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JONATHAN McGRATH: Good morning. Welcome to the 13th meeting of the National Commission on Forensic Science. It's good to see everybody again. I'm Jonathan McGrath, the Designated Federal Officer; and I call this meeting to order.

I just want to run through a couple of housekeeping items. First of all, I want to thank the Commission Staff and the OJP Staff for hosting this meeting again at the DOJ Office of Justice Programs Building. In particular, I'd like to thank the Commissioners who helped develop some of the panels for this current agenda as well. I know Peter Neufeld and Susan Howley and Kathryn Turman helped to facilitate the panels today and Judge Hervey for the training panel tomorrow. So thank you for the inputs.

Just a quick housekeeping item in terms of emergency evacuation procedures. There should be a slide up on the screen with the same information; but in the unlikely event of a situation requiring emergency evacuation of this building, the following procedures should be followed.

If you hear an alarm from anywhere in the building, you should begin evacuation.

Stay calm and gather any personal belongings, such as purses, briefcases, et cetera.

Do not take any beverages or food you may have with you; please leave them behind.

Unless otherwise directed by a stairwell monitor, exit through the back door of the room, the exit sign and back in the corner here.

Do not exit using the door through which you entered the room, up the staircase.

Exit in a calm, orderly manner; and you will exit the building on I Street, which is just north of the building behind me.

Move away from the building and follow the instructions of the OJP designated employees, who will be wearing orange vests.

Designated OJP employees will notify you when the all clear signal is given and you can return to the building.

Now I'd like to turn over the mic to Andrew Goldsmith and Kent Rochford, who will open the meeting; and then I believe John Butler will run through the introductory slides for the meeting. Thanks.

ANDREW GOLDSMITH: Good morning, everyone. First of all, let me say it's quite an honor to be here on behalf of the Acting Deputy Attorney General and be able to address this group. My name is Andrew Goldsmith; I'm an Associate Deputy Attorney General. I'm also the Department's National Criminal Discovery Coordinator. I know many of you will recognize me from having been here occasionally at meetings over the past three years. I'm familiar with many of your recommendations and views.

As some of you know, about two years ago, then Deputy Attorney General Sally Yates asked me to work with you on the Criminal Discovery Recommendation; and in that role, I had the pleasure of working with a number of you, in particular Judge Rakoff and other people that are here today. For those of you who

don't know me, let me just spend a couple of minutes giving you a sense of who I am so that my comments can be taken in that context.

In 2010, I was appointed as the Justice Department's first and, at this point, *only* National Criminal Discovery Coordinator. In this role, I oversee a wide range of initiatives designed to provide Federal prosecutors and other law enforcement officials with training and resources relating to criminal discovery, including electronic discovery or e-Discovery as many people call it.

As Associate Deputy Attorney General, the other hat I have, there are a number of areas for which I am responsible, including professional responsibility; recording of custodial statements; Department wide training efforts; and environmental matters. Late last year, I earned my fourth Attorney General's Award in recognition of my efforts to ensure that Department attorneys carry out their duties in accordance with the rules of professional conduct.

I've been with the Department for over 20 years. I started out as an Assistant United States Attorney in the District of New Jersey in the mid-1990s. I also served as First Assistant Chief of the Environmental Crime Section for the Department. In 2005-2006, I successfully prosecuted the Atlantic States case; it's an eight-month trial. It's the longest environmental-related trial in U.S. history; and you'll be interested to know that that case had its fair share of forensic evidence, as you could imagine.

I started off my legal career in the high-crime era of the 1980s in the Manhattan DAs Office. Among the hundreds of cases that I handled was one where a young Barry Scheck and, dare I say, young Andrew Goldsmith, worked as collegial adversaries to resolve that case in a very favorable way for everyone.

Perhaps most importantly, I received my Bachelor of Science degree from Cornell University in 1979 in biology; so this science is not nearly as scary to me as it may be to many other attorneys.

Now, before I go any further, I'd like to talk about the Attorney General's firm commitment to forensic science. On Friday, Attorney General Sessions and I spoke in his office; and during our conversation, he made clear to me that in his view, good forensics is not only important because it enables us to convict the guilty but also to clear the innocent. He stressed to me that we need to focus on the integrity of the process, where we have prompt access to high-quality forensics technology. He found particularly troubling the backlog in forensics analysis; and, as I'll discuss in more depth later, as part of the Task Force on Crime Reduction and Public Safety, he has established a Forensic Science Subcommittee to that Task Force.

Moreover, and I plan to also address this as well later on, he has authorized me to announce here today a series of forward-leaning actions that will inform the Forensic Science Subcommittee's development of a strategic plan on forensics.

I'd now like to discuss the status of certain outstanding recommendations from September 2016 that I'm sure you're all wondering about. In December of 2015, the Department announced that whenever

possible we'd respond to Commission recommendations within two meetings; and until today's meeting, we've been able to meet that timeline and have responded to every recommendation. As people in this room know, deputy attorney general nominee Rod Rosenstein has not yet been confirmed; and because of this, we're not yet able to announce a response to those recommendations at this meeting.

I want people to rest assured that people in the Department are processing options to respond to the recommendations on proficiency testing, technical merit, contents of case reports, and National Office of Medical/Legal Death Investigation. We have every expectation that we'll be able to issue public responses soon; and when those decisions have been made, Jon McGrath or others at the National Institute of Justice will transmit that to you promptly.

The Department and NIST created the Commission out of a shared commitment to strengthening forensic science. Our justice system depends on reliable, scientifically valid evidence to solve crimes, identify wrongdoers, and ensure that innocent people are not wrongly convicted. This Department, just like every other department that has come before it, remains committed to these principles. Over the past three years, the Commission has played an important role in this effort; and we are extremely grateful for your contributions. I'd like to highlight two contributions that I'm certain will have long-lasting effects.

As you know, we announced new Department wide guidance on criminal discovery in cases with forensic evidence at the last Commission meeting. From my vantage point as the National Criminal Discovery Coordinator, the recommendation on pretrial discovery will have long-lasting and important effects.

Now, just to clarify the significance and import of the January 2017 Supplemental Guidance that was announced at the last meeting, in 2010, then Deputy Attorney General David Ogden issued a memo entitled, "*Guidance for Prosecutors Regarding Criminal Discovery*." It's often referred to as "the Ogden Memo." The Ogden Memo provides general guidance on gathering, reviewing and disclosing information to the defendants during discovery. The Ogden Memo is one of the most fundamental pieces of guidance that prosecutors review regularly, along with the United States Attorneys' Manual.

For seven years, the Department neither amended nor supplemented this guidance memo *until* earlier this year when we issued the Supplemental Guidance for Forensics. The Supplemental Guidance goes a long way to assist prosecutors to meet their discovery obligations regarding forensic evidence and experts to ensure that defendants have a fair opportunity to understand the evidence that could be used against them. Every year, I'm responsible for providing mandatory criminal discovery training to the Department's roughly 6,000 prosecutors. Importantly, in 2017 the Supplemental Guidance will be included in the mandatory training for all prosecutors.

And I don't only train prosecutors. I also provide training to other law enforcement officials, including the Department's forensic analysts and forensic examiners. Just two weeks ago, I traveled down to Quantico and trained nearly 300 FBI forensic examiners on a variety of discovery-related topics, including how prosecutors will be using the Supplement Guidance to work with laboratories in meeting the Department's discovery obligations.

Now, as a career prosecutor, obviously, criminal discovery is directly in my wheelhouse; but I should add that as part of my training efforts, including my discussions and my training of forensic examiners, I've learned that there's no single Commission recommendation that has been more important to the practice of forensic science than the recommendation regarding universal accreditation. I've been told that the Department's decision to publicly announce the policy on accreditation and to mandate that our prosecutors rely on accredited labs whenever practicable has made a real difference in that more laboratories than ever are moving to accreditation.

These two recommendations, and the Department's review and implementation, are a demonstration of the measurable impact of the work of this Commission over the past three years; and for that, as well as many other products of this Commission, the Department thanks you.

Now, to identify the obvious elephant in the room, everyone here knows that the Commission's charter is expiring this month; and it probably won't be a surprise to most people to learn that the charter will not be reviewed. As part of *any* transition, it's critical to reevaluate and realign our resources to achieve a new Administration's priorities. Attorney General Sessions has announced his commitment to reducing violent crime in America, particularly in our cities; and he has identified the troubling rise in crime as a focus of the Department when he formed the Task Force on Crime Reduction and Public Safety and established a Forensic Science Subcommittee to the task force to fight against this increase in crime.

The task force and its various subcommittees, including the subcommittees on hate crime, forensic science and violence reduction, are *internal* Department working groups with representation from relevant components, including laboratories and prosecuting entities. Now, although these are internal in nature, they're each seeking relevant external stakeholder input. The Forensic Science Subcommittee in particular has been tasked with considering how we will continue to advance the purposes of this Commission in a manner consistent with the Department's forensics priorities and its policy to reduce crime in America and to develop a strategic plan.

We plan to consider all options, closely review the Commission's Summary Report, and secure feedback from the Commissioners and other stakeholders. We'll consider all the information before we decide how to move forward.

Now, today I'm announcing three actions that will inform the Forensic Science Subcommittee's development of a strategic plan on forensics.

First, in the coming week, the Department will appointment a senior forensic advisor to interface with forensic science stakeholders, advise Department leadership, and work with the subcommittee to develop a strategic plan. The strategic plan will consider questions that are critical to increasing capacity and to ensuring access to high-quality forensic analysis. Some of the questions that will be considered include the following.

One, what are the biggest needs in forensic science inside the Department and outside the Department?

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Two, is there more for a body, like the Commission, to accomplish; or would next steps be better undertaken by some other body?

Three, what specific support do Department laboratories and prosecutors need; what does the broader community need?

Four, what is required to improve practices; what are the barriers – legal, practical or otherwise – and what resources do we need to overcome those barriers?

Five, is the OSAC structure sufficient to set standards; or is some other body needed?

Six, what is needed to improve capacity so that every prosecutor can be assured that he or she will receive prompt results when he or she submits evidence for testing?

Seven, what resources and relationships can the Department best draw on to get thoughtful advice; are there other ways to organize an advising body?

Finally, what is the Department currently doing to advance this issue; are there better ways to support state and local practitioners?

The second major part of this initiative: I announce today that we're publishing an Issue for Comment in the Federal Register seeking broad stakeholder input on just these questions that I went through and what the Department should consider after the expiration of the Commission. That notice will be open until June 9th. We invite you – and I emphasize this – we invite you individually to submit comment and encourage you to share this notice broadly.

Third, the Department is conducting a needs assessment of forensic laboratories. Now, as you know, in December of 2016, Congress passed the Justice For All Reauthorization Act, which has several mandates to improve and advance forensic science. The needs assessment will examine serious issues of capacity and backlog at public crime labs and in the medical/legal death investigation community. It will consider other topics, such as research and coordination, that are necessary when developing a strategic plan to address the needs of the forensic science community.

At the same time, the Department is considering the previously-announced projects of forensic science discipline review and the uniform language for testimony and reports and identifying where they may fit in the subcommittee's work. We expect this process to develop a strategic plan to be deliberate and thorough, but it's not an endless one by any means. We have every expectation of announcing how we will continue to meet these goals in the coming months.

I note that expiration of the Commission's charter does not, repeat, does *not* impact the OSAC. The Department supports the work of OSAC and is coordinating with NIST to evaluate whether an MOU needs to be re-executed and, if so, what it would need to contain.

In conclusion I want to emphasize that at the Department we recognize our responsibility to work tirelessly to improve the work we do and to enhance the fair administration of justice. Part of that responsibility is to ensure that we're regularly coordinating with the right people on these issues and acting in a manner that demonstrates our commitment to fair play and honest dealings in every matter we

handle. We'll work to understand the lessons of this Commission and continue to advance our shared goals.

Again, I want to repeat, the Department thanks you for your contributions, emphasizes that we're not finished relying on you yet. Please expect to work with us in the coming months; and please review, share and respond to any public inquiries we issue. The commitment of people in this room, the time, the thoughtful participation over the past three years was exemplary and represents what we're capable of doing when we work together towards a single unified goal. There's no question that forensic science is one of the most critical tools we all have to reduce crime, to increase public safety; and, as such, it will remain a priority in the Department.

