

**REPORT OF THE
VIRGINIA STATE CRIME COMMISSION**

**ADMISSIBILITY, RELIABILITY
AND INTERPRETATION OF DNA
EVIDENCE**

**TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA**



HOUSE DOCUMENT NO. 62

**COMMONWEALTH OF VIRGINIA
RICHMOND
1997**



COMMONWEALTH of VIRGINIA

VIRGINIA STATE CRIME COMMISSION

General Assembly Building

December 10, 1996

John R. Isom
Executive Director

MEMBERS:
FROM THE SENATE OF VIRGINIA:
Janet D. Howell, Vice-Chair
Mark L. Earley
Kenneth W. Stolle

FROM THE HOUSE OF DELEGATES:
Clifton A. Woodrum, Chairman
James F. Almand
Jean W. Cunningham
John J. Davies, III
Raymond R. Guest, Jr.
William S. Moore, Jr.

APPOINTMENTS BY THE GOVERNOR:
Robert C. Bobb
Terry W. Hawkins
Robert J. Humphreys

ATTORNEY GENERAL'S OFFICE
James S. Gilmore, III

TO: The Honorable George Allen, Governor of Virginia, and
Members of the General Assembly:

House Joint Resolution 31, agreed to by the 1996 General Assembly, directed the Virginia State Crime Commission to study the admissibility, interpretation and reliability of DNA evidence, and to submit its findings and recommendations to the Governor and the 1997 session of the General Assembly.

In fulfilling this directive, a study was conducted by the Virginia State Crime Commission in 1996. I have the honor of submitting herewith the study report.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Clifton A. Woodrum".

Clifton A. Woodrum
Chairman

CAW:sc

MEMBERS OF THE VIRGINIA STATE CRIME COMMISSION

From the Senate of Virginia:

Janet D. Howell, Vice Chair
Mark L. Earley
Kenneth W. Stolle

From the House of Delegates:

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John J. Davies, III
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William S. Moore, Jr.

Appointments by the Governor:

Robert C. Bobb
Terry W. Hawkins
Robert J. Humphreys

Attorney General's Office:

James S. Gilmore, III, Attorney General

Members of the Law Enforcement Subcommittee

Senator Janet D. Howell, Subcommittee Chair
Delegate James F. Almand
Mr. Robert C. Bobb
Senator Mark L. Earley
The Hon. James S. Gilmore, III
The Hon. Robert J. Humphreys
Delegate William S. Moore, Jr.

Research Staff

Susan B. Williams, Policy Analyst

HJR 31 - Study on the Admissibility, Interpretation and Reliability of DNA Evidence

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I. Authority for Study

During the 1996 legislative session, Delegate Clifton A. Woodrum sponsored House Joint Resolution 31 directing the Virginia State Crime Commission to study the admissibility, interpretation and reliability of DNA evidence.

Section 9-125 of the **Code of Virginia** establishes and directs the Virginia State Crime Commission "to study, report, and make recommendations on all areas of public safety and protection." Section 9-127 of the **Code of Virginia** provides that "the Commission shall have the duty and power to make such studies and gather information in order to accomplish its purpose, as set forth in Section 9-125, and to formulate its recommendations to the Governor and the General Assembly." Section 9-134 of the **Code of Virginia** authorizes the Commission to "conduct private and public hearings, and to designate a member of the Commission to preside over such hearings." The Virginia State Crime Commission, in fulfilling its legislative mandate, undertook the study of the admissibility, interpretation and reliability of DNA evidence.

II. Members Appointed to Serve

At the May 15, 1996 meeting of the Crime Commission, Chairman Delegate Clifton A. Woodrum selected Senator Janet D. Howell to serve as Chair of the Law Enforcement Subcommittee studying the admissibility, interpretation and reliability of DNA evidence. The following members were selected to serve on the Subcommittee:

James F. Almand
Robert C. Bobb
Mark L. Earley
James S. Gilmore, III
Robert J. Humphreys
William S. Moore, Jr.
Clifton A. Woodrum, ex officio

III. Executive Summary

The Crime Commission invited defense attorneys, prosecutors and DNA experts to participate in the issue formulation and information gathering phases of this study. Interested parties made presentations at several Law Enforcement Subcommittee meetings and provided invaluable assistance to Commission Staff throughout the course of the study. The Commission carefully considered issues relating to access by the defense to laboratory proficiency test results; court-appointed experts for indigent defendants; laboratory standards and accreditation; training of law enforcement officers, judges, prosecutors and defense attorneys and the DNA

case backlog. The Commission made the following legislative recommendations with respect to issues concerning challenges to the reliability of DNA evidence; independent re-testing of evidence by the defense; court-appointed attorney compensation and destruction of biological evidence:

