NEW YORK STATE ASSEMBLY
STANDING COMMITTEE ON CODES
STANDING COMMITTEE ON JUDICIARY
STANDING COMMITTEE ON OVERSIGHT, ANALYSIS,
AND INVESTIGATION

PUBLIC HEARING ON
GOVERNMENT OVERSIGHT OF FORENSIC SCIENCE LABORATORIES

250 Broadway, New York, New York
Assembly Hearing Room 1923, 19th Floor
Wednesday, February 8, 2017
10:00 A.M. -- 2:15 P.M.
ASSEMBLY MEMBERS PRESENT:

ASSEMBLY MEMBER JOSEPH LENTOL
Chair, Assembly Standing Committee
On Codes

ASSEMBLY MEMBER HELENE WEINSTEIN
Chair, Assembly Standing Committee
On Judiciary

ASSEMBLY MEMBER MATTHEW TITONE
Chair, Assembly Standing Committee
On Oversight, Analysis and Investigation

ASSEMBLY MEMBER CHARLES LAVINE

ASSEMBLY MEMBER JO ANNE SIMON
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**Erin Murphy**
Professor,
New York University School of Law

**Marvin E. Schechter**
Attorney

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**Barry Scheck**
Co-Director,
The Innocence Project
Former Commission Member,
NYS Commission on Forensic Science

**Sarah Chu**
Senior Forensic Policy Associate,
The Innocence Project

**Scott McNamara**
District Attorney, Oneida County
The District Attorneys Association of NY

**Roger Muse**
Vice President of Business Development
ANSI-ASQ National Accreditation Board (ANAB)

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**Richard Torres**
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ASSEMBLY MEMBER JOSEPH LENTOL, CHAIR,

ASSEMBLY STANDING COMMITTEE ON CODES: May I ask everybody to be seated please? We’re going to begin the hearing. We were just waiting for our first witness but he’s not here yet. And we’ll take him later on in the day if he shows up. So, good morning everyone.

ALL: Good morning.

ASSEMBLY MEMBER LENTOL: I’m Assemblyman Joe Lentol and I’m Chairman of the Assembly Codes Committee. And I’m pleased to be joined by Helene Weinstein, who is Chair of the Assembly Judiciary Committee. And we’re expecting Matt Titone.

ASSEMBLY MEMBER MATTHEW TITONE, CHAIR,

ASSEMBLY STANDING COMMITTEE ON OVERSIGHT, ANALYSIS AND INVESTIGATION: Yes, we are.

ASSEMBLY MEMBER LENTOL: And here he is. And he came all the way from Staten Island to be here with us. And Matt is Chair of the Oversight, Analysis and Investigation Committee. I would like to thank all of you for attending this
morning and participating in this very important hearing. Maybe the first one of its kind outside of the Forensic Science Commission having hearings, at least by the Assembly, that I can recall. Many of you also have traveled long distances to be here. And I know I speak for all my colleagues when I say how much we appreciate your being here and your efforts.

New York State’s modern criminal justice system relies on evidence gathered at crime scenes, including fingerprints and DNA. This evidence is processed through science laboratories and assists law enforcement and prosecutors in investigations which can lead to conviction of a suspect. Disturbingly however in recent years, there have been several instances of misconduct in forensic labs and elsewhere in the country, resulting in errors and falsified results. These errors can range from systematic failures to inexperience of staff, to failures in following protocol.

The breakdowns could have been avoided if there had been appropriate oversight in place.
I think. And a very frightening possibility that errors committed in the analysis of handling evidence might lead to a wrongful conviction because, my God, we have enough wrongful convictions already; should not be overlooked or minimized.

Given the public’s reliance, having watched all of the TV shows about crime and DNA and law and order, that you know how important DNA is in the public’s mind. So misplaced faith in the integrity of poorly supervised and rarely reviewed laboratories could lead to many innocent prisoners languishing in our State prisons. So this hearing is to examine what oversight currently exists for forensic labs in New York and how we as Legislators can work to make a better system that ensures appropriate practices are in place and that forensic labs are appropriately supervised. Before we begin I would like to note that the State Police and the Office of the Inspector General were all invited to testify but they unfortunately chose not to appear. Division
of Criminal Justice Services and the Medical Examiner of New York City and the New York Civil Liberties Union were unable to attend today but they all have or will be submitting testimony, just so that you know that.

With that, let’s get started. I’d like to ask witnesses to first introduce yourself and what organization you represent. And as a reminder, we expect this to be a long hearing and we want to limit witnesses in their testimony to ten minutes; so that we can ensure that all of those testifying get a chance to testify and an opportunity to be heard and enough time for us the Members to ask you questions. So remember, please introduce yourselves for the record.

And the first witness will be another first in New York State. This is the first Skype witness that has ever testified before an Assembly Committee. I don’t know about Senate Committees. And that witness will be Barry Scheck, Co-Director. Now he’s on a panel with Sarah Chu. Is she in the audience or is she also on Skype? Sarah, why don’t you step up and sit
and introduce yourself. And we’ll let Barry
introduce himself by Skype and I hope we can hear
him because I know all of you want to hear what
he has to say and so do I. Does anybody else
before we begin, any Member have a statement to
make? Matt Titone?

ASSEMBLY MEMBER TITONE:  Certainly,
sure. Just while we’re waiting --

ASSEMBLY MEMBER LENTOL:  Chairman
Titone.

ASSEMBLY MEMBER TITONE:  Thank you,
Chairman Lentol. Chairman Lentol actually had
mentioned that this is one of the first of its
kind that we’ve ever had but it certainly is in
my mind one of the more important ones that we
will be doing this year. It’s important not only
to victims and their families but to an accused
and their families but also to law enforcement;
because law enforcement needs to know and our
district attorneys need to know that the evidence
that they are presenting to we the people is
accurate and reliable. So, I think this is a
really great step towards ensuring true justice
ASSEMBLY MEMBER LENTOL: Thank you, Matt. Are we having trouble electronically already? I always pull out the plug and then plug it back in. While we’re waiting, I just want to take this time to thank the staff of the Assembly Codes Committee and the Assembly Judiciary Committee for assisting in the preparation of this hearing, especially Nate Jenkins, who’s sitting in the back, who did most of the legwork to get you all here and to prepare us for this important hearing. Thank you, Nate. And thank you, Nadia, for being here as well, for helping as well. Maybe Sarah can start with her testimony and we can wait until we -- yeah, we can do an audio? This is an example of how technology can fail us. I know it’s not our tech wizards in the back because they spent all day yesterday and today trying to prepare us for this Skype testimony.

We can go to the next witness and call him next; alright, Sarah? Okay, let’s do that instead of delaying. McNamara, the District
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Attorney of Oneida County, the President of the District Attorneys Association?

This may be good, we have the next panel: Marvin Schechter, Attorney, and Erin Murphy, who is a Professor at the New York University School of Law.

MS. ERIN MURPHY, PROFESSOR, NEW YORK UNIVERSITY SCHOOL OF LAW: Good morning.

ASSEMBLY MEMBER LENTOL: We’ll begin with you, Erin, or does Marvin want to start?

MS. MURPHY: I guess I’m first up. I was anticipating to be a little more background. So hopefully my remarks will fit in well. But thank you, Chairman. We’ll jump right in. Good morning. My name is Erin Murphy and I’m a Professor at NYU School of Law. My research relates to the use of forensic evidence in the criminal justice system, with a particular emphasis on DNA technologies. And I’m the author of the 2015 book Inside the Cell: The Dark Side of Forensic DNA. I’m proud to report my work on these issues has been widely referenced and reproduced, including in citations by the Supreme Court of the United States.
My expertise rests in general issues surrounding forensic evidence, rather than an intimate familiarity with New York courts and New York practice. But I hope my testimony will place into context some of New York’s own experiences with the larger fabric of forensic testing in the United States. As we heard from Assemblyman Titone, I think we all agree that the protection of our safety and liberty in our State turns on reliable and accurate forensic testing.

Over 20 years ago, New York established itself as a leader in the field of forensic science by passing the law that created the Commission on Forensic Science. And that law paved the way for a promising future of meaningful oversight for testing and analysis. Among other things, the law explicitly tasked the Commission with setting accreditation standards for labs and minimum qualifications for certain personnel. It also established the State DNA Index, setting into place one of the law enforcement’s most powerful tools for identifying suspects and exonerating the wrongly accused.
New York in enacting this legislation in 1994 immediately distinguished itself from other states. At that time few laboratories conducted DNA testing at all, much less in any kind of systematic way. And most forensic laboratories were not accredited. What is more, accreditation didn’t really mean much. It was essentially a dues that you paid to an organization rather than rigorous standards of reliability.

Unfortunately a lot has changed in the forensic field since 1994, but not much at all has changed in the law and practice of New York. The system of oversight that was established long ago has not proven up to its task. And sadly New York has weathered a series of scandals, all involving laboratories accredited under the Commission’s regulations and overseen by the Commission that nonetheless failed to meet even basic standards.

To give just a hint of the scope of the problem, the Office of the New York State Inspector General has conducted search and reviews into the practices at the Nassau County
Police Department Forensic Bureau, the Morrow County Public Safety Laboratory in 2009 and again in 2012, the Erie County Department of Central Police Services Forensic Laboratory, the Trace Evidence Section of the New York Police Investigation Center and New York City’s own Office of the Chief Medical Examiner.

In each case the reports revealed not just forensic analysts gone rogue but deep and systemic flaws in the oversight, training and management procedures at those laboratories. And each of those reports provides detailed suggestions for improvement that go beyond the scope of the time I have here but I encourage the Assembly to consider them closely.

So what can be done? First, the Assembly and/or the Commission should set its own more demanding standards for laboratory accreditation, certification and proficiency testing. These three features are the pillars of forensic excellence. Accreditation just means that a laboratory meets basic standards of competence in its protocols, validation methods and operations.
Proficiency testing speaks to the ability of an individual analyst to competently perform his or her job. And certification is an award or a denomination given at a test or to show that they can pass a demonstrable standard of knowledge in their field.

So, first, accreditation. Although the accreditation process has grown more rigorous, the continued failures at accredited labs demonstrate that it still fails to do enough to safeguard lab integrity. One unknown factor right now and I’m glad that we have a representative from ANAB here is that there’s been a lot of change recently in the field of forensic oversight. For many years, the Association of Crime Lab Directors or ASCLD ran an accreditation program that functioned like a professional organization. Eventually the laboratory accreditation board of that organization broke off, forming the accreditor known as ASCLD/LAB, that as of 2014 accredited 73 percent of all the accredited labs in the United States. The alternative creditor known as FQS accredited
another ten percent.

Recently, ANAB acquired both FQS and ASCLD/LAB, which consolidates the market for forensic accreditation. They’ve been in the process of revising their accreditation standards and I think we’ll hear more about those. But I encourage this body to set standards that can help guide them in terms of their implementation of a new round of forensic oversight. What kind of standards might those include? Well, historically accreditation has been a purely paper review, executed with full notice to the laboratory with plenty of warning to anticipate.

Laboratories can object to assigned accreditors. They choose the date of their inspection. There’s no requirement that the lab is assessed during field conditions. Instead it can be in a sort of artificially pristine environment. There is no component that requires independent testing or retesting and verification, such as through random pulls of cases of the laboratory’s performance.

Accreditation occurs on a five-year cycle, with
only check-ins in between and the accreditation reports are not publicly available.

Similarly, with regard to proficiency testing, proficiency testing typically requires analysts to pass a declared test using samples that often don’t match the challenges of true field work. Instead more rigorous testing standards would either involve random reanalysis of existing work, so pulling existing cases and then actually conducting an analysis again to make sure that they are accurate or blind testing that simulated real world conditions.

Nationwide only 35 percent of crime labs conduct random reanalysis and this is down from 54 percent in 2002. Blind testing has also fallen precipitously from 27 percent of labs in 2002 to only ten percent today. And although some criticize proficiency testing, blind proficiency testing as too resource intensive and unworkable; it’s significant that other jurisdictions do successfully implement these programs.

In the Inspector General’s report on the Nassau County Lab failure, a series of its
concrete recommendations related to just these matters; including requiring that the Forensic Commission set minimum standards for each discipline, encourage transparency and accreditation and institute better programs for proficiency and certification.

The Commission could also profit from work done by the National Commission on Forensic Science and the Organization of Scientific Area Committees, which is housed within the National Institute of Standards and Technology. Both of these bodies have already put forward a wide array of expertise in various areas.

Contrast New York’s treatment of clinical laboratory testing or the program of clinical laboratory evaluation. The federal statute sets a two-year cycle for accreditation. For complex testing, it requires proficiency testing twice a year. It sets a limit of the maximum number of slides a technician can screen in two hours, to avoid the kind of mistakes or incentives to dry-lab that are pervasive in forensic science. It sets our rescreening rules.
It requires unannounced inspections to full access to lab materials and imposes restrictions on testing done by labs with prior misconduct. 

Or more pointedly, consider another regime, regulatory regime altogether. Imagine an oversight system that would start with random, unannounced inspections at least once a year to ensure the organization met a long list of quality assurance standards. Imagine inspectors would assign scores for compliance and any entity not awarded the highest marks would receive a second unannounced visit within a month to check for improvement, followed by continued visits if improvements didn’t occur.

Imagine the entity would be required to post its score publicly and detailed reports from these surprise inspections would be easily available on a city website. Imagine that all times the organization would be required to have on hand supervisors certified in quality assurance who would watch over line workers and ensure proper procedures were followed.

Such a system would create not just
powerful incentives for the audited organization to perform to the highest standards but allow for greater transparency for consumers over those services to make educated judgments about that entity.

If such a system sounds infeasible or unrealistic or too intrusive, then notice that it’s the exact system that New York City put in place to safeguard the integrity of the 24,000 restaurants we have; each of whom must pass rigorous food safety and handling standards and make public the results. Geneticist Eric Lander famously said: Clinical laboratories must meet higher standards to be allowed to diagnose strep throat than forensic labs must meet to put a defendant on death row. In New York, we currently seem to value the safety of our sandwiches over the safety of our streets.

Second, mandate a root cause analysis for every significant event involving forensic testing. After the scandal involving the analyst at New York City’s Office of Chief Medical Examiner, the City Council of New York City
convened a series of hearings that concluded in the passage of New York City’s Administrative Code 17-207.

That provision requires a root cause analysis to investigate any significant event occurring during the testing process. It helps ensure that laboratories don’t just brush off such errors as the product of a single lab but rather investigate these systems fully and including the management and supervision that permitted that error to occur. It also ensures these problems are brought to the attention of the appropriate constituencies, such as city officials, prosecutors and defense attorneys; so that any necessary legal corrections can be made.

Such comprehensive self-analysis might also improve the Commission’s own oversight capacity. For instance, it’s become increasingly clear that the existing structure of the Forensic Science Commission limits it to paper reviews, often by self-reported entities of problems within labs. The Commission doesn’t conduct its own independent reviews nor commission such
Thus, for instance, New York’s Inspector General report on the Morrow County Lab revealed that the director was able to mislead the Commission in a situation involving analyst deceit. In that case, the director reported that the analyst’s failure to detect biological material and stated that there were three negative results in other cases. A Commission member asked whether corrective action had included retesting in those cases and the director responded in language suggesting it had. Later inquiry revealed this was not true. Only one of the three cases had actually been retested. But because the Commission had no capacity to check those claims, they were unchallenged.

Similarly, in 2011, the report investigating the catastrophic failures of the Nassau County Public Police Lab, the State Inspector General concluded that the Forensic Commission abdicated most if not all of its responsibility for oversight of the State labs to
the private accrediting agency.

Indeed, at that time the IG observed that notwithstanding the Commission’s broad legislative mandate, in the history of the Forensic Commission no laboratory has ever been served with a notice of alleged violations. In short, the Commission rarely if ever exercises an independent power to revoke or suspend a forensic laboratory accreditation.

Three, reconstitute the Commission in both its charge and its composition to better serve as an independent voice for forensic science. The Commission itself appears to have structural flaws that prevent it from operating as a truly neutral oversight body and perhaps an insufficiently broad legislative mandate. The current composition of the Commission is prescribed by statute and its composition tilts heavily in favor of government and laboratory interests which often align.

Moreover, it is tasked chiefly with accreditation and oversight in language that appears to focus on technocratic tasks. But in
reality the Commission’s decisions impact issues that directly implicate legal practice, public policy, constitutionality, ethics and privacy. Yet, the Commission has failed either to take meaningful steps to bring such debates to the public or to press them toward legislative resolution.

Compare for instance the Texas Forensic Science Commission, which has emerged as the national leader on state level forensic issues. In contrast to the New York Commission, which has only a skimpy web presence and makes it difficult to find useful information; the Texas Commission has an easily navigable, informative site that reflects both the scope of their mission and their transparency in serving the public. You can easily find their annual reports, which contain detailed information about complaints and pending investigations. There are links to update the independent review work they are doing in microscopic hair analysis and DNA mixture analysis that are prompted by efforts on the federal level.
There’s a link to submit complaints about laboratory performance or analysis; a separate place to inquire as to status of such complaints; links for public information or opportunities to testify. There are also links to current information regarding specific laboratory accreditation standards listed by laboratory, the period covered and the type of evidence approved. To be clear, New York has undertaken some of this work but it fails to make its findings easily accessible to lawyers and practitioners who will benefit most from them.

Since the Commission’s founding there has been a series of landmark events in forensic science: a 2009 National Academy of Science report, which is called Strengthening Forensic Evidence, that called in question most forensic disciplines; a series of pronouncements by the Federal Bureau of Investigation regarding various techniques, most importantly hair microscopy; and the 2016 Presidential Council on Advisors of Science and Technology Report.

These reports by blue ribbon panels pose
serious questions about the quality of most forensic evidence used in our courts. Yet, the New York Commission has not responded meaningfully and certainly not in a leadership role to these challenges.

In contract, the Texas Commission has led the way, taking bold stands on controversial and discredited forensic methods, such as: publicly calling for a ban on bite-mark evidence; issuing reports to undermine the faulty myths that pervade the field of fire investigation; proactively requiring its laboratories to submit their DNA mixture interpretation protocols to an international expert panel; meticulously retesting cases involving trace amounts of DNA in light of the announcement by the FBI of statistical error; and just generally serving as a repository for the latest in forensic news. The Texas Commission is functioning not as a passive rubberstamp for government requests but is an active oversight body and information repository for forensic science in the state, as should our own.
Four, improve transparency in forensic science. In some respects the prior point calls for greater transparency. Given my time, I’m just going to skip over that but I will point to the New York City Council’s proactive efforts in this regard also in passing a statute to improve this issue.

Fifth, establish a resource council for defense attorneys. We all recognize the critical role that forensic evidence plays in criminal cases. And yet I think we know that in the real world, defense attorneys are not often able to challenge and interrogate the evidence due to pressures of their caseloads. In North Carolina, one solution to this problem has been establishing a Forensic Resource Council within their Indigent Services. Since then that office has served to advise the state’s public defenders on forensic evidence in the case.

With little more than lean staffing and a well-maintained web presence, the office has collected scientific resources otherwise inaccessible to attorneys by subject matter;
provided resources to help attorneys understand and monitor the state’s crime labs and analysts, including accreditation and proficiency testing results; giving resources to an array of experts; giving templates for motions and orders; collating testimony from analysts in prior cases and even engaging in limited case consultation.

In addition the site provides access to 100 free online forensic training modules and protocols for laboratories in the state. It’s a highly cost-effective model. And it’s especially effective in areas such as upstate New York that have widely dispersed indigent defenders with less ready access to experts on their own. It also serves as a good institutional check on the forensic laboratory system and a resource for legislators and other state actors seeking to obtain broad, statewide information about local practices.

Six, clarification of legal standards related to the collection, retention, analysis and search of genetic information. Given that genetic information is my particular area of
expertise, I’d be remiss if I didn’t spend a
moment addressing the special concerns by this
particular method.

We’re in the earliest days of our
understanding of the genome and all that might
one day glean from it. Researchers have already
made tremendous progress in various aspects of
genetic knowledge and are pushing for more
information about things like: propensity for
violence, sexual deviance, mental illness or
addiction. Yet as scientists rush to unlock the
secrets of the genome, law enforcement presses to
expand the collection, analysis and use of DNA.
And the advent of one-touch, 90-minute DNA typing
machines is likely to put pressure on this body
in the near future to embrace compulsory testing
of arrested persons.

Already there are calls to engage in
familial search methods, a technique that I feel
effectively turns relatives of convicted persons
into second-class citizens. Other jurisdictions
have relied on DNA testing to examine crime scene
samples for phenotypic traits; so they can
produce a kind of genetic mug shot image of a suspected perpetrator. Practices such as surreptitious DNA sampling, retention of samples given voluntarily and defense access to databases for exculpatory DNA are all likely to arrive on the legislative agenda at one point or another.

The current mandate of the Commission makes the scope of their authority to address such issues unclear. And the current composition of the Commission makes delegating it with authority over such matters unwise. The kind of comprehensive overhaul of forensic oversight imagined in my remarks could create a body that even if not expressly tasked with decision-making on such weighty matters would better serve in an advisory capacity to this Assembly.

In sum, although New York once led the way in forensic practices, we have fallen badly behind. As a result, the State is no longer protecting the safety of our citizens, nor their liberty interests as much as it should be. Though with benefit of a wide array of expertise from those within our own State to resources and
insights from other state and federal actors, this Assembly can help us regain our prominence in the field. Thank you.

ASSEMBLY MEMBER LENTOL: Wow, that’s a lot to digest.

MS. MURPHY: I’m sorry that was so quick, yes.

ASSEMBLY MEMBER LENTOL: Why don’t we go to you, Marvin? And then we’ll go to questions. I hope I don’t lose the train of thought that you’ve put me on.

MR. MARVIN E. SCHECHTER, ATTORNEY: Well, I’ll help you there, Chairman Lentol, by just simply beginning by saying I agree with everything Erin said. But I don’t want to lose the opportunity to express some other ideas and thoughts that I have. My name is Marvin Schechter. I’m a practicing criminal defense attorney of some 43 years. And I am currently a member of the Commission on Forensic Science and have been a member since 2010. My time on the Commission is coming to an end. I’m about to be replaced, hopefully by somebody far smarter and
more aggressive than I’ve been.

