

ALASKA LEGISLATURE COMMITTEE FILES 1995-1996 8672

8585 HOUSE JUDICIARY

Representative Brian Porter
January 24, 1995
Page 2

An attempt to commit any of the above crimes that is a felony under AS 11.31.100 would also be a "sex offense" or a "violent offense"

GPL:klb
95-004.klb

AMENDMENT

OFFERED IN THE HOUSE

TO: HB 27

1 Page 1, line 3:

2 Delete "felony"

3 Page 1, line 3, following "sex offense":

4 Insert "or a violent offense"

5 Page 1, line 13:

6 Delete "sex"

7 Insert "criminal"

8 Page 2, line 7, following "sex offense":

9 Insert "or a violent offense"

10 Page 2, line 10:

11 Delete "a sex offense"

12 Insert "criminal offenses"

13 Page 2, line 21:

14 Delete "received"

15 Insert "receive"

16 Page 3, line 3, following "section,":

17 Delete all material and insert:

18 "(1) "sex offense" means a crime, or a felony attempt to commit a crime,
19 under AS 11.41.410 - 11.41.438, 11.41.450, or 11.41.455;

1 (2) "violent offense" means a crime, or a felony attempt to commit a
2 crime, under AS 11.41.100 - 11.41.140, 11.41.200 - 11.41.220, 11.41.300, 11.41.500,
3 AS 11.46.300, 11.46.400, or AS 11.56.300.

4 * **Sec. 3. APPLICABILITY.** This Act applies to all convictions occurring on or after the
5 effective date of this Act for a sex offense or a violent offense, as those terms are defined in sec.
6 2 of this Act."

7 Renumber the following bill section accordingly.

① Request for
Use in Analysis
- Parnell
②

(1) Request
for...
for...
the...

HOUSE BILL NO. 27

IN THE LEGISLATURE OF THE STATE OF ALASKA

NINETEENTH LEGISLATURE - FIRST SESSION

BY REPRESENTATIVES PARNELL, B.Davis, Porter

Introduced: 1/16/95
Referred: Judiciary, Finance

A BILL

FOR AN ACT ENTITLED

1 "An Act directing the Department of Public Safety to establish and maintain a
2 deoxyribonucleic acid (DNA) identification registration system and requiring DNA
3 registration by persons convicted of a felony sex offense; and providing for an
4 effective date."

Certain felony offenses

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

6 * Section 1. LEGISLATIVE FINDINGS. The legislature finds that

7 (1) recent developments in molecular biology and genetics have important
8 applications for forensic science; it has been scientifically established that there is a unique
9 pattern to the chemical structure of the deoxyribonucleic acid (DNA) contained in each cell of
10 the human body; the process for identifying this pattern is called "DNA identification"; and

11 (2) the accuracy of identification provided by this method is superior to that of
12 any presently existing technique and recognizes the importance of this scientific breakthrough
13 in providing a reliable and accurate tool for the investigation and prosecution of sex offenses.

prosecution of offenses
prosecution of off
Why

1 * Sec. 2. AS 44.41 is amended by adding a new section to read:

2 Sec. 44.41.035. DNA IDENTIFICATION SYSTEM. (a) To support criminal
3 justice services in this state, the Department of Public Safety shall establish a
4 deoxyribonucleic acid (DNA) identification registration system. The DNA identification
5 registration system as established shall be compatible with that utilized by the Federal
6 Bureau of Investigation.

7 (b) A person convicted in this state of a violent felony offense shall have a blood sample
8 drawn for purposes of DNA identification analysis. A blood sample taken under this
9 section may be used only for the purpose of providing DNA or other blood grouping tests
10 for identification analysis or for the prosecution of a sex offense. ~~and prosecution of a sex offense.~~ *Criminal*

11 (c) The Department of Public Safety may provide

12 (1) DNA analysis services to law enforcement agencies throughout the
13 state;

14 (2) assistance to law enforcement officials and prosecutors in the
15 preparation and utilization of DNA evidence for presentation in court; and

16 (3) expert testimony in court on DNA evidentiary issues.

17 (d) Except as provided in (e) of this section, a local law enforcement agency may
18 not establish or operate a DNA identification registration system unless

19 (1) the equipment of the local system is compatible with that of the state
20 system under (a) of this section;

21 (2) the local system is equipped to receive and answer inquiries from the
22 department's DNA identification registration system and transmit data to the department's
23 DNA identification registration system; and

24 (3) procedure and rules for the collection, analysis, storage, expungement,
25 and use of DNA identification data do not conflict with procedures and rules applicable
26 to the department's DNA identification registration system.

27 (e) Nothing in (d) of this section prohibits a local law enforcement agency from
28 performing DNA identification analysis in individual cases to assist law enforcement
29 officials and prosecutors in the preparation and use of DNA evidence for presentation in
30 court.

31 (f) DNA identification data may not be used for any purpose that is not related

1 to a criminal investigation or to improving the operation of the system authorized by this
2 section.

3 (g) In this section, "sex offense" has the meaning given in AS 12.63.100.

4 * Sec. 3. This Act takes effect January 1, 1996.

**DIVISION OF LEGAL SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA**

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101


130 Seward Street, Suite 409
Juneau, Alaska 99801-2105

MEMORANDUM

January 24, 1995

SUBJECT: DNA Database - CSHB 27(), dated 1/24/95
(Work Order No. 9-LS0148\C)

TO: Representative Sean Parnell
Attn: Richard

FROM: Gerald P. Luckhaupt 
Legislative Counsel

Enclosed is the bill draft you requested. Since we expanded the list of crimes requiring testing from sex offenses to all felonies in AS 11.41 (except custodial interference) and arson in the first degree, instead of defining these offenses as "sex or violent offenses" (as I have done in this draft) you may want to consider renaming these offenses "crimes against a person". I believe that term would more accurately reflect the types of offenses that we are now including. AS 11.41 is entitled "crimes against a person" and arson in the first degree requires a danger or threat to a person.

GPL.lmb
95-085.lmb

Enclosure

AMENDMENT

OFFERED IN THE HOUSE

TO: HB 27

1 Page 1, line 3:

2 Delete "felony" *-Why?*

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2 crime, under AS 11.41.100 - 11.41.140, 11.41.200 - 11.41.220, 11.41.300, 11.41.500,
3 AS 11.46.300, 11.46.400, or AS 11.56.300.

4 * Sec. 3. APPLICABILITY. This Act applies to all convictions occurring on or after the
5 effective date of this Act for a sex offense or a violent offense, as those terms are defined in sec.
6 2 of this Act."

7 Renumber the following bill section accordingly.

120 Wash.2d 879

1879The STATE of Washington,

Respondent,

v.

Richard C. CAUTHRON, Appellant.

No. 58282-3.

Supreme Court of Washington,
En Banc.

Feb. 25, 1993.

Defendant was convicted in the Superior Court, Snohomish County, Gerald L. Knight, J., of multiple counts of rape, and he appealed. On certification from the Court of Appeals, the Supreme Court, Durham, J., held that: (1) evidence regarding restricted fragment length polymorphism method of DNA typing is admissible, but (2) testimony that rape defendant's DNA "matched" perpetrator's was erroneously admitted, in that it was unsupported by valid probability statistics.

Reversed and remanded.

Dore, C.J., dissented and filed opinion in which Utter, J., joined.

1. Criminal Law \S 388(1)

Novel scientific evidence will be admitted only if it is generally accepted in relevant scientific community.

2. Criminal Law \S 1139

Trial court's decision to admit or exclude novel scientific evidence is reviewed de novo; appellate court examines record, available literature of law reviews and other journals, and cases of other jurisdictions.

3. Criminal Law \S 388(1)

Once Supreme Court has made determination that specific novel scientific theory or principle is generally accepted by scientific community, trial courts can generally rely upon that determination as setting that theory's admissibility in future cases; however, trial court must still undertake *Frye* analysis if one party produces new evidence which seriously questions continued general acceptance or lack of acceptance as to that theory within relevant scientific community.

4. Criminal Law \S 388(1)

If particular scientific technique sufficiently accepted in scientific community at large, it is admissible, and any question about possibility of error or mistake made in case at hand can be argued by finder.

5. Criminal Law \S 469.1, 478(1)

Once it is determined that particular scientific evidence is sufficiently accepted in scientific community at large, court must analyze whether testimony is proper, testimony, i.e., whether witness qualified expert and whether expert testimony will be helpful to trier of fact. ER 702

6. Criminal Law \S 1153(1)

Although trial court's *Frye* determination, that novel scientific evidence is admissible in relevant scientific community, viewed de novo, trial court's finding that expert's testimony is admissible as to fact finder is reviewed for abuse of discretion. ER 702.

7. Criminal Law \S 388(2)

Scientific principle and restricted fragment length polymorphism method of DNA typing are universally accepted in relevant scientific community, and thus are admissible; problems concerning quality of testimony in any particular case go to weight rather than admissibility of testimony.

8. Criminal Law \S 486(8)

Testimony that rape defendant's DNA "matched" perpetrator's was erroneously admitted, in that it was unsupported by valid probability statistics.

9. Arrest \S 63.4(15, 16)

Police had probable cause to arrest rape suspect found hiding in bushes beside fast food restaurant at 2:45 p.m. morning with his genitals exposed. U.S.C.A. Const.Amend. 4.

10. Searches and Seizures \S 164

Rape suspect had no expectation of privacy in gun, gloves and mask found partially concealed under bushes in public place, near where suspect was arrested and thus could not complain that such a

Law \S 388(1)

Particular scientific techniques are accepted in scientific community is admissible, and any concern of probability of error or mistakes being at hand can be argued to fact

Law \S 469.1, 478(1)

It is determined that particular evidence is sufficiently accepted in community at large, court must determine whether testimony is proper expert testimony, whether witness qualifies as expert, whether expert testimony would be a trier of fact. ER 702.

Law \S 1153(1)

In trial court's *Frye* determination of scientific evidence is accepted in scientific community, is relevant, trial court's finding that expert testimony is admissible as helpful is reviewed for abuse of discretion. ER 702.

Law \S 388(2)

Principle and restricted fragment length polymorphism method of DNA typing are universally accepted in relevant community, and thus are admissible. Concerning quality of testing, particular case go to weight rather than reliability of testimony.

Law \S 486(8)

That rape defendant's DNA fingerprinting was erroneously admitted and that it was unsupported by probability statistics.

CR (15, 16)

Probable cause to arrest defendant found hiding in bushes outside restaurant at 2:45 in the afternoon when his genitals exposed. Const. Amend. 4.

and Seizures \S 164

Defendant had no expectation of privacy in gloves and mask found under bushes in public area where suspect was arrested, and defendant cannot complain that such arti-

facts were improperly seized. U.S.C.A. Const. Amend. 4.

II. Criminal Law \S 577.5

Trial in statutorily allotted time for speedy trial is not constitutionally required, and trial court had discretion to grant continuances. U.S.C.A. Const. Amend. 6; CrR 3.3(c)(1), (g)(3), (h)(2).

12. Criminal Law \S 577.12(2)

Granting of continuances which were necessary so that state could obtain DNA evidence did not deprive rape defendant of his statutory right to speedy trial; continuances requested by defendant were granted as well and no harm was done to defendant's case in the interim. CrR 3.3(c)(1), (g)(3), (h)(2).

13. Criminal Law \S 1134(3)

When reviewing exceptional sentence, appellate court asks whether reasons given are supported by record, whether reasons justify departure, and whether sentence is clearly excessive.

14. Criminal Law \S 1208.6(1)

Imposition of exceptional sentences on rape defendant was not abuse of discretion; victims' youth rendered them exceptionally vulnerable to assault, victims were raped multiple times, and victims were forced to submit to being photographed and were threatened with publication of pictures.

¹⁸⁸² Peter T. Connick, Seattle, for appellant.

¹⁸⁸³ Seth R. Dawson, Snohomish County Prosecutor, Seth Aaron Fine, Paul Stern, Deputies, Everett, for respondent.

Jon E. Ostlund, Whatcom County Public Defender, Bellingham, amicus curiae for appellant.

Christine O. Gregoire, Atty. Gen., S. Kim O'Neal, Asst., Olympia, amicus curiae for respondent.

Philip A. Talmadge, Robert G. Nylander, Seattle, amicus curiae for respondent on behalf of Cellmark Diagnostics.

DURHAM, Justice.

Richard Cauthron appeals his conviction on seven counts of first degree rape. He

argues that evidence of DNA typing was improperly admitted at trial. We affirm the trial court's decision that the scientific principle and the restricted fragment length polymorphism (RFLP) method of DNA typing are universally accepted, and therefore admissible. However, we reverse the conviction because testimony that Cauthron's DNA "matched" the perpetrator was admitted in error, in that it was unsupported by valid probability statistics. We remand for further consideration of the statistical evidence in accordance with our opinion.

In 1986 and 1987, a series of 20 to 25 rapes were committed in Everett under similar circumstances. In some of the cases, the perpetrator would come up to his victim's car ¹⁸⁸³ while she was at a stop and force her to move over at gunpoint. In others, the perpetrator would come up behind the victim and lead her to his own car. In each instance, the rapist wore a mask and cloth gloves, and carried a small black handgun.

Generally, the victim would be forced to undress totally. She would then be directed to use her own clothing to blindfold herself. The rapist would often touch his victim's breasts and genitals, and then force her to perform oral sex on him at gunpoint (except in one case, where he vaginally raped his victim). The perpetrator would then order his victim to pose while he took pictures of her, and would threaten to show the pictures all around town if she told anyone about the crime.

In the early morning hours on October 14, 1988, Everett police received a call that a man was seen in the bushes at a fast food restaurant wearing a ski mask and masturbating. When an officer reached the scene, he discovered Cauthron in the bushes. His pants were undone, except for the top button, and the officer could see the defendant's pubic hair and part of his penis. A search of the bushes turned up a ski mask, a pair of green wool gloves, and a black gun that turned out to be a plastic replica. Cauthron's car was found about two blocks away with the keys in the ignition and the door partially open. The offi-

cers on the scene believed that Cauthron was the serial rapist they were looking for. Cauthron was handcuffed and taken to the police station for further questioning. At the station, he consented to give a blood sample which was used for conventional and DNA blood testing. He also allowed police to search his car. He was fingerprinted and released that same day. After further investigation, Cauthron was charged with seven counts of rape.

Prior to trial, in late February and early March 1989, the court held a lengthy hearing to decide the admissibility of DNA typing evidence. Under the *Frye* standard for novel evidence, scientific evidence will be admitted only if it is generally accepted in the relevant scientific community. See ¹⁹⁸⁴*Frye v. United States*, 293 F. 1013, 1014, 34 A.L.R. 145 (D.C.Cir.1923). The State offered four witnesses to prove the acceptability of DNA testing: Robin Cotton, Ph.D. Molecular Biology and Biochemistry, manager of Research and Development at Cellmark, the forensic DNA laboratory used to test Cauthron's blood; Pat Concannon, Ph.D. Biology, Virginia Mason Research Center; Gerard Schellenberg, Ph.D. Biochemistry, University of Washington School of Medicine; and Ellen Wijsman, Ph.D. Theoretical Genetics, University of Washington.¹ The defense offered five witnesses to show that DNA evidence should not be admitted: Simon Ford, Ph.D. Biochemistry, University of California at Irvine; Randy Libby, Ph.D. Genetics, University of Washington; William Thompson, Ph.D. Psychology, J.D., University of California, Irvine; Laurence Mueller, Ph.D. Ecology, Population Geneticist, University of California, Irvine; and Seymour Geisser, Ph.D. Mathematical Statistics, University of Minnesota.

The trial court found that both the scientific principle of DNA and the RFLP process (discussed below) are universally accepted in the scientific community. As to the additional problems raised by defense witnesses with respect to the laboratory procedures used here and the validity of

the statistical evidence, the trial court ruled that those issues went to the weight rather than the admissibility of the testimony. The court denied defendant's motion to suppress the DNA evidence.

At trial, DNA typing evidence was introduced through expert testimony by both the State and the defense. The testimony showed that there was a "match" in five of the seven cases between the semen recovered from the clothing of the victims or the crime scene and Cauthron's blood.

The State also introduced the testimony of the victims, although none was able to identify her assailant. In addition, more traditional blood tests were admitted through expert testimony. Because of a rare enzyme present in ¹⁹⁸⁵several samples of the rapist's semen, the expert testified that less than 1 percent of the population could have deposited the semen. Cauthron's blood was found to contain this particular enzyme. Cauthron was convicted of all seven counts. He was sentenced to 68 months on five of the seven counts, and an exceptional sentence of 136 months was given in two of the counts, to be served consecutively under RCW 9.94A.400(1)(b).

Cauthron appealed and we accepted certification from the Court of Appeals. After oral argument, but before the court issued its opinion, we requested additional briefing on the applicability of a National Academy of Sciences document: Committee on DNA Technology in Forensic Science, *DNA Technology in Forensic Science* (National Academy Press 1992) (hereinafter *DNA Technology*). A committee of eminent scientists and jurists (hereinafter Committee) exhaustively researched and analyzed the current status of forensic DNA typing.

Because of the complexity of the subject matter, an outline of our analysis may be helpful. We begin our opinion with an explication of the *Frye* standard for admissibility of novel scientific evidence, and we renew our longstanding adherence to that test. We then determine that the proper standard of review of the trial court's decision in that regard is de novo. In addition,

1. It should be noted that there were some differences between the experts presented for both

the State and the defense at trial and at the *Frye* hearing.

we recognize that once the *Frye* question is resolved, the admission of expert testimony is within the trial court's discretion. Under ER 702, expert testimony may be admitted if the witness qualifies as an expert and the expert testimony will be helpful to the jury.

We next review both the RFLP test for DNA typing, and the statistical evidence used to compute the significance of a "match" using the standards set forth above. First, we explain the RFLP procedure of DNA typing, and then determine that it is generally accepted in the scientific community, and therefore meets *Frye*. Second, we hold that the trial court acted within its discretion when it admitted the expert testimony pertaining to the RFLP test over defense objections that the evidence was unreliable.

We then turn to an examination of the statistical evidence. Upon review of the relevant sources, we find significant disagreement within the scientific community regarding the validity of the databases used to construct the probability estimates which ultimately determine identity. As a result we conclude that the expert testimony of a "match" was admitted in error, since it was not accompanied by statistical verification. We therefore reverse the conviction, but we remand for reconsideration of the statistical evidence in light of current scientific knowledge.

1. STANDARDS OF ADMISSIBILITY

[1] In Washington, we have adopted the standard for determining if evidence based on novel scientific procedures is admissible set forth in *Frye v. United States*, 293 F. 1013, 1014, 34 A.L.R. 145 (D.C.Cir. 1923). The rule is settled:

[E]vidence deriving from a scientific theory or principle is admissible only if that

2. Conversely, some commentators recommend that courts adopt the test from *United States v. Downing*, 753 F.2d 1224, 1238 (3d Cir.1985). There, the court fashioned a 3-part test focusing on the reliability of the procedure. Joseph G. Petrosinelli, Comment, *The Admissibility of DNA Typing: A New Methodology*, 79 Geo.L.J. 313 (1990-1991). We have consistently applied the *Frye* test, however. The *Frye* test is more con-

theory or principle has achieved general acceptance in the relevant scientific community.

