies, in some jurisdictions to misdemeanors, and in the last six months or so the pace of proposals and commitments to action on the selection, the sampling of DNA from persons arrested for crime and ambiguity on the retention of those samples or the retention of the 13 STR profiles from those samples in state databases left open.

Now, it seems to me hard again to ignore the possibility that what that really is, is the force of the public safety interest expressing itself in an increasingly inclusive idea about useful typing and sampling of DNA.

And it seems to me, therefore, one has to ask the question, why exactly is it that we think we're going to stop at arrest? Because arrest gives us as a legal threshold probable cause. As a legal threshold, probable cause is an awfully low one and probable cause is very widely distributed in the population.



So, although it's widely distributed in the population, there are powerful arguments being made and with evidence of some probative value being offered that there are subpopulations for whom the probable cause to arrest is much more often the trigger for an arrest action than for other subpopulations.

Now, by itself, we've touched on this, that is, in the same subpopulations, let's take inner-city African-American populations, there's a powerful interest in the public safety dimension of all this thing, true, but at the end of the day it's going to be somewhat difficult. We imagine, we're trying to work this through a bit, to explain why the existence of probable cause is sufficient justification for taking my DNA.

Now, stated that way, it's just a little bit harder, though the public safety utility of doing so is unquestioned. So there are some cultural and political dimensions to this that at least we think ought to be as clearly and nonemotionally stated as we can so that they can be part of the discussion about this. Why? Well, one view would be that identification DNA bases in general are not a problem so long as the identification STRs don't turn out to be of some penetrating importance in privacy issues but the whole DNA is.

Now, the point that the whole DNA is both on, both retained by and accessible in lots of other institutions, in far greater volume than in the CODIS or the CODIS related databases is true. There's two points we seem, we sort of want to follow about that. One is, well, what's the position with respect to the privacy of those samples and those records? As a legal matter, which we're going to discuss at some point, at some length in our report, not well protected.

Looking at the history of attempts to protect them, not promising for legal protection of the kind of people I think often assume those records and samples have.

One way to look at that would be to say well, then, what the hell, why don't we go full bore on the law enforcement side, perhaps, but the other way to sort of look at that is to say why do we think we that in the future the technology won't be at a point and the public safety interest at a point whereas a much more routine matter law enforcement will look to those databases for DNA identifying people not in the arrestee or the convicted offender database.

And from our point of view at least asked that way it seems hard to see that they will not become important at least in the idea in the mind of a responsible law enforcement official as a resource for criminal investigations.

As a legal matter, we don't see a whole lot to bar that. There are statutes that could bar it but the durability of those statutes is open to question, I think, if we have cases like the one that Commissioner Schaefer (phonetic) put before us in Dallas.

I mean, if the serial rapist who since jumping a turnstile committed two savage rapes in New York, would have been identified after the first one had we typed his DNA upon jumping the turnstile, you don't need very many stories like that, it seems to me, to make a powerful point that convicted offender databases are sufficient unless you can prove it. What's the rationale?

So we want to open that up, not because we know at this stage even in our group what the answer to that question is or all those questions but it seems to us that simply addressing the Fourth Amendment issues, particularly when the Fourth Amendment offers so little by way of protection for the privacy interest that people articulate when scratched outside isn't sufficient. And so, we intend to give you a report which opens these questions up a little more widely. Phil, you want to say something about that?

COMMISSIONER REILLY: I think I, obviously I agree with the notion of opening it up. I was contributing to that discussion. I agree that there's a proliferation of banks of tissue with DNA in all sorts of quarters in our society, which theoretically could be linked one way or another or probed one way or another as part of law enforcement.

I doubt very much that they could be insulated from such a probe although there's at least one federal statute that offers things called certificates of confidentiality, or at least allegedly protects research databases.

And, although it may be inappropriate to say it for our report, if I was asked to prognosticate 50 years hence, and I'm not as wise a man as you, so, well, I think it is inevitable that we will move to universal DNA databanking, inevitable, because there will be such powerful, positive reasons to do so from the point of view of protecting the public health, avoiding disease and moving to a more preventive approach to medicine, that we'll get those for non-law enforcement reasons and then it will be irresistible to use that database.

So, I think we reach universal DNA databanking for criminal purposes through the back door of public health and that's exactly where we're going to be. And it won't be 50 years. That would be, if I had to make a prediction, I would say 20 to 25.

COMMISSIONER CROW: Yeah.

CHIEF JUSTICE ABRAHAMSON: Through the hospitals maybe on birth?

COMMISSIONER SMITH: HMOs, we authorize databases already.

COMMISSIONER REILLY: We already collect, in 1999 in America we will collect whole blood on 99.8 percent of the babies born in the United States and we will save it. We also subject it to DNA analysis in some cases rarely but we'll subject it to genetic analysis in all cases. And the thing's changing is we are saving those blood spots and so-called Guthrie cards. We have actually arrived at universal DNA databanking. It's just no one's talking about it.

COMMISSIONER SMITH: We thought we should talk about it.

COMMISSIONER SCHECK: Right. But the distinction, just so we're clear about it, is that when you talk about databanking if you only define it as we have the sample from everybody somewhere that we can test for some purpose, all right, that's one thing, and then we, and your suggestion that's it's inevitable, we're going to be wanting to do it for the benefit of the individual and get consents from people to do that if we even bother to ask for consents.

COMMISSIONER REILLY: Well, let me just elaborate. The interesting, I mean, if you'll permit me, I'm being a little bit provocative here but only a little. In fact, one of the most interesting things about the evolution of DNA databanks and the law is that we are collecting tens of millions of bits of genetic information on children in America and storing them without their consent because the laws are mandatory. So the system is in place to piggyback onto it.

Now, it is true that we're not doing DNA profiling for identification purposes but the samples there, the same lab doing the PKU testing could easily run the STR loci if we wanted it to and the cards are being saved. So it's actually an inefficient --

COMMISSIONER SMITH: We can't disguise those facts, right?

COMMISSIONER REILLY: Pardon? Yeah, we shouldn't.

COMMISSIONER SMITH: Right.

COMMISSIONER REILLY: And in fact it seems to me it would be disingenuous to talk about the evolution of forensic DNA databanking in the United States without nodding to our colleagues at CDC in Atlanta and the public health sector that says we've been doing this since 1962 already. And indeed I know the DNA -- I shouldn't call them DNA -- tissue databanks in which law enforcement has gone in for good reason to rule out, for example, a woman who has being falsely accused of murdering her child when it turns out the child died of a very rare genetic disease, things like that.

COMMISSIONER SCHECK: Yeah, and I always bring this up but this arose last Friday. In the case in Boston that I tried, involving the nanny, Louise Woodward, we were looking to do a genetic test to rule out that the baby was suffering from a genetic disease, two of them, osteogenesis imperfecta and glutaric acidemia, that could mask child abuse, in other words, one gives you a predisposition of brain hemorrhaging and the other one --

COMMISSIONER REILLY: Mimic it, really.

COMMISSIONER SCHECK: Mimic it, and brittle bone disease. And we could not get a postmortem sample so we got the Guthrie card and used that for the test. So, I mean, but in that regard, Michael -- and I apologize to you for not being able to attend your meeting or participate.