In order to turn back rising crime, we need to rely heavily on all of you working together -- forensic scientists, legal practitioners, and state and local law enforcement -- to lead the way. The Federal Government intends to use its money, research and expertise to help all of us figure out what *your* needs are and to determine the best ways to ensure that forensic science is accurate, reliable and available to law enforcement and prosecutors to fight crime; and the Department of Justice intends to do just that.

The new challenge of violent crime in our nation is real, and the task in front of us is clear. We need to resist the temptation to ignore this or downplay it. Instead, we need to tackle it head on to ensure justice and safety for all Americans. The Department's pledge to identify a strategic plan going forward reflects this abiding commitment to justice, to the rule of law, and to maintaining the public's confidence in the accurate and reliable forensic science analyses we need to clear the innocent and to convict the guilty.

On behalf of the Attorney General, the Acting Deputy Attorney General, and the men and the women of the Department of Justice, I thank you once again for your efforts.

KENT ROCHFORD: Thank you, Andrew; and thank you to my Department of Justice colleagues for the opportunity to address this distinguished group.

As you know, I'm the Acting NIST Director. The fact that I'm in a transitory position doesn't mean that we don't take our forensics work very seriously; it's something we do have a commitment to. We at NIST are grateful for the opportunity to contribute to this important effort, and I'm hopeful that our contributions to strengthening forensic science can be meaningful and impactful.

I have read the draft of the Summary Report from the first two terms of the Commission, and I'll say I'm very impressed with the accomplishments of this group. I commend you for your efforts. The report coordinated by Judge Pam King does a nice job of summarizing the work that you've done for the country, while calling out the work that remains to be done; so thank you.

Andrew has addressed the future of the Commission. I'd like to address the future of OSAC. OSAC was conceived under the original 2013 MOU between NIST and Department of Justice that also established

the Commission. The Department of Justice also provides funding for the OSAC, which is an effort that NIST cannot sustain on its own.

As Andrew mentioned, the OSAC organization does not have term limits like the Commission; it does require funding to continue. From the introduction of OSAC at the first Commission meeting, NIST has stressed that the intent would be to evolve and eventually spin off OSAC. We've termed this envisioned future state OSAC 2.0. We've learned a lot from OSAC 1.0. Over the past two years of operation, the organization has continued to mature as members of the group have come to a better appreciation of the standards development process.

One example of this strengthening was seen in the interest of key researchers and scientists joining the FSSB, such as Commissioners Jim Gates and Jeff Salyards. Thank you for your assistance in supporting and strengthening the OSAC.

NIST is committed to improving OSAC, including the establishment of a clear model that will support these important goals. We're working to create a stable, sustainable operational model that provides independence from NIST. Internally, a small group led by Rich Cavanagh, who I think you all know, who runs our Special Programs Office, has been exploring model concepts for OSAC 2.0. Each of these models is distinct in purpose and operation, yet consistent with the following goals.

The new OSAC has to have a defined structure and authorities. It needs to engage key stakeholders. We need to provide free access to work products. There has to be a smooth transition from the current OSAC 1.0, and we need to create the potential for long-term sustainability.

Currently, Rich's group has been looking at three models they're exploring further. These involve creating federal and state partnerships that develop codes, standards and model laws; restructuring the OSAC so subcommittee functions are dispersed to various standard development organizations; and the roles of the FSSB and SAC levels are changed to focus on quality of science and utility, respectively; and establishing a development, testing and evaluation function in coordination with creating forensic standards.

This is a process we're just starting, and we intend and hope to engage the broader community to better understand the strengths and weaknesses of these possible approaches. So if you have any questions about the OSAC 2.0 planning, please reach out to Rich Cavanagh.

I'd like to talk about NIST research efforts in forensic science. NIST remains committed to bringing its measurements and standards expertise to challenges in forensics; in fact, we've played a role in strengthening forensic science since at least the 1920s. You may have seen a recent National Geographic article about Wilmer Souder, a physicist from NIST who played a significant role in numerous forensic cases during the 1930s, including the famous Lindbergh baby kidnapping case.

The current six forensic research focus areas at NIST include DNA, digital and fingerprint evidence, ballistics, statistics, toxins and trace evidence. We plan to continue work in these core research areas as funding is available to do so. You'll see an example of how our core research expertise provides benefit to the forensic science community later today when Elham Tabassi, who is from our Information Technology Laboratory, talks to you about development of an ISO standard on method validation.

Let me turn now to technical merit review. The past September, the President's Council of Advisors on Science and Technology, or PCAST, recommended an expanded role for NIST in assessing the scientific foundations and maturity of various forensic disciplines. We do recognize the need for, and the value of, such studies and are exploring ways to conduct work in this area. Without additional funding recommended by PCAST, NIST cannot make any large-scale commitments to extensive technical merit review.

That said, we are planning an exploratory study to address concerns raised by PCAST regarding DNA mixtures. This will likely involve assessing the scientific literature; developing a detailed plan for evaluating scientific validity that would include probabilistic genotyping; and designing one or more interlaboratory studies to measure forensic laboratory performance with DNA interpretation. These interlaboratory studies would build upon NIST's DNA mixture studies conducted in 2003, 2005 and 2013. NIST has a history of involving external partners in its research and standards efforts, and we anticipate external and internal and international collaboration in this effort.

Finally, I do want to note our Error Management Conference; registration is now open. NIST and the FBI Laboratory are jointly organizing a second international symposium on international forensic science error management. This meeting will be held at NIST on the Gaithersburg Campus from July 24th to 28th. As you can see from this slide, there will be four tracks: crime scene/death investigation; human factors/legal factors; quality assurance/laboratory management; and criminalistics/digital evidence.

When we held this meeting two years ago, we had over 100 presentations and over 400 attendees. In order for us to develop an equally valuable program, we need your presentations and your participation. Registration is now open, and we look forward to receiving your abstracts and your participation at this meeting.

In closing, I want to personally thank you for your efforts on this Commission and your commitment to strengthening forensic science through your participation in the activities of this group. Your work has made a difference, and we are very grateful for your service to the nation. Thank you.

NELSON SANTOS: Any quick questions before we move on?

Peter?

PETER NEUFELD: First, Mr. Goldsmith.

Mr. Goldsmith, for the last year and-a-half, the Office of Legal Policy of the Justice Department has been working with this Commission to roll out a new quality assurance process at DOJ, which was the creation of the ULTRs, which you referenced, which would be standardized language that would be used in all forensic disciplines to ensure that they didn't exceed the limits of science. Two, they created this thing called the Forensic Science Discipline Review, the FSDR, which would be an ongoing quality assurance matter that would routinely look at all the transcripts to make sure each of the disciplines didn't have the same kinds of problems that occurred in the whole hair matter, namely, that analysts had been testifying and writing reports in a way consistent with the science.

In any event, OLP had rolled it out; expressed to this Commission their commitment to moving forward with it. They had been moving forward with it. They had meetings with statisticians; they, through the Federal Registry, had comment periods; and they were moving forward and forward. They told us at the last meeting that they had institutionalized it, if you will, at DOJ; and it was going forward.

Now what I heard from you is that you're simply going to have this as one of the many matters that will be *considered* through the public comment period and other things about what to do. Are you saying that in the meantime that the OLP will not be allowed to continue along, as they had been for the last year-and-a-half, to roll out the ULTRs and to move with their FSDR review unless and until the new Administration decides that's an appropriate thing to do?

ANDREW GOLDSMITH: Good morning, Peter.

PETER NEUFELD: Good morning.

ANDREW GOLDSMITH: I'm going to turn this over to my colleague from OLP who is here, Ms. Antell, who can address this.

KIRA ANTELL: Thank you for the question.

I recognize everyone in this room is really interested to know what is the status and what will be going on with the Forensic Science Discipline Review and the Uniform Language for Testimony and Reports. These are projects I've been committed to, that people in the Department have been committed to working on, over the past 18 months as you point out.

As Andrew said, in any transition, it's appropriate to reevaluate and consider next steps and what makes sense for the priorities moving forward. These are absolutely things that are being considered, and we hope to continue working on them and to have more information for you in the coming months about the status of them.

PETER NEUFELD: But too are you saying that in the meantime, while it's being discussed and decided, that the Office of Legal Policy is not continuing to advance these ULTRs and FSDR in the interim? They're in freeze, in other words.

KIRA ANTELL: I would say we have been in sort of a period of review at the start of the Administration, and we're hopeful that we'll have something to announce in the coming weeks/months.

PETER NEUFELD: The second question I had for Kent is, Kent, when you talked about things that NIST was doing, you mentioned your current evaluation of DNA mixtures. Your predecessor had stated – in fact, in response to this Commission making a recommendation that NIST take on the task of making an evaluation of foundational validity and reliability of different forensic methods -- that they intended to do a trial. They were going to start a trial in three different areas. The other two areas in addition to the DNA were ballistics and then bite marks.

We had been told at each meeting going up to this meeting that NIST was going ahead with these trials. I noticed that you only mentioned DNA. Is it still, Kent, the position of NIST that they will go ahead with the trials on ballistics and on bite marks?

KENT ROCHFORD: So we still continue to do the work on ballistics and on bite marks. Given the resources we have, we're going to do the trials with the (inaudible) laboratory studies with the DNA mixtures first.

Right now, the PCAST Report provided a number of trials that we should take on; but it is also recommending that we be funded to do this. So given our current funding, what we intend to do is start with the DNA programs. As funding may become available, then we can ramp up some of these other areas to include additional trials. So currently, we are doing the internal work but do not right now have the bandwidth to do the ballistics trials.

NELSON SANTOS: Thank you.

KIRA ANTELL: Jules?

JULES EPSTEIN: Good morning and thank you both.

One quick comment – are the two comments that were read to us today, could we get copies of them – the two speeches that were made today?

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KIRA ANTELL: Oh, I can't speak for NIST. The Department won't be releasing comments; these are really sort of Andrew's comments.

JULES EPSTEIN: Understood.

KIRA ANTELL: But there will be a press release that's going to be released this morning.

JULES EPSTEIN: Fine.

KIRA ANTELL: Also the Federal Register notice, which has gone to the Federal Register today, I think an advance copy of it will be available online later today.

JULES EPSTEIN: Great, and the other substantive question is can I just clarification on OSACs? Is it now the status that there is currently no further funding for OSACs?

KIRA ANTELL: No.

JULES EPSTEIN: Then can we understand just like what's in the pipeline or what is its projected longevity at this moment or sustainability?

KIRA ANTELL: I can't really speak – right now, we don't have a budget. We're in a continuing resolution. We just don't know what the status of it is going to be, so I really can't predict what it will look like – so apologies for that.

Julia, and I think that's going to be our last question.

JULIA LEIGHTON: I feel like we're talking to messengers, and so that makes this a little tricky; so I appreciate your roles – been there, seen it. But I think just on one piece though – the ULTRs and stopping work on this. It's inconsistent with the message I hear the Administration saying; and I think we have to understand the importance of this juncture where we're at where we're really grappling with, frankly, are we telling the truth as a matter of science to judges and jurors. And that can't be put on hold; it is inconsistent with the Department of Justice's mission to put that on hold.

I really appreciate the platitudes about the Commission, and I think they're more than platitudes; I think they're true. I think it's been exemplary work; it's been extraordinary. You've brought in independent scientists who have so much to contribute to this truth telling function. And I think the Department takes a

real step backwards if it doesn't continue that process and maybe put itself at odds of the very mission you've just described.

I understand that there's always a little bit of a pause. I mean, we imposed it on ourselves to some extent. But we shouldn't be, and the Department shouldn't be. The truth telling function is never put on pause; it's got to keep pushing forward. Thank you.

KIRA ANTELL: Thank you, Julia. I really appreciate the positive things you've said about the uniform language and sort of that Peter suggested. I think it is important for people to understand, within the Department and outside the Department, how meaningful those projects are, and I appreciate it. So it's been a pleasure.