- Amend **Code of Virginia §19.2-270.5** to clarify that challenges to the accuracy and reliability of the procedures employed in the collection and analysis of a particular DNA sample are permissible, whereas challenges to the basic scientific principles underlying DNA testing are precluded.
- Amend **Code of Virginia §19.2-163** to provide that, in cases involving higher felonies, the Circuit Court, upon a finding of good cause, can override the statutory cap on court-appointed counsel compensation.
- Amend **Code of Virginia §19.2-270.4** to except biological evidence from destruction to ensure that potentially valuable exculpatory evidence is not prematurely destroyed.
- Amend **Code of Virginia §9-196.13** to provide that, whenever feasible, evidentiary samples delivered to the Division of Forensic Science shall be divided prior to DNA analysis and secured for future independent retesting by the defense.

IV. Study Design

Law Enforcement Subcommittee Meetings

During the course of the DNA study, the Commission heard presentations from a distinguished group of prosecutors, defense attorneys and DNA experts. In formulating their final findings and recommendations, the Commission carefully considered the concerns raised and suggestions proffered by each of the following speakers:

May 28, 1996

- Jerry C. Lyell, defense attorney practicing in Arlington
- Dr. Paul B. Ferrara, Director of the Division of Forensic Science

June 25, 1996

- Eric A. Fischer, Study Director, National Research Council's Evaluation of Forensic DNA Evidence, Washington, DC

August 1, 1996

The Subcommittee toured the Division of Forensic Science's DNA laboratory in Richmond where analysts described the process of DNA profiling.

August 27, 1996

- David P. Baugh, defense attorney practicing in Richmond

September 24, 1996

- Barry C. Scheck, Professor of Law, Cardoza School of Law, New York, New York
- Albert D. Alberi, Chief Deputy Commonwealth's Attorney, Virginia Beach

October 22, 1996

Dr. Paul B. Ferrara, Director of the Division of Forensic Science, discussed forensic case backlog issues.

December 10, 1996

- Staff Presentation

Full Crime Commission Meetings

May 15, 1996

Staff Presentation

December 10, 1996

Staff Presentation

Conferences

The following conferences were attended by Commission Staff during the course of this study with the dual purposes of gathering information and securing speakers:

- National Conference on the Future of DNA: Implications for the Criminal Justice System, June 14-15, 1996, Arlington, Virginia
- DNA Advisory Board Meeting sponsored by the Federal Bureau of Investigation, June 20-21, 1996, New York, New York

Work Group Meeting

June 17, 1996

Jerry C. Lyell and William T. Linka participated in a work group session designed to provide a forum for criminal defense attorneys to voice their concerns with respect to the use of DNA evidence in the courtroom. Several defense attorneys who were unable to attend the meeting subsequently provided the Commission with their comments. The information thus gathered is reflected in the Commission's findings and recommendations.

V. Background

A. The DNA Profiling Process

The DNA (deoxyribonucleic acid) molecule is described as a double-helical strand and physically resembles a twisted ladder. The molecule

is contained in every cell that has a nucleus, which includes nearly all the cells of the human body. The configuration of the DNA molecule differs in every individual with the exception of identical twins. The DNA molecule's configuration is the same in every nucleated cell of a particular person, and its characteristics do not change during the life of that individual.

The DNA molecule is very complicated, and certain chemical procedures must be performed to "read" the genetic information contained in the molecule. Once the DNA is chemically extracted from the biological specimen, enzymes called "restriction endonucleases" are applied to the molecule. These enzymes recognize particular sequences of genetic information coded by certain chemicals. At the precise point of recognition, the enzymes cut the DNA strand into fragments. Next, a procedure called "electrophoresis" is used to separate the different lengths of the DNA fragments. The DNA fragments are then transferred to a piece of nylon membrane. Next, radioactive probes are added, which identify and bind to particular fragments that the probes are designed to recognize. The resulting accumulation of radioactivity exposes X-ray film that is placed next to the nylon membrane. Developing the X-ray film reveals bands of DNA. The pattern of the bands are then compared to the pattern of DNA bands obtained from testing other specimens.¹ See *Appendix B* for a diagram of this process.