COMMISSIONER SMITH: This is part of, you know, an attempt to get you to respond to the e-mail, to the report.

COMMISSIONER SCHECK: Yeah, right, but, what's related to this issue, I think, and really much more within our direct ambit and responsibility is the issue of mass screening. When you meant mass screening, you were talking here about --

COMMISSIONER SMITH: Voluntary.

COMMISSIONER SCHECK: -- the voluntary collection of samples.

COMMISSIONER SMITH: Right.

COMMISSIONER SCHECK: Because this issue right now is very much part of what Chief Sanders and the others are going to have to be dealing with, Chief Hillard, everyday, right? I mean, when you go out and you ask people to voluntarily give DNA samples for elimination purposes, do you need, should be informed consent, should that be a principle of it and then what do you tell them as part of that informed consent and distinguishing between that purpose and the purpose of taking it if you are a suspect.

My own feeling is, is that it would be of great service to people if we actually could write out model forms for this that could be of practical use to law enforcement anticipating that this is very soon going to be an issue they have to deal with on an everyday basis. A related question that we have danced in and around is okay, what are you going to do with those elimination samples?

COMMISSIONER SMITH: That's right.

COMMISSIONER SCHECK: And again the law is, you know, the courts have not thought very carefully about these issues and we could give them some guidance.

I mean, there are some precedents that say once you get somebody's DNA, even if they voluntarily give it to you for one purpose, elimination purpose, you can use it for all purposes.

We have such a case in the intermediate appellate courts in New York and believe me, that's dicta that nobody thought about very carefully when the Court of Appeals just said affirmed, no opinion, or didn't take it for review technically as precedence.

COMMISSIONER WEBSTER: Can we talk about that for just a minute? Because I, this is a role I don't normally assign to myself but the fingerprints, I remember the history of getting fingerprints. The Boy Scouts were very good on it. There was some litigation. It was always volunteer and, but people were concerned about what they might be giving up by giving the fingerprints.

Then when we get into the other areas of identification, that's purely identification, I don't know anything else that a fingerprint can be used for except to say I'm the person who has those fingerprints.

COMMISSIONER SCHECK: But you were at the last meeting. You're now taking the oil from the fingerprints and doing the DNA testing.

COMMISSIONER WEBSTER: Well, I don't know how you get to the DNA test but that is the purpose of the card in a legal sense. Now, when you get to DNA, I think most of the public, and I think I'm still basically uninformed about the other uses of DNA, they could be, they could have much more relevance in the extreme to social engineering, on kinds of things that the public tends to steer away from. If we don't like to use our Social Security number, although we use it in the District --

COMMISSIONER CROW: We do.

COMMISSIONER WEBSTER: -- for driver's licenses but there's still that feeling, how do we build public support for this very important investigative tool if we can't answer the question about what else can it be used for, what else, can it keep you from getting a job, for instance, down the road, because of some genetic defect in your family? I think most people would shy from that. That's not the role of government to make that kind of information available for that type of discrimination. What can we say about that, that will provide some reassurance; how can we limit the uses?

COMMISSIONER REILLY: This is why we opened it up.

COMMISSIONER WEBSTER: Yeah.

COMMISSIONER SMITH: The issue of sample retention, yeah.

COMMISSIONER REILLY: What we can say -- if you'll forgive me -- what we can say is in the decade preceding this debate, there has been a massive debate about so-called genetic discrimination in health care, health insurance underwriting. And it has been resolved in favor, largely in favor of not using genetic information from otherwise healthy individuals as a tool in underwriting in group health insurance. Thirty states have laws on the subject and there's one federal statute on the subject.

What has not been answered is the debate about is the information on life insurance or an occupational screening although Wisconsin does have a law on the use of genetic testing in the workplace. There is a very interesting forum in which to rehearse this problem.

COMMISSIONER SMITH: Yeah.

COMMISSIONER REILLY: If you're a potential employee who may have a genetic condition that predisposes you to a severe occupational disease in the workplace, is it the better public policy make sure that you are informed of that so you don't run the risk of disease or that you be able to maintain your privacy?

And this was also, the Johnson Controls case before the Supreme Court about the Americans with Disabilities, no, the Civil Rights Act of 1964 as it applied to pregnancy, things like that. Should a women have to disclose that she's fertile to work in a workplace; these kinds of questions have been rehearsed. But we do have a lot of data on genetic testing and health insurance that we could bring into play as an example of this issue.

COMMISSIONER WEBSTER: Well, we want to be sure that we pay attention to who is entitled to have that information.

COMMISSIONER REILLY: That's exactly right.

COMMISSIONER WEBSTER: And I think I have to, if you'll permit me, I tell, totally unrelated but maybe related experience I had that seared my sense about this. I was a, served three and a half years, World War II, practicing, halfway practicing law for a year and was called back in the Korean War.

Somewhere out in Japan or Korea I opened my Kiplinger letter and it says train only, plan your key positions carefully, train only those for key positions who are least likely to be recalled to military duty.

And I thought to myself, that this is, and I wrote a long, searing letter and got a three-page letter back saying what, that isn't what we meant, what we meant was, and three pages later it was still the same thing. And by the way you shouldn't be paying for your subscription. But I have a sensitivity to people who make bad use of good information. And I don't think we should be responsible for that.

COMMISSIONER REILLY: Well, I'm glad you said this and I think the point of our committee would be that it would be a disservice to isolate, although we clearly have a charge, it is impossible to isolate the wave of genetic information from other sectors of society.

COMMISSIONER WEBSTER: I understand but they shouldn't blame the law enforcement community for that, or be given a reason for blaming them.

COMMISSIONER REILLY: Agreed. Agreed.

COMMISSIONER HILLARD: Madam Chairman, right before I left, Barry mentioned about the informed consent form. Most law enforcement, I know Chicago has it, I wanted to be sure, that's the reason I went back to talk with Commander Cronin. We have, it seems like we have informed consent forms for anything and everything that we do in the City of Chicago, that we pursued for the last ten, fifteen years but we do have a form.

COMMISSIONER SMITH: Could we have a copy for our group?

COMMISSIONER HILLARD: Yeah, videotaping, or whatever, we have it.

COMMISSIONER SCHECK: Yeah, and you stimulated this thought, that one of the things, for example, even for elimination purposes is that law enforcement officers, certainly lab people, it's now required that soon law enforcement officers are going to have to give those samples for elimination purposes at crime scenes.

And then, you know, the restrictions, we have had a bad experience frankly with the military here with the retention of DNA samples for the Armed Forces databank, a lot of controversy, getting them to establish standards. I think they now retain them to what, 50 years?

COMMISSIONER REILLY: Fifty years.

COMMISSIONER SMITH: But you may request return of them --

COMMISSIONER REILLY: Right.

COMMISSIONER SMITH: -- and we've asked staff to try and find to out what the military's experience of that has been.

COMMISSIONER SCHECK: And the thing that has occurred to me many times, I think I might have mentioned it when we had the planning committee for this meeting is that given what we now know about Alzheimer's and the genetic basis for Alzheimer's, if President Reagan had to give a sample and I don't mean this as any knock on President Reagan but in light of his biography in particular I've been reading about it, I couldn't help but think about it, is that, you know, when was we elected at the age of 69, that with a, if they had, we don't know what his Applebee (phonetic) 4 type but we know that there's a test that shows a susceptibility to this disorder and given his age and the possibility of its onset with the genetic test, I think there would have been real peril that he couldn't have been elected president if that became public and then there would be a lot of people that say well, we really have to know this about employees.

