

Chris Asplen
American Society of Law Medicine & Ethics
DNA Fingerprinting and Civil Liberties Project
RO1-HGH002836-02
Workshop 1 Presentation
May 14-15, 2004

DNA Forum – Chris Asplen

Introduction:

“...between interest groups and the government...so without further delay, I am going turn it over to Chris and there will be a Q&A at the end of all these presentations...Chris.”

Chris:

First of all, I would like to thank the organizers, particularly Dave Lazer for the opportunity to be back at the Kennedy School of Government. I remain in David's debt for the work - the collaboration that we had with the commission and at the Kennedy School a number of years ago as we rounded out the commission's work here at the Kennedy School with Attorney General Reno in the last meeting. That was a great success and it's always a pleasure and a great opportunity to work with David.

I will say however that the task of summarizing the work of a four-year commission, along with summarizing the international considerations in DNA, along with discussing the framework for international sharing of information in twenty minutes is daunting, to say the least. It is particularly daunting when so many people in the room were active participants in that commission. So what I opted for is simplicity in terms of speaking about the commission's work, recognizing that if anything needs to be fleshed out in the future or in the next day and half, please feel free to ask as many questions as you would like.

To begin talking about the Commission: The genesis of the National Commission on the Future of DNA Evidence was actually not one of a law enforcement perspective but rather was the issue of post-conviction DNA analysis. It began with a study originally done by Barry Scheck and the Innocence Project, “Convicted by Juries, Exonerated by Science”, where they profiled a number of cases in which individuals were exonerated by DNA, having previously been at least validly, albeit not correctly, convicted.

Upon reading that report, Attorney General Reno recognized that there was an opportunity to do more than what we were currently doing with DNA. And she asked that the commission be established. With that, Chief Justice Shirley Abrahamson from Wisconsin was selected as the Chair of the Commission

At that stage, we began a four-year process where we looked at five areas that essentially kind of categorized the whole realm of DNA in the United States from

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a forensic standpoint... the five general areas...with the overall mission being to maximize the effectiveness of DNA technology in the criminal justice system.

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So what that meant was looking at these particular issues:

Number One: obviously the post-conviction issue because that was the genesis.

Number Two: looking at law enforcement training and education considerations recognizing that quite frankly law enforcement's application was probably the weak link in the whole chain of utilization of the technology.

We looked at laboratory funding because as we all know ultimately it comes down to money.

We looked at science and technology issues, specifically, because we needed to make sure that the money that we were investing in various areas made sense, that the SDR database that we were investing in today was not going to be outdated five years later like we saw happen when we converted from the original database to an SDR database.

And then finally we looked at legal issues. What were the legal considerations that needed to be addressed, if we were again going to maximize the value of the technology and at the same time balance individual civil rights, civil liberties against law enforcement's needs? Again, recognizing that we're summarizing in a very brief fashion.

To summarize the post-conviction work, one of the most important things that the commission did on the very outset was rather quickly – and for a national commission to turn something around a year and two months was actually pretty good – the turnaround for recommendations for handling post-conviction cases, I think, was very beneficial because what that led to was an opportunity to get that document and get those recommendations out to the community so they began to think a little bit differently about this issue. The biggest problem that we had in the criminal justice system from a post-conviction standpoint, quite frankly, was the attitude of prosecutors that this was something that they really weren't going to get their arms around because they understood that the floodgates were just starting to open wide up and they were going to be deluged with appeal cases and they were going to be right back where they were before the anti-death – the Antiterrorism and Effective Death Penalty Act – kind of affected the nature and scope of habeas corpus appeals.

So there was a great concern and there was a lack of recognition on prosecutors' parts that this was a good thing to continue to do. We also created some model legislation. The great impact there was having something that we could send as a resource to legislators in the individual states that were considering this kind of work. To make a very long and complex story short, what ultimately happened at

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the end of the four, four-and-a-half years of... in the beginning having prosecutors completely against the idea, by the time we were finished - it was either last summer or maybe the summer before that - the National District Attorney's Association actually passed a resolution supporting post-conviction DNA testing and supporting prosecutor initiated DNA testing. We actually got to the point where prosecutors themselves were actually going on their own looking for cases where there may have been miscarriages of justice and that they were initiating those cases themselves. We still have a long way to go in the ultimate application of this particular...or in the application of DNA post-conviction testing, but we have come light years from where we were originally.

