

# THE EVOLUTION AND ANATOMY OF THE PHILIPPINE RULE ON DNA EVIDENCE

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## VIII. SALIENT POINTS ON THE RULE ON DNA EVIDENCE

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The last decade of forensic science has been dominated by genetic analysis. Lawyers now focus on Deoxyribonucleic Acid (DNA) testing to prove the guilt or innocence of those accused of crimes, pushing traditional techniques such as fingerprint analysis into the background.<sup>1</sup>

DNA evidence has started to play a big part in many nations' criminal justice systems. It has been used to prove that suspects were involved in crimes and to also free people who were wrongly convicted. As early as 1983, DNA evidence was introduced in the United States of America (USA) and the United Kingdom (UK). In 1985, DNA entered the US Courtroom for the first time as evidence in a trial, but it was not until 1988 that DNA evidence actually sent someone to jail. The high profile case of O.J. Simpson in the USA is an example of a case that DNA evidence was presented to the Court, O.J. Simpson was then acquitted of the crime being charged.

In the Philippines, it was only in 2002 where the Supreme Court of the Philippines used DNA Evidence in convicting the accused beyond reasonable doubt.<sup>2</sup>

## I. INTRODUCTION

**1.1. DNA Basics.** DNA is essentially an instruction manual and blueprint for everything in a body. A DNA molecule, as Watson and Crick<sup>3</sup> described, is a long twisting chain known as a double helix. DNA is made of only four basic nucleotides: Adenine, Cytosine, Guanine, and Thymine. These nucleotides exist as base pairs that link together like the rungs in a ladder. Adenine and thymine always bond together as a pair with double bonds, and cytosine

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<sup>1</sup> NG & PO, FORENSIC SCIENCE (2006).

<sup>2</sup> *People v. Vallejo*, 382 SCRA 192 (2002).

<sup>3</sup> Nobel Price Awardees for the Double Helical Structure of DNA.

and guanine bond together as a pair with triple bonds. While the majority of DNA does not differ from human to human, some 3 million base pairs of DNA (about 0.10 percent of your entire genome) vary from person to person. This is what makes DNA evidence so valuable in investigations because it is almost impossible for someone else to have DNA that is identical to one has, except in identical twins.<sup>4</sup>

In human cells, DNA is tightly wrapped into 23 pairs of chromosomes. One member of each chromosomal pair comes from his mother, and the other comes from his father. In other words, a person's DNA is a combination of his mother's and his father's. Except for identical twin, the DNA is unique to oneself. Hence, DNA analysis is also very important in resolving paternity disputes.

**1.2. Advances in DNA Analysis.** DNA analysis is a complex area of forensic science that relies heavily on statistical predictions. In the early cases in the United States where jurors were presented with reams of evidence heavily laden with mathematical formulas, it was easy for defense attorneys to create doubt in jurors' minds. Since then, a number of advances have allowed criminal investigators to perfect the techniques involved and face down legal challenges to DNA fingerprinting. Improvements include:

- ✦ New testing procedures - RFLP (Restriction Fragment Length Polymorphism) analysis required large amounts of relatively high-quality DNA. Newer procedures require far less DNA and can be completed faster.
- ✦ Source of DNA - Science has devised ingenious ways of extracting DNA from sources that used to be too difficult or too contaminated to use.
- ✦ Expanded DNA databases - Several countries, including the United States and Britain, have built elaborate databases with hundreds of thousands of unique individual DNA profiles. However, these databases also raise questions about privacy. DNA holds a lot more information about a person than fingerprints do. For example, a person's DNA includes information about everything from eye color to genetic defects. Some people fear that the widespread use of DNA databases could encourage governments to discriminate against people because of information encoded in their DNA. However, the DNA used for the FBI's CODIS database is not currently thought to correlate to a person's actual traits.

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<sup>4</sup> <http://science.howstuffworks.com> (last accessed February 16, 2008).

