

Minutes
Forensic Science Board Meeting
January 9, 2008
DFS Central Laboratory, Classroom

Board Members Present

Mr. Steven Benjamin
Mr. Joseph Bono, Chair
Leah Bush, M.D.
Mr. Leonard Cooke
Mr. Mark Davis (designee for Ms. Marla Decker)
Mr. Barry Fisher
Colonel W. Steven Flaherty
Mr. Karl Hade
Sheriff F. W. Howard
Kristen Howard (designee for Delegate Albo)
Mr. Robert Jensen
Ms. Elizabeth Russell
Mr. S. Randolph Sengel

Staff Members Present

Ms. Wanda Adkins, Office Manager
Mr. Jeff Ban, Central Laboratory Director
Dave Barron, Ph.D., Technical Services Director
Ms. Leslie Ellis, Human Resources Director
Ms. Michele Gowdy, Department Counsel
Ms. Linda Jackson, Section Chief Controlled Substances
Ms. Katie Jones, Administrative Specialist Forensic Biology
Mr. Ron Layne, Director of Administration and Finance
Ms. Alka Lohmann, Breath Alcohol Section Chief
Mr. Pete Marone, Director, Department of Forensic Science
Ms. Carisa Onorato, Administrative Specialist Breath Alcohol
Mr. Kevin Patrick, Western Laboratory Director
Mr. Steve Sigel, Deputy Director
Mr. Sherwood Stroble, Policy, Planning and Budget Manager
Ms. Susan Uremovich, Eastern Laboratory Director
Ms. Amy Wong, Northern Laboratory Director

Call to Order:

Mr. Bono called the meeting to order at 10:00 a.m.

Mr. Bono acknowledged Wanda Adkins as the temporary secretary for the meeting.

Adoption of Agenda:

Mr. Bono asked if there were any additions or changes to the draft agenda. There were none. Mr. Cooke made a motion to adopt the agenda, seconded by Colonel Flaherty and it was adopted without amendment by unanimous vote.

Adoption of Minutes:

Mr. Bono asked if there were any changes that needed to be made to the draft minutes from the October 17, 2007 meeting. Mr. Benjamin requested that an addendum be attached to the minutes regarding Mr. Marone's report on the post conviction testing. Mr. Benjamin made a motion to accept the draft minutes with the addendum, seconded by Sheriff Howard and accepted by unanimous vote.

Chairman's Report:

Mr. Bono welcomed Dr. Leah Bush, new Chief Medical Examiner, as a new member to the Forensic Science Board.

Director's Report

Director Marone asked members of the Board to look at the information that had been provided on the 30-60-90 day workload summary reports by lab section as of January 1, 2008.

The DNA Section Chief posting has just closed and interviews will be conducted shortly – again Minimum Qualifications include:

- Master's Degree or Waiver by ASCLD
- 3 years of Laboratory Experience as a Forensic Nuclear DNA examiner
- QA/QC Experience
- Expert Testimony
- Research and Methods Development

Building update:

- Northern Laboratory – Construction is continuing with an expected move-in date in April of 2009
- Central Laboratory – Administration space in Biotech 8 is projected to be ready in February
- Eastern Laboratory – We have acquired 5,700 square feet with another 15,000 space to be available in late summer on the 5th floor for expansion
- Western Laboratory – In the future we hope to be able to acquire additional land adjacent to current location.

Director Marone reported on the following grants:

1) NIJ – Forensic Science Training Development and Delivery Program – development of new training, enhancement of existing training, and delivery of new and existing forensic science training – no \$\$ amount specified – application due Feb. 4. Board approved to proceed.

2) NIJ – Solving Cold Cases with DNA – reviewing, investigating violent crime cold cases that have potential to be solved using DNA – awards not to exceed \$500,000. Board approved to proceed.

3) NIJ - Social Science Research in Forensic Science – improve the practice of processing of impression evidence, including fingerprint, tool marks, bite marks, and shoe prints – no dollar amount specified for individual awards. Board approved to proceed.

4) NIJ - “Research and Development in the Area of Controlled Substances Detection and Analysis” – We have submitted a concept paper requesting \$50,100. The title of the proposed project is “Development of a Thin Layer chromatography Method for the Separation of Enantiomers Using Chiral Mobile Phase Additives.” The project seeks to find low cost alternatives for separating enantiomers which are controlled differently, such as dextromethorphan (NCS) and levomethorphan (Schedule II). Board approved to proceed.