State v. Martin, 101 Wash.2d 713, 719, 684 P.2d 651 (1984). Although we recognize that several jurisdictions have rejected the *Frye* test in favor of a more liberal test of admissibility based on the relevance standard of the Federal Rules of Evidence, we continue to employ it.² The classic statement of the test is found within *Frye* itself:

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 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, at 1014.

Under *Frye*, a court is to determine if the evidence in question has a valid, scientific basis. Because judges do not have the expertise required to decide whether a challenged scientific theory is correct, we defer this judgment to scientists. This inquiry turns on the level of recognition accorded to the scientific principle involved—we look for *general acceptance* in the appropriate scientific community. See *Jones v. United States*, 548 A.2d 35, 42 (D.C.1988). If there is a significant dispute between qualified experts as to the validity of scientific evidence, it may not be admitted.

[2, 3] We review the trial court's decision to admit or exclude novel scientific evidence de novo. A number of courts in other jurisdictions have adopted this approach. See *State v. Fenney*, 448 N.W.2d

servative than the reliability test; that is, the court is less inclined to admit evidence which is still disputed in the scientific community. See Edward W. Cleary, *McCormick on Evidence* § 203, at 607-09 (3d. ed. 1984). Thus, in making the initial determination to allow novel scientific evidence, we do not examine its reliability, but instead focus on whether it is generally accepted in the scientific community.

evidence, the trial court ruled that the issues went to the weight rather than the admissibility of the testimony. The defendant's motion to suppress the DNA evidence.

DNA typing evidence was introduced by the expert testimony by both the prosecution and the defense. The testimony established there was a "match" in five of the six samples between the semen recovered from the clothing of the victims or the defendant and Cauthron's blood.

The prosecution also introduced the testimony of several other witnesses, although none was able to identify the assailant. In addition, more blood tests were admitted in support of the expert testimony. Because of a "match" present in several samples of the defendant's semen, the expert testified that approximately 1 percent of the population would have deposited the semen. Cauthron was found to contain this profile. Cauthron was convicted on five of the seven counts, and received a sentence of 136 months on two of the counts, to be served consecutively under RCW 9A.04.010.

Cauthron appealed and we accepted certiorari from the Court of Appeals. After the appeal was argued, but before the court issued its decision, we requested additional briefs on the applicability of a National Academies document: Committee on Forensic Science, *DNA Typing in Forensic Science* (National Academies Press 1992) (hereinafter *DNA*).

A committee of eminent scientists (hereinafter Committee) researched and analyzed the scientific issues of forensic DNA typing.

Because of the complexity of the subject matter, the outline of our analysis may be summarized. We begin our opinion with an analysis of the *Frye* standard for admission of novel scientific evidence, and we discuss the longstanding adherence to that standard. We then determine that the proper standard of review of the trial court's decision is de novo. In addition,

we consider the defense at trial and at the *Frye* hearing.

54, 58 (Minn.1989); *Jones*, at 40 (citing cases). The standard of review of *Frye* determinations was discussed by a California court in *People v. Reilly*, 196 Cal. App.3d 1127, 242 Cal.Rptr. 496 (1987). There, the issue was whether to admit electrophoretic testing of dried bloodstains. Applying *Frye*, the court characterized the issue as a mixed question of law and fact. *Reilly*, at 1134, 242 Cal.Rptr. 496. The court said:

The issue, recently paraphrased as whether "a consensus of scientific opinion has been achieved" ... is factual but not entirely so for purposes of review. The trial court's determination cannot be sustained, for example, on a mere finding that the record contains "'sufficient evidence'" of the reliability of the challenged method.

The reviewing court undertakes a more searching review—one that is sometimes not confined to the record. Because it is impractical to parade a true cross-section of scientists before the court, the scientific literature may be considered on the ultimate issue of consensus.... Law articles, too, may be considered for that purpose.

¹⁹⁸⁸(Citations omitted.) *Reilly*, at 1134, 242 Cal.Rptr. 496. Decisions from other jurisdictions may be examined as well, but the relevant inquiry is the general acceptance by scientists, not by the courts. *Reilly*, at 1135, 242 Cal.Rptr. 496. In Washington, the court has previously examined "both the literature on the subject and the opinions of other jurisdictions for guidance." *State v. Black*, 109 Wash.2d 336, 342, 745 P.2d 12 (1987) (discussing the scientific literature pertaining to "rape trauma syndrome"); *Martin*, 101 Wash.2d at 721-22, 684 P.2d 651 (examining the literature on hypnosis). Thus, we examine the record, available literature of law reviews and other journals, and the cases of other jurisdictions.³

3. Once this court has made a determination that the *Frye* test is met as to a specific novel scientific theory or principle, trial courts can generally rely upon that determination as settling such theory's admissibility in future cases. However,

Cauthron urges us to adopt an alternative method of analyzing the admissibility of DNA typing, relied on by several courts in other jurisdictions. Some have ruled that even though the DNA test is reliable in a general sense (*i.e.*, it meets *Frye*), the forensic applications were not sufficiently reliable to be admissible. *See, e.g., United States v. Two Bulls*, 918 F.2d 56, 60-61 (8th Cir.1990), *vacated and appeal dismissed*, 925 F.2d 1127 (1991); *State v. Schwartz*, 447 N.W.2d 422, 428 (Minn. 1989); *see also* John Caleb Dougherty, Comment, *Beyond People v. Castro: A New Standard of Admissibility for DNA Fingerprinting*, 7 J.Contemp. Health L. & Pol'y 269 (1991). The most-often cited of this line of cases is a trial court opinion, *People v. Castro*, 144 Misc.2d 956, 959, 545 N.Y.S.2d 985 (Sup.Ct.1989). We do not agree with the approach advocated by the court there. *Castro*, 144 Misc.2d at 959, 545 N.Y.S.2d 985, employed a 3-part analysis:

Prong I. Is there a theory, which is generally accepted in the scientific community, which supports the conclusion that DNA forensic testing can produce reliable results?

Prong II. Are there techniques or experiments that currently exist that are capable of producing reliable results in DNA identification and which are generally accepted in the scientific community?

¹⁹⁸⁹*Prong III.* Did the testing laboratory perform the accepted scientific techniques in analyzing the forensic samples in this particular case?

The court answered the first inquiry, which it identified as a *Frye* issue, in the affirmative, holding that there was unanimous agreement among the scientists that DNA identification is capable of producing reliable results. *Castro*, at 963, 545 N.Y.S.2d 985. After explaining the testing procedures used in detail, the court examined particular problems in several areas. *Cas-*

trial courts must still undertake the *Frye* analysis if one party produces new evidence which seriously questions the continued general acceptance or lack of acceptance as to that theory within the relevant scientific community.

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tro, at 969-72, 545 N.Y.S.2d 985. It concluded, however, that the tests and procedures used are reliable and accepted in the scientific community. *Castro*, at 972, 545 N.Y.S.2d 985. Ultimately, though, the court determined that the testing laboratory (Lifecodes) "failed to conduct the necessary and scientifically accepted tests ..." *Castro*, at 977, 545 N.Y.S.2d 985. Insufficient controls were employed, and inconclusive tests were not redone. The court therefore excluded the challenged DNA typing tests. *Castro*, at 977-78, 545 N.Y.S.2d 985.

[4] The *Castro* analysis is inappropriate in jurisdictions utilizing the *Frye* standard of admissibility. The core concern of *Frye* is only whether the evidence being offered is based on established scientific methodology. This involves both an accepted theory and a valid technique to implement that theory. It is important to distinguish, however, between the general acceptance of the methodology, and the acceptance of the results of a particular study or of the laboratory testing procedures in the case before the court—prong 3 of the *Castro* analysis. The *Frye* test is concerned only with the former—prongs 1 and 2. If the particular technique is sufficiently accepted in the scientific community at large, any remaining concerns about the possibility of error or mistakes being made in the case at hand can be argued to the factfinder.

[5,6] In addition to the admissibility of the DNA evidence under *Frye*, the trial court must also analyze whether the admitted testimony was proper expert testimony. That is, once the *Frye* determination has been made, a party's objection to the evidence should be analyzed under the usual standards for admission of evidence. ER

4. We recognize that we have previously enunciated the test to be applied as a 3-part test. See *State v. Swan*, 114 Wash.2d 613, 655, 790 P.2d 610 (1990), cert. denied, — U.S. —, 111 S.Ct. 752, 112 L.Ed.2d 772 (1991); *State v. Allery*, 101 Wash.2d 591, 596, 682 P.2d 312 (1984). However, the second step of that test was a *Frye* determination. Because we review a *Frye* determination de novo, but review issues under ER 702 only for abuse of discretion, we find it inappropriate to include a *Frye* determination as part of

702, regarding expert testimony, provides as follows:

1990 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.

The determination of whether expert testimony is admissible is within the discretion of the trial court. Unless there has been an abuse of discretion, this court will not disturb the trial court's decision. *State v. Swan*, 114 Wash.2d 613, 655, 790 P.2d 610 (1990), cert. denied, — U.S. —, 111 S.Ct. 752, 112 L.Ed.2d 772 (1991).

The 2-part test to be applied under ER 702 is whether: (1) the witness qualifies as an expert and (2) the expert testimony would be helpful to the trier of fact.⁴ Part 2 of this standard should be applied by the trial court to determine if the particularities of the DNA typing in a given case warrant closer scrutiny. If there is a precise problem identified by the defense which would render the test unreliable, then the testimony might not meet the requirements of ER 702 because it would not be helpful to the trier of fact. In other words, although the possibility of a mistake or human error in a particular case is indeed pertinent, the trial court is best suited to address these factual matters. Moreover, these concerns are not properly a part of the *Frye* analysis, but are within the discretion of the trial court.

The task in this case is obviously an enormous one. The required scientific and legal materials are voluminous and complex. We are aided in our endeavor by the thorough work of the trial court. The rec-

the test for proper admissibility of expert testimony under ER 702. To reiterate, trial courts should initially make a *Frye* determination as to the general acceptance of the scientific principle underlying the expert's proposed testimony. Once the court is satisfied that there exists general acceptance in the appropriate scientific community, the court should look to ER 702 to determine the admissibility of the expert's testimony.

res us to adopt an alternative analyzing the admissibility relied on by several courts. Some have ruled that the DNA test is reliable (i.e., it meets *Frye*), the tests were not sufficiently admissible. See, e.g., *United Bulls*, 918 F.2d 56, 60-61 (1991); *State v. N.W.2d 422, 428* (Minn. John Caleb Dougherty, and *People v. Castro: A of Admissibility for DNA* 7 J.Contemp. Health L. & The most-often cited of is a trial court opinion, 144 Misc.2d 956, 959, 545 Sup.Ct.1989). We do not approach advocated by the *Castro*, 144 Misc.2d at 959, employed a 3-part analy-

there a theory, which is used in the scientific community supports the conclusion that genetic testing can produce

are there techniques or experiments currently exist that are producing reliable results in the scientific community

Did the testing laboratory accept scientific techniques for the forensic samples in your case?

the first inquiry, which is the *Frye* issue, in the affirmative there was unanimous

the scientists that DNA typing is capable of producing reliable results. *Castro*, at 963, 545 N.Y.S.2d 985. In examining the testing procedures, the court examined the evidence in several areas. *Cas-*

will undertake the *Frye* analysis. It produces new evidence which is not the continued general acceptance as to that theory in the scientific community.

ord in this case is contained [199] in some 22 volumes of transcript, exclusive of voir dire. The Frye hearing lasted 6 days and is contained in approximately 1,000 pages of testimony. Hundreds of additional pages of discovery are available. The briefs, including several from amicus, have also been helpful in understanding and analyzing the questions presented.

II. DNA TYPING

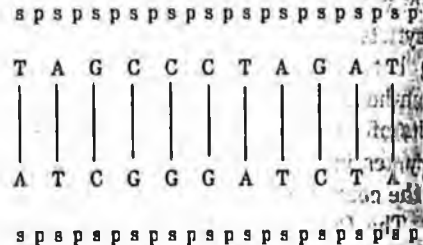
In examining the admissibility of the RFLP process, two distinct areas of inquiry are important. First, the court must decide if, as a matter of law, DNA typing is sufficiently well established in the scientific community so as to be generally admissible under the Frye test. Second, the court must decide if the trial court abused its discretion in admitting expert testimony about DNA typing in this particular case. A detailed understanding of the DNA process is required to make these determinations.

DNA (deoxyribonucleic acid) is the chemical material contained within an organism's cells which determine that organism's physical composition.⁵ Human cells each contain 46 chromosomes, which are arranged in 23 pairs. One chromosome in each pair is inherited from each parent. Approximately 100,000 genes are located on the chromosomes. Genes, which consist of DNA, determine eye, hair, and skin color, the organization of body parts, and virtually everything⁸⁹² else about our physical state. Each individual, with the exception of identical twins, has a unique DNA structure which is contained in every nucleated cell. That structure remains constant throughout a human lifetime. It can be

5. The explanation given here is commonly recited in cases and articles. We have relied heavily on the Committee's report, *DNA Technology, supra*. The version presented in this portion is condensed and synthesized from Laurel Beeler & William R. Wiebe, Comment, *DNA Identification Test and the Courts*, 63 Wash.L.Rev. 903 (1988). See also Linda R. Adkison, *DNA Fingerprinting: A Scientific Perspective*, 42 Mercer L.Rev. 1099 (1991); John Caleb Dougherty, *Beyond People v. Castro: A New Standard of Admissibility for DNA Fingerprinting*, 7 J.Contemp.Health L. & Pol'y 269 (1991); Paul C. Gi-

found in blood, semen, hair, bone marrow and other tissues.

The molecular structure of the DNA molecule is usually referred to as a "double helix". Thus, it resembles a ladder which is twisted like a spiral staircase. The DNA molecule, if stretched to its full length, would measure approximately 6 feet. The sides of the ladder are composed of alternating molecules of sugar (s) and phosphate (p). The rungs consist of pairs of molecules called bases. There are four kinds of bases: adenine, thymine, guanine, and cytosine. They are referred to by the letters A, T, G, and C. The bonding in these cases can occur in only a specific way, making up four "base pairs": Adenine pairs only with T, forming A-T or T-A; Guanine can pair only with C, forming C-G or G-C. A crude diagram may help to visualize it:



In each DNA molecule, there are approximately 3 billion base pairs. It is the precise order of these pairs that determine the unique traits of an individual. The analysis of computer data may be useful to understand this. All data in a computer is stored in terms of 0's and 1's. It is the precise order of only those two numbers that determines all the information contained within a computer program and its associated data. Of course, not every segment of the DNA molecule varies from one individual to the next. We each have genes

annelli, *Criminal Discovery, Scientific Evidence and DNA*, 44 Vand.L.Rev. 791 (1991); Ed Imwinkelried, *The Debate in the DNA Cases: the Foundation for the Admission of Scientific Evidence: The Importance of Human Error in the Cause of Forensic Misanalysis*, 69 Wash.L.Rev. 19 (1991); Janet C. Hoefel, Note, *The Debate in DNA Profiling: Unreliable Scientific Evidence Meets the Criminal Defendant*, 42 Staj.L.Rev. 465 (1989-1990); Joseph G. Petrosinelli, Comment, *The Admissibility of DNA Typing: Methodology*, 79 Geo.L.J. 313 (1990-1991)

cates a polymorphic site on the DNA which the probe was designed to find. Because the relative size of the fragments is known by their position on the membrane, the locations of the polymorphic sites on the particular DNA being tested can be determined by the DNA print.

¹⁸⁹⁵Finally, the results of two RFLP tests must be compared to see if the DNA prints match. For example, a suspect's blood can be compared to semen taken from a rape victim. Generally, the comparison is done by eye, and then the autorads are measured by hand with a ruler. These measurements can be converted to standard numerical values for record-keeping purposes.

There seems to be little dispute that the underlying theory—that DNA exists and is unique—is accepted. William C. Thompson & Simon Ford, *DNA Typing: Acceptance and Weight of the New Genetic Identification Tests*, 75 Va.L.Rev. 45, 60 (1989) (hereinafter Thompson & Ford); see also Laurel Beeler & William R. Wiebe, Comment, *DNA Identification Tests and the Courts*, 63 Wash.L.Rev. 903, 939 (1988). For instance, Thompson & Ford, who are generally critical of DNA typing in forensics (and both testified for the defense in this case), have stated:

There is nothing controversial about the theory underlying DNA typing. Indeed, this theory is so well accepted that its accuracy is unlikely even to be raised as an issue in hearings on the admissibility of the new tests.

Thompson & Ford, at 60.

The Committee commented specifically on the admissibility of DNA typing in *DNA Technology, supra*. The Committee stated that the principles discussed here are so well established that a court could take judicial notice of their acceptability:

Assumption 1—that, with the exception of identical twins, each person's DNA is unique—is so well established in human molecular genetics that a court is justified in judicially noticing it, even in the context of a *Frye* hearing.

Assumption 2 concerns the validity of procedures for extracting DNA from

samples of blood, semen, and other materials and analyzing it for the presence and size of polymorphisms. With regard to application in scientific research, the validity is sufficiently well established in the case of RFLP analysis with Southern blots that judicial notice is also appropriate.

DNA Technology, at 133. Because of the broad range of scientists involved in the Committee, it represents the sort of general scientific acceptance needed to satisfy *Frye*.

¹⁸⁹⁶Testimony at the *Frye* hearing in this case supports this conclusion. Dr. Cotton, from Cellmark, testified that each step of the RFLP testing procedure was accepted in the scientific community. Dr. Concanon, a research scientist at Virginia Mason Research Center, Seattle, Washington, works in the area of immunology, researching the genetics of susceptibility to autoimmune diseases or immunodeficient diseases. He testified that he uses the RFLP procedure in his own lab, and that each step is generally accepted in the scientific community.

Dr. Schellenberg, a biochemist with the University of Washington School of Medicine, studies the human genetics of Alzheimer's disease. He testified that the principle that DNA is unique to each individual is absolutely accepted in the scientific community. He added that DNA "[i]s completely accepted as being the basis of [heredity]—it's completely characterized and accepted." Report of Proceedings, at 589. Dr. Schellenberg's research sometimes involves comparing two unknown samples to determine if they come from the same individual. He testified that the RFLP process is universally accepted, and that he knew of no dispute in the scientific literature.

Even defense experts agreed that the general scientific principles were accepted. For example, Dr. Ford, who criticized many of Cellmark's procedures, agreed with the statement that RFLP technology is fully accepted in the scientific community. Dr. Ford is a molecular biologist currently employed at the University of California. Dr. Libby, a geneticist at the University of

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 sis is universally accepted in the scientific
 field.