ANDREW GOLDSMITH: Right, and I just want to comment. Julia and I have known each other for close to 20 years. I don't want anybody here to come away with the notion that the Department is shirking its responsibility to pursue the truth-seeking function, and particularly when that comes to conveying accurate forensic analyses to judges and juries.

So I didn't want Julia's comment to be out there in the air with no response from the Department.

NELSON SANTOS: Okay, let's move on.

Thank you, Andrew and Kira.

John, do you want to go over the agenda real quick, and then we'll go to Pam.

JOHN BUTLER: For our agenda items for the rest of the morning, we have subcommittee reports. We'll be going over the SPO report; Pam King will review the NCFS Summary report. We'll have the potential to vote then on the document that we have prepared.

The Reporting and Testimony Subcommittee has two documents that we'll be discussing and potentially voting on them.

Then at lunch time, Elham Tabassi from NIST will talk about the development of the ISO Standard on Method Validation being worked on, some of the experiences there.

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Then this afternoon, we have two panel sessions; one on wrongful convictions and forensic science, and the other on forensic science victims, notification and education. So we'll be hearing from those individuals, and we'll talk more about that this afternoon.

The next thing we'll go to then is -- tomorrow, the updates from the Office of Legal Policy is not going to happen. We're going to be going right to the Forensic Laboratory Financial Management and Return on Investment; and then we'll have three panel discussions on legal perspectives, practitioner perspectives, and then training and continuing education. So these are the documents that we have up for potential vote, and we'll go ahead with Pam, if you want to talk about the first one, Reflecting Back: Looking Towards the Future.

Then when we get to establishing a quorum, I'll bring up that for the voting.

PAM KING: Good morning to everyone.

I want to just give people an update from the last meeting as to where this document is and how it got there. As everybody here remembers, at the last meeting there were a number of really great suggestions for changes in formatting for things that could be added, things that were omitted or were not clear in the document. So we took this back, and the discussion was that we were going to hope to have a vote by e-mail or some sort of telephone conference with respect to this particular document.

The SPO, after some lengthy discussion, decided that the document really was something that we needed to continue to work on throughout the time that we had between the two meetings -- reach out to Commission members, make sure everybody had an opportunity to review and comment, and that those comments could be reformulated into what was being presented at this particular meeting. So that's the approach that was taken leading up to this meeting.

There have been significant revisions, so what you are receiving does not have a redlined copy because it would be a lot of red lines and super confusing. What you have in front of you now -- and I will say that, again, I want to just reiterate for everybody in this room; I may have acted as lead scrivener, but this document is the work product of every single person around this table. There have been many who have assisted in making comments, drafting, redrafting, making suggestions, providing input. So what you have in front of you is a collection of input from every single person in this room and some people who are not here.

We are on version 24, in case anybody thought we weren't working hard; 24 happens to be one of my lucky numbers, so kind of hoping this one will be the last one. As far as what we did, one of the things that you'll see different about this document is that it starts with sort of a statement about how the Commission was created and what critical function it serves; that was a recommendation with respect to some of the public comments that we'd heard. We tried to sort of shore up those pieces, give some identification as to what things we could identify had had a direct impact.

It's in some ways hard to measure what it is that this group has done because so many of those within the forensics community are still working on implementation; but I think that it gives at least a summary of some of the things that have happened, or are beginning to happen, as a result of the work of this body. Most of the remaining portions are very similar in nature, if not exactly the same; but we did work on trying to change some language in some of the recommendations going forward and the looking to the future portion of this document.

The other thing that we did is there were some comments with respect to not having good information about the interaction with the public and the public comments that were part of all of the drafting that we did on the documents we have. So some of that language you will see reflected in there. There were over 600 public comments that contributed to the work product that we did, and we wanted to make sure that got in there as well, to acknowledge that this was something that was very much a group effort.

Other than that, I think I'm going to mostly open it up for questions. I don't think there's a whole lot that I need to talk about. All of the Commissioners received this well in advance. You were all asked to review it, provide comments to myself or to either Jonathan or – well, to the group. I did receive those. Those were incorporated as well, and so this is the product that we have at this point in time. I certainly hope that this is something that if we can vote on that the Department will take into consideration when it is that they're going through the questions that Mr. Goldsmith presented as far as their internal changes and working forward into what this particular leadership wants to do.

But I certainly think that – I'm hoping it, for everyone in this room, truly reflects what this Commission has done and what we have collectively identified as things that still are left undone.

One other thing that I do want to mention is just that the document refers to the two documents which we will be discussing next, which are not yet voted on and acknowledges that they have not yet been voted on. We would like to vote on this particular document; this is a business record, so this is not something that is subject to public comment. It is simply a business document for this Commission.

With respect to that particular paragraph, I would ask that in voting on it that we be given permission to edit that one paragraph with that information which John has up on the screen now, to reflect what happens at this particular meeting. I think that would be certainly appropriate to do, and it's only basically one paragraph in the document itself; and then the appendix would also be amended in order to reflect the same. But that would be the only thing that would change from the one that you have before you; so with that, I'll open it up to questions.

[Pause]

Seeing none –

DEAN GIALAMAS: I just want to provide a very quick comment. Pam was very humble in saying that she didn't have too much input into this; but if it wasn't for all of her hard work, we wouldn't have had this document. So I just wanted to thank Pam for all the incredible work she personally put into it to make it

happen, to really kind of solidify what we did. I just wanted the group to recognize that although she's downplaying it, she was a significant role in making sure that it did get completed.

Thank you, Pam.

PAM KING: Tom?

THOMAS ALBRIGHT: Thanks, Pam.

One of the things that's mentioned in this report, and one of the important founding principles of the Commission, is that it would draw upon the expertise of independent research scientists and efforts to reform forensics – and independent here meaning not being under contract with or in any way affiliated with forensic labs or with law enforcement or prosecution at any level or branch of the government.

There are a handful of us on the Commission with these credentials; and I want to note for the record today that some of us – and this is Arturo Casadevall, Jim Gates, Suzanne Bell, Bonner Denton, Sunita Sah, and myself – have together communicated to the DOJ and to NIST in the form a letter our sincere appreciation for the opportunity to participate in this exercise. In doing so, in this letter we've also stressed the importance of inclusion of independent basic scientists in any efforts to strengthen forensic science going forward; this is absolutely critical.

I had asked Jonathan if we could circulate this letter to the Commission today, but I understand that process is too simple for the Federal Government. So in fact, the letter will be posted as a comment in the Public Comment space for this Commission. I'm happy to read the letter, if anybody wants to know its contents right now.

JONATHAN McGRATH: No, thank you for sharing in the e-mail that I received from you Friday afternoon with the letter. I think if it's appropriate to post it in the Public Comment period. I think Lindsay has got a copy that she can share, and it will be publicly available as soon as she posts it. So it will be accessible on electronic devices, but thank you for sharing.

THOMAS ALBRIGHT: I've been squelched. All right, so I'll read the first paragraph; and this is addressed to Attorney General Sessions and Acting Director Rochford:

"As Commissioners who were appointed because of our contributions to the basic sciences – biology, psychological, chemistry and physics – we would like to thank the Department of Justice and the National Institute of Standards and Technology for establishing the National Commission on Forensic Science. This landmark advisory body represents the first time the Federal Government has convened the full complement of forensic science stakeholders to work together with independent academic scientists to, and I quote, 'enhance the practice and improve the reliability of forensic science.' We're gratified that in

the development of the Commission, the DOJ and NIST acknowledged the role scientists from a variety of disciplines play in strengthening forensic science. We believe this Commission has made a positive and indelible impact on the Criminal Justice System, and we encourage you to renew the charter for the National Commission on Forensic Science. Historically, the community associated with forensic science was limited to criminal justice participants, sometimes at the expense of foundational science. Many forensic science disciplines have not fully benefitted from the resources and lessons gained by researchers in contributing fields."

So that's the first paragraph of the letter. The letter goes on for two pages; and, again, it will be posted. I regret that it can't be circulated by the most obvious means.

PAM KING: With respect to that, now I have a question; and I don't mean to derail my own vote and my own document or the document that we're talking about. But it seems to me that there were some letters that had been provided to the then Deputy Attorney General by Commissioners commenting, a number of meetings back, about some concerns that they had, and that those were provided to all of the Commissioners upon the permission of the writer. It seems to me that this falls into the same sort of scenario. So I don't know why it is that they couldn't be at least provided to those of us that are Commissioners by e-mail, even prior to tomorrow.

But I appreciate, Jonathan, your concerns and that this just came up for you on Friday. But seems to me there's some precedent for the fact that communications, especially when it's communication by more than three Commissioners, should be available to the Commissioners.

JONATHAN McGRATH: Yeah, and I replied to Tom earlier today, I believe. So just having read the letter too, because it didn't necessarily speak directly to a Commission business document or a work product, the reason why we advocated using the Public Comment period to make it transparent to the public and discussed at the open meeting too.

So I appreciate, Tom, that you're bringing it up while we're discussing the Summary Report especially.

THOMAS ALBRIGHT: Can I respond to that quickly?

I don't want to go on arguing about this, but I think it is directly relevant to this report. We do make a position in this document; but the document itself, the appreciation of bringing these people to the table, is fundamentally important to the report. In that sense, I think there's no reason why it shouldn't be circulated to the Commission.

JONATHAN McGRATH: I'm going to look behind me to see if Lindsay has posted it yet; but I think we're on our way to doing that.

One thing that I wanted to touch upon too is if this letter does need to be discussed and it affects the language in the Summary Report, we do have a couple of wrap-up periods. As Pam mentioned too, we can make amendments; we can add language to the Summary Report today or tomorrow as well.

PAM KING: Are there other questions or things that people have to say -- Bonner?

BONNER DENTON: I strongly recommend that this letter be amended to the wrap-up report and be officially a document of the Commission.

PAM KING: Julia?

JULIA LEIGHTON: I know it's a scheduling nightmare, but I think from what I've heard of the letter so far - and I haven't seen it and I would like to see it -- I would like to be able to respond to Bonner's suggestion that it be amended to the document.

I should start somewhere in there saying thank you, Pam. This has been group write; and that's a nightmare, and it often ends up a literary nightmare as well. The substance is really good, but I would like to see this; and I'd like to consider whether or not we would want to add it to the report. So I'm wondering if we can't flip the agenda in some way so that we can give it the time and the space that it deserves?

NELSON SANTOS: If you recall, in the last meeting there was a concern about including the language of whether the Commission should move forward or not. I think there was a vote, and it didn't pass. In other words, no language regarding the Commission's future was going to be mentioned. So by putting this addendum, what you're doing is going against that vote, saying that these six Commissioners are independent. So I think that's one of the reasons why DOJ said what it said.

JULIA LEIGHTON: All right, if we then can vote on this and then set aside a review of that. I mean, I think that the suggestion is there was a vote *not* to recommend its commission. I think there was vote not to take a position.

NELSON SANTOS: Correct.

JULIA LEIGHTON: This is new information, and I guess I'd like to see what it says.

NELSON SANTOS: All right, I would suggest that we vote on the Summary Report independent. We can have discussion about -- I think it's going to complicate the matters if we now go back and include an addendum that takes a position of six Commissioners, not the majority -- or whatever. So I would suggest

that we vote on the Summary Report, and we can have discussions about the group's letter. I have no problem with that, but I think it will muddy the waters if we attach it to the report.

PAM KING: I agree with Nelson.

Bonner, I appreciate your suggestion; but I do think that this particular document – its original purpose and creation was really looking at summarizing what the Commission has done and what is left undone, without commenting or making specific recommendations as to what that organization looks like going forward. I think it stands alone with respect to its value.

It may very well be that the letter that we're now all aware of provides a perspective that many, or some of us, may want to sign on to; and I think it's appropriate for this body to have a discussion about that. But I would ask that if someone wants to make some sort of a motion, unless there are other questions, that we do that.

NELSON SANTOS: Arturo?