The DNA/Serology case file review of all 534,000 files have been reviewed and pre-screened. A flow chart was provided pursuant to the Chairman’s request. A copy of the flow chart is attached to the minutes.

The review began with 5,000 cases containing human biological evidence. 2,000 of those cases contained only known samples from the Office of the Chief Medical Examiner. 2,215 cases contain crime scene evidence and a suspect and 850 cases have no named suspect. Requests to the Commonwealth’s Attorney, Virginia State Police and the Clerks of Court are being sent on the 2,215 to determine whether or not there was a conviction and what crime he/she was convicted of.

Cases returned from the private laboratory are being analyzed at DFS and fit into four general categories: 1) Suspect is included – you see the individual’s profile on the evidence; 2) Data Insufficient to Reach a Conclusion – very limited data; 3) No results; 4) Suspect is not indicated on the evidence – we have some results and the convicted person’s profile is not there.

Mr. Sengel addressed the Board indicating that the post conviction cases were and are being addressed by the Commonwealth’s Attorneys’ and at a recent meeting in December this issue was discussed quite thoroughly and that the prosecutors in Virginia take their jobs very seriously and are committed to doing what needs to be done with the results of these investigations whether they exclude or exculpate or raise serious questions about the investigation. Governor Kaine has a sub-committee to address possible revisions to the orders regarding this testing. As a member of that committee Mr. Sengel is happy to raise the concerns of this Board to that sub-committee.

Mr. Benjamin requested that DFS report to the Board on the criteria that was provided to them by the Governor on which post conviction cases would be tested.

The Board then took out of order Agenda Item VIII which was the review of the draft letter notifying suspects of evidence in post-conviction testing files that the Board had asked Mr. Benjamin to draft. Mr. Benjamin addressed the Board and discussion took place.

This proposed letter would be for the non tested cases. For those cases that were tested it would be notifying the individual that evidence was submitted for testing and it was analyzed and it tells them what to do if they want to obtain the results of testing and that's to be worked out.

Mr. Benjamin moved that the Board proceed with the development of the letter that he drafted and institute procedures for its dissemination, there was no second and the motion died.

Mr. Benjamin made a subsequent motion that the Board bring the issue to the attention of the Governor and to the Chairs of the Courts of Justice Committees both the House of Delegates and the Senate of Virginia, seconded by Mr. Jensen but Mr. Fisher proposed a friendly amendment to the motion: That the Chair direct Steve Benjamin to develop a letter to the appropriate people in the Commonwealth of Virginia Government outlining the issue and provide the draft at least a month before the next meeting for circulation to the Board in order to take action. Mr. Benjamin agreed to adopt the present amendment offered by Mr. Fisher.

There was general discussion among the Board members on the notification and who would be responsible for this notification. Some of the Board members expressed concern regarding additional workload, fiscal impacts, who the responsible party would be, if this was in the authority of the Board to delegate to other agencies or if it was outside of the purview of the Board's responsibilities.

The motion was defeated 6 no votes to 4 yes votes and 2 abstained: Mr. Benjamin – Yes; Mr. Cooke - No; Mr. Davis – No; Dr. Bush – Yes; Colonel Flaherty – No; Mr. Hade – Abstained; Sheriff Howard – No; Mr. Jensen – Yes; Ms. Russell – No; Ms. Howard - Abstained Mr. Fisher –Yes; Mr. Sengel - No

DFS has been validating and training on Y-STR technology for several years and expects to put this type of testing on-line sometime before July of 2008. Mr. Benjamin reminded the Board that any new protocols or validation studies conducted by DFS are required by statute that the Scientific Advisory Committee review all methods of testing, all scientific programs and report its recommendations to the Board. The statute is mandatory and if DFS is validating and making decisions on new technology we need to have the involvement of the Scientific Advisory Committee and hopefully the Committee will approve of the methodology, testing and the protocols that are being used now.

Mr. Benjamin made a motion to ask the Scientific Advisory Committee to perform and review the Y-STR testing that DFS is validating and report to the Board by the May 7, 2008 meeting, seconded by Mr. Hade and accepted by unanimous vote with Mr. Fisher (Scientific Advisory Committee Chair) abstaining.