And, so, see, this is why I'm so fixated on the sample retention issue and this is why I've been making this argument that it's really in the long-term interests of law enforcement to go this step.

You will never win the civil liberties argument because, you know, people are going to say look at all these reasons that we could go and get these samples. Certainly the, theoretically speaking the way the first statute was written, we should treat this as a fingerprint. That's the way we should treat it as a fingerprint because we know that all these other uses that can be made of this that will be, quote, law enforcement oriented.

COMMISSIONER SMITH: We don't keep the finger.

COMMISSIONER SCHECK: Right, we don't keep the finger.

COMMISSIONER BASHINSKI: But you do have the primary data, you absolutely do.

COMMISSIONER SCHECK: We do have the primary data. And the problem is, is that, I mean, what's going to happen, we're going to know a lot more about, talk about susceptibility to violence, I mean we could research the database of the collected samples of the offenders but one of the first applications is that we're going to say, okay, let's take every law enforcement officer that we're going to be hiring and it's going to be required screening to see whether they have that marker.

I mean, we always start with the despised populations to some extent but the data that comes from that is the first thing that's going to be used to look at everybody else.

COMMISSIONER SMITH: Managing school population, right?

COMMISSIONER SCHECK: That's my great fear about there. So I would suggest in the end, Michael, just to be specific for you, that I think it would be very useful if we could in, we might

even be able to come up with some recommendations on what to do with elimination samples informed consent, establishing that principal, as a --

COMMISSIONER SMITH: We have it but for the reasons I said we're at a phase or a moment where we're not trying to close in on recommendations so much as open up. But we expect to meet again November, by the beginning of the year, we'll be looking to see out of these discussions of ours what recommendations we might put before you, which is, of course no bar to other recommendations emerging from this Commission anyway.

But, I think that's right, there's a logical progression to this and we're not ready to make recommendations because we haven't finished doing our analysis.

CHIEF JUSTICE ABRAHAMSON: This relates to retention of samples, elimination of samples, informed consent.

COMMISSIONER SMITH: All of it, right, retention and these other issues that Barry brings up.

CHIEF JUSTICE ABRAHAMSON: Including timing, if you do decide to retain, the purpose that any retained samples can be used and where they should be kept. I mean, those are elements of that. Jim?

COMMISSIONER CROW: It's a different question --

CHIEF JUSTICE ABRAHAMSON: Would you use the microphone?

COMMISSIONER CROW: Yes, thank you. It's a different question and you alluded to it but I'm not quite sure what you said. I think it's searching databases in the future, the 13 STR loci as opposed to the previous BITRs. It's considerably more often that what's going to turn up brothers and be pretty sure that they are brothers. You said something about that but I don't remember what you said.

COMMISSIONER SMITH: Well, we said something about that in past reports, that is, that we don't see constitutional problems with doing that but we know that your committee is unhappy with that, and, you know, we would like to give you a new Constitution if we can.

COMMISSIONER CROW: There's at least one state, if I'm correct about this, is it Virginia, that prohibits the use of this?

CHIEF JUSTICE ABRAHAMSON: You mean giving out the information that it might be somebody --

COMMISSIONER SCHECK: No, no, no, no, no, no, no, no, no, no.

COMMISSIONER CROW: No, identifying a relative --

COMMISSIONER SCHECK: In the 19, what is it, the 1992 report --



COMMISSIONER SMITH: Right.

COMMISSIONER SCHECK: -- of the NRC, you know, this question was addressed. And, the history of it is, is that the committee concluded that you should not be using the search of the database as a subtexual search for relatives.

So in the CODIS rules the actual rules for putting these profiles from the crime scene or the offenders into the databank when you conduct the search there were rules about what are called low stringency or high stringency searches.

And the purpose of these rules is to, there's technical purposes but the policy purpose was to make sure that when you did the search you were only searching based, you know, here's a crime scene sample, it's got a pattern, we're looking for this person, we're not purposely saying let's look for ten markers instead of 13 so we can go figure out which one of the relatives of these inmates, what would be the next suspect, which is a different matter than saying if we have, as Chief Hillard had a case, a very famous case where you through independent evidence have good reason to look for the brother, you know, you would go get that person's DNA and run it. It's a --

COMMISSIONER BASHINSKI: A more subtle variant --

COMMISSIONER SCHECK: It's a lawyer's distinction.

COMMISSIONER BASHINSKI: A more subtle variant is you do the search, a stringent search, and you find 7 out of 8 alleles matching. Now you have certainly investigative information that can be very useful to the police in knowing that yes, I have eliminated this person but maybe you should be looking at his brother. What do you do with that information?

COMMISSIONER SCHECK: If it comes out that way. Depends on how you get that way.

COMMISSIONER BASHINSKI : Exactly. We actually have a case like that.

COMMISSIONER SCHECK: Yeah.

COMMISSIONER BASHINSKI: So my question is, should we not tell the police this?

COMMISSIONER SCHECK: Data is data, right? I mean, the point what was, I guess for legal purposes --

COMMISSIONER BASHINSKI: The purpose of the search.

COMMISSIONER SCHECK: And maybe we can discuss this, what was the purpose of your search. We have a lot of the law in this area that was hard to understand but, you know, if you inadvertently see something, that's okay, as long as you had a right to be there looking. If you didn't have a right to be there looking in the first place, that's a different story. If you purposely went to look for wrong reasons, that violates our Fourth Amendment.

COMMISSIONER SMITH: This reminds of something that I meant to say but here and in this earlier question, the, one of the reasons that I think we're paying so much attention in our group to the non-law enforcement database questions is that the information revealed in the context of those databases is much, much more intimate.

And the intimacy of that information, if you have a search that produces whether it's because of the eight alleles or because of the mixture of DNA found at a crime scene, eight suspects, but then there's seven files full of intimate detail that will become part of the investigation although one, or one will turn out to be the suspect.

That, that doesn't feel very good and therefore the idea that there ought to be, that we ought to pay attention to the advantages of having more inclusive law enforcement databases is there because that does help protect against the contextual revelations if it ends up in ten years or so that these non-law enforcement databases are being used.

CHIEF JUSTICE ABRAHAMSON: Woody?

COMMISSIONER CLARKE: Actually, I was just going to say in listening to the discussion about the one allele difference and the possibility of a brother, I'm not sure there's a distinction between that and the victim who says I was raped in that house down the street, it was by a six foot two, blond-haired man, turns out he's got a brother that looks just like him so police naturally investigate the brother. So I'm not sure that there's a distinction between those two.

COMMISSIONER SMITH: We agree.

COMMISSIONER BASHINSKI: And you could argue that if law enforcement has destroyed samples and there's a need to look at additional loci, that would be even more impetus to go after a medical sample, which is what you're trying to avoid.

COMMISSIONER SMITH: That's why we think we have to have it all on the table at the same time because, you know, it's, well --

CHIEF JUSTICE ABRAHAMSON: Of course, one of the differences maybe between the health data now and a single law enforcement data, is just that.