We are one of the few states that has a Commission on Forensic Science. And we are also one of the few states that has a mandatory accreditation requirement. One would have thought that the mere establishment of the Commission and the establishment of mandatory accreditation would have put us in the forefront of forensic science in this country. Instead, as my colleague has pointed out, we have fallen far, far behind. What happened?

Well, for starters, we don’t have an accreditation system. When the Legislature passed the law that established the Commission, it delegated to the Commission the right to go hire an outside vendor to do the accreditation. It did. The outside vendor turned out to be an organization known as ASCLD/LAB. Let me just stop for a moment and tell you that all of my written remarks center around ASCLD/LAB. ASCLD/LAB is gone. It was recently bought out. There’s a new sheriff in town: ANAB, which has gotten into the forensic science accreditation business. And it
remains to be seen what ANAB will do in terms of setting forward new rules and regulations as an accrediting agency.

More importantly for the Legislature, you should keep your eye on what the Commission intends to do with respect to which accrediting agency they will accept. One of the beauties of ASCLD/LAB for the forensic science industry was it was an industry group. It was created as an industry group. It was kept as an industry group. And in fact its entire system was aimed at protecting the industry. That’s what happened. There’s no question about it. People can argue about it. But all you have to do is look at the rules and regulations and you’ll find that what ASCLD/LAB created wasn’t an accreditation system; it was an audit system.

What’s the difference? An accreditation system takes a look at the quality of work being done by the labs and it assesses what’s going on and what’s happening. And then the accreditor turns to the lab and says: This is not the way this is supposed to be done. And in fact it's
leading to bad science and bad results.

And we had that with one of our labs in 2013 when the Suffolk County Crime Lab came before us and ASCLD/LAB was moving from one system to a new system. They found 26 violations of how that lab was running; some going back 20 years, through several ASCLD/LAB accreditations where they had been approved. And yet it took three visits by that lab before the Commission before they were finally approved over my objection, Mr. Scheck’s objection, Mr. Newfield’s objection and we were totally outvoted. And that lab was accepted and it was accredited.

So what we have is an audit system.

What’s an audit system? I am the inspector. I come to the Assemblyman Lentol Lab and I start looking around. And I check and say: You have six books. That’s excellent. Hmm. I see that everybody has signed off on the latest change. That’s excellent. Ah, you have locks on all your doors. Excellent. You are accredited.

That is not an accreditation system and that’s what we’ve had. And I might say and I will
say that the Commission on Forensic Science between 2010 and this moment has been a stalwart defender of ASCLD/LAB. The majority of the Commission, including its current leadership, believes strongly in ASCLD/LAB. And there was no way to move them off that and there’s still no way to move them off that even today. And it will be interesting to see what happens as the Commission now musts consider a new accrediting agency. Now, one of the things --

ASSEMBLY MEMBER LENTOL: Marvin, can you just stop for a minute?

MR. SCHECHTER: Yeah, sure.

ASSEMBLY MEMBER LENTOL: And just so that we have a chance to digest everything that we’ve heard.

MR. SCHECHTER: Sure.

ASSEMBLY MEMBER LENTOL: And tell us as a practicing lawyer how this translates for a lawyer going into the courtroom where there’s a laboratory that has not been up to snuff and you have DNA evidence that’s presented in the criminal case and what the effect of that is.
MR. SCHECHTER: Okay. It’s not only DNA evidence. It’s fingerprint evidence, tool marks evidence, arson investigation evidence, fiber evidence. It goes across the board. So how does it play out? The first problem for a criminal defense attorney and I might add for some prosecutors is that you can’t get access to the material coming from the lab. A lot of times you have to subpoena the material. Many of the labs, in fact most of the labs in New York State today pursuant to Article 240.21c on the giving of scientific reports; we don’t get those scientific reports. The labs consider themselves to be in large part an agency that gives its work product to the district attorneys.

We do not get that on the defense side. You have to go to it by a subpoena, by personal relationships or you have to make a motion and hope that a judge will expand it. Just to give you one clear example when we talk the practical result: It might shock the Legislature to know that under 240.21c, when I ask for a scientific report, there are judges in this State who
interpret that statute to mean that the only thing I can get is the cover page that says: the end result. This is what it is. It is a match: tool marks. It is a match: fingerprints. But all of the other information in the case file, all of the other information of how the result was reached, what protocols were used, what manuals were used; you can’t get that. Now some labs --

ASSEMBLY MEMBER LENTOL: Is it a result of the statute creating the forensic lab --

MR. SCHECHTER: No, no, it’s not.

ASSEMBLY MEMBER LENTOL: -- or is this the discovery statute that prevents that?

MR. SCHECHTER: It’s partly the discover statute, which is used as a shield for that. The simple fact of the matter is and it’s particularly true in upstate counties, where I’ve given a lot of lectures and I’ve spoken to attorneys in small legal aid offices, who are on the front lines: they won’t give it up. They just won’t give it up. The materials are theirs. And if you say, in fact I had this actually happen years ago; if you say to a lab director: Do you
give up your materials? They’ll look you in the eye and say: Yes. And then you’ll say: Who do you give it to? And they say: We give it to the D.A. That is their concept of discovery.

I’ll tell you one example. Years ago I was doing a lecture in upstate New York and I said to a group of attorneys: Why don’t you just go to the lab, knock on the door and say you want the materials? And that statement was greeted with laughter. That’s how entrenched this concept is.

ASSEMBLY MEMBER LENTOL: So just to clarify for me: Is it the statute itself, the evidence statute is not clear? Or is it because judges or courts are not interpreting it broader in a larger sense?

MR. SCHECHTER: It’s a great question. You need to make the statute clearer. You can’t have the current language. It says: I’m entitled to any and all scientific reports or any portion thereof. They’re not getting it -- the judges. They’re just not. And so you get some decisions that say; there’s one notable decision of a lower
court in upstate New York, where the judge said:

It says in the language any portion thereof. I interpret that to mean Mr. Schechter’s entitled to everything in the file: the case file, all the materials. But that is not the case. And let me not just say this is true for upstate New York. This happens in Manhattan, Brooklyn, in Queens.

ASSEMBLY MEMBER TITONE: Now this could also happen with the same building then?

MR. SCHECHTER: Yes, absolutely, absolutely. So, that’s the short answer. And I’ll give you to fully just round this out for you: One of the things that this Commission does when it hands out records or information; there’s quarterly meetings. I get a book. It’s a rather large book. It’s a briefing book of all the materials that are to be discussed at the meeting. When I get those materials, particularly lab disclosures; lab disclosures must be given to the Commission when something goes wrong, an anomaly or what we call a nonconformity.

When we get that, we find that the names of the technicians involved are redacted. And
I’ve asked why: Why is that so? One answer I got was: Well, some of these technicians are under investigation or there’s some kind of disciplinary action going. My answer to that is: If that’s the case, then it should be redacted. No one should have their name published who has some pending action against them.

But in the vast majority of cases, no such disciplinary action has been taken. There is no ongoing investigation. So here’s what happens and this actually occurred again about two years ago: The name is redacted. You don’t know who it is, who the technician is. And I get a call from an attorney in the Bronx who’s on trial and has just opened up the front page of The New York Times and sees that there’s a technician in The Times, who’s been identified as doing something wrong with respect to forensic science. And it’s the technician in her case.

So she had a very valid question: Marvin, did you know about this? And if you did, why didn’t you tell anybody? So my answer was: Well, we didn’t know about it. We don’t know who
the technician is.

So where does this come from? Because Chairman Titone, you ask a very valid question: Where does this come from? What’s the source? Part of it comes from the labs. And they have a representative on the Commission structure who represents the 19 labs. It is the belief that we should not have this transparency; that the names of these technicians should be kept from everybody. In fact, as we sit here today, the OIG report that was done by Ellen Biben in 2011, which I ask you to get hold of and read because it is a roadmap to change.

But when the Nassau County Lab imploded in November of 2010, resulting in the lab’s closure by the County Executive; even though that lab had been placed on probation in 2003, in 2006 and no one had been notified about it. The DA of Nassau County had no idea that the lab she was relying on was churning out reports in forensic science cases but was on probation. You ask, Chairman Lentol, how does this translate for the attorney in the courtroom? Well, I think Mr.
Schechter would have been happy to ask any of the technicians who were testifying about the results of their fingerprints: Excuse me, isn’t your lab on probation? How did that affect your unit?

I think that’s a valid credibility issue that the jurors should assess but nobody knew about it. Now the result of the FAB lab scandal, which cost taxpayers $100,000 a month to outsource everything and that went on for years; I don’t know the final figure but it was in the millions. We still don’t know today who the technicians were who were behind all of the errors, who the managers were. We have no idea. So it translates in very, very bad ways. This lack of transparency, which I refer to in my written remarks --

ASSEMBLY MEMBER LENTOL: So if the judges refuse to give you the information that you requested and just give you the cover page --

MR. SCHECHTER: Right, sure.

ASSEMBLY MEMBER LENTOL: -- is that because the D.A. has objected to your getting it? Or are the judges doing this on their own? Or
MR. SCHECHTER: It’s a combination of the two. And it’s also a combination of different district attorneys. There are some district attorneys who take the position that if the defense is asking for it, there’s only one response: an objection. There are some district attorneys who are a little bit more savvy and understand the issues and believe in justice and they will say: Well, let me see it and then we’ll turn it over to you. The judges have not been helpful in this area. There is a tendency of the judiciary in the forensic science arena to be very, very cautious.

You know, one of the findings of the National Academies of Science in its groundbreaking report published in 2009 was a statement by that Commission and I was on that Commission and I was one of the co-authors of this report; we stated in that report that the judges had utterly failed to enforce the Daubert Standard -- utterly failed. And I daresay that if we collected in this room, Chairman Lentol, the
entire Supreme Court Judiciary of this State, 90 percent or better have never read or heard of this report. That’s the situation we’re in.

So your having this hearing today of course is very timely given that we may have a changeover in the accreditation agency. I want to just finish with one last set of remarks. You must be wondering --

ASSEMBLY MEMBER LENTOL: Wait, we’ve been joined by Assemblyman Lavine, who I think has a question on point. And we’ve also been joined by Assemblywoman Simon. So, just if you’ll indulge us for a second.

ASSEMBLY MEMBER LAVINE: Thanks, Chairman Lentol. Marvin, good to see you again.

MR. SCHECHTER: Good to see you.

ASSEMBLY MEMBER LAVINE: You and I have toiled in the courts and we know the reality. And thanks for what you do to advance science. But CPL 240-21c says: You or we, defense attorneys, or you, defense attorneys now because I’m no longer one, are entitled to scientific reports, all or a portion dealing with any scientific test
or experiment. So can the statute itself be any more explicit?

MR. SCHECHTER: Well, I think we’re going to have to make it more explicit because we’re not getting anywhere in the courtroom arguments or the briefings. When you say scientific report --

ASSEMBLY MEMBER LAVINE: But Marvin, let me just ask and I don’t mean to interrupt you, it sounds to me from what you’re saying and from the experiences that I had that some judges are just going to be very difficult in terms of ordering what the defense is entitled to. Isn’t that what you’re describing here primarily? That it’s not so much a fault of the statute, as it is a fault of judges either through their own inability to understand or comprehend scientific evidence or their desire to frustrate efforts on the part of the defense?

MR. SCHECHTER: Here’s my answer to that. It is partly the judges. But the way you change judges is you give the lawyers, both the prosecutors and the defense, a statute that they
can work with and one that they can use to make
the appropriate record that will get us to the
higher courts, that will settle this dispute once
and for all.

ASSEMBLY MEMBER TITONE: Would you say
perhaps a menu which would -- including but not
limited to?

MR. SCHECHTER: That’s the answer. And
some saving grace language that says: When in
doubt, release. Now the prosecutors have
indicated to me on occasion that: we can’t
release, we can’t have the labs releasing this
information to the defense because we have
ongoing investigations. So the answer to that is
very simple and we have that language by the way
in Article 240 in some of the sections; you put
in a protective clause which allows the parties
to remove in court for protection. This works all
the time in the federal courts. If a federal
judge, so-called federal judge, would say to me:
Mr. Schechter, you’re not to reveal this
information to anybody; as Assemblyman Lavine
knows, you listen to a federal judge.
And by the way, if a state court judge in this State said to Mr. Schechter: This is under a protective order. You are not to reveal that information; 99 percent of the bar, because of their ethics involvement and their obligation to the law, would do so. So that’s the answer. 

And if there’s a problem when I get the materials and I want to explore them further with my expert, you go see the judge with the prosecutor and it’s done. So, Assemblyman Lavine, you need to expand the statute, along the lines that Chairman Titone is recommending. And a menu would be good: including but not limited to; and that should solve the problem.

ASSEMBLY MEMBER TITONE: If we’re going to make 240 great again, we talked about the exemptions where, you know, there’s an ongoing investigation.

MR. SCHECHTER: Right.

ASSEMBLY MEMBER TITONE: And where I as an individual have become problematic with that in my mind morally basically is: Well, why does that investigation -- why does this accused have
to be penalized because there’s an investigation on another matter?

MR. SCHECHTER: The primary question you should be asking and one I’ve asked in the courtroom is: What investigation is going on?

This was a buy on the street. There were two police officers and an undercover. The man was caught. He was arrested. He was identified. He’s indicted. What is the ongoing investigation that prevents me from getting the materials? My clients are charged with robbery. He was identified in a photo array. He’s indicted. He’s before the Court. I want all of the DNA information that you got off the handbag as soon as possible.

ASSEMBLY MEMBER TITONE: On this matter now.

MR. SCHECHTER: On this matter.

ASSEMBLY MEMBER TITONE: Yeah, right.

MR. SCHECHTER: Why can’t I get it? And the answer: because it’s an ongoing investigation. What is the ongoing investigation?

All cases involve ongoing investigations. And so
you get into this debate with the judge and the prosecutor of why I can’t have the forensic evidence. And so the answer really is to stop what the judges are doing is to elongate the statute, make it a little clearer and give the attorneys the tool by which they can operate.

ASSEMBLY MEMBER LAVINE: I can’t believe that the permeation of the lack of open file discovery in New York State isn’t present here because judges know that they can’t expect the D.A. to release information that he or she doesn’t want to. I can’t help but believe that that’s not the case. And I don’t know, but that’s why I’m asking you the question, if it is a question.

MR. SCHECHTER: Look, I mean, this is a very distinguished panel of Legislators. I know almost all of you. I don’t know Assemblywoman Weinstein personally but I know her reputation, as well as everybody else. We all sitting in this room know there’s a huge discovery problem in this State. We are going to trial as defense attorneys on rape cases, robbery cases,
kidnapping cases with nothing in the file, zero.

That’s impossible. That’s like life in Mississippi in the 1930’s. You can’t conduct business this way. I wish we were doing a discovery reform. I would be happy to testify. Although the Legal Aid Society and John Shaftel have done a spectacular job on laying out what needs to be done. But in the area of forensic science, there is a reluctance by judges to let this evidence out.

And I think part of the problem is -- and I blame Barry Scheck for this and Peter Neufeld -- is we’re victims of our own success. When we get hold of this material: we find it, we use it and guess what? We find a wrongful conviction. And not one wrongful conviction but many wrongful convictions. And forget about wrongful convictions. A lot of times we find leads which lead us to reopen cases and bring them back for further review. That’s happened in many cases under different statutes.

So, I think you can’t just address the judiciary. You have to change some of the
statutes. And you have to change the way this Commission operates. I’ll end by just simply saying this to you. This is a very passive Commission. I’ve been on it for now almost 6-1/2 years. This is not a Commission that is proactive. It is passive. It waits for the labs to come to it, explain the problem and then say: Well, I’m glad you improved that. Move on.

It doesn’t initiate legislation. It’s afraid to initiate legislation. I don’t know why. My colleague, Erin Murphy has pointed out and this is astounding to me: How is it that the City of New York has enacted a statute for root cause analysis, a time-honored, scientific method for trying to figure out how an anomaly occurred in a lab and we don’t have a State Commission Forensic Science rule of a similar nature? It would take all of one minute for the Commission on Forensic Science to enact this rule. All it has to say is: Starting tomorrow morning, any lab and certainly any city lab that has a root cause analysis shall submit such forthwith to the Commission. Done.

And by the way, this may shock you
because you talk about getting down into the weeds: Do you know that there’s no template for how to do a root cause analysis? It doesn’t exist. You just come in. Everybody has a different way of doing it.

Interestingly enough, the best root cause analysis template that I’ve seen comes to us from the New York City Police Department, which gave the Commission how it conducts root cause analysis. It’s a spectacular document. It should be adopted Statewide. Everybody should be required to have it. And by the way, when you adopt -- just to show you how deep this gets; when you adopt a root cause analysis rule, the Commission shall say to each lab: This particular root cause analysis shall be kept in the office of the quality compliance officer or quality assurance manager for the lab.

One of the things I find amazing is within labs, different units do this analysis or nonconformity analysis. Some keep it with the head of the unit. Some people give it to the head of the lab. Some people keep it within the
section. There is no uniformity to this. It’s insane.

And by the way, when you don’t have uniformity like that and a defense attorney comes along and says: I would like the root cause analysis, right; so I send a subpoena to the Titone Lab. And I say: I’d like to have the root cause analysis that was done in this case. Answer: Which root cause analysis are you talking about? Where is this root cause analysis? Where is it? I don’t know, it’s your lab. You tell me. It’s the root cause analysis that was done in this case. Well, it could be in the quality assurance manager’s office. It could be the head of the lab, etc. etc. etc. You get the idea.

A functioning progressive, aggressive Commission would enact rules that would end this kind of nonsense immediately. When my colleague Erin Murphy tells you we have fallen behind, she’s not kidding. This is almost disastrous. I have to tell you and I’ll just end of this note, which is a negative note --

ASSEMBLY MEMBER LENTOL: To fall behind
Texas is even worse.

MR. SCHECHTER: That’s right. Texas gets a lot of credit. But I’ll end on this note: One of the reasons I accepted an invitation to go on this Commission was because like you I thought it was an honor to serve the people of the State of New York. I still believe that. It’s what all of us dream about. What could be better than to serve your State? And particularly in my case and my personal background, this City and this State have given me all the opportunities that lead me to this table here today.

I will tell you that the last six years on this Commission have been a struggle. It’s one of the most difficult and aggravating things I’ve ever undertaken in my life. I don’t know that I made a difference. I tried my best. I think Mr. Scheck and Mr. Neufeld tried everything in their power to educate the Commission. And I think they failed. And I think I failed. But we’re here. This is a crucial hearing. I hope you take the bull by the horns. You can change this Commission. You can make a difference.
We should keep this Commission. We should strengthen it, change its structure, bring in scientists, get rid of all the interest groups. I do think and this is an interesting side note: Somebody asked me, Well, if you say get rid of all the interest groups, do you mean the defense attorneys, the prosecutors, the judges? I say: No, this isn’t just the science lab. It’s a forensic science lab. So the purpose of this lab is twofold. It does scientific testing but for a specific purpose; so that it can be presented in a court of law.

So if you’re going to have a Commission, it needs to know the perspective of judges, defense attorneys and prosecutors. And those people should sit side by side with scientists: people who run huge labs, know how to manage these labs, know what the rules should be, know about uniformity. And then we will have a true Commission on Forensic Science. Thank you.

ASSEMBLY MEMBER LAVINE: Sure. And I think Professor Murphy, you really hit the nail on the head when you began your testimony talking
about setting standards. And I this is what
you’re talking about, Counselor, really setting
standards. But it seems to me just from this
limited conversation that we’ve had that not only
do we need the standards and the proficiency
standards of things of that nature; but it seems
to me that the entire Commission needs to be on
almost, you know, a review but not just every
once in a while but maybe once a year, once every
other year. In the same way that every person
sitting up at this table is up for review every
other election day. When you spoke earlier,
Professor, is that something that --

MS. MURPHY: It is. I think these are
very closed universes, in terms of who’s involved
in forensic work in the State and who the kind of
interest groups are. And I think the most
important thing is that the composition of the
Commission is detached from the kind of very
adversarial, you know, very motivated reasoning
that takes place often in the courtroom in the
pitched battle between prosecution and defense.
And so whether that’s done through a review,
whether that’s done through a better allocation of the seats; I think the important thing is that they’re able to engage in these conversations, thinking about what’s best for the State.

And I will say you asked earlier about sort of the consequences. This is a small point but the consequences on the ground and what’s in the court and it’s important to note that the scandal at the OCME here in New York City for instance involved an analyst who was failing to detect the presence of biological evidence in samples. Including there was a very prominent case involving a rape victim, where that untrained, unqualified analyst who for ten years was able to operate without sanction, failed to detect the biological evidence that later proved -- found the actual assailant of the crime.

And so it is a public safety issue. It’s a liberty issue for defendants when evidence that’s; you know, in New York recently bite mark evidence was introduced in a case. Bite mark evidence is a wholly unfounded scientific discipline. Two Presidential level commissions
have said so. It’s a deeply problematic
technology. And yet we don’t have, as we do say
in Texas, a resounding statement or even a rule
from the scientific body charged with ensuring
that the evidence introduced is sound. This is
unsound. And until proven otherwise, it should
not be used in our courts.

ASSEMBLY MEMBER LENTOL: Just remember,
I’m happy that the City Council has introduced
progressive legislation. But just remember, they
are a unicameral body. We are not. And you have
to lead us to the promised land. And the promised
land is to get what we want by embarrassing the
other House of the Legislature to do what’s
right. And so that’s where we need your help more
than anything else. Because this is legislation,
not unlike -- that’s why I brought discovery into
the mix; because there is nobody on the streets
of New York that you would ask that doesn’t think
that we have open file discovery in this State
because they see it on TV.

And I believe that a technical subject
like the standards of a forensic laboratory, in
order to bring that out in importance, requires
something on the ground to prove it to another
body of the Legislature that may not be
interested in pursuing justice.