ARTURO CASADEVALL: All right, so I signed the letter; so I obviously have a vested interest in this. But I want to point out that one central issue in the letter is as this Commission sunsets and we go forward, is forensic science going to go back to being just a branch of the judiciary; or is it going to be basically moving to mainstream science? I think that comment that this is the first time in which you had people from the established scientific disciplines functioning and interacting with law enforcement, forensic scientists, and all that, in one body – this is a fundamental issue that we're talking about here. Where is the future going to go?

I think tremendous progress has been made in this discussion, and I would hope that issue makes it into the final report in some way.

NELSON SANTOS: Dean?

DEAN GIALAMAS: I just want to echo what Pam had said about the concept of the report was generated as a summary of activities and a kind of direction or path of topics that could be dealt with some other body at another time. We were very specific in the document to make sure that we didn't address the "who" and the "how" of how that would be dealt with. Although I completely agree with the concept of having science involved in the process and the discussion, I don't know that it's part of that report.

But to further Pam's point, I'll make the motion to move the document forward as it is, with the potential amendments that would come with respect to the two documents that we're going to discuss later.

PAM KING: Suzanne?

SUZANNE BELL: Yeah, I also signed the letter; and correct me if I'm wrong, but we never intended it to be part of the report. It was kind of a separate – so, yeah, I don't think that was ever an issue. The report was great. I second the motion. We should vote on it independently, and then we should share the letter. But it was never the intention for it to be merged with the report. I think the report said, in that sense, what we had hoped would be said.

THOMAS ALBRIGHT: Yeah, I agree with that. My intention was simply to have it shared with the Commission, which I wasn't able to do; but hopefully, that will get resolved.

NELSON SANTOS: All right, John, we have a motion and a second.

JOHN BUTLER: Okay, so I just want to review the quorum that we have here. Because Stephen Feinberg has not been replaced as statistician, we have 31 voting members potentially, 8 ex-officios. This is a business vote, so everybody will be able to vote on this. In terms of proxies that are here, Greg Motta is a proxy for David Honey; Frank DePaolo is a proxy for John Fudenberg; John Hollway is a proxy for Bridget McCormack; and Mike Ambrosino is a proxy for Deirdre Daly.

Right now, Jeff Salyards – I have his clicker. If he responds by e-mail, we can get something from him. Jim Gates I thought was going to be here but is not. So then we'll have – what's that?

(inaudible)

JOHN BUTLER: You have his clicker; you can take...

All right, so with 29 or 30 potential votes, we still need 20 to be able to reach at least two-thirds on regular votes. On the business votes, we would have to have at least 16 to be able to do that to pass the document. So this will bring up then the acceptance of the Summary Report. Should we add the comments about updating? I can just do that real quickly. People are already voting, so we'll add that – making the updates on the last two documents.

[Pause for voting]

Okay, it looks like we're up to 36. I do not have anything from Jeff Salyards yet; but if we do, we can add that later. So we'll see what we get here.

Okay, so we have 92% "Yes," 8%, "No," so it passes. So the Summary document is therefore approved by the Commission. In terms of additional comments, depending on what happens with the next two documents, we'll make an editorial change on those.

Pam, was there anything else you want to cover?

PAM KING: No.

JOHN BUTLER: Okay, thank you very much.

NELSON SANTOS: Thank you, Pam, great job.

[Applause]

JOHN BUTLER: Okay, Reporting and Testimony.

JULIA LEIGHTON: In case anybody didn't hear, Matt turned it over to me because I turned off his mic.

The Views Document on Case Record and Report Contents – as you'll recall, this was promised as part of our work of the recommendation on case record and case report contents. We did a very high-level Views Document, then a high-level recommendation to the Attorney General. In each instance, we got public comments saying, "What do you mean by those four or five things – what do you mean, what do you mean?"

And we kept saying, "It's coming; it's coming."

The group began working on this; the working group began in 2013. It was first introduced June 2016, along with that high-level recommendation. The high-level recommendation was approved September 2016. The more detailed Views Document was adjudicated, the public documents were adjudicated, and it was re-brought to the Commission January 2017. It was then revised again, based on the Commission discussion; and follow-up discussions, some by e-mail with Ted and with e-mail from Suzanne and Jeff – and thank you very much all three of you, and in particular Suzanne who really grappled with some drafting issues for us.

That was then taken back with our small group. We reworked it and put it to our Subcommittee and then put it out to another period of public comment. For those of you, our small group was Linda, Phil, Mike Cariola and Pam and myself.

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It went out for public comment in February. We received eight public comments; three were from organizations: The Innocence Project, ASCLAD Lab Board, and the Legal Aid Society of New York. We also received five individual comments; three were named, two were anonymous. We adjudicated each of these public comments – again, starting with our small group, who did it on a very tight turnaround. Real thanks to Phil, Linda, Pam and Mike for working through the weekend and through the night trying to make that a polished document. And that's what brings us here today.

What you have is the document that went out for public comment and the tracked changes we made in response to the comments we received. Before we move to that, I want to just talk a little bit about the early process.

In the early process of this document, we eliminated a lot of duplication that was pointed out to us. We spent a lot of time grappling with some issues that were raised very thoughtfully by Cecilia and others to make it clearer and tighter what we were looking for.

The next thing we did in this most recent iteration, we moved a number of items from the case report to the case record. For example, we talked about that you had to note whether other items were received or whether there were disagreements; but we did not ask for a list, and we did not ask for details. That was all moved to the case record. I think you know there were people that felt very strongly it should be in the case report, but there were also people that articulated real reasons why this would be a burden to forensic science providers.

We also eliminated some requirements, including for example, justifications for deviations from the sampling plan. Instead, all you have to do in the case record is document the deviations; but you no longer have to justify them. In every place, I think, where it said "in detail" or "provide detail" or the word "detail" was used, the word "detail" was eliminated.

Then the big thing we took on – and special thanks to Jeff and Suzanne for this – was addressing uncertainty, limitations and the like. I'm going to ask that we just go to that part of the Views Document and just remind everybody where we ended up with what was sent out for public comment -- if you scroll down to where we define "figures of merit," in the Views Document itself, in the text.

"The National Commission recognizes that definitions relating to method performance (e.g., accuracy, sensitivity, error rate, measurement uncertainty) vary among disciplines and FSSPs. Instead of imposing definitions, this document simply requires that the FSSPs define the terms used in this report. For the purposes of stating that information on method performance must be in the report, we use the term 'figures of merit' to cover the range of approaches used in method development and validation for describing a method or test's performance. The importance of including 'figures of merit' in a report is to fully inform the reader of the value and limitations of the results. As with any item listed in Appendix A, if the information is already available (for example, in an SOP posted online or separate reports), the information need not be repeated."

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I read this again because one of the changes we made to the document was to tie it back to this Views where we explain what this is. One of the tensions we saw throughout the comments we received is, "Tell us exactly what we're supposed to do; but when you tell us exactly what we're supposed to do, it actually doesn't fit when we are applying it to this discipline or that discipline."

So what we came up with here was a real statement of what we were talking about that leaves room for every FSSP in every discipline to define it as they see fit. To the extent that disciplines and FSSPs want standardized guidance on this, that body is the OSAC, I hope, and the place to go. So this was our effort to deal with that tension.

With that, what I'd like to do is walk you through the changes that we made. These are the changes that we made in response to the public comments we received this last go around. They start with the Views Document. You'll see above this, there's the paragraph above this is just correcting the title of the Subcommittee.

The last paragraph was modified, largely because we failed to do it, to reflect one of the significant changes, which is that we took out any gesture at a structure for the report. That we are leaving to the FSSPs, hopefully in partnership with stakeholders and customers, to structure reports that are best suited to their needs.

Moving to the Appendix A, the first change was a recommendation by ASCLAD Lab that we accepted – I'm pretty sure – which basically said let's assume that the author is the person giving the opinions, and only when somebody else is involved do you have to do the name. It's just trying to, again, limit the work that was required.

If you keep going down, the next change is that we removed – actually, if you just go up just one briefly – one of the comments we received was not to include the technical reviewer on the report but only the verifier. There was a lot of support for including the technical review; but ultimately, we decided on balance to move the technical reviewer to the case record because that person often comes so late in the game that there's a bit of a problem of getting the name back in the report. We certainly encourage the community to use technology to hopefully get over that hurdle and make that easy; but for now, we moved it over.

The next change – keep going down – this was, again, a recommendation from ASCLAD Lab Board; and that was to move requests submitted to the FSSP into the case record and simply have this state the analysis performed. So the case record should include – and there are other points in here where we talk about this -- all the communications with parties, with investigators, and certainly all of the requests that are received; but those requests no longer need to be part of the report.

If you keep moving down, this change was as a result of the conversations we had at the last meeting, trying to clarify when a subsequent report needs to be generated; when data submitted through CODIS and then there are resubmissions, resubmissions; and to make clear that we're only looking for a second report in the case of a subsequent positive association. I'm going to ask that you put a little pin in this because David Kaye, after the comment period, suggested some tweaks to this that I think make it even

clearer; and I'm going to put that up after we address this to see if we can turn those into friendly amendments.

The next change you'll see comes with where we talk about inserting the relevant figures of merit; and we added some language there describing method, performance and limitations to try and draw people back to the Views Document. We got a comment saying, "What do you mean by this?" And it's like, here's what we mean by this; and it's drawing them back up to that part of the document.

If you keep going on down, this was a change that was designed to address the comments that the original statement that we had actually talked about and sort of left after our last meeting: "The conclusions, opinions and interpretations that are based on training and experience of an analyst or expert should be so identified." I think that we received a very fair comment that, depending on how you read it, it could seem sweeping – that everybody thinks that something that they do in some process is based somewhat on their training and experience. It's what gives us all meaning, right? So we tried to be more precise about that item, that it is those things for which there are not empirical measures of performance and in which key procedures involve significant human judgment.

With that, those are all the changes that were made to the documents. To be fair, you all have before you the adjudications; I know you read them carefully, so I'll try and be brief about it. There were some things we did not do. We did not add a single item to the report or to the case record, despite receiving comment that we should not be taking out information but we should be putting information back in that stakeholders felt they needed.

We also did not eliminate everything except what's required under accreditation. We set a standard and a bar that was higher than that.

The other thing we did not do is there was a request that we not refer to making things electronically available or available on the Internet, and we've just really pushed back on that. The idea that a glossary can't be made available electronically or on the Internet and that you would actually have to request a copy of it seemed to us just not using technology. That to make people go to the case record to get the glossary just defeated the purpose of being able to understand and read the report, and then make an intelligent decision about whether or not to use the additional resources to see the case record.

Likewise with SOPs – you can copy them for every single person, or you can scan them once and make them available electronically. Surely we need to get away from the practice of saying the only way you can see the SOP is to come to the lab and pay your expert to come in and sit and read it.

So we pushed back on those two. The other pushback was a request that we eliminate the data underlying the results or conclusions or a description of the data underlying the results or conclusions. It was our view that if we did that, we would simply turn the report into a certification -- that we give the option to either show the data, which you can do in some very simple cases, is the example drug report that was attached as an addendum, or you can describe the data; but you can't just certify the results.

Again, to this we did add our thoughts on if the forensic science community feels that standardization is appropriate on how to present data and observations for each discipline, we agree. To the extent that that standardization is being pushed for, I think, again, the OSAC is probably a more appropriate body than this body.

The last issue was, again, the figures of merit and where we were asked for examples because they couldn't figure out what it was. We again referred back to our description in the Views Document so that people could understand the concepts and the freedom to develop those definitions on their own.

Are there questions -- Cecilia?

CECILIA CROUSE: Julia, this is significantly better – and I shouldn't say "better," but it made some significant changes. There are still three of them that I have; for some reason, my neurons aren't connecting when I read it.

One of them has to do with this relevant figures of merit because that is new, and the definition is "to cover the range of approaches used in method development and validation for describing a method or test performance." This definition doesn't help me when it comes to putting *in* a report a brief description or table of the methods or processes relevant figures of merit. I just have a roadblock with that in my head. I'm not sure what's being envisioned in a report. I can understand this being available in a laboratory, but it seems so onerous to me.

JULIA LEIGHTON: I'm going to ask Suzanne and/or Linda to help me with this because we struggled with it, but I really deferred to the lab people and the experts. This is not lawyer language; I promise.

