ALASKA LEGISLATURE COMMITTEE FILES, 1989-1990 8672
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by the commissioner within five years after the date of assessment of the tax. A notice of lien filed in one county may be transcribed to any other county within ten years after the date of its filing, but the transcription shall not extend the period during which the lien is enforceable. A notice of lien may be renewed by the commissioner before the expiration of the ten-year period for an additional ten years. The taxpayer must receive written notice of the renewal.

Subd. 5. [Repealed, 1985 c 101 s 17]

Subd. 6. **Enforceability of lien.** The lien imposed by this section shall be enforceable by levy as authorized in section 270.70, or by judgment lien foreclosure as authorized in chapter 550.

Subd. 7. **Notice of mortgage foreclosure or contract termination.** If a lien has been filed by the commissioner of revenue against real property pursuant to this section, and, subsequent to the recording of the lien, a mortgage foreclosure upon the real property is commenced under chapter 580, or a termination of contract of sale of the real property is commenced under section 559.21, notice of the mortgage foreclosure or termination of contract of sale shall be mailed to the commissioner not less than 25 days prior to the foreclosure or termination. Provided, notice need not be given pursuant to this subdivision if the lien of the commissioner has been filed within 30 days or less prior to the foreclosure or termination. The contents of the notice shall be as prescribed in section 7425(c)(1) of the Internal Revenue Code of 1954, as amended through December 31, 1982.

Subd. 8. **Filing entitlement.** Execution of notices of liens or of other notices affecting state tax liens by the commissioner of revenue or a delegate entitles them to be filed, and no other attestation, certification, or acknowledgment is necessary.

Subd. 9. **Lien search fees.** Upon request of any person, the filing officer shall issue a certificate showing whether there is on file, on the date and hour stated in the certificate, any notice of lien or certificate or notice affecting any lien filed after June 30, 1979, naming a particular person, and giving the date and hour of filing of each notice or certificate naming the person. The fee for a certificate shall be as provided by section 336.9-407 or 357.18, subdivision 1, clause (3). Upon request, the filing officer shall furnish a copy of any notice of state lien, or notice or certificate affecting a state lien, for a fee of 50 cents per page.

Subd. 10. **Limitation for homestead property.** A lien imposed under this section upon property defined as homestead property in chapter 510 may not be enforced against homestead property by levy under section 270.70, or by judgment lien under chapter 550.

History: *1982 c 523 art 2 s 8; 1983 c 180 s 3-6; 1985 c 101 s 6-9; 1985 c 281 s 2; 1986 c 444; 1Sp1986 c 1 art 7 s 11-14*

Minn Collection Statutes

270.70 LEVY AND DISTRAINT.

Subdivision 1. **Authority of commissioner.** If any tax payable to the commissioner of revenue or to the department of revenue is not paid when due, such tax may be collected by the commissioner of revenue within five years after the date of assessment of the tax, or if the tax judgment has been filed, within the statutory period of enforcement of a valid tax judgment, by a levy upon all property and rights to property of the person liable for the payment or collection of such tax (except that which is exempt from execution pursuant to section 550.37) or property on which there is a lien provided in section 270.69. For this purpose, the term "tax" shall include any penalty, interest and costs properly payable. The term "levy" includes the power of distraint and seizure by any means.

Subd. 2. **Notice and demand; jeopardy collection.** Before a levy is made, notice and demand for payment of the amount due shall be given to the person liable for the payment or collection of the tax at least ten days prior to the levy. If the commissioner has reason to believe that collection of the tax is in jeopardy, notice and demand for immediate payment of the tax may be made by the commissioner. If the tax is not paid,

the commissioner may proceed to collect by levy without regard to the ten day period provided herein.

Subd. 3. Manner of execution and sale. In making the execution of the levy and in collecting the taxes due, the commissioner shall have all of the powers provided in chapter 550 and in any other law for purposes of effecting an execution against property in this state. The sale of property levied upon, and the time and manner of redemption therefrom, shall, to the extent not provided in sections 270.701 to 270.709, be governed by chapter 550. The seal of the court, subscribed by the court administrator, as provided in section 550.04, shall not be required. The levy for collection of taxes may be made whether or not the commissioner has commenced a legal action for collection of such taxes.

Subd. 4. Stay of sale. (a) Where a jeopardy assessment or any other assessment has been made by the commissioner, the property seized for collection of the tax shall not be sold until the time has expired for filing an appeal of the assessment with the tax court pursuant to chapter 271. If an appeal has been filed, no sale shall be made unless the taxes remain unpaid for a period of more than 30 days after final determination of the appeal by the tax court or by the appropriate judicial forum.

(b) Notwithstanding clause (a), seized property may be sold if

(i) the taxpayer consents in writing to the sale, or

(ii) the commissioner determines that the property is perishable or may become greatly reduced in price or value by keeping, or that such property cannot be kept without great expense.

Subd. 5. Probate court jurisdiction. Where a levy has been made to collect taxes pursuant to this section and the property seized is properly included in a formal proceeding commenced under sections 524.3-401 to 524.3-505 and maintained under full supervision of the court, such property shall not be sold until the probate proceedings are completed or until the court so orders.

Subd. 6. Bond or security to release seizure. The property seized shall be returned by the commissioner if the owner gives a surety bond equal to the appraised value of the owner's interest in the property, as determined by the commissioner, or deposits with the commissioner security in such form and amount as the commissioner deems necessary to insure payment of the liability, but not more than twice the liability.

Subd. 7. Injunction. Notwithstanding any other provision to the contrary, if a levy or sale pursuant to this section would irreparably injure rights in property which the court determines to be superior to rights of the state in such property, the district court may grant an injunction to prohibit the enforcement of such levy or to prohibit such sale.

Subd. 8. Surrender of property subject to levy. Any person who fails or refuses to surrender without reasonable cause any property or rights to property subject to levy, upon demand by the commissioner, shall be liable personally to the state of Minnesota in an amount equal to the value of the property or rights not so surrendered, but not exceeding the amount of taxes for the collection of which such levy has been made. Any amount recovered under this subdivision shall be credited against the tax liability for the collection of which such levy was made.

Subd. 9. Penalty. In addition to the personal liability imposed by subdivision 8, if any person required to surrender property or rights to property fails or refuses to surrender the property or rights to property without reasonable cause, such person shall be liable for a penalty equal to 25 percent of the amount recoverable under subdivision 8. No part of such penalty shall be credited against the tax liability for the collection of which such levy was made.

Subd. 10. Person defined. The term "person" as used in subdivision 8 includes an officer or employee of a corporation or a member or employee of a partnership who, as such officer, employee or member is under a duty to surrender the property or rights to property or to discharge the obligation. The personal liability imposed by subdivision 8 and the penalty imposed by subdivision 9 may, after demand to honor a levy

has been made, be assessed by the commissioner within 60 days after service of the levy. An assessing tax order under this subdivision shall be appealable to the tax court without payment of the tax, penalty, or interest in the manner provided by law, but an appeal shall not preclude the commissioner from exercising any collection action the commissioner deems necessary to preserve the interests of the state while the matter is pending.

Subd. 11. Optional remedy. Any action taken by the commissioner pursuant to this section shall not constitute an election by the state to pursue a remedy to the exclusion of any other remedy.

Subd. 12. Equitable relief. After the commissioner has seized the property of any person, that person may, upon giving 48 hours notice to the commissioner and to the court, bring a claim for equitable relief before the district court for the release of the property to the taxpayer upon such terms and conditions as the court may deem equitable.

Subd. 13. Levy and sale by sheriff. If any tax payable to the commissioner of revenue or to the department of revenue is not paid as provided in subdivision 2, the commissioner may, within five years after the date of assessment of the tax, delegate the authority granted by subdivision 1, by means of issuing a warrant to the sheriff of any county of the state commanding the sheriff, as agent for the commissioner, to levy upon and sell the real and personal property of the person liable for the payment or collection of the tax and to levy upon the rights to property of that person within the county, or to levy upon and seize any property within the county on which there is a lien provided in section 270.69, and to return the warrant to the commissioner and pay to the commissioner the money collected by virtue thereof by a time to be therein specified not less than 60 days from the date of the warrant. The sheriff shall proceed thereunder to levy upon and seize any property of the person and to levy upon the rights to property of the person within the county (except the person's homestead or that property which is exempt from execution pursuant to section 550.37), or to levy upon and seize any property within the county on which there is a lien provided in section 270.69. For purposes of the preceding sentence, the term "tax" shall include any penalty, interest and costs properly payable. The sheriff shall then sell so much of the property levied upon as is required to satisfy the taxes, interest, and penalties, together with the sheriff's costs; but the sales, and the time and manner of redemption therefrom, shall, to the extent not provided in sections 270.701 to 270.709, be governed by chapter 550. The proceeds of the sales, less the sheriff's costs, shall be turned over to the commissioner, who shall then apply the proceeds as provided in section 270.708.

Subd. 14. Priority of levy. Notwithstanding section 52.12, a levy by the commissioner made pursuant to the provisions of this section upon a taxpayer's funds on deposit in a financial institution located in this state, shall have priority over any unexercised right of setoff of the financial institution to apply the levied funds toward the balance of an outstanding loan or loans owed by the taxpayer to the financial institution. A claim by the financial institution that it exercised its right to setoff prior to the levy by the commissioner must be substantiated by evidence of the date of the setoff, and shall be verified by the sworn statement of a responsible corporate officer of the financial institution. Furthermore, for purposes of determining the priority of any levy made under this section, the levy shall be treated as if it were an execution made pursuant to chapter 550

Subd. 15. Effect of honoring levy. Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made who, upon demand by the commissioner, surrenders the property or rights to property (or who pays a liability under subdivision 8) shall be discharged from any obligation or liability to the person liable for the payment or collection of the delinquent tax with respect to the property or rights to property so surrendered or paid.

Subd. 16. Notice of levy. Notwithstanding any other provision of law to the contrary, the notice of any levy authorized by this section may be served by mail or by delivery by an employee or agent of the department of revenue.

History: *1975 c 377 s 6; 1976 c 134 s 78; 1977 c 307 s 29; 1982 c 523 art 2 s 9-16; 1983 c 180 s 7-9, 1985 c 101 s 10,11; 1986 c 444; 1Sp1986 c 3 art 1 s 82*

## 270.701 SALE OF SEIZED PROPERTY.

Subdivision 1. Notice of seizure. As soon as practicable after seizure of property, notice in writing shall be given by the commissioner of revenue to the owner of the property (or, in the case of personal property, the possessor thereof), and shall be served in like manner as a summons in a civil action in the district court. If the owner cannot be readily located, or has no dwelling or place of business within this state, the notice may be mailed to the last known address. The notice shall specify the sum demanded and shall contain, in the case of personal property, an account of the property seized and, in the case of real property, a description with reasonable certainty of the property seized.

Subd. 2. Notice of sale. The commissioner shall as soon as practicable after the seizure of the property give notice of sale of the property to the owner, in the manner of service prescribed in subdivision 1. In the case of personal property, the notice shall be served at least 10 days prior to the sale. In the case of real property, the notice shall be served at least four weeks prior to the sale. The commissioner shall also cause public notice of each sale to be made. In the case of personal property, notice s' all be posted at least 10 days prior to the sale a' the post office nearest the place where the seizure is made, and in not less than two other public places. In the case of real property, six weeks' published notice shall be given prior to the sale, in a newspaper published or generally circulated in the county. The notice of sale provided in this subdivision shall specify the property to be sold, and the time, place, manner and conditions of the sale. Whenever levy is made without regard to the ten-day period provided in section 270.70, subdivision 2, public notice of sale of the property seized shall not be made within the ten-day period unless section 270.702 (relating to sale of perishable goods) is applicable.

Subd. 3. Sale of indivisible property. If any property liable to levy is not divisible, so as to enable the commissioner by sale of a part thereof to raise the whole amount of the tax and expenses, the whole of the property shall be sold.

Subd. 4. Time and place of sale. The time of sale shall be after the expiration of the notice periods prescribed in subdivision 2. The place of sale shall be within the county in which the property is seized, except by special order of the commissioner.

Subd. 5. Manner and conditions of sale. (a) Before the sale the commissioner shall determine a minimum price for which the property shall be sold, and if no person offers for the property at the sale the amount of the minimum price, the property shall be declared to be purchased at the minimum price for the state of Minnesota; otherwise the property shall be declared to be sold to the highest bidder. In determining the minimum price, the commissioner shall take into account the expense of making the levy and sale. The announcement of the minimum price determined by the commissioner may be delayed until the receipt of the highest bid.

(b) The sale shall not be conducted in any manner other than:

(i) by public auction, or

(ii) by public sale under sealed bids.

(c) In the case of seizure of several items of property, the items may be offered separately, in groups, or in the aggregate, and shall be sold under whichever method produces the highest aggregate amount.

(d) Payment in full shall be required at the time of acceptance of a bid, except that a part of the payment may be deferred by the commissioner for a period not to exceed 30 days.

(e) Other methods (including advertising) in addition to those prescribed in subdivision 2 may be used in giving notice of the sale.

(f) The commissioner may adjourn the sale from time to time for a period not to exceed 30 days.

(g) If payment in full is required at the time of acceptance of a bid and is not then and there paid, the commissioner shall forthwith proceed to again sell the property in the manner provided in this section. If the conditions of the sale permit part of the

within ten days from the sale cause the certificate of sale to be duly recorded by the county recorder of the county in which the real property is located.

History: *1982 c 523 art 2 s 20*

270.705 EFFECT OF CERTIFICATE OF SALE.

Subdivision 1. Personal property. (a) In all cases of sale pursuant to section 270.701 of personal property, the certificate of sale given pursuant to section 270.704 shall be prima facie evidence of the right of the commissioner to make the sale, and conclusive evidence of the regularity of the proceedings in making the sale. The certificate shall transfer to the purchaser all right, title, and interest of the party delinquent in and to the property sold.

(b) If the property consists of stocks, the certificate of sale shall be notice, when received, to any corporation, company, or association of the transfer, and shall be authority to the corporation, company, or association to record the transfer on its books and records in the same manner as if the stocks were transferred or assigned by the party holding the same, in lieu of any original or prior certificate, which shall be void, whether canceled or not.

(c) If the subject of sale is securities or other evidences of debt, the certificate of sale shall be a good and valid receipt to the person holding the same, as against any person holding or claiming to hold possession of the securities or other evidences of debt.

(d) If the property consists of a motor vehicle, the certificate of sale shall be notice, when received, to the registrar of motor vehicles of this state of the transfer, and shall be authority to the registrar to record the transfer on the books and records in the same manner as if the certificate of title to the motor vehicle were transferred or assigned by the party holding the same, in lieu of any original or prior certificate, which shall be void, whether canceled or not.

Subd. 2. Real property. In the case of the sale of real property pursuant to section 270.701, the certificate of sale given pursuant to section 270.704 shall be prima facie evidence of the facts therein stated, and shall be considered and operate as a conveyance of all the right, title, and interest the party delinquent had in and to the real property thus sold at the time the lien of the state of Minnesota attached thereto.

Subd. 3. Junior encumbrances. A certificate of sale of personal property or real property given pursuant to section 270.704 shall discharge the property from all liens, encumbrances, and titles over which the lien of the state of Minnesota with respect to which the levy was made had priority.

History: *1982 c 523 art 2 s 21; 1986 c 444*

270.706 RECORDS OF SALE.

The commissioner shall, for the department of revenue, keep a record of all sales of property under section 270.701 and of redemptions of real property. The record shall set forth the tax for which the sale was made, the dates of seizure and sale, the name of the party assessed and all proceedings in making the sale, the amount of expenses, the names of the purchasers, and the date of the certificate of sale. A copy of the record, or any part thereof, certified by the commissioner shall be evidence in any court of the truth of the facts therein stated.

History: *1982 c 523 art 2 s 22*

270.707 EXPENSE OF LEVY AND SALE.

The commissioner shall determine the expenses to be allowed in all cases of levy and sale.

History: *1982 c 523 art 2 s 23*

payment to be deferred, and if the part is not paid within the prescribed period, suit may be instituted against the purchaser for the purchase price or that part thereof as has not been paid, together with interest at the rate specified in section 549.09 from the date of the sale; or, in the discretion of the commissioner, the sale may be declared by the commissioner to be null and void for failure to make full payment of the purchase price and the property may again be advertised and sold as provided in this section. In the event of a readvertisement and sale, any new purchaser shall receive the property or rights to property free and clear of any claim or right of the former defaulting purchaser, of any nature whatsoever, and the amount paid upon the bid price by the defaulting purchaser shall be forfeited.

History: *1982 c 523 art 2 s 17; 1986 c 444*

## 270.702 SALE OF PERISHABLE GOODS.

If the commissioner determines that any property seized is liable to perish or become greatly reduced in price or value by keeping, or that the property cannot be kept without great expense, the commissioner shall appraise the value of the property, and if the owner of the property can be readily found, the commissioner shall give the owner notice of the determination of the appraised value of the property. The property shall be returned to the owner if, within the time specified in the notice, the owner (a) pays to the commissioner an amount equal to the appraised value, or (b) gives bond in the form, with the sureties, and in the amount as the commissioner prescribes to pay the appraised amount at the time the commissioner determines to be appropriate in the circumstances. If the owner does not pay the amount or furnish the bond in accordance with this section, the commissioner shall as soon as practicable make public sale of the property in accordance with section 270.701.

History: *1982 c 523 art 2 s 18; 1986 c 444*

## 270.703 REDEMPTION OF PROPERTY.

Subdivision 1. Before sale. Any person whose property has been levied upon shall have the right to pay the amount due, together with the expenses of the proceeding, if any, to the commissioner at any time prior to the sale thereof, and upon payment the commissioner shall restore the property to the person, and all further proceedings in connection with the levy on the property shall cease from the time of payment.

Subd. 2. Redemption of real estate after sale. The owners of any real property sold as provided in this section, their heirs, executors, or administrators, or any person having any interest therein, or a lien thereon, or any person in their behalf, shall be permitted to redeem the property sold, or any particular tract of the property, at any time within 6 months, or in case the real property sold exceeds 10 acres in size, at any time within 12 months, after the sale thereof. The property or tract of property shall be permitted to be redeemed upon payment to the purchaser (or if not found in the county in which the property to be redeemed is situated, then to the commissioner, for the use of the purchaser, or the purchaser's heirs or assigns) of the amount paid by the purchaser together with interest at the rate specified in section 549.09 from the date of the sale.

Subd. 3. Record. When any lands sold are redeemed as provided in this section, the commissioner shall cause entry of the fact to be made upon the record required by section 270.706 and the entry shall be evidence of the redemption.

History: *1982 c 523 art 2 s 19; 1986 c 444*

## 270.704 CERTIFICATE OF SALE.

In the case of property sold as provided in section 270.701, the commissioner shall give to the purchaser a certificate of sale upon payment in full of the purchase price. In the case of real property the certificate shall set forth the real property purchased, for whose taxes the property was sold, the name of the purchaser, and the price paid. If real property is declared purchased by the state of Minnesota, the commissioner shall

within ten days from the sale cause the certificate of sale to be duly recorded by the county recorder of the county in which the real property is located.

History: *1982 c 523 art 2 s 20*

## 270.705 EFFECT OF CERTIFICATE OF SALE.

Subdivision 1. Personal property. (a) In all cases of sale pursuant to section 270.701 of personal property, the certificate of sale given pursuant to section 270.704 shall be prima facie evidence of the right of the commissioner to make the sale, and conclusive evidence of the regularity of the proceedings in making the sale. The certificate shall transfer to the purchaser all right, title, and interest of the party delinquent in and to the property sold.

(b) If the property consists of stocks, the certificate of sale shall be notice, when received, to any corporation, company, or association of the transfer, and shall be authority to the corporation, company, or association to record the transfer on its books and records in the same manner as if the stocks were transferred or assigned by the party holding the same, in lieu of any original or prior certificate, which shall be void, whether canceled or not.

(c) If the subject of sale is securities or other evidences of debt, the certificate of sale shall be a good and valid receipt to the person holding the same, as against any person holding or claiming to hold possession of the securities or other evidences of debt.

(d) If the property consists of a motor vehicle, the certificate of sale shall be notice, when received, to the registrar of motor vehicles of this state of the transfer, and shall be authority to the registrar to record the transfer on the books and records in the same manner as if the certificate of title to the motor vehicle were transferred or assigned by the party holding the same, in lieu of any original or prior certificate, which shall be void, whether canceled or not.

Subd. 2. Real property. In the case of the sale of real property pursuant to section 270.701, the certificate of sale given pursuant to section 270.704 shall be prima facie evidence of the facts therein stated, and shall be considered and operate as a conveyance of all the right, title, and interest the party delinquent had in and to the real property thus sold at the time the lien of the state of Minnesota attached thereto.

Subd. 3. Junior encumbrances. A certificate of sale of personal property or real property given pursuant to section 270.704 shall discharge the property from all liens, encumbrances, and titles over which the lien of the state of Minnesota with respect to which the levy was made had priority.

History: *1982 c 523 art 2 s 21; 1986 c 444*

## 270.706 RECORDS OF SALE.

The commissioner shall, for the department of revenue, keep a record of all sales of property under section 270.701 and of redemptions of real property. The record shall set forth the tax for which the sale was made, the dates of seizure and sale, the name of the party assessed and all proceedings in making the sale, the amount of expenses, the names of the purchasers, and the date of the certificate of sale. A copy of the record, or any part thereof, certified by the commissioner shall be evidence in any court of the truth of the facts therein stated.

History: *1982 c 523 art 2 s 22*

## 270.707 EXPENSE OF LEVY AND SALE.

The commissioner shall determine the expenses to be allowed in all cases of levy and sale.

History: *1982 c 523 art 2 s 23*

## 270.708 APPLICATION OF PROCEEDS OF LEVY.

Subdivision 1. **Collection of liability.** Any money realized by proceedings under this chapter, whether by seizure, by surrender under section 270.70 (except pursuant to subdivision 9 thereof), by sale of seized property, or by sale of property redeemed by the state of Minnesota (if the interest of the state of Minnesota in the property was a lien arising under the provisions of section 270.69), shall be applied as follows:

(a) First, against the expenses of the proceedings; then

(b) If the property seized and sold is subject to a tax administered by the commissioner of revenue which has not been paid, the amount remaining after applying clause (a) shall next be applied against the tax liability (and, if the tax was not previously assessed, it shall then be assessed); and

(c) The amount, if any, remaining after applying clauses (a) and (b) shall be applied against the tax liability in respect of which the levy was made or the sale was conducted.

Subd. 2. **Surplus proceeds.** Any surplus proceeds remaining after the application of subdivision 1 shall, upon application and satisfactory proof in support thereof, be credited or refunded by the commissioner to the person or persons legally entitled thereto.

History: *1982 c 523 art 2 s 24*

## 270.709 AUTHORITY TO RELEASE LEVY AND RETURN PROPERTY.

Subdivision 1. **Release of levy.** It shall be lawful for the commissioner to release the levy upon all or part of the property or rights to property levied upon if the commissioner determines that the release will facilitate the collection of the liability, but the release shall not operate to prevent any subsequent levy.

Subd. 2. **Return of property.** If the commissioner determines that property has been wrongfully levied upon, it shall be lawful for the commissioner to return:

(a) The specific property levied upon, at any time;

(b) An amount of money equal to the amount of money levied upon, at any time before the expiration of nine months from the date of the levy; or

(c) An amount of money equal to the amount of money received by the state of Minnesota from a sale of the property, at any time before the expiration of nine months from the date of the sale.

For purposes of clause (c), if property is declared purchased by the state of Minnesota at a sale pursuant to section 270.701, subdivision 5 (relating to manner and conditions of sale), the state of Minnesota shall be treated as having received an amount of money equal to the minimum price determined pursuant to section 270.701, subdivision 5 or, if larger, the amount received by the state of Minnesota from the resale of the property.

History: *1952 c 523 art 2 s 25*

## 270.71 ACQUISITION AND RESALE OF SEIZED PROPERTY.

For the purpose of enabling the commissioner of revenue to purchase or redeem seized property in which the state of Minnesota has an interest arising from a lien for unpaid taxes, there is appropriated to the commissioner an amount representing the cost of such purchases or redemptions. Seized property acquired by the state of Minnesota to satisfy unpaid taxes shall be resold by the commissioner. The commissioner shall preserve the value of seized property while controlling it, including but not limited to the procurement of insurance. For the purpose of refunding the proceeds from the sale of levied or redeemed property which are in excess of the actual tax liability plus costs of acquiring the property, there is hereby created a levied and redeemed property refund account in the agency fund. All amounts deposited into this account are appropriated to the commissioner of revenue. The commissioner shall report quarterly on the status of this program to the chairs of the house taxes and appropriations committees and senate taxes and tax laws and finance committees.

History: *1982 c 523 art 2 s 26; 1986 c 444*

# STATE OF ALASKA

**DEPARTMENT OF LAW**

CRIMINAL DIVISION


STEVE COWPER, GOVERNOR

REPLY TO

☒ CRIMINAL DIVISION CENTRAL OFFICE
P.O. BOX KC
JUNEAU, ALASKA 99811-0310
PHONE: (907) 465-[illegible]8

☐ OFFICE OF SPECIAL PROSECUTIONS AND APPEALS
1031 WEST 4TH AVENUE, SUITE 318
ANCHORAGE, ALASKA 99501-5993
PHONE: (907) 279-7424


May 1, 1989

The Honorable Fred Zharoff
Alaska State Senator
P.O. Box V
Juneau, Alaska 99811

Dear Senator Zharoff:

We have been working with Pennelope Goforth of your staff to develop a piece of legislation that would impose taxes on controlled substances in a manner that is constitutional and that does not interfere with criminal prosecutions for possession or sale of controlled substances. The issues presented are complicated and involve criminal, constitutional and tax law.

I do have some ideas about this legislation, and have solicited input from other prosecutors (both in Alaska and Minnesota), but given the volume of work that we have at this time of year, we are unfortunately unable to provide the amount of attention to the bill drafting that it demands. The most recent work draft of the bill we feel, however, has significant problems. Since the likelihood that SB 272 will pass both houses of the legislature this year is not high, we suggest that we work together over the interim to develop a sound piece of legislation that accomplishes the goals you had in mind when introducing SH 272.

We trust this suggestion will meet with your approval. If not, please let us know.

Very truly yours,

DOUGLAS B. BAILY
ATTORNEY GENERAL

By: _____
Laurie H. Otto
Assistant Attorney General

cc: The Honorable Jan Faiks
The Honorable C.E. Swackhammer
Royce Weller
Bob Evans

03-C31LH

# STATE OF ALASKA
# THE LEGISLATURE

POUCH V STATE CAPITOL
JUNEAU ALASKA 99811
907 465 3800

## LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM April 25, 1989

SUBJECT: Draft CSSB 272 ( )

TO: Senator Fred Zharoff
ATTN: Pennelope Goforth

FROM: Jack Chenoweth
Legislative Counsel

This version of the draft committee substitute incorporates various additions and changes. You have indicated that you would like a summary of the changes comparing the original bill to this committee substitute.

*

TAX IMPOSED [AS 43.52.010 in both versions]: The bill as introduced taxed possession of cocaine, heroin, dilaudids, and marijuana. The draft committee substitute broadens the incidence of the tax by levying on all controlled substances, as those substances are identified in AS 11.71, and by applying differing tax rates dependent on the principal physical characteristic and schedule classification of the substance. The change was apparently prompted by the Attorney General's letter of March 14 to Representative C.E. Swackhammer, sponsor of a companion measure in the House. At your suggestion, the rates are linked to the six classifications of controlled substances set out in the controlled substances schedules. The committee substitute also adds the alternative characteristic form of a controlled substance, the "dosage unit," and incorporates new material indicating how the tax is to be determined.

STAMPS AFFIXED [AS 43.52.020 in both versions]: There are no differences in this section between the original bill and the draft committee substitute.

PAYMENT OF TAX [AS 43.52.030 in both versions]: There is only one technical difference in this section, picking up a reference to "dosage units," between the original bill and the draft committee substitute.

ADMINISTRATION OF CHAPTER [AS 43.52.040 in both versions]: The differences between the original bill and the draft committee substitute are in the nature of technical changes and corrections.

ASSESSMENT OF TAX BY COMMISSIONER [AS 43.52.050 in the committee substitute]: This section, new in the committee substitute, is included at the direction of your April 24 memo that I "specifically state the jeopardy assessment procedure as listed in the Minnesota statues." That direction is based on the instruction or suggestion of the Department of Law. The section, in my judgment, replicates AS 43.10.030, authorizing the remedy of distraint on property for the collection of all taxes and fees, and AS 43.20.270, the section that fully describes the distraint process. It is apparently of significance to someone that, because AS 43.20.270 says that "the department may collect taxes . . . by distraint and sale . . . ," the distraint provisions must be repeated in this specific tax.