- ✦ Training - Crime labs have developed formal protocols for handling and processing evidence, reducing the likelihood of contamination of samples. On the courtroom side, prosecutors have become more savvy at presenting genetic evidence, and many states have come up with specific rules governing its admissibility in court cases.
- ✦ Science education - In recent years, a number of debates have erupted around the world over issues like using DNA evidence, cloning animals or selling genetically modified crops. Since that time, classroom study of DNA and its properties has in many places become more in-depth and widespread.<sup>5</sup>

**1.3. Uses of DNA Analysis.** Locard's Principle is the cornerstone of Forensic science. According to Edmund Locard, whenever there is an interaction between the criminal suspect and the victim in the crime scene, trace evidence will be taken away or be left behind in the crime scene. Trace evidence necessarily includes DNA evidence.

DNA profiles are important in the criminal courtroom. DNA evidence is used by criminal investigators to prove guilt because matching DNA profiles can link a suspect to a crime or crime scene, or exonerate an innocent person – innocent people have been freed from death row in the United States based on DNA evidence. So far, DNA evidence has been almost as useful in excluding suspects as in fingering and convicting them; about 30 percent of DNA profile comparisons done by the FBI in the USA result in excluding someone as a suspect.<sup>6</sup>

DNA evidence is also useful in the civil courtroom in cases of paternity disputes. Paternity testing and other cases where authorities need to prove whether or not individuals are related. Other applications of DNA testing include:

Identification of dead bodies - Police investigators often face the unpleasant task of trying to identify a body or skeletal remains. DNA is a fairly resilient molecule, and samples can be easily extracted from hair or bone tissue; once a DNA profile has been created, it can be compared to samples from families of missing persons to see if a match can be made;

Studying the evolution of human populations - Scientists are

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<sup>5</sup> Adapted from <http://science.howstuffworks.com> (last accessed February 16, 2008).

<sup>6</sup> <http://science.howstuffworks.com> (last accessed February 16, 2008).

trying to use samples extracted from skeletons and from living people around the world to show how early human populations might have migrated across the globe and diversified into so many different races;

Studying inherited disorders - Scientist also study the DNA fingerprints of families with members who have inherited diseases like Alzheimer's Disease to try and ferret out chromosomal differences between those without the disease and who are have it, in the hopes that these changes might be linked to getting the disease.<sup>7</sup>

## II. DNA ACCORDING TO THE PHILIPPINE SUPREME COURT

DNA test (or analysis) is synonymous to DNA typing, DNA fingerprinting, DNA profiling, genetic tests, and genetic fingerprinting. The scientific basis of this test comes first from the fact that our differences as individuals are due to the differences in the composition of our genes. These genes comprise a chemical substance, DNA or deoxyribonucleic acid. In the United States, DNA tests have been used to convict perpetrators of crime, as well as exonerate innocent individuals.<sup>8</sup>

In 02 October 2007, the Supreme Court of the Philippines resolved and acted on the recommendation of the Chairperson and Members of the Subcommittee on Evidence submitting for the Court's consideration and approval the proposed Rule on DNA Evidence, the Court Resolved to APPROVE the same. The 2007 Rules on DNA Evidence<sup>9</sup> took effect in 15 October 2007 after its full publication in a newspaper of general circulation. Section 3 of the Rule gave the following definition of terms:

(a) "Biological sample" means any organic material originating from a person's body, even if found in inanimate objects, that is susceptible to DNA testing. This includes blood, saliva and other body fluids, tissues, hairs and bones;

(b) "DNA" means deoxyribonucleic acid, which is the chain of molecules found in every nucleated cell of the body. The totality

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<sup>7</sup> Adapted from <http://science.howstuffworks.com> (last accessed February 16, 2008).

<sup>8</sup> S. C. Halos, *Current trends in DNA typing and applications in the judicial system*, (3rd Convention and seminar of the Philippine Judges Association, June 11, 1999), *The Court Systems Journal* 47 (1999).