SUZANNE BELL: When I wrote it, I was thinking about the intimate link between method validation and figures of merit; and they're different for different things. So for example if you validate a quantitative toxicology analysis, you'll have limited detection, limited quantitation, freeze/thaw cycle; but somehow, you have a table that tells you what the method can do and what it's capable of doing. For some, that will be fairly involved; for others, it would be less involved.

When I was editing this, I didn't want to get into, well, you have to talk about accuracy and precision; those are different. Accuracy is bias and trueness; and depending on what particular discipline you're in, you may have different definitions. For example, SWGDRUG will define those terms for the world of seized drugs. I assume SWG TALKS has definitions for what they consider to be those sorts of things; whereas, like a color test for drugs that's gotten so many people in trouble would have a list of here are the common interferences and here's the limit of detection and here's what to be aware of.

So I envisioned it as a table that would be appropriate to the method. When we talk, for example, the limits to the methods for latent fingerprints are quite a different thing than a chemical assay. It would be quality of the image and other things that from the chemical world I don't know. So the thought there was to try to make it, in my mind – and the lab directors can correct me if I'm wrong – if you have a validated

method, you have, in fact, a table of figures of merit that define what can it do, what can't it do. That's one of the things that we went back and forth quite a bit; you can't spell that out. You can't say "accuracy and precision" or "error rate" because that has different meanings for different disciplines.

So that was the thought process behind that, was to go back to your method validation and whatever you do for QA/QC, and you have a list of what you would consider figures of merit for the assay or for the test.

CECILIA CROUSE: But what does range of approaches used – I mean, how do you put that in a report?

SUZANNE BELL: That's a good question – I mean, that one—

JULIA LEIGHTON: I think that was a reference to an acknowledgement that there's a range of approaches that are used by FSSPs. That's not something you're reporting on; that's our acknowledgement that FSSPs and disciplines have a range of ways of doing this. So we're not specifying.

CECILIA CROUSE: We report on the results of our analysis, number one. Second of all, to me it's obvious that somewhere in the laboratory there are foundational validation studies; there is literature; there is your merit. But this is in a *report* you want us to put this, and I'm kind of confused. I appreciate your explaining it; I just, depending on the discipline, still have some issues with that.

The other thing that I had mentioned earlier, in a report, information – this is on your page 6 at the bottom – "information of specific test conditions, such as environmental conditions that may affect results or an interpretation of the results." So if we have a power surge, do we have to report that? Is that an environmental condition?

JULIA LEIGHTON: No, it doesn't affect your results. I think Linda had some good examples of things that *could* affect results – I mean, if you're doing things in 120 degrees.

LINDA JACKSON: Right, so when we were talking about this and thinking about environmental conditions that would affect results, we were discussing things such as your air handling system was down and the humidity was 100% in your lab that day; and that somehow would affect whatever exam you were doing. It might not affect anything, depending on what was happening; but that was really taken from the ISO 17025 requirement that talks about the fact that if there are environmental conditions that are relevant to the interpretation of the results that they should be reported, I believe.

CECILIA CROUSE: Okay, thank you.

JULIA LEIGHTON: The other thing that we recognize, and I'm a little tongue in cheek about scanning as opposed to copying, but I'm not about this. This is a high-level statement which is, I think, appropriate to this body. It will take time for FSSPs to implement. I think those materials are in your lab; and in some instances, you won't have to put it in a report because you'll just reference it. That was the other point here; if it's in something that's accessible, all you need to do is reference it. I suspect that's probably going to be the practice that most places do; it's going to be a process of pulling that together and creating those documents for each discipline.

CECILIA CROUSE: And I'm sorry, I did have one more question.

JULIA LEIGHTON: So I don't think anybody is saying this is happening overnight.

CECILIA CROUSE: And I was just wondering if you could clarify one more thing; let me get the page for you. It would be on, I believe, page 2 of the Appendix about the disagreement between examiners; I just want to make sure I understand this.

In the report, if a technical reviewer comes and says, "You shouldn't have called this stutter; this is not stutter," and the other person says, "Well, this is why I called it stutter," and they say, "There is no indication of more than 2 people in 21 loci; it's only 0.5% above the stutter cutoff; it should not be called stutter." And then another person says, "You know, I agree with you."

Does that have to go in a report – because it says, "...even if the disagreement is resolved."

JULIA LEIGHTON: It's just the fact of the disagreement. Your records will show that exchange. It's just the fact of the disagreement; and that is because it's up to the stakeholders, the readers, to decide if it's important in this particular case or not. But the fact that it's there is something that is – again, we took out of the report any need to categorize it, any need to do anything. It's just the fact that it happened. If it matters in your case, or you think it might matter in your case, you get no more information than that as a reader; but you at least get the red flag to make the decision of whether you should follow up and take a look at the case record.

CECILIA CROUSE: So we just had a hearing last week on this very thing -- that exact example; and all of that information about the disagreement was in the case file. It was *not* in the report. The defense attorney read it; the defense attorney had an expert look at it. They said there was a disagreement here; they resolved it. So I'm not sure in the report – I still think we're being transparent, I guess.

JULIA LEIGHTON: Only if I can read the case file in every case, and you don't want me coming to your lab in every single case; and I don't want to go to your lab in every single case because the system will collapse. What I need to know is was it there; then I make an informed decision of whether I seek to look more. I may well seek to look more and find nothing, or I may have other reasons for saying that the fact that there might be a disagreement in there is not relevant to the way I'm approaching this case. But if you don't tell me, then there's no red flag – whatever the disagreement may be – for me to go and check.

So it's the information needed so that the people reading the report can make informed decisions about whether to take subsequent steps or not; that's the tension that we struggled with answer to not have the information, not to have the red flag, not to say to the reader, "Other items were seized that weren't tested." We're not asking you to tell us what, but it's the information I need to begin to make an intelligent decision about whether or not I should investigate further for other testing.

CECILIA CROUSE: Thank you.

DEAN GIALAMAS: Thank you, Julian.

First of all, I just want to say that I support the general concepts of this document. I think the Subcommittee knows our laboratory has not only supported these, but we've instituted policies; we've shared that with your Committee. We actually have templates that we use within the laboratory.

But I do want to bring out something; a change was made in the Appendix, and it's on page 8 of the Appendix. It has to do with the conclusions, opinions and interpretations. You had mentioned that you made a friendly amendment to a recommendation from ASCLAD about the issue of the experience of an analyst or examiner.

My concern is that, one, the request was to have it removed, not edited; but I think the edit actually adds a component now to laboratories that puts us in a double jeopardy situation, and that's what I'd like to try to sort out and clarify. It's specifically the language that says, "...methods for which there are currently no empirical measures of performance." I'm going to be very blunt; and what it sounds like you're saying is that labs now have to put themselves in a double jeopardy situation by self-identifying methods that they don't have empirical data for, and essentially now claiming in the report there's no science behind what we're doing. That, I think, is going to open up to a huge debate.

Now, that's how I read it when I read it for the second time. If that is not the intent, I'd like to propose a slight change and modification because the second phrase of that I have no problem with, where "procedures involve significant human judgment." Our laboratory has a statement similar to this, and we use the term "subjective kinds of things." So if we don't have objective data that we can look at, and it's based solely on an examiner's opinion and review, then we need to identify that in the report; and that's a tough language to put out.

So I have a real heartburn over that particular statement. I'm not sure if that was the intended design of making that change. Seeing you shake your head, "No," I'd like to offer something maybe that might clarify. I'd like to see if we can remove that phrase and just simply say, "Conclusions, opinions and interpretations for methods that primarily involve human judgment should be so identified." In other words, those types of analyses – and I'll use an example like blood stain pattern interpretation – the characterization of a blood stain, for the purposes of angle or incidence of impact, is very well-documented; but what those stains mean in relation to an activity is primarily based on judgment. Really,

there may not be that same level of degree of reproducible data that you'll get from a GCMS doing a controlled substances test. I think that's where this applies.

But making the statement where there are no empirical measures of performance, I think, puts the labs in a really, really bad position.

JULIA LEIGHTON: I guess I'm going to look around at my Subcommittee. I think that's fine. I think that change is fine.

JULES EPSTEIN: I think John's typing it.

DEAN GIALAMAS: Yeah, and I can repeat what I said. I don't mean to be the perfect wordsmith, but if you just delete the clause after the word "method" – so delete "for which there are currently no empirical measures of performance" and "in which key procedures." Then replace that with the words "that primarily."

JULIA LEIGHTON: Or "that involves significant human judgment."

DEAN GIALAMAS: That's fine too. I was removing the word "significant" because I don't know what significant human judgment, but it's all a matter of art; so I'm not going to go into too much wordsmithing.

JULIA LEIGHTON: Happy to have it be "that primarily involve." Does anybody have any heartburn to us accepting that as a friendly amendment?

Okay, thank you, Dean.

I believe Ted?

TED HUNT: I share the concern that Cecilia voiced, and thank you for the amendment. I also noted that phrase as well.

I want to bring up a separate issue, which has to do with the Appendix, page 4, that describes "the view of the underlying data or description of underlying data and observations that form the basis of any conclusions, opinions or interpretations reported." This, to me, is also problematic; and I am curious as to what this might look like in a report, especially when we get into feature comparison methods like latent prints or ballistics. What level of minutiae are we going to expect examiners to put in their reports and to testify to? I note that this is also in the bullet No. 1 of the Statistics Views Document; and I've questioned

how that can be included in the practicality of that being included in reports and just what that might look like in testimony.

So that's the first question I had is what level of specificity are we looking for when we talk about bases of conclusions and observations – because that could be quite a lot of stuff, quite frankly, depending on the discipline. That's number one.

Number two, the question of relative figures of merit – and I understand what you're getting at there in terms of sensitivity, specificity, false positive rate, et cetera. The question though is from whose perspective? I think the PCAST Report sort of illustrated some of the tension there between PCAST – what I think is a new test applicable to forensic science and footnoted to sources that don't support that test as being one that other scientific disciplines follow exclusively, versus the other literature out there where there are tests of false positive rates, et cetera, that PCAST said, "Well, those aren't appropriately designed studies, so we're going to say that those don't meet our test of criteria."

So the second point is whose perspective or whose point of view are you talking about when you say relevant figures of merit? Because you could have very different viewpoints about what is a study that supports a particular method's validity and reliability.

Then the third thing that I'll bring up – and this came up last time – is the point in Appendix A, page 3: "The report should list which databases were used and provide results of the search." I just want to clarify what that means. Does that mean all candidate matches that are produced, or are we just talking about a positive association?

So those are my three questions about different components of the Appendix. I might add I appreciate the fact there was a mock report that was included here because I went back and I looked at that report; and I compared it to the elements in Appendix A. I noted nine different areas that were set forth in the Appendix that that report did not include. So I think it's a little bit informative that the report itself really doesn't address all of the elements in the Appendix, and I think that's instructive of the fact that these reports that would comply with this Appendix are going to be much longer than the mock report and, I think, fairly significant depending on the relative degree of specificity that is expected, especially in terms of the bases of the opinions and the data that supports those opinions.

So those are my questions.

JULIA LEIGHTON: So quickly, with respect to the report, I think I respectfully disagree; I also think it's cited to things that were online and available online that will get you to it.

TED HUNT: Okay.

JULIA LEIGHTON: But more importantly, with respect to the data and the figures of merit, we have given this back to the FSSPs. It is from the perspective of the FSSPs. The only constraint is that you have to define it; you have to say it; you have to show it. Then, yes, maybe there will be a debate over whether your figures of merit are appropriate; but what we're saying is put down what you are using. Put down what you've developed. So it is—

TED HUNT: Let me follow up with that. Is this an internal test? For example, based on your internal validation; or is this something that is a community wide study? Or is that up to the—

JULIA LEIGHTON: That's up to the FSSP; and I think what we've heard in the comments is that I think there's going to be increasing growth for a call for standardization for really grappling with this as a larger community. But we aren't prescribing that; I don't think that's appropriate to this body and not what this document is about.