The requested exception, AS 43.20.270(b)(2), is included, per your request.

TAX PAYMENT REQUIRED FOR POSSESSION [AS 43.52.050 in original; AS 43.52.060 in committee substitute], CRIMINAL PENALTIES [AS 43.52.060 in original; AS 43.52.070 in committee substitute], and CIVIL PENALTIES [AS 43.52.070 in original; AS 43.52.080 in committee substitute]: There are no substantive differences in these sections between the original bill and the draft committee substitute.

CONFIDENTIAL NATURE OF INFORMATION [AS 43.52.080 in the original; AS 43.52.090 in the committee substitute]: Subsection (a) of the committee substitute adds the second sentence, making an exception for statistical information. I did so because you specifically indicated it should be drawn from the Minnesota statute and included.

In the same section, subsection (c), relating to the use of the stamp in other proceedings, is new in the committee substitute. It is included at the suggestion of Assistant Attorney General Laurie Otto who, citing the Minnesota

supreme court decision, Sisson v. Triplett, 428 N.W. 565 (Minn. 1988), upholding that state's tax statute against a constitutional challenge, indicated that the inclusion of the language would better position the state to defend against a claim based on asserted self-incrimination.

ACCOUNTING FOR RECEIPTS [AS 43.52.090 in the original; AS 43.52.100 in the committee substitute]: The sections are identical in the two bills.

RELATIONSHIP OF CHAPTER TO OTHER LAW [AS 43.52.110 in the committee substitute]: This is a new provision, added at your request. I do not know whether this provision is intended to try to address the question of the relationship of the tax proceedings under this chapter and criminal prosecutions under AS 11, the subject of the first part of the Attorney General's March 14 letter. We agreed, that the matter of immunity is better handled in another manner. We also agreed that the trial courts enjoy authority to stay the administrative or tax proceeding in deference to a criminal proceeding if so requested by the state, but I have added language to that effect.

DEFINITIONS [AS 43.52.099 in original; AS 43.52.199 in the committee substitute]: The definitions are extensively redrafted to respond to the broadening of the controlled substances subject to tax.

JC:gc
WKG9/113

Enclosure

STATE OF ALASKA
1989 LEGISLATIVE SESSION

BILL VERSION: SB 272
PUBLISH DATE: 4/10/89

# FISCAL NOTE

REQUEST:

Revision Date:
Title: "An Act imposing a tax on certain controlled substances
Sponsor: Zharoff
Requestor:

Agency Affected: Revenue
BRU: Income and Excise Audit Division
Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)

| | FY 90 | FY 91 | FY 92 | FY 93 | FY 94 | FY 95 |
|---|---|---|---|---|---|---|
| OPERATING | | | | | | |
| PERSONAL SERVICES | 65.0 | 65.0 | 65.0 | 65.0 | 65.0 | 65.0 |
| TRAVEL | 10.0 | 10.0 | 10.0 | 10.0 | 10.0 | 10.0 |
| CONTRACTUAL | 20.0 | 20.0 | 20.0 | 20.0 | 20.0 | 20.0 |
| SUPPLIES | 2.0 | 2.0 | 2.0 | 2.0 | 2.0 | 2.0 |
| EQUIPMENT | 14.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| LANDS & STRUCTURES | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| GRANTS, CLAIMS | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| MISCELLANEOUS | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| TOTAL OPERATING | 111.0 | 97.0 | 97.0 | 97.0 | 97.0 | 97.0 |
| CAPITAL | - | - | - | - | - | - |
| REVENUE | 1000.0 | 1000.0 | 1000.0 | 1000.0 | 1000.0 | 1000.0 |

FUNDING: (Thousands of Dollars)

| | | | | | | |
|---|---|---|---|---|---|---|
| GENERAL FUND | 111.0 | 97.0 | 97.0 | 97.0 | 97.0 | 97.0 |
| FEDERAL FUNDS | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| OTHER | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| TOTAL | 111.0 | 97.0 | 97.0 | 97.0 | 97.0 | 97.0 |

POSITIONS:

| | | | | | | |
|---|---|---|---|---|---|---|
| FULL-TIME | 2.0 | 2.0 | 2.0 | 2.0 | 2.0 | 2.0 |
| PART-TIME | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| TEMPORARY | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |

ANALYSIS: (Attach a separate page if necessary)

Prepared By: Steven E. Kettel, Director
Division: Income and Excise Audit Division
Phone: (907) 465-2320
Date: April 14, 1989

Approved by Commissioner: Hugh Malone
Agency:
Date:

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

Prepared By: Steven E. Kettel
Income and Excise Audit Division

SB 272 Analysis

| | |
|---|---|
| Personal Services Costs | |
| Tax Examiner II<br>12 months, 12A<br>Anchorage Office | $35.7 |
| Clerk Typist III<br>12 months, 8A<br>Anchorage Office | $29.3 |
| Travel Costs | $10.0 |
| Contractual Costs<br>Printing of Stamps<br>Advertising<br>Communications | $20.0 |
| Supply Costs | $2.0 |
| Equipment Costs | $14.0 |
| TOTAL | $111.0 |

SB 272
Prepared by:
Steven E. Kettel
Income and Excise Audit Division
April 13, 1989

FISCAL IMPACT

Facts and Assumptions

1) All statistics based on 6/30/87 annual drug report of Alaska State Troopers

2) Quantities of taxable drugs seized in FY87:

| | |
|---|---|
| Cocaine | 86.9 pounds |
| Marijuana | 626 pounds |
| Marijuana plants | 3,649; assume 1/4 oz. per plant |
| Heroin | 90 grams |
| Dilaudid | 697 tablet; assume 1 gram per tablet |

3) Street value of seized taxable drugs

| | |
|---|---|
| Cocaine | $8,573,326 |
| Marijuana | 3,394,140 |
| Heroin | 50,642 |
| Dilaudid | 54,180 |

4) Cash and property seized $994,991

5) No voluntary compliance
Revenue estimate based on FY 87 seizures

| | | |
|---|---|---|
| Cocaine | 86.9 pounds=39,713 grams or 397,130 1/10 gram units | |
| Tax Rate | $10.00/1/10 gram | |
| Total Tax | | $3,971,300 |
| Marijuana | 702,980 grams | |
| tax rate | 3.50/gram | |
| Total Tax | | $2,460,430 |
| Heroin | 90 grams = 900 1/10 grams | |
| tax rate | $100/ gram | |
| Total Tax | | $90,000 |
| Dilaudid | 697 grams | |
| tax rate | $100/gram | |
| Total Tax | | $69,700 |
| Grand Total | | $6,591,430 |

| | |
|---|---|
| Add: 100% penalty (AS 43.52.070) | $6,591,430 |
| Potential tax revenue | $13,182,860 |

Assume: Collection limited to property seized $995,000

SB 272
Prepared by:
Steven E. Kettel
Income and Excise Audit Division
April 13, 1989

BILL ANALYSIS

Section 1
Levies on excise tax on four different illegal drugs. The bill suggests voluntary compliance by requiring a stamp be purchased in advance of a person acquiring or importing drugs into the state. The tax rate is set out in statute and based upon weight and type of the substance purchased or imported.

The department will administer the chapter by printing and selling the stamps and otherwise enforcing the collection of tax against those persons not complying with the law.

Failure to comply with the law will subject the drug dealer/user to pay a penalty of 100% of the tax. Both the tax and the penalty will be deposited in the general fund.

The department is aware that similar legislation has been enacted in other states with a varying degree of success. In those states, such as Minnesota, where collection exceed $600,000/yr. resources have been devoted to confiscation and sale of seized property owned and used by drug dealers to carry out their trade, and for coordination between the Department of Revenue and police agencies throughout the state.

April 25, 1989

LIST OF ATTACHMENTS

1) Supreme Court Decision Sisson vs. Triplett

2) NCSL Summary of States with Drug Taxes

3) Financial Report Minnesota Dept. of Rev.

4) News articles regarding drug taxes
   a) GOVERNING
   b) STATE LEGISLATURES
   c) THE FISCAL LETTER (unpublished draft)

Attachment #1

STATE OF MINNESOTA

IN SUPREME COURT

C3-87-632

Ramsey County District Court

WAHL, J.

William Charles Sisson,
Appellant,

vs.

Filed August 26, 1988
Office of Appellate Courts

Mr. Thomas Triplett, Minnesota
Commissioner of Revenue, et al.,
Respondents.

S Y L L A B U S

Minn. Stat. ch. 297D (1986) does not violate procedural or substantive due process rights or the right against self-incrimination guaranteed by the fifth and fourteenth amendments of the United States Constitution and article I, section 7 of the Minnesota State Constitution.

Affirmed.

Heard, considered and decided by the court en banc.

O P I N I O N

WAHL, Justice.

This appeal arises from an action brought by William Charles Sisson, pursuant to 42 U.S.C. § 1983 (1982), challenging the constitutionality of the Minnesota Marijuana and Controlled Substance Taxation Act, Minn. Stat. ch. 297D (1986). The statute imposes a tax on marijuana and controlled substances, Minn. Stat. § 297D.08 (1986), and provides that assessment and collection of the tax be made pursuant to jeopardy procedures, Minn. Stat. § 297D.12 (1986). The trial court found the act constitutional and granted partial summary judgment for the state. We affirm.

By notice dated September 16, 1986, the Minnesota Department of Revenue (Department) assessed Sisson $113,600 for taxes and penalties due on controlled substances. On September 17, 1986 the Department levied upon a recreational vehicle, travel trailer and lawn tractor owned by Sisson and located near Baudette, Minnesota. The Department notified Sisson by certified mail that these items would be sold at a public sale on October 17, 1986. On October 16, 1986, Sisson filed an appeal with the Minnesota Tax Court which was still pending when this case was argued. At the same time, in district court, Sisson applied for a temporary restraining order which was granted that same day after he posted a $1,200 bond to cover the costs of cancelling the sale. The restraining order was continued by a temporary injunction dated November 10, 1986.

Sisson moved for partial summary judgment declaring Minn. Stat. ch. 297D (1986) unconstitutional. He alleged that jeopardy assessments made pursuant to chapter 297D authorized the seizure and forfeiture of property without due process of law, and also violated his right against self-incrimination by mandating that an alleged dealer of controlled substances affix to those substances a tax stamp as evidence of payment of the tax. He also argued that the act causes irreparable injury in that it deprives him of his property without due process of law and does not provide an adequate legal remedy by which to challenge the basis of the jeopardy assessment.

Respondents brought a cross-motion for partial summary judgment declaring chapter 297D constitutional and enforceable.

The district court granted summary judgment for respondents holding, first, that since the act provides an opportunity to obtain a judicial hearing after seizure and

prior to the sale of seized property, it fully meets the requirements of procedural due process. Regarding Sisson's substantive due process challenge, the court found that the act was not void-for-vagueness. Finally, the court determined that, since no information is required from the taxpayer and any volunteered information is subject to nondisclosure and use-immunity, the act does not violate rights against self-incrimination.

After briefing and oral argument, the court of appeals certified Sisson's appeal to this court for review pursuant to Minn. R. Civ. App. P. 118. Our review focuses on the following issues:[1] whether chapter 297D denies procedural due process as required by the fourteenth amendment to the United States Constitution and article I, section 7 of the Minnesota State Constitution; whether chapter 297D violates substantive due process; and whether chapter 297D violates an individual's right against self-incrimination as contained in the fifth and fourteenth amendments to the United States Constitution and in article I, section 7 of the Minnesota State Constitution.

I.

Minn. Stat. ch. 297D (1986) imposes a tax upon marijuana and controlled substances. Minn. Stat. § 297D.08. No dealer[2] may possess such substances unless the

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[1] Respondents raise an immunity defense in their answer, which if successful, would ordinarily bar only damages. Wood v. Strickland, 420 U.S. 308, 315 n. 6 (1975). Therefore, this court will consider that portion of Sisson's complaint which prays for injunctive relief based on the statute's constitutionality.

[2] Minn. Stat. § 297D.01, subd. 3 (1986), states:

"Dealer" means a person who in violation of Minnesota law manufactures, produces, ships, transports, or imports into Minnesota or in any manner acquires or possesses more than 42-1/2 grams of marijuana, or seven or more grams of any controlled substance, or ten or more dosage units of any controlled substance which is not sold by weight.

tax has been paid and stamps, issued upon payment, have been permanently affixed to the substances. Minn. Stat. §§ 297D.04, 297D.11, subd. 1 (1986).

Assessment and collection of this tax are made pursuant to jeopardy procedures. Minn. Stat. § 297D.12 (1986). That is, the commissioner of revenue need not first request voluntary payment from the dealer and then delay taking further action. Rather, the commissioner may assess the tax, demand payment and enforce collection immediately.[3] The seized property may be sold during the time an appeal of the assessment may be filed or while the appeal is pending. Minn. Stat. § 297D.12, subd. 1 (1986); Minn. Stat. § 270.70, subd. 4 (1986). However, a person whose property is sold may obtain the proceeds of the sale should the commissioner's assessment be reversed. Minn. Stat. § 270.709, subd. 2(c) (1986). Because the act incorporates Minn. Stat. § 270.70 (1986), certain equitable remedies are also available to the taxpayer. For example, although § 297D.12, subd. 2 provides that injunctions against the assessment or collection of any taxes or penalties are prohibited, a taxpayer can obtain injunctive relief to prevent irreparable injury. Minn. Stat. § 270.70, subd. 7 (1986). The taxpayer can also obtain release of the levied property upon such equitable terms and conditions as the court determines. Id., subd. 12. Finally, a person may obtain relief from an actual or potential seizure and/or sale by posting a surety bond or other security. Id., subd. 6.

The only requirement for issuance of the stamps is payment of the appropriate tax. Affidavit of Don Trimble, Acting Manager of Alcohol, Tobacco and Special Taxes Unit, Minn. Dept. of Revenue, Jan. 9, 1987. It is not required that the stamps be

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[3] These procedures are similar to provisions for jeopardy assessment and collection of certain other types of taxes. See, e.g., Minn. Stat. § 290.48 (1986) (income tax); Minn. Stat. § 297A.33, subd. 2 (1986) (sales tax). See also Minn. Stat. § 270.70, subd. 2 (1986) (levies generally).

purchased by the dealer himself or that the purchaser appear in person. Id. Although chapter 297D does not provide immunity to a dealer from criminal prosecution, any information which is supplied to the Department of Revenue cannot be disclosed and its use in a criminal proceeding is barred. Minn. Stat. § 297D.13 (1986).[4] Any dealer who fails to pay the tax is liable both for the tax and a 100% penalty. Minn. Stat. § 297D.09, subd. 1 (1986).

II.

The first issue to be decided is whether Minn. Stat. ch. 297D (1986) denies procedural due process as required by the fourteenth amendment to the United States Constitution and article I, section 7 of the Minnesota State Constitution. We conclude that it does not. The basic requirements of those due process clauses are notice and an opportunity for a hearing appropriate to the case. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). The right to notice and the opportunity to be heard must be "at a meaningful time and in a meaningful manner." Fuentes v. Shevin, 407 U.S. 67, 80 (1972) (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).

In the present case, Sisson argues that Minn. Stat. ch. 297D (1986) is constitutionally defective because it fails to provide a meaningful hearing. He asserts that the statute provides no opportunity to litigate the basis for the tax assessment. He also argues that the statute's incorporation of equitable provisions contained in Minn. Stat. § 270.70, subds. 6, 7, 12 (1986) does not rescue it from unconstitutionality because

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[4] Minn. Stat. § 297D.13 (1986) provides:

> Neither the commissioner nor a public employee may reveal facts contained in a report or return required by this chapter, nor can any information contained in such a report or return be used against the dealer in any criminal proceeding, unless independently obtained, except in connection with a proceeding involving taxes due under this chapter from the taxpayer making the return.

they do not allow an opportunity to actually litigate the taxpayer's liability.

He claims that the district court, in reaching the opposite conclusion, relied erroneously on Phillips v. Commissioner of Internal Revenue, 283 U.S. 589 (1931), a United States Supreme Court case which involved neither a jeopardy assessment nor irreparable injury to the taxpayer. He points out that the United States Supreme Court has specifically held Phillips inapplicable to cases where jeopardy assessments would cause irreparable injuries. Commissioner of Internal Revenue v. Shapiro, 424 U.S. 614, 631-32 (1976). Like the plaintiff in Shapiro, Sisson claims irreparable injury because he has been deprived of the use and enjoyment of his property, and argues that Shapiro should govern the present case.

Although Sisson is correct that Phillips did not involve a jeopardy assessment, that case simply stands for the undisputed principle that a taxing authority can seize property prior to a hearing on the validity of the tax. In Phillips, the plaintiff was a transferee of a dissolved corporation's tax liability. He challenged the constituitonality of a statute which allowed the government to assess and collect taxes before judicial review of the liability occurred. In upholding the right of the government to proceed summarily against a taxpayer, the Court reasoned that "[d]elay in the judicial determination of property rights is not uncommon where it is essential that governmental needs be immediately satisfied." Phillips, 283 U. S. at 597. The Court gave other examples of justifiable summary proceedings: destruction of property causing a public health hazard; seizure of property needed in wartime; property acquired by eminent domain. Id. Thus, Phillips stands for the proposition that mere postponement of a hearing until after seizure of the property is not a denial of due process, "if the opportunity given for the ultimate judicial determination of the liability

is adequate." Id. at 596-597. The Court found that the alternative remedies offered by the statute, a suit for a refund or immediate redetermination of liability by the tax court, were adequate. Id. at 597-98.

The Shapiro case, on the other hand, did involve a jeopardy assessment. In Shapiro, the commissioner of internal revenue determined that Shapiro's imminent departure for Israel under an extradition order to stand trial for criminal charges jeopardized the agency's collection of income taxes. Thus, the commissioner made a jeopardy assessment, filed liens and served notices of levy on various banks. Shapiro brought suit either to enjoin his extradition or, alternatively, to enjoin the jeopardy assessment. The Supreme Court determined that the injunction would be legitimately barred by the federal Anti-Injunction Act, 26 U.S.C. § 7421 (a) unless Shapiro's case fell within the exception to the act formulated in Enochs v. Williams Packing & Navigation Co., 370 U.S. 1 (1962).[5]

Contrary to Sisson's assertions, however, the Shapiro court did not dismiss the Phillips case as wholly inapplicable to jeopardy assessment. Rather, the Shapiro court quoted and emphasized those portions of the Phillips dicta most relevant to the concerns in Shapiro:

> Where, as here, adequate opportunity is afforded for a later judicial determination of the legal rights, summary proceedings

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[5] The Shapiro court held that relief from the federal Anti-Injunction Act could only be granted where:

> (1) [I]t is 'clear that under no circumstances could the government ultimately prevail' and
>
> (2) '[E]quity jurisdiction' otherwise exists, i.e., the taxpayer shows that he would otherwise suffer irreparable injury.

Shapiro, 424 U.S. at 627 (quoting, Enochs v. Williams Packing Company, 370 U.S. at 7).

> to secure prompt performance of pecuniary obligations to the government have been consistently sustained.
>
> * * * *
>
> Where only property rights are involved, mere postponement of the judicial inquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate * * * .

Shapiro, 424 U.S. at 631-632 (quoting Phillips, 283 U.S. at 595, 596-597 (emphasis in original)). The Shapiro court went on to point out that "neither the holding nor the dicta in Phillips support the proposition that the tax collector may constitutionally seize a taxpayer's assets without showing some basis for the seizure under circumstances in which the seizure will injure the taxpayer in a way that cannot be adequately remedied by a Tax Court judgment in his favor." Shapiro, 424 U.S. at 632 (emphasis added).

The Shapiro court was focusing on factors which were peculiarly relevant to that case. The Court noted that Shapiro had no right to start a proceeding before a tax court for 60 days following the jeopardy seizure. Shapiro, 424 U.S. at 630, n. 12. In fact, the IRS under the statute could wait 60 days before issuing Shapiro a deficiency notice which would, in effect, give him his "ticket to the tax court." Id., citing to 26 U.S.C. § 6861. Further, the actual seizure of his funds caused Shapiro irreparable injury because without money, he could not litigate his tax liability. Thus, without money, his only remedy was wholly unavailable.

In contrast, the seizure of Sisson's assets has not prevented him from pursuing any of his remedies. Therefore, the seizure itself cannot be said to have caused irreparable injury. The district court determined that only the sale of Sisson's property might cause irreparable injury as Sisson was not likely to recover the reasonable market value for

the property in a successful suit for refund. Unlike Shapiro then, irreparable injury might result here only from Sisson's assets being sold, not seized.

Further, Sisson is entitled to directly appeal the commissioner's assessment to the Minnesota Tax Court within 60 days from the date of his notice. Minn. Stat. S 271.06, subds. 1, 2 (1986). Only when the tax court proceedings and subsequent appeals are concluded will Sisson be finally deprived of any assets levied upon and held by the commissioner. With respect to any assets sold prior to this final determination, Sisson has the right to return of the proceeds of the sale in the event that the commissioner's assessment is reversed. Minn. Stat. S 270.709 (1986). Finally, Minn. Stat. S 297D.12 incorporates by reference the levy and sale provisions of section 270.70, thereby allowing Sisson a number of alternatives for pursuing equitable relief. Indeed, proceeding under section 270.70, subdivision 7, Sisson obtained the currently imposed injunction against the sale of his property. In addition, the procedures established in Minn. Stat. ch. 297D (1986) do not differ markedly from tax law provisions applicable to sales (Minn. Stat. S 297A.33 (1986)) and income/excise taxes (Minn. Stat. S 290.48 (1986)). Those taxes also authorize jeopardy assessments, contain anti-injunction provisions, and allow the commissioner to proceed on the basis of his own knowledge and information.

Furthermore, Minnesota provisions for equitable relief present a lower barrier to obtaining an injunction than exists within the federal courts. As previously noted, the United States Supreme Court has adopted a two-step test by which to establish an exception to the federal Anti-Injunction Act. See footnote 5, supra. Under this exception, equity considerations are secondary, and tax collections will not be enjoined merely because the collection would cause irreparable injury, "such as the ruination of the taxpayer's enterprise." Enochs, 370 U.S. at 6. In contrast, Minn. Stat. S 270.70, subd. 7 (1986), focuses on the harm to the taxpayer and allows an injunction where levy

or sale "would irreparably injure rights in property which the court determines to be superior to rights of the state in such property * * * ." Minn. Stat. § 270.70, subd. 7 (1986).

In summary, Sisson is arguing that the statute is constitutionally defective because it fails to provide any meaningful hearing. Under Phillips, however, a hearing need not take place before a seizure of assets. Further, under Shapiro, a prompt judicial inquiry must occur only when the injury cannot be adequately remedied by a later tax court judgment in the plaintiff's favor. Finally, a remedy is not inadequate because it relegates the taxpayer to a suit for refund.

In the present case, the facts establish that Sisson received notice, was given an opportunity to appeal and did appeal the assessment to the Minnesota Tax Court, and has been able, pursuant to incorporated equitable provisions under Minn. Stat. ch. 297D (1986), to successfully delay the single event that would cause the only irreparable injury that the district court was able to identify. Minn. Stat. ch. 297D (1986) does not deny procedural due process required by the fourteenth amendment to the United States Constitution and article I, section 7 of the Minnesota State Constitution.

III.

We determine next whether Minn. Stat. ch. 297D (1986) violates federal and state constitutional guarantees of substantive due process. This court has held that where an economic regulation is involved:

> Due process demands only that (1) the act serve to promote a public purpose, (2) it is not an unreasonable, arbitrary or capricious interference, and (3) the means chosen bear a rational relation to the public purpose sought to be served.

Contos v. Herbst, 278 N.W.2d 732, 741 (citing Federal Distillers, Inc. v. State, 304 Minn.

28, 229 N.W.2d 144, appeal dismissed sub nom. Heaven Hill Distilleries, Inc. v. Novak, 423 U.S. 908 (1975)). Sisson argues that Minn. Stat. ch. § 297D (1986) violates substantive due process because it fails to provide standards or guidelines which prevent the arbitrary or capricious assessment of a tax against an individual. Further, he asserts that the act allows the commissioner of revenue to assess a tax and seize property solely on the basis of unsubstantiated allegations that a party possesses a taxable amount of a controlled substance.

Sisson does not develop his argument, however, nor does he address the framework we set forth in Contos for judging the substantive validity of a statute. Even though the district court interpreted Sisson's argument as embodying a "void for vagueness" concern, the act itself makes clear the standards for determining who is a dealer and what is a controlled substance. Minn. Stat. § 297D.01, subds. 1, 2, 3 (1986). The act does allow the assessment of a tax based on the commissioner's personal knowledge or information, Minn. Stat. § 297D.12, subd. 1 (1986), but this does not differ from statutory provisions governing the collection of income, excise and sales taxes (see Minn. Stat. § 290.48, subd. 4 (1986); Minn. Stat. § 297A.33, subd. 2 (1986)), nor does it allow the commissioner to proceed on the basis of unsubstantiated allegations. Minn. Stat. ch. 297D (1986) does not violate federal and state constituitional guarantees of substantive due process.

IV.

The final issue is whether Minn. Stat. ch. 297D (1986) violates an individual's right against self-incrimination as contained in the fifth and fourteenth amendments to the United States Constitution and article I, section 7 of the Minnesota State Constitution.

The United States Supreme Court has considered the impact of tax laws on fifth amendment guarantees against self-incrimination in a trio of cases decided in the late

1960's. Leary v. United States, 395 U.S. 6 (1969); Marchetti v. United States, 390 U.S. 39 (1968); Grosso v. United States, 390 U.S. 62 (1968). The Court identified the following criteria for determining the constitutionality of a tax statute challenged on fifth amendment grounds: (1) whether the regulated activity is in an area "permeated with criminal statutes," and the tax aimed at individuals "inherently suspect of criminal activities," Marchetti, 390 U.S. at 47, (2) whether an individual is required, under pain of criminal prosecution, to provide information which the individual might reasonably suppose would be available to prosecuting authorities, id. at 48, (3) whether such information would prove a significant link in a chain of evidence tending to establish guilt. Id. The Court noted that "[t]he central standard for the privilege's application has been whether the claimant is confronted by substantial and 'real,' and not merely trifling or imaginary, hazards of incrimination." Id. at 53.

Sisson claims that the trial court, in finding that the second and third elements of the Marchetti test were absent in the present case, erred in two ways. First, he argues that the purchase of a drug tax stamp is in itself a compelled inculpatory act; i.e., the physical act of a dealer presenting him or herself at the revenue department offices for the purpose of purchasing a stamp constitutes a compelled disclosure of information. Further, even if a dealer obtains the stamps by mail or by courier, he is required to disclose his address and status as a dealer. He would also be subjecting a courier to a charge of criminal conspiracy under Minn. Stat. § 609.175 (1986).[6] Second, Sisson

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[6] We have determined that a conscious and intentional purpose to break the law is an essential element of the crime of conspiracy. State v. Burns, 215 Minn. 182, 9 N.W.2d 518 (1943). A person having no knowledge of a conspiracy is not a conspirator. Id. at 186, 9 N.W.2d at 521. Thus, it is highly unlikely that an innocent courier could be criminally implicated, and Sisson's argument in this regard appears to be a "trifling" hazard of incrimination. Marchetti, 390 U.S. at 54.

maintains that the stamp itself is information which could prove to be a significant link in an evidence chain. He points out that Minn. Stat. ch. 297D (1986) does not prohibit use of drug tax stamps against an individual in a criminal proceeding.[7]

In Marchetti, the Supreme Court reaffirmed the longstanding rule that the congress can tax an unlawful activity. Marchetti, 390 U.S. at 42. The issue raised in that case, as well as in Grosso and Leary, was whether the methods employed by the congress were constitutionally defensible. Marchetti and Grosso, which were argued together, concerned the wagering tax system; Leary involved the federal Marihuana Tax Act, 26 U.S.C. §§ 4741-4746 (1954) (repealed 1970).