Advanced statistical procedures are then employed to calculate the probability that the specimens originated from the same individual. In the criminal justice context, these probabilities are utilized to prove or disprove the identity of a suspect.

B. Virginia's Statute

Code of Virginia §19.2-270.5 is unique when compared to statutes relating to the admissibility of DNA evidence in other states in that it deems DNA analysis to be a "reliable scientific technique." Some Virginia courts have been interpreting this language to preclude any evidence offered for the purpose of questioning the reliability of a particular sample, including evidence relating to the possible contamination of a sample.

In addition, the Virginia statute does not address access to the results of proficiency tests performed by the DNA laboratory or the specific analyst. At present, discovery requests for such information are decided by judges on a case-by-case basis.

¹ *Spencer v. Commonwealth*, 238 Va. 295, 313 (1989)

House Bill 972 was introduced in 1996 by Delegate Robinson to address both issues. The measure failed; however, the House Courts of Justice Committee suggested that the Crime Commission consider these issues in the context of the Commission's broader study, pursuant to HJR 31, on the admissibility, interpretation and reliability of DNA evidence.

VI. Study Goals/Objectives

During the 1996 legislative session, Delegate Clifton A. Woodrum sponsored House Joint Resolution 31 directing the Virginia State Crime Commission to study the admissibility, interpretation and reliability of DNA evidence. Specifically, HJR 31 requests that the Crime Commission study:

- the general reliability of DNA evidence in a criminal trial setting;
- the legal methods available to the parties under current law to assure that both a judge and a jury may reasonably interpret the evidence offered; and
- the latitude and reasonableness of current law regarding challenges to DNA evidence introduction

The Law Enforcement Subcommittee identified and pursued the following issues:

- challenges to the reliability of DNA evidence
- access by the defense to laboratory proficiency test results
- independent re-testing of evidence by the defense
- court-appointed attorney compensation
- destruction of biological evidence
- court-appointed experts for indigent defendants
- laboratory standards and accreditation
- training of law enforcement officers, judges, prosecutors and defense attorneys
- DNA case backlog

VII. Findings and Recommendations

A. Reliability of DNA Evidence

Finding 1: Code of Virginia §19.2-270.5 deems DNA testing a "reliable scientific technique." According to testimony provided by practicing defense attorneys to the Commission, this language is being interpreted by some Virginia courts to foreclose

any and all challenges to the admissibility of DNA evidence, including challenges as to the reliability of the procedures employed in the analysis of a particular DNA sample. In addition, the Commission considered the language of the statute in light of the new DNA testing methodologies that have been implemented subsequent to the passage of the original statute.

Recommendation 1: Amend Code of Virginia §19.2-270.5 to clarify that challenges to the accuracy and reliability of the procedures employed in the collection and analysis of a particular DNA sample are permissible, whereas challenges to the basic scientific principles underlying DNA testing are precluded. *See Appendix C for proposed legislation.*

B. Access to the Results of Proficiency Testing

Finding 2: At present, defense counsel does not have access by statute to the results of proficiency tests relating to a DNA testing laboratory and/or a specific DNA analyst. Proficiency tests are regularly conducted by the Virginia Division of Forensic Science; in fact, in order to maintain its accreditation, the Division is required to conduct such testing on a prescribed basis. In addition, the accuracy of these proficiency test results is regularly reviewed by the laboratory's accrediting body.

During the 1996 legislative session, Delegate Robinson introduced HB 972 which would have required the proponent of DNA evidence in a criminal case to provide the opposing party with proficiency test results of the laboratory performing the DNA analysis; however, the measure failed. The Commission considered a proposal similar to HB 972 as well as the feasibility of making the results of proficiency testing a matter of public record but concluded that legislation should not be pursued at this time. The Commission determined that it would be more appropriate for judges to continue to evaluate discovery requests for proficiency test results on a case-by-case basis.

Recommendation 2: The Crime Commission should take no action regarding the accessibility of proficiency test results at this time.

C. Court-Appointed Attorney Compensation

Finding 3: During the 1996 legislative session, Delegate Robinson introduced HB 967 which would have provided that compensation be paid to court-appointed counsel in an amount deemed reasonable by the judge in cases where DNA profile evidence is introduced to prove or disprove the identity of any person. HB 967 passed the General Assembly; however, the legislation was vetoed by Governor

Allen. The Supreme Court of Virginia objected to HB 967 because it did not provide for a cap on compensation; however, the Court is currently developing a proposed cap.