The Mitochondrial lab staff has received Mito and CODIS training and has ordered servers for both programs (Mito and CODIS), they should be operational sometime in February. The manuals are currently being drafted and the laboratory should be online and processing casework this spring.

A screening method for unknown powders, tablets and residues utilizing the AccuTOF-DART has been validated and added to the technical procedures in our Controlled Substances section. Staff members in the Central laboratory have undergone training and competency testing to use the technique in casework. Screening using AccuTOF-DART can take minutes as opposed to nearly an hour on the Gas Chromatograph - Mass Spectrometer. Further validation studies focusing on selectivity are ongoing, in order to allow for other methods which may utilize the AccuTOF-DART as a confirmatory tool. This may be valuable in reducing the analysis time of marked prescription tablets.

Status of new blood vial kit – A new kit has been created which should make the process more clearly to the officers – the kit will include pictograms and instructions. In addition, the Certificate of Blood Withdrawal will have user-friendly cuts and instructions to clearly mark the portions which need to be affixed to the vial. The blood vial cannot have the certificate of blood withdrawal on it because there is a time limit for the vacuum tubes and because it can't be put on until after the blood because of the applicator.

Breath alcohol instrumentation – The six month evaluation period will end in late February and we expect to award contract by early March. The first shipment of instruments will be 75 days after the contract is awarded with the remaining of the instruments coming 150 days after the contract is awarded.

DFS and the newly appointed Chief Medical Examiner, Dr. Bush has agreed to have ongoing discussions about the evidence transfers, and timeliness of results in all disciplines, especially toxicology.

Scientific Advisory Committee Report

Mr. Fisher reported that the Scientific Advisory Committee had requested at their previous meeting that DFS research and review discipline specific certification requirements from relevant certification bodies; research and review the training guidelines recommended by Scientific Working Groups (SWG's) and review the individual DFS examiner training programs in comparison to the certification bodies and SWG's. The presentation was given by Dr. Barron and the Committee felt that DFS' training program meets and exceeds what is required.

The Scientific Committee had also requested at their previous meeting a report on Contextual Bias. Mr. Fisher appointed Norah Rudin, Ph.D. and Arthur Eisenberg, Ph.D., to the DNA Working Group and asked that Dr. Rudin give their finding to the Forensic Science Board. A copy of the report is attached as an addendum.

Contextual bias – The subcommittee made recommendations for DFS to consider minimizing the perception of and potential for contextual bias. The Scientific Committee

decided to give DFS time to review and study the recommendations in depth and report back to the Committee at its next meeting.

Mr. Benjamin made a motion that the recommendations of the Working Group be implemented by DFS. Mr. Jensen seconded the motion and passed by unanimous vote.

Breath Alcohol Regulations

Ms. Lohmann, Breath Alcohol Section Chief, addressed the Board on changes that needed to be made to the proposed Regulations on Breath Alcohol Testing. Mr. Fisher made a motion that the Board adopted the Breath Alcohol Regulations with the proposed changes, seconded by Colonel Flaherty and passed by unanimous vote.

Review of Innocence Project Legislative Proposal

Shawn Armbrust, Executive Director of the Mid-Atlantic Innocence Project, addressed the Board and stated that since DFS is validating and training on Y-STR technology and planning to implement this program the legislative proposal by the Innocence Project would be no longer needed.

New Business – None

Public Comment – None

Mr. Bono reminded members that the next meeting of the Forensic Science Board would be May 7, 2008 at 10:00 a.m.

The meeting adjourned at 12:30 p.m.

Addendum #1 -

Subcommittee statement on “inconclusives” in the first 31 Mary Jane Burton cases

At the August 8, 2007 Forensic Science Board meeting, A motion was passed to request the Scientific Advisory Committee to “study, report, and make recommendations on the criteria being used by the lab to report a case as inconclusive in the Mary Jane case file review.”

Because the report containing these conclusions is considered part of the Governor’s working papers, and no separate reports were prepared by the lab, it became a challenge for the subcommittee to gain access to the information that it was requested to review. Ultimately the members of the subcommittee were granted access to the document during a visit to the laboratory that occurred on January 7, 2008.