TED HUNT: Okay, so level of specificity when it comes to descriptions of underlying data and observations, I think that's something that we all ought to be very concerned about. I know I am because that could be enormous, or it could be very little. The problem is if it's just a summary statement, then that could be misleading because you've got all of this other data that's in the case record – where I think it should be. By the way, let me add incidentally, I am totally for full discovery. I don't have a qualm with any of the information here; it's the proper placement of it in the report or the case record. I come from a jurisdiction where we turn over everything, and I think that's very important.

So I'm not concerned about the content; it's the placement. I just see these reports as being onerously long. I think that *especially* that requirement, to have that data and those observations included could be either misleading because analysts and examiners are necessarily going to have to be fairly brief; they can't write long memos with all of the information that went into the basis in the report. If that's included in some way in the case record, I think that's more doable; but that's the one that really stuck out to me as being very problematic, quite frankly.

JULIA LEIGHTON: And as our response indicated in the materials, if you don't talk about the data, then it's a certification; and we think more is deserved here. We also think that labs are well-suited to defining this. I don't think this is every individual analyst trying to come up with the language in every single case; I think this is, again, the kind of – it's going to take time, but it's the kind of thoughtful articulation of what people do and what their results are that I think we've been calling for and I think the forensic science community is capable of grappling with.

TED HUNT: But the basis for a test result is not boilerplate; that's case-specific. So that's original work that you can't just plug in and send it over to a website or to put it in some pop-up that is boilerplate. This is specific; especially when you get into latent prints – this is my request for an example. Latent prints and tool marks, when you're talking about striae and minutiae of various kinds and forms, what I'm seeing here is you need to put that in your report at some level. That's going to be very, very difficult to put into a report. That should be documented at some level and put into a case record; but I just – I would love to see an example. I know the mock report has a quantitative example, but there's no qualitative example of exactly what that might look like in future comparison methods, like ballistics and latent prints.

JULIA LEIGHTON: Well, I can imagine an example where it says that the underlying data and observations are contained in the photographs that are in the file, in which nine points of comparison were reviewed -- I mean, right?

TED HUNT: But that wouldn't be the basis for the opinion because it's so much more than that.

JULIA LEIGHTON: I think we've grappled with this; and again, I think this goes back to that tension of people want specifics and yet each discipline is going to be different and, to some extent, each lab's standards for how they record data and record observations is going to be different. But if there's nothing about the data or the underlying observations, it becomes a certification; and that doesn't meet the standards that we think are appropriate or that we wanted to put forth as appropriate to what should be in a report for all of the stakeholders involved.

TED HUNT: Okay, and then lastly the database issue. We covered this last time, but I think it still asks for the results of the search. And my question is are we talking about candidate matches or not?

JULIA LEIGHTON: Whatever results you want to define -- again, the FSSP defines the results. If they define the results as the 10 closest matches and they put that, it's just define the results of your search. And, again, David Kaye had a little tweaking of this that has to do with putting in data and not samples so that it's clearer.

MATT REDLE: At this time, I'd move the adoption of this document. Is there a second?

UNIDENTIFIED FEMALE: Second.

MATTHEW REDLE: It being moved and seconded, first, are there any proposed amendments to the document?

JULIA LEIGHTON: Well, I think we've already put one in; and I asked if there were any objections, and I didn't see any.

MATTHEW REDLE: Any proposed amendments?

Okay, hearing none, all those in favor of the document signify -- we have to vote, excuse me, John. We'll turn it over to John.

JOHN BUTLER: Okay, it's now open for vote.

[Pause for voting]

This should just be the members, not the ex-officios. Only 29 have voted, so that's the correct number. Okay, so we had 59%, "Yes,"/41%, "No." Therefore, it doesn't reach the two-thirds; so it does not pass.

MATTHEW REDLE: Okay, we'll move to the document on Statistical Statements. With respect to this document, this document actually went through two 30-day public comment periods; and we had a narrow window of time after the second public comment period between the close of public comments and the date for circulating the final draft to the Subcommittee and then subsequently to the Commission.

There were a number of technical and minor edits from the working group that did not arrive in time to be considered and incorporated before it got sent to the body of the Subcommittee. We attempted to preserve some of them and to have them get to the Commissioners in advance of the meeting while maintaining public transparency. We basically did that because the meeting materials were subject to their own public comment period, and David Kaye then submitted those on behalf -- those aren't just David's proposed changes; they were actually proposed changes that were developed or being discussed by members of the Subcommittee or our working group.

There were two ways that we saw that we could do this. We could handle it through the public comment period; the other way that we felt we could handle this was in the course of the Commission meeting itself as friendly amendments that were suggested for this. So we're going to go about this a little bit differently than, for instance, the last document. The end result was that we have a Word document with tracked changes posted to www.regulations.gov followed by a separate explanation of an additional four wording changes to be made to actually convey the meaning that we had intended originally.

As for the content of the edits in the Word document and the two additional changes, most of the edits are really matters are form. They are deletions of extra words; and a few others are simply to ensure that somewhat technical terms, such as "statistical model" and "empirical foundations" and "statistical inferences" are used correctly. Because of the short window, we were exchanging e-mails back and forth among the members of the working group; and that was part of the reason that some of those things didn't make it in because they just missed getting in before the document was sent.

We also made a change in direction toward the end of the document that resulted in the document being shortened quite a bit. For instance, the section with respect to examples of statistical statements was eliminated.

I want to thank the members of our working group on this, who really did terrific work under the gun: Paula Wulff, Charlotte Word, Karen (inaudible), Alicia Carriquiry, Peter Neufeld, David Kaye, and acknowledge the work of the late Stephen Feinberg as a member of the group as well.

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You also received an Adjudication Statement with respect to this document as part of the binder, and I want to point out a couple of things about that adjudication document. First of all, that was the first draft of the adjudication document; and that first draft occurred before we made the more major changes to this document. Then David Kaye and I and others attempted to incorporate the changes that we had discussed in our working group.

As you can see, the Adjudication Document doesn't actually reflect what we did in that subsequent document. So at the end – and I'll take full responsibility for that – at the end what I would ask that we be allowed to do is that we be allowed to then, if the document passes, we would then take the document and provide an adjudication document that actually does cover what we did to adjudicate the document. You'll see there are several places where the adjudication document talks about how we respectfully disagree, and then we went ahead and did precisely what people had recommended be done.

The other thing, as we begin to go through the document, that I would suggest we do is I want to pull everybody's attention at the start to the six views statements that are made at the end of the document. I do that because our work product development document says that the portion of the document directly labeled "Views of the Commission" – because that's what this is, it's not a Recommendations Document, it's a statement of the Views of the Commission – represent the formal views of the Commission. Information beyond that section is provided for context. So let's talk about the meat of this, and then we can go back and take a look at the Overview section.

John is already ahead of me as usual.

When we look at the statements of views, prior to the meeting beginning today, Phil Pulaski raised an issue; and I think we have. His had to do with a potential conflict between this document and the document that we just reviewed.

Phil, if you still want to make those changes to the document, we can bring those up and talk about those; or if they're good to remain as they are, that's fine too.

The first one is that, "Forensic science practitioners should describe the features of the questioned and known samples -- that is, the data – and similarities and differences in those features, as well as the process used to determine them."

Are there any comments or concerns with respect to that, Phil?

PHIL PULASKI: Just to fill everybody in, I'd sent Matt an e-mail also when this was being discussed. My issue goes to the use of the word "reports." So Matt and I were kind of wordsmithing earlier. So "reports" is used both as a verb – "I'm reporting something" – and as a noun – "Put it in your report." The same concerns that we had discussed regarding what should go in a report/what should go in a case record are there. Matt and I had talked about excising in the first paragraph, numbered 1, the phrase "both in their reports and in testimony," – this is just a discussion point, I'm not saying that this is the solution.

And in paragraph No. 2, in the third line, "as part of a report and in testimony." But I still have a question on the phrase report used as a verb. So in No. 3, it says, "The forensic science practitioner should report the limitations and uncertainty associated with measurements and inferences." So if someone is testifying, and they're not asked a specific question, they're not in a position to report something out that doesn't come out on direct examination or cross examination.

Then on No. 5—

MATTHEW REDLE: Okay, let's just take that one Views Statement at a time. So if we took out both "in their reports and "in testimony," and then I think we had discussed "should be able to describe." So "should be able to" would be inserted after "should."

PHIL PULASKI: Both of those address my concerns. I don't know about—

MATTHEW REDLE: Okay, other concerns with No. 1 – Ted?

TED HUNT: Yeah, I have voiced concern about this in writing before. It kind of goes with the last comment I had about the level of detail. If you're asking a latent print examiner to describe the features of the question and known samples, the data, and similarities and differences in those features, as well as the process used to determine them, what are you asking for? I mean, are we talking about loops and whirls being put – this description of bifurcations, loops, swirls, et cetera, in a report and to testify to that? I guess that may not have made it.

MATTHEW REDLE: So you would support then the proposal that Phil and I were talking about, about eliminating both "in their reports and in testimony" and say, "A forensic science practitioner should be able to describe the features of the (inaudible) sample of the data and similarities and differences. We're not identifying that it's necessary to be in the report. We're not necessarily identifying that's it's necessary for them to testify to that; however, if someone with an interest were to bring that up, we should be able to—

TED HUNT: Right, as a non-practitioner, I think that's fair from my perspective. I don't know if that poses any difficulties, but that was my concern – to make them talk about things are going to right past the jury's head, very technical things in court and in reports. Again, to describe it is probably going to be under inclusive because there are so many things going on as they're making those comparisons, you can't possibly capture all of that and write that down; although they should be able to articulate that, I agree, when asked.

So that's my concern with that one. I do have other concerns if you want to continue.

MATTHEW REDLE: Okay, so does anybody have any objection to us deleting (inaudible)?

I don't see any objection to that.

NELSON SANTOS: Gerry does.

MATTHEW REDLE: Gerry?

GERALD LaPORTE: Hey, Matt, I'm sorry but I just want to sort of step back with some of the – I have an overall issue with some of the fundamental statements in this document that then lead into the views.

MATTHEW REDLE: Okay and, Gerry, we're not going to take them right now; we'll take them at the end. The reason we're going to proceed that way is because this is the heart of the document. So we'll come back and we'll talk about contextual issues, if that's okay.

GERALD LaPORTE: Okay.

MATTHEW REDLE: So nobody has objection to deleting both "in their reports and in testimony"? And then we'll insert "should be able to describe" right after that. Any objections or problems with that?

[No response]

Then let's go to the second. Phil raised the issue in the third line, the second sentence, "Thus the forensic science practitioner must be able to support," and we would eliminate "as part of a report" and "in testimony" so that: "A forensic science practitioner must be able to support the choice used and the specific analysis conducted and the assumptions upon which it is based."

Any objection to that?

[No response]

Any concerns raised about that?

[No response]

So we'll do that as a friendly amendment. Any other suggestions or concerns with respect to No. 2?

[No response]

Okay, No. 3: "The forensic science practitioner should report the limitations and uncertainty associated with measurements and the inferences that could be drawn from them." This report might take the form of an interval for an estimated value or a separate statement regarding errors and uncertainties associated with the analysis of the evidence. If the forensic science practitioner has no information on sources of error or in measurements and inferences, the forensic science practitioner should state this fact."

PHIL PULASKI: Matt, using kind of the methodology you were using in Nos. 1 and 2, maybe if that said, "The forensic science practitioner should be able to describe..." because that's kind of what we were using in the first one; and it might fit in both instances where the word "report" shows up.

MATTHEW REDLE: Is that acceptable to everyone?

[No response]

Okay, are there any other questions with respect to that – Pam?

PAM KING: Matt, I just want to point out I don't necessarily disagree with the suggestions that have been made by Phil; I think he's trying to get at something that is important. My concern is that when I read the language as it's being described now, I read it more as to talk about the competency of a particular analyst than I read it as to be requiring that they're in a position to have some affirmative obligation to provide information.

So from that standpoint, I'm a little bit concerned that we're getting into a place where we may not be – the document may have a different -- okay, I can't come up with a sentence. But that's my concern, is that it seems to me that there be more of are we talking about the competency of the analyst, or are we talking about someone having a particular and affirmative obligation to do something.