MR. SCHECHTER: Well, here’s the good
news. We are fortunate in this State to have some
of the finest and best people currently extant in
forensic science and its related issues, who live
and work here and are prepared to do that. Erin
Murphy at NYU should be a member of the
Commission on Forensic Science. She is a
scientist and she’s a teacher. It seems like a
natural. But I don’t think we’re hearing that
she’s going to be a member of the Commission on
Forensic Science any time soon.

Sitting behind me in this room are some
of the best people you’ll ever want to meet:
legal aid lawyers, public defense lawyers,
private lawyers; all of whom have been involved
in these issues. You put out the call for help,
Assemblyman Lentol, we’ll be there. We will do
the best we can and we will educate and we will
go to the Legislature. I spent yesterday, all day
before the New York State Legislature. It was a wonderful experience. I met some marvelous individuals who listened to me about another bill that I’m working on. And I found it to be a very exhilarating experience.

So, Albany’s not always where I want to go on a rainy Tuesday on the thruway. But we did it. So, I think the time is coming when we’ve got to get down to brass tacks. You know, all you have to do is amend Executive Law 995-a to include a requirement that the Forensic Science Commission every two years complete a State of the Union message on forensic science to the Legislature. That’s easy. And they’ll have to do it. And they’ll have to come to you. And they’ll have to say to you: This is what’s going on and this is what we’re doing.

MS. MURPHY: Texas issues annual reports. It lists the complaint, all the open investigations, the results of those investigations. I mean, you can access this on their website but it also has the annual reports.

ASSEMBLY MEMBER TITONE: It seems that a
report like that could be very helpful. But I’m also thinking that something should go to the judiciary as well. Because I wonder or I question and this is strictly just my own personal experience if perhaps often judges might be so uncomfortable with the science, not knowing it, that they tend to error towards whichever their perceived side of: You know, let me go with the prosecution. It’s their lab. Or let me go with the defense because it’s this person’s say so.

MR. SCHECHTER: In 2009, 2010, ’11 and ’12, I toured the country giving a number of lectures regarding the new report on the National Academy of Science. Some of those lectures were for judges’ groups and they were behind closed doors. That was the deal: behind closed doors. I couldn’t talk about it. And the reason that we did it that way is so they could ask questions. And I asked some prominent lawyers around the nation: What should I say to the judges? And they said: Just remember when you’re talking to the judges about science, they’re thinking about all the cases in the past where they have granted or
denied motions involving science and somebody was sent away for 20 to 25 years to life. And that fear exists in the judiciary.

Can it be changed? Absolutely. Have we seen such a change? Yes. Because between 2009 and 2017, we’ve seen spring up an entire body of forensic case law in the federal system, which excludes forensic evidence where it’s not properly qualified and in other cases limits the forensic evidence and even limits the conclusions of the so-called experts. Can it be done? Yes. In 2009, everyone said: The federal judiciary will never change. They did.

ASSEMBLY MEMBER HELENE WEINSTEIN: I wanted to ask a question, just sort of following up on what Assembly Lentol said about the fact that we can’t do this on our own. We need to have the other House with us and the Executive. Do you feel that the Commission has the authority currently, if it so desired, to make a lot of the changes that you’ve recommended? Certainly in terms of accreditation and standards and the root cause analysis that goes forward and demanded
that be the current standard?

MR. SCHECHTER: The short answer to that question is yes. Office of Inspector General Biben in 2011 in her report came to that very conclusion. She said: Not only did you abdicate your responsibility to the accrediting agency but more importantly you have in the statute the rulemaking authority. You just don’t want to use it. So, we don’t need a change. What we need is not the statutory change or a change to the Commission’s authority; we need a change in the way the Commission thinks of itself and its population and how it works, how it perceives forensic science change going forward.

For example, let’s take a simple thing. Assemblywoman Weinstein, I assume like the rest of us you go to a bank and you bank just like everybody else. You are confident when you go to your bank that your money’s going to be there day in and day out. Why? Because as an educated person, you know that the banks in the United States of America: state, village, city, town, federal are all audited by auditors and that
keeps the banks honest.

When the auditors go to a bank, they show up unexpected. They don’t tell the bank: Hey, we’ll be there in three months for the inspection and the audit. Get ready. Because if you did that, you’d never find any wrongdoing.

Here’s the current state of New York’s rules. ASCLD/LAB notified and still notified right up to the very end every lab of when an inspection was going to take place: three months, six months, we’re coming.

Then it got every more incredible and this showed up here in New York State in -- I may be off on this -- in 2009. Judge Fish was the Inspector General and we had a terrible scandal in the New York State Police Forensic Investigation Center in Albany. Where, as my colleague pointed out, somebody had been dry-labbing materials for two years; in other words faking a report and got away with it for ten years through several ASCLD/LAB inspections. How did he do it? Easy. The inspector would show up and they would say: Could you please give us some
files? And he did. He gave them Titone’s file, Lentol’s file and Weinstein’s files. Why? Because they knew what they were doing. So the ASCLD/LAB inspector said: Boy, this is a great fiber unit you have here.

Well, life caught up with this gentleman. And finally an ASCLD/LAB inspector said: What is this? And he had accidentally -- or maybe they just looked for it -- given one of his own files and that’s how the scandal erupted. And by the way, that scandal was a terrible scandal. The gentleman involved committed suicide. That’s not to be taken lightly. That’s another fallout from all of this. And we’ve seen that suicide happen many times across the United States amongst some forensic technicians when they get caught up in these scandals. Another reason why we’ve got to strengthen this: No one should be forced to end their life because they got caught up in a scandal in a forensic science lab. That seems like an awful waste of humanity.

But in that particular instance, we knew far back then that this business of relying on
ASCLD/LAB to do that, to rely on somebody to give them files was an insane system. So now there’s a new sheriff in town, as I pointed out, and the representative is here today and is from ANAB.

It will be interesting to see and I ask you, as the relevant Committees that oversee the function of these labs and the Commission on Forensic Science to get in touch with Commissioner Green and ask him his opinion on whether or not surprise inspections of the labs should be part of the contract that New York State signs through its Commission with any new accrediting agency. Should the accrediting agency that signs a contract with a Commission that is responsible to this Legislature and Governor, should that Commission sign a contract that requires that when they ask for files, they get the files? They don’t have to wait for you at the lab to give it to them. It will be interesting to see what Commissioner Green has to say to you.

ASSEMBLY MEMBER WEINSTEIN: Well, obviously he’s not here. He did submit some testimony. I don’t think it’s available to you.
And it’s rather short but it certainly paints a
different picture than you have.

MR. SCHECHTER: I’m sure it does.

ASSEMBLY MEMBER WEINSTEIN: And he ends
with saying that New York has the most
transparent oversight process in the country. So,
obviously that’s not your experience being on the
Commission.

MR. SCHECHTER: No. And if you require
it and you’re the Assembly and I’ll listen to
you, let’s have a public debate: Commissioner
Green on that side of the room, me on this side.
Ms. Murphy even better. And we’ll have the debate
about transparency on the Commission.

ASSEMBLY MEMBER WEINSTEIN: Well, I
assume that since we haven’t had an opportunity
to question Mr. Green who submitted the
testimony, that following the hearing the joint
committees will submit some questions to him.

MR. SCHECHTER: Great.

ASSEMBLY MEMBER WEINSTEIN: And the
questions and his responses will be part of the
official record.
MR. SCHECHTER: Thank you.

ASSEMBLY MEMBER SIMON: If I could just

-- oh --

ASSEMBLY MEMBER LAVINE: May I interrupt

for a second?

ASSEMBLY MEMBER SIMON: Sure, of course.

ASSEMBLY MEMBER LAVINE: And Marvin, we

will under no circumstances give you that

testimony. I just want you to know that. And

that’s a bit of a joke. Just for the sake of the

record, we talked about the crisis at the Nassau

County Lab. And I think we may have referred to

the district attorney, referring to Kathleen

Rice.

MR. SCHECHTER: It was Kathleen Rice at

that time.

ASSEMBLY MEMBER LAVINE: So Dennis

Dillon was the district attorney in Nassau County

in 2003. And in 2006, Kathleen Rice had just been

elected when that occurred.

MR. SCHECHTER: Right.

ASSEMBLY MEMBER LAVINE: Just for the

sake of the record.
MR. SCHECHTER: Right. But in 2010, Kathleen Rice was the D.A.

ASSEMBLY MEMBER LAVINE: Yes, she was.

MR. SCHECHTER: And her claim that she made to Inspector Biben was: I never even heard of the Commission on Forensic Science. That’s in the record. She never even heard of it; let alone that she would get notices from it.

ASSEMBLY MEMBER LAVINE: And that addresses another issue with respect to district attorneys being aware of their overall obligations in terms of being knowledgeable about scientific evidence. That touches on another issue. But I do have a quick question for Professor. You had briefly referred to familial DNA.

MS. MURPHY: Yeah.

ASSEMBLY MEMBER LAVINE: And you said you thought it made family members second-class citizens. So, it seems to me that all of criminal law in western jurisprudence is a matter of balancing: balancing the constitutional rights of the accused against the need to protect the
overall community from crime. How do you think it happens that; why do you believe that it makes family members second-class citizens when the family members are excluded as a result of the DNA analysis?

MS. MURPHY: Well, the sort of pivot person, the person in the database will be excluded. But all those family members, the people who just by dint of blood happen to be related to that individual, some of them might be the victims of that individual.

ASSEMBLY MEMBER LAVINE: And that’s again the balancing that goes on.

MS. MURPHY: Yeah.

ASSEMBLY MEMBER LAVINE: But do you have a sense that or should I say in your opinion is the concept of use of familial DNA, which is approved in many other states including California, that that’s something that should be prohibited here?

MS. MURPHY: I think it should be prohibited. I think we have seen across the country and here in New York that there’s very
vigorouss debate about who must give their DNA to
the government and who has to have a DNA sample
compulsorily given.

ASSEMBLY MEMBER LAVINE: So your concern
is then forcing family members to give DNA?

MS. MURPHY: It’s more that we are
arbitrarily saying that this group of people,
people related to people who were required to
give their DNA, are now kind of automatically
under a cloud of suspicion, based not on anything
they’ve ever done, based not on any action
they’ve taken to relinquish their genetic
privacy; simply because they happen to be a blood
relative.

ASSEMBLY MEMBER LAVINE: Even though
they’re still entitled to the full panoply of
constitutional rights?

MS. MURPHY: Absolutely. Because I think
one way to think about this is if we really feel
like they’re not being treated unfairly, then we
should use victim databases for familial
searches. We should use law enforcement exclusion
databases for familial searches.
ASSEMBLY MEMBER LAVINE: But is anyone actively trying to exclude that?

MS. MURPHY: Yes. And my understanding, I mean, for instance, one of the big champions of DNA, Mitch Morrissey, I’ve heard him say numbers of times -- I don’t know if he still adheres to this, but in the past he’s said repeatedly: No, we would never use victim databases. That would be unfair. We would never use law enforcement or lab exclusion databases. We’re talking just about using convicted offender databases. And I think once you make that distinction, you’re already conceding that you’re basically willing to treat the family members and relatives of convicted people as suspects but not the family members of victims as suspects, even though those family members have done nothing to distinguish each other.

ASSEMBLY MEMBER LAVINE: Wouldn’t it depend on the unique facts of the case?

MS. MURPHY: I don’t think so. I think that if we feel as a society and I agree about costs and benefits; if we feel as a society:
Look, genetic privacy’s important but law enforcement’s important too. We should all be willing to give our genetic information to the government. We trust they will use it responsibly and that need for crime solving is more important than privacy.

ASSEMBLY MEMBER LAVINE: Then this is part of your fear: It’s the camel’s nose under the tent, so to speak?

MS. MURPHY: Well, it’s more a sense that it’s arbitrarily singling out a group of people simply because they’re related to a convicted person. And that to me seems like not only treating them as second-class citizens but really unfairly taking away some of their genetic privacy based on no action of their own.

ASSEMBLY MEMBER LAVINE: Thank you.

MR. SCHECHTER: Just so you’re aware, you know, this Friday the Commission on Forensic Science has a special meeting, along with its DNA subcommittee; the first time that’s ever happened. And it was I think my motion and somebody else’s to have that on this request from
the Queens District Attorney to approve familial DNA. I haven’t made up my mind on it.

But I am aware, having studied the problem as a member of the National Association of Criminal Defense Lawyers, that there are many intertwined legal issues with familial DNA that we did not confront with say DNA straight out comparisons or even partial match. You may not get the chance as the Legislature to even rule on that issue because the Commission on Friday may abrogate to itself the right to approve familial DNA, the legal consequences be damned.

ASSEMBLY MEMBER LAVINE: Mm-hmm.

MR. SCHECHTER: I mean, I want to hear what people have to say about that but I’m very reluctant at the moment.

ASSEMBLY MEMBER LENTOL: You mean that they have the rulemaking authority to do it?

MR. SCHECHTER: Well, they have the rulemaking authority maybe to rule on the efficacy of the procedure called familial DNA searching. And my colleague has a book out which explains to you the problems with familial DNA
searching. That’s only one area that the Commission probably could do. But the related Fourth Amendment issues, in California a statute was enacted to have familial DNA. Colorado, a statute was enacted by a legislature, not a commission. So, I hope maybe some of you will attend and see what goes on Friday at the meeting. I know I’ll be there. I look forward to seeing you.

MS. MURPHY: I’ll be there.

ASSEMBLY MEMBER LAVINE: Yeah, we’ll be there.

ASSEMBLY MEMBER TITONE: I know Helene is part of this but there’s been a huge, huge social media push towards legislation on this issue and I’m glad you brought it up.

MR. SCHECHTER: I think Senator Boyle has a bill that’s already been voted on.

ASSEMBLY MEMBER TITONE: Yes. Yes.

ASSEMBLY MEMBER LENTOL: Maybe Erin or Marvin you could walk us through? Because the way I perceive familial DNA and you can correct me if I’m wrong, is if you have in a particular case,
you have DNA evidence and you get hit on a convicted person but it doesn’t match precisely. It only matches somewhat.

MR. SCHECHTER: Partially.

ASSEMBLY MEMBER LENTOL: Partially, I guess is the word. And so then the request would be to test all family members in those cases to determine, since it’s close? Well, just walk us through that so that we understand how it works.

MS. MURPHY: So, there’s actually a lot of technical dimensions that make it difficult to give one answer but I’ll give you a sense. First, because of the nature of the kind of genetic searching that’s done, it’s not that you get one back. You’ll get a candidate list essentially. And depending on the size of your database and the way you construct your search, that could be a 400-person candidate list or it could be a 200-person candidate list. It can really vary.

There are some things you can do to try to narrow your candidate list. One essential and indispensable step in this kind of testing is to pull the convicted person’s sample again and run
a separate genetic test, called a Y-STR test. That’s the male chromosome. And when you can rerun the sample and check the male chromosome, that will give you a sense of whether your source crime scene person has the same male genetic line as the convicted you’ve identified as one of these candidates. And that narrows down your list again. Because if they don’t have the same line, you know they’re not related.

It’s important to realize that just like in families, sometimes siblings look alike or you look like parents, but sometimes you look totally different and someone thinks: Ah, joke, you know, mailman or whatever. The same thing happens kind of genetically with non-identifying traits. Sometimes siblings have very similar genetic traits and sometimes they look nothing like each other and total strangers look like each other. That’s particularly true in communities that have for many generations stayed within the same geographic region.

So, all of this is to say you get a list. You have to do some extra testing and some
extra winnowing through that list, to then come up with a kind of secondary list of actual probable leads. And then you begin the process of investigation of the family members of that individual; investigating to see whether they have characteristics that might fit the crime; possibly engaging in surreptitious DNA sampling, where you take their DNA to see if you can get a match or not.

ASSEMBLY MEMBER LENTOL: Alright, thank you for that explanation.

MS. MURPHY: I will say just one final thing on that. A lot of times I’ve heard proponents of the method liking it to having an informant. It’s just like an informant. It’s just a genetic informant. And I think it’s important to understand given the technical specifications, it’s like an informant who says looking at a book of photos of suspects: I didn’t really get all that good of a look at the guy. It looks kind of like these 15 people. It’s not any of these 15 people but it kind of looks maybe like some of those 15 people. So maybe you should look at
their members to see one of those family people looks more like those people.

That’s sort of my mind the way it’s like an informant. It’s not like an informant who says: I got a really good look. I know who it is. It’s that guy. It’s really a much more fishing expedition type of process. Which is one reason it hasn’t been widely used because it’s not yet anyway very efficient.

ASSEMBLY MEMBER LENTOL: Thank you very much. We appreciate your testimony today.

MR. SCHECHTER: Thank you.

MS. MURPHY: Thank you for your time.

ASSEMBLY MEMBER LENTOL: Okay. Skype is all set up. Is District Attorney Scott McNamara here yet? Good. Well, you’ll be next. I just wanted to make sure you were here because we definitely want to hear from you. It looks like Barry Scheck.

MR. BARRY SCHECK, CO-DIRECTOR, THE INNOCENCE PROJECT; FORMER COMMISSION MEMBER, NEW YORK STATE COMMISSION ON FORENSIC SCIENCE: Hi. Well, I’ve been watching the livestream. You
should know it was very good for a while. I’m here in Salt Lake City, Utah. And I started getting bits of pieces of what everybody was talking about. But I’m thankful that my friends Erin and Marvin talked very fast; so I think I got the gist of it. We submitted -- the Innocence Project submitted a very substantial --

ASSEMBLY MEMBER LENTOL: But just state your name for the record, Barry, I’m sorry. And also we have Sarah. Can you state your name for the record as well before you begin?

MR. SCHECK: And Sarah can really answer all the questions the most knowledgeably. But let me just try to -- we submitted a substantial set of suggestions in the testimony here. And let me just try to hit some high points basically looking at some of the things that you’re asking questions about. Probably the thing that’s bothered me the most is that -- Peter Neufeld and I were involved in the creation of the Forensic Science Commission; we go back to the Poklemba Report and Richard Gigante [phonetic]. This was the last bill that Governor Cuomo -- the first
Governor Cuomo signed.

ASSEMBLY MEMBER LENTOL: And I sponsored the bill, Barry, just so you know that. It was my bill, Assemblyman Lentol’s bill.

MR. SCHECK: In contrast you should know as well that The Innocence Project and I had personal involvement, helped set up the Forensic Science Commission in Texas. We helped write the legislation. We worked with the commissioners. We brought the first set of complaints with respect to arson; established a duty to correct bad arson cases in Texas. And that commission evolved very, very differently on the critical issues that are facing the criminal justice system now. That is, we know from the National Academy of Science report in 2009 and most recently the report of what they call the PCAST report, the report of the President’s science advisors that deals with feature evidence.

And with all the work that the National Commission on Forensic Science has done, with the work that the National Institute on Science and Technology, a venerable part of the federal
government that sets standards on scientific matters; work that the Organization of Scientific Area Committees, where I’m on the legal resource commission there; an effort is being made because of what was discovered in 2009 in that report that much of what has passed for forensic science has not been properly validated scientifically.

And we are going to be going back and looking at cases involving pattern evidence as it’s called or feature evidence, whether it’s fingerprints or a bite mark evidence, which I think is believed now not to be validatable, or tool mark evidence, fiber evidence, all kinds of cases where the tool marks on bullets; all kinds of cases where there were convictions. And as the new science comes in and we realize that the statements in old cases were beyond the limits of science, maybe had no probative value at all or not the probative value that juries and courts were told; we’re going to have to go back and look at those cases and correct them.

That is something that is just going on all across the country. It started with a review
the FBI initiated itself on something called
composite bullet lead analysis. It moved to the
hair review, which the FBI has done itself,
getting rid of all procedural bars and going back
with The Innocence Project and the National
Association of Criminal Defense Lawyers and
looked at all the cases where FBI agents
testified beyond the limit of science and hair.

In Texas, they have able to follow
through on the hair review. They have been able
to go further on bite marks. They’ve been able to
look at bad calls on DNA mixtures and review
those cases. They have been able to work in a
very robust way, implementing what is a critical
feature now of forensic science in America and in
the world, which is the duty to correct and
notify everyone in the system: the defense
lawyers, the judges, the prosecutors; that they
may have to look at an old conviction.

Just let me give you a contrast. It is
now clear that the crime lab in Austin, Texas has
terrible problems. The Forensic Science
Commission has gone there and they’ve found that
there was all kinds of contamination and problem
in that Austin crime lab, just on DNA and
probably extends to other matters.

Two weeks ago I was at a meeting with
all the stakeholders: the district attorneys, the
judges, the Forensic Science Commission, the
court-appointed lawyers. They don’t have really a
public defender system there but everybody sat
around the table. Everybody was trying to come up
with ways of approaching this problem, getting
all the data on the table: all the facts, all the
discovery; so everybody can look at what the data
was and the DA’s file, the police file,
everybody’s file; and then make a sensible
judgment about what if anything should happen to
an old case.

They have progressed so far in Texas. By
the way, one of the things they have, they have
open file discovery -- real open file discovery;
where everything is computerized. And you just
literally get online and you’re able to get the
discovery that’s necessary and proper protective
measures are taken to make sure ongoing
investigations are not screwed up and work
product is protected. But that all works very
well. It’s extraordinary.

I know we are so far behind in New York.
We have to do something about discovery. There’s
no question about that. But what I’m trying to
say is I sit here every day thinking: How did the
New York Forensic Science Commission, which when
we started it was really a model, was supposed to
be an effort to get all labs at the cutting edge;
how have we come to a point where we are
certainly not the leaders and we have some very,
very significant structural problems? Whereas a
place like Texas, not known as a great, that you
would think leader in criminal justice reform is
lightyears ahead of us. So that’s question number
one for me.

Question number two is: Why was it when
we set up the Commission so many years ago that
the Commission was not able to anticipate or
address all these scientific problems with
forensic techniques? And I think again: Why did
it take this 2009 NAS report, the PCAST report;
why is it that our Commission was not able to 
bring in mainstream scientific community to take 
a look at forensic science and deal with these 
problems?