According to the Crime Commission's report on the Cost Effectiveness of Public Defender Offices (pursuant to HJR 79), Virginia's compensation rates for court appointed counsel are among the lowest of any state in the Nation. Obviously, cases involving higher felonies, especially those in which DNA evidence will be introduced at trial, require court-appointed counsel to expend a significantly greater amount of time and effort in preparing for trial. At least one defense attorney testifying before the Commission expressed concern that Virginia's inadequate compensation structure would support ineffective assistance of counsel issues raised by defendants on appeal.

Recommendation 3: Amend Code of Virginia §19.2-163 to provide that, in cases involving higher felonies, the Circuit Court, upon a finding of good cause, can override the statutory cap on court-appointed counsel compensation. *See Appendix D for proposed legislation.*

D. Destruction of Evidence

Finding 4: Code of Virginia §19.2-270.4 provides that the trial court in any criminal case may order the destruction of evidence introduced at trial upon the exhaustion of all appellate remedies. Several recent Virginia cases have demonstrated the importance of retaining biological/genetic evidence indefinitely. These cases have primarily involved defendants wrongly convicted on the basis of conventional serology findings and subsequently excluded by modern DNA testing methodologies.

Recommendation 4: Amend Code of Virginia §19.2-270.4 to except biological evidence from destruction to ensure that potentially valuable exculpatory evidence is not prematurely destroyed. *See Appendix E for proposed legislation.*

E. Re-testing of DNA Evidence by the Defense

Finding 5: In the National Research Council's Evaluation of Forensic DNA Evidence, released in 1996, the Council concluded "the best protection that an innocent suspect has against an [laboratory] error that could lead to a false conviction is the opportunity for an independent retest." At present, there is no statutory provision in Virginia addressing the division of evidentiary samples for independent retesting by the defense. If such a provision were enacted, defense attorneys testifying before the Commission urged that results from independent retesting not be admissible at trial.

Recommendation 5: Amend **Code of Virginia §9-196.13** to provide that, whenever feasible, evidentiary samples delivered to the Division of Forensic Science shall be divided prior to DNA analysis and secured for future independent testing by the defense. *See Appendix F for proposed legislation.*

F. Laboratory Standards and Accreditation

Finding 6: There is no Virginia statute which requires laboratory accreditation as a prerequisite to the admissibility of forensic DNA evidence at trial. The Virginia Division of Forensic Science is accredited by the American Society of Crime Laboratory Directors, Laboratory Accreditation Board (ASCLD-LAB); however, the FBI Laboratory is not accredited at this time. The Virginia Division of Forensic Science also adheres to laboratory standards promulgated by the Technical Working Group on DNA Analysis and Methods (TWGDAM) and the DNA Advisory Board.

Recommendation 6: At such time as the FBI laboratory achieves accreditation, the Crime Commission should reconsider amending the **Code of Virginia** to require that laboratories analyzing DNA evidence for use in Virginia courts be accredited.

G. Court Appointed DNA Experts for Indigent Defendants

Finding 7: In *Husske v. Commonwealth of Virginia*, decided on September 13, 1996, the Supreme Court of Virginia held "an indigent defendant who seeks the appointment of an expert witness, at the Commonwealth's expense, must demonstrate that the subject which necessitates the assistance of the expert is 'likely to be a significant factor in his defense' and that he will be prejudiced by the lack of expert assistance." (19 Va. App. 30, superseded by 21 Va. App. 91, affirmed by Supreme Court of Virginia September 13, 1996).

H. Training for Judges, Prosecutors and Defense Attorneys

Finding 8: The Einstein Institute in Bethesda, Maryland has developed a comprehensive Seminar on Courts and Challenges of Genetic Testing which will be open to judges, prosecutors and defense attorneys at nine sites nationwide. *See Appendix G for further details.*

I. Training for Law Enforcement Officers

Finding 9: The Virginia Division of Forensic Science provides extensive training to law enforcement officers on the collection of DNA and other biological evidence through the Forensic Academy. The Academies, held twice annually, are ten weeks in duration and provide training to a total of twenty officers. An officer interested in attending the Academy must apply to the Division of Forensic Science, be recommended by his/her chief or sheriff and submit to an interview and written

test. The cost to the Division is approximately \$15,000 per session or \$1500 per officer. In addition, the Division provides annual retraining and "spot" courses.