The second issue: law enforcement training and education. Again, this was recognized pretty early on as the weak link in the whole system because it really didn't matter how good your technology was in the laboratory. It really didn't matter how good your prosecutor was in understanding how to get it admitted in evidence if your law enforcement officers didn't pick it up in the first place or if they contaminated it when they did pick it up. There were so many issues surrounding the actual application in the field that we realized we needed to do something very tangible and very specific. As a result, we focused our energies were on creating resources, training resources, for police.

The first thing we did, we issued a simple little three-fold pamphlet which, in my mind, may be well one of the most important that the commission did in its entirety. Because we wound up sending that out literally to every single police officer in the country. Every law enforcement officer in the country got one of these little pamphlets. And it was more about making the point that this is *that* important than it was about making sure that every officer had it. And then after that we did a second run. It was so popular and so important that the Department of Justice committed to ultimately printing one and a half million copies of this little tri-fold, which again, it was a simplistic endeavor but it may be well the most important thing we did.

Now, what we also did was to create 2 CD ROMs, interactive CD ROMs, which were much more formalized training for law enforcement agents that they could, either in a classroom setting or individually, could learn how to identify, collect and preserve DNA on their own. And there is a beginners and advanced version. Again a very successful product. We wanted to do overall, speaking overall, in terms of the Commission's work, hat we tried to focus on was what was actually tangibly doable. Now I'll explain a little bit more by what I mean by that when we get to some of the other issues. But what we wanted to do was have an impact as immediately as possible. What Chief Justice Abrahamson was committed to was not meeting for four years and then ultimately writing some kind of report at the end of that process that nobody read and we really didn't have an impact.

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These were some the most important impacts that we had:

Laboratory funding - What the import of the laboratory funding working group was the identification of the backlog issue and the implications of that. I believe that it was the first meeting that the Commission had. We had representatives from the FBI. Don Perkingham and Steve Miscota (?) helped us understand that we had literally hundreds of thousands of blood and saliva samples sitting in storage that we weren't going to get to for another four years. That what we had...what was widely recognized as the best technology available to law enforcement to solve crimes and ultimately save lives but we weren't getting to use it simply because we didn't have the capacity to do it. And because we had this national forum and the ability to get on the front page of the newspaper because the Attorney General has this national forum - what we were able to do was to raise this particular issue, which was fundamental among the issues. And in that regard was relatively easy to solve once everybody understood it. Because we had a national commission and because that working group paid such attention to these issues, we were able to after I guess our first and second year get some commitment from the Attorney General at the time to begin to fund the reduction of these backlogs. And what we came up with was the recognition that while the public laboratories may not be capable of reducing these backlogs because of the capacity issues, there were plenty of folks in the private sector more than willing to make a lot of money to go ahead and do that and it wound up being a very effective public / private partnership to get those samples eliminated. And ultimately that lead to...we will talk a little about that a little bit later... the President's initiative to continue on down that path.

Now, what we failed to do, and we knew at the time that we were failing to do it was... We failed to adequately address the issue of laboratory capacity in the first place. What we did was we addressed what was easy and doable and that was throwing money at the backlog problem. What we didn't do well was... we didn't provide a plan or really elucidate the issue of laboratory capacity... how do we get a turnaround time to a couple of days rather than six months to a year at the time when the FBI wasn't turning cases around within a year. I live in England now and they are as good as anybody at DNA cases and one of the big articles in the newspaper about a month ago was the tragedy of the forensic science service only being able to turn cases around in fourteen days. That was a horrible, horrible thing: that they could only test cases in fourteen days. Fourteen days! If they only knew...

Science and technology: What we did was we issued a formal report in that particular working group. Ya know... I'll tell you a quick story about the kind of broader impact that a commission can have. I was in South Africa doing some

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work down there at the South African police service laboratory. And one of the gentlemen there was showing me a very sophisticated piece of robotics equipment. And he was about to tell a joke about Americans so he stops and says, "Wait a minute. Are there any Americans here?" And then he said "OK" and he tells the joke anyway. But afterwards he comes up and he says "Who are you and where are you from?" I said "my name is Chris and I used to run a commission in the United States on some DNA stuff." And he says, "You aren't Chris Asplen are you?" "Well yeah as a matter of fact." He says, "I can't believe it." He says, "I've read all your commission's stuff. He says, "You wouldn't believe how little information we get down here at the bottom of this big continent. The only access we have to what is going on in the rest of the world is what I can pull off the internet." And so every set of minutes that we set on the internet this guy read. He literally took me to his office and do you know what was tacked on his board? That pamphlet that he had printed off the internet. So the products -- the report ... science and technology report, the law enforcement pamphlets, the CD -- had literally gone all over the world. I have often taken them to different places and the training tools are being used in Australia, New Zealand, the Netherlands, all over the place. So were able to have a much bigger impact than just in the United States as result of some of the work that we did from an internet perspective.