<sup>9</sup> A.M. No. 06-11-5-SC.

of an individual's DNA is unique for the individual, except identical twins;

(c) "DNA evidence" constitutes the totality of the DNA profiles, results and other genetic information directly generated from DNA testing of biological samples;

(d) "DNA profile" means genetic information derived from DNA testing of a biological sample obtained from a person, which biological sample is clearly identifiable as originating from that person;

(e) "DNA testing" means verified and credible scientific methods which include the extraction of DNA from biological samples, the generation of DNA profiles and the comparison of the information obtained from the DNA testing of biological samples for the purpose of determining, with reasonable certainty, whether or not the DNA obtained from two or more distinct biological samples originates from the same person (direct identification) or if the biological samples originate from related persons (kinship analysis); and

(f) "Probability of Parentage" means the numerical estimate for the likelihood of parentage of a putative parent compared with the probability of a random match of two unrelated individuals in a given population.

In a landmark case of *People v. Vallejo*<sup>10</sup>, the Supreme Court En Banc in a *per curiam* decision stated the following:

DNA is an organic substance found in a person's cells which contains his or her genetic code. Except for identical twins, each person's DNA profile is distinct and unique (Thompson, 1999).

When a crime is committed, material is collected from the scene of the crime or from the victim's body for the suspect's DNA. This is the evidence sample. The evidence sample is then matched with the reference sample taken from the suspect and the victim (Swanson, 1996).

The purpose of DNA testing is to ascertain whether an association exists between the evidence sample and the reference sample (Inman and Rudin, 1997). The samples collected are subjected to various chemical processes to establish their profile (Inman and Rudin 1997).

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<sup>10</sup> 382 SCRA 192 (2002) at 208, 209.

The test may yield three possible results:

- 1) The samples are different and therefore must have originated from different sources (exclusion). This conclusion is absolute and requires no further analysis or discussion;
- 2) It is not possible to be sure, based on the results of the test, whether the samples have similar DNA types (inconclusive). This might occur for a variety of reasons including degradation, contamination, or failure of some aspect of the protocol. Various parts of the analysis might then be repeated with the same or a different sample, to obtain a more conclusive result; or
- 3) The samples are similar, and could have originated from the same source (inclusion). In such a case, the samples are found to be similar, the analyst proceeds to determine the statistical significance of the Similarity.

In assessing the probative value of DNA evidence, therefore, courts should consider, among others things, the following data: how the samples were collected, how they were handled, the possibility of contamination of the samples, the procedure followed in analyzing the samples, whether the proper standards and procedures were followed in conducting the tests, and the qualification of the analyst who conducted the tests.

In *People v. Yatar*,<sup>11</sup> the Supreme Court En banc in a *per curiam* decision stated the following:

DNA is a molecule that encodes the genetic information in all living organisms (Sudbery, 2002). A person's DNA is the same in each cell and it does not change throughout a person's lifetime; the DNA in a person's blood is the same as the DNA found in his saliva, sweat, bone, the root and shaft of hair, earwax, mucus, urine, skin tissue, and vaginal and rectal cells (Turman, 2001). Most importantly, because of polymorphisms in human genetic structure, no two individuals have the same DNA, with the notable exception of identical twins. [84 ALR4th 313]

DNA print or identification technology has been advanced as a uniquely effective means to link a suspect to a crime, or to exonerate a wrongly accused suspect, where biological evidence has been left. For purposes of criminal investigation, DNA identification is a fertile source of both inculpatory and exculpatory evidence. It can

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<sup>11</sup> 428 SCRA 504 (2004) at 514-515.

assist immensely in effecting a more accurate account of the crime committed, efficiently facilitating the conviction of the guilty, securing the acquittal of the innocent, and ensuring the proper administration of justice in every case.