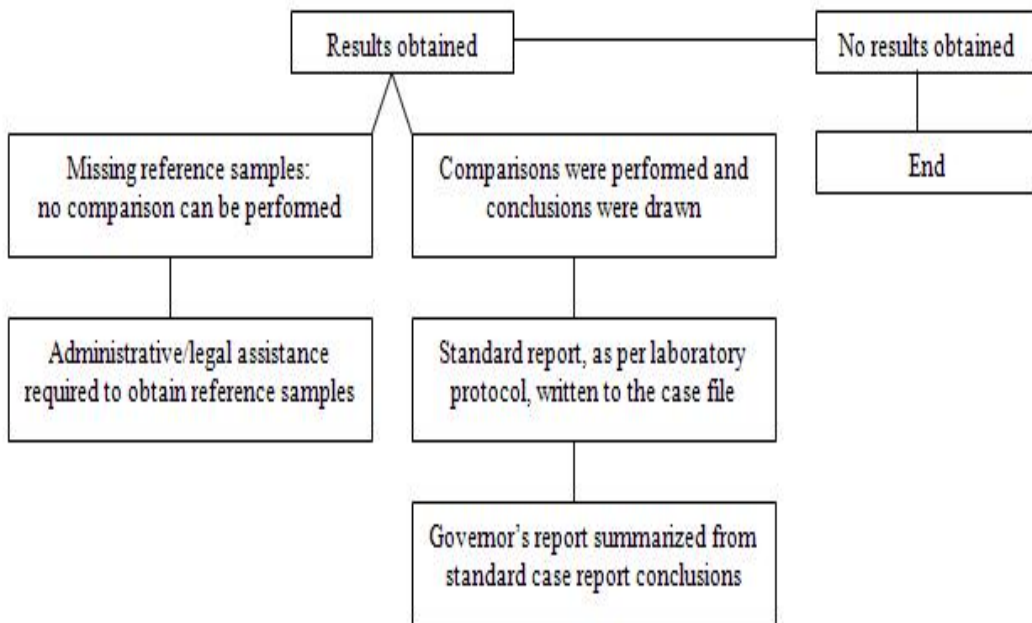
During this visit it was learned that 9 of the original 31 cases had been reported as “inconclusive.” Of the remaining 22 cases, in 6 instances, the suspect was excluded as a contributor of the evidence; however in only 2 of those cases did this information provide the factual basis for exoneration. In the other 4 exclusions, the evidence either was not relevant or did not change the facts of the case, and the convictions stood. In 16 cases, the original suspect was confirmed as a possible contributor of relevant evidence and the convictions stood.

As directed, the subcommittee focused on the 9 “inconclusive” cases. Upon reviewing the Governor’s report, it was found that 4 of these cases were reported as inconclusive because appropriate reference samples were not available. In these cases, results were obtained for the evidence samples that could be compared when and if reference samples were obtained. In 5 of the 9 “inconclusive” cases it was reported that no results were obtained for any of the evidence samples. The subcommittee requested access to the sample data to independently assess this conclusion for each of the 5 cases. Mr. Ban and his support staff kindly provided us with full access to both the case file and electronic data. For 4 of these 5 cases, the subcommittee agreed that no results were obtained; the gel lanes were effectively blank. However, in one case, some weak data was visually observed, and corroboration of this data was found in the case file. Mr. Ban agreed with the subcommittee that, although the data were very weak and no reliable comparisons could be performed with any reference samples, that the existence of the data should have been reported. Specifically, we agreed on the following statement to describe the results:

The results indicate the presence of a limited amount of male DNA. It is not possible to determine the number of contributors or if female DNA may also be present. Insufficient information exists to perform a meaningful comparison with any reference sample.

The subcommittee felt that it was important to provide this information so that interested parties could be fully informed that limited genetic material existed that might be tested in more sensitive systems, such as Y-STRs or mini-STRs.