The legal issues working group, of which we have two, maybe more than two, esteemed members are here...was also... it played a very important dynamic in the whole commission process because what it allowed us to do was that it allowed us to give the Attorney General specific advice on issues. What happened one day was... I got a phone call when I was in California about a front-page newspaper article that insisted that the Attorney General was going to test all arrestees, which was not true. The Attorney General had never said that. All that she had done was ask us to consider that particular issue. The headline even didn't match what the real story was. But what it did was it gave the Department of Justice a forum to publicly consider a very important and up to that stage not discussed issue. And what it did was, it allowed the Department of Justice to take a lot of input and to process it that way rather than simply react to the newspapers.

The great lesson that I learned, unfortunately, in terms of the formal reports coming out of that group was when you have a commission under an administration, get all your work done before the new administration. Because ultimately what happens is that priorities change and that's the nature of politics and it's the nature of the changes in administration, that what is a priority for one administration does not become the priority of the other administration. That being said, I will say not the priority of the administration. It can take different forms. Clearly, DNA is a very, very big priority in a different administration. The

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Commission was not – again, that’s just the way it goes...However, what we did do was we wound up getting a lot of that information, a lot of that processing that had been done around these legal issues out through the writing of people like Professor Canyon and Professor Smith [[ARE THESE NAMES RIGHT?]] as they went and wrote other papers elsewhere and had publications in other areas. So ultimately, I think the information and the data got out there but if we had to do it all over again, I think we would have been better at paying attention to the specifics of making sure that you’re ready to knock things out before the curtain closes on the end of what you’re doing.

Okay, just some general considerations on the impact on the policy considerations that the process had provided the forum with high-level issues. For example, post-conviction issues - we now have post-conviction legislation in umpteen number of states. Tim? (Chris asks a muffled question to Tim) .. about 35...where when we started the commission, I think two had kind of post-conviction legislation and now there are 35 with a lot them considering it, the laboratory backlog issue and arrestee testing.

...Provided a mechanism to produce resources and it wasn’t just the technical expertise but quite frankly because we had this Commission and we had this funding Commission already in place, what it gave us was a funding source for these other things rather than have to go to the Department of Justice and say “Hey, we’d like some money to do this CD ROM or to do this pamphlet” or something like that as a practical matter, what we were able to do was to take some of that funding that already existed and put it into those other things. From an administration standpoint and trying to really impact what’s going on through the use of a vehicle like a national commission that’s really, really important.

International experience: My story about South Africa is a good segue in terms of the international considerations and some of the impact that the commission has had in different areas.

But just to talk about some of the other areas in general. The United Kingdom stated as its goal - this was the Home Secretary, who about a year ago stated their goal is to database the entire criminal justice population. What they mean by that is anybody who gets arrested for anything. End of story. On top of that though, what they also do is they also retain profiles for anybody who’s arrested for anything. And quite frankly, it just kind of sailed right by. The public in the United Kingdom hasn’t really had a lot of problems with it. You haven’t seen a lot of protest. While the common belief was that they could take DNA upon arrest for quite a while in the UK, actually they just passed that law about six months ago, because arrest in the United Kingdom is different than in the US. There, a lot more people get arrested that are never prosecuted because the arrest is just

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a way to take somebody into custody for x amount of time. Whereas here in the United States pretty much most of the time if someone gets arrested they are ultimately going to get prosecuted. It is a very different system in the UK. But now, they can, if they just pick you up, they can automatically take your DNA. Originally they needed some prior approval but now it is simply an automatic proposition that upon arrest your DNA is taken.