In addition, no court has rejected RFLP
 testing on the basis that it was not general-
 ly accepted by the scientific community.
 Indeed, the majority of courts deciding the
 issue have found such evidence to be ad-
 missible. See, e.g., *United States v. Jako-
 betz*, 955 F.2d 786 (2d Cir.1992); *Snowden
 v. State*, 574 So.2d 960 (Ala.Crim.App.
 1990); *State v. Pennell*, 584 A.2d 513
 (Del.Super.Ct.1989); *Martinez v. State*, 549
 So.2d 694 (Fla. Dist.Ct.App.1989); *People v.
 Miles*, 1897 217 Ill.App.3d 393, 160 Ill.Dec.
 347, 577 N.E.2d 477 (1991); *State v.
 Brown*, 470 N.W.2d 30 (Iowa 1991); *Smith
 v. Deppish*, 248 Kan. 217, 807 P.2d 144
 (1991); *Cobey v. State*, 80 Md.App. 31, 559
 A.2d 391, cert. denied, 317 Md. 542, 565
 A.2d 670 (1989); *State v. Davis*, 814 S.W.2d
 593 (Mo.1991); *People v. Shi Fu Huang*,
 145 Misc.2d 513, 546 N.Y.S.2d 920 (Cy.Ct.
 1989); *State v. Pennington*, 327 N.C. 89,
 393 S.E.2d 847 (1990); *State v. Ford*, 301
 S.C. 485, 392 S.E.2d 781 (1990); *State v.
 Wimberly*, 467 N.W.2d 499 (S.D.1991);
Kelly v. State, 792 S.W.2d 579 (Tex.Ct.App.
 1990), *aff'd*, 824 S.W.2d 568 (Tex.Crim.App.
 1992); *Spencer v. Commonwealth*, 238 Va.
 275, 384 S.E.2d 775, 84 A.L.R.4th 293
 (1989).⁷

Even those courts which have ultimately
 determined that the proffered evidence was
 not admissible have commented that the
 principle underlying DNA typing was gener-
 ally accepted. For example, the court in
Commonwealth v. Curnin, 409 Mass. 218,
 220, 565 N.E.2d 440, 441 (1991), stated:
 "Everyone agrees that the underlying theo-
 ry and at least the general processes used
 by Cellmark are accepted in the scientific
 community." See also *State v. Schwartz*,

7. We note that the Legislature enacted a statute
 pertaining to DNA after this case was decided in
 the trial court. RCW 43.43.752-.758 sets forth a
 plan to establish a statewide DNA typing system.
 The Legislature's findings agree with our hold-
 ing:

The legislature finds that recent develop-
 ments in molecular biology and genetics have
 important applications for forensic science.
 It has been scientifically established that there
 is a unique pattern to the chemical structure
 of the deoxyribonucleic acid (DNA) contained

447 N.W.2d 422, 426 (Minn.1989) ("we
 agree that DNA typing is generally accept-
 able . . ."); *State v. Woodall*, 182 W.Va. 15,
 22, 385 S.E.2d 253 (1989) ("reliability of
 [DNA] tests is now generally accepted by
 geneticists, biochemists, and the like.");
People v. Castro, 144 Misc.2d 956, 963, 545
 N.Y.S.2d 1898 985 (Sup.Ct.1989) ("there is
 general scientific acceptance of the theory
 underlying DNA identification.").

Cauthron contends, however, that the
 RFLP test should not be admitted because
 it is fraught with potential problems. The
 commentaries provide several examples of
 the sorts of problems that arise. Contami-
 nation of the sample, or degradation due to
 passage of time, are commonly mentioned.
 Thompson & Ford, at 93. Partial digestion
 of the fragments when applying the restric-
 tion enzyme, or its converse "star activity",
 which occurs when the restriction enzyme
 cuts in too many places, can also create
 problems with the autorad. Human error
 can cause problems, e.g., samples can be
 cross-contaminated, or loaded onto the gel
 wrong. Thompson & Ford, at 93-95. In
 one proficiency study, conducted by the
 California Association of Crime Laboratory
 Directors in 1987, a laboratory technician
 at Cellmark compared two samples and de-
 clared a match in error. The original sam-
 ple had been too large to handle in one
 batch, and in the course of testing, two test
 tubes were confused. Thus, the compari-
 son that was ultimately made was of the
 sample to itself. See Janet C. Hoeffel,
 Note, *The Dark Side of DNA Profiling:
 Unreliable Scientific Evidence Meets the
 Criminal Defendant*, 42 Stan.L.Rev. 465,
 493 (1990); Thompson & Ford, at 92 n. 207.

While these problems are of concern,
 they do not require excluding the evidence

in each cell of the human body. The process
 for identifying this pattern is called "DNA
 identification."

The legislature further finds that the accu-
 racy of identification provided by this method is
 superior to that of any presently existing tech-
 nique and recognizes the importance of this
 scientific breakthrough in providing a reliable
 and accurate tool for the investigation . . . of
 sex offenses . . . and violent offenses. . . .

Laws of 1989, ch. 350, § 1, at 1748.

altogether. Once the general underlying principles are accepted, as they are here, then both the proponents and opponents of a particular test should be able to garner the necessary information to present both sides of the issue to the factfinder. Any remaining questions about the reliability of the particular tests in this case should be examined under the standards for admissibility of expert testimony, which is within the trial court's discretion.

Here, the jury was allowed to hear expert testimony for the State and the defendant. Dr. Cotton testified extensively to the jury about the process Cellmark used here. The requirements of ER 702 were met: Dr. Cotton was amply ¹⁸⁹⁹qualified as an expert; as discussed above, the opinion is based on an accepted scientific theory; and, clearly, this evidence was helpful to the jury. Two other state experts testified along the same lines. Additionally, the defense had the opportunity to thoroughly cross-examine. Cross examination addressed both the possibility for error in the laboratory here and the errors made in the California proficiency test. Moreover, the defense presented its own experts to rebut the State's conclusions. Dr. Ford and Dr. Libby both testified that they found the autorads in this case inconclusive, and discussed their reasons at length. In addition, they each pointed out the possible pitfalls of DNA testing, such as degradation, starring, cross contamination, etc., and the lack of controls employed in the testing procedure. The jury was presented with a balanced picture of the DNA evidence.

[7] In sum, a review of the applicable sources and the record in this case yields ample evidence that DNA typing meets the *Frye* test of admissibility. We hold that DNA typing is generally accepted in the relevant scientific community. In addition, we hold that the problems raised by the defense concerning the quality of the autorads in this case go to the weight rather than the admissibility of the testimony. The jury was in a position to evaluate the evidence fairly because of the care with which it was presented.

III. STATISTICAL EVIDENCE

In addition to the RFLP test, however, Cauthron specifically challenges the use of population statistics in DNA analysis on two grounds. First, Cauthron contends that the testimony presented to the jury that Cauthron's DNA "matched" the semen samples taken from the victims was inadmissible. Second, Cauthron argues that the statistical evidence presented at the *Frye* hearing was invalid.

Further explanation of the analytical technique involved is necessary to understand those arguments. The critical inquiry is this: once it has been determined that two autorads match, what is the likelihood that the suspect and the evidence from the crime scene have the same source?

¹⁹⁰⁰All scientists agree that if autorads are distinguishable, then they do not come from the same individual. Thus, DNA typing yields evidence which has the potential to exculpate innocent people. However, the experts disagree as to the criteria necessary to conclude that similar ("matching") autorads come from the same person. As the Committee stated:

DNA "exclusions" are easy to interpret: if technical artifacts can be excluded, a nonmatch is definitive proof that two samples had different origins. But DNA "inclusions" cannot be interpreted without knowledge of how often a match might be expected to occur in the general population. Because of that fundamental asymmetry, although each new DNA typing method or marker can be used for investigation and exclusion as soon as its technical basis is secure, it cannot be interpreted with regard to inclusion until the population frequencies of the patterns have been established.

DNA Technology, at 75.

There is no doubt that if the technology existed to analyze the entire length of DNA and compare it to another complete DNA molecule, an absolute identification could be provided. This is because each individual's DNA is unique, with the exception of identical twins. The RFLP test, however, does not detect the entire DNA strand. It focuses on the specific locations

I. STATISTICAL EVIDENCE

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"Exclusions" are easy to interpret if technical artifacts can be excluded. A nonmatch is definitive proof that the samples had different origins. But "inclusions" cannot be interpreted without knowledge of how often a match can be expected to occur in the general population. Because of that fundamental asymmetry, although each new DNA method or marker can be used for inclusion and exclusion as soon as its statistical basis is secure, it cannot be interpreted with regard to inclusion until population frequencies of the particular allele have been established.

Technology, at 75.

There is no doubt that if the technology is available to analyze the entire length of DNA and compare it to another complete molecule, an absolute identification can be provided. This is because each person's DNA is unique, with the exception of identical twins. The RFLP test, however, does not detect the entire DNA molecule; it focuses on the specific locations

(loci) detected by the probes used in a particular test. Although there are a very large number of sites on the DNA which vary from one person to another (approximately 3 million), only a small percentage of the overall number of positions on the human genome are variable (0.1 to 0.3 percent of 3 billion). Eric S. Lander, *Population Genetic Considerations in the Forensic Use of DNA Typing*, in *32 Banbury Report: DNA Technology and Forensic Science* 143, 143-46 (Jack Ballantyne et al. eds., 1989); *DNA Technology*, at 74. Thus, it is imperative that the probes used actually detect sites which are variable or polymorphic, and not those which are the same for each human being.

The field of population genetics is concerned with the theories and applications involved in making predictions about population characteristics. In making an estimate of the probability that a defendant's DNA is the same as that taken from the crime scene, the expert relies on a previously constructed database. Lorne T. Kirby, *DNA Fingerprinting* 171 (1990). The database is developed to test the probes used by the particular lab. As stated above, without such a database, there is no way to determine if a probe is detecting an allele which is common to all human beings, or a hypervariable site on the DNA. The more variations that a given site has, the more useful it is as an investigative tool.

Indeed, the fact that one autorad matches another has no meaning without the statistical evidence to back it up. If the autorad reflects only monomorphic sites, it imparts no information whatsoever about the defendant. In other words, if the probes used only detect sites on the DNA which are common to all human beings, the evidence obtained cannot be the basis for identifying the defendant. Thus, the expert must also show that the alleles detected by the particular probes used are polymorphic. This showing requires that a sufficient database—a large enough and truly random sample—be the basis of the expert's conclusions.

In addition, in order to make claims about probabilities which are of the high magnitudes usually seen in DNA cases, the experts rely on the product rule. The scientist first collects the data pertinent to each allele being compared. Based on the statistics derived from the database, the expert determines the probability that a sample of known origin will match (on an autorad) the given sample. That probability will vary from one allele to another. For instance, allele A may be found in 1 of every 10 people; allele B found in 1 of 20; and allele C found in 1 of 5. Under the product rule, if there is a match for each allele, the expert can multiply (1/10 x 1/20 x 1/5) to achieve the result that only 1 person in 1,000 will match all three sites.

However, "the scientific validity of the multiplication rule depends on whether the events (i.e., the matches at each allele) are actually statistically independent." *DNA Technology*, at 76. That is, the product rule cannot be applied where the three alleles are related, because that increases the likelihood that anyone who has one of the three has all of them. For example, suppose that A, B, and C are all related to having red hair, fair skin, and freckles. If the possibility of having these traits is interrelated, then anyone who has A is more likely to have B and C, and the multiplication is not valid—instead of a 1 in 1,000 chance of a match it may be only a 1 in 20 probability.

Two central theoretical principles involved in statistical analysis of DNA typing have provoked serious questions. First, it is assumed that each of the probes used detects an allele which is independent of the other alleles tested. That is, in calculating the statistics, the scientist attempts to ensure that the various sites tested are not related to each other. This requirement is referred to in the literature as "linkage equilibrium". It has not been sufficiently established that the various probes used detect independent alleles. Various scientists have raised concerns that the databases used do not adequately address the problem of population substructures.

Second, it is assumed that the statistical calculations are based on a truly random population—one which mates randomly and thus mixes the gene pool evenly. This assumption is known as “Hardy-Weinberg equilibrium”. However, it is not yet agreed that the databases used are either sufficiently random or sufficiently developed for any particular group being tested.

Our role is not to evaluate the merits of the theory or of the empirical evidence. Nonetheless, it is important that we understand the extent of any controversy in the scientific community. Although it is not our aim to make a judgment regarding which view is correct, we must be sure that a genuine and important controversy exists. Our decision rests on the existence of a controversy, not on its resolution.

The Committee acknowledged that the area was not settled:

Substantial controversy has arisen concerning the methods for estimating the population frequencies of specific DNA typing patterns. Questions have been raised about the adequacy of the population databases on which frequency estimates are based and about the role of racial and ethnic origin in frequency estimation.

(Footnote omitted.) *DNA Technology*, at 74-75.

At a conference held in at the Cold Spring Harbor Laboratory, Eric S. Lander presented a paper which expresses these concerns. Lander, at 143. After setting out the basic methodology discussed above, Lander identifies four underlying assumptions, any one of which he notes would “completely invalidate the analysis”. Lander, at 145.

First, Lander points out the importance of correctly identifying the population with which to compare the sample. Lander, at 145. Because of “genetic drift”, small populations may have distinct genetic differences. Although racial classification helps with this problem, it does not draw fine enough distinctions among groups. Second, the sample used in the database must be large enough to account for the possibility of error. When dealing with very rare

events, such as where the frequency of a given allele is 1 in 500, small errors are more significant. Lander, at 146-47. Third, in a related matter, the sample must be truly random. Lander, at 147-48.

Finally, and most importantly, the population must be mixed such that each locus (position of the DNA tested) is in Hardy-Weinberg equilibrium, and such that the loci together are in linkage equilibrium. Lander, at 148. Lander explains the problem as follows:

These assumptions are true, however, only if the population is homogeneously mixed. Let us illustrate the point with an extreme example. Suppose that (1) a distinct ethnic minority comprised 10% of the population studied; (2) the minority group members all shared the same allele at each of three RFLP loci tested (i.e., the minority was not polymorphic but monomorphic at these loci); and (3) the particular alleles found in the minority were absent in the rest of the population. In this case, a population study would find that each minority allele had a population frequency of 10%. Applying the cookbook approach, [the product rule] the probability of an individual being homozygous for all three minority alleles would be calculated at 1 in 1,000,000. If we did not know that the true genotype frequency was 1 in 10 (since all minority members share the genotype), we might be persuaded to convict the first minority suspect on the basis of the perfect DNA match.

Lander, at 148.

To solve the problem, the expert must be relatively certain that the alleles detected are in equilibrium—that they represent “a random selection from the overall pool.” Lander, at 149. Short of testing all the subpopulations of the United States for population substructures, the scientist can use various statistical methods to determine whether equilibrium exists in the database they are relying on. Although no one disagrees that Hardy-Weinberg is theoretically sound, “there seems to be a serious misperception that Hardy-Weinberg equilibrium is a law of physics that *must*

apply to a population." Lander, at 149. The expert must show more than the theory. For the evidence to be admitted, the theory must be valid in application. In fact, "there is no reason to expect that the loci are in Hardy-Weinberg equilibrium in such heterogeneous groups as Caucasians, Blacks, and Hispanics. Indeed, some early studies are finding statistically significant deviations from Hardy-Weinberg equilibrium, indicating the presence of genetically distinct subgroups." Lander, at 149.

Landers' concerns are bolstered by additional sources found in the scientific literature. See R.C. Lewontin & Daniel L. Hartl, *Population Genetics in Forensic DNA Typing*, 254 Sci. 1745, 1747 (1991); Lorne T. Kirby, *DNA Fingerprinting* 175-76 (1990) (citing J.E. Cohen, *DNA Fingerprinting for Forensic Identification: Potential Effects on Data Interpretation of Subpopulation Heterogeneity and Band Number Variability*, 46 Am.J.Hum.Genetics 358 (1990)). The legal literature also reflects concerns about population statistics. See Richard Lempert, *Some Caveats Concerning DNA as Criminal Identification Evidence: With Thanks to the Reverend Bayes*, 13 Cardozo L.Rev. 303 (1991); Michael J. Saks & Jonathan J. Koehler, *What DNA "Fingerprinting" Can Teach the Law About the Rest of Forensic Science*, 13 Cardozo L.Rev. 361 (1991).

¹⁹⁰⁵On the other hand, scientists have noted the utility of these statistical principles in a forensic setting:

If single-locus multiallele DNA analysis is used, this is comparable to but considerably more specific than conventional blood classification typing. When a match is observed, the probability that the match could have arisen by chance in the population must be calculated. Population allele frequencies and the frequencies of the loci genotypes must be known. Provided Hardy-Weinberg and linkage equilibria apply, the probabilities for the loci matched can be multiplied to determine the composite profile probability. The value of match evidence, in conjunction with other evidence, can be very incriminating especially if a number of

loci are analyzed and rare alleles are present.

Kirby, at 172; see also Ranajit Chakraborty & Kenneth K. Kidd, *The Utility of DNA Typing in Forensic Work*, 254 Sci. 1735 (1991).

Courts in other jurisdictions have expressed reservations about statistical evidence in DNA cases. In *Curnin*, the Massachusetts Supreme Court held that Cellmark's statistical assumptions were incorrect, and thus the evidence was inadmissible. *Commonwealth v. Curnin*, 409 Mass. 218, 227, 565 N.E.2d 440 (1991). After considering the testimony of Dr. Lawrence Mueller, the court in *Curnin* found that there was disagreement within the scientific community about the validity of the population studies used, the consequences of using very rare alleles, and the utility of the product rule. *Curnin*, at 226-27, 565 N.E.2d 440. Thus, the court held that "[b]ased on the absence of the general acceptance or inherent rationality of the process" the admission of the probability evidence was prejudicial error. *Curnin*, at 227, 565 N.E.2d 440. See also *People v. Pizarro*, 10 Cal.App.4th 57, 12 Ca' Rptr.2d 436 (1992); *People v. Barney*, 8 Cal.App. 4th 798, 10 Cal.Rptr.2d 731 (1992); *State v. Pennell*, 584 A.2d 513, 522 (Del.Super.Ct.1989); *Caldwell v. State*, 260 Ga. 278, 393 S.E.2d 436 (1990); *Commonwealth v. Lanigan*, 413 Mass. 154, 596 N.E.2d 311 (1992); *State v. Schwartz*, 447 N.W.2d 422, 428 (Minn.1989); *State v. Vandebogart*, — N.H. —, 616 A.2d 483 (1992); *State v. Anderson*, No. 12,899 (N.M.Ct.App. ¹⁹⁰⁶Dec. 14, 1992); *People v. Mohit*, 153 Misc.2d 22, 579 N.Y.S.2d 990 (Cy.Ct.1992). Cf. *People v. Atoigue*, DCA No. CR 91-95A, S.C. No. CF0023-91, 1992 WL 245628 (D.Guam App.Div. Sept. 11, 1992) (denying admissibility of DNA test results due to lack of general acceptance in scientific community, but holding admission of statistics harmless error).

The expert testimony here did not provide any probability statistics. Instead, four experts testified that Cauthron's DNA "matched" the semen samples taken from the victims. Dr. Cotton testified that: "The defendant Richard Cauthron using

here the frequency of a
a 500, small errors are
Lander, at 146-47.
matter, the sample must
Lander, at 147-48.

t importantly, the popu-
ed such that each locus
A tested) is in Hardy-
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in linkage equilibrium.
nder explains the prob-

ions are true, however,
ation is homogeneously
illustrate the point with
ple. Suppose that (1) a
minority comprised 10% of
studied; (2) the minority
all shared the same al-
three RFLP loci tested
was not polymorphic
at these loci); and (3)
les found in the minori-
the rest of the popula-
e, a population study
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ity of an individual be-
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m, the expert must be
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hat Hardy-Weinberg
of physics that must

our test is the source of the semen sample in the five cases that we got the result on. His pattern matches the pattern from the semen stain in those cases." Report of Proceedings, at 2045. In fact, Dr. Cotton testified that the DNA could not have come from anyone else on earth. On redirect, she stated that she had "no doubts about that identification." Report of Proceedings, at 2167.