In light of the confusion resulting from the categorization of these 9 cases as “inconclusive”, the subcommittee suggested a categorization scheme intended to simplify the reporting process and also to clarify and limit the responsibilities of the laboratory. Once cases are received back from the contract laboratory, they can be readily categorized as follows:



Addendum #2: Scientific Advisory Committee - Subcommittee statement on contextual bias:

Among the many reasons that Forensic DNA analysis has become the gold standard for forensic science is the relatively discrete nature of the data. For strong, single source samples, a profile can readily be determined, and is subject to little or no analyst judgment. However, ambiguity may arise when interpreting more complex samples, such as those containing multiple contributors, of poor quality (e.g. degraded or inhibited DNA), of low quantity (e.g. contact samples), or various combinations of these challenging situations. These kinds of samples are encountered with increasing frequency, as the sensitivity of the technology has increased, and as law enforcement has become more sophisticated about the kinds of samples they submit for analysis. Difficult samples are also frequently encountered when reanalyzing historical cases, in which samples were not collected and preserved using the precautions necessary for contemporary DNA analysis.

It is for these types of challenging samples, where the evidence profile may not exactly “match” a reference profile, that confirmation bias becomes a concern. The interpretation of an evidentiary DNA profile should not be influenced by information about a subject’s DNA profile. Each item of evidence must be interpreted independently of other items of evidence or reference samples. Yet forensic analysts are commonly aware of submitted reference profiles when interpreting DNA test results, creating the opportunity for confirmatory bias, despite the best intentions of the analyst. Furthermore, analysts are sometimes exposed to case information, such as eyewitness identifications or suspect confessions, that may compound an unintentional confirmatory bias potentially leading to a false inclusion.

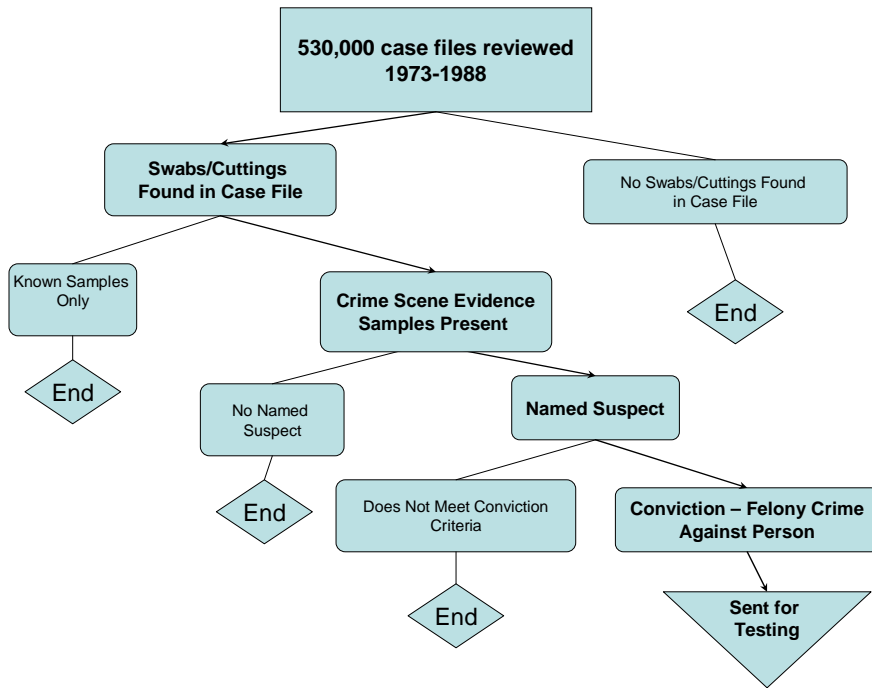
While it is clear that forensic scientists must be provided with case information in order assist law enforcement to determine the best and most relevant samples, and to make informed decisions about the processing of those samples, it is also clear that the analysts who interpret the data must not inadvertently allow case information, in particular knowledge of reference profiles, to influence their interpretation of an evidentiary profile. The following general scheme should serve to minimize the perception of and potential for confirmatory bias:

1. Data from each evidentiary sample must be interpreted independently by two qualified analysts
 - a. Both analysts must determine the evidence profile prior to any comparison with reference profiles.
 - b. Allele calls should be based on defined objective criteria.
 - c. Each analyst must document the specific allele calls, as well as any other notable characteristics of the profile, such as poor quality, low quantity, or possible multiple contributors.
 - d. If, upon comparison, discrepancies are noted, the reasons for and resolution of any such discrepancies must be fully documented.
2. Reference profiles will be compared to evidentiary profiles only after the evidence profiles are interpreted and agreement is reached by the two qualified analysts.
 - a. The comparison must be performed independently by each analyst.