MATTHEW REDLE: (Inaudible, no mic)

PAM KING: Maybe that's the way to try to be clear about it. Like I said, I don't disagree with what Phil is trying to get at; and I, in looking at it, am thinking through the language. But I do have that concern.

PETER NEUFELD: I think to deal with both Phil's comment and also Pam's concern, if you simply inserted the words "if asked" – "should be able, if asked." Then, obviously, it doesn't have to be included if not asked; but certainly, if asked, it's not a question of competency. It's a question of that it's significant to the content.

PAM KING: I think that sentence – yeah, it needs another word.

[Pause for revision of document]

PETER NEUFELD: As Phil said, it would be considered a friendly amendment if you included the words "if asked" in the earlier changes that Phil suggested, just to clarify that same concern that Pam had.

Is that right, Phil? Let's do that then.

[Pause for revision of document]

MATTHEW REDLE: Okay, any other comments on No. 3, on the substance of No. 3 – Mark?

MARK LE BEAU: I think it should be "to describe" as opposed to "to provide."

MATTHEW REDLE: On which...?

MARK LE BEAU: Yeah, right, there, "to describe." To me, the sentence would read best if you started with "If asked" instead of inserting it in the middle.

[Pause for revision of document]

MATTHEW REDLE: Okay, any other concerns about No. 3?

Okay, View 4, "Forensic science practitioners should not state that a specific individual or objective is the source of the forensic science evidence. They should make it clear that even in circumstances involving extremely strong statistical evidence, it is possible that other individuals or objects could possess or have

left a similar set of observed features. Forensic science practitioners should confine their evaluative statements to the support that the findings provide for the conclusion of a common or different source."

What we did in that paragraph was we deleted the word "and" in the second sentence. We deleted the word "claim" because "conclusion" seemed more appropriate than "claim." And we deleted the phrase "linked to the forensic evidence" at the end of that because it served no useful purpose.

Yes, sir?

TROY LAWRENCE: I have a question with No. 4. What if you do know that it came from the client, the suspect? What if they *are* the source? Can we not state that they are? For example, in digital evidence, if they give us their phone, can we not say that it's their phone?

MATTHEW REDLE: In that instance, Troy, aren't you relying upon information from other people to the effect that they gave this to me and they handed it over to me. In that case, frankly, the way I've seen this in reports in other contexts are people saying, "This was identified to me as...." When it comes time for trial, I'll put on that foundational witness to establish that, to make that connection, so that the link has been made; and then you're going to testify to what it was that you actually did with the item or the evidence that was presented to you and what you found once you looked at it. Is that right?

TROY LAWRENCE: Well, sometimes they just bring it directly to us; and we get it from the suspect themselves. On a consent or on a warrant, we may actually seize it from the individual. So I do know that it is the phone that we took from that person. But also, what about other sciences – like if we took a fingerprint from a suspect, or if we took a blood draw at the hospital from the suspect? Can we not say that it's his blood?

MATTHEW REDLE: Okay, so that would be our known sample; and what we're doing then in other areas is we're then trying to link, or make an association between, that known sample and some question sample that was received. So the phone might be considered the known sample, and then it's a question of what information did you find inside that phone.

Other – Fred?

FREDERICK BIBER: You're not implying that we cannot say that we took a specimen from a particular patient in the clinic or at autopsy, when we're standing right there at the autopsy table; are you?

JED RAKOFF: No, those are known samples. What we're talking about is the question, and is there a need for us to make that clearer that what we're talking about is the question?

You won't be operating as a scientist when you make that statement; that's an evidentiary statement. You're on the stand because you're making a comparison between that known and something else.

CECILIA CROUSE: I still – and I've mentioned this actually several times and, again, it might just be the way I process things – but No. 4 says: "Forensic science practitioners should not state that a specific individual or objective is the source." Then No. 5 says: "To explain the value of the data in addressing conclusions to the source...." So I still find that conflicting.

If No. 5 means to explain the value of the data in addressing as to the association, that maybe I might be able to understand. But to me, it sounds like in No. 4, don't say its source; and No. 5 says, but if you do.

MATTHEW REDLE: So if we were to make that: "To explain the value of the data in addressing the conclusions as to the association of a question sample to a known...." would that take care of it?

CECILIA CROUSE: For me it does, if that's what you meant.

MATTHEW REDLE: Mark, is that okay? I want to take advantage of your head time.

UNIDENTIFIED MALE SPEAKER: He might be falling asleep.

CECILIA CROUSE: And we're going to go over the body of the...? Okay.

TED HUNT: My question and concern is about No. 4, kind of in conjunction with No. 6. To state this as I understand it – correct me if I'm wrong – this document proposes that the view of the Commission be today. In 2017, it's the view of the Commission that, for example, a fingerprint examiner should not be able to say that I have identified this known print to this questioned print; and a firearms examiner shouldn't be allowed to say that this shell casing was fired from this gun. That's what I understand this to mean.

The problem, of course, is that in 2017 we don't yet have population databases, outside of DNA, that give us some idea of the frequency of particular minutiae or fired shell casings as they might relate to a particular gun. So the intent of this document is as we move forward, I think, that this would be a good thing if we were able to more accurately quantify the probability of a questioned sample having been derived from a known. The problem is we're not there yet, and I think everybody understands that.

My concern is that given the fact that we don't have these capabilities yet, these documents are going to be used in litigation to say, look what the National Commission said. You can't give a source attribution for a fingerprint or for a firearm, for example. Even the PCAST Report, as sort of an interim way forward,

sort of allowed a punitive identification to be used; so there was fudge room there for the present until we get to the future.

I don't see this document right now as being consistent with reality in terms of current capabilities. Now, I don't think we should not move forward; absolutely, I support what NIST is doing in the areas of firearms and tool mark analysis, as well as fingerprints. And we're well on our way, I think, to someday making these disciplines part of metrology. They're not there yet. They're not there yet, but they *can* get there someday. So what do we do in the present? Is this saying, "Don't say that in court in Kansas City tomorrow?"

MATTHEW REDLE: In response to that, what we don't want to do is disincentivize the community from going in that direction. With firearms let's say, let's use firearms as an example, we currently have examiners who may take the stand and testify that the bullet retrieved from the body was fired from this particular weapon, okay? And there isn't any kind of statement made about limitations to that. It's basically a reference to training and experience. On occasion, we will see some experts who will treat many samples that would run along a spectrum of quality, as if they're all the same; and so there's no real statement about that.

What we're saying is, number one, we're not making a recommendation; this is not a recommendation document. It's our views. We're saying this is where we need to be moving toward – toward a more empirical basis so that we have greater transparency and, frankly, greater trustworthiness wherever possible.

We're also not saying that you can't use this evidence in court because that's the purpose of No. 6 in one spot, and I think we've got another reference elsewhere in the document that helps make that point too. What we're really saying is that you can still provide, and courts still recognize that these common characteristics are all things that are relevant and admissible. As you know, that bar for relevancy is relatively low; and so that information can still come before the factfinder for the factfinder to consider. As you also know, these cases tend to have a context to them that we're able to provide to the jury as well.

TED HUNT: So from that I take that the recommendation or the view of the Commission would be that a fingerprint examiner couldn't say, "I've identified a print consistent with current practice." Same with firearms and tool marks, can't say this shell casing was identified to this gun. That's the recommendation before the Commission.

MATTHEW REDLE: No, you're putting words in the Commission's mouth.

TED HUNT: Okay, well show me—

MATTHEW REDLE: What we're saying, Ted, is that here are the problems that we have currently; and this is the way to resolve the problems. We're not recommending to courts what they necessarily do with respect to that. We are recommending to the community that this is the direction we perceive that we

need to go; and this is where research needs to be done because, for instance, you're not going to get any argument from me that in a good quality latent print the identification is very strong evidence. I recognize that. The idea is, okay, let's do it so that it's more transparent; and it doesn't rely so much on the ipse dixit of the examiner.

TED HUNT: I still have a problem with the tense of the document. I don't think it says that clearly enough, that we're not there yet and that these are aspirational objectives and that we should try to get there. If that destination we reach proves to be more reliable than an identification – and those trials are still ahead of us to compare which one is actually more reliable than the one we assume to be. But I can see this document being used as a wedge in court; and the defense attorney going before a judge and saying, "Look, the National Commission says this guy can't talk about a source attribution."

I realize it's just a Views Document; but it carries some weight, having come from this Commission; and I am concerned about context and tense in this report. I appreciate the fact that this is like the fourth or third iteration of this document, and you and others have worked to make this much better than it started out as. But I still really have some concerns with tense, and then we haven't even gotten to No. 6 yet. But this document is sort of an anachronism where it's speaking about a place and time we're not at right now.

MATTHEW REDLE: Well, no, we're actually speaking first about the state of things as they are today; and the state of things can well be improved upon.

TED HUNT: Absolutely.

MATTHEW REDLE: You acknowledged that before. We're saying this is where we are; we need to get better; we *can* get better; and these are the sorts of things that we need to do to get better. So if you want to say that's aspirational, then it's aspirational; and I think that's clear in the document itself.

Peter?

PETER NEUFELD: Ted, I think you're actually painting a picture of doom and gloom, which is completely over broad. In fact, there's nothing in this statement which would prevent the black box data from going in, in a fingerprinting case, for instance – nothing at all. There's nothing in these six principles that would not allow that. It is a statistical approach. It's a statistical approach that's been recognized, so that data could go in; and that data could go in to show the limitations of the testimony. So just as the NAS Report said, just as the PCAST Report said, the scientists came out in opposition to saying that this fingerprint comes from this person to the exclusion of all humanity.

That's what this document is saying today, but there's nothing in this document that would prevent the fingerprint examiner from using the fine work they have from the black box studies and putting in other numbers to suggest the power of the conclusion that there's a positive association.

So if there are other kinds of statistical data, it could be used; and I think we should also just move on, Ted. It's sort of like you need to have the last word on this all along. I'm willing to continue with it, but at least be fair to the language of the document.

TED HUNT: Well, the language of the document clearly says that source attributions should not be testified to.

PETER NEUFELD: Exactly right, and a black box study is not talking about source attribution.

TED HUNT: The black box studies you're referring to talk about specificity and false positive rates, which is different than an examiner testifying to a source attribution.

PETER NEUFELD: That's exactly right, so it's on the FBI or anybody else to use fingerprint testing, to talk about the strength of the evidence in terms of the traditional (inaudible) specificity and sensitivity without saying that this man speaks for the whole world. The difference is you're asking the FBI in this document, or anybody else, to simply rely on empirical data. A black box study is interested in one source of empirical data, different from the database.

MATTHEW REDLE: Well, and I might add that this document also recognizes that many of these disciplines are not devoid of data, that there is data. What we're calling for with respect to those is that that data be strengthened, and we're calling on the powers that be to provide the resources necessary for research to be done to effect that.

TED HUNT: Okay, so just to make clear, this document is not saying that a latent print examiner or firearms examiner can't testify to an identification tomorrow in court?

MATTHEW REDLE: That's going to be up to a court; it's not going to be up to—

TED HUNT: Well, I understand it's going to be up to a court. But is it this Commission's or this proposed document's position that that not happen tomorrow?

MATTHEW REDLE: Go ahead, Judge.

JED RAKOFF: So how does this really come up in real world right now? I can only speak for the Federal court; but I am required, it's not an option, I am required in every Delbert hearing to ask, "What's the known error rate," because the Supreme Court says I have to ask that. The answers I get are usually very unsatisfactory because the expert has not focused on the kind of things that this Views Document

says they should focus on. So I get either things that are ridiculous – like in one case, oh it's -- in a tool mark case – 100% accuracy.

I said, "Why?"

They said, "Well, because in every case I've testified, the guy's been convicted."

Or I get much more often, from better experts than that, a kind of, "Gee, I haven't really come prepared to discuss that. I need to go back and look more into it," and so forth.

"But, sir, the trial is tomorrow."

So I think a major positive aspect of this views report is to alert the community as to what a judge would like to hear when he or she is trying to assess admissibility; and it's going to vary tremendously from discipline to discipline, and it's only one of the factors we take account of.