Similarly, Ms. Corey testified that Cauthron "was the donor of the semen in those five cases." Report of Proceedings, at 2223. She based her opinion on her testimony that there was a "match" in each case. Dr. Schellenberg and Dr. Diane Durnam, a molecular biologist, also each testified that the samples "matched". The State rested without presenting any evidence of population statistics.

[8] This testimony should not have been admitted, because it does not meet the test for expert testimony. As stated above, expert testimony is admissible only when the underlying scientific principle satisfies the threshold *Frye* requirements and the testimony meets the 2-part test of ER 702: (1) the witness qualifies as an expert and (2) the expert testimony would be helpful to the finder of fact. Several courts have commented on the usefulness of the type of evidence presented to the jury here—testimony that there was a "match", without the background probability information. In *Curnin*, 409 Mass., at 222 n. 7, 565 N.E.2d 440, the court noted:

It is apparent from the basis on which we decide the DNA testing issue that we would not permit the admission of test ¹⁹⁰⁷results showing a DNA match (a positive result) without telling the jury anything about the likelihood of that match occurring.

The Supreme Court of Alabama has made a similar observation:

Stated simply, the evidence necessary to show a "match" does not by itself indicate the frequency with which a given DNA pattern might occur statistically or might occur in a given population; to establish population frequency generally requires data on the relevant populations

involved as well as data for the mathematical, statistical analysis.

Ex parte Perry, 586 So.2d 242, 254 (Ala. 1991). The Committee's view supports the conclusions reached in the courts:

To say that two patterns match, without providing any scientifically valid estimate (or, at least, an upper bound) of the frequency with which such matches might occur by chance, is meaningless. *DNA Technology*, at 74.

Because the testimony presented did not include the background probability information, it was insufficient. The Committee recommends that: "[r]egardless of the calculated frequency, an expert should—given with the relatively small number of loci used and the available population data—avoid assertions in court that a particular genotype is unique in the population." *DNA Technology*, at 92. Testimony of a match in DNA samples, without the statistical background or probability estimates, is neither based on a generally accepted scientific theory nor helpful to the trier of fact.

In addition, the testimony is not supported by the evidence presented at the *Frye* hearing. Although Dr. Cotton testified that the methods employed by Cellmark are generally accepted, her testimony was not borne out by the other witnesses. One of the State's own witnesses, Dr. Wijsman, even testified that Cellmark incorrectly computed certain statistics. Defense experts also pointed out various problems. For example, Dr. Mueller, a population geneticist, testified that it had not been shown that the statistical database was representative of the general population (*i.e.*, that ¹⁹⁰⁸it was in Hardy-Weinberg equilibrium). Dr. Geisser, a statistician, argued that when the standard deviation used by Cellmark is applied to each of the eight bands matched here, the probability of a perfect match is 1 in 100, a much more likely event than the probability claimed by Cellmark. These opinions are in accord with the scientific literature discussed above.

Although we are convinced that the testimony presented at trial was improper, and

as well as data for the mathematical analysis.

Frye, 586 So.2d 242, 254 (Ala. 1989). The Committee's view supports the approach reached in the courts:

"That two patterns match, without any scientifically valid estimate (at least, an upper bound) of the probability with which such matches occur by chance, is meaningless." *Id.*, at 74.

The testimony presented did not provide background probability information that is insufficient. The Committee stated that: "[r]egardless of the probability, an expert should—given a relatively small number of loci and the available population data—advise the jury in court that a particular locus is unique in the population." *Id.*, at 92. Testimony of a statistician, without the statistical background or probability estimates, based on a generally accepted methodology nor helpful to the trier of fact.

In this case, the testimony is not supported by the evidence presented at the trial. Although Dr. Cotton testified that the methods employed by Cellmark were generally accepted, her testimony was contradicted by the other witnesses. The State's own witnesses, Dr. Mueller and Dr. Geisser, testified that Cellmark had imputed certain statistics. Dr. Geisser also pointed out various problems. For example, Dr. Mueller, a population geneticist, testified that it had not been established that the statistical database used by Cellmark was representative of the general population. It was in Hardy-Weinberg equilibrium. Dr. Geisser, a statistician, testified that when the standard deviation of Cellmark is applied to each of the loci that matched here, the probability of a match is 1 in 100, a much more than the probability claimed by Cellmark. These opinions are in accord with the scientific literature discussed

and we are convinced that the testimony presented at trial was improper, and

thus requires reversal, we are encouraged by the Committee's findings and recommendations.

Although mindful of the controversy, the committee has chosen to assume for the sake of discussion that population substructure may exist and provide a method for estimating population frequencies in a manner that adequately accounts for it. Our decision is based on several considerations:

1. It is possible to provide conservative estimates of population frequencies, without giving up the inherent power of DNA typing.

2. It is appropriate to prefer somewhat conservative numbers for forensic DNA typing, especially because the statistical power lost in this way can often be recovered through typing of additional loci, where required.

3. It is important to have a general approach that is applicable to any loci used for forensic typing. Recent empirical studies pertain only to the population genetics of the VNTR [variable number of tandem repeats] loci in current use. However, we expect forensic DNA typing to undergo much change over the next decade—including the introduction of different types of DNA polymorphisms, some of which might have different properties from the standpoint of population genetics.

4. It is desirable to provide a method for calculating population frequencies that is independent of the ethnic group of the subject.

DNA Technology, 80. The Committee goes on to set out a method for accounting for the possibility of population substructuring, called the ceiling principle. *DNA Technology*, at 82-83. It also adopted sev-

8. Because we reverse Cauthron's conviction, we do not reach the various discovery issues raised in this case. On remand, we recognize the defense's need to have access to materials pertaining to Cellmark's database and statistical analysis. The trial court, however, retains ample discretion to protect all the interests involved. CrR 4.7(h).

9. Cauthron has argued that he is entitled to additional compensation for the experts he pre-

eral recommendations for collecting databases, and for estimating population frequencies in the period of time prior to the adoption of the ceiling principle. *DNA Technology*, at 89-93. Although we lack the scientific expertise to either assess or explain the methodology, its adoption by the Committee indicates that sufficient acceptance within the scientific community has been achieved to satisfy *Frye* in appropriate circumstances.

We reverse the conviction, and remand for a new trial.⁹ On remand, the trial court should take additional expert testimony⁹ to determine if the empirical evidence utilized by Cellmark is valid under the criteria set forth by the Committee prior to allowing an expert to testify about the results in Cauthron's case.

IV. ADDITIONAL CLAIMS

Cauthron argues that the evidence obtained when he was first detained on October 14, 1988, including the gun, gloves and mask and blood drawn, must be suppressed. He claims that the detention was more than permitted as an investigatory stop, and that since he was never formally placed under arrest, the ensuing search is not valid.

[9,10] This argument lacks merit in several respects. First, the police had probable cause to arrest when they found the defendant hiding in some bushes outside a fast-food restaurant at 2:45 in the morning with his genitals exposed. *Cf. State v. Chiles*, 53 Wash.App. 452, 456, 767 P.2d 597 (1989). Second, the police discovered the artifacts partially concealed under the bushes in a public place. Defendant had no expectation of privacy in the property.

presented at the *Frye* hearing and at trial. However, our review of the record shows that the trial court only authorized funding for two experts to a maximum of \$5,000, and specifically warned defense counsel that he might be proceeding at his own risk by presenting additional experts. The trial court allowed partial or full compensation for all the experts. We find no abuse of discretion in this payment plan.

Cauthron also argues that the testimony concerning those items amounts to evidence of prior bad acts. The J₉₁₀ "prior bad acts" here are the circumstances of the arrest. However, the trial court expressly excluded reference to defendant's indecent exposure at the time of the arrest, and allowed only testimony concerning the items which were found with him. The record does not support Cauthron's claim.

Cauthron further contends that he was denied his right to a speedy trial. CrR 3.3(c)(1) provides, in part: "A defendant not released from jail pending trial shall be brought to trial not later than 60 days after the date of arraignment."

[11, 12] CrR 3.3(h)(2) provides that a continuance may be granted on the State's motion "when required in the administration of justice" so long as the defendant will not be substantially prejudiced thereby. Such continuances are excluded from the 60-day time period. CrR 3.3(g)(3). Trial in the allotted time is not constitutionally required, and the trial court has discretion to grant continuances. *State v. Hoffman*, 116 Wash.2d 51, 77, 804 P.2d 577 (1991). Here, the continuances were necessary to obtain the required evidence. Moreover, defense requested and was granted continuances as well. No harm was done to defendant's case in the interim. Cauthron's right to a speedy trial was not violated.

Finally, Cauthron argues that the trial court erred in imposing an exceptional sentence. Exceptional sentences were imposed on two counts. One of these victims was 14, and the other 16. The court relied on three factors to impose an exceptional sentence: deliberate cruelty, victim vulnerability, and multiple acts of rape against an individual victim.

[13, 14] The reviewing court asks three questions: (1) Are the reasons given supported by the record? (2) Do the reasons justify a departure? and (3) Is the sentence clearly excessive? *State v. Dunaway*, 109 Wash.2d 207, 218, 743 P.2d 1237, 749 P.2d 160 (1987). The standard of review for the trial court's factual findings is clearly erroneous. *State v. Nordby*, 106 Wash.2d 514,

517-18, 723 P.2d 1117 (1986). Here, the victims were forced to submit to being photographed and were threatened with publication of the pictures. Moreover, the victims' youth rendered them exceptionally vulnerable J₉₁₁ to assault. In addition, both were raped multiple times. A sentence of 136 months, taking the circumstances into account, is not an abuse of discretion.

In sum, we affirm the trial court's ruling that RFLP testing is admissible. However, we conclude that it was error to admit the testimony of a "match" since it was not accompanied by valid probability statistics. We therefore reverse the conviction and remand for further proceedings in accordance with the foregoing.

BRACHTENBACH, DOLLIVER,
ANDERSEN, SMITH, GUY and
JOHNSON, JJ., concur.

DORE, Chief Justice (dissenting).

I dissent. DNA testing is not reliable; it does not pass the *Frye* standard; and it is not admissible. In order for novel scientific evidence to be admissible in court, it must be generally accepted in the scientific community. *Frye v. United States*, 293 F. 1013, 1014, 34 A.L.R. 145 (D.C.Cir.1923); *State v. Martin*, 101 Wash.2d 713, 719, 684 P.2d 651 (1984). The novel scientific evidence in this case is DNA fingerprinting. This method of identification is based on the scientific principle that no two persons, except identical twins, have matching DNA. Clearly, the relevant scientific community accepts this principle as conceptually accurate. It follows that, if DNA fingerprinting could accurately show that a DNA sample taken from a crime scene matches a defendant's DNA, it would be strong inculpatory evidence.

DNA fingerprinting may be conceptually accurate, but it is plagued by two problems. First, although whole DNA molecules from different persons cannot match, portions of DNA recur in some persons. Second, the technology does not exist to test an entire DNA molecule; rather, tests can only evaluate individual sections of DNA molecules at a time. *Majority* at

STATE v. BARBERIO

Cite as 846 P.2d 519 (Wash. 1993)

512. This is significant because the fact that one section of a DNA sample matches another has no meaning without knowing the statistical probabilities of that match occurring. *Majority* at 513; see *Commonwealth v. Curnin*, 409 Mass. 218, 222 (n. 7), 227, 565 N.E.2d 440 (1991). In the present case, accurate statistical probabilities are not available. Scientists compute statistical probabilities from DNA databases. The databases currently used by scientists, however, are not generally accepted by the scientific community. Rather, they are the subject of significant debate. *Majority* at 514. The fact that these databases are not accepted in the scientific community is central to a *Frye* analysis.

As the majority states, the core concern of *Frye* is whether the evidence being offered is based on accepted scientific methodology.

This involves both an accepted theory and a valid technique to implement that theory... any remaining concerns about the possibility of error or mistakes being made in the case at hand can be argued to the factfinder.

Majority at 507. The inability to compute statistical probabilities accurate enough to be accepted by the relevant scientific community is not merely a "possibility of error" such as mixing up DNA samples during an experiment. On the contrary, it is an inherent flaw in the scientific methodology, and it is because of this flaw that the majority should have held that DNA fingerprinting was inadmissible.

Instead of holding the evidence inadmissible, however, the majority sidestepped the statistical probabilities issue by dividing the DNA fingerprinting theory into two parts, the underlying theory and the statistical analysis. In doing so, the majority was able to shield DNA fingerprinting from the controversy surrounding statistical probabilities and hold that at least the underlying theory met the *Frye* standard. The majority then dispensed with the statistical issue by holding that it did not affect admissibility; it only went to the weight afforded the evidence by the jury.

The majority's holding is correct only in that if accurate statistical probabilities were available, those probabilities would go to the weight of the evidence. In this case, however, the databases from which the probabilities are computed are the subject of debate, and without those databases the scientific methodology is useless. It follows that the majority's holding that the underlying principle of DNA fingerprinting meets *Frye* is irrelevant. The theory that no two DNA molecules are identical is only the first part of the scientific methodology. The second part, a valid technique to implement that theory, simply does not pass the *Frye* standard.

Although scientists may develop an acceptable statistical database in the future, the contemporary statistical probabilities are still the subject of significant scientific debate. Until such time, I would hold that the testing does not pass the *Frye* admissibility standard. I dissent.

UTTER, J., concurs.



121 Wash.2d 48

STATE of Washington, Respondent,

v.

Anthony Ben BARBERIO, Petitioner.

No. 59741-3.

Supreme Court of Washington,
En Banc.

March 4, 1993.

Reconsideration Denied March 30, 1993.

Defendant was convicted in the Superior Court, King County, Faith Enyeart, J., of second and third-degree rape, and he appealed. The Court of Appeals reversed conviction for third-degree rape and remanded for resentencing. On remand, the Superior Court reimposed same exceptional sentence that had been imposed at first sentencing, and defendant appealed. The

RIES

2d 1117 (1986). Here, the forced to submit to being photographed were threatened with pictures. Moreover, the victim was rendered their exceptionally to assault. In addition, both multiple times. A sentence of making the circumstances into an abuse of discretion.

affirm the trial court's ruling that the evidence is admissible. However, it was error to admit the "match" since it was not valid probability statistics. Reverse the conviction and other proceedings in accordance with the foregoing.

BACH, DOLLIVER,
MITH, GUY and
concur.

Justice (dissenting).

A testing is not reliable; it does not meet the *Frye* standard; and it is not admissible. In order for novel scientific evidence to be admissible in court, it must be generally accepted in the scientific community. See *Frye v. United States*, 293 F.2d 101, 105 (D.C. Cir. 1962); *United States v. Williams*, 401 F.2d 101, 105 (D.C. Cir. 1968).

The novel scientific evidence is DNA fingerprinting. Identification is based on the principle that no two persons, except identical twins, have matching DNA profiles. The relevant scientific community has accepted this principle as conceptual. It allows that, if DNA fingerprints accurately show that a DNA profile from a crime scene matches a profile from a suspect, it would be strong incul-

minating may be conceptually flawed. It is plagued by two problems. First, although whole DNA molecules from different persons cannot match, they can recur in some persons. Second, the scientific methodology does not exist to test whether a molecule; rather, tests are conducted on individual sections of DNA at a time. *Majority* at

Referee: Uh huh.

Mrs. Allen: . . . that's this year, this . . . fall semester. So, he didn't put me in writing or none of us agreed that I'd come to work. I just wanted to know what's . . . what's the job. . . . [Emphasis added].

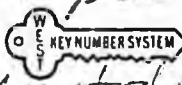
As the state points out, "apparently the question in Judith Allen's mind was not whether she would be reemployed, but whether or not she wanted that employment due to the anticipated heavy work load."

We conclude, based on the foregoing, that substantial evidence supports the Department of Labor's finding that Allen had a reasonable assurance of reemployment and thus was ineligible for unemployment compensation.

The judgment is **AFFIRMED**.

CONNOR, J., not participating.

*Don't need court order
for palm print (+ etc.)
??) of custodial
/*



Ricky LISTON, Appellant,

v.

STATE of Alaska Appellee.

No. 5898.

Court of Appeals of Alaska.

Feb. 18, 1983.

Defendant was convicted in the Superior Court, Third Judicial District, Anchor-

age, Seaborn J. Buckalew, J., of burglary not in a dwelling and concealing evidence, and he appealed. The Court of Appeals, Singleton, J., held that: (1) trial court did not err in failing to suppress evidence of the defendant's palm print which was obtained without a warrant, and (2) the trial court did not err by permitting the defendant's trial counsel to withdraw a motion for mistrial after it had been granted where counsel obtained a recess so that he could consult with the defendant about a retrial and an instruction was given to direct the jury to disregard improper comment made by a witness.

Judgment affirmed.

1. Searches and Seizures ⇐7(12)

Federal Constitution does not prevent police from obtaining evidence such as palm prints from someone lawfully in their custody without a warrant.

2. Criminal Law ⇐627.5(3)

Rule of criminal procedure governing disclosure to prosecuting attorney of nontestimonial identification procedures was not intended to apply to those in custody. Rules Crim.Proc., Rule 16(c).

3. Criminal Law ⇐627.5(3)

Court of Appeals would not, as part of its rule-making power, extend discovery rule governing disclosure of nontestimonial identification procedures to cover those in custody. Rules Crim.Proc., Rule 16(c).

4. Criminal Law ⇐627.5(3)

Taking of palm print from defendant who was in custody on charge of assault on airport police officer did not violate rule of criminal procedure governing disclosure to prosecuting attorney of nontestimonial identification procedures. Rules Crim.Proc., Rule 16(c).

5. Criminal Law ⇐641.13(2)

Decision to move for mistrial and decision to withdraw such motion, if granted,

are matters of trial strategy which defense counsel may determine without express agreement of his client. U.S.C.A. Const. Amend. 6.

6. Criminal Law §1174(1)

Where defense counsel obtained recess so he could consult with defendant about retrial after defendant's motion for mistrial was granted, counsel concluded that they should stay with same jury and instruction was given directing jury to disregard witness' comment that defendant had remained silent when questioned about burglary, no reversible error occurred when defense counsel withdrew motion for mistrial after it had been granted and trial court indicated that retrial was not barred. U.S.C.A. Const. Amend. 6.

7. Criminal Law §641.13(2)

Whether or not decision was influenced by counsel, defendant's decision to proceed with existing jury after mistrial had been granted based on accidental comment by witness regarding defendant's silence during questioning, did not deprive defendant of assistance of competent counsel even if counsel allowed concerns about counsel's own calendar to influence decision to waive mistrial. U.S.C.A. Const. Amend. 6.

Susan Orlansky, Asst. Public Defender, and Dana Fabe, Public Defender, Anchorage, for appellant.