In Marchetti and Grosso, the Supreme Court reviewed the provisions of the wagering tax law system. The Court noted first that section 4401 of title 26 imposed an excise tax on all accepted wagers. Marchetti, 390 U.S. at 42. Those liable for payment of that tax were required to submit monthly returns which detailed the taxpayer's wagering activities. Grosso, 390 U.S. at 65. The Court observed that the congress imposed no restrictions upon the use of this return information, and in fact, the IRS made it a practice to tender the information to prosecuting authorities. Id. at 66. In addition, section 4411 imposed an occupational tax on all bookmakers, and section 4412

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[7] Congress cured the constitutional deficiencies contained in early wagering tax statutes by enacting 26 U.S.C. § 4424 (1982) subsequent to the Supreme Court's decisions in Marchetti and Grosso. That statute provides in part that

> "(l) any stamp denoting payment of the special tax under this chapter, * * * shall not be used against such taxpayer in any criminal proceeding."

26 U.S.C. § 4424 (c) (1) (1982). Minnesota has no statutory counterpart to this explicit prohibition. However, we will not resolve issues not formally before this court. The possession of drug stamps is not raised by the facts of the present case and Sisson's concern here is purely speculative.

required that those liable for the tax register each year, providing the IRS with their residence and business addresses as well as the names and addresses of their employees or agents. Marchetti, 390 U.S. at 42. Moreover, section 6107 required the IRS to furnish prosecuting authorities with the names of those individuals who had paid the occupational tax. Id. at 43-44. When the bookmaker registered and paid the occupational tax, he was issued a stamp which section 6806 (c) required that he display "conspicuously" in his place of business, or, lacking such, keep on his person to present upon demand of any treasury officer. Id. at 43.

The Court concluded that every element of the statutory requirements had the consequence of incriminating petitioner. Id. at 50. The Court observed that evidence of possession of a wagering tax stamp, as well as payment of the taxes, had often been admitted at trials in both federal and state gambling prosecutions. Further, the Court noted that a former commissioner of the IRS admitted that the Service made the names and addresses of wagering taxpayers available to law enforcement personnel, and fully cooperated with the U. S. Attorney General's efforts to prosecute organized gambling. Marchetti, 390 U.S. at 47-48.

Similarly, in Leary, the Court reviewed federal statutes governing traffic in marijuana. That act imposed a tax on marijuana transfers, as well as an occupational tax upon those who dealt in the drug. It required that all marijuana transfers be carried out in pursuance of written order forms obtained by the transferee. Leary, 395 U.S. at 14-15. In addition, it was virtually assured that any information that was included in the order form would be available to law enforcement officials. Id. at 15. Also, the IRS was required to keep duplicate order forms and make them available for inspection by both treasury personnel and state and local officials charged with enforcement of

marijuana laws. Id. Upon payment of a fee, such officials could receive copies of the form. The Court determined that transmittal of this information would surely prove a significant link in a chain of evidence tending to establish the petitioner's guilt under both state, and possibly federal, laws, as well. Leary, 395 U.S. at 16.

In all three cases, the Court refused to avoid constitutional issues and impose use restrictions on information obtained through tax law compliance because it found "that the furnishing of information to interested prosecutors was a 'significant element of Congress' purposes in adopting' the statutes therein involved." Leary, 395 U.S. at 26 (quoting Marchetti, 390 U.S. at 59). In regard to the Marihuana Tax Act specifically, the Court stated that "we think the conclusion inescapable that the statute was aimed at bringing to light transgressions of the marihuana laws." Leary, 395 U.S. at 27.

Unlike the federal or state statutes discussed above, Minn. Stat. ch. 297D (1986) contains a confidentiality provision which states:

> Neither the commissioner nor a public employee may reveal facts contained in a report or return required by this chapter, nor can any information contained in such a report or return be used against the dealer in any criminal proceeding, unless independently obtained, except in connection with a proceeding involving taxes due under this chapter from the taxpayer making the return.

Minn. Stat. § 297D.13 (1986).[8] In addition, Minnesota Revenue Department regulations explicitly relieve a dealer of submitting any information when purchasing a stamp, and otherwise protect a dealer's anonymity. It is not necessary for a dealer to file in person or to give his name or address when acquiring drug tax stamps. See Trimble

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[8] In 1987 the legislature strengthened the confidentiality provision as follows:

> Disclosure Prohibited. Notwithstanding any law to the contrary, neither the commissioner nor a public employee may reveal facts

Affidavit, supra. The stamps can be mailed to any address or picked up by any other individual. Id. In 1987, these departmental procedures were incorporated into the statutes themselves. Minn. Stat. § 297D.02 (Supp. 1987) now provides that dealers are not required to give their name, address or other identifying information. Thus, chapter 297D does not have the constitutional pitfalls which were evident in the federal Marihuana Tax Act or the early wagering tax statutes.

In Marchetti, Grosso, and Leary, the United States Supreme Court refused to impose restrictions on the government's use of information obtained from the taxpayer because it found that a "significant element of Congress' purposes in adopting" those statutes was the furnishing of such information to prosecutors. Leary, 395 U.S. at 26. A similar purpose is not evident in Minn. Stat. ch. 297D. Under the Minnesota statutes as well as revenue department regulations, a dealer is assured anonymity. Minn. Stat. ch. 297D does not violate rights against self-incrimination protected by the fifth amendment to the United States Constitution and article I, section 7 of the Minnesota State Constitution.

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(footnote 8 continued)

> contained in a report or return required by this chapter or any information obtained from a dealer; nor can any information contained in such a report or return or obtained from a dealer be used against the dealer in any criminal proceeding, unless independently obtained, except in connection with a proceeding involving taxes due under this chapter from the dealer making this return.

Minn. Stat. § 279D.13, subd. 1 (Supp. 1987).

In addition, the 1987 legislature established a penalty for disclosure. Minn. Stat. § 297D.13 (Supp. 1987) now provides:

> Subdivision 2. Penalty for Disclosure. Any person violating this section is guilty of a gross misdemeanor.

In conclusion, we hold that Minn. Stat. ch. 297D (1986) does not violate procedural or substantive due process rights or the right against self-incrimination guaranteed by the fifth and fourteenth amendments of the United States Constitution and article I, section 7 of the Minnesota State Constitution. We affirm the judgment of the district court granting partial summary judgment for respondents.

Affirmed.

National Conference of State Legislatures

Attachment #2

1050 17th Street
Suite 2100
Denver, Colorado 80265
303/623-7800

President Ted Strickland
President of the Senate
Colorado

William T. Pound
Executive Director

DATE: NOVEMBER 1988

TO: INTERESTED PARTIES

FROM: MARTHA FABRICIUS, DENVER

## Illegal Drug Tax Summary

1. States that have taxes on illegal drugs

   Arizona (1983)
   Colorado (1988)
   Illinois (1987)
   Kansas (1987)
   Maine (1987)
   Minnesota (1986)
   Nevada (1987)
   Utah (1988)

2. States that have proposed legislation

   Texas
   Indiana
   Michigan
   Florida
   Georgia
   S. Carolina

3. States that tax illegal drugs under different tax laws (e.g., sales tax)

   Alabama
   California
   Florida
   Georgia
   Illinois
   S. Carolina

4. States that repealed law

   S. Dakota

5. What the law is

   The law places an excise tax on illegal drugs. Requires that dealers of illegal drugs pay a tax on each ounce of marijuana and on any other controlled substance which they are planning to sell.

Range of taxes:

$20-$100 per ounce of marijuana

$20-$1000 per ounce of controlled substance

6. License provision

Some states require that dealers license with the state. This provision was developed essentially so that the state can track the dealers down quickly if they have failed to pay taxes on their drugs.

Range of license fees:

| | |
|---|---|
| S. Dakota | $500 marijuana<br>$1000 controlled substances |
| Nevada | $250 |
| Arizona | $100 |

Licensing of drug dealers appears to be the most controversial of all aspects of illegal drug taxation because it gives the image of professionalizing the career of drug dealers. Most states have started with the provision in the legislation but have amended the bill and deleted the licensing section. S. Dakota's law was found unconstitutional based on the right not to self-incriminate: dealers required to register were, in a sense, turning themselves in. States that still have the licensing provision have included a provision stating that the information collected by the state taxation departments is confidential and cannot be released even to law enforcement personnel. In fact, Nevada just put into place a provision which makes it a misdemeanor to release that information.

7. Pros:

a. Provides additional revenue to states. Any person who fails to pay taxes is subject to a civil penalty of 100% of the tax in addition to the actual tax imposed. Arizona has already received $92,000. *Note: Earmarking of confiscated money is another option that legislators are using to help validate the law. States are using the money towards enforcement and treatment programs.

b. Places additional penalties on drug dealers

c. Gives police yet another way to convict drug dealers

-Quote: This is not an unusual procedure for catching criminals--Al Capone went to jail for income tax evasion and for not paying the excise tax on his bootleg liquor.

8. Cons:

a. Initial response is that people think marijuana is being legalized.

attachment #3

STATE OF MINNESOTA
OFFICE MEMORANDUM

DEPARTMENT OF REVENUE

TO: DATE: April 04, 1989

FROM: PHONE:

SUBJECT: CONTROLLED SUBSTANCES TAX REPORT FOR THE MONTH ENDED MARCH 31, 1989

| | STAMP SALES # | ASSESSMENTS # | COLLECTIONS |
|---|---|---|---|
| Fiscal 87 | $1,150.00 (151) | $ 8,923,764.20 (121) | $ 66,794.84 |
| Fiscal 88 | 666.00 (143) | $ 6,683,969.90 (184) | $ 314,749.50 |
| Fiscal 89 | $0.00 | $ 9,441,109.50 (109) | $ 269,515.91 |
| New | $0.00 | $ 757,887.50 (48) | $ 23,712.84 |
| Total 89 | $0.00 | $ 10,198,997.00 (157) | $ 293,228.75 |
| Total | $ 2,018.00 (294) | $ 25,806,731.10* (462) | $ 674,773.09 |

| *Assessments | # | Total Paid | Current Balance | Total Assessed |
|---|---|---|---|---|
| Under $ 20,000 | 334 | 233,563.18 | 1,582,223.61 | 1,863,569.60 |
| Between 20,000 & 100,000 | 92 | 190,359.82 | 3,800,046.98 | 4,037,666.00 |
| Over $ 100,000 | 36 | 250,850.09 | 17,531,703.25 | 19,905,495.50 |

DEPARTMENT : of REVENUE

STATE OF MINNESOTA

# Office Memorandum

DATE : July 11, 1987

TO :

FROM :

PHONE :

SUBJECT : CONTROLLED SUBSTANCES TAX REPORT FOR THE FISCAL YEAR ENDED JUNE 30, 1988

| | | | |
|---|---|---|---|
| Assessments: | 6,683,969.90 / 184 | | |
| Stamp Sales: | | 508.00 / 143 | |
| Collections: | | 314,749.50 | |
| Total revenue collected in fiscal 1988: | | 315,257.50 | |
| Estimated expenses for fiscal 1988: | | 40,000.00 | |
| Cases closed by payment: | 9 | | |
| Cases closed by compromise: | 5 | Amount of compromises: | 125,170.38 |
| Abatements granted: | 0 | Amount of Abatement: | 0.00 |
| Payment agreements: | 11 | | |
| Estimate collection for fiscal year 1988: | | | 220,000.00 |
| Estimated expense for fiscal 1988: | | | 40,000.00 |
| Hours spent in training police officers in 1987: | | 17 | |
| Hours to be spent in training police officers in 1988: | | 25 | |

Attachment # 4 A



# FEDS SUE L.A. COUNTY OVER HISPANIC SEATS

Maybe it's principles, and maybe it's politics. The Reagan administration long resisted charging local governments with voting rights violations just because the way they conducted their elections resulted in all-white governments. The administration argued that there must be evidence that the government intended to discriminate against minority voters before such a suit was viable.

Both Congress and the U.S. Supreme Court firmly disagreed, however, and just weeks after Richard L. Thornburgh replaced Edwin Meese III as U.S attorney general, the U.S. Justice Department sued the Los Angeles County board of supervisors, seeking a stronger voice for Hispanic voters in local government.

Los Angeles County is home to the largest Hispanic community in the United States — more than two million — but it is divided among the county's five electoral districts and has never elected one of its own to county office.

The Justice Department says this is a violation of the 1965 Voting Rights Act. Along with the Mexican American Legal Defense and Education Fund and the American Civil Liberties Union, which have filed a similar suit, it seeks immediate redrawing of district lines, which is expected to result in making Hispanics a majority in at least one district.

The suit was filed as a last resort, after several months of negotiations produced no commitment to redistricting, according to Mark Weaver, a Justice Department spokesman.

Others suggest that the administration was seeking Hispanic votes, and still others that Thornburgh takes a different view from his predecessor.

The presidential election will provide no escape hatch for the county. Thornburgh is expected to remain in office if Vice President George Bush is elected in November, and a Dukakis administration would be likely to enforce the voting rights law even more emphatically than the Republicans.

And so, the Los Angeles County supervisors seem to be moving down the road to a settlement rather than contesting the charges. They have hired a private firm to begin drawing alternative district maps.

However, the board does not wish to redistrict before 1990, says the board of supervisors' chairman, Deane Dana, only to be forced to draw new district lines after the 1990 census. It's hard to project what the census will show, "but we're going to try to do it," he says. —*Elder Witt*


Peter Hoey illustration

# MINN. FIRST TO UPHOLD 'GRASS TAX'

Law enforcement officials nationwide are applauding the Minnesota Supreme Court, which has affirmed the state's right to impose taxes on illegal drugs and prosecute dealers who don't pay them. The decision marks the first such ruling on the so-called grass tax, now being used in at least seven other states.

Under the two-year-old law, dealers who do not buy tax stamps for their packages of drugs are subject to five years in prison and a $10,000 fine, plus a 100 percent civil penalty.

The plaintiff in the Minnesota case, William Sisson, sued the state after it had assessed $113,000 against him in unpaid drug taxes. The court, however, ruled against him, holding that the tax does not violate the U.S. Constitution's Fifth Amendment guarantee against self-incrimination because it ensures confidentiality for those buying the stamps.

So far, the law has paid

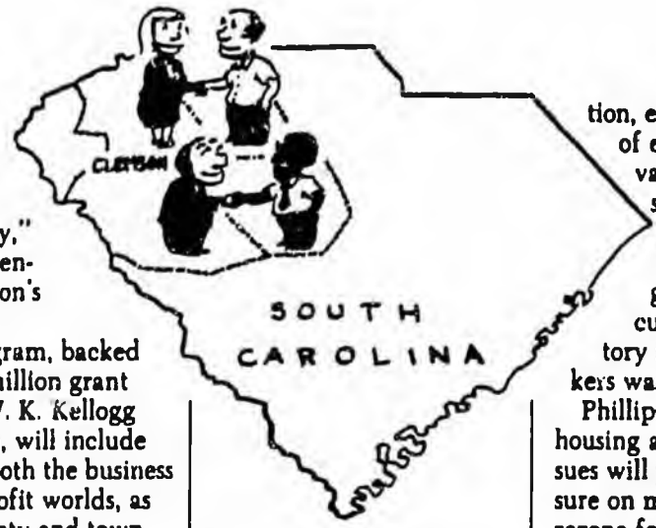
off in Minnesota, which has collected $444,000 in drug taxes and prosecuted "at least" 10 cases, says Chris Sanft, a state tax collection officer. Sanft says he expects the law to become a model for other states because of its Fifth Amendment safeguards.

"We're looking at it strictly from a revenue angle," says Sanft. "As long as they pay their taxes, we don't care who they are." —*Carol Clurman*

## CLEMSON TRAINING RURAL LEADERS

Clemson University is training rural leaders by getting them to look — with expert help — at some of the worst problems in their counties. The land-grant university's extension service is picking four counties to participate in its pilot Rural Leader Training Program. Dozens of leaders in each county will team up to decide on the most pressing problems they face. Clemson will then send in experts from the university and state government to help the counties find solutions.

As work continues in the four pilot counties, more will be pulled in to participate. "We want the program to be a model nationwide for preparing rural leaders for the 21st century," says Max Lennon, Clemson's president.




The program, backed by a $1.1 million grant from the W. K. Kellogg Foundation, will include leaders in both the business and non-profit worlds, as well as county and town government. It will ultimately reach hundreds statewide, says Lennon.

"Naturally, a major segment of those we choose will be elected and appointed officials," says Elwyn Deal, an assistant director with Clemson's extension service. "But we also want people from the business community, volunteer groups, churches and charities; we want old and young folks, black and white, male and female, rural and downtown."

Once the current crop of leaders has been trained, Clemson is asking that they continue to work with future leaders in their communities. "The idea is to create continuity," says Deal. "In the past you'd have a generation of leaders who knew how to pursue economic development or fill out grant applications, then they'd die off or move along and it would take five or six years to bring along the next generation. This way, that next generation will be ready." —*Jonathan Walters*

## IS THERE ANOTHER YONKERS WAITING TO HAPPEN?

The question looms in the wake of the divisive Yonkers housing discrimination case: How many more Yonkers-like battles are waiting to happen nationwide?

"You won't see any soon," says Carter Phillips, partner in the Washington, D.C., office of the Chicago law firm of Sidley & Austin and co-counsel to the city of Yonkers in the case. "The next round is going to be in the 1990s. There's little question that in the 1990s . . . there will be a big call for subsidized public housing." The problem of where, in a city, to place public housing "in the wake of Yonkers, is going to be a very tough question, especially because of escalating land values. Anyone who suggests housing be put in poorer areas is going to be accused of discriminatory intent," as Yonkers was, he predicts.

Phillips adds that the housing and land-cost issues will put severe pressure on municipalities to rezone for higher-density development in areas where such rezoning won't always be welcome.

David Tatel, a civil rights attorney and a partner with the Washington, D.C., law firm of Hogan & Hartson, takes a somewhat different view, predicting that "a lot of it depends on who wins the [presidential] election." The Reagan Justice Department has indicated it has no plans to pursue any new housing discrimination cases, at least against municipalities, and Tatel thinks a Bush administration would continue that course. In fact, the Yonkers case was filed in the late stages of the Carter administration.

Some municipalities, however, are defusing potentially explosive situations right now, says Tatel, by facing up to the housing issue as part of school desegregation case settlements. "The settlement in Milwaukee, for example, has a housing provision that is very creative and is even supported by a conservative governor [Republican Tommy G. Thompson]," says Tatel.

*Jeff Moore illustration*

# Deterring Illegal Drug Traffic Through The Tax Code

Drug dealers are meeting their match in two states that have revived an old federal strategy. Arizona and Minnesota have enacted legislation that places excise taxes on illegal drugs. Arizona has taken its provision one step further by requiring drug dealers to purchase licenses.

Taxing and licensing illegal drugs are attempts to give law enforcement officials tools to combat drug trafficking in a most unconventional manner—through the tax code. Since trafficking is an all-cash industry, it is often difficult to differentiate between income and assets derived from illegal drug sales and income and assets obtained through legitimate means.

These new laws address that problem not by presupposing guilt or innocence under criminal statutes, but by determining whether the tax code has been violated. For example, if an individual is arrested for possession of illegal drugs on which revenue stamps have not been affixed, he is guilty of tax evasion, independent of his guilt or innocence under criminal statutes.

Although this method of drug enforcement is new at the state level, taxing marijuana is not a new approach from the federal government's point of view. The Federal Marijuana Tax Act of 1937 required people possessing marijuana to file and pay for tax stamps. The law was repealed in 1970, partially due to violations of the Fifth Amendment—freedom from self-incrimination.

The states have attempted to avoid Fifth Amendment problems by ensuring strict confidentiality for persons who purchase licenses and stamps. In South Dakota, however, similar legislation was ruled unconstitutional in April by the state Supreme Court. Under the South Dakota statute, information regarding licensees could be provided to law enforcement officials upon request. Consequently, the state Supreme Court found the statute was incriminatory and violated the Fifth Amendment. The South Dakota Attorney General's office will not appeal the decision to the U.S. Supreme Court.

In addition to the civil liberties issue, questions arise as to how states can tax illegal goods. But there is precedent. Federal and state income tax laws require that all income, whether obtained legally or illegally, be reported for income tax purposes. Although the precedent originated from income tax law, it is not limited to that area of taxation since a variety of illegal goods and activities are subject both to federal and state taxation.

Arizona, the first state to implement this unusual excise tax, has levied taxes on controlled substances since 1983. The revenue derived from the tax has been low, and it has not offset implementation costs. From fiscal year 1984 through January 1986, $4.8 million has been assessed, but only $177,650 has been collected. Collections are low because frequently persons arrested for possession are hired hands, commonly called "mules," who do not have the money to pay the tax assessments against them. In these cases there is no property to seize either.

Photo: Marlin Jeong


*Double trouble: Drugs without stamps mean dealers face tax evasion charges.*

However, according to Kevin DeMenna, staff economist for the Arizona Senate, increased revenue was not the purpose of the law. "The primary intent of the Legislature was simply to provide a deterrent to drug trafficking, particularly since Arizona is a border state," he says.

Senator Jeffrey Hill, sponsor of the legislation, agrees. "The tax is one more way to take the profit out of drug dealing. It forces drug activity to other states and thus shifts the enforcement burden."

In Minnesota, legislation to tax illegal drugs—based on a recommendation by the Minnesota Tax Study Commission—was introduced this session. In its review of similar laws, the Commission determined that taxing controlled substances could be justified for three reasons: The tax creates another way to prosecute drug dealers, it reduces the tax evasion that takes place in the underground economy and it sends out signals to drug dealers to deal elsewhere.

Representative William Schreiber, sponsor of the bill, stresses the importance of the increased enforcement element of the law. "Hitting drug dealers hard in the pocketbook may be a more effective enforcement tool than trying to put them behind bars," he says.

The states are definitely aiming at drug dealers' pocketbooks. Under the Arizona law, drug dealers are required to purchase a $100 license and affix revenue stamps to their products—a $10 revenue stamp per ounce of cannabis (marijuana) and a $125 revenue stamp per ounce of any other illegal controlled substance (cocaine, heroin, hashish, etc.). Minnesota, which eliminated the license provisions before passing its law, taxes marijuana at $100 per ounce and other illegal drugs at a whopping $5,670 per ounce.

Public response to the new laws has been mixed. Public officials report that citizens who understand the law are supportive, but some think the law legalizes illegal drug sales or provides

the first step toward legalization. In fact, legislation introduced in Indiana would have required that drug dealers affix tax stamps to their goods, but the bill was intentionally held up in the House by its sponsor, Representative Paul Robertson. "We did not want anyone to misconstrue marijuana as an acceptable drug or give credence [to the notion] that drugs are legal," explains Robertson. He expects that after a study of other state laws, legislation will be introduced again next year.

At least three other states—Florida, Georgia and South Carolina—are also addressing the possession and sale of illegal drugs, but through existing sales and use tax provisions. For example, if an individual is arrested for possession and cannot prove that he paid sales tax on his goods, he is taxed at current sales and use tax rates based on the street value of the drugs. He also is assessed a penalty for failure to remit the sales and use tax.

The laws in these three states do not explicitly include illegal drugs in the list of taxable items, but they also do not prohibit their taxation. Florida has taken steps to make its provision explicit, however, by specifically stating that marijuana and other illegal controlled substances are subject to the sales and use tax. If passed, House Bill 91 would add a 300 percent penalty to the existing sales and use tax rate. Tax officials say they do not want to run the risk of not having explicit statutory authority behind them in their drug enforcement efforts.

Opposition toward laws that tax illegal drugs have come from a variety of sources. One citizen testifying against the law in Arizona stated that cigarettes are more dangerous than drugs, so until cigarettes were treated like marijuana, he would not have respect for the government.

Opposition has also come from the National Organization for the Reform of Marijuana Laws. According to NORML executive director Kevin Zeese, "It's nice that state legislatures recognize the economic value of marijuana to raise revenue. We generally oppose laws which further illegalize marijuana, however."

Laws that tax illegal drugs may not indicate a trend, but a number of state legislators believe these new approaches will help curtail drug trafficking. In the words of Representative Schreiber, "Al Capone was not put in jail because of his racketeering activities, but because of tax evasion."

*—Corina Eckl, senior research analyst, NCSL's Fiscal Affairs Program.*

# Are Unfit Physicians Going Undisciplined?

In the 1960s, just a few years after he started practicing medicine in Lovell, Wyo., rumors began to drift around the little town about Dr. John Story's questionable behavior with his women patients. Although a smattering of reports was made to authorities over the years, it wasn't until November of 1983 that the Wyoming State Board of Medical Examiners set a date for a hearing to determine whether Dr. Story's license should be revoked for unethical and unprofessional conduct.

At the hearing, in March of 1984, the Board did vote to revoke Dr. Story's license. In June, the doctor appealed to a district court for a stay of the revocation. The stay was granted. He continued to practice until his spring 1985 trial, when a Big Horn County jury convicted him on two counts of rape, three counts of assault and battery and one second-degree sex assault. The doctor voluntarily surrendered his license while he appealed both the criminal conviction and license revocation to the state Supreme Court. A decision is pending.

The tale of Dr. Story illustrates an aspect of the medical malpractice crisis that has so far received relatively little attention—medical discipline. While lawmakers scramble to solve the problems competent doctors are having in obtaining liability insurance, they have scarcely had time to address the problem of incompetent doctors. And according to a series of recently published reports, there may be many doctors with questionable ethics who go on practicing for years.

Many of the reports are blunt in their criticism. A report by the Public Citizen Health Research Group, for instance, charges that "states have been wholly ineffective in disciplining malpracticing doctors. This lack of regulation has made a significant contribution to the so-called malpractice crisis."

A draft report by the U.S. Department of Health and Human Services (HHS) says state medical boards often are forced to negotiate lesser disciplinary actions and end up, in effect, plea bargaining. These actions are "a practical response by boards faced with insufficient investigatory resources and with the memory of many cases that have lingered during the hearing and judicial process for two or more years, while the physicians involved have continued to practice."

More evidence of the need to discipline doctors comes from the Professional Review Organizations, which have been formed in each state at the behest of the federal government to review the quality and cost effectiveness of doctors and hospitals providing Medicare services. In their first 7½ months of existence, the PROs began disciplinary actions against 950 doctors and 183 hospitals. Of those, 744 cases involved doctors allegedly providing poor-quality care, and the rest involved doctors consistently prescribing unnecessary treatment.

Most experts agree that without state action, unfit doctors will continue to practice. Advocates of improving medical disciplinary procedures agree

Source: May/June issue of The Fiscal Letter, 1989 (Draft of article)

# A BAD BUSINESS CLIMATE FOR ILLEGAL DRUGS

4C

The sign on the wall of the Hennepin County (Minneapolis) Sheriff's Department says, "Remember to Call Chris!"

Chris Snaft is the Minnesota Revenue Department's person in charge of enforcing the Minnesota "grass tax," a special excise tax levied on the possession of illegal drugs.

That phone call is just the first step in what has become a very serious piece of business for both revenue and police officials. In August 1986 the state began requiring drug dealers to buy stamps for their supplies of marijuana, cocaine, and other illegal drugs.

The grass tax is good news for revenue officials, state and local police, and the general public alike. On the revenue side, the collections to cost ratio is nearly 5:1, a respectable record for most any tax collector. Some police officials consider the grass tax to be one of the best pieces of anti-narcotics legislation to come along in years. And, Minnesota residents get to send out a clear message to the pushers--find another place to do business.

Minnesota is not the first state to enact a specific excise tax on controlled substances. Arizona (1983) and South Dakota (1984) were a couple of years ahead. But two aspects of the Minnesota experience make it particularly noteworthy. First, Minnesota is the first state to make a serious effort to coordinate local police and state tax collector activities. In contrast, Arizona officials have had only limited success gaining local cooperation. Second, the tax has passed the civil liberties test. In August 1988 the Minnesota law became the first such tax in the nation to survive a constitutional challenge before a state supreme court--a decision that has not been appealed by the defendants. Unlike the South Dakota law, which was ruled unconstitutional by its state court in 1986, the Minnesota statute was carefully drafted to safeguard the right against self-incrimination.

## The Process

The Minnesota law is quite simple. It says that drug dealers--people who are in illegal possession of amounts exceeding specified minimums of marijuana and/or controlled substances (thereby exempting licensed pharmacists, people with prescriptions, and casual users)--must pay an excise tax as follows: $3.50 per gram of marijuana, $200 per gram of controlled substances, and $400 per 10 dosage units of controlled substances sold by weight. In Minnesota, casual use is defined as possession of less than seven grams of cocaine, nine grams of LSD, and 42 1/2 grams of marijuana. In terms of a pound of cocaine, for example, the tax amounts to $90,000.