COMMISSIONER SMITH: Right .

CHIEF JUSTICE ABRAHAMSON: Go to one place that's just a lot easier and faster than going around the city or state or country and then does it matter in terms of privacy.

COMMISSIONER SMITH: And public safety.

CHIEF JUSTICE ABRAHAMSON: Public safety.

COMMISSIONER SCHECK: And I mean frankly, remember -- and this goes to your social concerns -- Brian Stephenson has presented some unbelievable data about the number of

African-American males that were convicted in the state of Alabama and have lost the franchise, convicted felonies and lost a franchise. I can't remember the exact statistic so don't hold me to it but it's mind-boggling, it's up to like, what is it, Michael, 65 percent?

COMMISSIONER SMITH: I don't know.

COMMISSIONER SCHECK: Some ridiculous crazy number. You know, when you start collecting all this data, you know, disproportionately, it's scary.

COMMISSIONER SMITH: The lifetime chances of arrest, for example --

COMMISSIONER SCHECK: We're going to have huge databases, I guess is what I'm really trying to say.

COMMISSIONER SMITH: Approaching all-inclusive for some parts of the city. All right.

CHIEF JUSTICE ABRAHAMSON: Okay. Next topic. Mike, you want to talk about something else?

COMMISSIONER SMITH: No, no. I mean, I think I'm going to spend the better part, the rest of my life talking about it, if these meetings are any indication, you know, I don't have any --

COMMISSIONER REILLY: I'm feeling inadequate now.

CHIEF JUSTICE ABRAHAMSON: No, no. I just wanted to know if there were any other topics you were to point to.

COMMISSIONER SMITH: No. I feel full on topics.

CHIEF JUSTICE ABRAHAMSON: Well --

COMMISSIONER SMITH: Well, I'll circulate that first report I mentioned and then at the next meeting of this Commission, in preparation for it, we hope to circulate this document that I just described.

COMMISSIONER THOMA: And we will have had another Working Group --

COMMISSIONER SMITH: I hope to have one in early November and perhaps another one before the next Commission meeting.

CHIEF JUSTICE ABRAHAMSON: Now, you indicated in your comments that you'll have more on sample retention but is there more discussion on that issue there in light of this morning's discussion, in light of Mike Smith's discussion, or am I wrong?

COMMISSIONER SMITH: I think that my point to you I think is, really had to do with I think this issue comes back in sharper focus, after we were able to give you our report that I just

described because I do think it bears on sample retention for the reasons we just discussed. It cuts both ways.

COMMISSIONER THOMA: And we've noted, if I may --

CHIEF JUSTICE ABRAHAMSON: Yeah, go ahead.

COMMISSIONER THOMA: -- within the Working Group how often our particular issues are as a result of other working groups. And in fact, Jim, your report actually just brought up something to my mind with the use of what we have is junk DNA.

And I guess the difference between junk and garbage is junk we just haven't figured out a use for it yet and garbage is something that will never be used.

But, I think it cuts to a reason for non-sample retention at some point and I think we're talking about ten or 20 years or whatever because we really just want it for identification purposes.

I know we'll go back to the table with this but, and if you keep it, even though it's junk DNA now, there may be a time when it no longer is, so.

COMMISSIONER SCHECK: I mean, actually, the one thing I forgot to mention also Mike, well, I don't know if you've been -- the first place that this will come in I think is at the sentencing phase in criminal cases where, or one of the first, where arguments are going to be made that there's genetic predispositions to different, to alcoholism, drug addiction, violence.

COMMISSIONER SMITH: That depends on whether the prosecution or the defense will advance the argument but --

COMMISSIONER SCHECK: Well, I think the defense, if I had a bet, I'd say the defense is going to be the first. I've already seen that.

COMMISSIONER SMITH: We've got some intentions here, I think.

COMMISSIONER SCHECK: Right, but either way, I mean, it's a, but I guess the whole point of this concern about sample retention is, is that it's going to be first put forward as a benign purpose. That's how it's going to first come in. And it's, it's here a lot faster than you think.

COMMISSIONER SMITH: Well, this morning's discussion helped, I think, because it sort of put into I think a sharper and better perspective the element of this, which involves trust, not for its own sake but instrumentally, that is, without the trust there's things that are going to be hard to do.

And so we need to sort of look at that in one piece; otherwise, we can't decide whether or not it's worth the cost of a more complicated, technological future, because of the trust that might engender and the law enforcement advantages that would follow. I don't know. We got to talk about it in those terms, I think.

COMMISSIONER GAHN: You know, and I want to go back to another issue. I seem to harp on this. Maybe it's just having been with the sexual assault unit too long. But, you know, every time there's a sexual assault and at a time when it's probably the most traumatic time for that victim, a blood sample is taken from her, shall we say, and that's retained at your crime lab.

And that's always there, the victim's blood sample, and if we're going to talk about retention, when I hear talk maybe in the future turning to medical, diagnostic type situations, I still think we've got to call in more the victim advocates in this. Can this have a chilling effect on reporting sexual assault? If my blood sample's going to be taken, what's it going to be used for in the future, where is it going? And these are, that's another dimension, another issue that we have to address.

COMMISSIONER SMITH: You know, the crime scene evidence retention also has some of these problems in it.

COMMISSIONER SCHECK: And that's why frankly I don't think anybody that is saying let's destroy the samples is saying it in a way that, obviously we want to be able to convert everybody to this STR technology and not get in the way of it in a state like Wisconsin or anywhere, I mean, you know, but there are trade-offs here.

And, you know, the hardest thing, if I were sitting in the position of somebody that's, you know, trying to get somebody to test the 450,000 backlog samples and the one million owed samples, I don't want anybody screwing around with me right now.

But, in the long-term I don't think you're going to get the money unless we can really give it a clean answer to people. We can tell you exactly why. You don't have to worry about anybody doing any strange things with your blood because you ain't here anymore.

COMMISSIONER BASHINSKI: Or because you have a statute against --

COMMISSIONER SCHECK: Yeah. We have a felony statute.

COMMISSIONER BASHINSKI: We have to remove any evidence samples or any other samples we test in the case. Once a case has been solved and it's been determined that that sample didn't have anything to do with the case, we cannot have it in your databank. So if we have a piece of evidence that turns out to be, you know, we've already identified the suspect, this is irrelevant, that profile cannot go into the databank.

You can solve it in ways other -- what I'm trying to say -- than destroying the sample but you have to identify all the risks and if the victim sample is one of them, that needs to be part of the list of things that needs to be looked at as to what do you do with that information.

CHIEF JUSTICE ABRAHAMSON: And I think that again, Barry and Chief Sanders and others here have set forth this balance. I have a sense that you will differ as to how that balance will be made but we'll continue discussing that and see these differences.

COMMISSIONER SMITH: They came slightly closer together today.

CHIEF JUSTICE ABRAHAMSON: Did you think that?

COMMISSIONER SMITH: Yeah. They're still on the opposite sides of the room but it's the same --

COMMISSIONER SANDERS: Well, I mean, some vote on it because they may sit side by side, too.

COMMISSIONER SMITH: You're a mixed sample over there.

COMMISSIONER BASHINSKI: That's an interesting lineup over there.