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The reason that they retain samples and they retain profiles is quite literally because there were a number of times when as we all know happens they failed to take profiles out of the database when they were supposed to and people subsequently got arrested at times when they wouldn't been arrested if their DNA...if their profile had been appropriately taken out of the system. Those cases went to court and went to international court and they were upheld and the prosecutions were upheld. And this is simply the easiest way not to get into that problem. It was literally a simple matter of logistics. That it is was easier to keep everything in than it was to take the ones out that you were supposed to take out. It is an absolute true statement. It is interesting but it's true.

Also the thing to understand about the system in the United Kingdom as well as a number of other countries around the world is that it was never a system based on convicted offenders. While we started in the United States as a system based solely on convicted offenders and never, I won't say never, and in taking us a long time it to the point that they are talking about suspects and arrestees. It was always a suspect database in the United Kingdom. And in plenty of countries you can't put convicted offenders in. In South Africa, you can't put convicted offenders in the database. You can put suspects in and you can keep them if they are ultimately convicted. But by nature of your conviction, that doesn't do it. So the development of the database in the UK was very, very different. It was used much, much more as an investigative tool from the beginning.

The difference in the way the database developed in the UK compared to the US was from the start DNA was an investigative tool in the UK. In the United States, from the start, DNA was a prosecutorial tool. It was something that we used more to prove cases initially than it was to actually solve cases. Whereas in the UK, they kind of understood it as databasing and they have been doing databasing for close to fifteen years now.

Now - to give you a flavor of some of the considerations and the different ways that the international community handles DNA databasing. There are any number of different schemes and bases upon which decisions are made in terms of who goes in the database. Some countries base their database on specific enumerated offenses, very similar to the way the United States does it in many places. General classes of offenders sometimes. The length of the potential sentence may also be a consideration for whether someone goes into the database. Sometimes judicial authorities require it, sometimes not. Sometimes you need to get an order signed by a judge even if they fit into a particular classification. Sometimes you don't, depending on the country. Some database base it on the suspect, the status of suspect. Some countries, for example the Netherlands and Sweden, base inclusion in the database as to whether or not DNA was an issue in the original case. So if DNA was found in a case and was

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used to prosecute the individual and the individual was ultimately convicted then that person's DNA profile would go into the database. You can well imagine that if that's the requirement, that's a very small database. And quite frankly it's pretty useless.

And quite frankly, a number of countries' databases are quite useless because of that. However, most of those countries have begun to see that it is relatively ineffective that way and so they have begun to change. Sweden has introduced new legislation. The Netherlands has introduced new legislation, and a number of other countries, to fix that particular issue. Some countries base it solely on convicted offenders. And again some convicted offenders if DNA is in fact used.

Now, there are some other considerations, other experiences of other countries in fact. New Zealand, for example - in fact when it first started databasing...in New Zealand they had a couple of problems. Number one, they didn't include anything other than sex crimes and homicide. But number two, they required that the samples to be used had to be blood. And a number of countries have done this. But that caused significant problems. From an expense standpoint, it is much more expensive and much more difficult. They have also had the requirement that evidence from the crime scene could only be blood or semen. Knowing what we know now in the application of PCR and everything else, again, it was a very ineffective system. However, they've begun to change those and in fact they have changed those laws so now New Zealand is becoming much more efficient at their databasing procedures.

The final issue I am supposed to talk about is pretty easy because there is no legal framework for international data for sharing, quite frankly. The only thing that exists out there is... which is a bad thing and if that's the case then we are all in a lot of trouble. Interpol has established a new databasing program, they are calling it a DNA Gateway. It is a pilot program right now. It is completely voluntary by any - any Interpol networked country can use it.

However, many, many countries have specific prohibitions against international sharing of data. Many countries in Europe, by law, are prohibited from sharing their DNA profiles with other countries. So they can't participate in the program.

You also have the issue of how that data sharing is going to happen in terms of does Interpol get all of your data or is this just more of an interconnectivity of different databases where you get to kind of "one off" - as we say in England - run a search, and the data stays in there, so there are a lot of considerations. We are still very very far away from any international framework. We've got different considerations in the European Union. We've got different considerations here and we are a long way. What you'll probably see before you

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see a fully functional and effective Interpol system is more kind of regional databasing, maybe a, intra-European database, maybe a database with Canada and the United States, etc. But right now there is no real legal framework for that being allowed. It is strictly voluntary basis.

So with that, I am pretty close to my time now. Again thanks for the opportunity to be here.