When the tax has been paid it will be evidenced by a tax stamp printed and sold by the state. In order to ensure protection against self-incrimination, no information of any sort is required of the taxpayer. If the taxpayer elects to provide information regarding his or her name or address, very strict confidentiality rules prohibit the Revenue Department from revealing that information to any person. Thus, not only is the stamp sale confidential, but the tax records are off limits to police and interstate data exchange services.

When arrested in Minnesota, drug dealers are now subject to two actions. First, the usual criminal proceedings from arrest to bail to plea bargaining begin. This includes Minnesota's use of its recently beefed-up forfeiture law, which, like the federal forfeiture statute, permits the police to seize all materials or property used to produce, contain, or transport controlled substances as well as all proceeds traceable to the

transaction. Unlike most state laws, this administrative forfeiture puts the burden of appeal to repossess the property on the owner rather than on the police.

In addition to the usual judicial proceedings, the state can now prosecute for felony tax evasion if tax stamps are not affixed to the illegal drugs, and, at the same time, pursue civil remedies to collect tax plus penalty.

Here is how it works. At the time of arrest police call tax officials who can impose a 100 percent penalty on the unpaid tax. The tax and penalty are due whether or not the dealer is convicted on other criminal charges. This is the same process that can be used if one evades any other tax, such as, the income tax.

The tax officials then immediately issue an assessment on the pusher's assets and begin to collect the tax and the penalty. This means that when a pusher selling drugs is caught and has no evidence of the tax stamps, tax officials can bill that person for the amount of the tax and the penalty due, and then initiate collection efforts anywhere in the state by seizing motor vehicles, bank accounts, real estate, or other assets, and any state (and, soon, perhaps, federal) tax refunds due. Since the law's enactment in 1986 the Minnesota Revenue Department has assessed $25 million. Although collections ($651,000) are well below the amount of assessment (few dealers have the income or wealth to pay the amount due), so is the total cost of the Department's operations (about $55,000 per year). For FY 1989, Minnesota collections are running at $269,000. Total costs of administration for FY 1989 are $55,000.

For the dealer, this all hits where it matters most--in the pocketbook.

## Tax Policy Considerations

Are taxes on the illegal drug trade an appropriate use of tax policy? Yes. There are three primary justifications:

*Equity*. The tax addresses one part of a growing problem--tax evasion in the underground economy. Illegal drug dealing is a growing and economically important activity or industry. As such, it can and should be taxed. It surely makes no sense to provide preferential treatment to drug dealers over those who engage in legal market transactions.

*Efficiency*. Throughout history and at all levels of government, taxes have been imposed for "sumptuary" reasons--to discourage consumption of products held to be morally or ethically undesirable. Although the Minnesota grass tax does generate some state revenues, from a social policy perspective the tax also serves the important role of discouraging illegal drug dealing within the taxing jurisdiction.

*Support for the System of Law*. The tax adds another tool to the nation's fight against drug abuse. Drug traders can now be charged with felony tax evasion in addition to current criminal statutes. To paraphrase Justice Oliver Wendell Holmes, taxes are a tool for providing for a civilized society.

## A State Concern

At present, 11 states have special taxes on illegal drug transactions, and at least six others are considering Minnesota-style legislation (see map). In addition, at least six other states tax illegal drugs through other tax mechanisms such as the general sales tax.

That a "grass tax" is largely a state (or multistate compact) initiative makes good policy sense. For the policy to be effective, a broad jurisdictional authority needs to be combined with an established tax administration process. These requirements tend to rule out most, though not all, local governments. The federal government could also enact the grass tax, but it would not add much to existing federal drug enforcement policy. The federal government not only has had a broad forfeiture law in place since 1978, but also maintains a significant effort with regard to enforcement of the federal income tax, which does not exempt income from illegal drug activity.

### Final Comment

The "grass tax" will certainly not bring victory to a state's war on drugs, but it is an important tool in support of that effort. Moreover, the policy is sound from the twin perspectives of tax policy and tax administration. Drug dealers may be odious characters, but they are also entrepreneurs who must buy, sell, and turn a profit to stay in business. This basic commercial aspect of the business creates a weak spot in the dealers' defenses against the law. This is one case where a bad tax climate makes good business sense.

# SB 275

STATE OF ALASKA
1989 LEGISLATIVE SESSION

Bill Version: SB 275
Publish Date: 4-89

# FISCAL NOTE

REQUEST:

Revision Date:
Agency Affected: Alaska Court System
Title: An Act concerning the admissibility into evidence DNA print tests...
BRU: Trial Courts
Sponsor: Jones, Rodey, Falks, Fischer, ...
Components:
Requestor: Judiciary

EXPENDITURES/REVENUES: (Thousands of Dollars)

| OPERATING | FY 89 | FY 90 | FY 91 | FY 92 | FY 93 | FY 94 |
|---|---|---|---|---|---|---|
| Personal Services | | | | | | |
| Travel | | | | | | |
| Contractual | | | | | | |
| Supplies | | | | | | |
| Equipment | | | | | | |
| Land & Structures | | | | | | |
| Grants & Claims | | | | | | |
| TOTAL OPERATING | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| CAPITAL | | | | | | |
| REVENUE | | | | | | |

FUNDING: (Thousands of Dollars)

| | | | | | | |
|---|---|---|---|---|---|---|
| General Funds | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| Federal Funds | | | | | | |
| Other | | | | | | |
| TOTAL | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |

POSITIONS:

| | | | | | | |
|---|---|---|---|---|---|---|
| Full-time | | | | | | |
| Part-time | | | | | | |
| Temporary | | | | | | |

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact.

Prepared by: Jan Strandberg, General Counsel
Phone: 264-8228
Division: Alaska Court System
Date: 04/17/89

Approved by: Arthur H. Snowden, II, Administrative Director
Date: 04/17/89
Agency: Alaska Court System

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management & Budget
Impacted Agency(ies)

STATE OF ALASKA
1989 LEGISLATIVE SESSION

BILL VERSION: SB 275
PUBLISH DATE: _____

# FISCAL NOTE

**REQUEST:**

Revision Date: _____
Title: "An Act ... admissibility into evidence of dioxyribonucleic acid (DNA) ..."
Sponsor: Senator Jones
Requestor: Senate Judiciary

Agency Affected: Department of Law
BRU: Prosecution
Components: All

**EXPENDITURES/REVENUES:** (Thousands of Dollars)

| OPERATING | FY 89 | FY 90 | FY 91 | FY 92 | FY 93 | FY 94 |
|---|---|---|---|---|---|---|
| PERSONAL SERVICES | | | | | | |
| TRAVEL | | | | | | |
| CONTRACTUAL | | | | | | |
| SUPPLIES | | | | | | |
| EQUIPMENT | | | | | | |
| LAND & STRUCTURES | | | | | | |
| GRANTS, CLAIMS | | | | | | |
| MISCELLANEOUS | | | | | | |
| TOTAL OPERATING | -0- | -0- | -0- | -0- | -0- | -0- |
| CAPITAL | | | | | | |
| REVENUE | | | | | | |

**FUNDING:** (Thousands of Dollars)

| | | | | | | |
|---|---|---|---|---|---|---|
| GENERAL FUND | -0- | -0- | -0- | -0- | -0- | -0- |
| FEDERAL FUNDS | | | | | | |
| OTHER | | | | | | |
| TOTAL | | | | | | |

**POSITIONS:**

| | | | | | | |
|---|---|---|---|---|---|---|
| FULL-TIME | -0- | -0- | -0- | -0- | -0- | -0- |
| PART-TIME | | | | | | |
| TEMPORARY | | | | | | |

**ANALYSIS:** (Attach a separate page if necessary)

Please see the attached analysis.

Richard L. Pegues

Prepared by: Richard L. Pegues, Director
Phone: 465-3672
Division: Administrative Services
Date: April 16, 1989

Richard L. Pegues (FOR)

Approved by Commissioner: Douglas B. Baily, Attorney General
Date: April 16, 1989
Agency: Department of Law

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

# CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. SB 275

This bill amends AS 09.25, AS 12.45, and has the effect of amending Rules 401 and 403 of the Alaska Rules of Evidence, to provide that the results of a deoxiribonucleic acid (DNA) print test is admissible evidence in a civil or criminal action or proceeding. The bill further provides that there is a presumption that a DNA print test is valid, and further foundation for introduction as evidence is unnecessary if the DNA print test was performed by a person who has been fully trained to perform the test and the person's training has been certified or monitored by the Department of Public Safety. Lastly, the bill has the effect of amending Rules 703 and 705 of the Alaska Rules of Evidence by eliminating a requirement that the court require or allow antecedent expert testimony concerning the reliability of a DNA print test as a method of identification prior to its receipt into evidence under certain conditions.

This is a procedural change which acknowledges the scientific reliability of the DNA print test identification method. Because it deals with evidence procedures, the bill will not have a fiscal impact on the Department of Law.

# Senate Bill 275

# Admissibility of DNA Print Test Evidence

**A Discussion Paper**

**by**

**Office of Senator Lloyd Jones**

Researched by Senate Advisory Council and Legislative Legal Services

## HOW OTHER STATES USE DNA PRINT TESTS

California

California is setting up a data bank system in which everyone convicted of sex offenses, felony assaults, and homicides will be profiled. The program will be phased into existence. The first phase is setting up a laboratory in Berkeley with 21 people at a cost of $1.8 to $1.9 million annually. The second phase is to create the computerized data bank at a cost of $625-630,000. The third phase is to provide training in standardized techniques to sub-regional laboratories operated by cities and counties which will cost $2.1 million.

Washington

Washington is setting up a laboratory and a DNA data base of convicted criminals. Washington has a three phase program to establish DNA profiling. The Washington state budget for the biennium is $900,000 of which $285,000 is start up equipment money. The staff will include 2 forensic scientists, 2 technicians, 1 molecular chemist, and 1 clerk typist. The personnel budget for the biennium is $500,000 and the remainder of $115,000 is for supplies. A population study was to be completed by November 1988; collection of blood samples from convicted sex and violent prisoners by December 1, 1989; and a DNA laboratory should be open by June 1990.

Florida

Florida is setting up five laboratories to do DNA fingerprinting on criminal and paternity cases. The state already has 20 people doing conventional serology work and are anticipating a large caseload. Current legislation is pending which includes a fiscal note of $150,000 to develop a DNA bank. That State of Florida will spend, overall, $1 million for DNA print tests. Training will be a large part of the budget for the first few years. To date 13 cases have been taken to court in Florida on the basis of DNA profiling.

New York

New York is staffing a laboratory with four people and $50,000 of additional equipment to conduct DNA profiling. Officials there anticipate it will be one year before staff training will be complete and the program will be operational.

Federal Bureau of Investigation

The FBI is currently doing DNA profiling for states and other jurisdictions. However, it is on a first come first serve basis and only for homicides which are recent cases and in which there is a suspect. It takes about eight weeks for a sample to be analyzed.

## POLICY ISSUES

The matter of infringement of civil liberties and constitutional rights seems to be the major policy concern regarding DNA data banking. This issue comes up when states enact a requirement that all persons convicted of sex, homicide and violent crimes submit materials for profiling. Lawmakers have worked closely with civil liberties advocates in developing legislation. Many believe DNA profiling is just an extension of serological tests which are standard and acceptable.

There is no provision for data banking in my proposed legislation. The issue of violation of civil liberties will be, I suspect, less of a controversy.

Without provisions for a DNA testing lab, my bill should not carry a fiscal note. The cost of lab work for DNA print testing would be incurred on a case-by-case basis. As in the regular standard operating procedure, cost of forensic testing would be borne by the state.

## PURPOSE OF THE LEGISLATION

The "need" for this legislation arises out of existing case law decisions governing acceptance or rejection of evidence based on changing scientific technologies. With the enactment of this legislation, prosecutors would not be faced with extended court appeals if they chose to use DNA print tests as evidence. The legislation assumes DNA genetic print test results have attained sufficient general acceptance in the scientific community as to warrant its acceptance.

Background

Admissibility of the evidence is the threshold legal question when considering DNA print tests. Historically, Frye v. U.S., 293 F. 1013 (D.C. Circ. 1923) has governed admission of the product of new scientific techniques into evidence in Alaska courts.

Frye involved the question of admissibility of lie detector test results. In the decision, the federal court held that expert testimony relating to novel scientific evidence must satisfy a special foundational requirement not applicable to other types of expert testimony, and that the technique must be sufficiently established to have gained general acceptance in the relevant scientific community.

In Alaska, the initial case was Pulakis v. State, 476 P.2d 478 (Alaska 1970) in which the court determined the results of polygraph reports should not be received in evidence over objection to their admission. Considering the question, the state Supreme Court cited and relied on Frye:

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(T) he general rule precludes admission of the results of the polygraph tests. The authority usually cited as the first reported American case holding such evidence inadmissible is Frye v. United States. In Frye, the court said of expert testimony based on a test of blood pressure fluctuations...:

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while the courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

Frye v. United States, supra, at 1014, quoted in Pulakis, supra, at 478.

Reliance on the Frye approach adopted by the Supreme Court in Pulakis was discussed in Contreras v. State, 718 P.2d 129 (Alaska, 1986) (extending the Frye test to consider hypnotically-induced testimony by a witness)[1] and Rodriquez v. State, 741 P. 2d 1200 (AK. App., 1987) (applying the Frye test to admit testimony by an expert witness providing background information to assist a jury).

In the only reported appellate decision considering and upholding the admissibility of DNA print identification evidence, Andrews v. Florida, 533 So.2d 841 (Fla.Ct.App. 1988), reh. den., the Florida Court of Appeals (comparable to the Alaska Court of Appeals–it is not that state's highest court) allowed consideration of DNA print identification evidence at a criminal trial. The Florida court applied the so-called "relevancy approach" that had been substantially adopted in U.S. v. Downing, 753 F.2d 1224 (3d Circ. 1985), a test that required the court to assess:

- the novelty of the technique;
- the existence of a specialized literature dealing with the technique
- the qualifications and stature of expert witnesses (who, in this case, were required to explain the operation of the test and its results to the jury); and
- the nonjudicial uses to which the scientific technique is applied.

---

[1] In Contreras, the Supreme Court declared:

> The Frye standard is essentially a "prejudice-versus-probative value test," similar to (Alaska) Evidence Rule 403. Since there is a significant danger of prejudice from admitting evidence which appears scientific and is especially likely to be believed, and which has no probative value if it is unreliable, such evidence should be excluded. Application of the Frye test permits the court, rather than the jury, to make a threshold reliability determination.

Finding genetic print analysis a reliable, well established procedure that has been regularly and successfully used in forensic, paternity, and clinical testing, the Florida court upheld the use of the test in that state's criminal proceedings and admitted the evidence obtained from it.

Since the courts have not built an extensive record, it is felt Alaska courts would continue to use the Frye test in regards to admissibility of DNA print test evidence. My proposed legislation adds to the body of law governing criminal procedures authority to admit DNA genetic print test evidence. It follows the model used for admission of evidence of chemical analysis of breath and blood for purposes of operating a motor vehicle, aircraft, or watercraft while intoxicated (AS 28.35.033(d)), AS 09.25.300(a) establishes the presumption of admissibility of test results contingent on the test's performance by a qualified individual, and prescribes how an individual may be deemed qualified. This legislation would, replace the court's case-by-case determination for the legislature's determination.

I plan to request extensive hearings in the Senate Judiciary Committee and, by the Committee's findings, enter into record that DNA print tests have, indeed, attained sufficient reliability and general acceptance in the scientific community as to be admissible in criminal and civil proceedings.

The state prosecutor's office has reviewed this legislation and intends to support it.

# STATE OF ALASKA
# THE LEGISLATURE

## LEGISLATIVE AFFAIRS AGENCY

POUCH Y STATE CAPITOL
JUNEAU ALASKA 99811
907 465 3800

M E M O R A N D U M April 8, 1989

SUBJECT: Admissibility of DNA print test evidence (Work order 6-1032E) -- sectional analysis

TO: Senator Lloyd Jones

FROM: Jack Chenoweth
Legislative Counsel

The bill as prepared and offered for legislative consideration provides for the admission in civil and criminal proceedings in the courts of the state evidence that is based on the DNA fingerprinting or genetic identification process.

Bill section 1 adds to the body of law governing criminal procedures authority to admit DNA genetic print test evidence. Following the model used for admission of evidence of chemical analysis of breath and blood for purposes of operating a motor vehicle, aircraft, or watercraft while intoxicated (AS 28.35.033(d)), AS 09.25.300(a) establishes the presumption of admissibility of test results contingent on the test's performance by a qualified individual, and prescribes how an individual may be deemed qualified. Since genetic print test evidence deals in probabilities--in the likelihood that two or more individuals would not have identical genes and therefore would not have identical genetic print test results--AS 09.25.300(b) authorizes admission in a civil proceeding any statistical population frequency computations based upon the DNA genetic print tests. Definitions of two terms used in the section are offered in AS 09.25.300(c).

AS 12.45.035, added to the Criminal Procedure Code by bill section 2. makes the provisions of AS 09.25.300 applicable in criminal prosecutions.

Normally, court rules apply to determine the admissibility of evidence. In this case, the proposed legislation should cut off extended court consideration as to whether or not

DNA genetic print test results have attained sufficient reliability and general acceptance in the scientific community as to be admissible. As to DNA genetic print testing, the legislation substitutes the legislature's determination for case-by-case determinations under applicable provisions of the Alaska Code of Evidence. Necessarily, the legislation affects court rules, and bill sections 3 and 4 are included to identify the court rules that we believe are affected.

The legislation is given an immediate effective date by bill section 5.

JC:lmb
L7/054

court shall instruct the jury accordingly. When the burden of producing evidence to meet a presumption is satisfied, the court must instruct the jury that it may, but is not required to, infer the existence of the presumed fact from the proved fact, but no mention of the word "presumption" may be made to the jury.

(b) **Prima Facie Evidence.** A statute providing that a fact or group of facts is prima facie evidence of another fact establishes a presumption within the meaning of this rule.

(c) **Inconsistent Presumption.** If two presumptions arise which conflict with each other, the court shall apply the presumption which is founded on the weightier considerations of policy and logic. If there is no such preponderance, both presumptions shall be disregarded.

(Added by SCO 364 effective August 1, 1979)

## Rule 302. Applicability of Federal Law in Civil Actions and Proceedings.

In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which federal law supplies the rule of decision is determined in accordance with federal law.

(Added by SCO 364 effective August 1, 1979)

## Rule 303. Presumptions in General in Criminal Cases.

(a) **Effect.**

(1) *Presumptions Directed Against an Accused.* In all criminal cases when not otherwise provided for by statute, by these rules or by judicial decision, a presumption directed against the accused imposes no burden of going forward with evidence to rebut or meet the presumption and does not shift to the accused the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast. However, if the accused fails to offer evidence to rebut or meet the presumption, the court must instruct the jury that it may, but is not required to, infer the existence of the presumed fact from the proved fact, but no mention of the word "presumption" shall be made to the jury. If the accused offers evidence to rebut or meet the presumption, the court may instruct the jury that it may, but is not required to, infer the existence of the presumed fact from the proved fact, but no mention of the word "presumption" shall be made to the jury.

(2) *Presumptions Directed Against the Government.* In all criminal cases when not otherwise provided for by statute, by these rules, or by judicial decision, a presumption directed against the government shall be treated in the same manner as a presumption in a civil case under Rule 301.

(b) **Prima Facie Evidence.** A statute providing that a fact or group of facts is prima facie evidence of another fact establishes a presumption within the meaning of this rule.

(c) **Inconsistent Presumptions.** If two presumptions arise which conflict with each other, the court shall apply the presumption which is founded on the weightier considerations of policy and logic. If there is no such preponderance, both presumptions shall be disregarded.

(Added by SCO 364 effective August 1, 1979)

**Annotations**

**Cases**

Breathalyzer result alone established a prima facie case, entitling the prosecution to go to the jury on the issue of defendant's blood alcohol level at the time of her driving. Erickson v. Municipality of Anchorage, Op. No. 238, 662 P2d 963 (Alaska App. 1983).

Expert evidence is not necessary to relate a person's blood alcohol rate at the time a test is administered to the blood-alcohol rate at an earlier time when the person was driving. Erickson v. Municipality of Anchorage, Op. No. 238, 662 P2d 963 (Alaska App. 1983).

Although a blood-alcohol level in excess of the statutory presumption does not necessarily establish criminal recklessness or culpable negligence as a matter of law, it was not error for the trial in a vehicular manslaughter case to instruct the jury on the statutory presumptions concerning intoxication. Dresnek v. State, Op. No. 455, 697 P2d 1059 (Alaska App. 1985).

## ARTICLE IV. ADMISSIBILITY OF RELEVANT EVIDENCE

## Rule 401. Definition of Relevant Evidence.

Relevant evidence means evidence having a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

(Added by SCO 364 effective August 1, 1979)

**Annotations**

**Cases**

Where defendant was charged with assault and battery, evidence that victim was 9 months pregnant was relevant to show defendant's present ability to inflict a violent injury, to create apprehension on part of the victim and to establish criminal intent and use of unlawful force. Rathbun v. Anchorage, Op. No. [illegible] P2d 751 (Alaska 1979).

At trial for murder, it was reversible error for the trial court to exclude a journal written by the victim, parts of which showed a sense of mental instability and a violent nature. Keith v. State, Op. No. 2099, 612 P2d 977 (Alaska 1980).

Evidence of drug use by the accused was admissible where it established direct contact between the victim and the accused possessed sufficient amounts of cocaine for him to have invested more than pocket cash in his purchase from the victim. Dorman v. State, Op. No. 2272, 622 P2d 448 (Alaska 1981).

Testimony and photographs concerning the physical condition of a child allegedly kidnapped by defendant from state custody were admissible to show motive for kidnapping. Crump v. State, Op. No. 1129, 625 P2d 857 (Alaska 1981).

Evidence of actual sobriety offered to rebut the accuracy of a breathalyzer result is admissible as relevant circumstantial evidence. Denison v. Anchorage, Op. No. 32, 630 P2d 1001 (Alaska App. 1982).

Defendant's contention that because his conviction for driving while intoxicated was predicated on his blood alcohol rate and not on driving it was error for the trial court to admit evidence that he drove erratically and appeared intoxicated to arresting officers was properly rejected. Byrne v. State, Op. No. 169, 654 P2d 795 (Alaska 1982).

Admissibility of breathalyzer refusals should be determined on a case-by-case basis by weighing probative value against potential for unfair prejudice. Coleman v. State, Op. No. 229, 658 P2d 1364 (Alaska App. 1983).

Defendant's resistance to "pat down" search was admissible as evidence that defendant was aware of the cocaine found in his pocket, although there were other possible explanations for his behavior. Elson v. State, Op. No. 2615 659 P2d 1195 (Alaska 1983).

In prosecution for murder, admission into evidence of a .380 caliber automatic pistol owned by the defendant was not error even though expert testimony could not conclusively establish that the gun was the murder weapon. Bangs v. State, Op. No. 253, 663 P2d 981 (Alaska App. 1983).

In drunk driving prosecution of defendant who refused to submit to a breathalyzer examination, court erred in excluding expert testimony for the defense concerning defendant's blood alcohol level at the time of his arrest. Quinto v. City and Borough of Juneau, Op. No. 265, 664 P2d 630 (Alaska App. 1983).

In prosecution for driving with a suspended license, attempted use by prosecution for impeachment purposes of voluntary statements made by defendant at the arrest scene concerning the reason she was driving, but which statements did not include the reason she later cited for driving, presented a question of whether the evidence was relevant and whether its probative value outweighted its prejudicial effect. Nelson v. State, Op. No. 427, 691 P2d 1056 (Alaska App. 1984).

Where defendant in murder trial claimed that he was defending himself against a homosexual rape by the victim who lured him into a car by offering him Quaaludes, trial court erred in excluding the testimony of a witness who would have testified that he had had a similar encounter with the victim one year before, and the trial court also erred in excluding evidence that the police found Quaaludes in the victim's home during their investigation. Williamson v. State, Op. No. 430, 692 P2d 965 (Alaska App. 1984).

Where defense strategy was to show that an alcoholic blackout prevented defendant from formulating an intent to kill, court did not err in rejecting lay testimony which defendant offered to establish the existence of alcoholic blackouts, since it would not have shed any light on the dispute between the experts who testified on the subject, nor would it have made it more or less probable that defendant was unable to form an intent to kill at the time of the shooting in question. Staael v. State, Op. No. 454, 697 P2d 1050 (Alaska App. 1985).

In negligence action where defendant alleged that the accident was caused by a design defect in her automobile which caused it to accelerate spontaneously, consumer complaint reports to the National Highway Traffic Safety Agency of similar incidents involving the same type of automobile were relevant and admissible as hearsay exceptions. Norris v. Gatts, Op. No. 3187, 738 P2d 344 (Alaska 1987).

In prosecution of defendant for lewd and lascivious acts toward children in which it was alleged that defendant would invite them to his house, offer them drugs, show them pornographic materials, and then attempt sexual acts with them, trial court did not abuse its discretion in refusing to allow defendant to call as witnesses two police officers who had been in his home at different times and who would have testified that they had not seen drugs, pornography, or film-making equipment in his home. Rodriquez v. State, Op. No. 735, 741 P2d 1200 (Alaska App. 1987).

## Rule 402. Relevant Evidence Admissible—Exceptions—Irrelevant Evidence Inadmissible.

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States or of this state, by enactments of the Alaska Legislature, by these rules, or by other rules adopted by the Alaska Supreme Court. Evidence which is not relevant is not admissible.

(Added by SCO 364 effective August 1, 1979)

### Annotations

#### Cases

Admission of evidence which had some tendency to establish an ultimate issue was not error, even though relevance of such evidence was marginal. Alyeska Pipeline Service v. Aurora Air Service, Op. No. 2004, 604 P2d 1090 (Alaska 1979).

The evidencing rule precluding admission of post-injury accidents or redesign changes toward proof of negligence is inapplicable in products liability cases based on strict liability. Caterpillar Tractor Co. v. Beck, Op. No. 2304, 624 P2d 790 (Alaska 1981).

Evidence offered by defendant to show reasonableness of defendant's apprehension of being in imminent danger from shooting victim is not relevant when defendant did not know of such evidence at the time of the shooting. Byrd v. State, Op. No. 2184, 626 P2d 1057 (Alaska 1980).

Although the presentation of irrelevant evidence as to the scope of burglaries is error, it is harmless error if the presentation produces little or no prejudicial effect. Nelson v. State, Op. No. 2350, 628 P2d 884 (Alaska 1981).

Admissibility of breathalyzer refusals should be determined on a case-by-case basis by weighing probative value against potential for unfair prejudice. Coleman v. State, Op. No. 229, 658 P2d 1364 (Alaska App. 1983).

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Defendant's conviction for sexual abuse of child was reversed because extensive evidence of prior consistent statements made by the victim was admitted at trial without any determination of its actual probative value and before any charge of recent fabrication or improper motive or influence was made against the victim. Nitz v. State, Op. No. 629, 720 P2d 55 (Alaska App. 1986).

Evidence of consistent statements made by a child abuse victim on prior occasions may be admitted to bolster the testimony of the victim in a case involving the sexual abuse of the child, provided that it is actually relevant to rebut an express or implied charge of recent fabrication or improper motive or influence, and provided that its probative value outweighs its potential for prejudicial

impact; before such evidence is admitted, however, the victim must testify and be subjected to a charge of recent fabrication or improper motive or influence; furthermore when it appears that the alleged motive to testify falsely arose before the prior statement was made, the statement may be admitted only for the purpose of rehabilitating the victim's credibility and may not be considered as substantive evidence of guilt. Nitz v. State, Op. No. 629, 720 P2d 55 (Alaska App. 1986).

## Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time.

Although relevant, evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

(Added by SCO 364 effective August 1, 1979)

### Annotations

**Cases**

Where only prejudice was possibility that jury might misestimate probative value of certain real evidence for state's case, even slight probative value outweighed such prejudice. Eben v. State, Op. No. 1920, 599 P2d 700 (Alaska 1979).

Where informant's credibility was relatively unimportant because testimony was corroborated by police officer's evidence that informant had made written statement alleging informant's testimony before grand jury in unrelated case was product of police coercion was properly excluded on grounds whatever relevancy statement had to issue of informant's credibility was outweighed by likelihood it would confuse the issues, mislead jury and consume an undue amount of time. Taylor v. State, Op. No. 1932, 600 P2d 5 (Alaska 1979).

Where defendant was charged with assault and battery, evidence that victim was 9 months pregnant was relevant and not unfairly prejudicial to right of defendant. Rathbun v. Anchorage, Op. No. 1928, 599 P2d 751 (Alaska 1979).