W.H. Hawley, Asst. Atty. Gen., Office of Sp. Prosecutions and Appeals, Anchorage, and Wilson L. Condon, Atty. Gen., Juneau, for appellee.

Before BRYNER, C.J., and COATS and SINGLETON, JJ.

OPINION

SINGLETON, Judge.

Ricky Liston was convicted of burglary not in a dwelling, former AS 11.20.100, and

concealing evidence, former AS 11.30.315. Liston appeals contending: (1) that the trial court erred in failing to suppress evidence of his palm print which was obtained without a warrant, Alaska Rule of Criminal Procedure 16(c), and (2) that the trial court erred by permitting Liston's trial counsel to withdraw a motion for mistrial after it had been granted.

I. ALASKA RULE OF CRIMINAL PROCEDURE 16(c)

On November 26, 1979, Liston was arrested for assault on an airport police officer. The assault occurred while the officer was investigating charges that Liston was transporting contraband. Liston was taken to the airport security office and certain property was taken from his person and locked in a desk drawer: \$500 in cash, an airplane ticket to Kodiak, and two plastic packets of white powder. Liston was booked and released when his mother posted bail. The next morning an airport security officer discovered that the security office desk had been broken into and that the plastic packets and money were stolen. The officer observed palm prints on the conduit pipes above the ceiling to the office in the area in which they believed the intruder had made his entry. The police had no known palm prints of Liston for comparison.

[1,2] On December 6, Liston appeared for arraignment on his assault and battery charge and the prosecutor successfully moved to have Liston's bail increased arguing that Liston was a suspect in the burglary of the airport security office. He had not been charged with this offense at that time and no court order permitting the police to obtain Liston's palm print had been obtained in either the burglary or the assault proceeding. Nevertheless, the trooper investigating the burglary ordered the corrections officials holding Liston to obtain a palm print which was done. Liston's palm print matched the print found in the airport security office. Liston moved to suppress this evidence reasoning that it

had been obtained in violation of Alaska Rule of Criminal Procedure 16(c). The trial court denied that motion and Liston appeals. Alaska Rule of Criminal Procedure 16(c) provides in relevant part:

(c) *Disclosure to the Prosecuting Attorney.*

(1) *Non-Testimonial Identification Procedures—Authority.* Upon application of the prosecuting attorney, the court by order may direct any person to participate in one or more of the procedures specified in subsection (c)(2) of this rule if affidavit or testimony shows probable cause to believe that:

(i) An offense has been committed by one of several persons comprising a narrow focal group that includes the subject person;

(ii) The evidence sought may be of material aid in identifying who committed the offense; and

(iii) The evidence sought cannot practicably be obtained from other sources.

(2) *Non-Testimonial Identification Procedures—Scope.* An order issued under subsection (c)(1) of this rule may direct the person to do or submit to any and all of the following:

(i) Appear in a line-up;

(ii) Speak words, phrases or sentences relevant to the case for identification by witnesses;

(iii) Be fingerprinted;

(iv) Pose for photographs not involving reenactment of a scene;

(v) Try on articles of clothing;

(vi) Permit the taking of specimens of material under his fingernails;

(vii) Permit the taking of samples of blood, hair and other materials of his body which involved no unreasonable intrusion thereof;

(viii) Provide specimens of his handwriting;

(ix) Submit to a reasonable physical or medical inspection of his body.

(3) *Right to Counsel.* When issuing an order under subsection (c)(1) of this rule, the court shall also order that the person be represented by counsel or waive his right to be represented by counsel before being required to appear in a lineup, give a specimen of handwriting, or speak for identification by witnesses of an offense.

The federal constitution does not prevent the police from obtaining evidence such as palm prints from someone lawfully in their custody without a warrant. *United States v. Euge*, 444 U.S. 707, 100 S.Ct. 874, 63 L.Ed.2d 141 (1980); *United States v. Dionisio*, 410 U.S. 1, 93 S.Ct. 764, 35 L.Ed.2d 67 (1973); *United States v. Mara*, 410 U.S. 19, 93 S.Ct. 774, 35 L.Ed.2d 99 (1973); *In re Grand Jury Proceedings*, 507 F.2d 963 (3d Cir.), cert. denied, 421 U.S. 1015, 95 S.Ct. 2424, 44 L.Ed.2d 685 (1975). See 1 W. LaFave, *Search and Seizure* § 2.6(a) (1978). Liston does not argue that our state constitution precludes the police from obtaining palm prints without a warrant. See *Zehrunge v. State*, 569 P.2d 189, 193 n. 12 (Alaska 1977), modified, reh'g. 573 P.2d 858, 859 (Alaska 1978) (reserving the issue). The sole question, therefore, is whether Alaska Criminal Rule 16(c) was intended to apply to those in custody. We conclude that it was not. The Alaska Criminal Rules are largely derived from the Federal Rules of Criminal Procedure. In some cases, however, the Alaska Supreme Court looked elsewhere for models. Alaska Rule of Criminal Procedure 16(c) is based on the ABA Standards Relating to Discovery and Procedure Before Trial § 3.1 (Approved Draft 1970). The commentary to that section makes it clear that the section was intended to enable the prosecution to obtain evidence, e.g., fingerprints, from those not in custody. It was not intended to address the rights of those in custody.¹ The commentary provides in part:

1. Those in custody are entitled to state and federal constitutional protections against illegal

searches and seizures. Our holding that no court order is necessary to obtain a palm print

Cite as, 658 P.2d 1346 (Alaska App. 1983)

The central point of the standard is that such prosecution investigation [e.g., obtaining fingerprints] as may be permissible prior to formal charging or when the accused is in custody should also be available to the prosecution once charges have been lodged and the accused is at liberty.

Id. at 96.

[3] We conclude that the rule is intended to address problems created by *Davis v. Mississippi*, 394 U.S. 721, 89 S.Ct. 1394, 22 L.Ed.2d 676 (1969). *Davis* has been interpreted to hold that identification evidence, such as fingerprints, may not be obtained from those who are not legally in custody under circumstances in which such evidence could have been obtained from those in legal custody. *United States v. Anderson*, 490 F.2d 785, 788 (D.C.Cir.1974). The ABA standard thus serves the same purpose as the Model Code of Pre-Arrest Procedure § 170 (1975). See especially commentary at 459-89 (where the suspect is in custody, the code does not contemplate a need for a court order). See also *id.* § 160.2(6) & (7)(a); Note, *Fourth Amendment Implications of Compelling an Individual to Appear in a Lineup Without Probable Cause to Arrest*, 45 Fordham L.Rev. 124, 126 (1976). We are satisfied that the discovery rule was not intended by the supreme court to address the rights of those in custody. We recognize that the court could extend the discovery rule, as part of its rule making power, to cover those in custody but we do not believe that we should do so by decision. We are influenced by the following factors: (1) case authority precludes the need for court orders to obtain nontestimonial identification evidence from those in custody, (2) the current ABA

from one in custody recognizes the distinction drawn in *Cupp v. Murphy*, 412 U.S. 291, 93 S.Ct. 2000, 36 L.Ed.2d 900 (1973), between obtaining evidence in a manner that involves an invasion of the suspect's body which the court concludes constitutes a "search," governed by the fourth amendment, and obtaining identification evidence, that does not invade the suspect's body or otherwise subject him to pain or embarrassment, which would not be a

Standards dispense with court orders even where the subject is not in custody (II ABA Standards for Criminal Justice Standard 11-3.1 (2d. ed. 1980); but cf. *People v. Moselle*, 57 N.Y.2d 97, 454 N.Y.S.2d 292, 439 N.E.2d 1235 (N.Y.1982) (court finds similar discovery rule applicable to those who have been charged and those who have not and by implication would extend to those in custody); (3) court orders, if required, will be issued almost as a matter of course; and (4) the inconvenience to the subject from giving a palm print will in most cases be minor.

[4] Since the rule does not apply to defendants in custody, it is not necessary to determine whether the palm print was obtained solely by exploiting a violation of the rule. Cf. *United States v. DeSimone, III*, 660 F.2d 532, 542-43 (5th Cir.1981); accord *United States v. Rowell*, 612 F.2d 1176, 1179-80 (7th Cir.1980) (alternate holding); *United States v. Jarvis*, 560 F.2d 494, 498-99 (2d Cir.1977), cert. denied, 435 U.S. 934, 98 S.Ct. 1511, 55 L.Ed.2d 532 (1978) (each of these cases hold that fingerprints illegally seized from one whom the police had probable cause to suspect of a crime admissible despite the illegal seizure under a theory akin to inevitable discovery); and *Harker v. State*, 637 P.2d 716, 719-20 (Alaska App.1981) (prohibition against illegally obtained evidence in Evidence Rule 412 applies only to evidence obtained in violation of the objecting parties' constitutional rights).

II. LISTON'S MOTION FOR MISTRIAL

[5, 6] During the course of the examination of a prosecution witness, the witness

"search." Under *Cupp*, the police could not obtain blood samples or fingernail scrapings without complying with the fourth amendment whether or not a specific discovery rule applies to those in custody. It is clear, however, that obtaining identification evidence such as a fingerprint, and by extension a palm print, does not constitute a "search." See *United States v. Dionisio*, 410 U.S. 1, 93 S.Ct. 764, 35 L.Ed.2d 67 (1973).

commented on Liston's remaining silent when questioned about the burglary. Liston immediately moved for a mistrial and argued that the comment was so clearly inappropriate that retrial should be barred. The trial court granted the mistrial, holding that he was not convinced beyond a reasonable doubt that the comment might not affect the outcome. The trial court ruled, however, that the comment was an accident and therefore a retrial was not barred. Faced with a new trial, Liston's counsel reevaluated his position and recommended to Liston that he waive the error and proceed with the trial before the jury they had. Counsel represented to the court that Liston personally agreed to proceeding and the trial resumed. Liston now argues that the trial court was under an obligation to procure a verbal waiver from Liston personally and, in default thereof, the conviction must be set aside. Liston relies on cases like *Walker v. State*, 578 P.2d 1388 (Alaska 1978), where the supreme court held that a judge must personally address the defendant before accepting waiver of a full jury of twelve persons. We disagree. The decision to move for a mistrial and the decision to withdraw such a motion, if granted, are matters of trial strategy which defense counsel may determine without the express agreement of his client. *Matter of C.L.T.*, 597 P.2d 518, 522-23 (Alaska 1979); *Lanier v. State*, 486 P.2d 981 (Alaska 1971). In any event, we are satisfied that the record compels a finding that Liston joined in his counsel's decision to withdraw the motion. See *State v. Nixon*, 223 Kan. 788, 576 P.2d 691 (Kan.1978). The record reflects that counsel obtained a recess so that he could consult with Mr. Liston about the retrial and counsel's conclusion that they should stay with the same jury. An instruction was given directing the jury to disregard the comment. Under these circumstances, we find no reversible error.

[7] Liston argues that his counsel was concerned about starting the case again the following day in the event the first jury

was discharged and the mistrial granted. He claims that defense counsel allowed concerns about counsel's own calendar to influence his decision to waive the mistrial. Liston contends that counsel's concerns created a conflict of interest which deprived Liston of the effective assistance of counsel. *Risher v. State*, 523 P.2d 421 (Alaska 1974). Liston did not request an evidentiary hearing in the trial court on this issue. Looking only at the record made at trial, we are unable to say that Liston has sustained his burden of proving that trial counsel gave him less than the average representation customary in criminal cases in this community. It is clear that Liston, in moving for mistrial, hoped that the trial court would find that retrial was barred. When this hope was not realized, Liston was faced with choosing between a new jury and the present one. Liston's right to complete the trial with the present jury and his right to a speedy trial conflicted with terminating the trial and beginning with a new jury. Liston was faced with a tactical choice. We cannot say that his decision to proceed with the existing jury, whether or not influenced by counsel, deprived him of the assistance of competent counsel.

The judgment of the superior court is **AFFIRMED**.



Roy D. GARIBAY and Lenora J.
Amato, Appellants,

v.

STATE of Alaska, Appellee.

No. 6246.

Court of Appeals of Alaska.

Feb. 18, 1983.

Defendants were convicted before the Superior Court, Fourth Judicial District,

FISCAL NOTE

STATE OF ALASKA
1995 LEGISLATIVE SESSION

BILL NO. HB 27

Revision Date: _____ Dept. Affected: Department of Law
 Title: "...directing the Dept. of Public Safety to establish BRU: Prosecution
and maintain a deoxyribonucleic acid (DNA)...registration system..." Component: All
 Sponsor: Representative Parnell
 Requester: Representative Parnell COMPONENT SERIAL NO. 0085 - 0090

Expenditures/Revenues

(Thousands of Dollars)

OPERATING EXPENDITURES	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
----------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()						
------------------------	--	--	--	--	--	--

FUND SOURCE

(Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY95) - cost: \$ 0.0

POSITIONS

FULL-TIME	0.0	0.0	0.0	0.0	0.0	0.0
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

This bill directs the Department of Public Safety to establish and maintain a deoxyribonucleic acid (DNA) identification registration system and requires registration by persons convicted of a felony sex offense in this state. The bill also provides that the Department of Public Safety may provide (1) DNA analysis services to law enforcement agencies; (2) assistance to law enforcement officials and prosecutors in the preparation and utilization of DNA evidence for presentation in court; and, (3) expert testimony in court on DNA evidentiary issues. Although there may be some cost for the Department of Public Safety, in establishing the registration system, the bill will not have a fiscal impact on the Department of Law. And the bill will make it easier for prosecutors to make their cases where identification of defendants is an issue.

Prepared by: Richard T. Pegues, Director
 Division: Administrative Services Division
 Approved by Commissioner: Bruce M. Botelho, Attorney General
 Agency: Department of Law

Phone: 465-3672
 Date: 1/23/95
 Date: 1/23/95

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Deoxyribonucleic Acid

A Pathfinder on the Admissibility
of forensic DNA Evidence
13 Legal Reference Services
Quarterly 15-74 Fall '94

Admissibility of DNA Evidence in Wash

State v. Cauthron

846 P.2d 502

(Wash 1552)

69 Wash L.R. 383-404 April '94

Use & Admissibility of DNA typing
evidence

24 Rutgers L.J. 847-882
Spring '93

State v. Cauthron

w/ evidence admissible

Frye

U.S.

293 F. 1013

(W.C. v. W.)
1923

① Needs Frye test (it is generally
accepted in the scientific
community
Then enter trial courts
in discretion

But - expert testimony of a
match was admitted in error

i.e. ^{SP 702} ~~less~~ will expert testimony
assist trier of fact?
This is when court is discretion

Ek 702 - 2 Part

- ① Does W qualify as expert +
- ② Will testimony assist trier of fact

DNA ~~exists~~ exists + is unique

Fingerprinting is well accepted

National Academy of Sciences -
DNA Committee on DNA
Technology in Forensic
Science

① Said principles ~~are~~ are so well established that the the court could take jud. notice of their acceptability

② Then Validity of procedures
Here methods commonly accepted
(RFLP analysis with Southern Blots)

Major
Problems

These should be decided in court's discretion } contamination of sample
degradation due to passage of time

Issues -

Most of DNA is similar for humans

A - 10% are variable

Exclusion easy
Inclusion, or "match" much harder

To "match" - you must be able to show that the alleles you are using are polymorphic (Variable among humans) This requires a large enough sample (& truly random) to make a match.

Here - experts testified to a "match" - w/o probability evidence. To say samples match, w/o any estimate of the frequency w/ matches may occur, is meaningless

* Note The Admissibility of DNA Evidence in Wash. after State v. Caathron
By Elizabeth A. Allen
69 Wash. Law Review 383-404
April 1994

Court should allow for Stat DNA Evid w/ Conserv Probab
~~Probab~~ Statistical Probab
but by Fed.
Federal Rules (FR02) are more liberal in relation to Scientific Evid than Fed - this is

Criticizes T^m in Cauchon for
being unclear -
seems to accept the ~~the~~ Ceding
theory for probability

Other scientific tests

Breathalyzer

Voice spectrographic ID
are not certain but
accepted

~~Adhering~~ Ceding Principle
is so conservative that
no scientific argument
B

Adhering Ceding principle is
very conservative -
could not be based
against Δ

Alaska State Legislature

REPRESENTATIVE
SEAN R. PARNELL



716 WEST 4TH AVENUE, SUITE 320
ANCHORAGE, ALASKA 99501
(907) 258-8194

While in Juneau
STATE CAPITOL
JUNEAU, ALASKA 99801-1182
(907) 465-2995

HOUSE OF REPRESENTATIVES

SPONSOR STATEMENT House Bill 27

"An act directing the Department of Public Safety to establish and maintain a deoxyribonucleic acid (DNA) identification registration system."

This bill requires the Department of Public Safety (DPS) to draw a blood sample from convicted sex offenders and authorizes DPS to use the samples in establishing a DNA registration system for purposes of DNA analysis. DPS will use the data to investigate violent crimes and DPS may provide DNA analysis and testimony to law enforcement agencies and prosecutors throughout the state for use as evidence in court.

The bill requires compatibility of Alaska's DNA registration system with the Federal Bureau of Investigation's system. A local law enforcement agency may not establish or operate a DNA identification registration system unless the local DNA registration system is compatible with the state system. The DNA data may not be used for any purpose unrelated to a criminal investigation or improvement of the operation of the system.

DPS' State Crime Lab will be technologically incapable of maximizing use of a DNA databank or utilizing samples until 1997; however, DPS is currently capable of maintaining DNA fingerprints from convicted criminals. Passing HB 27 will establish a DNA database on convicted sex offenders and modernize our criminal prosecution efforts. I respectfully request your support of HB 27.

**DIVISION OF LEGAL SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA**

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

130 Seward Street, Suite 409
Juneau, Alaska 99801-2105

MEMORANDUM

January 23, 1995

SUBJECT: House Bill 27, directing establishment of a DNA identification registration system, and requiring registration in it by convicted felony sex offenders: sectional analysis (Work Order No. 9-LS0148\A)

TO: Representative Sean Parnell
ATTN: Richard Vitale

FROM: Jack Chenoweth
Legislative Counsel

The bill would direct the Department of Public Safety to establish and maintain a statewide deoxyribonucleic acid (DNA) identification system and require that persons convicted of felony sex offenses be registered to it. The measure tracks relevant provisions of the comparable Washington enactment, codified as RCW 43.43.752 - 43.43.759.

Bill section 1 sets out legislative findings for the measure.

Bill section 2, adding a proposed new section, AS 44.41.035, prescribes establishment and maintenance of the DNA identification system:

-- subsection (a) directs the Department of Public Safety to establish the system, to be compatible with the existing FBI registration system;

-- subsection (b) directs that persons convicted of sex offenses--the term is defined in proposed AS 44.41.035(g)--have a blood sample drawn for purposes of DNA identification analysis, and sets limits on the proper use of that blood sample;

-- subsection (c) enumerates additional powers of the department relevant to DNA analysis;

-- subsection (d) imposes limitations on local (municipal) law enforcement operation of comparable DNA identification registration systems;

-- subsection (e) explicitly permits local law enforcement agencies to perform DNA identification analysis;

SECTIONAL ANALYSIS

CS FOR HOUSE BILL NO. 27(JUD)
IN THE LEGISLATURE OF THE STATE OF ALASKA
NINETEENTH LEGISLATURE - FIRST SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): REPRESENTATIVES PARNELL, Toohey, B.Davis, Porter, Green, Bunde

A BILL

FOR AN ACT ENTITLED

1 "An Act directing the Department of Public Safety to establish and maintain a
2 deoxyribonucleic acid (DNA) identification registration system and requiring DNA
3 registration by persons convicted of a felony crime against a person; and providing
4 for an effective date."