J. DNA Case Backlog

Finding 10: Dr. Paul Ferrara, Director, Division of Forensic Science discussed forensic case backlog issues at the October 22, 1996 meeting of the Law Enforcement Subcommittee. The Division's headquarters will be relocated in 1997, and, at that time, the Division will have adequate space to accommodate additional analysts and equipment. The Department of Criminal Justice Services will be proposing several FY98 budget amendments to increase the resources of the Division. The Commission requested that Dr. Ferrara return in 1997 to discuss FY98 budgetary requirements.

VIII. Acknowledgements

Arlington County Commonwealth's Attorney's Office
Arthur L. Karp, Deputy Commonwealth's Attorney

David P. Baugh, Esquire

Commonwealth's Attorneys' Services Council
Walter S. Felton, Jr., Administrator

William T. Linka, Esquire

Jerry C. Lyell, Esquire

National Academy of Sciences
Board on Biology
Eric A. Fischer, Director

Newport News Commonwealth's Attorney's Office
Jennifer S. Sternick, Chief Deputy Commonwealth's Attorney

Richmond Circuit Court (Manchester Courthouse)
Judge J.B. Wilkinson

Barry C. Scheck, Professor of Law, Cardoza School of Law

Virginia Beach Commonwealth's Attorney
Albert D. Alberi, Chief Deputy Commonwealth's Attorney

Virginia College of Criminal Defense Attorneys (VCCDA)
Alan D. Albert, Esquire
Gerald T. Zerkin, Esquire

Virginia Department of Criminal Justice Services
Division of Forensic Science
Dr. Paul B. Ferrara, Director
Deanne F. Dabbs, Assistant Director
Jeffrey D. Ban, Forensic Section Chief

Virginia Trial Lawyers Association
Talmage T. Williams, III, Director of Government Affairs
Dennis W. Dohnal, Esquire

APPENDIX A

1996 SESSION
ENGROSSED

966953492

HOUSE JOINT RESOLUTION NO. 31

House Amendments in [] —February 1, 1996

[*Requesting Directing*] the Virginia State Crime Commission to study DNA evidence and the ability of the parties to review it and to challenge its introduction.

Patrons—Woodrum, Almand, Cranwell, Guest and Howell

Referred to Committee on Rules

WHEREAS, by authorization of § 19.2-270.5 of the Code of Virginia, a DNA (deoxyribonucleic acid) profile of a person is admissible in a criminal proceeding to prove or disprove his identity; and

WHEREAS, as set forth in § 19.2-270.5, DNA testing is "deemed to be a reliable scientific technique;" and

WHEREAS, notwithstanding the statutory assertion that DNA evidence is deemed reliable, there is some concern among the scientific and legal communities that this assertion may not always be valid in the setting of a criminal trial; and

WHEREAS, DNA evidence is among the most difficult evidence to understand and interpret because of its basis in complex science, and presents a challenge to both juries and judges; and

WHEREAS, the presentation and interpretation of DNA evidence is, likewise, challenging for the parties; and

WHEREAS, if the law of Virginia may so boldly state that DNA evidence is reliable, an adequate legal method of verifying its reliability is necessary; now, therefore, be it

RESOLVED by the House of Delegates, the Senate concurring, That the Virginia State Crime Commission [~~study~~ be directed to study DNA evidence and the ability of the parties to review it and to challenge its introduction. The Commission shall examine and consider] (i) the general reliability of DNA evidence in a criminal trial setting, (ii) the legal methods available to the parties under current law to assure that both a judge and a jury may reasonably interpret the evidence offered, and (iii) the latitude and reasonableness of current law regarding challenges to DNA evidence introduction. The Commission shall be assisted by the Division of Forensic Science and other agencies of the Commonwealth at the request of the Commission. Attorneys for the Commonwealth and members of Virginia's criminal defense bar [~~will~~ shall] be requested to assist in the study.

The Commission shall complete its work in time to submit its findings and recommendations to the Governor and the 1997 Session of the General Assembly as provided in the procedures of the Division of Legislative Automated Systems for the processing of documents.