Exclusion of relevant evidence concerning rape victim's poor grades and excessive school absenteeism was proper where other evidence had already made the jury aware of these factors. Alexander v. State, Op. No. 2077, 611 P2d 469 (Alaska 1980).

Evidence regarding prior confrontations between the defendant and trespassers was relevant and admissible to show that the defendant's pointing of a shotgun at the victim was not accidental or inadvertent. Adkinson v. State, Op. No. 2090, 611 P2d 528 (Alaska 1980).

At trial for murder, it was reversible error for the trial court to exclude a journal written by the victim, parts of which reflected a sense of mental instability and a violent nature. Keith v. State, Op. No. 2099, 612 P2d 977 (Alaska 1980).

Evidence of the circumstances of a prior rape committed by the defendant was properly admitted for the purpose of providing the identity of the assailant by showing a distinctive modus operandi employed in both the prior rape and the rape of the current victim. Coleman v. State, Op. No. 2190, 621 P2d 869 (Alaska 1980).

Evidence of drug use by the accused was admissible where it established direct contact between the victim and the accused and indicated that the accused possessed sufficient amounts of cocaine for him to have invested more than pocket cash in his purchase from the victim. Dorman v. State, Op. No. 2272, 622 P2d 448 (Alaska 1981).

The evidentiary rule precluding admission of post-injury accidents or design changes toward proof of negligence is inapplicable in products liability cases based on strict liability. Caterpillar Tractor Co. v. Beck, Op. No. 2304, 624 P2d 790 (Alaska 1981).

In statutory rape case, evidence of defendant's prior sexual conduct with victim was admissible. Burke v. State, Op. No. 2194, 624 P2d 1240 (Alaska 1981).

Testimony and photographs concerning the physical condition of a child allegedly kidnapped by defendant from state custody were admissible to show motive for kidnapping. Crump v. State, Op. No. 2309, 625 P2d 857 (Alaska 1981).

It was not error for the court to allow a defendant charged with drunk driving to be cross-examined regarding a possible law suit against the City of Fairbanks arising out of the same incident upon which the drunk driving charge was based. Roth v. State, Op. No. 13, 626 P2d 583 (Alaska 1981).

The trial court has considerable discretion in determining whether the probative value of an admission by silence is outweighed by the danger of unfair prejudice. Dolsher v. State, Op. No. 30, 632 P2d 242 (Alaska App. 1982).

Evidence that defendant, charged with driving while intoxicated, refused to take the breathalyzer examination had possible probative value, and trial court did not err in finding that the probative value outweighed the possibility of prejudice. Williford v. State, Op. No. 148, 653 P2d 339 (Alaska App. 1982).

Where the evidence in each of five rape and assault incidents was sufficiently similar and sufficiently unusual when viewed in its totality and in the common pattern it presented to constitute a modus operandi probative of defendant being the assailant in all instances, trial court did not err in denying defendant's request for severance of the various rape, burglary with intent to rape, and assault charges. Nix v. State, Op. No. 157, 653 P2d 1092 (Alaska App. 1982).

Defendant's contention that because his conviction for driving while intoxicated was predicated on his blood alcohol rate and his driving it was error for the trial court to admit evidence that he drove erratically and appeared intoxicated to arresting officers was properly rejected. Byrne v. State, Op. No. 169, 654 P2d 795 (Alaska App. 1982).

This rule, when properly applied and which excludes evidence which is minimally relevant, does not violate a defendant's constitutional right to confront the witnesses against him and to present evidence in his own behalf. Larson v. State, Op. No. 177, 658 P2d 571 (Alaska App. 1982).

Evidence that victim had assisted defendant in forging a prescription and that defendant's friend had previously assisted a pharmacist in attempting to pass the forged prescription was admissible to show defendant's motive for kidnapping. Bidwell v. State, Op. No. 199, 656 P2d 592 (Alaska App. 1982).

Admissibility of breathalyzer refusals should be determined on a case-by-case basis by weighing probative value against danger for unfair prejudice. Coleman v. State, Op. No. 229, 658 P2d (Alaska App. 1983).

Defendant's resistance to "pat down" search was admissible evidence that defendant was aware of the cocaine found in pocket, although there were other possible explanations for behavior. Elson v. State, Op. No. 2615, 659 P2d 1195 (Alaska

In damage action involving allegedly defective crane, experiments by defendant on the brake system of the crane to demonstrate the capabilities of such cranes in general, and not to have the draw conclusions about the particular crane, were properly excluded due to the danger of unfair prejudice, because the procedure was slipshod, because the tests were performed on particular crane involved in the accident, and because the evidence was cumulative. Yukon Equipment v. Gordon, Op. No. 2 P2d 428 (Alaska 1983).

In assault prosecution in which defendant claimed self-defense, trial judge did not err in granting protective orders which prevented defendant from questioning victim about charges for posse

shotgun while intoxicated and assault with a dangerous weapon which were pending against the victim at the time of trial and from using the victim about prior alcoholism and convictions for driving while intoxicated. Dyer v. State, Op. No. 268, 666 P2d 438 (Alaska App. 1983).

In prosecution for murder, admission into evidence of a .380 caliber automatic pistol owned by the defendant was not error even though expert testimony could not conclusively establish that the gun was the murder weapon. Bangs v. State, Op. No. 253, 663 P2d 911 (Alaska App. 1983).

Court did not abuse its discretion in limiting cross-examination of prosecution witness concerning the dismissal or lenient disposition of previous charges against the witness absent evidence that the current dispositions had been received in return for past cooperation, where the jury was already aware that the witness was being treated favorably by the prosecution in return for his testimony. Murdock v. State, Op. No. 256, 664 P2d 589 (Alaska App. 1983).

In drunk driving prosecution of defendant who refused to submit to a breathalyzer examination, court erred in excluding expert testimony for the defense concerning defendant's blood alcohol level at the time of his arrest. Quinto v. City and Borough of Juneau, Op. No. 265, 664 P2d 63[illegible] (Alaska App. 1983).

The standard for appellate review of a trial court's decision to exclude testimony is whether the court abused its discretion. Alaska Northern Development, Inc. v. Alyeska Pipeline Service Co., Op. No. 2689, 666 P2d 33 (Alaska 1983).

In prosecution for assault with a dangerous weapon, trial court did not abuse its discretion in determining that the probative value of defendant's flight from the crime outweighed the danger of unfair prejudice. Dyer v. State, Op. No. 268, 666 P2d 438 (Alaska App. 1983).

In action against state concerning alleged negligent inspection, trial court did not err in allowing expert to state his opinion as to whether the inspection was negligent, where the opinion was helpful to the trier of fact, was based upon facts or data reasonably relied on by other experts, and was not unduly prejudicial or misleading, particularly where any possible confusion or prejudice was cured by predicating the expert's opinion on a standard of care and issuing a cautionary instruction. Wilson v. State, Op. No. 2720, 669 P2d 1292 (Alaska 1983).

Complaining witness to crime, who prior to trial had been hypnotized to refresh her recollection, was not incompetent to testify at trial as to her after-hypnosis identification of the assailant. State v. Contreras, Op. No. 318, 674 P2d 792 (Alaska App. 1983).

Trial judge in drunk driving prosecution did not abuse his discretion in refusing to admit transcript of expert testmony on breathalyzer machine's failure point to counter testimony by police officer on the same subject even if the evidence was within the former testimony exception to the hearsay rule. Thayer v. Municipality of Anchorage, Op. No. 395, 686 P2d 721 (Alaska App. 1984).

In tort action where issue was whether plaintiff's injuries were caused solely by his own intoxication, evidence that plaintiff had previously undergone alcohol treatment was admissible. Luof v. Sanders, Op. No. 2859, 686 P2d 1205 (Alaska 1984).

Trial judge did not abuse his discretion in refusing to admit expert testimony that pimps would rather settle disputes among themselves than go to the police since the jurors themselves would certainly have arrived at that conclusion. Wortham v. State, Op. No. 414, 689 P2d 1133 (Alaska App. 1984).

In prosecution for driving with a suspended driver's license, trial judge abused his discretion in allowing admission of defendant's two recent convictions for driving while intoxicated which led to the license suspension. Nelson v. State, Op. No. 427, 691 P2d 1056 (Alaska App. 1984).

In prosecution for driving with a suspended license, attempted use by prosecution for impeachment purposes of voluntary statements made by defendant at the arrest scene concerning the reason she was driving, but which statements did not include the reason she later cited for driving, presented a question of whether the evidence was relevant and whether its probative value outweighted its prejudicial effect. Nelson v. State, Op. No. 427, 691 P2d 1056 (Alaska App. 1984).

Where defendant in murder trial claimed that he was defending himself against a homosexual rape by the victim who lured him into a car by offering him Quaaludes, trial court erred in excluding the testimony of a witness who would have testified that he had had a similar encounter with the victim one year before, and the trial court also erred in excluding evidence that the police found Quaaludes in the victim's home during their investigation. Williamson v. State, Op. No. 430, 692 P2d 965 (Alaska App. 1984).

When a prior bad act is relevant to a material fact other than propensity, the court may admit the evidence if it is more probative than prejudicial. Lerchenstein v. State, Op. No. 453, 697 P2d 312 (Alaska App. 1985).

Trial court's limiting curative instruction was not sufficient to remove the prejudice presented by improperly admitted evidence. Lerchenstein v. State, Op. No. 453, 697 P2d 312 (Alaska App. 1985).

In murder trial where self-defense was the issue, admission of evidence of recent prior bad acts of the defendant toward persons other than the victim was error notwithstanding the state's contention that the evidence was relevant to the question of whether defendant carried a gun to the crime scene in anticipation of a confrontation or merely pulled it from its customary place under his car seat and also relevant to defendant's state of mind at the time of the offense, since the evidence was to some extent cumulative and its prejudicial impact outweighed its probative value. Lerchenstein v. State, Op. No. 453, 697 P2d 312 (Alaska App. 1985).

Where defense strategy was to show that an alcoholic blackout prevented defendant from formulating an intent to kill, court did not err in rejecting lay testimony which defendant offered to establish the existence of alcoholic blackouts, since it would not have shed any light on the dispute between the experts who testified on the subject, nor would it have made it more or less probable that defendant was unable to form an intent to kill at the time of the shooting in question. Stanel v. State, Op. No. 454, 697 P2d 1050 (Alaska App. 1985).

Admission of evidence that defendant failed to appear for a hearing, fled the jurisdiction after being charged with robbery, and used an alias when subsequently arrested on a different charge was not error. Lipscomb v. State, Op. No. 477, 700 P2d 1298 (Alaska App. 1985).

Where defendant was charged with sexual offenses against his daughter, evidence of alleged sexual relations between defendant and his daughter before and after the dates specified in the indictment was admissible to establish the ongoing relationship between the defendant and his daughter, explaining in part the daughter's inability to specifically describe separate incidents. Covington v. State, Op. No. 491, 703 P2d 436 (Alaska App. 1985).

In a trial for possession of cocaine with intent to distribute, a detailed analysis of the many items available for sale at defendant's drug paraphernalia business was unduly prejudicial. Adams v. State, Op. No. 525, 706 P2d 1183 (Alaska App. 1985).

DWI defendant's testimony that as a truck driver he could not afford the penalty of having his license revoked should have been excluded under this rule. Browning v. State, Op. No. 520, 707 P2d 266 (Alaska App. 1985).

Trial court did not err in permitting the prosecution to cross examine defense witness concerning earlier allegations that defendant had sexually molested her for the purpose of impeaching her testimony that she did not believe the victim's claim of molestation and to counter defendant's testimony of accident or mistake. Moor v. State, Op. No. 543, 709 P2d 498 (Alaska App. 1985).

Where defendant cross-examined the prosecution witness, his former girlfriend, concerning their bitter breakup in order to establish her bias, trial court hat erred in then allowing the state on redirect to inquire into all of the circumstances of the breakup, since it exceeded the scope of redirect permissible under the doctrine of

curative admissibility, which exists to permit introduction of otherwise inadmissible evidence only to the extent necessary to remove any unfair prejudice which might otherwise ensue from the original evidence. Bentley v. State, Op. No. 560, 711 P2d 544 (Alaska App. 1985).

In prosecution of defendant for manslaughter for causing the death of the 18-month-old son of his live-in girlfriend, trial judge did not abuse his discretion in admitting evidence which tended to indicate that defendant had abused the child on prior occasions. Garner v. State, Op. No. 569, 711 P2d 1191 (Alaska App. 1986).

In prosecution of defendant for manslaughter in the death of the 18-month-old son of his live-in girlfriend, trial judge abused his discretion by precluding defendant from offering extrinsic evidence that a neighbor, who had also taken care of the child on the day the fatal injuries were inflicted, had abused her own child on prior occasions, since such evidence was critical to defendant's defense, which suggested that the neighbor had inflicted the fatal injuries. Garner v. State, Op. No. 569, 711 P2d 1191 (Alaska App. 1986).

Evidence that defendant in sexual assault case had made sexual propositions to several other young girls was admissible to show design, scheme or plan, but not to establish motive. Oswald v. State, Op. No. 594, 715 P2d 276 (Alaska App. 1986).

Although trial court allowed testimony by sexual assault victim as to her virginity prior to the assault, it did not err in precluding defendant from cross-examining the victim regarding a prior incident in which the victim had allegedly been digitally penentrated by a school friend, since the probative value of the earlier incident as an alternative explanation for the perforation of the victim's hymen was very weak while the possible prejudice from invading her privacy unnecessarily and confusing the issues was very high. Oswald v. State, Op. No. 594, 715 P2d 276 (Alaska App. 1986).

Where purpose of allowing police officer to testify concerning out-of-court statement by child victim in sexual assault case was not to prove the truth of the matter asserted in the statement, i.e. that the child had engaged in fellatio with her father, but rather to establish that the child knew what a penis was, the testimony was admissible. Drumbarger v. State, Op. No. 601, 716 P2d 6 (Alaska App. 1986).

Trial court did not abuse its discretion in finding that the probative value of admitting photographs of alleged child abuse victim's injuries outweighed the danger of unfair prejudice. Sluka v. State, Op. No. 606, 717 P2d 394 (Alaska App. 1986).

In prosecution for assault, trial court's order excluding inquiry into a prior false report by the complaining witness against the defendant for assault did not amount to reversible error, since such inquiry would have allowed the prosecution to elicit a full explanation of the circumstances underlying the prior report to defendant's disadvantage. Richey v. State, Op. No. 611, 717 P2d 407 (Alaska App. 1986).

Circumstances surrounding death of defendant's first child from a skull fracture while alone with defendant was admissible in trial of defendant for first degree assault against his second child, who also suffered a skull fracture while alone in defendant's care, to show that defendant's actions manifested an extreme indifference to human life. Rhodes v. State, Op. No. 613, 717 P2d 422 (Alaska App. 1986).

When a witness has been previously hypnotized, his subsequent testimony at trial, as to facts and recollections adduced during hypnosis, is inadmissible; he may testify only to facts which he related prior to hypnosis. Contreras v. State, Op. No. 3042, 718 P2d 129 (Alaska 1986).

Error in jury instruction together with error in admission of certain character evidence constituted plain error. Pletnikoff v. State, Op. No. 625, 719 P2d 1039 (Alaska App. 1986).

Defendant's conviction for sexual abuse of child was reversed because extensive evidence of prior consistent statements made by the victim was admitted at trial without any determination of its actual probative value and before any charge of recent fabrication or improper motive or influence was made against the victim. Nitz v. State, Op. No. 629, 720 P2d 55 (Alaska App. 1986).

Evidence of consistent statements made by a child abuse victim on prior occasions may be admitted to bolster the testimony of the victim in case involving the sexual abuse of the child, provided that it is actually relevant to rebut an express or implied charge of recent fabrication or improper motive or influence, and provided that its probative value outweighs its potential for prejudicial impact. before such evidence is admitted, however, the victim must testify and be subjected to a charge of recent fabrication or improper motive or influence; furthermore when its appears that the alleged motive to testify falsely arose before the prior statement was made, the statement may be admitted only for the prupose of rehabilitating the victim's credibilty and may not be considered as substantive evidence of guilt. Nitz v. State, Op. No. 629, 720 P2d 55 (Alaska App. 1986).

Evidence of sexual acts which the defendant allegedly committed with victims other than those named in the indictment was not relevant to a material fact other than propensity, thus admission of the evidence constituted reversible error. Bolden v. State, Op. No. 632, 720 P2d 957 (Alaska App. 1986).

Where defendant was charged with sexually molesting his daughters, admission of evidence concerning his alleged sexual molestation of other young girls was reversible error, since neither intent nor identity were at issue and since the alleged acts were not admissible as evidence of a common scheme or plan. Bolden v. State, Op. No. 632, 720 P2d 957 (Alaska App. 1986).

In trial of defendant for sexual abuse of a six-year-old, trial court committed reversible error in allowing the State to present evidence of a prior uncharged sexual incident involving defendant and the same girl 18 months earlier. Johnson v. State, Op. No. 655, 727 P2d 1062 (Alaska App. 1986).

In sexual assault case where the defendant was the alleged victim's father, the "lewd disposition" exception to the exclusionary rule was properly extended to allow the testimony of the victim's sisters who were allegedly seduced under substantially similar circumstances and at roughly the same age. Soper v. State, Op. No. 675, 731 P2d 587 (Alaska App. 1987).

Evidence that defendant has been convicted of sexually assaulting the same girl two years prior to the incidents alleged in the current indictment for sexual abuse was properly admissible before the grand jury and at trial to establish that defendant had a significant sexual desire for that particular girl. Patterson v. State, Op. No. 681, 732 P2d 1102 (Alaska App. 1987).

Admission of racial statement made by defendant to police officer was error since the statement was more prejudicial than probative, but the error was harmless in light of the substantial evidence of defendant's guilt. Ward v. State, Op. No. 685, 735 P2d 625 (Alaska App. 1987).

In prosecution for resisting arrest where the issue of defendant's intoxication was not part of the prosecution's case-in-chief but was first raised during defendant's own testimony, the trial court did not abuse its discretion in allowing a videotape of defendant's arrest at the police station following his arrest to be used by the prosecution to rebut defendant's testimony that he had consumed so much that he was not influenced by it. Carson v. State, Op. No. 700, 736 P2d 1150 (Alaska App. 1987).

In sexual assault prosecution where the defense was consent, the trial judge did not abuse his discretion in excluding evidence that the victim had posed for Penthouse Magazine and had acted in x-rated movies and had willingly told same to the defendant, since the defense offered for the purpose of showing that the defendant and the victim in the months prior to the assault had been involved in a relationship that was sexual, rather than meterly platonic as alleged by the victim. Wood v. State, Op. No. 701, 736 P2d 1150 (Alaska App. 1987).

In prosecution of defendant for lewd and lascivious acts with children in which it was alleged that defendant would invite them to his house, offer them drugs, show them pornographic movies and then attempt sexual acts with them, trial court did not abuse discretion in refusing to allow defendant to call as witnesses police officers who had been in his home at different times

. uld have testified that they had not seen drugs, pronography, or n making equipment in his home. Rodriquez v. State, Op. No. 741 P2d 1200 (Alaska App. 1987).

In prosecution for attempted sexual abuse of a minor, trial court ed in allowing testimony about statements defendant made one ek after the incident concerning his sexual fantasies and orienta- n since the testimony was clearly character evidence and was not levant to show proof of motive, opportunity, intent, preparation, an, knowledge, identity or absence of mistake or accident; nev- heless, due to the strength of the other evidence against defend- t the error was deemed harmless. Stevens v. State, Op. No. 773, 5 P2d 771 (Alaska App. 1988).

In action by union worker against the union for intentional nfliction of emotional distress during a strike, testimony by nother worker concerning episodes of violence aimed at that orker during the strike was relevant not to prove the facts asserted t to prove defendant's resultant state of mind based on the cidents related to him by the other worker, and the trial court ercised proper discretion in admitting the testimony on the basis at its probative value outweighed the danger of unfair prejudice. Teamsters Local 959 v. Wells, Op. No. 3263, 749 P2d 349 (Alaska 988).

When a complaining witness testifies that he or she has been the ubject of sexual or physical abuse and the defense seeks to discredit is testimony by showing that the witness' conduct was inconsis- ent with the claimed abuse and therefore that the claim of abuse as false, the state should be permitted to offer expert testimony hat other members of the relevant class (i.e., abused or battered omen or sexually abused children) characteristically exhibit such onduct even though they are, in fa t, abused. Anderson v. State, Op. No. 771, 749 P2d 369 (Alaska App. 1988).

Before expert testimony seeking to establish that a person is a ember of a particular class or group, i.e., battered women or xually abused children, by showing that they exhibit behavioral ha racteristics common to that group, the proponent should estab- sh, in a hearing out of the presence of the jury, that the probative alue of the testimony outweighs its possible prejudicial effect; the rial court should require the proponent of such evidence to identify in advance what he or she intends to prove and why that evidence would be relevant to the case; furthermore, the court should con- sider the extent to which the expert witnesses' assumptions are shared by a consensus of those mental health practitioners knowl- edgeable about the subject matter. Anderson v. State, Op. No. 771, 749 P2d 369 (Alaska App. 1988).

## Rule 404. Character Evidence Not Admissible to Prove Conduct—Exceptions—Other Crimes.

(a) **Character Evidence Generally.** Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) *Character of Accused.* Evidence of a relevant trait of his character offered by an accused, or by the prosecution to rebut the same;

(2) *Character of Victim.* Evidence of a relevant trait of character of a victim of crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor, subject to the following procedure:

(i) When a party seeks to admit the evidence for any purpose, he must apply for an order of the court at any time before or during the trial or preliminary hearing.

(ii) The court shall conduct a hearing outside the presence of the jury in order to determine whether the probative value of the evidence is outweighed by the danger of unfair prejudice, confusion of the issues, or unwarranted invasion of the privacy of the victim. The hearing may be conducted *in camera* where there is a danger of unwarranted invasion of the privacy of the victim.

(iii) The court shall order what evidence may be introduced and the nature of the questions which shall be permitted.

(iv) In prosecutions for the crime of sexual assault in any degree and attempt to commit sexual assault in any degree, evidence of the victim's conduct occurring more than one year before the date of the offense charged is presumed to be inadmissible under this rule, in the absence of a persuasive showing to the contrary.

(3) *Character of Witness.* Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

(b) **Other Crimes, Wrongs, or Acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

(Added and amended by SCO 364 effective August 1, 1979)

**Annotations**

**Cases**

In prosecution for negligent homicide of 18-month-old child, where no defense of accident or mistake was raised, admission of evidence that defendant had on a prior occassion beaten another child to the point of leaving belt marks was reversible error. Harvey v. State, Op. No. 1096, 604 P2d 586 (Alaska App. 1979).

Evidence regarding prior confrontations between the defendant and trespassers was relevant and admissible to show that the defendant's pointing of a shotgun at the victim was not accidental or inadvertent. Adkinson v. State, Op. No. 2090, 611 P2d 528 (Alaska App. 1980).

The giving of a jury instruction which drew attention to possible prejudicial inadmissible information regarding the accused was prejudicial error. Keith v. State, Op. No. 2099, 612 P2d 977 (Alaska App. 1980).

A defendant may offer evidence of a relevant character trait of a victim without its having the effect of granting to the prosecution the right to introduce evidence of defendant's character. Keith v. State, Op. No. 2099, 612 P2d 977 (Alaska 1980).

An unintentional reference at trial to defendant's probation did not violate this rule to the extent that a motion for mistrial should have been granted. Preston v. State, Op. No. 2146, 615 P2d 594 (Alaska 1980).

## Rule 702. Testimony by Experts.

(a) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

(b) No more than three expert witnesses may testify for each side as to the same issue in any given case, unless the judge permits an additional number of witnesses to testify as experts.

(Added by SCO 364 effective August 1, 1979; amended by SCO 793 effective March 15, 1987)

### Annotations

**Cases**

In action against state concerning alleged negligent inspection, trial court did not err in allowing expert to state his opinion as to whether the inspection was negligent, where the opinion was helpful to the trier of fact, was based upon facts or data reasonably relied on by other experts, and was not unduly prejudicial or misleading, particularly where any possible confusion or prejudice was cured by predicating the expert's opinion on a standard of care and issuing a cautionary instruction. Wilson v. State, Op. No. 2720, 669 P2d 1292 (Alaska 1983).

Trial judge did not abuse his discretion in refusing to admit expert testimony that pimps would rather settle disputes among themselves than go to the police since the jurors themselves would certainly have arrived at that conclusion. Wortham v. State, Op. No. 414, 689 P2d 1133 (Alaska App. 1984).

Trial court is vested with considerable latitude to decide whether an expert should be allowed to testify; the court's decision is reviewable only for an abuse of discretion. New v. State, Op. No. 587, 714 P2d 378 (Alaska App. 1986).

Trial court did not abuse its discretion in excluding expert testimony of former truck driver in support of defendant's "point of no return" defense to manslaughter charge arising out of defendant's failure to stop his truck at a red light, since the testimony would have been cumulative, could have confused the jury, and in any case concerned a common sense concept readily capable of being understood by lay persons. New v. State, Op. No. 587, 714 P2d 378 (Alaska App. 1986).

There is no requirement that a witness possess a particular license or academic degree in order to qualify as an expert; the criterion in determining whether a person qualifies as an expert is whether the fact finder can receive appreciable help from that person. Dymenstein v. State, Op. No. 624, 720 P2d 42 (Alaska App. 1986).

Trial court at sentencing hearing did not err in allowing police officer to testify as an expert on the subject of pedophilia, even though his expertise was based on police investigation rather than academic studies. Dymenstein v. State, Op. No. 624, 720 P2d 42 (Alaska App. 1986).

Witness with credentials in the area of electronic engineering and computer technology who had experience with vehicle operating systems was qualified to be an expert witness in a negligence action against a driver of an Audi 5000 automobile who contended that the automobile had spontaneously accelerated through no fault of her own. Norris v. Gatts, Op. No. 3187, 738 P2d 344 (Alaska 1987).

## Rule 703. Basis of Opinion Testimony by Experts.

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. Facts or data need not be admissible in evidence, but must be of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.

(Added by SCO 364 effective August 1, 1979)

### Annotations

**Cases**

Trial court did not commit error in excluding statements made by murder defendant to psychiatrist that he was unable to recall the murder and did not recall other violent incidents which had occurred when he was intoxicated. Evans v. State, Op. No. 2505, 645 P2d 155 (Alaska 1982).

In action against state concerning alleged negligent inspection, trial court did not err in allowing expert to state his opinion as to whether the inspection was negligent, where the opinion was helpful to the trier of fact, was based upon facts or data reasonably relied on by other experts, and was not unduly prejudicial or misleading, particularly where any possible confusion or prejudice was cured by predicating the expert's opinion on a standard of care and issuing a cautionary instruction. Wilson v. State, Op. No. 2720, 669 P2d 1292 (Alaska 1983).

Consumer complaint reports to the National Highway Traffic Safety Agency, relied upon by an expert witness in a negligence action involving alleged spontaneous acceleration of an Audi 5000 automobile, met the "reasonable reliance" criteria of this rule. Norris v. Gatts, Op. No. 3187, 738 P2d 344 (Alaska 1987).

## Rule 704. Opinion on Ultimate Issue.

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

(Added by SCO 364 effective August 1, 1979)

### Annotations

**Cases**

In action against state concerning alleged negligent inspection, trial court did not err in allowing expert to state his opinion as to whether the inspection was negligent, where the opinion was helpful to the trier of fact, was based upon facts or data reasonably relied on by other experts, and was not unduly prejudicial or misleading, particularly where any possible confusion or prejudice was cured by predicating the expert's opinion on a standard of care and issuing a cautionary instruction. Wilson v. State, Op. No. 2720, 669 P2d 1292 (Alaska 1983).

## Rule 705. Disclosure of Facts or Data Underlying Expert Opinion.

(a) Disclosure of Facts or Data. The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event disclose

examination, or be required to disclose on examination, the underlying facts or data, subject to subdivisions (b) and (c).

(b) **Admissibility.** An adverse party may request determination of whether the requirements of Rule 703 are satisfied before an expert offers an opinion or discloses facts or data.

(c) **Balancing Test — Limiting Instructions.** When the underlying facts or data would be inadmissible in evidence for any purpose other than to explain or support the expert's opinion or inference, the court shall exclude the underlying facts or data if the danger that they will be used for an improper purpose outweighs their value as support for the expert's opinion. If the facts or data are disclosed before the jury, a limiting instruction by the court shall be given upon request.