COMMISSIONER SCHECK: I don't think that there's, there's, the differences shouldn't be that great but I will say you will not solve this problem politically or even ethically as far as I'm concerned by saying we have a statute on the books that says unauthorized access is a felony because tomorrow somebody is going to redefine what authorization is and use it for -- that's going to be the spectre. You'll never answer that question unless you eliminate the ability to test the whole genome. It is different than a fingerprint. You can't overlook that.

Now, as to exactly how long they should be kept, I mean, you know, we don't want to stand in the way of the technology for practical purposes being advanced but there is ultimately going to be some kind of trade-off.

CHIEF JUSTICE ABRAHAMSON: And my sense is that there will be a discussion of those trade-offs --

COMMISSIONER SCHECK: Right.

CHIEF JUSTICE ABRAHAMSON: -- and see how close we can get to a consensus and if not, that's okay, too, as long as the issues are set forth. As I see it, I don't think it's going to be solved today but I think the discussion is good.

COMMISSIONER SCHECK: Well, I think that, I mean, I may be crazy about this but just as there was a kind of consensus eventually on whether or not we ought to take samples from people at arrest, right, I think rational self interest can reach some kind of a compromise here. Because the one thing that this Commission is focused on in a very useful way and it is Dr. Crow, I guess you were saying, that, you know, the STRs in here in your judgment by the time we get in there for ten years.

Now, that doesn't mean we aren't going to use additional other things for other purposes but, but, you know, it's going to cost a fortune. And, you know, we need every, if you want to use this in a way that reassures the public, you're going to need every basis for reassuring them and every kind of political --

COMMISSIONER SMITH: But not every. The point is, the exact point is it's almost time for it and your answer seems to be the opposite, that is, nobody, in this particular tension you can't go all the way in one direction or the other and get either side to its maximum position.

I mean, the maximum position for both sides is resolution that maximizes within that conflict and tension both. I mean, it just seems to me obvious that every precaution is at least one precaution too many for getting the public safety benefit where we could have it with reasonable protections of privacy. And so we just have to work that balance more carefully.

COMMISSIONER SCHECK: Well, I guess what concerns me is this. When you go back and you, it depends on how long you -- where did Phil go, unfortunately -- it depends on how long you've been looking at this.

What really annoyed me, and somebody who is in favor of use of these databanks for investigative purposes and for exonerating people is that when we had all these statutes passed over the last six or seven years, what would go on in state legislatures is they go, oh, oh, here's a DNA databank, oh, that's a magic bullet, let's pass that statute.

And, they never put any money into the labs to do DNA typing on the casework so they would have sufficient capacity to deal with it and created all these backlogs.

Very little thought or rational planning went into this and created a very unfortunate situation from both the laboratories and law enforcement in effectively promoting this technology.

Now, what I find, for example, when this issue was discussed in public, is that you get into any, you know, my police commissioner, who again I have to cop to, you know, setting him off on the whole potential for this but he gets on television, he says, well, you know, the problem is with these federal people, they just don't have, they won't cut through the bureaucracy and get to the bottom of it. We can do all of this.

Let's take it from arrest. And that becomes the issue. The next big issue will be shall we take DNA from people at arrest, is that constitutional, unconstitutional, ethical, unethical and lost in the shuffle will be the real important applications of it.

So, it seems to me you just have to find a way of taking some steps that are farsighted that will eliminate attacks upon the technology before they're made. You can eliminate a lot of these problems at some cost.

CHIEF JUSTICE ABRAHAMSON: Well, we shall see. We shall see what the cost will be and where we'll reach a consensus. Anything else?

DIRECTOR ASPLEN: May I ask a couple questions?

CHIEF JUSTICE ABRAHAMSON: Sure.

DIRECTOR ASPLEN: I find myself in the need for some direction as to how to get to us that point. How, what is the plan from here to get us to some kind of consensus; what, who do we need to hear from if anyone else, how do we need to proceed. Let me ask this question first.

Is there a general consensus that we seem to be working towards an idea of restricting research provisions providing kind of a criminal sanctions on a more universal basis for misuse and some finite period of retention? Not holding anyone to that.

COMMISSIONER SMITH: There seems to be a desire to do that but we haven't established that we can do it.

DIRECTOR ASPLEN: Okay. But, for in terms of a general framework, recognizing that we can throw that framework out if we so choose. Does that work?

CHIEF JUSTICE ABRAHAMSON: And I think the other thing that was on the table was where should this be left, in the private lab, in the public lab, in the police department, law enforcement courts, wherever.

COMMISSIONER SMITH: Well we put, I don't know, Chris, what else may happen with that but did we not put a recommendation forward that wherever retention is, it oughtn't to be outside of government's hands.

DIRECTOR ASPLEN: Yes, yes, that was --

COMMISSIONER SMITH: We already did that one.

DIRECTOR ASPLEN: That was the first issue which the Legal Issues --

COMMISSIONER SANDERS: Also the thing about the provision about prohibitive research.

DIRECTOR ASPLEN: Yeah.

COMMISSIONER SMITH: So we'll come back with more on that --

COMMISSIONER SCHECK: Yeah, I don't think that there's much disagreement that, you know, we want to define it pretty much the way it was defined originally in the 1992, it's 1992 act, right, you know, that forensic identification purposes for linkage to a crime scene or identification of dead bodies.

I mean, that language is there. It's in a number of statutes. We can make recommendations about how to keep it. We've thought that problem through in many states. We do bar codes and we put the blood one place and the pattern another and we can make suggested ways of doing it but the ultimate, the nut-crunching question, you know, and we can limit, so, you know, the research purposes, or eliminate them other than validation for, you know, databanks that Dr. Crow is going to eliminate because we'll just add more loci and it's a good idea.



But, the bottom line is going to be, you know, can we reach a consensus on defining a way, I mean, I think that what the group would say is, well, if you could, we could get a consensus.

If you could say we'll retain it until such time as you have switched to your technology that you can use for some substantial period and then you can't hold it indefinitely, you got to put a reasonable period of years on that. I think that may be a --

DIRECTOR ASPLEN: Not trying to address the issue of how long, let me ask this. Professor Smith, do you feel, have we addressed the public trust question enough? And if not --

COMMISSIONER SMITH: Today, I'm finished for today on that question but I don't think --

DIRECTOR ASPLEN: I don't mean today. I mean, where do we go from here?

COMMISSIONER SMITH: We want to come back, our Working Group with your permission will come back with a more carefully thought through and presented set of observations and arguments about that.

I mean, one of the things we didn't talk about much today although it was referenced today in a more useful way is that the cultural and historical roots of distrust, sort of have to notice what they are in order to try and figure out how plausible any particular strategy we're dealing with.

And, you know, Dorothy Nell has sort of been helping us put together a presentation that the Commission itself might find useful because it's not all irrational stuff. So, we think that the Commission needs more material. That's why we're working to provide some --

COMMISSIONER SCHECK: If I could make a request around that. I did an Internet search. I mean, one thing that we, I know Dorothy's work and I know the cultural entities but I would sure like to try to find more of these people that are doing the behavioral, and I don't mean to denigrate them, I mean, I have noticed in the literature that there were a lot of work in this area.