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

6 * Section 1. LEGISLATIVE FINDINGS. The legislature finds that

7 (1) recent developments in molecular biology and genetics have important
8 applications for forensic science; it has been scientifically established that there is a unique
9 pattern to the chemical structure of the deoxyribonucleic acid (DNA) contained in each cell of
10 the human body; the process for identifying this pattern is called "DNA identification"; and

11 (2) the accuracy of identification provided by this method is superior to that of
12 any presently existing technique and recognizes the importance of this scientific breakthrough
13 in providing a reliable and accurate tool for the investigation and prosecution of offenses.

CORRECTION

THE FOLLOWING DOCUMENT(S)
HAVE BEEN REFILMED TO
ASSURE LEGIBILITY OR PAGINATION



Rev. 6/98

Central Microfilm Services
Department of Education
State of Alaska

**DIVISION OF LEGAL SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA**

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-- subsection (d) imposes limitations on local (municipal) law enforcement operation of comparable DNA identification registration systems;

-- subsection (e) explicitly permits local law enforcement agencies to perform DNA identification analysis;

SECTIONAL ANALYSIS

Representative Sean Parnell
January 23, 1995
Page 2

-- subsection (f) prescribes limitations on the use of DNA identification data; and

-- subsection (g) sets out a definition of the term "sex offense"; the definition's cross-reference to AS 12.63.100 adapts the definition of crimes that are, in fact, felony offenses.

Bill section 3 gives the measure a January 1, 1996, effective date.

JBC:glc
95-087.glc

CS FOR HOUSE BILL NO. 27(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

NINETEENTH LEGISLATURE - FIRST SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered:

Referred:

Sponsor(s): REPRESENTATIVES PARNELL, Toohey, B.Davis, Porter, Green. Bunde

A BILL

FOR AN ACT ENTITLED

1 "An Act directing the Department of Public Safety to establish and maintain a
 2 deoxyribonucleic acid (DNA) identification registration system and requiring DNA
 3 registration by persons convicted of a felony crime against a person; and providing
 4 for an effective date."

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

6 * Section 1. LEGISLATIVE FINDINGS. The legislature finds that

7 (1) recent developments in molecular biology and genetics have important
 8 applications for forensic science; it has been scientifically established that there is a unique
 9 pattern to the chemical structure of the deoxyribonucleic acid (DNA) contained in each cell of
 10 the human body; the process for identifying this pattern is called "DNA identification"; and

11 (2) the accuracy of identification provided by this method is superior to that of
 12 any presently existing technique and recognizes the importance of this scientific breakthrough
 13 in providing a reliable and accurate tool for the investigation and prosecution of offenses.

1 * Sec. 2. AS 44.41 is amended by adding a new section to read:

2 Sec. 44.41.035. DNA IDENTIFICATION SYSTEM. (a) To support criminal
3 justice services in this state, the Department of Public Safety shall establish a
4 deoxyribonucleic acid (DNA) identification registration system. The DNA identification
5 registration system as established shall be compatible with that utilized by the Federal
6 Bureau of Investigation.

7 (b) A person convicted in this state of a crime against a person shall have a blood
8 sample drawn for purposes of DNA identification analysis. A blood sample taken under
9 this section may be used only for the purpose of providing DNA or other blood grouping
10 tests for identification analysis, for preparation of statistical blind analysis, and
11 prosecution of criminal offenses.

12 (c) The Department of Public Safety may provide

13 (1) DNA analysis services to law enforcement agencies throughout the
14 state; and

15 (2) assistance to law enforcement officials and prosecutors in the
16 preparation and utilization of DNA evidence for presentation in court.

17 (d) Except as provided in (e) of this section, a local law enforcement agency may
18 not establish or operate a DNA identification registration system unless

19 (1) the equipment and the DNA typing method of the local system are
20 compatible with that of the state system under (a) of this section;

21 (2) the local system is equipped to receive and answer inquiries from the
22 department's DNA identification registration system and transmit data to the department's
23 DNA identification registration system; and

24 (3) procedure and rules for the collection, analysis, storage, expungement,
25 and use of DNA identification data do not conflict with procedures and rules applicable
26 to the department's DNA identification registration system.

27 (e) Nothing in (d) of this section prohibits a local law enforcement agency from
28 performing DNA identification analysis in individual cases to assist law enforcement
29 officials and prosecutors in the preparation and use of DNA evidence for presentation in
30 court.

31 (f) DNA identification data may not be used for any purpose that is not related

1 to a criminal investigation or to improving the operation of the system authorized by this
2 section.

3 (g) In this section, "crime against a person" means a felony offense, or a felony
4 attempt to commit an offense, under AS 11.41, other than AS 11.41.320, or under
5 AS 11.46.400.

6 * Sec. 3. APPLICABILITY. This Act applies to all convictions occurring on or after the
7 effective date of this Act for a crime against a person, as that term is defined in sec. 2 of this Act.

8 * Sec. 4. This Act takes effect January 1, 1996.

FISCAL NOTE

STATE OF ALASKA
1995 LEGISLATIVE SESSION

BILL NO: HB 27

Revision Date: _____ Dept. Affected: Public Safety
 Title: "An Act directing the Department of Public Safety to establish and maintain a deoxyrib....." BRU: STATEWIDE
 Sponsor: Parnell Component: Alaska Criminal Records and Identification
 Requestor: Judiciary COMPONENT SERIAL NO. 1190

EXPENDITURES/REVENUES: (Thousands of Dollars) (inflation not included)

OPERATING	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
PERSONAL SERVICES	3.0	3.0	3.0	3.0	3.0	3.0
TRAVEL						
CONTRACTUAL	5.0					
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	8.0	3.0	3.0	3.0	3.0	3.0
CAPITAL EXPENDITURES	0	0	0	0	0	0
CHANGE IN REVENUES () <small>Revenue Code</small>	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	8.0	3.0	3.0	3.0	3.0	3.0
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	8.0	3.0	3.0	3.0	3.0	3.0

Estimate of current year (FY 95) impact: \$ 0

POSITIONS:

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

ANALYSIS: (Attach a separate page if necessary.)
 SEE ATTACHED ANALYSIS

Prepared By: Ken Bischoff Phone: 465-4336
 Division: Administrative Services Date: January 24, 1995
 Approved by Commissioner: *[Signature]* Date: January 24, 1995
 Agency: for Ronald L. Otte, Dept. of Public Safety

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1/24/95

ANALYSIS
HB 27

The assumptions upon which this fiscal note is based fall into two categories as discussed more fully below:

Costs for R&I personnel to verify and update APSIN DNA criminal history flag;

It is estimated that there are approximately 300 convicted sexual offenders annually.

Cost Summary:

Personal services costs the first year are for data entry, revising procedures and training data entry personnel. Continuing costs are for verification and data entry.

Contractual costs are requested to modify the fingerprint card tracking system to capture, maintain status and provide statistical reports.

FISCAL NOTE

STATE OF ALASKA
1995 LEGISLATIVE SESSION

BILL NO: HB 27

Revision Date: _____ Dept. Affected: Public Safety
 Title: "An Act directing the Department of Public Safety to establish and maintain a deoxyrib..." BRU: STATEWIDE
 Sponsor: Parnell Component: Alaska Public Safety Information Net
 Requestor: Judiciary COMPONENT SERIAL NO. 528

EXPENDITURES/REVENUES: (Thousands of Dollars) (inflation not included)

OPERATING	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
PERSONAL SERVICES	10.0	5.0	5.0	5.0	5.0	5.0
TRAVEL						
CONTRACTUAL	10.0	5.0	5.0	5.0	5.0	5.0
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	20.0	10.0	10.0	10.0	10.0	10.0
CAPITAL EXPENDITURES	0	0	0	0	0	0
CHANGE IN REVENUES ()	0	0	0	0	0	0
<small>Revenue Code</small>						

FUNDING: (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	20.0	10.0	10.0	10.0	10.0	10.0
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	20.0	10.0	10.0	10.0	10.0	10.0

Estimate of current year (FY 95) impact: \$ 0

POSITIONS:

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

ANALYSIS: (Attach a separate page if necessary.)

SEE ATTACHED ANALYSIS

Ken Bischoff
 1/24/95 Prepared By: Ken Bischoff Phone: 465-4336
 Division: Administrative Services Date: January 24, 1995
 Approved by Commissioner: *Ronald L. Otte* Date: January 24, 1995
 Agency: for Ronald L. Otte, Dept. of Public Safety

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ANALYSIS HB 27

The assumptions upon which this fiscal note is based fall into two categories as discussed more fully below:

Costs to ensure the APSIN Criminal History Record database is flagged so that law enforcement and other criminal justice agencies know a DNA record exists;

Costs to participate in design, implementation, program monitoring, problem resolution with the Crime Lab, Courts and/or Department of Corrections.

The Alaska Public Safety Information Network (APSIN) component provides the only statewide law enforcement computer network in Alaska with interfaces to national criminal justice information networks. APSIN currently services 39 communities, 172 agencies with 2,010 users.

APSIN maintains state databases and access to national databases for criminal history record, wants, warrants and person information including fingerprints.

ROLE OF APSIN and National Criminal Justice Information Networks regarding DNA:

The role that APSIN should perform in the implementation of HB 27 is to provide a flag on the criminal history record to indicate that a DNA sample exists for lawful purposes authorized by the bill. The flag is simply an indicator, not the DNA record itself which would be located in the separately managed DNA Identification System defined in section 2 of this bill.

It is important for law enforcement and others to know that a DNA records exists. The most efficient method of providing law enforcement this information is with a field in the APSIN criminal history record that can be set to YES or NO indicating whether or not a DNA sample exists.

The manner in which APSIN should be updated is to require fingerprints to be taken of the individual at the time the blood sample is taken and forward the fingerprints to the Department of Public Safety, Division of Administrative Services, Records and Identification Section (R&I). R&I would perform a fingerprint verification to ensure the correct persons criminal history record is updated.

ROLE OF APSIN In Assisting the State Crime Lab, police and criminal justice agencies:

APSIN will perform a two part support role.

In the first instance, APSIN programming staff need to participate in the design of the registration system to ensure proper flow between the Crime Lab, Records and Identification, APSIN Courts and/or Corrections. APSIN staff would participate in the analysis, design, review, programming, testing and ongoing maintenance of the registration system.

In the second instance, APSIN staff perform the Control Terminal Agency responsibilities for Alaska police and criminal justice agency participation with the FBI - National Crime Information Center (NCIC) and other FBI Criminal Justice Information Systems Division functions. APSIN staff would review existing FBI standards and recommendations to help ensure current and future compliance with FBI initiatives like CODIS and flagging criminal history records sent to or indexed with the FBI for DNA purposes.

Note: CODIS is an FBI pilot program that is networking a number of crime labs around the country to facilitate remote searching of DNA records for possible matches. Automated identifications have already been made in Florida using this system. In order for a network such as this to be successful and evolve into a national system, standards need to be finalized and agreements reached among the states to operate with a uniform set of rules and procedures.

Cost Summary:

APSIN and other programming necessary to establish a DNA flag in the APSIN criminal history record and provide for periodic reconciliation of APSIN entries to records on the DNA registration System - \$10.0

Personal Services are required to assist in coordination of the project, draft procedures and regulations, provide problem resolution assistance. First Year - \$10.0, Continuing - \$5.0

FISCAL NOTE

STATE OF ALASKA
1995 LEGISLATIVE SESSION

BILL NO: HB 27

Revision Date: _____ Dept. Affected: Public Safety
 Title: "An Act directing the Department of Public BRU: STATEWIDE
Safety to establish and maintain a deoxyrib..... Component: Laboratory Services
 Sponsor: Parnell
 Requestor: Judiciary COMPONENT SERIAL NO. 527

EXPENDITURES/REVENUES: (Thousands of Dollars) (inflation not included)

OPERATING	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
PERSONAL SERVICES	10.0	5.0	5.0	5.0	5.0	5.0
TRAVEL						
CONTRACTUAL	9.4	4.4	4.4	4.4	4.4	4.4
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	19.4	9.4	9.4	9.4	9.4	9.4
CAPITAL EXPENDITURES	0	0	0	0	0	0
CHANGE IN REVENUES () <small>Revenue Code</small>	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	19.4	9.4	9.4	9.4	9.4	9.4
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	19.4	9.4	9.4	9.4	9.4	9.4

Estimate of current year (FY 95) impact: \$ 0

POSITIONS:

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

ANALYSIS: (Attach a separate page if necessary.)

SEE ATTACHED ANALYSIS

Prepared By: Ken Bischoff Phone: 465-4236
 Division: Administrative Services Date: 1/25/95
 Approved by Commissioner: Ronald L. Otte Date: 1/25/95
 Agency: Ronald L. Otte, Dept. of Public Safety

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ANALYSIS
HB 27

This fiscal note is intended to permit the Crime Lab to receive samples from the Department of Corrections and store them for later use.

The assumptions upon which this fiscal note is based are discussed below:

Costs for Laboratory personnel to receive, catalog, prepare, index and store samples;

Costs for Laboratory and/or contract personnel to work out procedures and programming to automate and provide reconciliation between the Crime Lab Computer system and the Alaska Public Safety Information Network (APSIN);

Costs to reimburse the Department of Corrections for drawing blood samples, providing fingerprints and delivery to the Crime Lab (\$4.4);

It is estimated that there are approximately 300 convicted sexual offenders annually.

~~This fiscal note does not address typing blood samples or analyzing and typing crime scene evidence, for storing in an automated computer system for matching and remote networking purposes. Collection of the blood samples will have value on a case by case basis where a suspect's blood is on file with the crime lab and knowledge that a sample exists has been made available to law enforcement via APSIN.~~

FISCAL NOTE

STATE OF ALASKA
1995 LEGISLATIVE SESSION

BILL NO. HB 27

Revision Date: _____ Dept. Affected: Department of Law
 Title: "...directing the Dept. of Public Safety to establish
and maintain a deoxyribonucleic acid (DNA)...registration system..." BRU: Prosecution
 Sponsor: Representative Parnell Component: All
 Requester: Representative Parnell COMPONENT SERIAL NO. 0085 - 0090

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
------------------------	--	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY95) cost: \$ 0.0

POSITIONS

FULL-TIME	0.0	0.0	0.0	0.0	0.0	0.0
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

This bill directs the Department of Public Safety to establish and maintain a deoxyribonucleic acid (DNA) identification registration system and requires registration by persons convicted of a felony sex offense in this state. The bill also provides that the Department of Public Safety may provide (1) DNA analysis services to law enforcement agencies; (2) assistance to law enforcement officials and prosecutors in the preparation and utilization of DNA evidence for presentation in court; and, (3) expert testimony in court on DNA evidentiary issues. Although there may be some cost for the Department of Public Safety, in establishing the registration system, the bill will not have a fiscal impact on the Department of Law. And the bill will make it easier for prosecutors to make their cases where identification of defendants is an issue.

Prepared by: Richard I. Pegues, Director
 Division: Administrative Services Division
 Approved by Commissioner: Bruce M. Botelho, Attorney General
 Agency: Department of Law

Phone: 465-3672
 Date: 1/23/95
 Date: 1/23/95

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EXPERT TESTIMONY FOR HB 27

Jay Miller
Chief Forensic Science Systems Unit
FBI Lab Washington D.C.
Director of the DNA National Database and the "DNA Identification Act"
(established in the new national crime bill)

Richard Guerrrieri
Assistant Director
Forensic Identity Laboratory
Roche Biomedical Laboratories
Research Triangle Park, NC

George Taft
Director
Alaska State Crime Lab

Dean Guaneli
Chief Assistant Attorney General
Central Office, Department of Law

EXPERT TESTIMONY FOR HB 27

Jay Miller
Chief Forensic Science Systems Unit
FBI Lab Washington D.C.

HOME 301 779 3166

530 EST
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Director of the DNA National Database and the "DNA Identification Act"
(established in the new national crime bill)

Richard Guerrieri
Assistant Director
Forensic Identity Laboratory
Roche Biomedical Laboratories
Research Triangle Park, NC

Summary of DNA Database Hits in Minnesota

Minnesota's central crime laboratory in St. Paul has been a CODIS pilot site for the past several years as the system was under development. They have begun to show some success in linking sexual assault and murder cases to their state DNA database of convicted offenders, as the following cases show:

1. November 1994: A man wearing a nylon stocking over his face and armed with a knife jumped out from behind bushes and forced a woman who was walking by to perform oral sex. Semen was recovered from the victim's skirt and saliva samples. A suspect was excluded based on conventional serology. Searching Minnesota's DNA database, however, identified Terry Lee Anderson, who confessed and is now in prison.
2. October 1994: In St. Paul, a woman was grabbed by the neck and taken several blocks to an area near the railroad tracks. She was held by the neck, raped, and left at the scene. A suspect was eliminated because his DNA profile did not match the rape evidence. A previously unknown suspect was identified when the rapist's DNA was searched against Minnesota's DNA database.
3. October 1994: Two men were accused of sexually assaulting a woman whom they had brought home. She had been carrying a sign that said, "Work for food", and was intoxicated and bruised when police arrived. Both suspects were eliminated as contributors of the semen found on the woman's underwear. The DNA from the semen was then matched to a man who had been required to provide a blood sample from DNA typing as a result of a previous conviction.
4. October 1994: DNA evidence was matched from two unrelated assaults involving forced oral sex. Police departments in the two towns where the assaults occurred were notified that the same man committed both acts. A suspect was identified by searching the state DNA database.
5. February 1993: A woman entering her home was caught from behind and threatened with a screw driver. She was hooded with a ski mask, forced into her own car, and driven to a remote site where she was raped. Her attacker then dropped her off near her home and abandoned the car nearby. DNA evidence from vaginal swabs and the carpet from the car was matched in the DNA database to Troy Bradley Bloom. Bloom was convicted and sentenced to 30 years.
6. December 1991: Jean Broderick was raped and murdered in her home. Police had no suspect. The DNA from semen found on the Ms. Broderick's buttocks was matched to Martin Estrada Perez,

whose DNA profile was stored in Minnesota's DNA database. Perez was found guilty of murder and sentenced to life in prison without the possibility of parole. His conviction and sentence were affirmed by the Minnesota Supreme Court. [Note: Perez was an illegal alien from Mexico who had a history of sexual assaults in Georgia, Texas and Minnesota. Perez had been deported to Mexico following his previous release from prison by Minnesota. He quickly made his way back to Minnesota where he was arrested for burglary. Because he gave an alias, his previous convictions were not discovered. Jean Broderick was murdered a few days after he was released on the burglary charges.]