(Added by SCO 364 effective August 1, 1979)

**Annotations**

Trial court did not commit error in excluding statements made by murder defendant to psychiatrist that he was unable to recall the murder and did not recall other violent incidents which had occurred when he was intoxicated. Evans v. State, Op. No. 2505, 645 P2d 155 (Alaska 1982).

In parental rights termination proceeding, testimony of social workers and counselors as to information received from other caseworkers would have been admissible hearsay if the testimony had been offered as expert opinion. Matter of J.R.B., Op. No. 3029, 735 P2d 1170 (Alaska 1986).

Where evidence relied upon by expert witness met the "reasonable reliance" test, trial court's failure to hold a hearing on that issue as required by this rule was harmless error. Norris v. Gatts, Op. No. 2187, 738 P2d 344 (Alaska 1987).

## Rule 706. Court Appointed Experts.

(a) **Appointment.** The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint expert witnesses. An expert witness shall not be appointed by the court unless he consents to act. A witness so appointed shall be informed of his duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of his findings, if any; his depostion may be taken by any party; and he may be called to testify by the court or any party. If the court determines that the interests of justice so require, the party calling an expert appointed under this rule may cross-examine the witness.

(b) **Disclosure of Appointment.** In the exercise of its discretion, the court may disclose to the jury the fact that the court appointed the expert witness.

(c) **Parties' Experts of Own Selection.** Nothing in this rule limits the parties in calling expert witnesses of their own selection.

(Added by SCO 364 effective August 1, 1979)

### ARTICLE VIII. HEARSAY

## Rule 801. Definitions.

The following definitions apply under this article:

(a) **Statement.** A statement is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.

(b) **Declarant.** A declarant is a person who makes a statement.

(c) **Hearsay.** Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) **Statements Which Are Not Hearsay.** A statement is not hearsay if

(1) *Prior Statement by Witness.* The declarant testifies at the trial or hearing and the statement is

(A) inconsistent with his testimony. Unless the interests of justice otherwise require, the prior statement shall be excluded unless

(i) the witness was so examined while testifying as to give the witness an opportunity to explain or to deny the statement or

(ii) the witness has not been excused from giving further testimony in the action; or

(B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive; or

(C) one of identification of a person made after perceiving him; or

(2) *Admission by Party-Opponent.* The statement is offered against a party and is (A) his own statement, in either his individual or a representative capacity, or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

(Added by SCO 364 effective August 1, 1979)

by the Agency involved his livelihood, and involved the Agency's determination, in its regulatory capacity pursuant to Chapter 393, Florida Statutes, that the Respondent did not meet the requirements necessary to engage in his profession." Thompson also contended that the Agency's actions were "substantially unjustified in law and in fact, and [that] no circumstances exist[ed] that would make the requested award unjust." The hearing officer denied the petition for attorney's fees, finding that Thompson did not meet the criteri outlined in § 57.111(3)(d) to be considered a "small business party."

Section 57.111, Fla.Stat. (1987), provides for an award of attorney's fees from the state to a "small business party" under certain circumstances in order to "diminish the deterrent effect of seeking review of, or defending against, governmental action." This section states in part:

(3)(d) The term "small business party" means:

1.a. A sole proprietor of an unincorporated business, including a professional practice, whose principal office is in this state, who is domiciled in this state, and whose business or professional practice has, at the time the action is initiated by a state agency, not more than 25 full-time employees or a net worth of not more than $2 million, including both personal and business investments;

* * * * * *

(e) A proceeding is "substantially justified" if it had a reasonable basis in law and fact at the time it was initiated by a state agency.

(4)(a) Unless otherwise provided by law, an award of attorney's fees and costs shall be made to a prevailing small business party in any adjudicatory proceeding or administrative proceeding pursuant to chapter 120 initiated by a state agency, unless the actions of the agency were substantially justified or special circumstances exist which would make the award unjust.

In this case, the hearing officer correctly found that Thompson did not fall within the statutory definition of "small business party." There is no evidence to support Thompson's contention that he is the sole proprietor of an unincorporated business, nor does he fit within the definition of partnership or corporation. Rather, the evidence shows that Thompson is a state employee employed on a salaried basis by the Florida State Hospital. By definition, the Florida Equal Access to Justice Act does not apply to individual employees such as Thompson. If the legislature had intended the act to apply to individual employees it could have said so.

We recognize the apparent unfairness in permitting the limited class of persons falling within the definition of "small business party" to recover attorney fees and costs while excluding other persons such as employees of private and governmental entities who are forced to litigate with state agencies. However, Thompson makes no attack on the constitutional validity of the statute; and whether to extend the act's protection beyond the limitations presently imposed by the statute is a matter for legislative, not judicial, action.

AFFIRMED.

ERVIN and WENTWORTH, JJ., concur.


Tommie Lee ANDREWS, Appellant,

v.

STATE of Florida, Appellee.

No. 87-2166.

District Court of Appeal of Florida, Fifth District.

Oct. 20, 1988.

Rehearing Denied Nov. 22, 1988.

Defendant was convicted in the Circuit Court, Orange County, Rom W. Powell, J.,

of aggravated battery, sexual battery, and armed burglary of a dwelling. Defendant appealed. The District Court of Appeal, Orfinger, J., held that: (1) "genetic fingerprint" evidence was admissible, and (2) charges of aggravated battery and sexual battery arose from discrete acts committed during one transaction and separate convictions and punishments were thus appropriate.

Affirmed.

1. Criminal Law ⇐388(1)

Where a form of scientific expertise has no established "track record" in litigation, courts may look to a variety of factors that may bear on reliability of evidence, including novelty of new technique, i.e., its relationship to more established modes of scientific analysis; existence of specialized literature dealing with technique; qualifications and professional stature of expert witnesses, and nonjudicial uses to which scientific technique are put.

2. Criminal Law ⇐388(2)

"Genetic fingerprint" evidence, by which strands of coding found in genetic molecule of deoxyribonucleic acid (DNA) are compared for purpose of identifying perpetrator of crime was admissible; evidence derived from DNA print identification appeared based on proven scientific principles, there was testimony that the evidence had been used to exonerate those suspected of criminal activity, and test was administered in conformity with accepted scientific procedure so as to ensure to greatest degree possible a reliable result.

3. Criminal Law ⇐726

Prosecutor's comment that no evidence had been presented which provided innocent explanation was proper response to defendant's argument that there was innocent explanation for defendant's fingerprints found on victim's window screen.

4. Criminal Law ⇐29(12), 984(6)

Charges of aggravated battery and sexual battery arose from discrete acts committed during one transaction; therefore, separate convictions and punishment were appropriate.

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James B. Gibson, Public Defender and Kenneth Witts, Asst. Public Defender Daytona Beach, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee and Kellie A. Nielan, Asst. Atty. Gen., Daytona Beach, for appellee.

Andre A. Moenssens, Kilmarnock, Va., for amicus curiae, Lifecodes Corp.

ORFINGER, Judge.

The issue in this case concerns the admissibility of "genetic fingerprint" evidence, by which strands of coding found in the genetic molecule of deoxyribonucleic acid (DNA) are compared for the purpose of identifying the perpetrator of a crime. The trial court admitted the evidence, and the jury convicted defendant of aggravated battery, sexual battery and armed burglary of a dwelling. Defendant also contends that his motion for mistrial should have been granted because of an improper comment by the prosecutor, and that he could not be convicted for both aggravated battery and sexual battery arising from the same incident. We conclude that the evidence was properly admitted and that defendant's other issues are without merit, and we affirm.

In the early morning hours of February 21, 1987, the victim was awakened when someone jumped on top of her and held what felt like a straight edge razor to her neck. The intruder, who the victim could only identify at trial as a strong, black male, held his hand over her mouth, told her to keep quiet and threatened to kill her if she saw his face. The victim struggled with the intruder and for her efforts was cut on her face, neck, legs and feet.

The intruder then forced vaginal intercourse with the victim, following which he stole her purse containing about $40, and then left the house. A physical examination made after the attack was reported to the police revealed the presence of semen in the victim's vagina. A crime lab analyst testified that both the victim and appellant

were blood type O but that appellant like a majority of the population is a secretor (secretes his blood type in his saliva and other body fluids) while the victim was not. Blood type O was found in the vaginal swabs taken from the victim though the analyst conceded that while this result could have come from the semen found in the victim's vagina, it also could have come from the victim's blood picked up by the swab. The analyst concluded that appellant was included in the population (which he stated constituted 65% of the male population) that could be the source of the semen.

A crime scene technician testified that on the morning following the crime one of the windows of the victim's house was open, and the screen was missing. The victim had testified that this window had been broken previously and was held together with wire from a coat hanger. A screen was found on the ground and fingerprints were lifted from it. A fingerprint expert testified that two of the prints lifted from the screen matched appellant's right index and middle finger.

Over objection, the state presented DNA print identification evidence linking appellant to the crime. The DNA test compared the appellant's DNA structure as found in his blood with the DNA structure of the victim's blood and the DNA found in the vaginal swab, taken from the victim shortly after the attack. The test was conducted by Lifecodes Corp., a corporation specializing in DNA identity testing. Dr. Baird of Lifecodes testified to a match between the DNA in appellant's blood and the DNA from the vaginal swab, stating that the percentage of the population which would have the DNA bands indicated by the samples would be 0.0000012%. In other words, the chance that the DNA strands found in appellant's blood would be duplicated in some other person's cells was 1 in 839,914,540.

We have found no other appellate decision addressing the admissibility of DNA identification evidence in criminal cases. Although appellant primarily attacks the methods used by Lifecodes as opposed to the admissibility of DNA evidence in general, the novelty of the question requires, in our opinion, that we address both issues.

## (A) ADMISSIBILITY OF A NEW SCIENTIFIC TECHNIQUE—STANDARD

We begin by confessing some uncertainty as to the standard applicable in this state governing admissibility into evidence of a new scientific technique. In the seminal case of *Frye v. United States*, 293 F. 1013 (D.C.Cir.1923), which involved the question of admissibility of lie detector test results, the court, in holding that expert testimony relating to novel scientific evidence must satisfy a special foundational requirement not applicable to other types of expert testimony, declared:

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in the twilight zone the evidential force of the principle must be recognized, and while the courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, *the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field to which it belongs.* [Emphasis in original].

293 F. at 1014.

One leading commentator has summarized *Frye* as requiring courts to determine: (1) the status, in the appropriate scientific community, of the scientific principle underlying the proffered novel evidence; (2) the technique applying the scientific principle; and (3) the application of the technique on the particular occasion. Giannelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States A Half Century Later*, 80 Columbia Law Rev. 1197, 1201 (1980). *Frye* is still applied in a number of jurisdictions, *compare Cobey v. State*, 73 Md.App. 233, 533 A.2d 944 (1987) (state failed to establish that chromosome variant analysis was generally accepted as reliable in relevant scientific community) *with People v. Reilly*, 196 Cal.App.3d 1127, 242 Cal.Rptr. 496 (1987) (sufficient showing

made that electrophoretic typing of dried bloodstains had found general acceptance or consensus in scientific community to warrant its introduction), though it has of late come in for criticism by a number of judges and commentators as being too inflexible [1] as well as inconsistent with modern evidence codes. *See, e.g., United States v. Downing*, 753 F.2d 1224 (3d Cir. 1985); *Brown v. State*, 426 So.2d 76, 87–89 (Fla. 1st DCA 1983); Giannelli, *supra*. One judge has suggested that the *Frye* standard should be rejected as a precondition to the admissibility of evidence relating to novel scientific techniques. *Hawthorne v. State*, 470 So.2d 770, 783 (Fla. 1st DCA 1985) (Ervin, C.J., concurring and dissenting in part).

In *Brown v. State*, 426 So.2d 76 (Fla. 1st DCA 1983) Judge Ervin exhaustively reviewed the law in Florida on the applicability of the *Frye* test, concluding that it was unclear whether that test had been accepted by the Florida courts. His review of *Kaminski v. State*, 63 So.2d 339 (Fla.1952), *Coppolino v. State*, 223 So.2d 68 (Fla. 2d DCA 1968), *appeal dismissed*, 234 So.2d 120 (Fla.1969), *cert. denied*, 399 U.S. 927, 90 S.Ct. 2242, 26 L.Ed.2d 794 (1970), and *Jent v. State*, 408 So.2d 1024 (Fla.1981) led him to conclude that the *Frye* test had not been adopted. He added, however that

> More recently the Florida Supreme Court cited *Coppolino* as supporting its view that "[a] court should admit evidence of scientific tests and experiments only if the reliability of the results are widely recognized and accepted among scientists." *Stevens v. State*, 419 So.2d 1058, 1063 (Fla.1982). Superficially, it would seem that the above statement embraces the *Frye* rule, yet the court's reliance upon *Coppolino* undercuts that interpretation. Additionally, the statement made in the same paragraph that "[t]he admissibility of a test or experiment lies within the discretion of the trial judge ..." is contrary to *Frye* since a strict adherence to *Frye* would severely curtail trial court discretion. The latter quoted statement is, moreover, consistent with the court's earlier opinion in *Jent*.

426 So.2d at 87.

In *Jent v. State*, 408 So.2d 1024 (Fla. 1981), the question raised was the admissibility of hair analysis testimony. In rejecting the defense claim that evidence regarding hair analysis was not sufficiently reliable or exact to be allowed into evidence, the court stated:

> As a general rule, the problem presented to a trial court is whether scientific tests are so unreliable and scientifically unacceptable that admission of those test results constitutes error. *Coppolino v. State*, 223 So.2d 68 (Fla. 2d DCA 1968), *cert. denied*, 399 U.S. 927, 90 S.Ct. 2242, 26 L.Ed.2d 794 (1970).... A trial court has wide discretion concerning the admissibility of evidence, and, in the absence of an abuse of discretion, a ruling regarding admissibility will not be disturbed.

408 So.2d at 1029. The evidence was held to be admissible despite the testimony that, although the unknown hair found at the scene of the crime was microscopically the same as the defendant's it could not be positively identified as having come from the defendant. The court noted that "[d]etermining what weight to accord this testimony was within the jury's province...."

In *Bundy v. State*, 455 So.2d 330 (Fla. 1984) [*Bundy I*] the court extensively reviewed case law pertaining to the admissibility of hypnotically aided testimony, but declined to decide which test was applicable, finding that the specific testimony involved was admissible because "... this is simply not a case of hynotically refreshed recall testimony." *Id.* at 341. The court then addressed the admissibility of expert testimony on bite mark comparison evidence. Without specifically referencing *Frye*, the court held such testimony to be admissible and explained:

1. For instance, as Professor Giannelli points out, rigid application of *Frye* would require a court to await the passage of time until such time as the new technique has been developed to the point that it has become "generally accepted." This creates a "cultural lag" during the technique's development, resulting in the exclusion of evidence which could be completely reliable. Giannelli, *supra* at 1223, nn. 201 and 202.

The trial court found that the science of odontology, which is based on the discovery that the characteristics of individual human dentition are highly unique, is generally recognized by scientists in the relevant fields and therefore is an acceptable foundation for the admissibility of expert opinions into evidence. The court in effect ruled that since the profferred [sic] evidence met this criterion the details of the comparison techniques were matters of credibility and weight of the evidence for the jury to determine ...

* * * * * *

As the trial court found, the basis for the comparison testimony—that the science of odontology makes such comparison possible due to the significant uniqueness of individual dental characteristics—has been adequately established. Appellant does not contest this supposition. Forensic odontological identification techniques are merely an application of this established science to a particular problem. *People v. Marx* [54 Cal.App.3d 100, 126 Cal.Rptr. 350 (1975)]. The technique is similar to hair comparison evidence, which is admissible even though it does not result in identifications of absolute certainty as fingerprints do. *Jent v. State*, 408 So.2d 1024 (Fla.1981), *cert. denied*, 457 U.S. 1111, 102 S.Ct. 2916, 73 L.Ed.2d 1322 (1982); *Peek v. State*, 395 So.2d 492 (Fla.1980), *cert. denied*, 451 U.S. 964, 101 S.Ct. 2036, 68 L.Ed.2d 342 (1981). Its probative value to the case is for the trier of fact to determine.

The trial court also found that the comparison techniques actually used in this case were reliable enough to allow the experts to present their materials and their conclusions to the jury. Bundy has presented no basis for finding that the trial judge abused his discretion in doing so.

455 So.2d at 348–49.

In *Bundy v. State*, 471 So.2d 9 (Fla.1985) [*Bundy II*], the court directly confronted the question of the admissibility of hypnotically aided testimony. While referring to *Frye*, 471 So.2d at 13, the court never specifically declared that it was adopting the *Frye* standard. However, in holding that the testimony was per se inadmissible in criminal trials "because of its basic unreliability," the court drew on language in opinions from jurisdictions that apply *Frye*.[2] *See also Mills v. State*, 476 So.2d 172 (Fla.1985) (results of neutron activation analysis gunshot residue test held admissible with court noting test "has attained sufficient standing among scientists to be accepted as reliable evidence in the courts").

In *Kruse v. State*, 483 So.2d 1383 (Fla. 4th DCA 1986) where the state sought introduction of expert testimony that the child/victim was suffering from a condition known as Post Traumatic Stress Syndrome, the Fourth District employed the relevancy

2. The court declared:

> We are swayed by the opinions of the courts of other jurisdictions that have held that the concerns surrounding the reliability of hypnosis warrant a holding that this mechanism, like polygraph and truth serum results, has not been proven sufficiently reliable by experts in the field to justify its validity as competent evidence in a criminal trial. Nor can we agree that employing safeguards has been shown to insure that hypnotically recalled testimony is reliable at the present time. The Michigan Supreme Court recently joined the growing number of jurisdictions that hold that the testimony of a witness whose memory has been refreshed through hypnosis is inadmissible. We feel that court's conclusion in *People v. Gonzales*, 415 Mich. 615, 329 N.W. 2d 743 (1982), aptly describes our view on this issue. The court stated:
>
> > Hypnosis has not received sufficient general acceptance in the scientific community to give reasonable assurance that the results produced under even the best of circumstances will be sufficiently reliable to outweigh the risks of abuse and prejudice.
> >
> > ... [U]ntil hypnosis gains general acceptance in the fields of medicine and psychiatry as a method by which memories are accurately improved without undue danger of distortion, delusion, or fantasy and until the barriers which hypnosis raises to effective cross-examination are somehow overcome, the testimony of witnesses which has been tainted by hypnosis must be excluded in criminal cases.
>
> 471 So.2d at 18. *But see Rock v. Arkansas*, 483 U.S. 44, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987) (per se exclusion of a criminal defendant's post-hypnotic testimony infringes impermissibly on the right of a defendant to testify on his or her own behalf).

approach based on our evidence code for determining the admissibility of such expert testimony. Noting that the "helpfulness" standard of section 90.702 [3] reflects a liberal policy in the admission of expert testimony, the court held:

> With some qualification, we believe the relevancy approach set out in the evidence code is the appropriate standard for determining the admissibility of expert testimony on child sexual abuse. The statutory relevancy standard also comports with the holdings of the Florida Supreme Court in the area of expert testimony. The court has stated that while trial courts have broad discretion in determining the range of subjects on which an expert may testify, such testimony should usually be received only where the disputed issue for which the evidence is offered, is beyond the ordinary understanding of the jury. *Johnson v. State*, 393 So.2d 1069, 1072 (Fla.1980). This view is consistent with the first requirement of section 90.702, that the opinion evidence be helpful to the trier of fact, as well as the provisions of section 90.403, that the danger of prejudice may outweigh the value of the evidence.

483 So.2d at 1385.

In an effort to ensure a degree of reliability of such evidence, the court went on to:

> reaffirm what we view to be a fundamental requirement that the party seeking to introduce expert testimony first establish that the subject can support an expert opinion with a reasonable degree of reliability. Expert testimony in areas that are not sufficiently developed to support an expert opinion can present the kind of danger that section 90.403 was designed to prevent. While there is no requirement to demonstrate general acceptance, we believe that, without some indicia of reliability, opinion evidence on a particular subject could hardly be helpful to a jury as required by section 90.702.

*Id.* at 1386.

This "relevancy approach" suggested by the First District in *Brown* and adopted by the Fourth District in *Kruse*,[4] has been referred to as the preferred approach and was substantially adopted by the federal Third Circuit in *United States v. Downing*, 753 F.2d 1224 (3d Cir.1985).[5] This approach recognizes relevancy as the linchpin of admissibility, while at the same time ensuring that only reliable scientific evidence will be admitted, and seems preferable to the "general acceptance" approach of *Frye* which is predicated on a "nose counting," *Downing*, 753 F.2d at 1238, and may result in the exclusion of reliable evi-

3. 90.702 Testimony by experts.—If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion; however, the opinion is admissible only if it can be applied to evidence at trial.

4. In a recent case, *Correll v. State*, 523 So.2d 562 (Fla.1988), our supreme court was confronted with the question of admissibility of blood tests using the electrophoresis process, a method used to determine the presence of certain enzymes in the blood. The court, noting at the outset that such process *could hardly be characterized as novel* (a fact which distinguishes that case from the one before us), held the evidence to be admissible. We make note of this case, despite its factual differences, because the electrophoresis process is an important step in separating the DNA fragments.

5. *Downing* involved expert testimony on the accuracy of eyewitness identification *offered by the defendant*. At least one commentator has suggested that this may be a distinguishing factor and that "the additional threshold of acceptance in the scientific community as a joint requirement with a judicial determination of reliability seems warranted where the scientific evidence carrying so much weight with the trier of fact is admitted against the criminal defendant, as it usually is." Graham, *Handbook of Florida Evidence*, § 704.2, p. 552 (n. 18). Professor Graham suggests that because of the importance juries place on scientific tests, "the *Frye* test in its original general acceptance or preferably its liberalized substantial acceptance form, which serves to screen such tests to assure scientific reliability, should continue to be followed." *Id.* at § 704.2, p. 551. Conversely, Professor McCormick advocates admissibility based on logical relevancy and exclusion if probative value is substantially outweighed by prejudice, misleading the jury or consuming undue amounts of time. *McCormick on Evidence*, § 203 at p. 608 (3d ed. 1984).

dence. We believe this approach to be the one which should be followed in Florida.[6]

[1] In *Downing*, the Third Circuit, in applying a relevancy/reliability approach, declared that where, as here, a form of scientific expertise has no established "track record" in litigation, courts may look to a variety of factors that may bear on the reliability of the evidence. 753 F.2d at 1238. These include the novelty of the new technique, i.e., its relationship to more established modes of scientific analysis, the existence of a specialized literature dealing with the technique, the qualifications and professional stature of expert witnesses, and the nonjudicial uses to which the scientific technique are put. *Id.* at 1238–39, citing 3 J. Weinstein & M. Berger, *Weinstein's Evidence* § 702[03].

(B) THE TECHNIQUE AND TESTIMONY RELATING TO DNA PRINTING—

(1) *Witnesses:*

Several witnesses testified for the State concerning the test. Dr. David E. Housman, the holder of a bachelor's degree and a Ph.D in biology, of the Massachusetts Institute of Technology, is a professor of molecular genetics, which deals with the structure and function of the DNA molecule and has taught at several universities since 1973. He has engaged in DNA analysis for some eleven years. He has published approximately 120 papers on molecular genetics, most of which deal with DNA, and has served on advisory boards involving genetics for the National Institute of Health, the Heredity Disease Foundation, and the Tourette's Syndrome Foundation. Housman visited Lifecodes, Inc., the company which performed the instant test and examined the procedures of the company though he did not witness the instant test.

Allen Guisti is a forensic scientist employed by Lifecodes, Inc. and performed the DNA print identification tests here. He holds a Bachelor of Science degree from Yale University and has published several papers on genetics, one of which involved his own research on DNA analysis. He has performed the identification test about 200 times.

Dr. Michael Baird is the manager of forensic testing at Lifecodes. He received a doctorate in genetics from the University of Chicago in 1978. He worked as a research associate at both the University of Michigan and Columbia University in the field of blood diseases at the DNA level and joined Lifecodes at its inception in 1982. He has been the manager of forensic testing for the past year and one-half. He teaches graduate courses in DNA technology at New York Medical College and has published a number of articles on DNA testing.

(2) *Scientific Principles:*

Summarizing Dr. Housman's testimony, it appears that DNA print identification is predicated on several well accepted scientific principles. DNA, a molecule that carries the body's genetic information, is contained in every living organism in every cell which has a nucleus (nearly all the cells of the human body). The configuration of the DNA is different in every individual with the exception of identical twins. It is the same in all the particular person's cells, and its characteristics remain unchanged during the life of the individual. DNA is a very complicated molecule and to read the "information" contained therein one needs to perform certain chemical procedures. Dr. Housman stated that a procedure known as restriction fragment length polymorphism has been in existence for ten years and enables scientists to cut the strands at predetermined locations and compare the DNA structure of different individuals. The test involves treatment of the DNA molecule with an enzyme or reagent which recognizes differences in the sequences found in the DNA molecule. The discovery of the use of these reagents won Dr. Arber a Nobel Prize about ten years

6. The State correctly asserts that in this case the evidence would meet the *Frye* standard as well as the relevancy test. We have reviewed the authorities discussing the standards of admissibility to determine which of these will apply in this District, pending a definitive interpretation by our supreme court.

ago and according to Dr. Housman, is generally accepted in the scientific community. Indeed, Dr. Housman testified that DNA sequencing and comparison testing has been done for about ten years, is considered reliable, is performed by a number of laboratories around the world and is generally accepted in the scientific community. He stated also that the test and information received therefrom are routinely used in such areas as the diagnosis, treatment and study of genetically inherited diseases.[7]

We briefly summarize the test as described by Doctors Housman and Baird. The strand of DNA is cut at very precise points using the reagents which in effect "read" the order of the elements and cut precisely at the sequence they recognize. The next step is to identify by length the DNA fragments. This is done through gel electrophoresis which separates the different sized fragments of DNA. In this procedure, the cut DNA is put in a cell matrix composed of gel and a negative electric current applied. The DNA, which has a negative charge, runs toward the positive charge. The gel acts as a sieve in which the large fragments cannot move as fast as the smaller ones. Once the length of the DNA fragments is established, the DNA is transferred to a piece of nylon membrane. A radioactive probe is then added which identifies particular fragments that it is designed to recognize. The membrane is put next to X-ray film and the film is exposed by the radioactivity. The film is developed and the results reveal bands of DNA. Such bands or more accurately the pattern of such bands can then be compared to those obtained in tests of other specimens.[8]

(C) PROCEDURES IN THIS CASE:

The test here was performed by Lifecodes, Inc., a licensed clinical laboratory in the State of New York. The testimony

7. In the work entitled Scientific Evidence in Criminal Cases, Third Ed. (1986), the authors, Professors Moenssens, Inbau and Starrs comment thusly on the reliability studies and courtroom use of DNA evidence:

> c. Reliability Studies and Courtroom Use
>
> Unlike many advances in forensic sciences, which are developed by experts who are actively engaged in case work, and immediately applied by them to forensic experimentation and use, the DNA probe studies on semen and blood came out of a research laboratory whose scientists did not initially desire to apply the techniques to actual forensic investigations as soon as a working postulate and hypothesis had been formulated. Instead, they chose to subject the novel technique (explained here at greater length than some of the other techniques precisely because no other literature on it is as yet in print) to extensive experimentation and verification. As part of this research process, they have also invited independent scientists to follow their protocols, put the new techniques through its paces, and arrive at an impartial scientific assessment of the claims made by Lifecodes —a process of verification that ideally should always be followed by forensic scientists, but almost never is. The proponents of the techniques contend that the DNA testing establishes identity in rape and similar cases to a higher degree of certainty and with greater reliability and consistency than any other testing method currently available to forensic science and in paternity cases will provide a significant improvement over any current scientific test in establishing biological parentage and accurately identifying cases of innocent alleged parenthood. Their research to date appears to validate these claims. However, independent research is still going on to determine if the claims can be supported. As this chapter is being written, there are, as yet, no court decisions involving the use of DNA testing for the simple reason that its developers have refrained from seeking its evidentiary use until all testing is completed. With the body of knowledge and verification that is currently available, the test results undoubtedly could meet a standard of "verifiable certainty." Possibly, since the underlying genetic research has been done for several decades by the most prominent geneticists and immunologists, the test results could meet the "general acceptance test" of the venerable *Frye* decision. Because the developers of the probes and test protocols have not, as of this writing, chosen to offer the test as an evidentiary tool, no appellate courts have had the opportunity to decide the issue of admissibility. Without a doubt, if the independent verification that is expected to be well advanced even as this book is published confirms the claims of the originators, courts will leap to embrace the new technique as yet another source for scientific evidence of identity. [Footnote omitted].