DNA evidence collected from a crime scene can link a suspect to a crime or eliminate one from suspicion in the same principle as fingerprints are used. [84 ALR4th 313] Incidents involving sexual assault would leave biological evidence such as hair, skin tissue, semen, blood, or saliva which can be left on the victim's body or at the crime scene. Hair and fiber from clothing, carpets, bedding, or furniture could also be transferred to the victim's body during the assault. [84 ALR4th 313] Forensic DNA evidence is helpful in proving that there was physical contact between an assailant and a victim. If properly collected from the victim, crime scene or assailant, DNA can be compared with known samples to place the suspect at the scene of the crime. [*People v. Vallejo*, G.R. No. 144656, 9 May 2002, 382 SCRA 192]

In *Herrera v. Alba*,<sup>12</sup> the First Division of the Supreme Court through Justice Carpio stated the following:

DNA is the fundamental building block of a person's entire genetic make-up. DNA is found in all human cells and is the same in every cell of the same person. Genetic identity is unique. Hence, a person's DNA profile can determine his identity (Ungria, 2001).

DNA analysis is a procedure in which DNA extracted from a biological sample obtained from an individual is examined. The DNA is processed to generate a pattern, or a DNA profile, for the individual from whom the sample is taken. This DNA profile is unique for each person, except for identical twins (UP-NSRI, 2001).

The first Division further quoted the relevant portions of the trial court's 3 February 2000 Order with approval:

Everyone is born with a distinct genetic blueprint called **DNA (deoxyribonucleic acid)**. It is exclusive to an individual (except in the rare occurrence of identical twins that share a single, fertilized egg), and DNA is unchanging throughout life. Being a component of every cell in the human body, the DNA of an individual's blood is the very DNA in his or her skin cells, hair follicles, muscles, semen, samples from buccal swabs, saliva, or other body parts.

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<sup>12</sup> 460 SCRA 197 (2005) at 209-211.

The chemical structure of DNA has four bases. They are known as **A** (adenine), **G** (guanine), **C** (cytosine) and **T** (thymine). The order in which the four bases appear in an individual's DNA determines his or her physical makeup. And since DNA is a double-stranded molecule, it is composed of two specific paired bases, **A-T** or **T-A** and **G-C** or **C-G**. These are called "*genes*."

Every *gene* has a certain number of the above base pairs distributed in a particular sequence. This gives a person his or her genetic code. Somewhere in the DNA framework, nonetheless, are sections that differ. They are known as "*polymorphic loci*," which are the areas analyzed in DNA typing (profiling, tests, fingerprinting, or analysis/DNA fingerprinting/genetic tests or fingerprinting). In other words, DNA typing simply means determining the "*polymorphic loci*."

How is DNA typing performed? From a DNA sample obtained or extracted, a molecular biologist may proceed to analyze it in several ways. There are five (5) techniques to conduct DNA typing. They are: the *RFLP* (*restriction fragment length polymorphism*); "*reverse dot blot*" or HLA DQ a/Pm loci which was used in 287 cases that were admitted as evidence by 37 courts in the U.S. as of November 1994; mtDNA process; VNTR (variable number tandem repeats); and the most recent which is known as the PCR-([polymerase] chain reaction) based STR (short tandem repeats) method which, as of 1996, was availed of by most forensic laboratories in the world. PCR is the process of replicating or copying DNA in an evidence sample a million times through repeated cycling of a reaction involving the so-called DNA polymerize enzyme. *STR*, on the other hand, takes measurements in 13 separate places and can match two (2) samples with a reported theoretical error rate of less than one (1) in a trillion.

Just like in fingerprint analysis, in DNA typing, "*matches*" are determined. To illustrate, when DNA or fingerprint tests are done to identify a suspect in a criminal case, the evidence collected from the crime scene is compared with the "*known*" print. If a substantial amount of the identifying features are the same, the DNA or fingerprint is deemed to be a **match**. But then, even if only one feature of the DNA or fingerprint is **different**, it is deemed **not to have come from the suspect**.