And so I think a number of those issues 
are structural. We’ve made our suggestions. I 
think the biggest problem comparing New York and 
Texas: In Texas, the Forensic Science Commission 
was administrated or is administrated really out 
of the university system in Texas. It was 
independent of the law enforcement apparatus. And 
one of the big problems we have in just the 
membership of the Commission and its 
administration is that there’s a fundamental 
conflict of interest.

It is the Department of Criminal Justice 
Services that administers the Commission. We have 
a real imbalance in terms of many of the same 
police officials and laboratory officials whose 
work is being investigated have the majority vote 
on the Commission. And the truth is you really 
can’t investigate yourself or have an independent 
scientific entity doing it. So we really have to
make some fundamental change as far as that is concerned.

I realize that we have to be realistic politically about these things. But in the long run, we should start really looking with the Executive Branch, with people in the Senate who really care about good forensic science. Remember, this is a public safety issue. So in Texas, the Assembly and the Senate there essentially, the House and the Senate as they call it; they’re Tea Party red. So there is a left-right coalition around criminal justice reform. And one of the things that really motivates it is that everybody wants to get it right. We want to protect the innocent. We want to enhance the capability of law enforcement to find the person who’s really guilty with scientifically sound measures.

And so we have to find a way to break the logjam here. And I do think that one of the number one ways is to make this Commission more independent of those it regulates. Maybe find a way to take it out of the Department of Criminal
Justice Services as the primary administrator; you know, get it into the New York State university system, either directly or through reconstituting the membership of who sits on the Commission. Getting the people being investigated themselves out of it essentially and bring in people that have real scientific expertise in the various different disciplines that are going to be involved as forensic science evolves and do it that way. So we’ve made a number of suggestions along those lines.

I agree with everything that Erin said and I agree with everything that Marvin said pretty much in their testimony with respect to the difficulties in the way that the Commission is currently functioning, the problem with the accreditation system and the many of the mistakes that we’ve made in the past. And I heard that you are all very concerned about the familial searching issue, which I know we’re having a hearing about that Friday and obviously has caught everybody’s attention.

The first point I’d like to make about
the familial searching: Number one, it is not even a close question that when the DNA databanking system legislation was passed in the State of New York, it specifically indicated, said that the only hit that you could put into that databank is a hit of crime scene evidence to a convicted offender in the system.

In other words, it was very, very clear that the Legislature specifically rejected; this was also true in the 1992 DNA Identification Act that set up the CODA system: Everybody wanted to know; they wanted assurances that this would not be familial searching. And the reason for that is that there may be some arguments in favor of a limited system to experiment with familial searching and I will suggest one of those to you; but it’s a tradeoff between law enforcement needs and efficiency versus the privacy rights of citizens. And DNA, as Professor Murphy has written about eloquently, is the ultimate in terms of our own autonomy and protecting the privacy rights around DNA. The information there is extraordinary when people get to it.
Just think of this though: Since it’s absolutely clear that for there to be familial searching, it requires an act of the Legislature. One of the really troubling things that happened over the course of time is that the Office of Chief Medical Examiner in the City of New York, once it developed its own very formidable internal databases, that is to say they’re able to do DNA testing; it’s one of the largest DNA laboratories in the world; they’re able to create their own database separate from the local, state and federal database. So they called it a linkage database. Literally, you could call it a rogue database, an offline database. But it is literally a database alone of the Office of Chief Medical Examiner. There is no statutory rules that necessarily govern that. I would argue that it is literally unauthorized.

The first thing that happened over time with respect to so-called linkage database is that efforts were made to do familial searching of the linkage database, just with rulemaking from the DNA Subcommittee in conjunction with the
Police Department. Now, it just shows you why we need real controls over this and this Commission has truly overstepped its authorized bounds.

It turned out that the efforts to use the linkage database to apprehend criminals didn’t work and that was predictable because of the limited power of even doing this familial searching at this point in time. And the Chief of Detectives then at the New York City Police Department, Phil Pulaski, you know, you can read the articles about in The New York Times; realized that this just really was not cost effective or worth it. But the problem is is that it all emerged through this rulemaking which in our judgment went beyond the bounds of what the Commission can do.

So please when it comes to a system of familial searching, you the Legislature absolutely and I think that even the proponents of familial searching understand this: The Legislature has to think about this, has to consider it, has to go through a very careful process because you and you alone have the power
to do it.

It is absolutely illegal and unauthorized and contrary to the intent of the Legislature and the plain text of the statute to just have the New York State Forensic Commission on Forensic Science based on a recommendation from the DNA Subcommittee or however they’re going to do it to say: Here’s how we’re going to do familial searching. That cannot be done. It must be authorized by the Legislature. And this is really an opportunity I think for all of you to step in and think about it carefully.

The Innocence Project will present testimony on Friday and you should take a look at it. The one thing that I can tell you and in a similar position taken years ago by the National Association of Criminal Defense Lawyers: If you’re going to have familial searching and it’s still for all the reasons Professor Murphy was talking about may not be the best idea in the world; but if you’re going to do it, it must be done pursuant to judicial warrant. It must be overseen by the judiciary. There must be a
showing that all ordinary investigative means have been exhausted.

And the reason why I say that is that it’s very plain even from this terribly upsetting case of the poor young woman who was killed in Howard Beach is that the suspect in that case and we still presume that person innocent in our system; but the suspect that was apprehended in that case and reportedly whose DNA matches DNA biology found at the crime scene, that case was broken by old-fashioned, good old-fashioned detective work; you know, somebody that traced back a 911 call that had been overlooked.

The reason why there has to be this requirement that all usual investigative means have been exhausted is that if you start every investigation by just going to the databanks and doing familial searching, right, not only will it for technical reasons not be particularly productive but you’re going to undermine the investigations themselves. Every investigation will start that way. And not only that, people in communities will be very reluctant to voluntarily
turn over their DNA to law enforcement as reference samples in ordinary crimes because they will understandably be worried about their samples being in a databank at all and they won’t trust the government with their DNA.

So, number one, you have to have that investigative means test in there. Number two, it must just be for a very, very small class of cases: serious murders and rapes. Number three and most importantly, there must be a showing by law enforcement when they do their investigation based on a familial searching, that they’re using the least intrusive means of doing it and none of these DNA dragnets that really upset neighborhoods. Number four, there must be a report back to the Court on exactly what happened and how they did this. There must be periodic updates on the warrant. And finally, it should be sunset after two or three years. And a blue ribbon panel of experts should look at every one of these and it won’t be that many cases; that what experienced teachers across the country would even try this, just to see what happens.
So something like that I think, because I know that’s on your mind because you started asking those questions, is the way to begin going about thinking about familial searching in a sensible way that protects people’s civil liberties but also gives law enforcement a tool and if it’s really an effective tool; we don’t know yet. There may be lots of reasons that this will never happen because we’re going to have even more DNA markers soon that may obviate the need to even go down the road of familial searching. So, so much for that.

Finally, I can’t emphasize enough the need to change the composition of the Forensic Science Commission. Put more scientists on it. I really think that the DNA Subcommittee, which we created because in the early days of this Commission nobody understood anything we were talking about when we started discussing DNA. So we needed a specialized subcommittee to deal with it, right. Since then we now have a very robust capability in the National Institute of Standards and Technology, led by Dr. John Butler, who’s
written the authoritative textbook on DNA testing.

Over the last ten to 15 years, the federal government has issued standards, has assessed the new technologies that’s come in for DNA testing. That role in terms of the DNA Subcommittee has really been supplanted by the federal government. And our DNA Subcommittee, when you actually look at it, they meet only periodically. They don’t even have the capacity to do Skype meetings with each other. It’s been too complicated. They are not properly staffed. They don’t have the capacity for scientific staffing to really do a deep dive into looking at any of these new DNA technologies as they come in; things like what are known as probabilistic genome typing that emerged in that case in upstate New York that our colleague Bill Fitzpatrick tried. They don’t have the capacity to do that.

But most importantly, they really don’t have the capacity to do a deep dive into what the laboratories are doing. And so we need to
completely reconstitute that. I think we need knowledgeable, independent DNA analysts; people with a background on bioethics and privacy, as we indicate in the testimony, on the Commission itself. And we need a more robust way to actually look at the labs.

Which leads me to the last point, which was truly one of the most disturbing experiences on the Commission, which really indicates why we need some structural changes. Marvin mentioned some of the other scandals that we’ve had over the years. All criminal justice systems and laboratory systems have scandals. One good thing is that we were able to work out a mechanism through the Inspector General to do investigations any time there was serious negligence or misconduct that affected the integrity of laboratory results. And as Marvin pointed out, a lot of these investigations showed us the weaknesses of the accrediting body that we had then: ASCLD/LAB. Hopefully, ANAB will be much stronger.

Certainly this Commission has always had
the authority to go beyond what the accrediting body that we delegate laboratory inspections to. We never really exercised it. That’s one of the problems again with having people that are basically inspecting themselves and not having independent scientists and really administrative people controlling the actual administration of the Commission.

But the most upsetting experience and I know it was for everyone on the Commission, be it prosecutors, Chairman Green himself, everyone, was the incident that arose with the Office of Chief Medical Examiner and the question of what they call Low Copy Number DNA testing. Low Copy Number DNA testing was a methodology that the New York City Office of Chief Medical Examiner essentially was inventing itself. And it was their way of taking very, very small amounts of starting material, amplifying it up and trying to get results, number one, and interpret mixtures, number two.

And probably the best way to look at it and I think literally thousands of cases involved
swabbing guns. Right, they would get a gun. They would swab the handle or different parts of the gun to see if they could get DNA and identify a particular suspect having touched the gun and/or being part of a mixture.

This began getting litigated very vigorously by the Legal Aid Society in a series of cases. Ultimately, it resulted in a decision by Judge Mark Dwyer, who you probably all know, who was for many years the Chief of Appeals of the New York County District Attorney’s Office. He now sits in Brooklyn. He held a very, very comprehensive hearing and he found that Low Copy Number DNA testing did not pass the Frye test. By the time that decision was made, we’ve had thousands of cases. It’s not going to be appealed. The lab is going to move away from that system. So, we’re now in a situation where one of our most respected judges, the Co-Chair of our Justice Task Force in the State of New York, has issued a very solid reasoned opinion saying that this methodology lacks essentially scientific --
But here’s what really was disturbing in terms of the Commission: As the Low Copy Number controversy emerged in a case, a Daubert case that was being litigated in federal court and the Legal Aid cases in Queens and Brooklyn; the Commission itself started asking questions of representatives from the Office of Chief Medical Examiner. I think he’s the head of quality assurance. Eugene Lien came before us. And he was asked directly and I asked him the question: Has the OCME done internal validation studies on samples replicating case work at below 25 picograms -- which is a very, very small amount of DNA -- involving two or more contributors? And Mr. Lien said: Yes, it was done. At the hearings in federal court and a representative of the OCME said: No, we don’t have such a -- we didn’t do such an internal validation study. Mr. Lien came back to the Commission and I asked him exactly the same question again. He said: No, we’ve done that study. I said: Look, we have testimony in federal
court. We have your representations.

With the agreement of Bill Fitzpatrick,
we sent it back to the DNA Subcommittee to
address this issue. The DNA Subcommittee came
back and said: No, we are still in favor of Low
Copy Number testing. But they did not
specifically answer whether or not there was an
internal validation study done on samples
replicating case work of two or more people at
this very low level.

Now let me tell you why an internal
validation study is so important and it’s just
common sense. And it’s the requirement that John
Butler and the federal government has had for DNA
and it’s a requirement really for any forensic
assay. It’s one thing to develop a new technique.
It’s quite another to say: In the actual case
work where I’m going to be working, when I get
these guns and I swab small amounts of DNA from
the guns; can I get the right results? Can I get
accurate results? That’s the bottom line. So, an
internal validation study is absolutely critical
to validate a method.
When this question then came back after
the DNA Subcommittee didn’t address whether there
was an internal validation study but just say:
Oh, we still think Low Copy Number is fine; I
asked OCME to produce that internal validation
study. They declined. Then I asked the Commission
as a whole to vote to disclose an internal
validation study. Now think about it: We’re
talking about science. There is nothing more
fundamental in science than being able to be
transparent and disclose your validation study.
Nothing is more basic than that, in terms of
being able to replicate what people are doing and
show that you really have a valid and reliable
technique.

The Commission voted not to disclose it.
But one of the Commissioners, Marina Stajic, who
is the Chief of Toxicology for many years in the
Office of Chief Medical Examiner, voted with me,
with Marvin Schechter. Peter Neufeld was not
there that day. I don’t believe Bill Fitzpatrick
was there that day. But we lost a close vote. But
Marina Stajic, Dr. Marina Stajic voted with us to
disclose this report. And by the way, we even had a second vote to just disclose it to the Commissioners under protective order. That lost too.

Sometime later, Dr. Stajic was fired. This was disturbing to all members of the Commission. She has filed a lawsuit in federal court claiming that this firing was retaliatory, a violation of her First Amendment rights. The lawsuit speaks for itself. I will not address the merits. It will be adjudicated. But what’s disturbing to me is that that happened: the validation study was not disclosed. So this to me was the ultimate sign that a lot of very well-meaning people on the Commission and I’m not saying that people were not well-meaning; I mean, I was there with every director of criminal justice from Carl Sluvetka [phonetic], who is very good, from Paul Shechtman. I’m sure Chairman Green is well-intentioned about all of this and has professed many times; he looks at me and he goes: You know, I don’t really understand this DNA. I understand that.
But the point is that when you get to the point where the Commission’s composition is so slanted in favor of the same law enforcement bodies and crime lab bodies that are inspecting themselves essentially, that they can’t reveal a validation study, an internal validation study on a critical technique that affects the safety of every citizen in the City of New York and this State; just think about it: If they have been wrong with this Low Copy technique, as Judge Dwyer has found, and they were swabbing guns and making bad calls on mixtures in what literally is probably tens of thousands of cases over the last few years, that is not only running the risk of convicting the wrong person but the real person is getting away.

So the Commission came to that. And there were lots of reasons that I resigned. Peter Neufeld resigned. I’m very busy with the federal agenda and really it’s important to have new people come forward and do the work on these institutions. But I would be less than candid if I didn’t say that it was the whole way that the
Low Copy Number validation issue was handled and the problem that Dr. Stajic encountered that made me think that the Legislature really has to take a good hard look at the Forensic Science Commission, its structure and try to change it.

We’ve had quite a number of scandals over the years. And the question is: Why didn’t our Commission find those? Those are all fair questions. Ellen Biben tried to address those. But this latest incident involving the Low Copy Number testing and the issues: the failure to turn over an internal validation study on such an important matter, that it has come to that just shows me that the Commission has lost its way.

So I really rest on the remarks. And if you want to know anything that’s going on in forensic science and you want somebody that gets along with everybody and is very, very knowledgeable, ask Sarah Chu from The Innocence Project. She does fantastic work.

ASSEMBLY MEMBER LENTOL: Thank you. Now he can’t hear us, right?

MR. SCHECK: I hear you now.
ASSEMBLY MEMBER LENTOL: So, I want to ask one question since we can of Sarah or you. Because I agree now very much that there should be some sort of a reconstitution of the Commission. However, just like the question I asked of Marvin Schechter and Erin Murphy, we aren’t a unique cameral Legislature. And we have to deal with another House who may not have the same view about whether or not this particular Commission is functioning as it ought to. And we’d like to bring it out in the sunlight if that’s the case. And we need you to show us the way to do that. Because as you suggested and Mike Green admitted, this is a very technical subject. He doesn’t understand DNA. A lot of people don’t even know there’s a Commission on Forensic Science. How do we make this sexy enough so that the public understands there’s a need for change?

MR. SCHECK: I completely appreciate the question you’re asking me. And I think there are ways forward. I want to make it very clear that I’ve served with a lot of people on that Commission from law enforcement and from the
crime labs. And I don’t want to be
misinterpreting and saying I in any way that
they’re bad people, that they’re dishonest
people, that they don’t want to get the right
results or anything of the kind.

ASSEMBLY MEMBER LENTOL: And I know
you’re not and I’m not suggesting that. It’s just
that we’ve fallen into --

MR. SCHECK: Oh, no, I know you’re not.
I know you’re not. I just want to make sure
that’s on the record.

ASSEMBLY MEMBER LENTOL: Okay.

MR. SCHECK: But what I really think
might be a way forward even if we could put
together some kind of blue ribbon committee to
take a look at the Forensic Science Commission
itself and how it’s constituted and suggest
changes where there’s buy-in both by the
Executive Branch and Members of the Senate.
Because it is fundamentally a scientific issue
and you need the relevant scientific expertise.
And we have an opportunity of drawing upon one of
the great scientific communities in the world.
And there is more and more interest now in the scientific community to solve some of these problems that have arisen in forensic science.

And so I think we could get people from Rockefeller University, Cornell, Columbia, NYU; all the great medical centers and research centers if the Governor with the buy-in perhaps from the Assembly and the Senate were to appoint a group -- a blue ribbon group to do an analysis of where we are with the Forensic Commission in New York and what kind of structural changes might be appropriate. And they can evaluate the suggestions we’ve made and others. I think that might help a lot.

Certainly it wouldn’t hurt to move around the edges a little bit and change the composition of the Committee. But we really are at a point where we should have some long-term thought, where we get buy-in with both Houses and the Executive to how to change this. Because there are a lot of good people involved in the forensic science laboratories and in the system here but it is a captured agency. And we’ve got
to put science back in charge with good buy-in
and appropriate feedback from criminal justice
takeovers. But if we’re talking about forensic
science, we’ve got to make sure that the science
is ripe.

And when I talk about the science, I’m
not just talking about the different techniques.
I’m talking about laboratory management, right:
the way we run hospitals; the way we run over
institutions where life and liberty are at stake.
There’s a lot of science involved in that as well
in terms of a regulatory system. And we have to
rethink this fundamentally. And that’s why I’m
really pleased that you’re holding these hearings
and giving it serious thought. So that really is
my answer, Chairman Lentol. Who’s the Chairman
now? Is it Chairman Titone or Chairman Lentol? I
forgot.

ASSEMBLY MEMBER LENTOL: It’s Lentol
speaking.

MR. SCHECK: Okay. That’s what I
thought. You’ve been my Chairman for a long time.
So, I really think that some move like that,
where we bring the Governor in; we bring the
leaders of the Senate in because I think that
everybody’s got to be interested in getting this
right.

And then try to draw upon the leaders of
our scientific community, not for a study takes a
hundred years because a lot of this is known from
the work that’s going on on the federal level.

But to make a set of recommendations to both
Houses, so that you can really do a sensible and
intelligent dive into this agency, which really
started with great promise and I think can be
rescued if we restructured it but it has to be
restructured in some fundamental ways.

ASSEMBLY MEMBER LENTOL: I mean, I think
you have given us a perfect example by the Low
Copy validation technique used by the Chief
Medical Examiner’s Office. And the fact that it
was found invalid by a former district attorney
should count for something and should make people
in the government and I’m not talking about the
Assembly necessarily but we didn’t even know that
this was going on at the time. And I’m sure that
if we didn’t know in the New York State Assembly
and the Chairman of the Codes Committee was
unaware of it in its entirety, the State Senate
nor the Governor’s Office knows about it. And
these are examples of things that would
demonstrate need for change.

MR. SCHECK: Chairman, the thing that’s
most troubling about that is not so much that --
I mean, there’s a decision by a respected judge
and that’s a problem of course that it won’t get
reviewed and they are going to switch their
technique.

ASSEMBLY MEMBER LENTOL: Yeah.

MR. SCHECK: Which should tell you
something. But the real problem is that that
internal validation study, the Commission could
get to the point where it would not disclose an
internal validation study to the public on a
technique this important, just shows me that it’s
lost its way. And look, the lawsuit about the
firing of Dr. Stajic was upsetting by the way to
everyone on the Commission. I don’t want to
pretend that we were all upset by that. That’s a
lauisit. That’s a separate issue about whether it was a retaliatory firing. But the scientific issue to me is that you can’t have a Commission on Forensic Science which does not force an entity to disclose its internal validation study on a critical technique. How did we get to that point?

ASSEMBLY MEMBER LENTOL: Questions?

ASSEMBLY MEMBER TITONE: Yes.

ASSEMBLY MEMBER LENTOL: Mr. Titone?

ASSEMBLY MEMBER TITONE: Thank you. Good afternoon, Mr. Scheck. Just I’m wondering where is -- you know, we keep talking about we want to put more scientists on this Committee. We want to do more with science to ensure what we’re doing legislatively or in our courtrooms is credible. My question then is: Where are the scientists? Where are they today? When you speak to them, what’s their appetite? What’s the level? Has The Innocence Project ginned them up at all to get them to be participating, get them to be part of this process here, not just today but come Friday or anything in the future? Where are the
scientists saying: New York State, your science is lacking; the credibility of your science is lacking? How do we get them to come to us to talk to not only the Assembly, who clearly we’re very open to change, but to the Executive and to the Senate?

MR. SCHECK: Well, I think you can. And I’ll tell you why. Because things have changed enormously. There’s really been a tectonic change in the way that the scientific community has now turned its attention to forensic science. The first real shot across the bow was the 2009 National Academy of Science report. The National Commission on Forensic Science that President Obama put together, which was a combination of the National Institute of Standards and Technology and the Justice Department, that Commission probably won’t continue through the next Administration.

But this is totally in the game. And they are committed to this research. We have seen major grants from the federal government to, for example, a group called See Save [phonetic],
which is a grant that goes to a number of universities across the country to deal with statistics and forensic scientists. So, Mr. Titone, it’s in motion. There are scientists on a national level. There are scientists everywhere that are ready, willing and actually interested in looking at key questions of forensic science like never before.

That’s why I think that outreach from the Assembly, the Senate and the Governor to the leaders of the scientific community in the City of New York, certainly the State of New York I should say; I think would be responded to because that scientific community is paying a lot of attention. In the President’s Science Advisors report, the PCAST report is probably the thing you should read right away.