FISCAL NOTE

STATE OF ALASKA
1995 LEGISLATIVE SESSION

BILL NO: HR 27

Revision Date: _____ Dept. Affected: Public Safety
 Title: "An Act directing the Department of Public Safety to establish and maintain a deoxyrib....." BRU: STATEWIDE
 Sponsor: Pamell Component: Alaska Public Safety Information Net.
 Requestor: Judiciary COMPONENT SERIAL NO. 528

EXPENDITURES/REVENUES: (Thousands of Dollars) (inflation not included)

OPERATING	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
PERSONAL SERVICES	10.0	5.0	5.0	5.0	5.0	5.0
TRAVEL						
CONTRACTUAL	10.0	5.0	5.0	5.0	5.0	5.0
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	20.0	10.0	10.0	10.0	10.0	10.0
CAPITAL EXPENDITURES	0	0	0	0	0	0
CHANGE IN REVENUES () <small>Revenue Code</small>	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	20.0	10.0	10.0	10.0	10.0	10.0
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	20.0	10.0	10.0	10.0	10.0	10.0

Estimate of current year (FY 95) impact: \$ 0

POSITIONS:

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

ANALYSIS: (Attach a separate page if necessary.)

SEE ATTACHED ANALYSIS

Prepared By: Ken Bischoff Phone: 465-4336
 Division: Administrative Services Date: January 24, 1995
 Approved by Commissioner: *Ronald L. Otte* Date: January 24, 1995
 Agency: for Ronald L. Otte, Dept. of Public Safety

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ANALYSIS HB 27

The assumptions upon which this fiscal note is based fall into two categories as discussed more fully below:

Costs to ensure the APSIN Criminal History Record database is flagged so that law enforcement and other criminal justice agencies know a DNA record exists;

Costs to participate in design, implementation, program monitoring, problem resolution with the Crime Lab, Courts and/or Department of Corrections.

The Alaska Public Safety Information Network (APSIN) component provides the only statewide law enforcement computer network in Alaska with interfaces to national criminal justice information networks. APSIN currently services 39 communities, 172 agencies with 2,010 users.

APSIN maintains state databases and access to national databases for criminal history record, wants, warrants and person information including fingerprints.

ROLE OF APSIN and National Criminal Justice Information Networks regarding DNA:

The role that APSIN should perform in the implementation of HB 27 is to provide a flag on the criminal history record to indicate that a DNA sample exists for lawful purposes authorized by the bill. The flag is simply an indicator, not the DNA record itself which would be located in the separately managed DNA Identification System defined in section 2 of this bill.

It is important for law enforcement and others to know that a DNA records exists. The most efficient method of providing law enforcement this information is with a field in the APSIN criminal history record that can be set to YES or NO indicating whether or not a DNA sample exists.

The manner in which APSIN should be updated is to require fingerprints to be taken of the individual at the time the blood sample is taken and forward the fingerprints to the Department of Public Safety, Division of Administrative Services, Records and Identification Section (R&I). R&I would perform a fingerprint verification to ensure the correct persons criminal history record is updated.

ROLE OF APSIN In Assisting the State Crime Lab, police and criminal justice agencies:

APSIN will perform a two part support role.

In the first instance, APSIN programming staff need to participate in the design of the registration system to ensure proper flow between the Crime Lab, Records and Identification, APSIN Courts and/or Corrections. APSIN staff would participate in the analysis, design, review, programming, testing and ongoing maintenance of the registration system.

In the second instance, APSIN staff perform the Control Terminal Agency responsibilities for Alaska police and criminal justice agency participation with the FBI - National Crime Information Center (NCIC) and other FBI Criminal Justice Information Systems Division functions. APSIN staff would review existing FBI standards and recommendations to help ensure current and future compliance with FBI initiatives like CODIS and flagging criminal history records sent to or indexed with the FBI for DNA purposes.

Note: CODIS is an FBI pilot program that is networking a number of crime labs around the country to facilitate remote searching of DNA records for possible matches. Automated identifications have already been made in Florida using this system. In order for a network such as this to be successful and evolve into a national system, standards need to be finalized and agreements reached among the states to operate with a uniform set of rules and procedures.

Cost Summary:

APSIN and other programming necessary to establish a DNA flag in the APSIN criminal history record and provide for periodic reconciliation of APSIN entries to records on the DNA registration System - \$10.0

Personal Services are required to assist in coordination of the project, draft procedures and regulations, provide problem resolution assistance. First Year - \$10.0, Continuing - \$5.0

9-LS0148F
Luckhaupt
1/25/95

CS FOR HOUSE BILL NO. 27()
IN THE LEGISLATURE OF THE STATE OF ALASKA
NINETEENTH LEGISLATURE - FIRST SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVES PARNELL, Toohey, B.Davis, Porter, Green, Bunde

A BILL

FOR AN ACT ENTITLED

1 "An Act directing the Department of Public Safety to establish and maintain a
2 deoxyribonucleic acid (DNA) identification registration system and requiring DNA
3 registration by persons convicted of a felony crime against a person; and providing
4 for an effective date."

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

6 * Section 1. LEGISLATIVE FINDINGS. The legislature finds that

7 (1) recent developments in molecular biology and genetics have important
8 applications for forensic science; it has been scientifically established that there is a unique
9 pattern to the chemical structure of the deoxyribonucleic acid (DNA) contained in each cell of
10 the human body; the process for identifying this pattern is called "DNA identification"; and

11 (2) the accuracy of identification provided by this method is superior to that of
12 any presently existing technique and recognizes the importance of this scientific breakthrough
13 in providing a reliable and accurate tool for the investigation and prosecution of offenses.

1 * Sec. 2. AS 44.41 is amended by adding a new section to read:

2 Sec. 44.41.035. DNA IDENTIFICATION SYSTEM. (a) To support criminal
3 justice services in this state, the Department of Public Safety shall establish a
4 deoxyribonucleic acid (DNA) identification registration system. The DNA identification
5 registration system as established shall be compatible with that utilized by the Federal
6 Bureau of Investigation.

7 (b) A person convicted in this state of a crime against a person shall have a blood
8 sample drawn for purposes of DNA identification analysis. A blood sample taken under
9 this section may be used only for the purpose of providing DNA or other blood grouping
10 tests for identification analysis, for preparation of statistical blind analysis, and
11 prosecution of criminal offenses.

12 (c) The Department of Public Safety may provide

13 (1) DNA analysis services to law enforcement agencies throughout the
14 state; and

15 (2) assistance to law enforcement officials and prosecutors in the
16 preparation and utilization of DNA evidence for presentation in court.

17 (d) Except as provided in (e) of this section, a local law enforcement agency may
18 not establish or operate a DNA identification registration system unless

19 (1) the equipment of the local system is compatible with that of the state
20 system under (a) of this section;

21 (2) the local system is equipped to receive and answer inquiries from the
22 department's DNA identification registration system and transmit data to the department's
23 DNA identification registration system; and

24 (3) procedure and rules for the collection, analysis, storage, expungement,
25 and use of DNA identification data do not conflict with procedures and rules applicable
26 to the department's DNA identification registration system.

27 (e) Nothing in (d) of this section prohibits a local law enforcement agency from
28 performing DNA identification analysis in individual cases to assist law enforcement
29 officials and prosecutors in the preparation and use of DNA evidence for presentation in
30 court.

31 (f) DNA identification data may not be used for any purpose that is not related
32 to a criminal investigation or to improving the operation of the system authorized by this

1 section.

2 (g) In this section, "crime against a person" means a felony offense, or a felony
3 attempt to commit an offense, under AS 11.41, other than AS 11.41.320, or under
4 AS 11.46.400.

5 * Sec. 3. APPLICABILITY. This Act applies to all convictions occurring on or after the
6 effective date of this Act for a crime against a person, as that term is defined in sec. 2 of this Act.

7 * Sec. 4. This Act takes effect January 1, 1996.

HB

28

*Sheila Peterson
Doe 2803*

9-LS01511G

CS FOR HOUSE BILL NO. 28(HES)

IN THE LEGISLATURE OF THE STATE OF ALASKA

NINETEENTH LEGISLATURE - FIRST SESSION

BY THE HOUSE HEALTH, EDUCATION AND SOCIAL SERVICES COMMITTEE

**Offered: 2/22/95
Referred: Judiciary, Finance**

Sponsor(s): REPRESENTATIVES BUNDE, Rokeberg, Green, Toohey, Kott, Elton

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to the possession of weapons within the grounds of or on the
2 parking lot of preschools, elementary, junior high, and secondary schools or while
3 participating in a school-sponsored event; requiring the expulsion or suspension of
4 students possessing deadly weapons on school grounds; requiring reports to the
5 Department of Education concerning those expulsions or suspensions; and relating
6 to school lockers and other containers provided in a public or private school by
7 the school or the school district."

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

9 * **Section 1.** AS 11.61.210(a) is amended to read:

*misconduct involving weapons
40
class A
misd.*

10 (a) A person commits the crime of misconduct involving weapons in the fourth
11 degree if the person

12 (1) possesses on the person, or in the interior of a vehicle in which the
13 person is present, a firearm when the person's physical or mental condition is impaired

1 as a result of the introduction of an intoxicating liquor or a controlled substance into
2 the person's body in circumstances other than described in AS 11.61.200(a)(7);

3 (2) discharges a firearm from, on, or across a highway;

4 (3) discharges a firearm with reckless disregard for a risk of damage
5 to property or a risk of physical injury to a person;

6 (4) manufactures, possesses, transports, sells, or transfers metal
7 knuckles;

8 (5) manufactures, sells, or transfers a switchblade or a gravity knife;

9 [OR]

10 (6) knowingly sells a firearm or a defensive weapon to a person under
11 18 years of age;

12 (7) other than a preschool, elementary, junior high, or secondary
13 school student, knowingly possesses a deadly weapon or a defensive weapon
14 without the permission of the chief administrative officer of the school or district
15 or the designee of the chief administrative officer, within the grounds of, or on the
16 parking lot immediately adjacent to a public or private preschool, elementary,
17 junior high, or secondary school or while participating in a school-sponsored
18 event, except that a person 21 years of age or older may possess

19 (A) a deadly weapon other than a loaded firearm in the
20 trunk of a motor vehicle or encased in a closed container in a motor
21 vehicle;

22 (B) a defensive weapon;

23 (C) an unloaded firearm if the person is traversing school
24 premises in a rural area for the purpose of entering public or private land
25 that is open to hunting and the school board with jurisdiction over the
26 school premises has elected to have this exemption apply to the school
27 premises; in this subparagraph, "rural" means a community with a
28 population of 5,500 or less that is not connected by road or rail to
29 Anchorage or Fairbanks or with a population of 1,500 or less that is
30 connected by road or rail to Anchorage or Fairbanks; or

31 (8) being a preschool, elementary, junior high, or secondary school

1 student, knowingly possesses a deadly weapon or a defensive weapon, within the
2 grounds of or on the parking lot immediately adjacent to a public or private
3 preschool, elementary, junior high, or secondary school or while participating in
4 a school-sponsored event, except that a student may possess a deadly weapon,
5 other than a firearm as defined under 18 U.S.C. 921, or a defensive weapon if the
6 student has obtained the prior permission of the chief administrative officer of the
7 school or district or the designee of the chief administrative officer for the
8 possession.

*Waiting for
Answer from
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>*

9 * Sec. 2. AS 11.61.210 is amended by adding a new subsection to read:

10 (d) The provisions of (a)(7) of this section do not apply to a peace officer
11 acting within the scope and authority of the officer's employment.

12 * Sec. 3. AS 11.61.220(a) is amended to read:

*Class
B.
msd.*

13 (a) A person commits the crime of misconduct involving weapons in the fifth
14 degree if the person

15 (1) knowingly possesses a deadly weapon, other than an ordinary
16 pocket knife or a defensive weapon, that is concealed on the person;

17 (2) knowingly possesses a loaded firearm on the person in any place
18 where intoxicating liquor is sold for consumption on the premises;

19 (3) being an unemancipated minor under 16 years of age, possesses a
20 firearm without the consent of a parent or guardian of the minor;

21 (4) knowingly possesses a firearm

22 [(A) OR A DEFENSIVE WEAPON WITHIN THE GROUNDS
23 OF OR ON A PARKING LOT IMMEDIATELY ADJACENT TO A PUBLIC
24 OR PRIVATE PRESCHOOL, ELEMENTARY, JUNIOR HIGH, OR
25 SECONDARY SCHOOL WITHOUT THE PERMISSION OF THE CHIEF
26 ADMINISTRATIVE OFFICER OF THE SCHOOL OR DISTRICT OR THE
27 DESIGNEE OF THE CHIEF ADMINISTRATIVE OFFICER, EXCEPT THAT
28 A PERSON 21 YEARS OF AGE OR OLDER MAY POSSESS

29 (i) AN UNLOADED FIREARM IN THE TRUNK OF
30 A MOTOR VEHICLE OR ENCASED IN A CLOSED CONTAINER
31 IN A MOTOR VEHICLE;

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(ii) A DEFENSIVE WEAPON; OR

(B)] within the grounds of or on a parking lot immediately adjacent to a center, other than a private residence, licensed under AS 47.33 or AS 47.35 or recognized by the federal government for the care of children; or

(5) possesses or transports a switchblade or a gravity knife.

* Sec. 4. AS 14.03.080 is amended by adding a new subsection to read:

(f) This section does not require a school district to admit a child or person currently under suspension or expulsion under AS 14.03.160 in that or another school district.

* Sec. 5. AS 14.03 is amended by adding a new section to read:

Sec. 14.03.105. SCHOOL LOCKERS. (a) Subject to (b) of this section, a locker or other container provided in a school by the school or the school district may be searched and examined with the permission of the chief administrative officer of the school or the school district or the designee of the chief administrative officer to determine compliance with school regulations, school district regulations, and local, state, and federal laws.

(b) Notices in letters at least two inches high stating the right and the intention of school and school district officers to permit searches and examinations under (a) of this section shall be posted in prominent locations throughout a school.

(c) Nothing in this section limits the ability of a peace officer, chief administrative officer, or other appropriate person, acting in compliance with local, state, or federal laws, to search a locker or other container provided in a public or private school by the school district.

* Sec. 6. AS 14.03 is amended by adding a new section to read:

Sec. 14.03.160. SUSPENSION OR EXPULSION OF STUDENTS FOR POSSESSING WEAPONS. (a) Notwithstanding any other provision of law, a school district shall

(1) expel for at least one year a student who violates AS 11.61.210(a)(8) while possessing a firearm, as that term is defined under 18 U.S.C. 921;

(2) suspend for a least 30 days, or expel for the school year or

1 permanently, a student who violates AS 11.61.210(a)(8) while possessing a deadly
2 weapon, other than a firearm as that term is defined under 18 U.S.C. 921.

3 (b) The administrative officer of a school district may on a case-by-case basis
4 reduce or otherwise modify the expulsion or suspension of a student under (a) of this
5 section.

Why - No Standards etc.

6 (c) A prior conviction, or adjudication of delinquency or child in need of aid,
7 for violation of AS 11.61.210(a)(8) is not necessary for a school board to suspend or
8 expel a student under this section.

9 (d) Each school district shall adopt a policy providing for the referral to law
10 enforcement authorities of students who violate AS 11.61.210(a)(8).

11 (e) Annually on a date set by the department, each school district shall report
12 to the department the number of students expelled under this section and the types of
13 weapons involved.

14 (f) In this section,

15 (1) "deadly weapon" has the meaning given in AS 11.81.900;

16 (2) "district" has the meaning given in AS 14.17.250.

17 * Sec. 7. AS 14.45 is amended by adding a new section to article 3 to read:

18 Sec. 14.45.190. SCHOOL LOCKERS. A private school may search school
19 lockers and other containers as provided in AS 14.03.105.

GUIDANCE CONCERNING STATE AND LOCAL
RESPONSIBILITIES UNDER THE
GUN-FREE SCHOOLS ACT OF 1994

This guidance is to provide information concerning State and local responsibilities under the Gun-Free Schools Act (GFSA), which was enacted on October 20, 1994 as part of the Improving America's Schools Act of 1994 [the reauthorization of the Elementary and Secondary Education Act of 1965 (ESEA)], Public Law 103-382. Preliminary information, including a copy of this new legislation, was mailed to Governors and Chief State School Officers in a letter dated November 28, 1994.

The GFSA states that each State receiving Federal funds under ESEA must have in effect, by October 20, 1995, a State law requiring local educational agencies to expel from school for a period of not less than one year a student who is determined to have brought a weapon to school. Each State's law also must allow the chief administering officer of the local educational agency (LEA) to modify the expulsion requirement on a case-by-case basis.

The legislation explicitly states that the GFSA must be construed to be consistent with the Individuals with Disabilities Education Act (IDEA). Therefore, by using the case-by-case exception, LEAs will be able to discipline students with disabilities in accordance with the requirements of Part B of the IDEA and Section 504 of the Rehabilitation Act (Section 504), and thereby maintain eligibility for Federal financial assistance. The Department intends to issue separate, more detailed guidance on discipline of students with disabilities, which will include clarification of the implementation of the GFSA consistent with IDEA and Section 504.

The following questions and answers have been prepared to assist States, State educational agencies (SEAs), and LEAs in implementing these new requirements.

- Q1. What entities are affected by the provisions of the Gun-Free Schools Act?
- A. Each State, as well as its State educational agency and local educational agencies, has responsibilities under the GFSA.
- Q2. Are private schools subject to the requirements of the Gun-Free Schools Act?
- A. Private schools are not subject to the provisions of the GFSA, but private school students who participate in LEA programs or activities are subject to the one-year expulsion.

requirement to the extent that such students are under the supervision and control of the LEA as part of their participation in the LEA's programs. For example, a private school student who is enrolled in a Federal program, such as Title I, is subject to a one-year expulsion, but only from Federal program participation, not a one-year expulsion from the private school. Of course, nothing prohibits a private school from imposing a similar expulsion from the private school on a student who brings a weapon to school.

Q3. Will SEAs and LEAs have a period of time to comply with the requirements of the Gun-Free Schools Act?

A. States must take prompt action to implement the requirements of the GFSA, including prompt action to initiate the legislative process. States have until October 20, 1995 to enact and make effective the one-year expulsion legislation required by Section 14501. States that have not enacted and made effective legislation by this date risk losing ESEA funds.

In order to be eligible to receive ESEA funds, LEAs must have an expulsion policy consistent with the required State law.

LEAs must take immediate action to implement the referral policy required by Section 14602, because the GFSA directs that no ESEA funds shall be made available to an LEA unless that LEA has the required referral policy.

Q4. Is compliance with the requirements of the Gun-Free Schools Act a condition for the receipt of Federal financial assistance under the ESEA?

A. Yes, compliance with the requirements of the GFSA is a condition for the receipt of funds made available to the State under the ESEA.

Q5. Will failure to comply with the requirements of the Gun-Free Schools Act result in the termination or withholding of funds made available to the State under the ESEA?

A. Failure to comply with the requirements of the GFSA could result in the withholding, under the provisions of the General Education Provisions Act, of funds made available to the State under the ESEA; however, it is anticipated that technical assistance provided to States will result in timely compliance and make withholding of funds unnecessary.