966953492

HJ31E

Official Use By Clerks

Passed By

The House of Delegates

- without amendment
- with amendment
- substitute
- substitute w/amdt

Passed By The Senate

- without amendment
- with amendment
- substitute
- substitute w/amdt

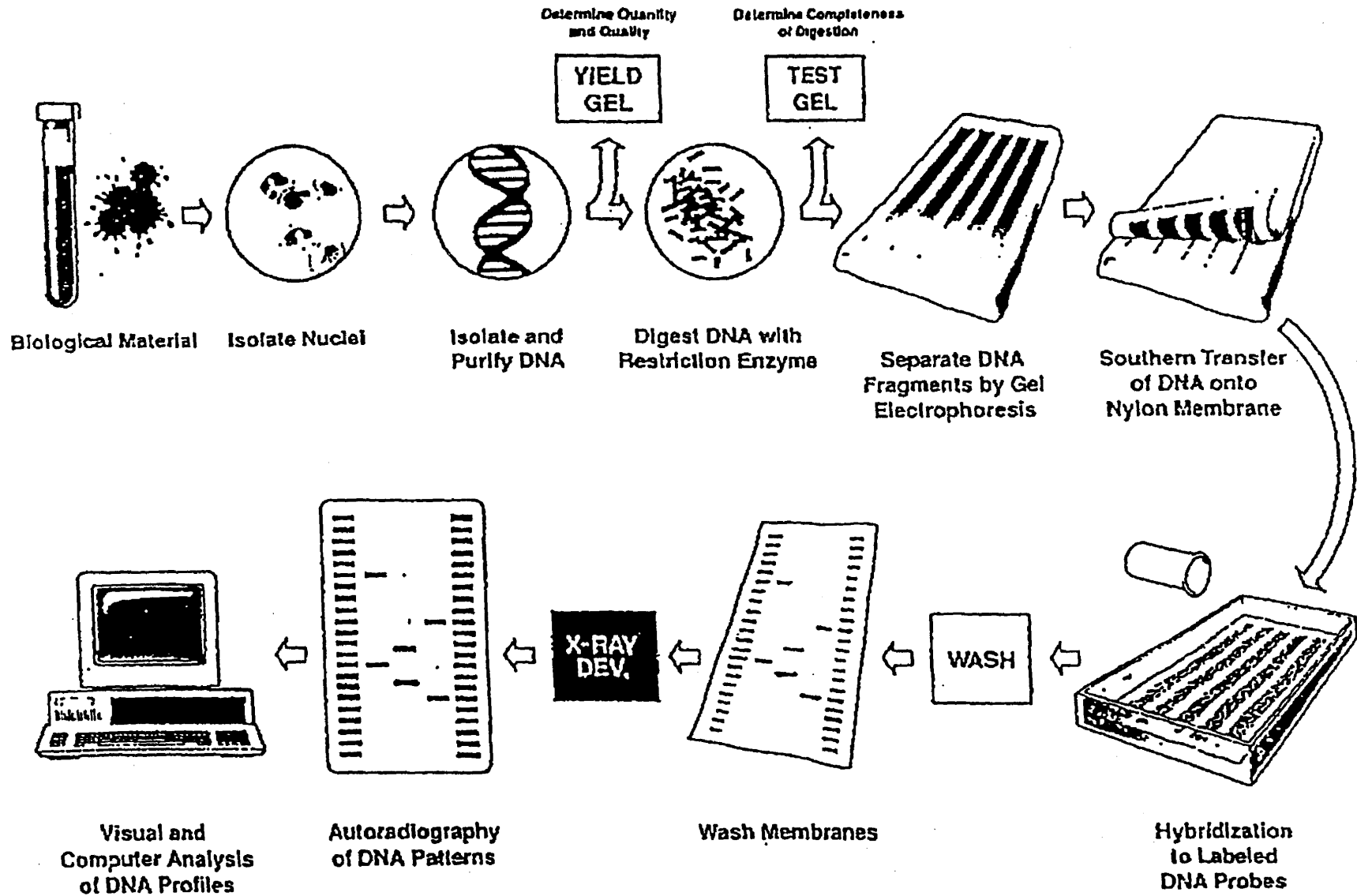
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APPENDIX B

DNA Profiling Process



APPENDIX C

Recommendation 1

§ 19.2-270.5

DNA profile admissible in criminal proceeding

In any criminal proceeding, DNA (deoxyribonucleic acid) testing shall be deemed to be a reliable scientific technique and the evidence of a DNA profile comparison may be admitted to prove or disprove the identity of any person. This section shall not otherwise limit the introduction of any relevant evidence bearing upon any question at issue before the court, including the accuracy and reliability of the procedures employed in the collection and analysis of a particular DNA sample. The court shall, regardless of the results of the DNA analysis, if any, consider such other relevant evidence of the identity of the accused as shall be admissible in evidence.