ASSEMBLY MEMBER LENTOL: Sure.

MR. SCHECK: Because that lays down the gauntlet and says: Here are ways that you can validate some of these methods. Do it. And frankly there’s a lot of scientific credit and even grants that can be gained if you now start
saying: I can come up with a better way to do fingerprints and express its probative value or ballistics, etc.

So, the tide has turned and it's a great question, Mr. Titone. Because if you'd asked me that 15 years ago or 20 years ago, I would say: Well, there isn't a great interest in the scientific community in difficult issues of forensic science. But now we know that in digital evidence, in neuroscience, in molecular genetics, in physics, biophysics, all of these groups are now looking -- computer obviously sciences; they're all looking at these forensic science issues and they're interested in solving them. And we can unlock an enormous well of expertise and frankly funding if we can get them seriously interested in helping us reform the Forensic Science Commission.

ASSEMBLY MEMBER TITONE: So do you think something where the Legislature is creating grants to expand upon the research? Because quite frankly like you I believe that the whole familiar DNA testing is going to be a little bit
obsolete in a couple of years. And I’m sure that
the science that we’re talking about being
cutting edge today will look very different in
ten years. So, I wonder in the interest of
justice, should the State be investing more
grant-wise towards this type of science into
particularly the schools that we invest so much
of our taxpayer money into?

MR. SCHECK: I think that’s definitely
right. And it would be good to do it in a
collaborative and a consortium type way; where we
try to get all the different scientific centers
in our State connected and involved in this. I
mean, we’re talking here about digital evidence.
We’re just beginning the era of digital evidence.
We have big issues on how to get into phones or
how they could be searched or computers, you
know, facial recognition. And frankly when you
talk about DNA, there are a lot of problems now
with DNA because it’s like the Low Copy incident
shows: Can you push the technology beyond its
limits? And how do you properly control it in
terms of ethical issues and privacy questions?
These are all matters I think that are absolutely of vital interest to the scientific community, the leaders of the scientific community. And I’m sure if we go about it in a concerted way with cooperation from the Senate and the Executive and the Assembly, we might be able to put together a small group that can look at the issues that we’re putting before you and say: Yes, here are some ways that this Forensic Science Commission can be changed. Here are some ways that we can help. Here’s what we have to do because this has been going on at a national level. It’s like a lot of things these days. Big, big changes were happening at the end of the Obama Administration in terms of forensic science.

I don’t know and I’m a little pessimistic about whether that’s going to continue in the Trump Administration. But the genie is out of the bottle and the scientific community itself is engaged. And I don’t think that will cease. And I think in fact it may create an opportunity for the State of New York
to jump in to the extent that what had been
started by the National Commission of Forensic
Science is continued here in the State, if in
fact it sunsets on the federal level.

ASSEMBLY MEMBER TITONE: Thank you.

ASSEMBLY MEMBER LENTOL: So do you think
that there is an -- well, let me just put it this
way. I’m not sure that there’s an appetite for
change in the Commission because of what I’ve
heard this morning. I don’t know that the
Governor or the New York State Senate would be
interested in change. And I guess with
Commissioners resigning from the Commission, it
sounds more like they’re giving up rather than
trying to fix what’s wrong with the Commission.
And let me just say this: If I were running for
President, I might charge that the system is
rigged. And I know that you’re not saying that.
What you’re saying is that they’ve lost their
way.

MR. SCHECK: When Peter and I resigned
from this Commission, really it had to do with
primarily a workload in terms of forensic science
reform on a federal level and across the country and also for the desire and you heard Professor Murphy, you can’t find anybody more expert on these matters than her. So that generation should really come to the fore. It just seemed frankly that we might be able to effectuate better change in terms of the structure of the Commission from the outside talking to people like you than from the inside anymore.

ASSEMBLY MEMBER LENTOL: Well, you should know that I advocated for Professor Murphy to the Speaker, that that appointment be made. And unfortunately the Speaker had another candidate who I don’t know, so I don’t know the background of that individual. So, I just wanted to let you know that because I saw when this happened and heard from a lot of people that recommended her as an expert that should be on the Commission. So you should know that, that I did advocate for her but it didn’t happen.

MR. SCHECK: I understand. Well, but I’m sure there are many people. But it’s a bigger issue than just -- I don’t think we’re really
going to be able to fix it by just changing one
or two appointments. I think that it has to be a
larger look. And I am actually optimistic that
that can happen because larger forces are in
motion in terms of changing forensic science.

And as Assemblyman Titone was pointing
out, you know, there’s greater interest on the
part of scientists than there ever has been
before in making sure that forensic science is
valid and reliable. And I don’t think that is
going to stop. And I think that there are
probably some pretty sensible ways that we can
involve that community. And I don’t want to give
up on the people in the Senate or the Executive
Branch from seeing this as necessary.

ASSEMBLY MEMBER LENTOL: Nor in the
Fourth Estate. There’s nobody here from the press
following this hearing. They don’t care about it.

MR. SCHECK: People will start coming.

ASSEMBLY MEMBER TITONE: Look, what I’d
like to see from the scientific community to be
perfectly frank is; you know, when people attack
me as a legislator, as a politician -- using the
P word or my profession as an attorney, I get upset sometimes because I know that my credibility as a public servant when something goes wrong with someone else, my credibility as a public servant is tarnished.

When a lawyer is taken away in cuffs because he stole a client’s money, my credibility to my profession is being tarnished. So I just see it that: Look, in the scientific community, when we hear these stories of bad science or technicians gone afoul, whether intentionally or not, that their credibility, they’re being tarnished. And as professionals, I would like to hear more from them demanding of not only their colleagues but of the State of New York, both the defendant as well as the prosecutors and of our judges that their work be taken with more respect and credibility.

And I think that’s where we start to really get the attention of perhaps the Executive and perhaps the Senate: when the professionals actually in the field are making the noise rather than the advocates who know what the problems
are. But really when the science community is there saying there’s a problem with what we’re doing and how we’re treating New Yorkers, then I think that’s where we start to get people will pay attention and irrespective of what side of the aisle they sit in the Senate, as well as on the second floor, as well as in the Assembly itself.

MR. SCHECK: And I couldn’t agree with you more. But let’s be clear about there are forensic science practitioners and I don’t mean to denigrate them by that term but it’s like anybody else in a particular discipline or field: You are a practitioner in the field and then there are people that have expertise, scientists in the broader area than just the narrow area of expertise. Not to say that there isn’t much to be learned and it’s not very important to know what the bench scientist, the bench forensic scientist is doing or what their problems are; that’s of course critical.

But what we have now that we didn’t have before is the mainstream scientific community. I
shouldn’t even say mainstream. It’s the larger scientific community is now paying more attention to the issues of validation and reliability than they ever did.

So when you look at what the National Institute of Standards and Technology has done, we have now scientific area committees in chemistry, in physics, in digital, etc.; that is the way that this organization of scientific area committees is put together. There’s still a lot of tension between the statisticians and the broader scientists in the field and the practitioners. But you don’t have the drug companies and the practitioners deciding for themselves what the regulations should be. You have a larger independent scientific and public health body looking at it. And the same thing should be true here.

So, what I’m really saying is I think we can get and we have gotten the leaders of the scientific community to speak out now. You get the President’s science advisors. You get the National Academy of Science issuing these kinds
of reports. That ought to get the attention of everybody that’s serious about public safety and national security and making this system work. And I think it has. So, I think that there’s a reservoir of people there that we can bring into it. And so I quite agree, it would be the best thing in the world if we had all the people that --

ASSEMBLY MEMBER TITONE: Sure, sure. I imagine that the forensics scientists --

MR. SCHECK: I don’t think that’s going to happen but other scientists will.

ASSEMBLY MEMBER TITONE: I just think imagine how great it would be if the forensic scientists, if our great professionals were out there saying that: This Commission does not represent my profession.

MS. SARAH CHU, SENIOR FORENSIC POLICY ASSOCIATE, THE INNOCENCE PROJECT: And may I add on to what Barry said?

ASSEMBLY MEMBER LENTOL: Sure. Yeah, please Sarah.

MS. CHU: My name is Sarah Chu and I’m
the Senior Forensic Policy --

MR. SCHECK: I’m going to have to sign off. I apologize and I apologize for all my technical difficulties. It’s all my fault.

ASSEMBLY MEMBER LENTOL: Thank you, Barry.

MS. CHU: I’m the Senior Forensic Policy Advocate at The Innocence Project. And Barry was able to speak from the perspective of a Commission member. And I have been an observer of Forensic Science Commissions across the country. Something that I think is a pressing need and this stakeholders committee that Barry mentioned could be engaged immediately to work on issues regarding the duty to correct. It would be important for the State to be able to come together to work on these issues before the decision is made for the State.

And the reason I say that is because the State of Texas through its Forensic Science Commission has done discipline-wide reviews. And they’ve looked at arson. They looked at microscopic hair comparison. They looked at
problems with DNA interpretation. They looked at bite marks and the use of bite marks in their criminal justice system. And that Commission, these reviews are still ongoing. There were hundreds of cases that they needed to look at because they’re such a large state.

But the fact that New York State has not done its own review does not mean that these issues don’t exist in our State. And we were incredibly disappointed to see that the Commission on Forensic Science in New York State began a discussion to consider microscopic hair comparison review back in 2013. And the review the initiated is because the FBI realized that after decades and decades of application of this evidence, that they found that at a systematic level FBI examiners were testifying to hair comparison evidence in a way that was scientifically invalid.

And so the FBI with The Innocence Project and the National Association of Criminal Defense Lawyers partnered to do a review. And in doing that review, one of the things that was
uncovered was the fact that hundreds and hundreds of State level hair examiners were trained by the FBI to conduct the examinations and to testify to evidence in the exact same way that FBI examiners had.

So when the State of Texas heard that, an advisory went out in I think April 2013. The Texas Forensic Science Commission initiated its review in November of 2013. In New York State, the same advisory came out in 2013. The Commission began to debate whether or not to do a hair review. Committees were formed to consider it, to develop a process. And then abruptly in June 2016, just this last summer, the Commission voted to send a letter to the Governor to ask the Attorney General to consider conducting a hair review. Now again, one of the things I want to emphasize: arson issues, hair issues, bite marks; we have institutional bit mark experts in New York State; that these problems will continue to mount.

And unless we do our job and conduct these reviews and take the lessons from them to
improve the practice of forensic science in these disciplines, that there may be a day when the decision is made for us. And when the State could proactively plan and guide our institutions through a review in a way that builds our institutions and informs and educates all the people involved in the criminal justice system.

ASSEMBLY MEMBER LENTOL: Thank you. Thank you very much. We appreciate your sitting through Barry’s testimony. Our next witness is Scott McNamara, the District Attorney of Oneida County; the President-Elect of the District Attorneys Association of New York. Good afternoon.

MR. SCOTT MCNAMARA, DISTRICT ATTORNEY, ONEIDA COUNTY; PRESIDENT-ELECT, THE DISTRICT ATTORNEYS ASSOCIATION OF NEW YORK: Good afternoon.

ASSEMBLY MEMBER LENTOL: This is not a lynching party.

MR. MCNAMARA: I’m a little concerned. Well, good afternoon. My name is Scott McNamara. I’m the elected District Attorney of Oneida
County and I am the President-Elect of The District Attorneys Association of the State of New York. I’m also a Commissioner on the Forensic Science Commission. And today I’m speaking before you on behalf of DAASNY. And I am accompanied today by the Executive Director of DAASNY, Morgan Bitton.

As a major stakeholder in this area, DAASNY thanks you for including us in this discussion and considering our positions and our concerns. It’s my understanding that the purpose of this hearing from the announcement was, number, one, to examine the oversight of forensic science in our State; and number two, to determine whether additional steps are needed and should be taken to assure the reliability and the effectiveness of our current practices.

Unmistakably, prosecutors want forensic labs that are reliable. Indeed, if we had our way, laboratories that we use would be beyond reproach. As a profession, we want laboratories and scientists that are thorough and trustworthy. Further, the constitutional mandates of speedy
trial require us to stick to a rather strict
schedule and demand results in a timely and yes,
some would argue a hurried fashion at times.

The reliability of a lab is paramount to
our ability to seek justice and to produce fair
and just resolutions of our cases, whether that
be a conviction or an exoneration. We cannot do
that if we cannot rely upon the labs that perform
the analysis, unless they are working the highest
reasonable professional standards. Therefore,
proper oversight of the public labs upon which we
rely on is a major concern of our organization.

Currently DAASNY is well represented as
a major stakeholder on the Commission on Forensic
Science. Two of the 14 members on the Commission
are elected district attorneys: D.A. William
Fitzpatrick and myself. However, one of the
criticisms of the Commission as you have heard
today is that it has become too political. It has
become common for three people on the Commission
to vote in a block. Often those votes make little
sense and establish nothing but to make a biased
point. Two of the members have recently left and
I consider them both friends; so I’m not saying this in a bad way. And the other one is contemplating leaving.

The truth is that the Commission should be run by scientists, not by politicians and not by people that have an ax to grind or a position. And you’ve heard that even from Marvin and Barry today. Don’t misunderstand me. It is one of the greatest honors I have. When I go places where I’m introduced to say that I’m a member of the Commission, it’s a great honor. I mean, I like Assemblyman Titone, very proud that I serve the public, just like I’m sure all of you are and proud of what we do. But the reality is perhaps there should be an advisory board to the Commission and the Commission should be made of scientists like the DNA Subcommittee is.

Nonetheless, talking about the Commission as it exists right now, I do stand in a unique vantage point to speak to you as both an elected D.A. and as a Commissioner. I, like Marvin and Barry did before, I attend the quarterly meetings. Prior to being appointed
however, I had limited knowledge of the oversight that the Commission exercised over the public labs in New York State. To be honest with you, I was unaware that each lab was required to go through an intensive accreditation every four years. Not currently, but until just recently those accreditations were done by ASCLD/LAB.

I don’t necessarily agree with what Marvin said. My understanding is ASCLD/LAB and another company merged and that’s the accrediting agency. I would disagree with something that was said though. The Commission has not blindly turned everything over to ASCLD/LAB. And that’s absolutely not true and all of this is public. That’s the other thing too. And I’m with you on: How do you make this spicy? How do you make the public get interested? Everything we do is public. Our Commission meetings are broadcast. I mean, people can download them. And I know people in my profession, some of them don’t even appreciate what we do there.

So I understand that problem as you say it. But we did go through a procedure where we
looked at other bodies to see if one of those
bodies would be better for what we do; to make
sure that we can make these labs be more
reliable.

I’m not totally disagreeing with Marvin
on some of the things he said. But on that I just
cannot agree with him at all. We have looked at
that. We don’t blindly and I forget what his
exact words were -- rely upon that. We have
looked at other agencies. But in addition to not
knowing when that was done; I also didn’t know
that on the first and third year they also had to
go through an off-site performance review. And on
the second year, they actually had to go through
an expanded surveillance from ASCLD/LAB.

I also did not know and I think it was
surprising in a good way too as a prosecutor,
that all the abnormalities, all the errors, all
the missteps and all the acts of misconduct
within the labs were required to be reported to
ASCLD/LAB and also to the Commission. And that’s
part of the public documents that we get.

Now there was some talk about why the
technicians’ names are taken out. My understanding is it’s because of their right to privacy. Because when these things are turned into us, often they are at the very initial stages of an investigation. They might be cleared. They might be found to be culpable for what they did wrong. But I understood it to be a right to privacy issue. It has nothing to do with hiding their names.

And as a matter of fact, with one of the things that has happened recently involving New York State, we know all of their names. So when we ask, we get them. So I would disagree that there’s any hiding going on by the labs. I think they work in a unique situation. And I think we can see that from the New York State Police issue that we had. There are other things at play here: civil service, privacy; people being afraid of being sued if we say something about somebody that’s wrong. So we don’t want to be sued and we don’t we don’t want to be subject to that. So I think those things too we have to keep in mind when we talk about some of those things.
But I would like to say this: In preparing for the Commission meetings, I spend no less than 25 hours. Most of the time it’s closer to 40 to 80 reading. Okay. I’m an elected district attorney. I have a full-time job. This is a lot of work and it is for all the other people. And I oftentimes have to look up what the reports are talking about. So once again, I can’t emphasize enough: I think scientists that understand it should be the people.

Now, I will share with you one thing. There was a scientist on it and you, I think Assemblyman Titone, had asked a question: How do you get them? I think if you get the politics out of it, you’ll get the scientists in. That’s my opinion from an observer on the Commission. Because we had a Commissioner that I thought did a phenomenal job. And to be honest with you, she didn’t want to deal with the political and the bickering and the fighting that goes on and the positions that were being taken and that certain people were advocating and chewing up hours upon hours at these meetings. And I know she was asked
to stay and I know she declined.

Now I think if you get the political part of it out and let the scientists be there and have some sort of oversight committee made up of defense attorneys, made up of prosecutors, made up of the judiciary that can give the practical end of it to help the Commission if they had a question; I think that’s a great idea. And, you know, I can’t speak for DAASNY. But I can tell you I would definitely go back and as the president-elect and as a member of DAASNY and have been a member of DAASNY for my entire career; I’m sure that this is something we would definitely be willing to discuss and talk about.

So I won’t go into the rest of my speech. I’ll leave that -- you have it. It’s part of it. But I would like to just address a couple of things. The hair analysis subcommittee that was mentioned a few minutes ago; actually I was on that subcommittee. Okay. So sometimes when things are talked about and said: We didn’t do anything or nothing was done; maybe if you knew the whole story, maybe that would straighten
things up. The person that was actually chairman of that called one meeting. Okay, it was a telephone conference meeting and that’s the only meeting we ever had.

At the conclusion of nothing happening, it was me, a prosecutor, that asked to send the letter to the Governor. Okay? Because I realized based upon -- and that’s why I tell you how many hours it takes me to prepare for these meetings; that committee because I knew Peter was very busy, I knew some other people on that were very busy; we didn’t have the time to go and order all these transcripts and review these transcripts.

Where do you find the time when you have a full-time job? So those are the type of things that when you have a committee like this, you do have limitations on their time.

So that’s why I thought the best thing to do would be to create a committee within the State that would make it so that there would be some people that were actually getting paid to do this and would be able to spend the time and energy and not be distracted by all the other
things; whether they’re a defense attorney with numerous clients or whether they’re a prosecutor that has a full-time job.

So those are the things that I would say to you. Yeah, I believe there are ways of fixing it but I will say this: I do not as a Commissioner believe that what is coming out of our public labs is not reliable. To the contrary. And I will say this: People make mistakes. People in my profession make mistakes. People in your profession make mistakes. People in the clergy make mistakes. I don’t care what profession we’re in, we have people that make mistakes. It’s not about people making mistakes that’s the problem. It’s about: What do we do when they make a mistake? Do we look the other way? Do we cover it up or do we expose it? Do we bring it to light? And do we do something to make sure it doesn’t happen again? And I believe the Commission does that.

As with any government, okay, there are claims, you know, how slow we take sometimes. But once again I remind you: People have rights to
defend themselves. People have the right to have hearings. So when a lab person is accused of doing something wrong, it does take a little time to fully vet out what took place and to hear their side of the story.

And you know there was some talk earlier about one of the lab technicians who actually committed suicide. Well, let me tell you the other side of that story. That lab individual testified in a case for me in my county, involving the assassination of a police officer. Okay. The police officer is writing a ticket and the guy came up behind him and shot him in the head. That lab technician did work for us. Because of the disclosure, we had to turn that over to the defense attorney and did. And we had to go through a hearing. And there was a chance had he done more work for us that we would have had to retry that case.

So we do care about those things because they have a definite adverse impact upon us in convictions in very difficult cases. That case was very traumatic for our community and for the
Utica Police Department. And the fact that his negligence or his malfeasance, whatever you want to call it, could have affected our conviction. Fortunately, he did almost nothing in our case but we still had to go through a hearing and everything.

And I will say something that Marvin said and I think it is somewhat incorrect to state that we don’t turn the reports over. That’s absolutely not true and at least I can say that in my county. Okay, first of all, I have a standing rule that we have open discovery: You give them everything unless it’s going to get somebody killed. Okay, number two: We give them everything we possibly can give the defense attorneys. Because we’ve found that if you give them everything, they can make a decision that’s fully vetted and oftentimes we get plea bargains that we might not have got when we’re not giving them everything. And as for the reports --

ASSEMBLY MEMBER LENTOL: That’s what I’ve been trying to tell the D.A.’s Association for the last ten years.
MR. MCNAMARA: Well, there are a lot of D.A.’s doing it just like me, to be honest with you. There’s a lot. And it’s just that like you said: There’s a certain narrative that comes out of the media. There’s a certain narrative that comes against us. I don’t find it necessarily to be true in many places. But we do turn over the whole report. The question becomes: What part of the report is Rosario and what part of the report is discovery? And that’s where the bickering becomes. To be honest with you, we try to get the Rosario end of it as soon as we can and give to them. Okay. But I have never heard the argument made that we give one page and the rest of it isn’t covered by discovery. I’ve never heard that argument. And to be honest with you, I wouldn’t want to make that argument in front of the judges that we practice in front of because it wouldn’t go well for us.

ASSEMBLY MEMBER TITONE: Well, I don’t think Mr. Schechter brought that up. I think it was I that suggested that it might be because of discovery.
MR. MCNAMARA: I don’t think so. But I do think that the discovery is pretty clear: the report has to be turned over in its entirety. I don’t read that to mean we can give the front page and not the rest of it.

ASSEMBLY MEMBER TITONE: I think the question was, you know, it’s not just the report but the methodology of the report; at the end of the day how did we get to the report? I don’t know if Marvin’s still here but I think that’s more what we’re talking about is: What was the methodology that was used to draw these conclusions that are in this report? And I think what’s become perhaps problematic to some people is that they feel that because the way a lab technician over here does this work, as compared to the way the lab technician over does it could differ.