*Id.* at 358–359.

8. For a more detailed description of the test, see Moenssens, et al., Scientific Evidence In Criminal Cases, Third Ed. (1986), pp. 356–358.

revealed that Lifecodes was founded in 1982 as a research and development laboratory, specializing in DNA paternity and identity testing and began developing DNA probes. The company currently performs forensic and paternity testing as well as testing in diagnosing genetic-type diseases. The DNA test is essentially the same for all of these purposes, with the difference being in the probe that is used.

There was extensive testimony as to the precise methods used by Lifecodes in performing the instant test. Dr. Guisti testified about each step in the process and Dr. Housman, who reviewed Dr. Guisti's results testified that in his opinion the test was accurately and properly performed. There was also testimony that various controls were used in the testing process. For example, Dr. Baird testified that every reagent and enzyme purchased by Lifecodes is tested on known DNA samples. Similar tests are performed on the gel used in the electrophoresis process. Appellant contends that this test is unreliable, because the new gel is only tested to be certain that it works the way the old gel worked and that if the old gel worked improperly, that error would be carried over to the new batch. We find no merit in this contention. In audition to the foregoing tests, control samples containing known fragment sizes are loaded in the test to monitor the electrophoresis and assure an accurate result. The evidence reveals that if the gel is not properly prepared or if it is bad, the test will ordinarily not work rather than leading to an incorrect result. Indeed, if there were any voltage fluctuations or problem with the solutions ordinarily no result is received as opposed to an erroneous result. Use of control samples is also a check as they would also be affected by any error. The scientific testimony indicates acceptance of the testing procedures. The probative value of the evidence is for the jury.

The radiographs of the victim's and appellant's blood and the vaginal smear were exhibited to the jury, the comparison was explained, and the radiographs were admitted into evidence. Dr. Baird concluded that to a reasonable degree of scientific certainty, appellant's DNA was present in the vaginal smear taken from the victim. The State's expert witnesses were skillfully and thoroughly cross-examined, but no expert witness testified for the defense.

(D) ADMISSIBILITY.

In applying the relevancy test, it seems clear that the DNA print results would be helpful to the jury. § 90.702, Fla.Stat. (1988). Each of the State's witnesses was accepted by the trial court as an eminently qualified expert in the field of molecular genetics.[9] The crucial question here is whether the probative value of the testimony and test is substantially outweighed by its potential prejudicial effect. In this regard, the indicia of reliability referred to in *Kruse* come into play.

As noted in *Downing*, under the relevancy approach where a form of scientific expertise has no established "track record" in litigation, courts may look to other factors which bear on the reliability of the evidence. 753 F.2d at 1238. One of these is the novelty of the technique, i.e., its relationship to more established modes of scientific analysis. DNA testing has been utilized for approximately ten years and is indicated by the evidence to be a reliable, well established procedure, performed in a number of laboratories around the world. Further, it has been used in the diagnosis, treatment and study of genetically inherited diseases. This extensive nonjudicial use of the test is evidence tending to show the

9. Appellant argues that these witnesses, particularly Dr. Baird, possess a built-in bias because their reputations and careers are built on DNA comparison work. Several courts have questioned whether a leading proponent of a particular technique could fairly and impartially testify concerning admission of the technique. *See, e.g., People v. Kelly*, 17 Cal.3d 24, 130 Cal.Rptr. 144, 549 P.2d 1240 (1976); *People v. Tobey*, 401 Mich. 141, 257 N.W.2d 537 (1977) (both cases involving voiceprints). Neither *Frye* nor our evidence code require impartiality. *See* Giannelli, *supra* at 1216. Further, the point would not appear substantial here given that unlike voiceprints, DNA comparison work has a number of uses in fields other than forensic medicine such as diagnosis and treatment of disease.

reliability of the technique. *Downing*, 753 F.2d at 1239.

Another factor is the existence of specialized literature dealing with the technique. The record reveals that a great many scientific works exist regarding DNA identification. According to Dr. Baird, Lifecodes maintains a file on all scientific journal articles and publications with regard to DNA testing and he was unaware of any that argue against the test's reliability.[10]

A further component of reliability is the frequency with which a technique leads to erroneous results. *Downing*, 753 F.2d at 1239. The court there noted:

> At one extreme, a technique that yields correct results less often than it yields erroneous one[s] is so unreliable that it is bound to be unhelpful to a finder of fact. Conversely, a very low rate of error strongly indicates a high degree of reliability. In addition to the rate of error, the court might examine the type of error generated by a technique.

*Id.*

The testimony here was that if there was something wrong with the process, it would ordinarily lead to no result being obtained rather than an erroneous result. Further control samples are employed throughout the process which permits errors, if any, to be discovered. These factors are further indicia of reliability. *See United States v. Williams*, 583 F.2d 1194 (2d Cir.1978) (court, in upholding admission of voiceprint evidence, emphasized that any shortcomings in scientific technique would result in inability to match two voice spectrograms rather than erroneous conclusion that the two spectra were generated by the same voice).

The frequency by which given DNA bands appear in the population is calculated by using an established statistical data base, employing a statistical formula known as the Hardy–Weinberg equilibria. This principle is used for determining other genetic characteristics such as blood type or Rh factors, dates back to the 1920's and has been generally accepted in the scientific community as being accurate for this calculation. Appellant contends that the data base of 710 samples is too small to be statistically significant. The only evidence in the case supports the statistical value of the randomly selected samples. The testimony reveals that as the data base expands, the probability numbers do not change statistically, and that The American Association of Blood Banks, in its book entitled *Probability of Inclusion in Paternity Testing* (1982) concludes that a data base of two to five hundred samples was found to provide adequate statistical results. Admittedly, the scientific evidence here, unlike that presented with fingerprint, footprint or bite mark evidence, is highly technical, incapable of observation and requires the jury to either accept or reject the scientist's conclusion that it can be done. While this factor requires courts to proceed with special caution, *cf. United States v. Ferri*, 778 F.2d 985 (3d Cir.1985) (expert testimony as to footprint evidence, unlike other scientific evidence is susceptible to examination by jury which factor limited potential prejudice), it does not of itself render the evidence unreliable.

[2] The trial court did not abuse its discretion in ruling the test results admissible in this case. In contrast to evidence derived from hypnosis, truth serum and polygraph, evidence derived from DNA print identification appears based on proven scientific principles. Indeed, there was testimony that such evidence has been used to exonerate those suspected of criminal

10. While no appellate court in this country has yet passed on the admissibility of DNA print identification in criminal cases, such evidence has been admitted in civil actions, *In the Matter of the Adoption of Baby Girl S*, 140 Misc.2d 299, 532 N.Y.S.2d 634 (N.Y.Surr.Ct.1988), (holding DNA evidence admissible in paternity action and noting that New York state trial court had recently authorized a DNA comparison test in criminal prosecution), and is admitted at trials in England. *See Cobey v. State*, 73 Md.App. 233, 533 A.2d 944, 950, n. 1 (1987). Further, at least one jurist, concurring in part and dissenting in part in a capital case wondered why the State had not done a DNA test which he said would have made the question of guilt or innocence far less murky. *State v. Apanovitch*, 33 Ohio St.3d 19, 514 N.E.2d 394, 406 (1987) (Brown, J., concurring in part, dissenting in part).

activity. Given the evidence in this case that the test was administered in conformity with accepted scientific procedures so as to ensure to the greatest degree possible a reliable result, appellant has failed to show error on this point.

[3, 4] We find no merit in appellant's remaining points on appeal. The objected to comment by the prosecutor was in response to appellant's argument that there was an innocent explanation for appellant's fingerprints found on the window screen. The prosecutor commented in response that no evidence had been presented which provided an innocent explanation. Appellant's reliance on *Carawan v. State*, 515 So.2d 161 (Fla.1987) for the proposition that he could not be convicted on both the aggravated battery and the sexual battery charges is misplaced. *Carawan* specifically applied only to separate punishments arising from one *act*, not one *transaction*. The charges of aggravated battery and sexual battery arose from discrete acts committed during one transaction and separate convictions and punishment are appropriate here. *See Arnold v. State*, 514 So.2d 419 (Fla. 2d DCA 1987).

Finding no error, the convictions and sentences are

AFFIRMED.

DAUKSCH and DANIEL, JJ., concur.


**Tommie Lee ANDREWS, Appellant,**

**v.**

**STATE of Florida, Appellee.**

**No. 88–320.**

District Court of Appeal of Florida, Fifth District.

Nov. 10, 1988.

Appeal from the Circuit Court for Orange County; Rom W. Powell, Judge.

James B. Gibson, Public Defender and Kenneth Witts, Asst. Public Defender, Daytona Beach, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee and Kellie A. Nielan, Asst. Atty. Gen., Daytona Beach, for appellee.

ORFINGER, Judge.

Affirmed on the authority of *Andrews v. State*, 533 So.2d 841 (Fla. 5th DCA 1988). We write simply to note that in addition to the DNA identification evidence, the victim here identified appellant both at a photo line-up and at trial as the perpetrator.

AFFIRMED.

DAUKSCH and DANIEL, JJ., concur.


**STATE of Florida, Appellant,**

**v.**

**Carol BOWEN, Appellee.**

**No. 88–544.**

District Court of Appeal of Florida, Fifth District.

Oct. 20, 1988.

Defendant was convicted in the Circuit Court, Brevard County, John Dean Moxley, J., of DUI manslaughter, and State appealed sentence imposed. The District Court of Appeal, Orfinger, J., held that trial court improperly retroactively applied amended DUI statute as reason for downward departure sentence.

Vacated and remanded.

Offered: 5/5/89
Referred: Rules

6-1032H

ADDITIONS

DELETIONS

Original sponsors: Jones, Rodey, Faiks, et al.

IN THE SENATE BY THE JUDICIARY COMMITTEE

CS FOR SENATE BILL NO. 275 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act concerning the admissibility into evidence of deoxyribonucleic acid (DNA) print tests in civil and criminal proceedings; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. FACTUAL BASIS AND FINDINGS. (a) Recent developments in molecular biology and genetics have established scientific principles that, when applied forensically, can determine the identity of any person. Deoxyribonucleic acid (DNA) is an organic substance found primarily in the chromosomes that are structures within the nuclei of cells. DNA fingerprinting, often called genetic fingerprinting, is a forensic technique that relies on the unique sequence of genetic building blocks that make up human chromosomes. DNA fingerprinting permits the personal identification of an individual by comparing, in extracted samples, the repetitive patterns of the DNA in the chromosomes. The sample taken produces a print that an expert can read to identify sequential patterns of the four basic components of DNA. The sequential pattern of the DNA, unique to each individual, permits identification with a high degree of certainty. Depending on the number of probes and the specific test that is used, DNA fingerprinting permits exceptionally precise personal identification.

(b) Personal identification has always been of vital concern to enforcement of criminal law and completion of some civil proceedings. Developed only in the past six years, DNA fingerprinting has already come to play a significant role in civil actions, chiefly to confirm or refute

paternity, and in criminal prosecutions. The technique provides investigators and litigators with powerful evidentiary tools to help resolve difficult cases. Research recently conducted for the Alaska State Legislature affirms that approximately 30 states have used the DNA fingerprinting process in conjunction with criminal prosecutions. In many of the states, trial courts have initiated action on a case-by-case basis to admit DNA fingerprint evidence. In most cases, the trial court judge has determined that the evidence is admissible, finding that the procedure has gained acceptance within the scientific community and that proper testing procedures had been followed.

(c) The legislature, believing that it is necessary to resolve the policy question relating to the admissibility of evidence developed by the DNA fingerprinting technique without unnecessary litigation, finds that

(1) the scientific methods of identifying unique DNA patterns or structures in human chromosomes have been refined to a level of accuracy that approaches an imperceptible margin of error;

(2) when conducted by trained personnel in a manner that is consistent with standard methods and techniques, the results of DNA fingerprinting tests are recognized in the scientific community as accurate and reliable;

(3) because of the high degree of accuracy that attends DNA print testing, DNA fingerprint evidence has probative value that outweighs the danger of unfair prejudice of that evidence;

(4) DNA fingerprint evidence should be admitted into evidence in civil actions and criminal proceedings in the courts of the state.

* Sec. 2. AS 09.25 is amended by adding a new section to read:

Sec. 09.25.300. ADMISSIBILITY OF DNA PRINT TESTS. (a) The results of a deoxyribonucleic acid (DNA) print test are admissible into evidence in a trial or hearing in a civil action. There is a

presumption that the DNA print test results are valid and further foundation for their introduction as evidence is unnecessary if it is established at the trial or hearing that the DNA print test was performed according to methods approved by the Department of Public Safety by a person who has been trained [and whose training was certified] according to techniques, methods, and standards of training approved by the Department of Public Safety.

(b) Statistical population frequency evidence based on a DNA print test result is admissible into evidence in a trial or hearing in a civil action to demonstrate that an individual is the source of a specific human sample of blood, semen, urine, tissue, or other DNA-bearing cells.

(c) In this section,

(1) "deoxyribonucleic acid" or "DNA" means molecules containing genetic information that are found in chromosomes;

(2) "deoxyribonucleic acid print test" or "DNA print test" means the genetic identification process through which DNA material in a human sample of blood, semen, tissue, or other DNA-bearing cells is analyzed and compared with another human sample of DNA-bearing cells for identification purposes.

* Sec. 3. AS 12.45 is amended by adding a new section to read:

Sec. 12.45.035. ADMISSIBILITY OF DNA PRINT TESTS. The provisions of AS 09.25.300 apply in a criminal action or proceeding.

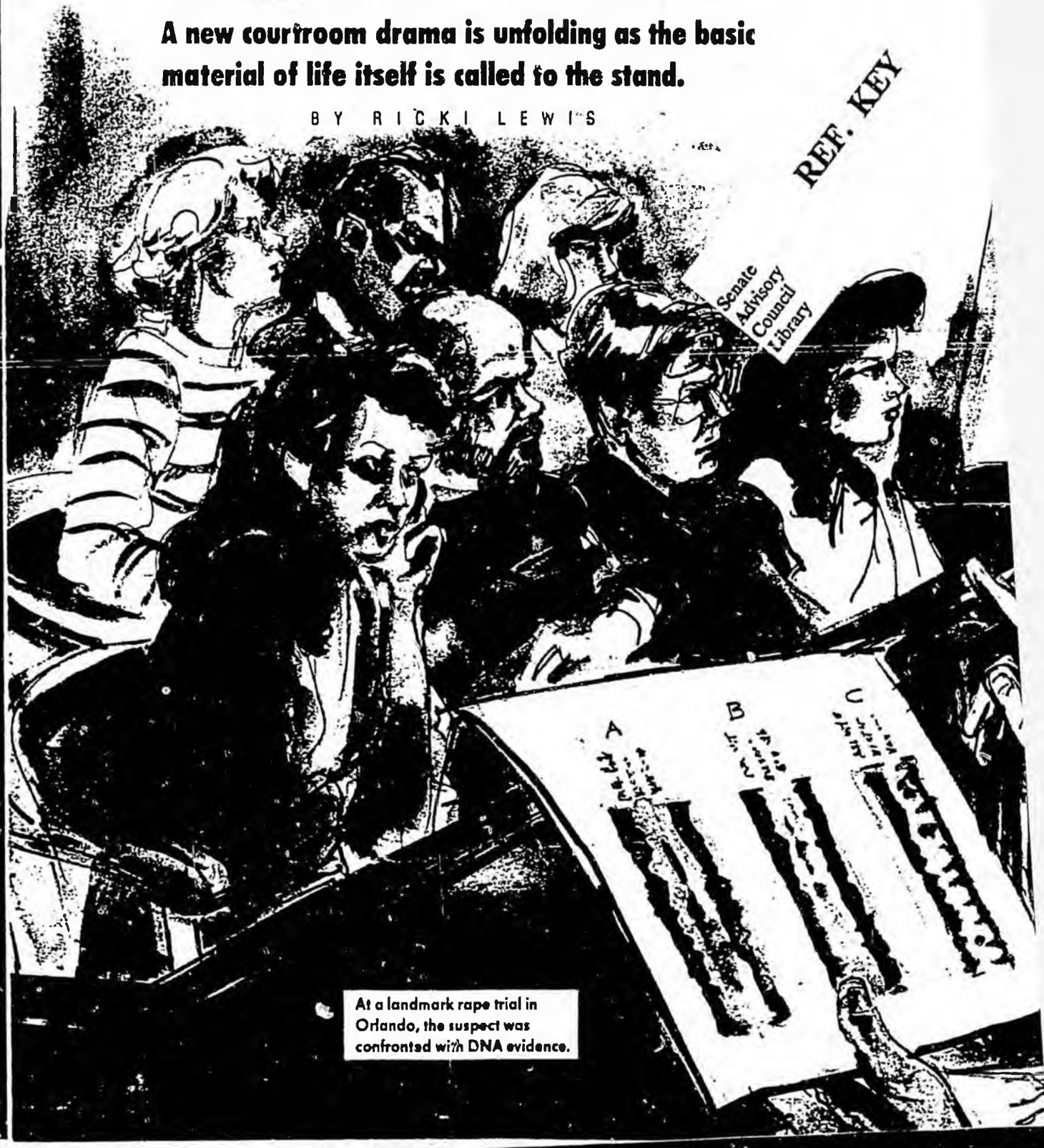
* Sec. 4. This Act takes effect immediately under AS 01.10.070(c).

DNA FINGERPRINTS

# WITNESS FOR THE PROSECUTION

**A new courtroom drama is unfolding as the basic material of life itself is called to the stand.**

BY RICKI LEWIS






At a landmark rape trial in Orlando, the suspect was confronted with DNA evidence.

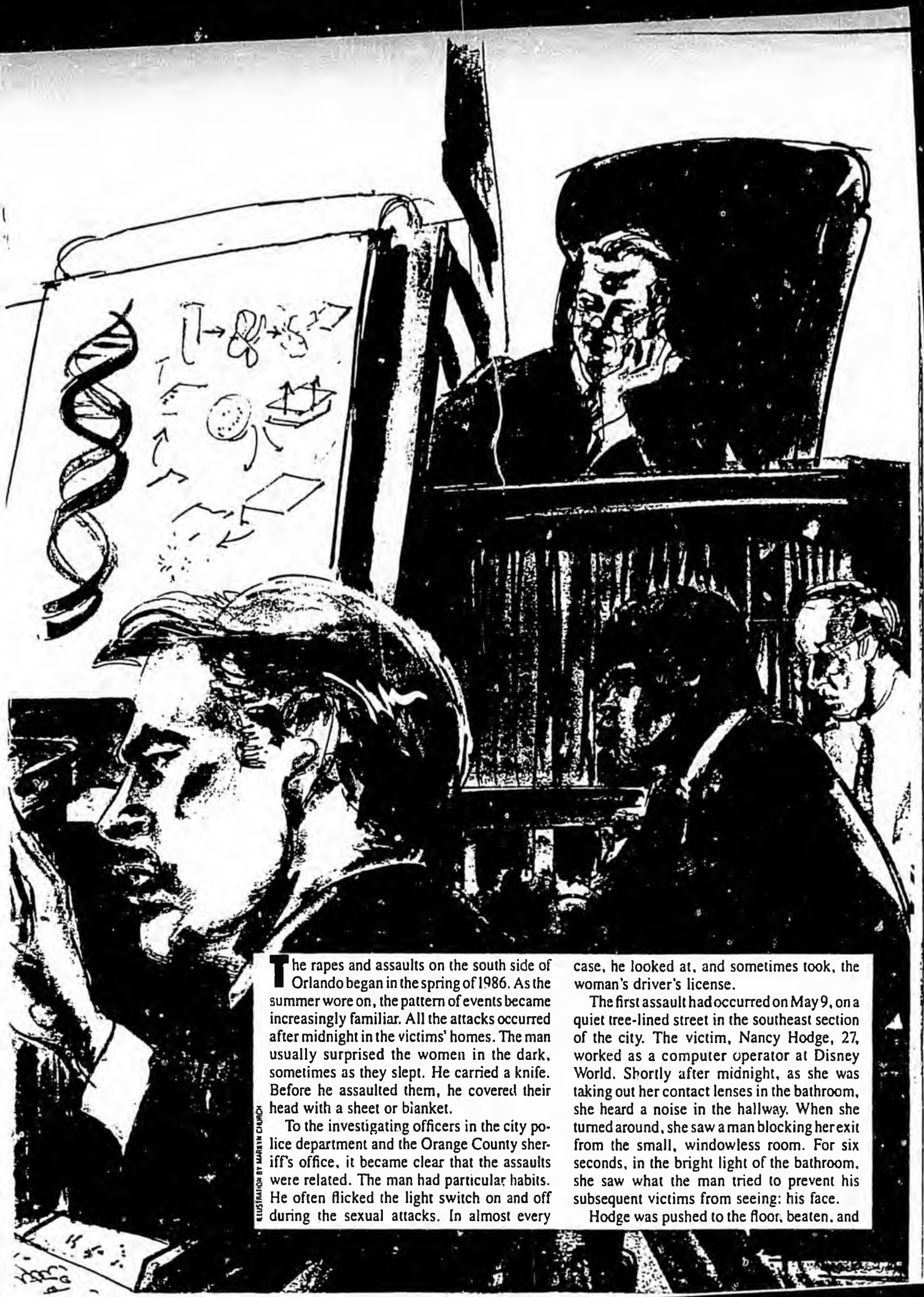


ILLUSTRATION BY MARILYN CHURCH

The rapes and assaults on the south side of Orlando began in the spring of 1986. As the summer wore on, the pattern of events became increasingly familiar. All the attacks occurred after midnight in the victims' homes. The man usually surprised the women in the dark, sometimes as they slept. He carried a knife. Before he assaulted them, he covered their head with a sheet or blanket.

To the investigating officers in the city police department and the Orange County sheriff's office, it became clear that the assaults were related. The man had particular habits. He often flicked the light switch on and off during the sexual attacks. In almost every case, he looked at, and sometimes took, the woman's driver's license.

The first assault had occurred on May 9, on a quiet tree-lined street in the southeast section of the city. The victim, Nancy Hodge, 27, worked as a computer operator at Disney World. Shortly after midnight, as she was taking out her contact lenses in the bathroom, she heard a noise in the hallway. When she turned around, she saw a man blocking her exit from the small, windowless room. For six seconds, in the bright light of the bathroom, she saw what the man tried to prevent his subsequent victims from seeing: his face.

Hodge was pushed to the floor, beaten, and

cut with a sharp instrument. Her face was covered with a sheet and she was raped three times. When he finished, he tried to wipe his semen from her body. He took her purse, which contained her driver's license and credit cards, and ordered her not to move. She heard him walking from room to room, as if he were checking the house to make sure that he had left behind no evidence. Then he slipped out as he had entered, through an unlocked door.

The man was careful, very careful. As more assaults occurred, the detectives on the case began to build a profile of a man who methodically chose his victims. He intimately knew the lives of the women he attacked. He stalked his victims for weeks beforehand, prowling around their houses, looking through their windows, learning when they would be alone. (In fact, six weeks before Hodge was raped, she had notified the police of a prowler around her house.) Before raping one woman, he told her, "I've seen what you do with your fat boyfriend. Now I want you to do the same with me."

The police had little to go on. A composite drawing of the man had been made, based on Hodge's description, but it hadn't led to any suspects. No fingerprints had been found at Hodge's house or at the houses of the other victims. But there was one piece of evidence that Hodge's rapist could not erase. A vaginal swab taken after the attack contained his semen. Many months later the evidence turned out to be critical.

Meanwhile, all through 1986, the rapes in Orlando continued. The police suspected that the same man was responsible for some 23 incidents of prowling, breaking into women's homes, and attempted assaults or rapes. On February 22, 1987, he struck again. A 27-year-old woman was assaulted in the early morning hours while her two young children slept in the room next door. A sleeping bag was wrapped around her head, and she was beaten, cut, and raped repeatedly. But this time the man was less careful. The police found two fingerprints on the window screen that he had removed to enter the house. A vaginal swab was taken from the victim to collect a semen sample.

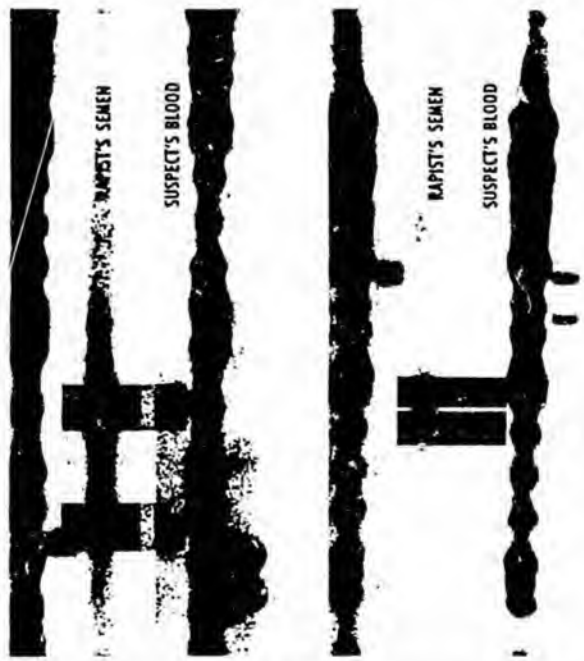
By early 1987, officers from the city's tactical patrol force had been assigned to the case. Plainclothesmen staked out the neighborhoods where the rapist was most likely to strike and patrolled the streets in unmarked cars. On March 1 their surveillance paid off. At 2:48 A.M. a woman called the police to report a prowler on Candlewick Street in the southeast section of the city. A responding patrol car saw a blue 1979 Ford Grenada speeding away from the area. The officer followed the car for two miles before the suspect sped around a sharp corner and crashed into a utility pole.

The driver's name was Tommie Lee Andrews. He was 24 and worked at a local pharmaceutical warehouse. He lived about three miles from Hodge's house.

The following morning, at Orlando Police Department headquarters, Hodge was asked to examine a photo lineup. She immediately identified Andrews as her assailant. He was charged with sexual battery, aggravated battery, and armed burglary. He was also charged with the rape of the young mother attacked in February, just one week before his arrest.

The prosecutor handling the cases was Tim Berry, 43, assistant state attorney for Orange County. Berry, a burly, sandy-haired ex-sheriff, had prosecuted serial rape trials before. But he was having a hard time building an ironclad case against Andrews. The assailant was so damned fastidious in shielding his victims' eyes! Even Hodge's six-second view, although it seemed an eternity to her, might not be enough to convince a jury. Standard forensic tests comparing the suspect's blood with the semen found on the victim could only suggest that Andrews *might* have committed the crime. (The results fit Andrews, but they also fit 30 percent of the U.S. male population.) Berry wished that he could come up with something else.

One afternoon in early August Berry was visited by Jeffrey Ashton, another attorney in his office, who told him of a TV news report he'd seen about a new technique called DNA fingerprinting. It had been used in a rape-murder case in Britain. More than 1,000 men living in three villages near Leicester had




**The most dramatic evidence in the Orlando trial was these autoradiographs. They clearly show that the DNA patterns (highlighted areas) in the suspect's blood matched those in the semen found on the rape victim.**

**Other tests can exclude a man or suggest he's guilty. This one can positively nail him.**

had their DNA tested in the search for the guilty man. The test had cleared one man under suspicion and led to the arrest of another, who subsequently confessed.

Ashton was referring to the much publicized case of Colin Pitchfork, a 27-year-old baker and family man who was found guilty of raping and strangling two 15-year-old girls in the Leicestershire countryside. The DNA fingerprinting test used in Britain was developed by Alec Jeffreys, a geneticist at the University of Leicester. Jeffreys got the idea for the test while looking for genetic variations to serve as markers for inherited disease. It struck him that the techniques molecular biologists use to visualize variations in DNA could also be used to establish identity. His test was quickly seized on for forensics and paternity testing. When it was used to compare the DNA patterns in Pitchfork's blood with those in the semen found on the two strangled girls, it clearly showed a match.

Ashton had been intrigued by the British case and filed it in the back of his mind. Then, in the summer of 1987, he saw an advertisement in a U.S. law publication for Lifecodes, a new DNA testing service. Berry and he called Michael Baird, Lifecodes' director of forensic and paternity testing, who agreed to analyze the evidence in the Andrews rape cases.

In August the evidence was flown from Florida to the Lifecodes laboratory in Valhalla, New York. Meanwhile, with less than two months to go to trial, Berry began a crash course in genetics. He realized he was embarking on new territory. DNA analysis had never been used in a rape trial in the United States. To familiarize himself with the new technology, Berry called on David Housman, a molecular biologist at MIT whom he planned to use at the trial as an expert witness. In late summer Berry and Hal Uhrig, one of the lawyers for Andrews, met with Housman and Baird for an intensive three-hour session on genetics.