At least twenty-one days prior to commencement of the proceeding in which the results of a DNA analysis will be offered as evidence, the party intending to offer the evidence shall notify the opposing party, in writing, of the intent to offer the analysis and shall provide or make available copies of the profiles and the report or statement to be introduced. In the event that such notice is not given, and the person proffers such evidence, then the court may in its discretion either allow the opposing party a continuance or, under appropriate circumstances, bar the person from presenting such evidence. The period of any such continuance shall not be counted for speedy trial purposes under § 19.2-243. If the opposing party intends to object to the admissibility of such evidence he

shall give written notice of that fact and the basis for his objections at least ten days prior to commencement of the proceedings.

No blood sample submitted to the Division of Forensic Science for analysis and use as provided in this section and no results of the analysis performed shall be included in the DNA data bank established by the Division pursuant to § 19.2-310.5 or otherwise used in any way with identifying information on the person whose sample was submitted.

APPENDIX D

Recommendation 3

§19.2-163

Compensation of court-appointed counsel

Counsel appointed to represent an indigent accused in a criminal case shall be compensated for his services in an amount fixed by each of the courts in which he appears according to the time and effort expended by him in the particular case, not to exceed the amounts specified in the following schedule:

1. In a district court, a sum not to exceed \$100 or such other amount as may be provided by law; such amount shall be allowed in any case wherein counsel conducts the defense of a single charge against the indigent through to its conclusion or a charge of violation of probation at any hearing conducted under § 19.2-306, without a requirement for accounting of time devoted thereto; thereafter, compensation for additional charges against the same accused also conducted by the same counsel shall be allowed on the basis of additional time expended as to such additional charges;

2. In a circuit court (i) to defend a felony charge that may be punishable by death an amount deemed reasonable by the court; and (ii) to defend a felony charge that may be punishable by confinement in the state correctional facility for a period of more than twenty years, or a charge of violation of probation for such offense, a sum not to exceed \$575, unless upon a finding of good cause the court deems otherwise, in which case the court may award a reasonable amount; and (iii) to defend any other felony charge, or a charge of violation of probation for such offense, a sum not to exceed \$265;

and (iv) to defend any misdemeanor charge punishable by confinement in jail or a charge of violation of probation for such offense, a sum not to exceed \$132. In the event any case is required to be retried due to a mistrial for any cause or reversed on appeal, the court may allow an additional fee for each case in an amount not to exceed the amounts allowable in the initial trial. In the event counsel is appointed to defend an indigent charged with a felony that may be punishable by death, such counsel shall continue to receive compensation as provided in this paragraph for defending such a felony, regardless of whether the charge is reduced or amended to a felony that may not be punishable by death, prior to final disposition of the case.

The circuit or district court shall direct the payment of such reasonable expenses incurred by such court-appointed attorney as it deems appropriate under the circumstances of the case. Counsel appointed by the court to represent an indigent charged with repeated violations of the same section of the Code of Virginia, with each of such violations arising out of the same incident, occurrence, or transaction, shall be compensated in an amount not to exceed the fee prescribed for the defense of a single charge, if such offenses are tried as part of the same judicial proceeding. The trial judge shall consider any guidelines established by the Supreme Court but shall have the sole discretion to fix the amount of compensation to be paid counsel appointed by the court to defend a felony charge that may be punishable by death.

The circuit or district court shall direct that the foregoing payments shall be paid out by the Commonwealth, if the defendant is

charged with a violation of a statute, or by the county, city or town, if the defendant is charged with a violation of a county, city or town ordinance, to the attorney so appointed to defend such person as compensation for such defense.

Counsel representing a defendant charged with a Class 1 felony may submit to the court, on a monthly basis, a statement of all costs incurred and fees charged by him in the case during that month. Whenever the total charges as are deemed reasonable by the court for which payment has not previously been made or requested exceed \$1,000, the court may direct that payment be made as otherwise provided in this section.

When such directive is entered upon the order book of the court, the Commonwealth, county, city or town, as the case may be, shall provide for the payment out of its treasury of the sum of money so specified. If the defendant is convicted, the amount allowed by the court to the attorney appointed to defend him shall be taxed against the defendant as a part of the costs of prosecution and, if collected, the same shall be paid to the Commonwealth, or the county, city or town, as the case may be. An abstract of such costs shall be docketed in the judgment docket and execution lien book maintained by such court.