The Journal of Human Behavior is one that I was looking through just on Internet search and I saw them, you know, linking certain loci and get some of those people so they're before us and we see these people are not, you know, it's not doctor --

COMMISSIONER CROW: Not ogres.

COMMISSIONER SCHECK: You know, somebody that's doing some serious work, you know, or outsiders or some kind of person that's in this field --

CHIEF JUSTICE ABRAHAMSON: Into the microphone.

COMMISSIONER SCHECK: -- to see what the uses are.

COMMISSIONER SMITH: Well, Dr. Crow and I have been talking a little bit about some other, some form of a joint endeavor between our committees to take a look at this particular question, I think.

DIRECTOR ASPLEN: Also in response to your concern I have asked and have been told that we will receive before the next Commission meeting a report from the ACLU, which we have asked them to produce, which would outline either actual examples of inappropriate database misuse and that kind of thing or what they would list as the potential misuses.

They have had a busy summer and as such couldn't get it ready for this meeting but we certainly thought that they would be one of the more vigilant pursuers of that issue. So, we anticipate that we will have something to kind of really hit, you know, hit that trust issue head on.

COMMISSIONER GAHN: And one last, something which we also haven't addressed, and I think it's sort of a practical question, and it's this. I don't know what other states, we take buckle-buchal swabs, we call them that in Wisconsin. We don't know whether you say, buckle or buchal, so we call them buckle-buchal.

And what you do is, but, you know, we have done our RFLP for our databank. Sometimes many of the samples have to be sent back, they've been outsourced, they've been frozen and unfrozen on many times. Now we're going to do PCR. There may be some technology in the future. Well, how much, how often can you go back to this buckle-buchal swab?

COMMISSIONER SMITH: At least twice apparently.

COMMISSIONER GAHN: But 50 years from now after it's been frozen, unfrozen, I mean, is there estimates, ideas and how good is this sample even going to be when we talk retention and it will be used up maybe at some point, should we be taking more swabs now in the event we want them 50 years down the road, maybe take eight swabs from -- I mean, this is another question I think we should look at.

COMMISSIONER BASHINSKI: We don't have 50-year-old samples but we have 15-year-old samples, and they're quite typeable, assuming that they're collected properly in the first place. I don't think that's going to be the limiting factor.

CHIEF JUSTICE ABRAHAMSON: Now, you asked, what direction are we thinking in terms of this Working Group coming back with a definite proposal on retention?

DIRECTOR ASPLEN: My question really goes towards what resources do we need to get either the Working Group or the Commission before them by way of research, by way of particular individuals, groups represented.

COMMISSIONER SMITH: Then I didn't, I mean, we have to look at the past and I didn't but yes, I think it would be good, given our working group's discussions if we could encourage representation from communities that have historical interests that, in trust, in a mistrust, right, has historical mistrust of government with respect to genetic and medical matters.

And I'm thinking particularly, though I may be ignorant of others, of African-American communities where a basis for distrust is historically rooted. And I just think that would be useful to discuss not the ACLU but NAACP or some other set of organizations that can talk with some authority on this question.

CHIEF JUSTICE ABRAHAMSON: Jeff?

COMMISSIONER THOMA: Well, I can say that I think Brian Stevenson can make himself available, among others, on this issue. I think I can speak for Brian as a friend of his because it's a crucial enough issue to him that he make himself available either to a Working Group or to the full Commission and I'm sure if, if he needs additional help, he would be able to give us some recommendations.

COMMISSIONER SMITH: And secondly, as you already, you are doing this now, we, because of this sort of opening up, we're having a series of empirical questions arise on which we could greatly benefit from staff help but then staff help is being provided so maybe that's just a way of acknowledging that you're doing that for us and we appreciate it.

DIRECTOR ASPLEN: You're welcome.

CHIEF JUSTICE ABRAHAMSON: Woody?

COMMISSIONER CLARKE: Actually, I think it would be helpful, and I think I mentioned this at the meeting in Boston, that human genetic societies -- and I know Dr. Doctor Crow can help with that -- are examining this question from their perspective as well. So it might be helpful to hear from someone from one of those organizations and someone from the medical profession as well because these are storages of a lot of samples in a different context but I think it would be helpful for us to know what steps, if any, they're taking to deal with what's certainly a related issue.

COMMISSIONER SCHECK: Actually, what Mr. Callaghan suggested, Dr. Callaghan suggested about the robotics, that, in other words, if you are going to save them and you figure that in five years or whatever, you know, we're going to switch to a new technology, he was saying you really should save them in a particular way that's different than the way we're saving them now so that robotics could cut the costs.

DR. BASHINSKI : Well, a lot of labs are because what they're doing is extracting the DNA and keeping it in format that it can just be applied to the next technology. I don't think that's unusual.

CHIEF JUSTICE ABRAHAMSON: We need the information on that so that it's part of our basis and underlying assumptions.

COMMISSIONER SMITH: That's right. These are the more practical aspects of retention. We haven't spent as much time on this, these other things.

CHIEF JUSTICE ABRAHAMSON: That's good. Jim Crow.

COMMISSIONER CROW: Two things. There is a society of --

CHIEF JUSTICE ABRAHAMSON: Would you use the microphone, please.

COMMISSIONER CROW: There is a society of clinical geneticists and they have an ethical subcommittee. I think Bill Bradley's on it and knows a lot about it. That would be, it would be a group that could provide some of the kind of input that's been asked for here.

COMMISSIONER THOMA: And he's in our Working Group.

CHIEF JUSTICE ABRAHAMSON: Right. Judge Reinstein?

COMMISSIONER REINSTEIN: I don't know whether it was when I was out but the human genome project has the ethical, legal and social implications on division of the genome project. I think it's headed by Dr. Dandrel (phonetic) but I'm not exactly sure if he's the actual head of it. And they might be somebody to look to because I know that they have gone into these issues as well.

CHIEF JUSTICE ABRAHAMSON: Chief Sanders?

COMMISSIONER SANDERS: I guess I was just thinking that, it seems to me like the two head-buffers are the practitioners and those that are concerned about privacy rates or the perceived fear of what, the misuse of this, this stuff.

So, I mean I don't know who could bring additional information that would help me make up my mind as to how I would vote on it when it finally comes to a vote.

I mean, I don't know how we can get evaluated information, to do what Barry was saying yesterday. If I could get my mind around whether the benefit to be gained by retaining them outweighs the benefit of even having to deal with this issue, that's the difficult part for me.

But, it seems to me that I have not even heard articulated other reasons other than they need to keep it to practitioners. I certainly don't know anything about it and if the practitioners tell me that's what they need, then I would think that's what they need but I don't know what to suggest.

COMMISSIONER SMITH: Don't you trust me?

COMMISSIONER SANDERS: Huh? Oh, I think there's a lot more trust in our society than you guys seem to, I don't know what you guys are studying but --

COMMISSIONER SMITH: No, I think there is a lot.

COMMISSIONER SANDERS: You need to be in Frankfort, Illinois.

COMMISSIONER SMITH: I think we have to trust. That's the point.

COMMISSIONER SANDERS: I think that's what it is. I'm just shielded. I live in Frankfort, Illinois. It's a great place to live and people trust us and we all get along and work out different problems. We have community-oriented policing in that we work together to solve problems. So, therefore, there would be this open debate but I don't think they would be as scared as some of us perceive.