DNA, or deoxyribonucleic acid, our genetic blueprint, is a three-foot-long chemical tightly wound inside virtually every cell of the body. It's packaged into 46 chromosomes—23 contributed by the father's sperm, 23 contributed by the mother's egg. "Every cell derived from that fertilized egg will have the same DNA," explains Housman. That's one of the keys to DNA testing. "It can be done on basically any type of cell—cells in blood samples, semen samples, hair samples, skin scrapings from under a suspect's fingernail. All of the cells will bear a unique imprint."

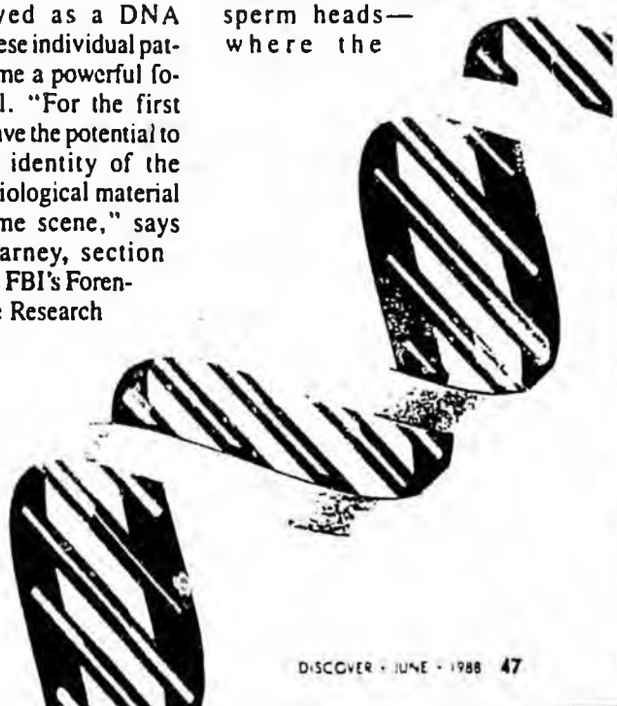
DNA looks like a sleek double-stranded spiral—the double helix. Its two strands are made up of four chemical building blocks—adenine (A), cytosine (C), guanine (G), and thymine (T)—that are strung together in unfathomable permutations, like AACTTCCTTATG TGTTTGGTATTTGGGGT TTATTTGGGTTCCCCT.

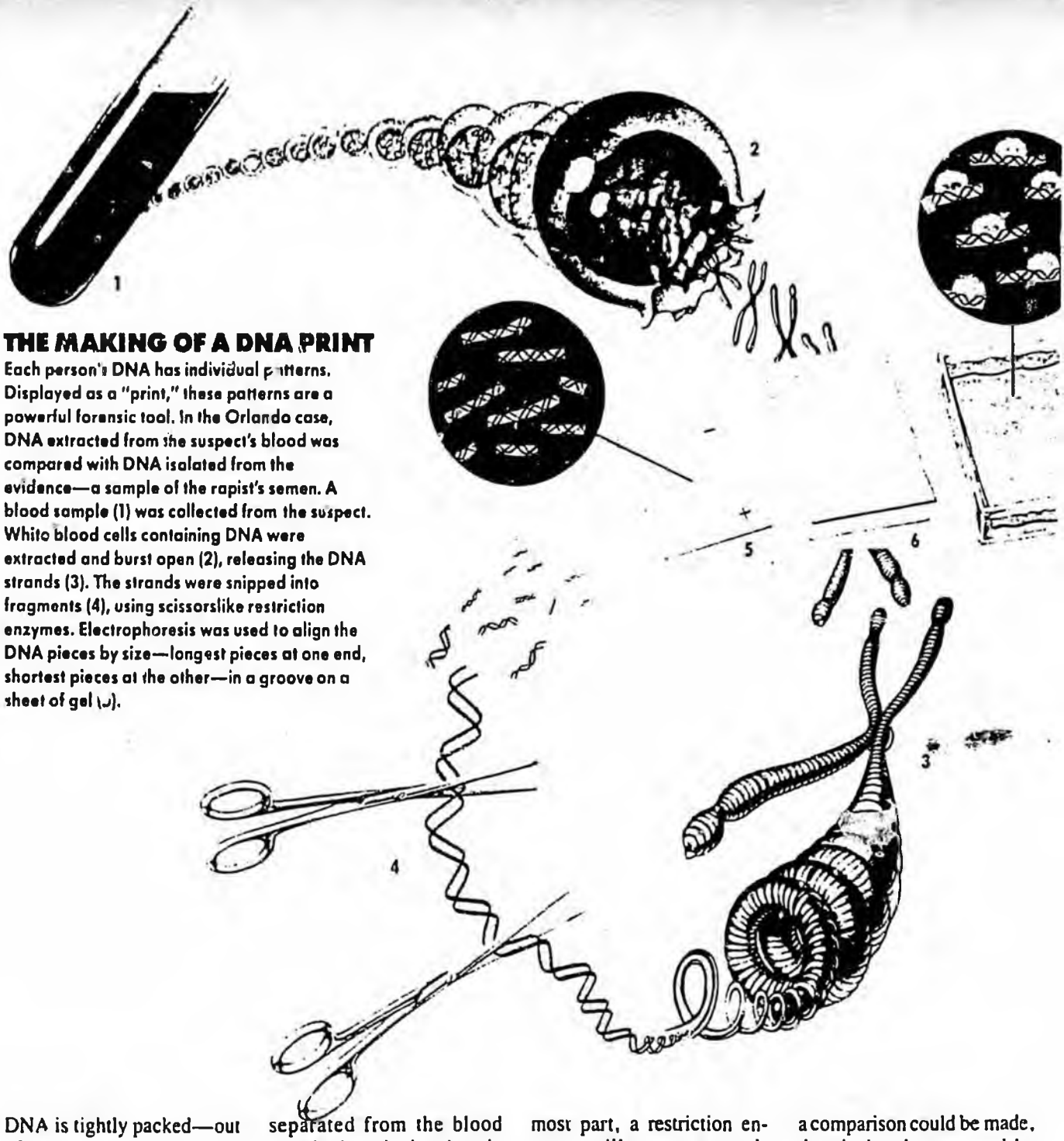
The two strands are held together by pairings of these building blocks—somewhat like the two sides of a ladder are held together by its rungs. A simple rule determines how the building blocks pair up: A invariably joins with T, C always joins with G. Because of this neat arrangement, the sequence of building blocks on one strand is faithfully complemented by the sequence of building blocks on the other strand. These incredibly long sequences of DNA contain an awesome amount of information. They spell out all the instructions needed for making a human being.

Long stretches of this DNA, not surprisingly, remain the same from person to person—we all have a head, a heart, legs, arms, and so on. But certain areas of the DNA vary dramatically from one individual to another. In these areas, short sequences of "junk DNA," whose function is not clearly understood, repeat themselves over and over again, like a kind of stutter. It's these highly variable, or polymorphic, regions that allow us to establish identity, explains Baird. Because of them, the DNA from no two people (with the exception of identical twins) breaks down into precisely the same pattern.

Displayed as a DNA "print," these individual patterns become a powerful forensic tool. "For the first time, we have the potential to prove the identity of the source of biological material at the crime scene," says James Kearney, section chief of the FBI's Forensic Science Research and Training Center in Quantico, Virginia. Biochemical forensic techniques traditionally used are not nearly as specific. These tests rely on the fact that certain blood-group substances and protein markers are found in both blood and semen. Crime lab serologists can therefore compare semen samples found on the victim or her clothing with samples of the suspect's blood and look for matching patterns. But serologists can only narrow down the number of people with a particular combination of markers to a certain percentage of the population. They can exclude a falsely accused man or suggest that a suspect could be guilty with a certain probability—but they cannot positively nail him.

On August 11 Baird and Alan Giusti, a Lifecodes forensic scientist, analyzed the vaginal swab collected within an hour of Hodge's rape and the blood samples from Hodge and from the suspect. First Giusti determined that the semen on the swab could provide enough DNA. (The test requires about 300,000 intact sperm heads—where the






## THE MAKING OF A DNA PRINT

**Each person's DNA has individual patterns. Displayed as a "print," these patterns are a powerful forensic tool. In the Orlando case, DNA extracted from the suspect's blood was compared with DNA isolated from the evidence—a sample of the rapist's semen. A blood sample (1) was collected from the suspect. White blood cells containing DNA were extracted and burst open (2), releasing the DNA strands (3). The strands were snipped into fragments (4), using scissorslike restriction enzymes. Electrophoresis was used to align the DNA pieces by size—longest pieces at one end, shortest pieces at the other—in a groove on a sheet of gel (5).**

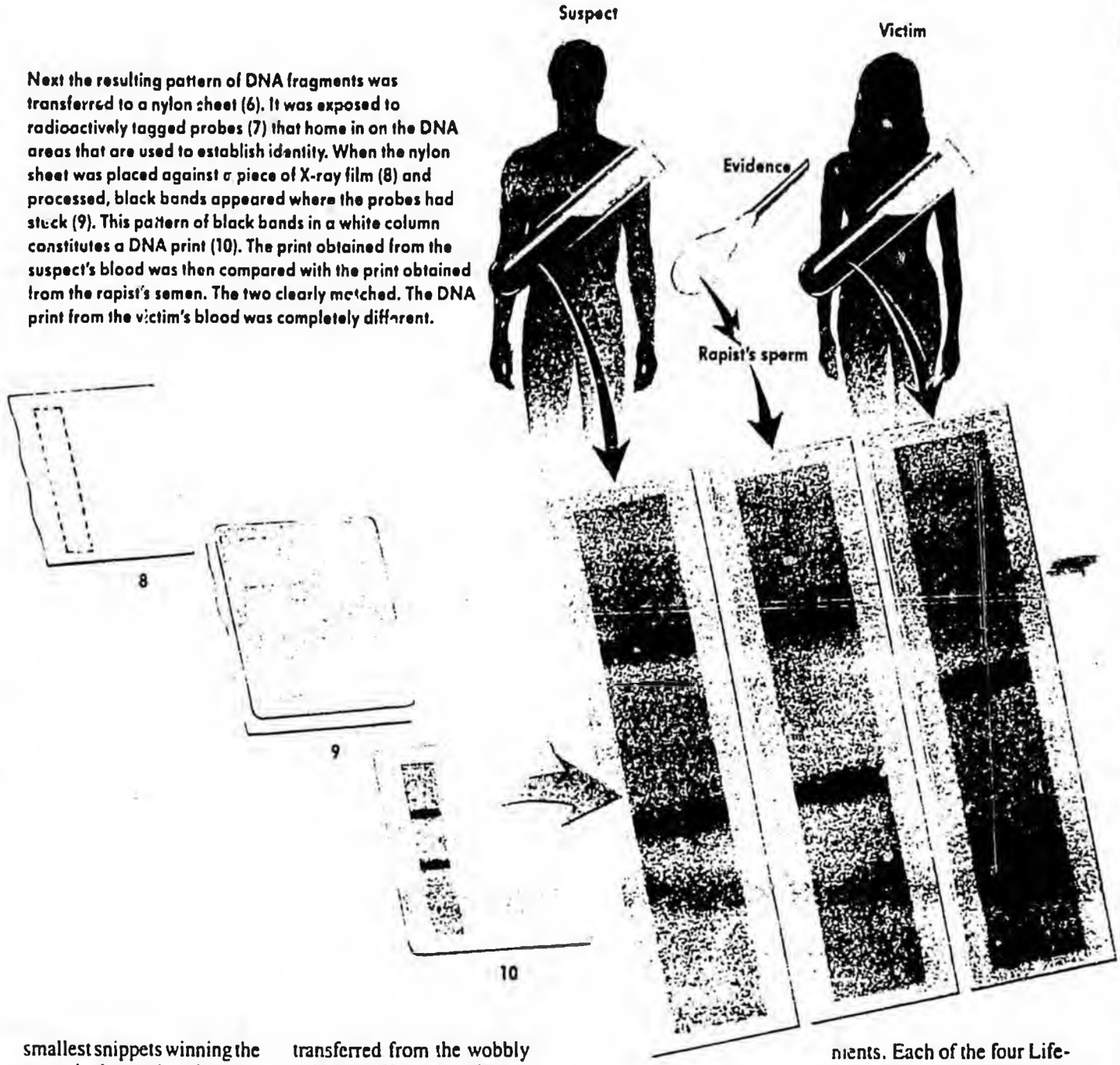
DNA is tightly packed—out of an average of 400 million to 500 million sperm per ejaculate). The cotton end of the swab was soaked in detergent to wash off the sperm and selectively destroy the vaginal cells. Next the sperm heads were chemically burst open to release the tangled strands of DNA. A solvent was used to isolate the DNA from the cell membranes and other cellular debris.

Giusti then turned his attention to the blood samples. The large, blobby white cells that contain the DNA were separated from the blood samples by spinning them in a centrifuge. Then these cells were burst open and their DNA isolated.

The different samples of DNA (from the suspect's blood, the victim's blood, and the rapist's semen) were cut apart with restriction enzymes. These "molecular scissors" snip strands of DNA wherever they recognize a specific sequence of building blocks (for example, the restriction enzyme Pst I always cuts at the sequence CTGCAG). For the most part, a restriction enzyme will cut everyone's DNA in the same places, and therefore into same-size fragment lengths. But in every person's DNA, units of repetitive "junk DNA" periodically turn up; in those areas the cut points get shifted, and as a result, the fragment lengths vary. These highly individual fragment patterns can then be visualized on film and compared.

At this stage, though, the fragments from the three samples Giusti was analyzing were a mishmash. Before a comparison could be made, they had to be arranged by size. This was done with one of molecular biology's most common tools, gel electrophoresis. The cut DNA was placed in a groove at one end of a sheet of a gelatinous substance called agarose. An electric current was then used to drive the pieces across the gel.

This is how the process works: DNA carries a negative charge, and a positive electric pole is placed at the far end of the gel sheet. The DNA pieces head for it, the




**Next the resulting pattern of DNA fragments was transferred to a nylon sheet (6). It was exposed to radioactively tagged probes (7) that home in on the DNA areas that are used to establish identity. When the nylon sheet was placed against a piece of X-ray film (8) and processed, black bands appeared where the probes had stuck (9). This pattern of black bands in a white column constitutes a DNA print (10). The print obtained from the suspect's blood was then compared with the print obtained from the rapist's semen. The two clearly matched. The DNA print from the victim's blood was completely different.**

ILLUSTRATION BY JOHN GARRETO

smallest snippets winning the race, the larger, heavier ones mired closer to the starting line. By the end of the race the fragments are neatly separated by size, but they cannot be seen—somewhat like conventional fingerprints before they are dusted.

Giusti next used a chemical to split apart the double-stranded DNA fragments. The process "unzips" each fragment into two strands, leaving their chemical bases A, C, G, and T exposed like teeth on an open zipper. The fragment pattern was then transferred from the wobbly gel to a stiffer nylon sheet.

The next step was to zero in on the parts of the DNA pattern that are unique to each individual. To do this, Giusti exposed the nylon sheet to a series of four "probes" that had each been labeled with a radioactive tag. These probes are actually short sequences of lab-made DNA that stick wherever they find their complementary sequences on the DNA strands. (Since A binds to T, and C to G, a probe with the sequence ATCGTA would bind to the sequence TAGCAT. Or, to continue the zipper analogy, when a probe finds its matching piece of DNA, the two pieces "zip" together.)

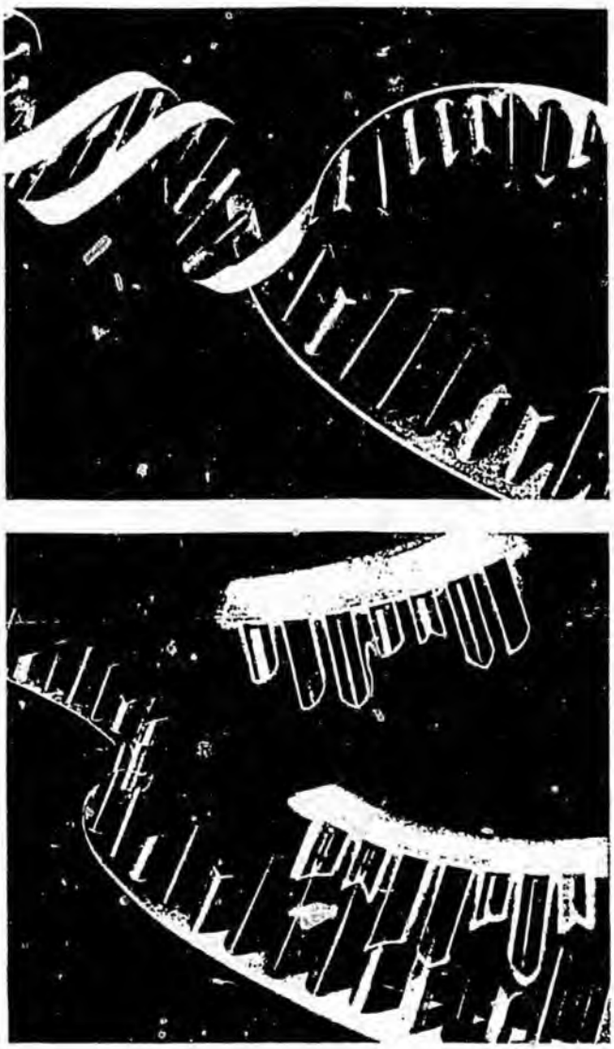
The stage was now set for developing the DNA print. The nylon sheet was placed against a piece of X-ray film and exposed for several days. When the film was processed, black bands appeared where the radioactive probes had stuck to the fragments. Each of the four Lifecodes probes produces an average of two dark bands in an off-white column. Since fragment patterns vary from person to person, the bands appear in different positions in the columns, looking something like bar codes on cereal boxes. This band pattern is the DNA print, and each person's is as individual as the prints on his fingers.

By early October the DNA prints from all three samples in the Hodge case were ready. When Baird compared them, the bar codes from Andrews's

blood matched, band for band, the bar codes from the sperm sample. (The bar codes from the victim's blood, on the other hand, looked completely different.) The evidence was even more compelling when he consulted Lifecodes' data base, which calculates how frequently a pattern could conceivably appear. The frequency of Andrews's pattern was one in 10 billion. "In a world population of just over five billion, he's the only guy who could have left his semen there," says Baird.

Berry had his evidence. On October 20, 1987, Andrews stood trial for the sexual assault on Hodge. But this was no ordinary rape trial. DNA fingerprinting was on the stand just as much as Andrews.

**"We all felt like we were back in science class," recalled a 63-year-old juror.**



DNA strands are unzipped (top) and exposed to lab-made DNA probes that stick where they find their matching sequence.

When a new scientific test is used as evidence in a trial, it must first meet the so-called Frye standard: the judge must be convinced that the technology involved is "sufficiently established to have gained general acceptance in the particular field in which it belongs." This usually requires a pretrial hearing, with no jury present, in which lawyers from both sides argue the reliability and reputation of the new technology, with the aid of expert scientific witnesses. Such a hearing took place on Monday, October 19. Housman, Berry's expert witness, told the judge that DNA fingerprinting is a familiar technique in genetic research. "We do it routinely, roughly five to ten times a day in my laboratory," said Housman, "and it's done on a similar basis in laboratories around the world." The judge ruled that the DNA evidence was admissible. On Tuesday the four-man, two-woman jury was selected, and on Wednesday morning the jurors began hearing the evidence.

Berry led the prosecution. When it was Housman's turn to testify, he repeated the basic genetics lesson he'd given at the pretrial hearing. A nervous Hodge took the stand and identified Andrews as the man who had attacked her 17 months earlier. Later, when Andrews testified, he denied ever leaving his apartment on the evening of May 9, 1986. It was a classic rape case, with the word of the victim pitted against the word of the suspect.

Thursday's proceedings opened with Lifecodes' Giusti and Baird. Using charts to illustrate the DNA fingerprinting procedure, they walked the jury members through each stage of the test. Finally, on a light box, Baird displayed the X-ray photographs, or autoradiographs, of the DNA patterns. They clearly showed that the DNA from Andrews's blood sample matched the DNA of the sperm found on the victim.

So far, everything had gone more or less Berry's way. Hodge was holding up well under pressure. The expert witnesses were doing fine. But when Berry asked Baird to explain to the jury the one-in-10-billion statistic that supported the DNA test results, the defense lawyers objected. Berry was caught off guard. He hadn't expected the defense to challenge him on the admissibility of the statistical evidence, and he didn't have a strong legal counterargument prepared. He decided to withdraw the figure. Later Berry felt that this was what hurt them. The jury was unable to reach a verdict, and the judge declared a mistrial. Afterward Berry learned that one juror, an engineer, was quite forceful in his objections to accepting the technology.

It was a major blow to the prosecution and a bitter shock to Hodge. Until that point it had never even occurred to her that Andrews might not be convicted. For the first time it dawned on her that the man who had raped her, the man now sitting across the courtroom, might be given his freedom, and the thought both angered and frightened her. Above all, she was devastated that some jurors had apparently doubted her word. Her own testimony, she felt, had been somewhat upstaged by all the attention given to DNA. She had hoped that the trial would be the end of her ordeal. Now there would be a retrial.

Two weeks after the mistrial, on November 3, Andrews was in court again to stand trial for the rape he was accused of committing in February 1987. Berry, who was stricken with a bad case of the flu, watched his colleague Ashton lead the

ILLUSTRATIONS BY IAN WORPOLE

prosecution. Drawing on research they had done between the two trials, the prosecutors were able to establish the legal precedence of using statistics to back up forensic test results. When DNA evidence was introduced at this trial, it had the added weight of the statistics. In addition, there were conventional fingerprints to bolster the case. On November 6 the jury returned a verdict of guilty. Andrews was sentenced to 22 years. He became the first man in the United States to be convicted of a crime with the help of DNA evidence.

The retrial of Hodge's case began on Tuesday, February 2, 1988. On the witness stand Hodge was determined to convince this jury that there was no question she knew who her assailant was. She looked straight at Andrews and told the jurors, "There's no doubt that it's him." In his 20 minutes of testimony Andrews stuck to his story that he never left home the night of May 9, 1986. His girlfriend and her sister backed his alibi.

On Thursday DNA testing once again took center stage. Pointing to their charts and diagrams, Housman and Baird led the new group of jurors through the procedure. "We all felt like we were back in science class," a 63-year-old juror said afterward. Baird then presented the autoradiographs showing the DNA patterns found in the victim's blood, the suspect's blood, and the semen sample. Concentrating intently, the jury compared the DNA band patterns in one column with the band patterns in the next, figuring out the test results for themselves. "You didn't need a Ph.D. to see that the pattern in Andrews's blood matched the pattern in the semen on the swab," Baird recalls.

When Berry asked Baird to tell the jury what percentage of the population would have this particular DNA pattern, Baird responded .00000001 percent. "In other words, one in ten billion people would have it," he explained.

The defense lawyers had not been able to find expert witnesses to challenge the test. But they attempted to question its reliability on the basis that not *all* of Andrews's DNA had been analyzed. "I tried to get across to the jury that we didn't need to look at the entire DNA molecule," recalls Baird. "We needed only to look at the *highly variable* regions. For example, if we tried to identify people by the number of arms, legs, and fingers they have, we wouldn't be able to differentiate between them easily. But if we looked at their eye color, hair color, whether or not their skin is freckled, we could distinguish them easily."

On Friday the six jurors met for 90 minutes. After a final review of the DNA prints, they returned to the packed courtroom and delivered the verdict: Andrews was guilty.

On Monday morning, in a courtroom jammed with reporters and TV camera crews, the judge handed down his sentence. Tommie Lee Andrews received concurrent terms of 78 years for sexual battery, 22 years for armed burglary, and 15 years for aggravated battery. Added to the 22-year sentence he'd received in the other rape trial, Andrews would serve 100 years.

For the DNA fingerprinting technique, however, the trial is far from over. Each time a prosecutor chooses to use DNA evidence, he will have to repeat the process of convincing the judge of the technique's "general acceptance" in the scientific community. Only when it's been admitted in court many times will the pretrial hearings become unnecessary—and then only in the states where the hearings were held. The law is designed to protect defendants against a jury's being overly impressed by experts and scientific techniques before they've been shown to be truly reliable.

The acceptance process, however, is beginning. Since the Andrews verdict, seven rape and murder trials in the United States have resulted in convictions based on DNA fingerprinting. The evidence from at least another 100 criminal cases is being tested with a view to going to cour (In Britain DNA fingerprin ing has resulted in convic tions in eight criminal case But its main use there ha been in immigration dis putes, in which DNA testin is routinely called upon t resolve questions abou blood-relatedness betwee family members.)

"I think it's going to revo lutionize forensic biology i the same way that fingerprint ing did in the early 1900s," says Michael Baird. His nor mally sober face lights up. "I you're a criminal, it's like leaving your name, address, and social security number at the scene of the crime. It's that precise." C

Geneticist Alec Jeffreys pioneered DNA fingerprinting, which wa first used to solve a British rape case.

PHOTOGRAPH COURTESY CELLMARK DIAGNOSTICS

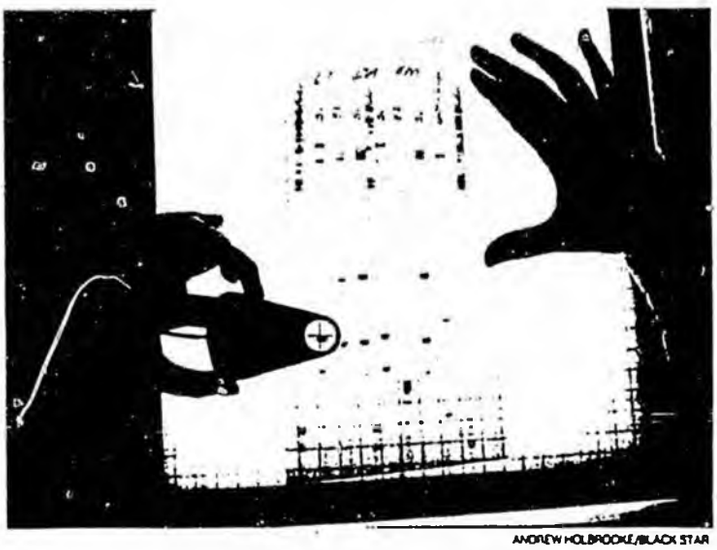
*Ricki Lewis, a biologist at the State University of New York at Albany, wrote about drugs from the sea in the May issue.*

# DNA Detectives

*Genetic 'fingerprinting' may herald a revolution in law enforcement.*







ANDREW HOLBROOKE/BLACK STAR

*A forensic scientist compares displays of the DNA codes for suspects in different rape cases.*

**By Stephen G. Michaud**

THERE WERE TWO things that the police in Pierce County, Wash., believed for a certainty last year about the rape suspect Alan J. Haynes: One, Haynes was guilty and two, they'd never be able to prove it. A 35-year-old bus driver for an adult day-care facility in a rural area south of Seattle, Haynes was accused of the sexual assault of one of his passengers. The 57-year-old victim was afflicted with Alzheimer's disease, which rendered her incapable of identifying her attacker, or testifying against him in court.

County Deputy Prosecutor Barbara Corey-Boulet had no witness to the crime, and no physical evidence except a semen sample recovered from the victim. A standard serological blood-type analysis of Haynes's blood and semen indicated merely that he — as well as one-fifth of all the rest of the males in the state — might have committed the rape. "He was adamant that he didn't do it," says Corey-Boulet, "and we had no way to solve the crime."

No way, that is, until Corey-Boulet sent the tissue evidence to Lifecodes Corporation in Valhalla, N.Y. There, scientists subjected it to a state-of-the-art forensic technology commonly referred to as genetic fingerprinting. After a month of testing, Lifecodes reported that the semen sample could have come from only 1 in 3.5 million people — statistical proof that the sample belonged to Alan Haynes. So conclusive were the results that Haynes's attorney could find no expert willing to dispute them. His distressed client pleaded guilty as charged, and is now serving 10 years in the Washington state prison system.

Alan Haynes was positively linked to his crime by his DNA, deoxyribonucleic acid, the master molecule of life, which carries the complete human genetic code and is contained within virtually every human cell. Since last year, Haynes and a rapidly expanding number

*Stephen G. Michaud writes frequently about forensic science.*