- b. If, upon comparison, discrepancies are noted, the reasons for and resolution of any such discrepancies must be fully documented.

Members of the subcommittee are willing to work with the laboratory to assist in incorporating these safeguards into the DNA analysis protocol.

Addendum #3: Post-Conviction testing project flow chart



Addendum # 4- Transcription of Report on Mary Jane Burton Cases

Pete – The post conviction testing project all 534,000 case files have been reviewed and screened. You have been provided with a flow chart, Joe asked for a flow chart last to understand where we are going with things. Basically the flow chart shows the case file reviews. Number 1 we are identifying in that fact serology cases with human biological evidence in the case file for all the testing that was conducted there are about 5,000 of those. Of those items crime scene the way the process is going we are determining the equal _____. There sometimes there's evidence in it that's about 5,000 samples. Of those about 2,000 were known samples, Medical Examiner's Office had the practice of getting a death investigation blood sample dried down and then there was no really where to go with it, the known of the deceased. The crime scenes sample that actually had some kind of evidence in there that was applicable of about 3,000 cases of crime scene evidence and then the next step is if there a suspect name, yet about 850 had no named suspect or no suspect listed on our case file and the number that you are all familiar with is 2,215 that the number we are pretty solidified now and Steve I think the question was it 2,208 or 2,215. The number we are sticking on is 2,215 now. Those have crime scene evidence and a named suspect. The next question is was that person convicted of that crime. Yes-No. If not, we are not going to be doing anything with it but maintaining the evidence everything it does meet the criteria, yes a conviction of felony conviction crime against person is the criteria the Governor gave us. Work towards that is set for testing. O.K. So we are sending the cases that fit all that criteria to the laboratory as we determine as we get the information and we are determining whether the person has been convicted or not by approaching the State Police. We are asking them for conviction records, talking to the Clerk of Courts, we're talking to Commonwealth Attorney's and between the three of those we are getting information back to determine whether the person has been convicted. Once we get that we are sending along even if we don't have the subject sample and not waiting to try to find the individual to get a subject sample because if we find out there's either no evidence or the guy is included in the limited stuff we have we are not going to go back-up and get a known sample to try and identify the person. If we don't have it then all the letters are going back again to the police departments or the prosecutors saying we need to get a blood sample from (cough – not audible) get a sample. What the State Police has agreed to do is, if for one reason or another for example the person is outside the law enforcement jurisdiction or the Commonwealth Attorney can't identify them State Police will pick it up and try to run the person down. They don't want to step in front of and maybe step on a local law enforcement agency toes, if the agency comes back and says we can't find them or they are not in their jurisdiction anymore State Police will pick up from there and that's the way we are handling those samples. When the case is returned from the private laboratory we are analyzing the data and they fit into 4 categories: Suspect is Included – in other words you can see the individual's profile on the evidence; Data Insufficient to Reach a Conclusion – there is very limited data; No Results there; Suspect is Not Indicated on the Evidence – we have the evidence we have the results and the individual's profile is not on it. In each one of these cases we are writing a report back to the law enforcement agency, back to the prosecutor, back to all the people which includes the defendant if we can find them, if we can get an address.

Mr. Benjamin: Is that a certificate of analysis? Is this certificate of analysis being filed with the clerk's office?

Mr. Marone: Filed with the prosecutor and its up to them to file it. We don't file.

Mr. Benjamin: You do not,

Mr. Marone: Routinely we don't file

Mr. Benjamin: Routinely they go back to the submitting agency don't they?

Mr. Marone: Yes

Mr. Benjamin: You're right, right

Dr. Bush: Can I ask a question?

Mr. Bono: of course

Dr. Bush: I hope this isn't a stupid question, but in some cases is there a possibility that there is somebody out there that the defense knows about that the Commonwealth may not be aware of something, is there a way for the defense to approach you about this. Is it publicized enough so if there's a defense attorney out there with somebody sitting in jail that they can approach you in some form or fashion you know to say that you have not contact us about this, but my defendant or my person is in jail and they can get some action.