So it's difficult for me, I mean, and I admit that freely. I have not been scarred as much, I guess, so that I don't see it. But I've not lived in an African community in the inner city either, so, I mean, and I certainly recognize that that perspective might be different. It's just that it's difficult for me to try to weigh what's in the best interest of everybody when you get into that.

COMMISSIONER SCHECK: I'm just curious, what would your officers say if you collected a blood sample from each of them and kept it there and the justification for it was we're doing this because like we need elimination fingerprints, we fingerprint you, we're now taking your blood?

COMMISSIONER SANDERS: Well, I think the majority of officers would be just like there are, we have a mandatory random drug testing but our union voluntarily agreed to put it in the contract as well. So, we're probably not a good example. They, they would be pretty open and free if it helps us do our job and showed that we got nothing to hide and we're not going to misuse it, they would be supportive of it. That's how they are with the drug testing but I don't know, I couldn't speak for them.

COMMISSIONER CROW: Would the public be more accepting of the use of DNA if it were known that law enforcement officers had volunteered their own DNA to a pool?

COMMISSIONER SANDERS: I'll certainly be the first to volunteer to give mine. You can take it right now if you like in a buchal-buckle or whatever. Do it twice.

COMMISSIONER SCHECK: Actually, I mean, there have been instances where police officers have gotten very upset because, I mean, they didn't want their blood taken for these purposes, even for elimination. So, because, I mean, and I frankly think that law enforcement officials would be among the first that they would do screening for susceptibility to certain personality disorders.

COMMISSIONER SANDERS: You know, when you get into those kind of discussions, though, some of that stuff is going to come no matter what. How do we get to the DNA that we got now? Somebody's doing research, this, that and the other.

COMMISSIONER SCHECK: I think it came out wrong.

COMMISSIONER SANDERS: I guess what I'm thinking is, is we're talking about for identification purposes and the things that we're talking about, that's why I don't have a big problem of, if they say they have to keep it in, fine; if they say that in 15 years they don't need it, that's fine.

It's a whole different thing as to what I can envision a lot of things that down the road we would be able to use it for that would make our particular jobs easier. I don't imagine that happening, I mean, but that's a societal question that I don't think is relevant just to DNA.

I mean, I think that's just how society perceives it. And the scare that went up when they did all that stuff about cloning, I mean, I think that all comes into play in what people believe and how the media plays it as well.

CHIEF JUSTICE ABRAHAMSON: And that's going to be the balance as to, one of the balances --

COMMISSIONER SANDERS: I think so.

CHIEF JUSTICE ABRAHAMSON: -- on retention as to saleability with the public, then with the legislature.

COMMISSIONER SANDERS: You should visit me in Frankfort, Ma'am.

CHIEF JUSTICE ABRAHAMSON: I'm going to come on down.

COMMISSIONER SANDERS: Yeah.

CHIEF JUSTICE ABRAHAMSON: Sounds like a wonderful part of the world.

COMMISSIONER SANDERS: It is. It really is.

CHIEF JUSTICE ABRAHAMSON: It's like that in Madison, too.

COMMISSIONER SANDERS: Yeah.

COMMISSIONER SMITH: We sample right at the border of town.

CHIEF JUSTICE ABRAHAMSON: Okay. Chris, anything else?

COMMISSIONER CROW: What have we done wrong to get through early?

COMMISSIONER SANDERS: Actually, they put Smith on the agenda. Mike wasn't ready to talk, that's all.

DIRECTOR ASPLEN: I would have just a few miscellaneous.

CHIEF JUSTICE ABRAHAMSON: Go ahead.

DIRECTOR ASPLEN: First of all, check out our Web site. The Web site for the Commission is really neat because what we have done, thanks to the efforts of Ms. Wilson, who is walking towards me for some reason, and, our, and Dan Tompkins, who you have met before, we now are

beginning to put collages of photographs of the Commissioners on the transcript pages. So now when you click on the transcripts, there's a collage of pictures. And then we have actually embedded a few in the transcript itself so when you pull up a transcript as someone's speaking oftentimes you'll see a photograph of the person there.

So it's really neat. It's very interesting and we think it's, the more interesting we make it, the more I think readily people will use it and be inclined to come back to it. And as, you know, the gentleman asked yesterday who is still here today, you know, what are we doing to inform the public, we're trying to make it an attractive proposition for them to get involved with also. So, I would encourage you to do that.

CHIEF JUSTICE ABRAHAMSON: It's, let's see, is it OJP, is that it?

DIRECTOR ASPLEN: Yeah, if you go to [WWW.OJP.USDOJ.GOV/NIJ](http://WWW.OJP.USDOJ.GOV/NIJ) and then DNA, you'll go directly to it. If you look up the DNA Commission under any search engine, it will come up under that also.

In terms of the lab funding, which we didn't talk about today or yesterday, we don't, I don't think we need to have a full-blown discussion about it and originally had intended not to. But one, just to kind of give you an update on that, what we're considering doing is taking a report that you have already received, which provides some details on different pilot programs, different options on how to coordinate court systems and sheriffs and police departments and such on sample collection and combining that with a recommendation that Woody Clarke wrote up, which is similar to the recommendations that we've already furnished to the Attorney General in style.

However, upon kind of rethinking our approach to that, one of the things that we thought of was that this is the kind of document that would be of benefit going not just to the Attorney General for quote-unquote federal funding, asking money for pilot programs, but rather is something that should be crafted and more importantly should be distributed to the individual states also to make them aware of the problem, to send it to the various components in the states and in the counties and such to make them aware of not just the problem but some potential solutions also and also maybe create a tool that would be of benefit when those systems or those communities are going to their funding agencies, be it their county commissioners, be it their state legislators, et cetera.

So, we're kind of rethinking that a little bit and starting to think about it in the context of something, not a complex document like the postconvictions and not something as simple as the brochure but something in between again that would benefit kind of a wider, a wider audience.

The only other thing I have, I think, unless someone else has anything, yeah, that's it, it looks like this. You've all received it. It's a, looks like this, and at the bottom the three points are in italics and it's under Commissioner Paul Ferrara's name.

The only other thing I have is there have been a lot of things kind of running around the table today in various and sundry ways and I haven't specifically thanked Robin for the work that she's done in getting this stuff out the door.

We work well because she works well and because she is so dedicated and so efficient, as you all know every bit as well as I do in terms of her getting back to you and things. So as always, thank you to Robin Wilson and thank you for your time. Do we have any scheduling --

CHIEF JUSTICE ABRAHAMSON: When is our next meeting, approximately?

DIRECTOR ASPLEN : We have not scheduled our next meeting. We're anticipating one before Christmas so probably the very beginning of December.

COMMISSIONER GAHN: Could you let the Commission generally know when Professor Smith's Legal Issues Working Group is meeting?

DIRECTOR ASPLEN: Yeah, we have to.

COMMISSIONER SMITH: I'm going to try, next week I'm personally, with Robin's help I'm going to try and organize one for sometime in the first two weeks of November. So, a good start to that is anybody who is interested in coming to our next meeting, let me know what your schedules look like in the first two weeks of November.

COMMISSIONER GAHN: Where might it be? Where might it be?

COMMISSIONER SMITH: Here and where you might be.