And so when we think about science, we tend to and perhaps it’s a mistake, but we tend to think of it as an absolute. And we want to have complete confidence in science because if we can’t trust science, then: My God, what can we
trust? And I think not only for the accused and
the attorney representing the accused but for
their family members, as well as for law
enforcement, you want to have as close as you
possibly can get to that scientific certainty,
that what this report says is based on good
science, good credible methodology.

So I think that’s more what Marvin was
speaking to. It’s not: I’m getting the last page
of the report; I’m getting not the full report.
What I want to know sometimes is: Well, what did
the lab technician do to generate this report?
And I think that’s where the discovery becomes a
little bit; am I articulating this correctly?

MR. SCHECHTER: On the money.

ASSEMBLY MEMBER TITONE: Thank you.
That’s the last time I’m doing that today by the
way.

MR. MCNAMARA: Which I think we
interpret that to be Rosario material. But once
again I can only speak for my county. Okay, we
give that to the defense attorney usually a month
before the scheduled trial.
ASSEMBLY MEMBER TITONE: Alright, and I’m heartened to hear that. I really am. And speaking of my present district attorney, I know that he is a man who is just as interested as finding the guy who did it or woman who did it and ensuring that there’s a penalty with that; as ensuring that the innocent person is protected. I give my district attorney a heck of a lot of credit. You know, I have a personal relationship with him but I can’t imagine that that’s the majority of the district attorneys --

MR. MCNAMARA: I would disagree --

ASSEMBLY MEMBER TITONE: -- in our State.

MR. MCNAMARA: Who is your district attorney?

ASSEMBLY MEMBER TITONE: Mike McMahon.

MR. MCNAMARA: Yeah, he’s a fine man. But I would disagree with you. And obviously as I said, with any profession you have outliers. But I will say this: As a general statement about the prosecutors that I know and the people that are the elected D.A.’s in this State, we want to get
it right. We don’t want to convict innocent people. And we want to make sure whatever we’re relying upon is accurate and reliable as it possibly can be and all of us feel that way.

This narrative that has been put out about all we care about is convictions and putting people away; it’s absolutely not true. I’ve stood in a courtroom when Barry Scheck was with somebody that got exonerated. I stood there. Okay. That’s no place a prosecutor ever wants to be. It’s a terrible thing. And I’ve done a lot of things and I know the D.A.’s Association has done a lot of things to make sure that those type of events don’t happen in the future.

ASSEMBLY MEMBER TITONE:  Sure.

MR. MCNAMARA:  And the public labs are one of them. We need to have oversight.

ASSEMBLY MEMBER TITONE:  Sure. And I think what I’m speaking more to is that the confidence level of not only the district attorney, the people who work for you, under you, you know, want that confidence, that pride that comes with the confidence. And you want to ensure
like us at this panel that the people that we all
represent and ultimately every person in the
State of New York is being given that fair shake;
that they’re confident in a decision, whether
it’s guilty or not guilty, that there was a fair
shake or that the person being investigated had a
fair shake throughout the process.

And I just want to switch gears. When we
talk about the labs and creating confidence, one
of the things I’m wondering and maybe you can
speak to is: You and every attorney in this room
every year has to go through a continuing legal
education process.

MR. MCNAMARA: Absolutely.

ASSEMBLY MEMBER TITONE: Every medical
doctor, irrespective of their line of practice,
has to go through continuing education of
medicine. Do you think maybe perhaps it would be
helpful if once we have a real standard set, a
uniform set of processes, particularly as our
science grows and expands and ultimately changes;
would it be a good idea, one, to ensure that the
lab technicians that we are relying upon as the
public, they continue their education? You know, you don’t just get your license. Here’s your job and here’s your paycheck. It’s done. But to require continuing education in their process?

And I had a note here which I’ll probably get back to later but also within our Commissioners. We heard the problem that you just stated that you’re not a scientist and you wish that there were more scientists on this Commission. But what’s the education that you guys are getting? The Commissioners, what are they getting? Whether it’s from us or --

MR. MCNAMARA: Obviously based on what I said, I think the Commission should be made up of scientists. I do agree with you. I think there should be a report submitted to you. Although I would submit to you in essence it already is because it’s all public and anybody could watch it. But I don’t have a problem with a report being submitted to you. I do believe, as would our profession as an attorney or in my profession specifically as a prosecutor, the fact that we have to get continuing legal education and we
have to stay updated on everything; I think
scientists should have to do that, absolutely.

I do think though when you’re looking
for answers to some of these solutions, you need
to go back to law school. Law schools don’t teach
prosecution specific. There’s no law school class
about forensics or what you can or can’t say. I
mean, I know that’s not in your jurisdiction but,
I mean, there are a lot of things as a society
that we can do to make everything better. But,
yes, I do believe scientists should be; but I’m
not positive, as I sit here, to be honest --

ASSEMBLY MEMBER TITONE: Scientists
particularly in the field, if they’re going to be
creating evidence that either puts a person, you
know, takes away their liberty --

MR. MCNAMARA: But I’m not sure as I sit
here right now that that doesn’t already happen
in many of the labs. I mean, I can’t say that
once they graduate from college and then they
don’t ever get update. I don’t believe that to be
true. I do believe that there is continuing legal
education. I do believe they have to study. I
know from being on the Commission that whenever they implement a new procedure that they have to go through all training on that; that they have to successfully complete testing on it; that they have to actually be able to perform the test and prove to their supervision that they can do that test.

So, as I sit here right now, I don’t believe that they don’t get any continuing legal education. Now whether or not it has to be reported as a lawyer like you and I; every two years we have to report it to the State and we have to swear that we got it and prove what we did. I’m not sure if it goes to that degree. But I do believe from being on the Commission that there is continuing legal education and within these labs. I don’t believe they just --

ASSEMBLY MEMBER TITONE: Legal education, for example, the Brady Rule, like what about that? Where are we going with --

MR. MCNAMARA: I was hoping the worst I would deal with is familial searches. I mean, obviously my position is is I will tell you
exactly what I tell my assistants: turn it all over, period. Don’t come to me and try to explain to me how you navigated this incredible legal argument, how something wasn’t Rosario and it wasn’t Brady. Just turn it all over. Don’t try to make the decision yourself because I don’t want to be standing in our appellate division, which is Rochester, defending that, period. And if you get yourself in that, you’re probably not going to have a job. That’s my position. So, I don’t believe that sometimes -- I mean, there are people that do foolish things. There are people that don’t turn things over.

ASSEMBLY MEMBER TITONE: I know.

MR. MCNAMARA: But having said that, that doesn’t make our whole profession do it that way. And once again it’s how people in the position of power: What do you do when somebody makes a mistake? How do you react to it? And when it comes to Brady, like I said, everybody knows my position. Everybody in the D.A.’s Association knows my position. I’m fairly -- I guess the word would be liberal on it. I turn everything over
unless it’s going to get somebody killed. And
that includes all the reports of the police and
everything like that. So I can’t sit here and
tell you; I don’t know what goes on in New York
City. I don’t know what goes on for that matter
in Buffalo or Syracuse.

ASSEMBLY MEMBER TITONE: Which makes me
then wonder: Is there a need for something that’s
a bit more uniform? Because maybe what you’re
doing, which sounds really incredible and thank
you and it’s something that the people in
Rochester and Utica can be proud of. It sounds
like from the get-go, once the horse is out of
the gate, that there’s a fair shake coming along.
But the stigma, the thought process of many
people, particularly in New York City, you know,
in my community that I represent; they feel that
they’re not getting the fair shake. And maybe
it’s because in the past they weren’t.

But having set rules that every, all 62
district attorneys are following with respect to
the handling of forensic evidence; maybe we can
do better and maybe that can do better is a set
of formalities that are set: These are your guidelines. This is what you are doing when you’re dealing with -- and starting at the lab level or collection process.

MR. MCNAMARA: I understand what you’re saying. And to be honest with you, from a philosophical standpoint I would want to say yes. But I will tell you something that I’m very familiar with because like Marvin, who served on the National Academy of Science on Forensic, I served on the National Academy of Sciences on Eye Witness Identification. And I have pushed your section of the government. I have pushed the Senate. And I have pushed the Governor to adopt a law that’s been out there.

There’s something I learned about that that I didn’t appreciate being originally a little farmer, growing up on a farm in a very small community in upstate New York until what am I am now or serving on the National Academy of Science. What I can do in Oneida County and in the City of Utica and did; for example, first thing I did when I became the D.A., we videotape
all confessions, all -- not major crimes -- all. 
I actually videotape our eye witness 
identification procedures. I’m probably the only 
one in the State that does that. 

Okay, I think that’s pretty simple. But 
what I realized when I started advocating some of 
these positions was that New York State Police, 
the New York City Police Department; these are 
huge police departments. They’re not the police 
departments that I’m working with when I can as 
the D.A. of a county of 250,000 people, I can 
manipulate something like that and make it 
happen. I’m not moving an institution that has 
almost as many employees as I have citizens. So 
that’s the thing I say and when we pass a law or 
when you want to do discovery. 

I’ll tell you something I do in my 
county. I don’t know if it could be done in a big 
county like Queens. Queens is bigger than many 
states. I don’t know if it could be done. What we 
do: We have electronic -- basically our office is 
paperless. We put everything into a computer. We 
scan it all in. So for example, if you came to my
county as a defense attorney, you would get a
name and a password. And we’d give you full
access to our file, except for anything that we
chose not to give you. Like for example, once
again, if we had a CI, we didn’t want to give you
the CI’s name. You would have full access to
that. I can do that in Oneida County. I don’t
know if D.A. Vance or D.A. Brown or D.A. McMahon
could do that.

ASSEMBLY MEMBER TITONE: Right.

MR. MCNAMARA: So that’s the problem
when we talk about, you know, our State is very
different when you start talking about New York
versus the little town that I live in, which
there’s 500 people in that town. So, that’s the
problem when we talk about these discovery
reforms or we talk about these things: What can
be done? I can’t sit here and say that we should
do those because it might be physically
impossible. It might be physically impossible to
create that computer system that I use in New
York City. I don’t know.

ASSEMBLY MEMBER LENTOL: Oh, I wish we
could use it in New York City because I just want to interrupt you for a second. I have a thought that I don’t want to lose and that is this: I kidded before about the system being rigged and discovery isn’t the only part of the problem. And laboratories may be a problem. You may think differently now. But there are other aspects, like the videotaping of custodial interrogations. And the cops in New York City get a bad rap because it’s not only police-community relations that causes outcries from the community about fairness. It’s the system being rigged against people after they’re arrested too that we have to be concerned about. And I’m glad to hear that you’re doing some of the things that will improve police-community relations because it will. And a lot of prosecutors don’t get it and you do.

MR. MCNAMARA: Thank you.

ASSEMBLY MEMBER LENTOL: And the last thing I want to point out: I’m also happy that you talked about all scientists being on this Commission because that was the Assembly’s position back when the Commission was formed. But
we lost that one to the Senate. The Senate wanted politics to be involved in the Commission. So maybe, just maybe you as the incoming president of the District Attorneys Association, you can convince our counterparts in the other House that it’s a better idea to have scientists than it is to have politicians. Because you have politicians from both sides and we’d like the Commission to be fair to both sides.

ASSEMBLY MEMBER TITONE: And I want to point out that, you know, you’re making the point that I was going to make too. Joe, I think that DAASNY could be very, very helpful in helping us to reform a Commission that seems to have lost its way and I don’t mean to say that but hearing what I’ve heard thus far. And particularly when you look at the makeup of some of the members in the majority in the Senate; I think of my Senator, Andrew Lanza, a former prosecutor himself. He would listen to you, more so than he would listen to an advocate on the issue. So, I’m hoping that moving forward and congratulations on being president; congratulations but I’m hoping
that we can count on your support should we come up with recommendations and if we need you to advocate for the district attorneys to our colleagues in the Upper House that you’ll be available for us.

MR. MCNAMARA: I would definitely to speak to them if they ask.

ASSEMBLY MEMBER TITONE: Okay. And just, I wrote the bill that made it a felony to assault the district attorney.


ASSEMBLY MEMBER TITONE: Yes, I did.

MR. MCNAMARA: It never got passed though.

ASSEMBLY MEMBER TITONE: Yes, it did. It’s signed.

MR. MCNAMARA: Did it?

ASSEMBLY MEMBER TITONE: It got signed, yeah.

MR. MCNAMARA: Did it? Alright.

ASSEMBLY MEMBER WEINSTEIN: Thank you very much for your testimony today. I’m sure that we’ll be in touch --
MR. MCNAMARA: Thank you.

ASSEMBLY MEMBER WEINSTEIN: -- as we go along trying to make some reforms as it relates to the Commission and the forensics. Thank you.

MR. MCNAMARA: Thank you for having us.

ASSEMBLY MEMBER TITONE: Thank you and best of luck.

MR. MCNAMARA: Thank you.

ASSEMBLY MEMBER WEINSTEIN: Our next witness, Roger Muse, Vice President of Business Development, ANSI-ASQ National Accreditation Board. And you didn’t provide us with any written testimony?

MR. ROGER MUSE, VICE PRESIDENT OF BUSINESS DEVELOPMENT, ANSI-ASQ NATIONAL ACCREDITATION BOARD (ANAB): I did not.

ASSEMBLY MEMBER WEINSTEIN: Okay, we’ll listen carefully then.

MR. MUSE: Sure. And actually again as you stated, my name is Roger Muse. I’m with ANAB. I spoke with Mr. Jenkins on the phone who requested that I come. I didn’t have an agenda to push. I don’t have a testimony to give. I was
asked to come to potentially answer questions as to what’s going on. I can give you an overview of what’s going on.

But my understanding walking into this was that there was some lack of interconnectivity between this Assembly and the New York State Commission of Forensic Science: there is some information that doesn’t always get shared; there’s a misunderstanding and just some misinformation about how accreditation works in general.

ASSEMBLY MEMBER WEINSTEIN: So maybe I can start off with a question.

MR. MUSE: Sure.

ASSEMBLY MEMBER WEINSTEIN: Others will jump in. So, when your organization visits forensic labs, what are you looking for in order to grant, suspend or revoke accreditation. What’s your process?

MR. MUSE: So, we audit the laboratories in all disciplines. Meaning whether it’s an aerospace, automotive, mechanical, microbiological, forensic; we’re there to audit
the laboratories to ISO 17025 and those requirements that fall into that.

The genesis of this really dates back to this community, this forensic community and their reliance upon a company that we’re recently acquired, which is ASCLD/LAB. And they had a legacy system that operated outside of the ISO structure for many years. So what we’re looking for typically when we go to a laboratory is the requirements to ISO 17025. And when we’re there, we also keep in mind the international standard that the accrediting bodies follow underneath the International Laboratory Accreditation Cooperation, which is accepted and required by 85 economies around the world. ISO 17025 is the general requirements for all testing and calibration in laboratories. That’s what’s accepted in Europe, Asia, South America. And that’s what the general of requirements.

However, in certain industries, okay, in aerospace, medical devices, some other areas, forensics; there are layered requirements over top of the general elements inside 17025. So when
we got to assess a laboratory, it may be an industry-specific situation, such as forensic science; where sometimes it’s the accrediting body who is interested in putting their own supplemental requirements in there. Sometimes it’s an international guidance document, an ILAC-P or G series documents that’s driving this. And then often it’s industry related what’s doing that.

So in our case, yeah, what we’re looking for is conformist to ISO 17025 and those 230-some odd elements that are in there; our supplemental requirements that are in there; the ILAC requirements under G19 and any industry-specific infusions that we’ve got. So when I met with certain individuals when the National Commission was evolving and served on the accreditation subcommittee, we identified some things that seemed different in this industry is: You don’t necessarily want to build a straw house and then get upset when it blows down. You want to build it the way you want to build it for the results and the objectives that you’d like to achieve.
So you can’t get mad at the set of requirements that are in place. What you have to do is build a scheme on top of that. That’s what aerospace has done. That’s the Department of Justice had done with the body armor program. That’s what the Consumer Product Safety Commission has done with toy safety. However, we thought maybe there was somebody who was going to take on at the national level, so that accrediting bodies don’t have to go from state to state to state operating different accrediting programs.

We have to keep in mind the costs to the laboratories obviously. That’s not really our concern. That’s your concern. That’s the government’s concern. That’s what happens when you build conformity assessment programs is you don’t want to build a $4,000 car seat and say: Hey, it’s safe. Well, if you can’t afford it, it doesn’t work. So, the hope was that at the national level that there was going to be some type of domestic scheme, an accreditation scheme; whereby the accrediting bodies are used simply as
a tool, as an audit engine. But they’re there to
set over the 17025 requirements for general
requirements of laboratories and then any layered
requirements that are over top of that.

So that kind of was the hope that we
were looking to see at that level. I’m not sure
where it’s going to go or what’s going to happen.
At a State level, I think you still have some
abilities to shape that, to cooperate with the
accrediting bodies. And I think that every
agency, every state and every industry specifier
who’s cooperated with us in the past has agreed
that at this point it’s been a pretty good
result. So I hope to see more cooperation at that
level. I’m not sure I necessarily saw a high
degree of cooperation with the Commission.

I support a whole lot of what I’ve heard
today. And I think there’s good ways to improve a
lot of these things. We’ve acquired and merged
with ASCLD/LAB and we’ve kind of taken the best
of breed approach with that. We’ve got a bigger
concern with --

ASSEMBLY MEMBER LENTOL: Did you work
for ASCLD/LAB when it was in existence? Or do you
strictly work for ANAB?

MR. MUSE: I did not work for ASCLD/LAB.

I’ve been with ANAB for about 16 years.

ASSEMBLY MEMBER LENTOL: Okay.

MR. MUSE: So, but the best of breed
philosophy there was going to be, Assembly Titone
mentioned the recurring, continuing education
that you’ve seen in other industries, which is
interesting too. Some other things that we’re
looking at has to do at the technician’s level.
There are some concerns at that level. We’ve
taken a bigger focus on what used to be a five-
year cycle and made it a four-year cycle. Instead
of proficiency testing for the laboratory and the
laboratory results, it’s proficiency testing in
addition to the people – the technicians; their
proficiency testing of themselves as individuals.
That’s more of a personnel thing. That’s unique
to this industry.

ASSEMBLY MEMBER TITONE: So that does or
does not happen?

MR. MUSE: It’s in our new rules.
ASSEMBLY MEMBER TITONE: Okay. And has that been implemented? Or is that --

MR. MUSE: That’s being released in March.

ASSEMBLY MEMBER TITONE: Okay.

MR. MUSE: This is the fusion of our requirements from the preceding to the new.

ASSEMBLY MEMBER TITONE: Okay.

ASSEMBLY MEMBER LENTOL: So there’ll be a whole protocol that we can see?

MR. MUSE: Yup. There’ll be everything that you can look at. These will be the accreditation requirements. I want to say this. There’s probably about 230 elements or 240 elements in ISO 17025. But when you combine them with the supplemental requirements for this industry that adds to the tune of like four or 500. The gentleman before me explained: Yeah, people do make mistakes. There’s a lot of that. We’ve identified a few here; obviously a lot in the last few years. I don’t know that it’s terribly different in every other industry.

But there are communities within medical
devices or aerospace where these technicians, there’s a difference in compensation and that’s industry driven. This is State driven or in some cases Federal lab driven. So, you’re dealing with budgets, the money to pay for these individuals flows down. There may be a “you get what you pay for” element to that.

And also I think if the State had the power to pull the reports that they need or the listing of individuals that they need or a lot of the stuff that Marvin was talking about, it would be easier. Because typically with an accreditation body, our contract and our relationship because we have to adhere to ILAC structure, to 17011 and to the International Committee, who audits us and keeps our credentials in line.

ASSEMBLY MEMBER LENTOL: I don’t want to interrupt you. I just want to get to some of what needs to be asked. When a lab fails, even continually fails a few times, how often do you notify CFS about that? Do you notify them or you just notify the accrediting agency?
MR. MUSE: We notify the accrediting body. Now in Maryland, Maryland requires that those labs send them all the failures. They’re notified of every single failure. So to say that that’s not possible is not true.

ASSEMBLY MEMBER LENTOL: And that’s in the Maryland law that requires it?

MR. MUSE: Yeah. And so the State can get that information. Now if you try to lobby the independent institutions -- not you; but I’m saying if one were to try to lobby the independent institutions who are doing the assessments, it’s a tougher route than going straight to the labs and saying: I need this. I need this. And I need that. From there you see tremendous amount of cooperation I think from the accrediting bodies.

ASSEMBLY MEMBER LENTOL: And would you cooperate without a statute with the Commission on Forensic Science?

MR. MUSE: If it’s not in violation of ISO 17011, which protects; see these standards weren’t built around lawyers and industry. They
were built around science, right. And we’ve been talking a lot about scientists all day.

ASSEMBLY MEMBER LENTOL: That’s what we fought for.

MR. MUSE: Yeah, yeah.

ASSEMBLY MEMBER LENTOL: But the Senate had a different idea at the time I believe about how this Commission should have been structured.

MR. MUSE: Gotcha.

ASSEMBLY MEMBER LENTOL: And that’s probably why we’re in this situation we’re in now.

MR. MUSE: So, I don’t know a lot about how states enforce those laws. I know that things are very tricky. Things are very different in some parts of the state and commissions and institutions have more power than others. But if you could lay out what you want and drive that from a legal standpoint and make it a rule that they must supply; then you don’t run into any conflicts of interest between the accrediting body and the laboratory. That relationship can stay clean. Whoever wants that information
before, should drive it and get it out. And that way the accrediting body has no say in that. It has to go out.

ASSEMBLY MEMBER TITONE: One of the problems we face as legislators is we can say we want science to be driving the bus but it’s the legal field that created Rosario, that created Brady. And we need our scientists to be savvy as to what constitutionally makes good or bad evidence that can get into a courtroom. But we also want to ensure, you know, the district attorney’s office, the perception is is that they have unlimited resources; so that they can go the labs, they can get this. And then they may use the lab over and over again. And now the lab feels that: If I don’t get this result, I could lose business. I mean, can you speak to any part of the optics of the business of labs?

MR. MUSE: Sure. And I assume you mean specifically not outside of the forensic industry but here specifically, the forensic industry itself?