The other person, or persons, that it's helpful to are the jury. I talk to the jury after every trial, and it's one of the actually tremendous learning experiences for me as a judge because I couldn't do that as a lawyer. When forensic science is involved and the defense attorney, for whatever reason, has not brought out the statistical aspect of it, the jury always asks me, "That was really important to us, but how accurate was it?" And by accurate, they're really asking the statistical question.

So we can spend a great deal of time, even though it's our last meeting, talking about the individual placements of words here. That's important too; I don't want to minimize that. But I want to really stress what I think is the *very* great importance of this Views Document, which is to focus both the practitioners and the courts and the jurors on the fact that that this *is* statistically sensitive evidence, and they need to be focused on it.

TED HUNT: I don't contest, or I don't really want to argue the merits of the points you're making. I was just asking for clarification as to what the intent was behind that statement; and I think it's pretty clear that is the intent, that source attribution statements not be provided by examiners – just for everybody's edification.

GREGORY MOTTA: Thank you, Matt. Just two quick observations and then a question.

First, I think that I would hope on our last day we don't lose our sense of courtesy and decorum. We're probably one of the few deliberative bodies in Washington that's maintained that for this length of time, so if we could try to keep that in mind.

I think I have to say the discussion says even in circumstances involving extremely strong statistical evidence. I don't know if anyone else noticed it; but it struck me when I was reviewing these documents, about two weeks ago it seemed as though *all* of the astrophysicists in the world were astonished when they announced a new mineral had been discovered in a meteorite that had come from the middle of the solar system. They said – are you ready for this – "never before observed on earth."

I thought, well, geez, that's an outrageous scientific statement based on everything I've been hearing because how do they know it's never before been observed? How do they know they've searched everywhere? How do they know it's not embedded 1,000 feet under the ground?

But nonetheless, they came together and they gave it a new name – pangonite, paconite, or something. Anyway, the point being is it was a new mineral. But this rule would suggest that a scientist who if someone, I guess, clubbed someone to death with this piece of meteorite, would be prohibited from saying, "No, it only came from this meteorite. We've never, ever seen it before anywhere in the history of time or in the world." He'd have to say, "But I could be wrong; it could be coming from other places."

So the statement, I guess, is really a statement taking a formal position about embedded in its logic, what is the certainty of certainty. It stands to the proposition you could never, ever, ever, ever, ever be certain – no matter what evidence. I guess my question is, is that really the heart of this statement as a matter of recommendation?

So that's the question. Then the other question is, where did the term "forensic science evidence" come from? It's not defined in the document. Is it relative to another document we pulled it from? It seems to be a catch phrase that creates some complications in this document. Those are the two questions.

MATTHEW REDLE: Greg, there is a suggestion on View No. 5, part C – and I want to take a look – that I think goes at least in part to your issue – and this is included in the comments that David Kaye provided that is part of the supplemental information you received. David suggested changing the original language in "C" from "present statistical model generated results to determine the possible origin of the questioned sample. The forensic science practitioner should note the uncertainties and any values,; to saying "Present quantitative statement of degree to which the evidence supports a conclusion, the forensic science practitioner should note the uncertainties in such values."

The distinction that he draws there is that he explains his rationale; but essentially, it is one where the evidence supports the same gun hypothesis more than it supports the different gun – I'm reading the end of this – the different gun hypothesis. No statistical model is generating these frequencies. Nonetheless, if the method of overall scoring similarity in impressions is reliable and valid, the expert should be able to report the frequencies, along with the expressions of the uncertainty, due to sampling error in the database."

Now, when you say that it's never before been observed, that's data. Science is saying we've never seen this before, and so that data could be presented. This has never been seen before; now we've seen it.

Draw from that whatever conclusion you might make from the fact that there's a shard of whatever that new mineral is in the skull of the deceased.

Suzanne?

SUZANNE BELL: Thank you.

I certainly support the essence of this. Like, for example, when you're saying in 2017, if we can't say we identify it – well, we can't; and you can't default back on therefore it's okay, and we're going to continue to call it until such time as we're proven otherwise. So I think there is a lot of data, as Peter pointed out. There are black box studies; there's stuff in the literature. And it's never going to be – I mean, all science is probability. It's not just forensic science that's struggling with this, I guarantee you. We're all struggling with how do we define this, and we can't.

What we have to be aware of is I think it's really important that the Commission come out and say we can't just identify it with no more doubt. There is – there is some uncertainty; we can't be afraid to say it. Is it small uncertainty? Is it large? What's the context? How do you explain it?

That's part of the judge's and the jury's role; but you can't – I don't think now you can identify it. You can't say this fired with absolutely zero doubt; we can't say that. I think this compromise is perfectly reasonable; you're saying qualify your statements. What are the limitations of the method?

We'll struggle with quantitations all along; but I don't think we can stop and say, well, lacking further data, we're going to assume it's okay until somebody shows me, through black box studies, that there in fact is a finite error rate on tool marks. That would be my point, is that I think however we word it, it's valuable to get it in there; and I don't think it degrades the value of fingerprint evidence or tool mark evidence. It just makes it clear as to how it should be expressed in a scientifically defensible way.

[Pause]

PHIL PULASKI: In keeping with my earlier comments, Matt, in No. 5, the lead sentence says: "To explain the value of the data in addressing conclusions as to the source of questioned samples, forensic science practitioners *may*"—which is good, then refer, present, present. But when you get to "D", "D" no longer has the "may" qualifier. It says: "When the statistical statement is derived from an automated system for making classifications, a forensic science practitioner *should* present not only the classification." Once again, they're in that position where if they're on the stand, they don't have the option to do this. So if asked that type of thing, that might be—

(inaudible)

Well, "D" is no longer really part of No. 5.

MATTHEW REDLE: And that's 5C?

PHIL PULASKI: No, "D", David.

MATTHEW REDLE: (inaudible)

PHIL PULASKI: Yes, in other words, the language that we agreed to; but "D" needs to become, I think, separate so it's no longer modified by the word "may." I don't know if that's a solution, but it certainly mitigates one of the problems.

CECILIA CROUSE: All the comments that I've presented earlier, your Committee has addressed with regard to this one.

I'll be honest; I'm struggling with this for a lot of the reasons that have already been stated before. I originally had asked for definitions of "relevant experiments" and "relevant populations" and "relevant databases" and "relevant...." I think the information that I received back was that it was going to depend on the individual discipline; it was going to depend on what the OSACs do; it's going to depend on....

In that regard, it left it reasonably open, depending on the discipline. The words "should present" I also had a comment about the word "present" throughout this document; and I'm specifically talking about "D" here. I didn't know if that's the same as "report" or "describe" or "provide."

MATTHEW REDLE: Would we take care of that issue if any time it said "should present" we added "if asked"?

CECILIA CROUSE: I'm not sure, Matt; I'd have to go back and read it. You've been really good, actually, about changing the other ones that I felt were important.

MATTHEW REDLE: We could certainly do that because we recognize that when the witness is on the stand, the witness is limited to the questions that they're asked by either counsel; and you don't get to just make ad hoc statements.

JED RAKOFF: Well, did you also want to change "present" to "describe"?

CECILIA CROUSE: I think you more frequently want to be asked to describe something than to present it.

JED RAKOFF: Yeah, so describe, okay.

MATTHEW REDLE: Other comments?

Okay, No. 6.

TED HUNT: Matt, I had one question about No. 6. I assume, in light of the last discussion on the previous document, it looks to me like the last sentence in No. 6 you might want to think about removing that. We're talking about testimony and reports again, and expressing a directive or a view of expressing empirical data, both in testimony reports.

MATTHEW REDLE: You're proposing—

TED HUNT: For consistency, I think it should be removed since we did remove--

MATTHEW REDLE: Would it be more consistent to say that "in the absence of (inaudible), empirical evidence should be abolished both in testimony and written reports (inaudible)."

TED HUNT: Well, I guess that assumes that there's no empirical data; and I think there is empirical data in a lot of these.

MATTHEW REDLE: So in those instances where there is empirical data, you would describe the empirical data. Make it an affirmative statement as opposed to a negative statement.

TED HUNT: Yeah, I just want to have a directive that this be automatically addressed, absent some kind of inquiry.

MATTHEW REDLE: Okay, any other comments?

[Pause for revising document]

We've eliminated "the absence," and we're making it an affirmative statement as opposed to the negative statement.

Gerry, you had something that – I'm going to cut everything off then and ask that we take a vote on this. Doing that though, one way that we could proceed to deal with the overview, since the overview simply provides context and it's the statements that we've just gone through that provide the views, what we could do is if people have proposals for changes to language in that area, they could perhaps send that to us; and we could incorporate those in, perhaps, through the SPO.

NELSON SANTOS: Another option is the wrap-up also. We've got 45 minutes; we might use that time for that too.

MATTHEW REDLE: Okay, perfect.

Gerry?

GERALD LaPORTE: Matt, I just have one kind of a major overarching comment. First of all, I think this document conflates way too many issues. First of all, why aren't any of these requirements for DNA testimony either? I mean, there seems to be a lot of undertone about impression, pattern and trace evidence; but we have all these recommendations about what someone should testify to and so forth. But why is DNA kind of pulled out of this? Shouldn't they sort of adhere to those same recommendations?

The other thing is there are a lot of terms in here that just aren't defined. What are impression pattern and trace evidence? I mean, we haven't even defined what those disciplines are – or those methods. We use terms like "statistical database." What is a statistical database? A database is a database, and then you do studies with that database and then gain statistics from it; so I don't know what a "statistical database" is.

We have issues here – we're conflating issues with the *need* for databases and then the need for statistical statements, but we need databases *first*, before we can do research, to make statistical statements. This whole document, though, conflates a lot of very important issues.

The other thing is if this document is about making a statement or not making statements about source attribution with 100% certainty, then maybe that should just be the recommendation clearly and simply, make a very short statement that that shouldn't be. Forensic examiners, DNA people – everybody shouldn't be making statements of absolute certainty.

So those were my overall arching comments about the entire document.

PETER NEUFELD: Just to respond briefly -- also an overarching comment, Gerry – number one, DNA is not out of this document; it's totally subject to the document. It's a form of trace evidence; no question about that. It's there and was always meant to be there. That's number one.

Number two, it doesn't require databases, as I mentioned before; the kind of data that they have from black box studies would allow somebody to testify and explain the levels of uncertainty, as we saw from the black box study.

Number three, as the overarching point, I think what you really have to consider here is at 30,000 feet, this statement is basically saying that the forensic science community wants to move forward; and instead of, as we have in the past in certain disciplines, relied almost exclusively on experiential data, we realize, as Suzanne pointed out in her remarks, that frankly all this evidence is fundamentally at its core probabilistic, and that we would like to see the community's culture and the community as a whole move in the direction of being able to express uncertainty and express those kinds of probabilistic conclusions. That's all it's doing.

We all agree that there are some things that could be better written. There are some things that we would like to be stronger, that you might like to be weaker; but it's a Views Document. The fundamental view of this document, when you take away all the commas and periods, is that we'd like the community to move toward this new era, where probabilities will be able to be expressed; where statistics will be able to be used; and it's not going to be the way it was 50 years ago. That's it, plain and simple, thank you.

NELSON SANTOS: We can do one of two things. We can defer the vote till the afternoon as well, if there's some more discussion; or we'll take a vote, and it is what it is. It's up to you.

MATTHEW REDLE: I would move the document.

NELSON SANTOS: It's been moved and seconded; so, John, it's over to you.

JOHN BUTLER: Okay, it's open for vote now. Looking for 28; I think that's correct. 60%, "Yes"; 4%, "No"; 4% "Abstain" so it does not pass, doesn't reach two-thirds.

NELSON SANTOS: Okay, let's break. Lunch will be distributed. Please try to be in your seats at around noon so that we can start with our working lunch presenter.

One additional comment too – the letter that was referenced this morning is now up and on the Public Comment website. So if you go to the Commission webpage and you click on the "General Information" link, you can see direct access to the Public Comment portal on www.regulations.gov.