- Q6. May a State request a waiver of the requirements of the Gun-Free Schools Act?
- A. Yes. The ESEA authorizes the Secretary to waive the requirements of the GFSA if that action will increase the quality of instruction for students or will improve the academic performance of students. However, it is not anticipated that the requirements of the GFSA will be waived except in unusual circumstances.
- Q7. Does the Gun-Free Schools Act's one-year expulsion requirement preclude any due process proceedings?
- A. No. Students facing expulsion from school are entitled under the U.S. Constitution and most State constitutions to the due process protection of notice and an opportunity to be heard. If, after due process has been accorded, a student is found to have brought a weapon to school, the GFSA requires an expulsion for a period of not less than one year (subject to the case-by-case exception discussed below).
- Q8. What does the Gun-Free Schools Act require of States?
- A. The GFSA requires that each State receiving Federal funds under the ESEA must, by October 20, 1995: (1) have in effect a State law requiring LEAs to expel from school for a period of not less than one year a student who is determined to have brought a weapon to school; (2) have in effect a State law allowing the LEA's chief administering officer to modify the expulsion requirement on a case-by-case basis; and (3) report to the Secretary on an annual basis concerning information submitted by LEAs to SEAs. SEAs must also ensure that no ESEA funds are made available to an LEA that does not have a referral policy consistent with Section 14602.

One-Year Expulsion Requirement

Each State's law must require LEAs to comply with a one-year expulsion requirement; that is, subject to the exception discussed below, any student who brings a weapon to school must be expelled for not less than one year.

Case-by-Case Exception

Each State's law must allow the chief administering officer of an LEA to modify the one-year expulsion requirement on a case-by-case basis.

Annual Reporting

Each State must report annually on LEA compliance with the one-year expulsion requirement, and on expulsions imposed under the State law, including the number of students expelled in each LEA and the types of weapons involved.

Q9. What does the Gun-Free Schools Act require of LEAs?

- A. The GFSA requires that LEAs (1) comply with the State law requiring the one-year expulsion; (2) provide an assurance of compliance to the SEA; (3) provide descriptive information to the SEA concerning the LEA's expulsions; and (4) adopt a referral policy for students who bring weapons to school.

One-Year Expulsion Requirement

LEAs must comply with the State law requiring a one-year expulsion; that is, subject to the case-by-case exception, any student who brings a weapon to school must be expelled for not less than one year.

LEA Assurance

An LEA must include in its application to the State educational agency for ESEA assistance an assurance that the LEA is in compliance with the State law requiring the one-year expulsion.

Descriptive Report to SEA

An LEA must include in its application for ESEA assistance a description of the circumstances surrounding expulsions imposed under the one-year expulsion requirement, including:

- (A) the name of the school concerned;
- (B) the number of students expelled from the school; and
- (C) the type of weapons concerned.

Referral Policy

LEAs must also implement a policy requiring referral to the criminal justice or juvenile delinquency system of any student who brings a weapon to school.

Q10. When must an LEA implement its referral policy?

- A. LEAs must take immediate action to implement a policy requiring referral to the criminal justice or juvenile delinquency system of any student who brings a weapon to school. The GFSA directs that no ESEA funds shall be made available to an LEA unless that LEA has the required referral policy.

Q11. When must an LEA submit the required assurance?

- A. In its first application to the State educational agency for ESEA funds after the date that the State enacts and makes effective the required one-year expulsion legislation, the LEA must include an assurance that the LEA is in compliance with the State law.

Q12. What is the role of the SEA in determining whether an LEA is in compliance with the Gun-Free Schools Act?

- A. The GFSA requires States to report to the Secretary on an annual basis concerning LEA compliance. Therefore, before awarding any ESEA funds to an LEA, the SEA must ensure that the LEA has: (1) implemented a policy requiring referral to the criminal justice or juvenile delinquency system of any student who brings a weapon to school; and (2) included in its application for ESEA funds the assurance and other information required by the GFSA. SEAs must ensure that the LEA application contains:

(1) an assurance that the LEA is in compliance with the State law requiring the one-year expulsion; and

(2) a description of the circumstances surrounding expulsions imposed under the one-year expulsion requirement, including:

- (A) the name of the school concerned;
(B) the number of students expelled from the school; and
(C) the type of weapons concerned.

Q13. Who is the LEA's "chief administering officer"?

- A. The term "chief administering officer" is not defined by the GFSA. Each LEA should determine, using its own legal framework, which chief operating officer or authority (e.g., Superintendent, Board, etc.) has the power to modify the expulsion requirement on a case-by-case basis.

Q14. Can any individual or entity other than the LEA's "chief administering officer" modify the one-year expulsion requirement on a case-by-case basis?

A. No. However, the chief administering officer may allow another individual or entity to carry out preliminary information gathering functions, and prepare a recommendation for the chief administering officer.

Q15. Is it permissible for an LEA to use the case-by-case exception to avoid compliance with the one-year expulsion requirement?

A. No, this exception may not be used to avoid overall compliance with the one-year expulsion requirement.

Q16. How is the term "weapon" defined?

A. For the purposes of the GFSA, a "weapon" means a firearm as defined in Section 921 of Title 18 of the United States Code.

According to Section 921, the following are included within the definition:

- any weapon which will or is designed to or may readily be converted to expel a projectile by the action of an explosive
- the frame or receiver of any weapon described above
- any firearm muffler or firearm silencer
- any explosive, incendiary, or poison gas
 - (1) bomb,
 - (2) grenade,
 - (3) rocket having a propellant charge of more than four ounces,
 - (4) missile having an explosive or incendiary charge of more than one-quarter ounce,
 - (5) mine, or
 - (6) similar device
- any weapon which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant, and which has any barrel with a bore of more than one-half inch in diameter

- any combination of parts either designed or intended for use in converting any device into any destructive device described in the two immediately preceding examples, and from which a destructive device may be readily assembled

According to Section 921, the following are not included in the definition:

- an antique firearm
- a rifle which the owner intends to use solely for sporting, recreational, or cultural purposes
- any device which is neither designed nor redesigned for use as a weapon
- any device, although originally designed for use as a weapon, which is redesigned for use as a signaling, pyrotechnic, line throwing, safety, or similar device
- surplus ordnance sold, loaned, or given by the Secretary of the Army pursuant to the provisions of section 4684(2), 4685, or 4686 of title 10

In addition, we have been advised by the Bureau of Alcohol, Tobacco, and Firearms that Class-C common fireworks are not included in the definition of weapon.

- Q17. Does the Gun-Free Schools Act preclude classes such as hunting or military education, or activities such as hunting clubs or rifle clubs, which may involve the handling or use of weapons?
- A. No, the GFSA does not prohibit the presence at school of rifles that the owners intend to use solely for sporting, recreational, or cultural purposes.
- Q18. Are knives considered weapons under the Gun-Free Schools Act?
- A. No, for the purposes of the GFSA, the definition of weapon does not include knives. State legislation or an SEA or LEA may, however, decide to broaden its own definition of weapon to include knives.

Q19. What is meant by the term "expulsion"?

A. The term "expulsion" is not defined by the GFSA; however, at a minimum, expulsion means removal from the student's regular school program at the location where the violation occurred.

Q20. Is a State, SEA, or LEA required to provide alternative educational services to students who have been expelled for bringing a weapon to school?

A. The GFSA neither requires nor prohibits the provision of alternative educational services to students who have been expelled. Other Federal, State, or local laws may, however, require that students receive alternative educational services in certain circumstances.

Q21. What is an "alternative setting" for the provision of educational services to an expelled student?

A. An alternative setting is one that is clearly distinguishable from the student's regular school placement.

Q22. Is Federal funding available to provide alternative educational services?

A. Yes, formula grants awarded under the Safe and Drug-Free Schools and Communities Act may be used for alternative educational services. In addition, other Federal funds may be available for alternative educational services, consistent with each program's statutory and regulatory requirements.

Q23. Do the requirements of the Gun-Free Schools Act conflict with requirements that apply to students with disabilities?

A. No. Compliance with the GFSA may be achieved consistently with the requirements that apply to students with disabilities, as long as discipline of such students is determined on a case-by-case basis in accordance with the IDEA and Section 504. The Department intends to issue separate, more detailed guidance on discipline of students with disabilities, which will include clarification of the implementation of the GFSA consistent with IDEA and Section 504.

Q24. Is it permissible to expel a student for a "school year" rather than a year?

A. No. The statute explicitly states that expulsion shall be for a period of not less than one year.

Q25. Does the expulsion requirement apply only to violations occurring in the school building?

A. No. The one-year expulsion requirement applies to students who bring weapons to any setting that is under the control and supervision of the LEA.

FISCAL NOTE

Bill Version: CS HB 28(HES)

(H) Publish Date: 2/22/95

STATE OF ALASKA

1995 LEGISLATIVE SESSION

Revision Date: _____

Title: Possession of Guns on School Property

Sponsor: Representative Bunde

Requester: Representative Bunde

Department Affected: Education

BRU: K-12 Support and Education Program Support

Component: Foundation Program and Special and Supplemental Services

COMPONENT SERIAL NO. 141 and 166

Expenditures/Revenues:

(Thousands of Dollars)

OPERATING	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL						
---------	--	--	--	--	--	--

REVENUE FUND SOURCE:						
----------------------	--	--	--	--	--	--

FUNDING:

(Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year (FY95) impact: \$ 0.0

ANALYSIS: (Attach a separate page if necessary.)

Federal legislation, *Gun Free Schools Act*, requires that each state, in order to receive funds under the Elementary and Secondary Education Act (ESEA), must enact a law by October 20, 1995 which mandates a one-year expulsion of a student who brings a weapon to school. Section 6 of HB 28 address this needed provision. In FY 95, the State of Alaska received over \$ 90 million, most of which went directly to local school districts, under ESEA. Please see the attached sheet for a break down on the funds received in FY 95.

Prepared by: Sheila Peterson *Sheila Peterson* Phone: 465-2803
 Division: Commissioner's Office Date: _____
 Approved by Commissioner: Mike Maher *Mike Maher* Date: Mike Maher, Acting Commissioner
 Agency: Education Date: _____

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COMMITTEE COPY

Elementary and Secondary Education Act
FY 95 Program Funding
(Thousands of Dollars)

Chapter I	\$ 12,475.5
Chapter II	1,833.1
Migrant	6,983.1
Evenstart	250.0
Neglected and Delinquent	149.4
Eisenhower Grants	1,241.6
Drug Free Schools	1,371.2
Governor's Drug Free Schools	441.8
Equity	110.8
Bilingual	75.0
Impact Aid	66,000.0
TOTAL	\$ 90,930.5

REPRESENTATIVE CON BUNDE
CO-CHAIR HEALTH, EDUCATION
& SOCIAL SERVICES
VICE-CHAIR RULES


Alaska State Legislature
House of Representatives

DURING SESSION
STATE CAPITOL, ROOM 108
JUNEAU, ALASKA 99801 1182
1 (907) 465-7343

SPONSOR STATEMENT
HB 28

DURING INTERIM
716 WEST 4th AVENUE
ANCHORAGE, ALASKA 99501 2133
1 (907) 258 8168

The increasing trend towards violence and guns in schools across the nation is the reason the Federal Gun Free Schools Act was passed by Congress. This act requires a school system, as a condition of receiving federal education funds, to implement a program for the control of guns and weapons in schools. HB 28 will put Alaska into compliance with the mandates of the Federal Gun Free Schools Act.

The possession of deadly weapons and defensive weapons on school grounds, in parking lots adjacent to public or private schools, and while participating in school events is prohibited within HB 28. However, a person can obtain permission from the chief administrative officer of a school to carry a prohibited weapon into a school. This provision will allow a school to use an existing gun range or continue functions within a school that require the legal use of a deadly or defensive weapon.

HB 28 provides for a one year expulsion or suspension of a student that possesses a weapon on school grounds. However, in instances of disabled or special education students the school administrator is granted the ability to modify the mandatory expulsion or suspension. Additionally, this legislation requires an annual statistical report to the Department of Education regarding the number of students expelled and the types of weapons involved. This provision will improve the way many school districts keep weapons reports. Both of these provisions are for compliance with the Gun Free Schools Act.

This legislation allows school locker searches in order to determine compliance with school regulations and state laws. The policy of locker searches must be posted in prominent locations throughout the school.

Alaska must comply with the Federal Gun Free Schools Act by passing this legislation, or our schools will lose needed federal dollars. However, the most important reason for passing this legislation is, schools cannot work well when students and teachers are concerned about their safety. The educational process stops when people are afraid. Although a wide range of underlying social ills contribute to violent incidents, children with guns and weapons in our schools is a strong catalyst for governmental action. I urge your favorable consideration of HB 28.

(9)

Date Referred: January 16, 1995

FURTHER REFERRALS:

Judiciary
Finance

Date of Committee Action: 2/21/95

The HEALTH, EDUCATION AND SOCIAL SERVICES Committee considered:

HB 28

HOUSE BILL NO. 28

POSSESSION OF GUNS ON SCHOOL PROPERTY

"An Act relating to the possession of weapons within the grounds of or on the parking lot of preschools, elementary, junior high, and secondary schools or while participating in a school-sponsored event; requiring the expulsion or suspension of students possessing deadly weapons on school grounds; and relating to school lockers and other containers provided in a public or private school by the school or the school district."

recommends it be replaced
with the following committee substitute

CS HB 28 (HES)

the same title
 a new title

additional referral to _____ Committee

attached amendment(s)

ADOPTS: _____ Letter of Intent

ATTACHES NEW FISCAL NOTE(S): (Dept)

APPROVES PREVIOUS: (Dept/Date)

fiscal note(s) _____

fiscal note(s) _____

zero fiscal note(s) Public Safety zero fiscal note(s) _____
Education

SIGNING WITH RECOMMENDATIONS	DP	DNP	NR	AM
<i>[Signature]</i>	✓			
<i>[Signature]</i>	✓			
<i>[Signature]</i>	✓			
<i>[Signature]</i>	✓			
<i>Caren Robinson</i>			✓	
<i>[Signature]</i>			✓	

CHAIR'S SIGNATURE *[Signature]*

DIVISION OF LEGAL SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

130 Seward Street, Suite 409
Juneau, Alaska 99801-2105

MEMORANDUM

February 14, 1995

SUBJECT: Sectional Summary of CSHB 28 (HES), draft, dated 2/13/95
(Work Order No. 9-LS0151\F)

TO: Representative Con Bunde
Attn: Patty

FROM: Jerry Luckhaupt *JEL*
Legislative Counsel

You have asked for a sectional summary of the above-described bill. Please be advised that a sectional summary is not an authoritative statement of the contents of a bill - the bill itself is the best statement of its contents.

Section 1 of the bill amends AS 11.61.210(a) by providing that a person other than a student commits the crime of misconduct involving weapons in the fourth degree if the person possesses a deadly weapon¹ or a defensive weapon,² on school grounds or the parking lot of a preschool, elementary, junior high, or secondary school, in certain situations or while participating in a school sponsored event. This section also provides that a student commits the crime of misconduct involving weapons in the third degree if the student possesses a deadly weapon or a defensive weapon on school grounds or at a school-sponsored event, except that a student may possess a deadly weapon, other than a firearm as defined under federal law, or a defensive weapon with the permission of school authorities. Violation of this section is a class A misdemeanor.³ AS 11.61.220(g). The possession of firearms and defensive weapons is currently prohibited at schools and their grounds under AS 11.61.220-(a)(4) which is being repealed in sec. 3 of this bill.

¹ "Deadly weapon" is defined at AS 11.81.900(b)(13) as:

firearm, or anything designed for and capable of causing death or serious physical injury, including a knife, an axe, a club, metal knuckles, or an explosive.

² "Defensive weapon" is defined at AS 11.81.900(b)(16).

³ A class A misdemeanor is punishable as provided in AS 12.55.135 (imprisonment) and 12.55.035 (fine).

Representative Con Bunde

February 14, 1995

Page 2

Section 2 of the bill provides that a peace officer may possess a deadly weapon on school grounds.

Section 3 of the bill amends AS 11.61.220(a) to correspond with the change made in sec. 1 of the bill.

Section 4 of the bill amends AS 14.03.080 by adding a new subsection that provides that school officials do not have to admit a child under suspension or expulsion under AS 14.03.160, added in sec. 6 of the bill.

Section 5 of the bill amends AS 14.03 by adding a new section that provides for the search and examination of school lockers by school officials. Subsection (c) of that section, provides that this grant of authority does not diminish any separate authority to search that might exist.

Section 6 of the bill amends AS 14.03 by adding a new section that mandates expulsion or suspension for students that possess weapons on school grounds and requires reports from school districts concerning these suspensions and expulsions.

Section 7 of the bill amends AS 14.45 by adding a new section that permits private schools to search school lockers as provided in AS 14.03.105 (added by sec. 5 of the bill).

GPL:lmb:glc

95-121.lmb

FISCAL NOTE

STATE OF ALASKA
1995 LEGISLATIVE SESSION

No. 2
Bill Version: CS HB 28(HES)
(H) Publish Date: 2/22/95

Revision Date: _____ Dept. Affected: Public Safety
Title: Possession of guns on school property BRU: Alaska State Troopers
Component: Detachments
Sponsor: Representative Bunde
Requestor: (H) HESS COMPONENT SERIAL NO. 0799

EXPENDITURES/REVENUES: (Thousands of Dollars) (inflation not included)

OPERATING	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL EXPENDITURES	-0-	-0-	-0-	-0-	-0-	-0-
CHANGE IN REVENUES ()	-0-	-0-	-0-	-0-	-0-	-0-
Revenue Code						

FUNDING: (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

Estimate of current year (FY 95) impact: \$ -0-

POSITIONS:

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

ANALYSIS: (Attach a separate page if necessary.)
No fiscal impact is anticipated.

Prepared By: Francis C. Allan Phone: 269-5691
Division: Alaska State Troopers Date: 02/10/95
Approved by Commissioner: *Ronald L. Otte* Date: 2/12/95
Agency: Ronald L. Otte, Dept. of Public Safety

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NEA-ALASKA

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POSITION STATEMENT

HB 28

NEA-Alaska supports passage of HB 28 to restrict the possession of weapons on school property and at school sponsored events. We commend the sponsors for taking one step to curb violence in our schools. Passage of this bill will not end school violence but will clearly send a clear message to students and to parents that weapons are not allowed at school or extracurricular events.

We are aware that the epidemic of violence in Alaskan society has reached the school house door. Nationally the Centers for Disease Control have classified violence among youth as an epidemic. Any serious effort at ending this epidemic must address its root causes. Among the causes is family disintegration, loss of moral values and a popular culture that glorifies violence as a means of settling disputes.

NEA-Alaska is committed to working with its local associations and the legislature to insist upon development and enforcement of laws that guarantees the safety of school employees and children from physical attacks on their person or property. We feel that violence must be addressed because it disrupts the school environment which affects the teaching and learning process.

Safe homes plus safe schools equal safe schools. Safe homes begin with parents spending quality time with their children and exhibiting love and caring within the family setting. Children must be taught the difference between assertiveness and aggressiveness. Little can be done if violence is not seen as wrong at home. Schools cannot change student behavior but families can shape constructive behavior in children.

The issue is complex but we view HB 28 as a step toward creating "gun free zones" for children. Schools must be a safe haven where children and school employees can feel safe from violent attacks.

3-10-95