ASSEMBLY MEMBER TITONE: The forensic
industry itself.

MR. MUSE: Yeah. I mean, sure, there’s cultures under forensic accreditation; or instance, some cultures in Asia where it’s extraordinarily frowned upon and rude to go and do someone else’s house and write findings and call them out on the nonconformities. And it’s been an issue. Here, we’re a little more brazen than that. I mean, they write findings. They do things. What’s released out to the public is different from state to state, different from accrediting body program to program. But the optics of that: If our requirement under ILAC is to write a finding, submit the finding and if we have to suspend the lab, we do if their corrective action isn’t sufficient. Or we see a systemic breakdown or failures, we’ll suspend them and we have. We’ve suspended laboratories for doing that.

So irrespective of the optics, we’re beholden to ISO 17011 and 17025; those requirements and our own accreditation body policies. So if somebody’s going to be fired as a
result of that, that doesn’t really weigh into
our analysis of the lab.

ASSEMBLY MEMBER TITONE: So when there
is a suspension, a failure, who does that get
reported to?

MR. MUSE: Again, this is a contract
between --

ASSEMBLY MEMBER TITONE: Does it go to
the Commission --

MR. MUSE: So, we’re not a national
body, right. So we’re not a national, like a
government body, right.

ASSEMBLY MEMBER TITONE: Right.

MR. MUSE: There’s no law saying we
report anything to anybody. Again, we go back to
what we do is: We assess the lab. We provide a
result whether they get their accreditation or
not. Their accreditation itself is public
knowledge. We keep all our accredited labs on a
public database. But you won’t see the failures
necessarily from us.

ASSEMBLY MEMBER TITONE: On the business
end, who’s paying you to do the inspection?
MR. MUSE: The labs.

ASSEMBLY MEMBER TITONE: The labs themselves are paying you to inspect them?

MR. MUSE: Mm-hmm.

ASSEMBLY MEMBER TITONE: You see how that could be a problem to some communities, that: Well, if the lab is paying me to oversee me, you know, and then I fail once, I fail twice. It’s not being reported. And I’m not saying this happens. But I’m talking about because our job is ensure that the people we represent, which if you’re a New York State resident it includes you; that there’s a confidence in the system. And the confidence in the system, whether rightly or wrong, is deteriorating and for many, many reasons. But one of the reasons could be the whole perception that: The lab that got my son convicted was inspected three times. It failed three times and get this: The inspector was paid by the lab. And so do you see --

MR. MUSE: Right. No, I mean, it’s the system that the world has built around oversight of testing laboratories. We didn’t invent it or
design it. There’s not cash under the table: wink, wink, we’ll sweep --

ASSEMBLY MEMBER TITONE: No, I get it. I don’t mean to imply that at all.

MR. MUSE: But this is obvious, right, the relationship where sometimes when one municipality, it wasn’t the lab itself; it was the mayor’s office who hired us. And even in case of doing special inspections over top of what we’ve done, we’re paid by them. So, it’s not always a lab owner. Moreover, it’s usually the municipality or the private entity or somebody else paying for the accreditation. Our whole mission as a nonprofit entity and as part of a standards body in the United States is to try to maintain that objectivity and really the visibility of that objectivity to others.

Whereas the market share typically and as history has taught us in the conformity assessment work sniffs out those types of situations. Because if there’s a conflict that changes the status of someone’s accreditation, as soon as somebody were to leave that laboratory,
that’s out in the public, that’s out in the public. Those things generally don’t occur.

And it’s not just here. Even in some economies where there’s a high degree of suspicion of bribery and fraud, way more so than the United States; even in those economies, the accreditation structure is designed the say way we’re talking about here where the lab pays for the assessment, from that respect has been untethered.

ASSEMBLY MEMBER TITONE: Sure. Very rarely can you shame a bad actor into acting well. So, I hear what you’re saying. What is the relationship with you and with the CFB? Do you communicate with them at all? Have you ever made recommendations to them?

MR. MUSE: From my standpoint, no, we haven’t. I have no contact with them.

ASSEMBLY MEMBER TITONE: None whatsoever?

MR. MUSE: Yeah.

ASSEMBLY MEMBER TITONE: Okay. Alright.

ASSEMBLY MEMBER LENTOL: Any questions?
Well, the only question I have is based upon what Mr. Titone asked. Is it necessary for us to have a different system in place in order to have an inspection of laboratories as opposed to as he’s suggesting -- my words, not his -- having the chicken police the fox -- police the hen house? Is there a better system of how this could be done?

MR. MUSE: I would say if you had the lab directors themselves auditing themselves and submitting paperwork, that’s a better example of the fox watching the hen house, right. But I think by understanding accreditation in the United States with the other industries, the reliance upon the aerospace which has NIST and the panels that have gone through have been touted as the most stringent and effective quality structure over every industry. I was at NIST when the DOE, the DOJ, the DEA, everybody just stood up and kind of bowed and applauded the aerospace industry for their quality infrastructure.

So if were in the forensics industry, I
would be thinking: Well, what are they doing? And
they run this entire system like this and that’s
why planes don’t fall out of the sky. But if you
were to ask me this question, I say: Okay, I
would look at how these other industries have
structured this; where you utilize the laboratory
accreditation system. You’ve got the accrediting
bodies in place. It’s nearly impossible to
mobilize your own accrediting infrastructure with
the software and the people and the interface and
those things. That’s why FDA and the food safety
legislature is having to rely upon the system as
well.

ASSEMBLY MEMBER LENTOL: Well, let me
ask the question a different way. Would it be
better if we had the State pay, through the
forensic labs, CFS for the accreditation of the
labs?

MR. MUSE: I don’t think so. I don’t
think it would make any difference who pays the
bill. We’re going to do our job the same way
regardless. But I would just say if you wanted to
improve that, take the existing systems like
aerospace and food and as some others have done
and layer and build upon them and make them
mandatory.

If you want to see who the technicians
were, if you want to see the full report, don’t
rely on a judge; I’ve heard a lot of interesting
points in there, some judge this way, that way;
Marvin and his guys had to lobby the judge to get
it. Make it all mandatory. Make that stuff
appear. And you don’t have to rely upon
accrediting bodies to do that. Furthermore, you
can layer requirements onto what needs to be
audited. We can take what we have now. We can
make that additional requirements onto our
checklist and we can cooperate and communicate
that. And that’s how we’ve done that in a lot of
other industries.

ASSEMBLY MEMBER TITONE: Thank you so
much.

ASSEMBLY MEMBER LENTOL: Thank you.

MR. MUSE: Yeah, no problem.

ASSEMBLY MEMBER LENTOL: Next panel is
Benjamin Ostrer, Attorney, Ostrer and Associates;
and Richard Torres, Attorney for The Legal Aid Society.

MR. RICHARD TORRES, ATTORNEY, THE LEGAL AID SOCIETY: Good afternoon.

ASSEMBLY MEMBER LENTOL: Good afternoon.

MR. TORRES: My name is Richard Torres. I’m an attorney with The Legal Aid Society here in New York City. I’m a member of our DNA unit, where we focus on defending against DNA evidence and other forensic evidence. A lot of my written comments mirror what Professor Murphy, Barry Scheck, Ms. Chu and Mr. Schechter had said earlier. So I’m going to try to not repeat them just for economy of time.

Our concern is in two areas. One, the Commission of Forensic Science is overstepping its role into areas of the Legislature. As you’re aware, they have a hearing this Friday for the purpose of, quote: Looking at whether New York State regulations should be amended to allow familial searching and if so, under what conditions? That is a question of privacy. It’s a question for the Legislature. And familial
searching by definition targets people who were never convicted of a crime. It targets people who are not in the DNA database.

The current DNA database is overrepresented with people of color. It’s disproportionately African American, Latino and the poor. Those communities will inevitably be the primary target of familial searching. When false positives inevitably occur, those communities will be the ones that suffer. There’s a reason why the district attorney from Denver, I believe Ms. Murphy said earlier, said that he will never crime victims’ profiles for these searches. It is a privacy invasion.

This is a question for the Legislature. We do not believe that the Commission should be entertaining this question. If you look at this broader policy, there’s going to be questions as how whatever regulation comes to be will regulate the police, district attorneys, the judiciary? Should a district attorney be able to say a relative of Richard Torres is a suspect and put that on the news? The Commission on Forensic
Science has no power to regulate the judiciary, no power to regulate law enforcement. They should be taking this question. They’re overstepping their bounds.

This is not the first time that this has happened. You heard about the Medical Examiner’s independent, unauthorized DNA databank. The State DNA databank has regulations, which protect privacy. There’s a mechanism for exonerees to have their DNA removed from that databank. The Medical Examiner’s Office, their databank is unregulated. There is no protection for privacy in that databank. There is no mechanism for an exoneree to have DNA profile removed from that databank. That is a huge concern. This is a privacy question that the Commission on Forensic Science took on. They should be taking on these issues.

Should legislation come out? New York needs clear, unambiguous legislation to prevent the Commission on Forensic Science from regulating privacy policy. They should be limited to regulating labs, not addressing questions of
privacy.

My second main area is the history of ASCLD/LAB. I’m not going to go too deeply into it. Again, I don’t want to repeat but people spoke to you about it earlier. But I do want to add that in September of 2015, ASCLD audited the Austin, Texas crime lab. It found no problems. It was a good audit. Months later, the Texas Commission on Forensic Science closed that lab for using scientifically invalid techniques, inaccurate statistics. That lab is now indefinitely closed. That is an illustration as to how ASCLD did not ensure the integrity of that lab.

ANAB is now taking over the role. I hope ANAB does a much better job than ASCLD has in the past around the country. But I believe that New York State needs proactive measures to ensure better laboratory oversight, as the system that we know, the only one that we have a history with has failed; repeatedly failed with Nassau, with the New York City Medical Examiner; Austin, Texas, all around the country. This is not new
ASSEMBLY MEMBER LENTOL: Do you have any suggestions? Inspector General?

MR. TORRES: The Inspector General unfortunately are the ones who have done investigations in the labs. I would suggest an independent body, some kind of an arm for the Commission to do a real investigation, perhaps in addition to ANAB. But there needs to be more teeth to it. Right now what’s going on is not working. And you bring up the Inspector General. The Inspector General in the 2013 report recommended that forensic labs should be reporting disagreements. They said that the Commission on Forensic Science should make a regulation requiring that.

That hasn’t been done. That needs to be done. If there is a disagreement within the lab as to how to interpret, weigh, measure a piece of evidence; that needs to be communicated to the criminal justice system. It should not stay in the lab. I think that that’s a strong check to prevent questionable forensics from entering the
court or being overvalued or misvalued.

Additionally, the PCAST report, which people talked about earlier, one topic that comes up repeatedly in the PCAST report is that there is inadequate research for more forensic disciplines. They say how validation studies are not being published. I think that legislation would be very helpful if labs were required to publish their validation studies for their techniques when they develop them and the developmental validation studies and also their internal validation studies for when they implement a technique. That would allow the scientific community to actually monitor what’s going on inside of the lab. That would be another protection to keep bad forensic science out of the labs.

I’m actually going to say something nice about a lab. The New York City Office of the Chief Medical Examiner does a wonderful thing. They meet with the defense lawyers. They will give us their paper files. If we send them an E-mail, it’ll take some time but they’ll give us a
copy. And if there’s confidential material,
they’ll redact it. And they really need to be
commended for that policy.

It’s very generous. It serves justice.
It helps educate defense attorneys. I know a bit
about DNA evidence; I’m not an expert but some
lawyers know nothing. And the criminalist from
the OCME will sit there and spend hours
explaining everything that happened at that lab.
Or if I have a question about the nitty-gritty of
a case, they’ll go into it with me and explain
their opinions as to why they did a test a
certain way or what something means. Not all labs
in the State do this. I believe OCME’s openness
should be a model for all labs within the State.
I don’t believe that this should be limited to
forensic biology labs, which do DNA testing. I
think that this should apply to ballistics labs,
drug labs and DNA labs across the State. This
will help prevent bad forensic evidence from
entering courts.

And I’m going to go a little off of my
script here. There was questions about 240-20.
One common fight I have in court is whether 240-20 includes computer files. In a typical case, I’ll have hired an expert in a DNA case and they’ll say: We want to look at the data that the Medical Examiner interpreted; so I can make my independent interpretation of the testing data. I need the computer files.

So we’ll request it as discovery. Most district attorneys in the City will say no. We’ll file a motion. Then the question becomes: Is a computer file a written instrument? And there are a lot of judges in the Bronx that say it is; many judges in Queens that say it’s not. I think it is in our current day, it borders on the level of absurd to say that a computer file is not a written instrument; that it somehow changes when you hit the print button on a computer. I think that the legislation, if 240 20 is going to be changed, needs to have the words “computer files” added to it, to be explicit that it just doesn’t require the production of printed materials.

Thank you for this opportunity to speak in front of you. And I would hope you would reach
out to us, my office to assist you in any way we could.

ASSEMBLY MEMBER TITONE: When you were talking about visiting the labs and you said that that’s very good, that pretty much goes to the point that Marvin was making earlier about you now feel comfortable; when you’re dealing with that lab, that you know what methodology was actually used to generate a report; is that what I’m hearing here?

MR. TORRES: I feel much more comfortable because it helps educate me about, as a defense lawyer, about what goes on in that lab. However, that isn’t the full picture because you have the validation studies which aren’t always published with new techniques, the more exotic techniques. A lot of the criminalists in the lab will operate a system but might not fully understand what’s going on with it. They have a DNA mixture interpretation program called: The Forensic Statistical Tool. No one really knows what goes on in that program. I believe the next panel are going to talk a bit about black box
software. So, I am much more comfortable knowing about the case when I speak to the criminalist. But there’s still gaps. I don’t know everything. But again I bring --

ASSEMBLY MEMBER TITONE: You think by having a broader discovery process with the 240 -- what was it, 21c?

MR. TORRES: Correct.

ASSEMBLY MEMBER TITONE: Where you’re actually getting and reviewing the methodology or maybe even the opportunity to speak to the technicians or the lab themselves as to how they drew a conclusion and drafted their reports. So you would agree that there’s more work to be done?

MR. TORRES: Absolutely. I think that this is mandatory. When I speak to defenders from other counties, they’re told that they don’t get any access to the labs; that they are just not allowed to speak with the people on the case. And I think that puts them at a disadvantage. And I think that what would otherwise be questionable evidence in some instances, certainly not all
instances, but those instances where bad evidence gets in the court; perhaps they could have been caught if there was just more openness. Maybe mistakes would have even been caught. I think it’s very important for there to be communication with labs to both parties in the criminal justice system.

ASSEMBLY MEMBER TITONE: Thank you.

MR. TORRES: Thank you.

ASSEMBLY MEMBER LENTOL: Mr. Ostrer?

MR. BENJAMIN OSTRER, ATTORNEY, OSTRER AND ASSOCIATES, PC: Yes, thank you very much. I’m a private criminal defense attorney. I practice in the Hudson Valley and I greatly appreciate the opportunity to address you here this afternoon. I’d like to describe two incidents that have taken place at the New York State Police Lab, which illustrate why the current scheme of self-reporting and policing and the scheduled inspections are insufficient to ensure quality performance.

In January of 20015, the Albany Times Union published the report regarding misconduct
in the New York State Police lab. There was literally no disclosure following those initial reports to the defense community concerning who, what, when, where, how this misconduct had taken place.

In fact, it wasn’t until April of 2016 that counsel for the New York State Police transmitted documents to the district attorneys throughout the State advising and titling it: document disclosure pursuant to Brady and Giglio obligations. That prompted at least in Orange County a press release from the Orange County District Attorney in which he said that they were going to make a showing to the defense community of everything that they could. Well, that showing fell miserably short. The district attorney’s statement was: If any witness’s credibility is affected by the State Police investigation into the Trulia certification testing, we recognize that complete information about that issue must be provided to defense attorneys.

Well, what occurred was: We were able to determine from documents, not that were provided
by the Orange County District Attorney but that we received through another district attorney’s office, that there had been 15 scientists among 31 who worked in the DNA area of the New York State Police Lab who were being disciplined; five others who had received letters of caution for tolerating cheating.

Now the nuts and bolts of the cheating is whether it was an open book exam on certification on Trulia, which was a new statistical tool. That was abandoned by the New York State Police Lab after succeeding in a Frye hearing to make it admissible in New York State. Well, we received in a case Rosario material, 240-20 material contained in excess of 20 sets of initials of scientists who had worked on a particular case. Mathematically, we assumed that at least five of those sets of initials or six had to be people involved in the misconduct. We requested translation of these initials as to who the scientists were. We were told instead that none of the implicated scientists worked on a particular case.
When we asked at the time we received that information, recertification of the work that had been completed was actually ongoing because the State Police Lab knew that at least two of the supervisors who worked on the case were among the 15 who had been disciplined. When we were told ultimately that the two were disciplined, we asked if we could have their initials. And it gives the illusion, these initials that appear on the documents, that somebody’s actually handled the document and scribbled their initials on the documentation. As an appendix to what I’ve submitted to you here today, I have what I believe is demonstrable proof that these initials are affixed mechanically by somebody sitting at a computer console and pasting them onto the particular document.

At this point in time, despite public statements that they are going to provide all the information that a defense attorney might need, we were successful -- something that might be pleasing to my friend Marvin, in having a judge
direct that the State Police Lab and the district
attorney decipher the initials for us.

The district attorney’s office at the
request of the New York State Police Lab took an
Article 78 proceeding for a writ of prohibition
to the Appellate Division, Second Department, who
rules that much of what Mr. Torres was saying,
that because they’re not written files, that
these initials reside on the computer database,
that it exceeded the authority of the Court to
direct disclosure and that a Brady disclosure
would be premature and a 240-20 disclosure did
not lie. And that decision I’ve also appended to
the paperwork.

Now, this has to be viewed in the
context of the fact that the same management
staff of the New York State Police Lab that were
in place and being certified by ASCLD/LAB when
the Veedeer situation arose. And District Attorney
McNamara told you about his frightening
experience that an assassination case may have
been undermined by Mr. Veedeer’s misconduct. Well,
I was involved with now federal judge, Vernon
Broderick, in upsetting a conviction in Saratoga County involving a woman who had been involved in a very heinous murder. And her co-defendant was acquitted because of the irregularities in Veeder’s work. And this is before there was knowledge that Veeder had been dry-labbing and doing what has been described and is well-documented in an Inspector General report.

So it cost the Saratoga County a conviction. This woman pleaded guilty, the person who we had filed a 440 motion on behalf of. We were ultimately able to vacate her conviction. It had a very sorry ending. But during the hearings that were ordered in Saratoga County, it was determined that the self-policing by the New York State Police Lab of the Veeder situation was also miserably deficient. So we now have this misconduct involving the Trulia scandal between 2014 and to date being policed by the New York State Police Lab, not by the Forensic Commission. They’re doing their investigation. They’re disclosing and doing a very good job of keeping a lid on it.
The same choreography was followed during the Veeder situation. The initial investigation was going to be conducted by the New York State Police. Tape recordings of Mr. Veeder were lost. Nobody was disciplined. Veeder had been creating evidence. In the case I was involved in, he took a glove and put it on duct tape and then said the fibers exactly matched. Well, he took the wrong glove and put it on the wrong duct tape, resulting in the acquittal of the co-defendant. His peer review was done by someone who hadn’t done but three fiber cases more than ten years earlier. There wasn’t a fox watching the hen house. There was nobody watching the hen house.

But Mr. Veeder had been at the lab since 1998. His misconduct wasn’t discovered until 2008. The lab and his section of the lab had been certified by ASCLD at least twice before his misconduct was discovered. In my written submission, his reports were countersigned by senior lab officials. No discipline for those senior lab officials. The placement of initials...
mechanically upon discovery materials to give the illusion that somebody is handling it are things that the Forensic Commission should be looking into. And sadly, these things are not happening.

My suggestion to you is that defense advocates through discovery would probably be as good as an insurance policy against malfeasance in a lab as any I can think of. A dedicated defense attorney will explore if he has the materials to explore. I’ve been foreclosed in a case from even determined who handled my client’s paperwork or a client’s paperwork. I’m sure others are frustrated in the same way. We do not enjoy the same hospitality at the New York State Police Lab as Legal Aid enjoys with the Office of the Medical Examiner here. We’re treated like we’re radioactive if we want to go up to the New York State Police Lab and take a look around.

And the New York State Police Lab’s answer to the problem at the forensic section, the hair and fiber section, was not to fix it but it was to close the section down, to eliminate the conversation: We don’t have to talk about
that anymore because we no longer do hair and fiber examinations at the New York State Police Lab. Don’t fix it. Don’t correct it. Don’t hire the best scientists you can find to make it right. Just we won’t do it anymore.

At the last Forensic Commission meeting, the New York State Police Lab advised that because of ventilation issues, they’re not doing muzzle to target determinations. In my experience, a lot of muzzle to target determinations don’t require ventilation problems because you do them at the range outdoors. But they announced without comment that: By the way, we’re not doing muzzle to target determinations at this time because of a ventilation problem and we’re worried about our employees.

So I believe if there’s not going to be oversight, then discovery and disclosure needs to be formalized, so that a vibrant defense bar can test this. We do it in all areas of personal injury, product liability litigation as a way of policing industry. I think a good way to police our forensics industry and our science fields is
by arming defense attorneys with what they need
to to investigate. Thank you very much.

ASSEMBLY MEMBER LENTOL: Thank you.

Excellent suggestions. Thank you very much. We
appreciate you both coming.

MR. TORRES: Thank you as well.

MR. OSTRER: Thank you.

ASSEMBLY MEMBER LENTOL: Our next panel
is Rebecca Wexler, Resident of The Data and
Society Research Institute; and Sumana
Harihareswara, Founder and Principal of the
Changeset Consulting firm. Thank you for coming.

MS. SUMANA HARIHARESWARA, FOUNDER AND
PRINCIPAL, CHANGESET CONSULTING: Thank you. Ms.
Wexler and I decided that it might make sense for
me to go first, if that’s alright.

ASSEMBLY MEMBER LENTOL: Please do.