For the purposes of this section, the defense of a case may be considered conducted through to its conclusion and an appointed counsel entitled to compensation for his services in the event an indigent accused fails to appear in court subject to a capias for his arrest or a show cause summons for his failure to appear and remains a fugitive from justice for one year following the issuance

of the capias or the summons to show cause, and appointed counsel has appeared at a hearing on behalf of the accused.

APPENDIX E

Recommendation 4

§ 19.2-270.4

When donation, destruction or return of exhibits received in evidence authorized

A. Unless objection with sufficient cause is made, the trial court in any criminal case may order the donation or destruction of any or all exhibits received in evidence during the course of the trial (i) at any time after the expiration of the time for filing an appeal from the final judgment of the court if no appeal is taken or (ii) if an appeal is taken, at any time after exhaustion of all appellate remedies. The order of donation or destruction may require that photographs be made of all exhibits ordered to be donated or destroyed and that such photographs be appropriately labeled for future identification. In addition, the order shall state the nature of the exhibit subject to donation or destruction, identify the case in which such exhibit was received and from whom such exhibit was received, if known, and the manner by which the exhibit is to be destroyed or to whom donated. However, for any biological evidence, the court shall order the storage of such evidence for a period equal to the maximum term for which the defendant can be incarcerated or twenty years, whichever is less.

For the purposes of this subsection, biological evidence means any evidentiary sample containing any human physiological fluids, tissue or hair upon which DNA testing can be performed.

B. A circuit court for good cause shown, on notice to the attorney for the Commonwealth and any attorney for a defendant in

the case, may order the return of any or all exhibits to the owners thereof, notwithstanding the pendency of any appeal. The order may be upon such conditions as the court deems appropriate for future identification and inclusion in the record of a case subject to retrial. In addition, the owner shall acknowledge in a sworn affidavit to be filed with the record of the case, that he has retaken possession of such exhibit or exhibits.

C. Any photographs taken pursuant to an order of donation or destruction or an order returning exhibits to the owners shall be retained with the record in the case and, if necessary, shall be admissible in any subsequent trial of the same cause, subject to all other rules of evidence.

D. Upon petition of any organization which is exempt from taxation under § 501 (c) (3) of the Internal Revenue Code, the court in its sound discretion may order the donation of an exhibit to such charitable organization.

APPENDIX F

Recommendation 5

§ 9-196.13

Independent examination of forensic DNA evidence.

Whenever feasible, unused, untested portions of forensic DNA samples shall be sealed by the person testing the sample or at his direction and returned to the law enforcement agency which submitted the case. Any independent analysis of the unused, untested sample shall not be performed on behalf of the accused unless an analysis of the Division's sample fails to exclude the accused as a suspect. The failure of the accused to offer the results of the independent analysis into evidence shall not be evidence against the accused and shall not be subject to any comment by the Commonwealth at the trial of the case, except in rebuttal.

Any independent analysis of unused, untested portions of forensic DNA samples conducted pursuant to a request by the accused must be performed by a laboratory which is in demonstrated compliance with standards promulgated by the Federal Bureau of Investigation DNA Advisory Board.

APPENDIX G

**Einstein Institute
Bethesda, Maryland
Seminar on Courts and Challenges of Genetic Testing**

Contact:

Franklin Zweig, President and CEO
Phone: (301) 961-1949

Facts:

- Each seminar will be sponsored by an anchoring court
- The seminars will be federally funded in part through the Human Genome Project
- State and federal trial, appellate and limited jurisdiction judges, prosecutors and defense and civil attorneys are invited to attend
- Space will be available on a first come, first served basis with a limit of 100 - 250 at each seminar
- Some scholarship funding will be available for judges
- Other attorneys attending the seminars will pay tuition
- The amount of tuition will vary among the regions and will be available on-line as soon as it is determined
- A faculty core has been selected from the scientific community
- Small break-out sessions are planned with a judge as group leader and one faculty member assigned to each group
- As additional information becomes available, it can be accessed through Courts and Science On-Line Magazine (CASLOM) at <http://www.ornl.gov/courts/>

Tentative Schedule:

February 9 - 13, 1997	National Conference Scottsdale, Arizona
May 3 - 6, 1997	Washington DC
June 29 - July 5, 1997	New England Regional Orleans, MA (on Cape Cod)
October 13 -16, 1997	Northwest Regional Bellingham, WA
March 2 -7, 1998	Midwest Regional Chicago, IL
TBA	Texas Regional Dallas, TX

Note: Three additional sites and dates will be announced later this year.