DIRECTOR ASPLEN: My guess is it will probably be in Chicago.

CHIEF JUSTICE ABRAHAMSON: I want to go to Chicago.

COMMISSIONER SMITH: The earlier in November, the better.

DIRECTOR ASPLEN: Yeah, right, we understand.



## Public Comment

CHIEF JUSTICE ABRAHAMSON: Anything else to come to the group? If not, thank you all. I think we've made very good progress today. And, pardon me, well, there will be public comment and it's scheduled for 3:30 to 4.

Anyone here now who wants to, yes, thank you, do public comment, fine, but somebody will stay to hear public comment and then it will be available on the Web site, in transcript, et cetera. But, but everyone need not stay if they don't want to but I think we're required to do that. Yes, sir.

MR. DERIENZO: Sure, thank you very much. My name is Paul Derienzo, D-E-R-I-E-N-Z-O, a graduate of the University of Wisconsin, Madison, by the way.

CHIEF JUSTICE ABRAHAMSON: Good.

COMMISSIONER SMITH: Great place to live.

MR. DERIENZO: Yeah, great place to live. I loved it out there. My first question was half facetiously but I think it's important anyway to the California representative. Was O.J. Simpson's DNA sample destroyed when he was acquitted; is it still in the database or was it destroyed?

COMMISSIONER BASHINSKI: Mr. Simpson's sample was never in our database.

MR. DERIENZO: Never so but --

COMMISSIONER BASHINSKI: Samples will only get into databases where there are cases that are unsolved. And that was considered a solved case.

MR. DERIENZO: So it wouldn't be in, it wouldn't be held by the State of California at this point at all according to your laws?

COMMISSIONER BASHINSKI: It's not in the database and never was.

MR. DERIENZO: But would it still be in the possession of law enforcement or some, in the possession of a state in some, some way or another?

COMMISSIONER BASHINSKI: Probably because most evidence samples are retained, for all the reasons that you've heard in our discussions but our laboratory would not retain it because we return the samples to the agency that sent it to us.

MR. DERIENZO: Thank you. And my other question was, just to all of you, it just seems to be something that struck me and some of the technical people who I have talked to who do testing mentioned this as a problem, that what happens in a situation where a criminal sprinkles blood or fluid or replaces the saliva in their own mouth at a crime scene or when it's taken from them and what effect would that have, would DNA have in actually complicating an investigation if that

happens in a way that, for example, fingerprinting couldn't? Because you can't really fake your fingerprints.

CHIEF JUSTICE ABRAHAMSON: Norm?

COMMISSIONER GAHN: I recently had a case in Milwaukee just a few weeks ago where a convicted rapist sent his semen sample from the jail to a friend and for \$50 she rubbed it on herself and reported a sexual assault. And, of course, he would have been incarcerated during the time and then that sample, he engineered having that sample sent to the crime lab and, of course, it came up a perfect match with him. So it happens but --

COMMISSIONER SMITH: He was trying to establish there must be somebody else with the same profile.

COMMISSIONER GAHN: Right, yeah, he wanted to establish there was someone else with the same profile but we found the victim and she told us, you know, what was up. But, we have ways of dealing with that and I think we can recognize when situations like that occur.

MR. DERIENZO: Because I know that there's magazines, for example, that you can buy at a newsstand right down the street that have advertisements for buying freeze-dried, drug-free urine and people use that all the time in order to beat a drug test, for example. And, so, would there not be a market now in blood fluids in capsules that you could buy over the Internet or from a magazine?

CHIEF JUSTICE ABRAHAMSON: Dr. Crow will talk.

COMMISSIONER CROW: There might be a market for a cocktail of a mixture of all sorts of DNA that could be scattered at a crime scene and confuse the investigation.

MR. DERIENZO: And I guess going back to my ultimate question, isn't that, doesn't DNA evidence under that, in that use actually complicate an investigation rather than make it easier to solve it?

COMMISSIONER CROW: It would be possible to complicate it but I think it would also be possible to solve it.

DIRECTOR ASPLEN: We did talk about that at a prior meeting of Dr. Crow's group. And the bottom line is you kind of get back to the fact that DNA is one tool among many tools. And we were solving cases long before DNA came along and in a situation that Dr. Crow explains where you would have a whole bunch of DNA in one area, you look at it and you go, well, this isn't an option, this is clearly, you know, something to throw us off track so let's move on to what we already know how to do.

CHIEF JUSTICE ABRAHAMSON: Terry, do you want to add to that?

COMMISSIONER GAINER: No, I think actually I would just affirm both those things. It is, you have to remember it is but a tool and it doesn't speak for itself and it would be, you just have to take it into consideration in your investigative process.

MR. DERIENZO: And my last question since I slay the criminals, let me throw this one at law enforcement. When officers -- and the O.J. case I guess is a good example -- go into a crime scene and because of a lot of reasons, their own social background as well as how the crime scene looks, become convinced immediately who they think they know who did the crime and that influences the way they collect the sample so that, and this could be whether DNA, fingerprints or any other forensic evidence, it tends to fulfill their belief that this person is guilty.

COMMISSIONER GAINER: If they did that, that would be poor investigative practices. And that's, again, you're hitting, that could be done, that closed mind could work in any area of evidence we're picking up or interviews or interrogations or anything else and it's just something you train against and have audits to ensure that it doesn't happen.

COMMISSIONER CLARKE: And it didn't happen, either, having gotten involved in that fairly closely. That was a very thoroughly investigated crime scene.

MR. DERIENZO: And that just brings me to one more question. I'm sorry to hold you because I know it's been a very long day. Something that was brought up earlier just came back to me about how technically because of the high arrest rates -- I think Barry Scheck brought it up, I wish he was here -- because of the high arrest rates in inner city areas you can get a huge propensity of African-American young males in your database.

And I know you have discussed that but it's a concern of mine and I think a lot of people out there that considering that, you know, some of the problems we have had in this country, with, you know, integration and segregation and racism that, that something like that could be dangerous. And not to say that any of you folks, of course, would have, would use it in any bad way but it concerns me because a lot of people really are very, still very racist in this society and that these kind of databases could be used in a very scary sort of way. And I think there might be some concern about that.

And you have even admitted that the propensity, the tendency would be for certain racial and ethnic groups who are perceived as more akin to be committing crime but basically because they're just in a certain area where there's more police activity.

For example, you don't have people knocking down doors in suburban areas on drug busts and you have some felonies, a lot of felonies, drug felonies might wind up in databases and you won't have white, European, Caucasian people in these databases but who are just, who use drugs just as much, for example, but you will have poor people and African-American people and Hispanic people, a larger propensity of them in these databases. And it seems scary to me. And I just want to leave that as a comment. Thank you.

COMMISSIONER SMITH: What I was trying to say and perhaps didn't well is that that's, that's one of the central concerns for the Legal Issues Working Group in crafting a report for this Commission to help us consider it. We'll be trying to talk about that.

CHIEF JUSTICE ABRAHAMSON: Is there any other public comment at the moment? Well, then we do stand adjourned and there will be a group that will wait for the 3:30 to 4 time period so that if people want to come, they will be available, we will be available; otherwise, we're adjourned except for public comment. We will reconvene.

(Conference adjourned at 4 p.m.)