MS. HARIHARESWARA: Okay. Good
afternoon. My name is Sumana Harihareswara and I
will accept all variations on that name. So
please don’t worry.

ASSEMBLY MEMBER LENTOL: I tried.

MS. HARIHARESWARA: I thought you did
much better than 90 percent of telemarketers and substitute teachers, Chair Lentol.

ASSEMBLY MEMBER TITONE: Well, I haven’t started yet.

MS. HARIHARESWARA: I’ll keep my eye on you, Titone -- Mr. Titone.

ASSEMBLY MEMBER TITONE: Yeah.

MS. HARIHARESWARA: Thank you for inviting my testimony on the government oversight of forensic science in the State of New York. I am the founder and principal of Changeset Consulting. I am a programmer, a software developer and a manager who’s worked in the software industry for over a decade. And as the founder of Changeset Consulting, I work on multiple public sector and private sector software projects.

And that is the reason why I’m speaking with you today. I’m here to discuss steps New York should take to improve the reliability and effectiveness of our practices in forensic science. I’m greatly to the Assembly Standing Committees on Codes, Judiciary, and Oversight,
Analysis and Investigation for your time.

So, today specifically I’ll be discussing the software we use in our forensic science labs. First I’ll talk a little about two different types of software: proprietary and open source and why the distinction is important. And then I’ll go into reasons why the open source approach would help with auditability, transparency, cost and efficiency in our labs. And then I’ll make some requests of you regarding procurement and validation. We’ve talked some about validation earlier today. And so some of these suggestions will be in concert with the ones you’ve already heard and some of them will be new. And yes, I do mention the PCAST report since everyone seems to be required to do that today.

So, we use both proprietary and open source software in all parts of industry and government. And to explain the difference and where open source is superior, I need to explain what source code is. And please bear with me if this is a bit redundant and you’ve had this
When programmers like me write software, what we write is called source code. And you can think of it as like a recipe for the computer to carry out, like a recipe for baking a loaf of bread. And then the application or the system that you use, like Microsoft Windows or Google’s Gmail is like the finished loaf of bread. And so our forensic technicians, administrators, police officers, everybody, right, they use software in the pursuit of their work every day.

Now proprietary software is also known as closed source software because we the users, we can use the end result but the vendor who makes the software won’t let us see the recipe. So we don’t know what they’re putting into the bread. We have to simply trust our vendors to give us quality software, even though they will always turn around a month or several years later and tell us to upgrade because the new version fixed a slew of defects.

In our forensic labs, for example, in New York State we pay Porter Lee Corporation,
just as an example, to use for instance their closed source software, Crime Fighter Beast Bar Coded Evidence Analysis Statistics and Tracking and LIMS, Laboratory Information Management System. For service between 2015 and 2019, we’re paying them $749,333.

And instruments in our forensics labs are also affected. For instance, we’ve paid Applied Biosystems for equipment that comes with closed source software. I have much more information here in the footnotes. The Division of State Police paid over $9 million to Applied Biosystems between 2012 and early 2017. Instruments are affected and because we’ve paid Applied Biosystems for equipment that comes with closed source software; because it’s proprietary we and other bodies can’t inspect the source code to see what mistakes it might be making. And we can’t improve it ourselves either.

Open source software on the other hand is where we get to see the recipe. Open source software is software that might be inspected, modified and redistributed freely by anyone. And
when the software is open source, there’s a specific vendor called a maintainer who takes charge of integrating suggested improvements for everyone’s benefit. If you’ve used an Android phone or browsed the web using Chrome or Firefox or if your website users Wordpress or Drupal, for example, as the New York State Senate and the White House do, you’ve used open source software.

Your offices as well as other government agencies, including national security and intelligence agencies frequently choose to use open source software because it’s more trustworthy; because we can fix defects and share those fixes with other users and because we don’t have to pay license fees. A very popular example is Linux open source software which we often use to run website servers. And one more distinction that I’ll make: Using open source software does not mean we have to open any data. Whether we’re using proprietary or open source software, I am not proposing any changes today to our data protection rules.

I just want to pause since that was a
little bit technical and ask if people are basically following me so far?

ASSEMBLY MEMBER TITONE: Huh?

MS. HARIHARESWARA: More seriously, is that okay?

ASSEMBLY MEMBER TITONE: Yes.

MS. HARIHARESWARA: Okay, great, thank you. So, now let’s come to auditability and transparency. We need auditability and transparency in the science our labs do and in their administration, such as chain of custody tracking. So let me speak first about the science. The 2016 PCAST report, and you can check that off on your bingo card now, focused on, one, the need for clarity about the scientific standards for the validity and reliability of forensic methods; and two, the need to evaluate specific forensic methods to determine whether they have been scientifically established to be valid and reliable.

Software is prone not just to big defects that crash the system, so we can easily find them; but to intermittent defects that give
us wrong output and that are harder to find.

The Association for Computing Machinery’s U.S. Public Policy Council in January of this year said in its statement on algorithmic transparency and accountability: An algorithm is a self-contained step-by-step set of operations that computers and other smart devices carry out to perform calculation, data processing and automated reasoning tasks. Increasingly, algorithms implement institutional decision making based on analytics which involves the discovery, interpretation and communication of meaningful patterns and data. I’ll just skip this next sentence. But there is also growing evidence that some algorithms and analytics can be opaque, making it impossible to determine when their outputs may be biased or erroneous. End of quote.

Being able to see the source code to see the recipe is crucial to auditing, accountability and transparency; to understanding the decisions our forensic software is making and systematically checking whether those decisions are appropriate. On the administrative side, we
lack proper auditability in our forensic science labs partly because of deficiencies in our software.

For instance, I spoke with a lab worker who said that LIMS, the Laboratory Inventory Management System structures its permissions for who can do data entry in a counterproductive way. In order to give workers the ability to update records of evidence, LIMS administrators also need to give those workers the ability to completely delete a record of evidence. And when we use proprietary software, it is harder for us to get different pieces of equipment to talk to each other; so workers have to manually retype figures or findings from an instrument into a computer, introducing the possibility of human error and reducing auditability.

Now I’ll talk about getting value for our taxpayer dollar and maybe this is the bit where it’ll help you talk to the Senate.

ASSEMBLY MEMBER LENTOL: How did you know I will do that?

MS. HARIHARESWARA: I was trying to pay
attention during the earlier bits. With proprietary software we don’t know exactly what we’re paying for. I’ll use the example of Beast/LIMS. I spoke with a lab worker who said: It’s often unclear whether a new software update for Beast/LIMS is available or has gone out to a given lab. And we don’t know whether those updates have fixed known issues, known defects or problems in the software.

In 2013, New York’s Inspector General uncovered a problem with the interaction of police and a forensics lab that stemmed from a lack of update notifications generated by Beast as of 2009. Neither this lab worker nor I were able to confirm whether Beast had addressed this issue. Applied Biosystems and Porter Lee Corporation are both vendors with a substantive lock on the market that are, according to the lab workers I’ve spoken with, unresponsive to defect reports and requests for support or improvements even when we are paying for support contracts on top of expensive licenses.

For example, New York State labs have
been asking for some time for a module that lets them link their DNA instruments with Beast/LIMS. But according to the lab worker I spoke with, Porter Lee has not provided it. I am mentioning these vendors as examples not to just single them out but because this is a common dynamic with vendors of proprietary software.

If we were to contract with a vendor or set of vendors to build or improve open source software for our labs, we would have less vendor lock in and it would be easier for our IT staffs to track down defects and integrate different systems together. Once companies and agencies other than the main vendor have the ability to suggest improvements and write tools, you can increase the quality of the forensics labs tools faster, which can increase labs throughput and reduce backlogs. And given how much money we spend on this software for licenses and support, if we band together with other State governments in consortia, an open source benefit would benefit us all. An open source alternative would benefit us all.
Now procurement. So the New York State Office of --

ASSEMBLY MEMBER LENTOL: Do you know what the feds do -- the FBI?

MS. HARIHARESWARA: In terms of what software they use?

ASSEMBLY MEMBER LENTOL: In terms of the whole conversation that we’re having regarding laboratories that they use, the software that they use and how they police it to make sure that the results of the FBI is correct? That’s what I mean.

MS. HARIHARESWARA: Oh, I see. Regarding that aspect of like the federal software; no, I’m sorry, I can’t speak to that. Can you? Okay. It could very well be that one of your other witnesses would be able to pipe up with information about that. I’m sorry that I don’t know.

ASSEMBLY MEMBER LENTOL: I’m sorry that I just thought about it now.

MS. HARIHARESWARA: That’s completely fine. Alright, shall I move onto procurement or
are there any other questions people want to ask right now? So, the New York State Office of Information Technology already directs all agencies to consider open source software when purchasing. I would ask you to further require that in the procurement, specifically of software for forensic laboratories, open source software be not just considered but preferred; not necessarily required but preferred.

And I’d also ask that we require vendors be able to import and export data in standardized open formats and document and publish the formats they use to allow labs to more easily chain together instruments and other software. And when it comes to validation, in order to find our software’s intermittent defects, especially when a software is performing operations that humans cannot double-check fast enough for police needs, like probabilistic, complex DNA genome testing or massive facial recognition operations on hundreds of thousands of faces; isolated validation tests and the attestation of the vendor is not good enough.
We need a mechanism of independent verification and validation. We should work with our labs, the Commission on Forensic Science and other forensics bodies to move towards IEEE, Institute of Electrical and Electronics Engineers standards for verification and validation processes, per the recommendations and the International Society for Forensic Genetics from September, which I have a link to in my notes. And we should facilitate uniform implementation across the State. Thank you. And I welcome your questions but also we could go directly to Ms. Wexler first.

ASSEMBLY MEMBER LENTOL: Please, Ms. Wexler.

MS. REBECCA WEXLER, RESIDENT, THE DATA AND SOCIETY RESEARCH INSTITUTE: Thank you. So, I’m Rebecca Wexler and I’m a Resident with The Data and Society Research Institute. Sumana has explained some of the merits from a technical perspective of why access to source code matters. I’m going to talk about the fact that there is absolutely no legal basis for denying that access
to criminal defendants.

Our Constitution gives criminal defendants certain rights: the right to confront the evidence against them, the right to compulsory process to produce favorable evidence, a right to due process to present a defense --

ASSEMBLY MEMBER LENTOL: Now I’m going to tell you to go talk to the Senate.

MS. WEXLER: -- and to do all of that in a public trial. Software programs are increasingly automating forensic science methods. And the PCAST report recommends automation as a solution to help increase efficiency and accuracy and to help reduce cognitive bias and error. But with software and automation comes ownership -- ownership claims. Trade secrets are the primary intellectual property protection for source code. Bringing those intellectual property claims into the criminal justice system raise undertheorized tensions between life, liberty and property interests.

For instance, algorithms that generate probabilistic matches for latent fingerprint
analysis are proprietary. The algorithms used to search ballistic information databases --

ASSEMBLY MEMBER LENTOL: Just remember most of us here grew up before fax machines. I’m only kidding.

MS. WEXLER: It’s actually a problem that’s happening across the country and it’s unprecedented. So the fact that this is relatively an issue of first impression in New York means that this is the time for the Legislature to act. The developers of face recognition technology have refused to disclose even user manuals for their software programs. People need those user manuals to know whether the software has been adequately validated across racial groups. And nonprofit organizations have refused to disclose source code in their technology.

So the means of production is not the determining factor here. When developers claim that the details about how forensic technologies work are trade secrets that can’t be disclosed in criminal cases, they imply a right to own the
very means by which the government determines
guilt or innocence.

The Legislature should clarify that no
such right exists by prohibiting public agencies,
government agencies from claiming trade secrets
in forensic science methods, which has happened
here in New York State and right in New York
City. And by limiting courts to restrict their
safeguards for trade secrets evidence at issue in
criminal cases to protective orders and nothing
more. So, I’m asking for a smaller step than open
sourcing the whole system, which I think should
happen but at the very least give it to the
defendants.

ASSEMBLY MEMBER TITONE: So when an
agency, a public agency acquires a program --
facial recognition for example, it should be
something that they can also acquire the
ingredients and otherwise no deal, correct? Is
this your suggestion?

MS. WEXLER: I think it would be great
if the agency could purchase intellectual
property rights. Then they would be able to
disclose it in public. But backing up, our current baseline scenario is even worse than that. In New York City, the Office of the Chief Medical Examiner, which is a department of the City, has produced a forensic statistical tool used for low copy number DNA. That’s been brought up here before today. They’ve made that tool in-house using taxpayer money. And they have for years successfully refused to disclose it to criminal defendants in criminal cases.

Their claims and I’ll quote from two cases, they said that they withheld the code because of the City’s, quote: ownership interest in the program. And they argued in another case that they withheld the code -- these quotes are here for you too; but that the code was a copyrighted and proprietary asset belonging exclusively to the City of New York. And they claimed this successfully.

Now a federal judge, Valerie Caproni, the former general counsel for the FBI, a woman who knows when it matters to keep law enforcement methods secret, did not credit those claims and
rightfully ordered disclosure under a protective order to a federal defendant. Even after that has happened, New York State courts continue to deny defendants access to the source code.

ASSEMBLY MEMBER LENTOL: Federal government has discovery. That’s the difference I think.

MS. WEXLER: Yeah, that may be one of the explanations. And so if you’re going to do the 240-20 reform, then perhaps they should also include an argument that trade secrets should not be a barrier to disclosure here. Let me explain that in terms of the City agency, the public agency space anyway. There is zero legal basis for this nondisclosure. Article 45, CPL Article 45 established our statutory evidentiary privileges. Trade secrets are not one of them. New York relies on a common law, substantive law for trade secrets.

And the court of appeals has recognized that in order to be eligible for trade secrets protection, in order to have a valid trade secret, the definition is that the information
has to be one that’s used in a business and that gives you an opportunity obtain an advantage over competitors who do not know or use it.

Government agencies, forensic laboratories that are public, when they are public, have no legitimate business use for secret forensic science methods and no competitors that they should be seeking to gain an advantage over. Pretending that criminal defense attorneys are business competitors misconstrues the adversarial process and contaminates the criminal justice system. Okay. Private developers and I’ll get to this quickly -- you know, you have all of it here; but even private developers have not legitimate reason to entirely withhold trade secrets, including source code in a criminal case because protective orders are an adequate remedy.

In civil suits, there are more structural checks on over-claiming and abuse of claims to invalid trade secrets and on wrongful exclusions of relevant evidence because civil cases have more adequately matched resources.
generally between the parties. Because whether
the trade secret that’s claimed is actually valid
is often a focal point of intense litigation. And
because discovery is broader in civil cases,
which gives parties a more thorough opportunity
to develop a theory of the case and establish for
the judge why it’s relevant to disclosure should
be compelled. So granting a trade secrets
privilege in criminal cases will only lead to
over-claiming, to abuse and to the wrongful
exclusion of evidence.

ASSEMBLY MEMBER LENTOL: And by the way,
I guess you know that civil discovery is allowed
in New York State because it’s only property or
money that’s involved. But when somebody’s
liberty is involved, you can’t have discovery.

MS. WEXLER: Yeah. So, I mean, I think
that’s exactly the issue that’s at stake in
recognizing a trade secrets privilege here. It’s
a flat out property interest versus a liberty and
life interest. So, I hope that the Legislature
will make sure that that doesn’t happen moving
forward.
ASSEMBLY MEMBER TITONE: Us too.

ASSEMBLY MEMBER WEINSTEIN: Just a quick question.

MS. WEXLER: Yes.

ASSEMBLY MEMBER WEINSTEIN: The two cases regarding the City of New York that upheld the trade secrets argument; do you know if either of those -- I see they’re both 2016 cases, have any of those been appealed?

MS. WEXLER: I believe not. But I also want to clarify that those cases did not make an explicit claim to an evidentiary privilege. No such privilege exists in our statutes. The common law courts in New York have established some protections and a standard test for invoking a trade secrets safeguard in civil cases. And that test was not applied here. The rationale that OCME has brought has been that the code review is not relevant. And so there’s been somewhat of a confusion about all of these issues are jumbled together in the cases. It’s very informal.

So that’s why I wanted to get out right up front that there are reasons why the source
code review is relevant and needed. But the
quotes are from the kind of surrounding
reasoning. And they show not an explicit claim to
privilege but that the argument that’s convincing
judges not to order disclosure is I think a fear
of interfering with business interests.

MS. HARIHARESWARA: And talking about
the need for source code review here, I’m going
to speak here as a programmer and a manager.
Every piece of software that’s ever been written
that’s longer than just a couple of lines long,
that actually does anything substantive has bugs.
It has defects. And if you want to write code
that doesn’t have defects or if you want to at
least have an understanding of what the defects
are so that you can manage them, so that you can
oversite them; the same way that we have a system
of democracy, right, of course there’s going to
be problems but we have mechanisms of oversight.

If in a system that’s going to have
defects, if we don’t have any oversight, if we
have no transparency into what those instructions
are doing and to what the recipe is, not only are
we guaranteed to have bugs; we’re guaranteed to
have bugs that are harder to track down. And
given what we’ve heard earlier about the fact
that it’s very likely that in some of these cases
there will be discriminatory impacts.

I think it’s even more important; this
isn’t just going to be random. I’ll give you an
example. HP, the computer manufacturer, they made
a web camera, a camera built into a computer or a
laptop that was supposed to automatically detect
when there was a face. It didn’t see black
people’s faces because they hadn’t been tested on
people with darker skin tones. Now at least that
was somewhat easy to detect once it actually got
out into the marketplace and HP had to absorb
some laughter. But nobody’s life was at stake,
right?

When you’re doing forensic work, of
course in a state the size of New York State,
edge cases, things that’ll only happen under this
combination of combination of conditions are
going to happen every Tuesday, aren’t they? And
the way that the new generation of probabilistic
DNA genotyping and other more complex bits of software work, it’s not just: Okay, now much of fluid X is in sample Y? It’s running a zillion different simulations based on different ideas of how the world could be. Maybe you’ve heard like the butterfly effect? If one little thing is off, you know, we might get a hurricane.

ASSEMBLY MEMBER TITONE: Sure. But let me ask you this.

MS. HARIHARESWARA: Sure.

ASSEMBLY MEMBER TITONE: Have there been any cases where a person who is actually innocent had their liberty taken away because there was a bug in the program that created evidence that led to a conviction?

MS. HARIHARESWARA: Isn’t this where the breathalyzer cases come in?

MS. WEXLER: Well, there’s been a lot of bugs in software throughout the criminal justice system. And so an example has been there have been errors in calculating the sentence length in California. They adopted a software program that had bugs and ended up releasing people early. So,
it’s just an example that: Yes, there have been some decisions that have affected ultimate liberty outcomes.

MS. HARIHARESWARA: Yeah, I’ll give you two responses really. I’d like more time to check.

ASSEMBLY MEMBER TITONE: How big is the problem I want to know? Basically, how big is this --

MS. HARIHARESWARA: Right. One is I would want more time to check. I’m sorry to say that I only found out yesterday that I’d be testifying instead of someone who was set to testify. But the other thing is we might not know. It might be really hard to know. Barry might be coming to you next year with actually a huge slew of them, right?

MS. WEXLER: Sure. It’s hard to get through that whole exoneration process. And another example is that right now there’s 240 cases around the country where the FBI has been challenged to disclose source code in a cybercrime investigative software that it used.
Some of those challenges are arguing that the way that the software actually operates violates the Fourth Amendment because it exceeded the jurisdiction of the warrant or potentially reaches parts of a computer that were not made public. And determining that answer depends on being able to see and not to take the word for the developer but how the software works; but actually see what the code does, how it runs.

ASSEMBLY MEMBER TITONE: This could potentially become extraordinarily important when we talk about hacking and things of that nature.

And maybe not --

MS. HARIHARESWARA: You brought up security. I wasn’t going to but --

MS. WEXLER: Yeah, I mean, digital --

ASSEMBLY MEMBER TITONE: She did it first.

MS. WEXLER: I mean, a Fourth Amendment challenge is a criminal defense challenge. And so we’re not only talking innocence here; we’re talking about maintaining the ability for defense to make the arguments that they’re permitted to
ASSEMBLY MEMBER TITONE: Sure.

MS. HARIHARESWARA: There’s also sort of this issue -- so the reason I brought up the breathalyzer stuff, right, is because my understanding is that a number of cases have been either greatly stalled or even thrown out due to challenges where the defense said: I would like to actually be able to see the source code to see if the breathalyzer was working correctly when it analyzed the level of alcohol in my client’s breath. And basically because of the refusal to provide the source code, those cases were thrown out; is that correct?

MS. WEXLER: Around the country, probably about ten years ago there were some litigation around breathalyzer source code and it was an early instance of this issue. There’s now been a wave of litigation around the country in probabilistic genotyping software programs; so that’s one other measure of scale. But I would suggest that this is going to be happening in almost every forensic method that’s matching-
based because we’re going to probabilistic systems. We’re doing this with fingerprints and with face recognition.

ASSEMBLY MEMBER TITONE: Gotcha.

MS. HARIHARESWARA: And so to the security point, I will say that I as an open source software expert and a programmer, I’m going to tell you that just by default, because more people can audit it; by default open source software has this edge on security, on data privacy that proprietary software can’t match. And when you especially look at the number of different organizations around the country that are based on the adversarial system and sort of poking holes in each other’s arguments; there’s sort of an analogy to be made there that the open source software in a criminal justice context is stronger in that sense.

ASSEMBLY MEMBER LENTOL: You’ve been great. Thank you.

MS. HARIHARESWARA: Thank you very much.

MS. WEXLER: Thank you.

ASSEMBLY MEMBER LENTOL: And that concludes our
hearing for today. Thanks everybody for coming.

(The public hearing concluded at approximately 2:15 P.M.)
CERTIFICATE OF ACCURACY

I, Fei Deng, certify that the foregoing transcript of Assembly Standing Committee on Codes, Assembly Standing Committee on Judiciary and Assembly Standing Committee on Oversight, Analysis, and Investigation on February 8, 2017, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Certified By

[Signature]

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