Mr. Marone: We get several of those a month by the way, we got three this week.

Dr. Bush: O.k.

Mr. Marone: The defense I've got a client is he in the pool and we tell them yes we have that name yes we are working on it and if we know where we are and have results we let them know.

Dr. Bush: O.k.

Mr. Benjamin: Do you let them know if there is even if you don't have results you let them know there is evidence samples in the file, o.k.

Mr. Marone: If they ask, we don't actually go out and tell everybody, but if they ask we tell them we have it. It's the process that started this whole ball rolling, for example the Innocence Project calls up and I'm representing so and so do you have evidence left? We go into the file if it's there we tell them we do.

Mr. Benjamin: Right and I think all though this is latter in the agenda we also talking about becoming more proactive and notifying people that we can identify that does in fact exist evidence that could be tested in the file.

Mr. Marone: That's something you brought up

Mr. Benjamin: O.K. that's later in the agenda, but that's also what will fully answer the question that's another item that we

Dr. Bush: Absolutely we get them to look, somebody to not know about this, you know

Mr. Benjamin: Right, right

Mr. Fisher: I'm from California so I understand these things in following these Mary Jane Cases I find them to very interesting because the laboratory has been placed in the middle of everything where from my understanding of case law this is really the prosecutor's responsibility because this is what would be Brady material, that they have a duty if its material to provide to the defendant or person in prison or his lawyer. I'm curious to know what the prosecutor bar, commonwealth attorney or the attorney general is doing with all of this stuff, because I think that the focal point of the laboratory maybe misplaced and ought to be looked at.

Mr. Marone: I have been dancing around that very subject for the last year, literary we note, at the point where we have the individual, we have evidence and we are looking to see if we have a conviction. We are essentially notifying the prosecutor this individual is in play tell me what he's convicted of and notify the prosecutor if they have something to do. Maybe Randy would like to pick it up from there.

Mr. Sengel: I echo your concern and I understand what Steve's concern is and I understand what you are trying to do but, I don't why these cases ought to be treated any differently in terms of procedure and processed than any other investigation that you do for a law enforcement agency. Your statutory mandate in terms of who you report to and who you work for does not include reporting the results of laboratory investigations to people who are suspected of committing crimes. Obviously if there's a case in which the results are obtained you report that to your local law enforcement agency and it's our obligation I think to make sure that the right result obtained from that investigation whatever it is and I would like to say that at a recent meeting of the Commonwealth Attorney's Association in December in Richmond this issue was discussed quite thoroughly and I feel confident in saying that prosecutors in Virginia take this stuff very seriously and are I think obviously committed to doing what needs to be done with the results of these investigations whatever they maybe and if they are results which exclude or exculpate or raise serious questions about an investigation I think its fair to say that the prosecutors are going to do what needs to be done in terms of notifying people about that. I guess I'm a bit puzzled at the notion that if you obtain results in one of these cases you would take it upon yourself to send notices of those results to a person who had been suspected of being involved in a crime or even to a defendant when he was represented by counsel and the case was investigated by a law enforcement agency. I think it's our responsibility to get that information and make sure that it's properly handled and the right thing is done with it. I may be jumping ahead on the agenda here, but I think that pretty much what the prosecutor's perspective on it would be.

Mr. Jensen: If I could make sure I understand that if I go to the flow chart named suspect, can you define and if you did it earlier I apologize, the conviction is the person convicted of a crime

or incarcerated or given any punishment maybe they are still in jail or maybe they've been release. What the definition that does not meet conviction criteria?

Ms. Gowdy:convicted of a crime against person inaudible

Mr. Marone: Or he was convicted of a lesser offense _____ inaudible

Mr. Jensen: In Virginia, but if they had that misdemeanor conviction or something of a less conviction that conviction don't count against them in like the 3 strikes rule

Mr. Benjamin: Let me put it in an easier to understand example, let say someone breaks into a home and rape an occupant and they are charged with rape and breaking and entering. As a result of a plea negotiation the rape charge is dropped and they plead guilty to burglary which I don't think the department is treating as a crime against the person and so that means that they maybe serving a 30 or 40 year sentence for burglary but they would be ineligible for this testing even though biological evidence recovered from the victim might exclude them where it to be tested and that to me seems like a unattended result of the program and an unattended result of the Governor if this was his criteria. Was this in fact Pete his criteria he said he only wanted tested for felony crimes against the person.

Mr. Marone: Very clear

Mr. Benjamin: Did he define when he said against the person which steps are using a particular definition of what constitutes a crime against a person? How does the lab determine whether a felony

Mr. Marone: Homicide, rape or sexual assault and that was it, really

Mr. Benjamin: O.k.

Ms. Gowdy: _____ inaudible

Mr. Benjamin: In the correspondence, o.k. so the Governor ask the Department to test those cases where you had crime scene evidence present in the file where there was a named suspect and where that suspect was convicted of and did the Governor use the word crime against a person, felony against a person or did he just name these specific categories?

Ms. Gowdy: I've have to go back and look _____ inaudible

Mr. Jensen: _____ inaudible They may not have been convicted of a crime but the evidence was most certainly used _____ inaudible but we don't know what was used

Ms. Gowdy: We don't know

Mr. Benjamin: What we know is that there could well be cases where there is biological evidence that exists that if it were to be tested may exonerate a person who is serving an

extremely lengthy prison sentence. In my opinion we have a duty to test that anyone considering this would want to test it and I think the Governor would want to test it. I don't know, well,

Mr. Jensen: You mentioned yesterday

Mr. Benjamin: Randy has a suggestion.

Mr. Bono: Let's bring this back to one at a time.

Mr. Sengel: Governor Kaine has put together a subcommittee to address possible revision to the marching orders governing this testing process. I'm a member of that committee and would certainly be happy to raise that issue to see if there is a way to tweak that language so that if there are these cases where that's a area that you describe that arises I think perhaps you maybe overstating the case. I can't remember the last time somebody got 40 years for burglary conviction in Virginia but I think again that goes back to point that if that information goes back to the prosecutor it's the prosecutor obligation to go back and examine that case very carefully and make that kind of determination that you are talking about which is notwithstanding the fact that this is a properly crime or something like that if there a possibility of exonerated here then it should be further looked at.

Mr. Jensen: But that information is furnished

Mr. Bono: I think Barry wanted to make a comment.

Mr. Fisher: I have a hypothetical question for Pete, Randy might want to jump in. Assume that someone been convicted of rape and in viewing the Mary Jane files you examine the evidence and through your DNA testing find that this is not the right person, his DNA is not the DNA found in the seminal fluid and you provide that information to the prosecutor as is your responsibility and the prosecutor decides that he doesn't feel that its material, have you dismissed your burden or do you need to do anything else or what might be done

Mr. Marone: We put that in writing and sent it to them and that where it gets into Randy's question on who has to be notified is problematic. We don't have the man power to go back and check to make sure that they made the right call. I'll give you a for instance we had one particular case not sure which batch it is in, but the individual was not included was not there and the prosecutor looked at the case not a problem this was a niece-uncle, she knew who he was there was no question on who it was he admits that nothing happen and the DNA we were picking up was from her boyfriend that kind of thing. They know they went back and looked at the whole case, at face value it looks to us and we don't anything about we're not an investigative agency we're not a legal agency we notify them of what it is and you know what can I do I can't be in a position to question their logic and they have formal knowledge about the individual case then we would have. What could I do other than notifying them, I really have no more authority to do anything other than that, is there a responsibility after I have notified an officer of the court, no I don't know, I don't think so.

Mr. Bono: Randy do you want to weigh in on that?

Mr. Sengel: You know there are cases in which a prosecutor might conceivably make that call, but I think the bottom line is that in my experience they're going to make a call for the right reasons. It's not going to be a case where a prosecutor simply says well I can't be bothered I don't want to worry about the fact that there maybe somebody who is not guilty of the crime whose locked up for something that they didn't do. I mean in order for a prosecutor to make the assessment of whether or not a report like that is or is not material they have to go back and look carefully, examine the case and see whether there was a confession from the defendant, was there more than one perpetrator identified at the crime scene, is there other evidence to the prosecutor's satisfaction that supports the conviction of this defendant and if there is fine and I also think that prosecutors would weigh on the side of any plausible reason that would justify further investigation is going to be done.

Mr. Fisher: My question was has he fulfilled his duties?

Mr. Sengel: I think he has.