As earlier stated, certain regions of human DNA show variations between people. In each of these regions, a person possesses two genetic types called "*allele*," one inherited from each parent. In [a] paternity test, the forensic scientist looks at a number of these variable

regions in an individual to produce a DNA profile. Comparing next the DNA profiles of the mother and child, it is possible to determine which half of the child's DNA was inherited from the mother. The other half must have been inherited from the biological father. The alleged father's profile is then examined to ascertain whether he has the DNA types in his profile, which match the paternal types in the child. If the man's DNA types do not match that of the child, the man is **excluded** as the father. If the DNA types match, then he is **not excluded** as the father. (Emphasis in the original)

### III. INTRODUCTION OF DNA EVIDENCE IN PHILIPPINE COURT INITIALLY RECEIVED WITH CAUTION

In the 1995 case of *People v. Teehankee, Jr.*<sup>13</sup> where the appellant was convicted of murder on the testimony of three eyewitnesses, the Supreme Court stated as an *obiter dictum* that "while eyewitness identification is significant, it is not as accurate and authoritative as the scientific forms of identification evidence such as the fingerprint or the *DNA testing*."

The faith of the Supreme Court in DNA testing, however, was not quite so steadfast when DNA Evidence was first introduced in Court. In *Pe Lim v. Court of Appeals*<sup>14</sup>, promulgated in 1997, Supreme Court cautioned against the use of DNA because "DNA, being a relatively new science, had not as yet been accorded official recognition by our courts. Paternity would still have to be resolved by such conventional evidence as the relevant incriminating acts, verbal and written, by the putative father."

In 2001, however, the Supreme Court opened the possibility of admitting DNA as evidence of parentage, as enunciated in *Tijing v. Court of Appeals*.<sup>15</sup> In *Tijing*, the Supreme Court issued a writ of *habeas corpus* against respondent who abducted petitioners' youngest son. Testimonial and documentary evidence and physical resemblance were used to establish parentage. In case proof of filiation or paternity would be unlikely to satisfactorily establish or would be difficult to obtain, DNA testing, which examines genetic codes obtained from body cells of the illegitimate child and any physical residue of the long dead parent could be

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<sup>13</sup> 249 SCRA 54 (2003) at 94.

<sup>14</sup> 270 SCRA 1 (1997) at 3.

<sup>15</sup> 354 SCRA 17 (2001) at 26.

resorted to. A positive match would clear up filiation or paternity. However, the Supreme Court observed that:

Parentage will still be resolved using conventional methods unless the Supreme Court adopts the modern and scientific ways available. Fortunately, the Philippines have now the facility and expertise in using DNA test for identification and parentage testing. The University of the Philippines Natural Science Research Institute (UP-NSRI) DNA Analysis Laboratory has now the capability to conduct DNA typing using short tandem repeat (STR) analysis. The analysis is based on the fact that the DNA of a child/person has two (2) copies, one copy from the mother and the other from the father. The DNA from the mother, the alleged father and child are analyzed to establish parentage. Of course, being a novel scientific technique, the use of DNA test as evidence is still open to challenge. Eventually, as the appropriate case comes, courts should not hesitate to rule on the admissibility of DNA evidence. For it was said, that courts should apply the results of science when competently obtained in aid of situations presented, since to reject said result is to deny progress.

#### IV. ADMISSIBILITY OF SCIENTIFIC AND TECHNOLOGICAL EVIDENCE

##### 4.1. Admissibility of Evidence under the Philippine Rules of Court

Section 3 of Rule 128 of the Philippine Rules of Court provides that evidence is admissible when it is relevant to the issue and is not excluded by the law of these rules. There are two important elements for the admissibility of evidence – relevance and not excluded by the law. The admissibility of evidence depends on its relevance and competence.

**4.1.1. Relevance.** Evidence in order to be admissible must be important to the issues for the resolution of the case.

**4.1.2. Competence.** Evidence in order to be admissible in court should not be excluded by the law of these rules. Evidence should not be gathered from illegal search or seizure, it should not be a fruit of the poisonous tree (Poisonous tree Doctrine).

**4.1.3. Admissibility is not the same as Weight of Evidence.** The admissibility of evidence should not be equated with weight of evidence. The

admissibility of evidence depends on its relevance and competence while the weight of evidence pertains to evidence already admitted and its tendency to convince and persuade.<sup>16</sup>

**4.2. Need for Standards or Rules of Admissibility of Scientific or Technological Evidence in American Jurisprudence.** The misuse of scientific evidence is a serious problem. Even the government laboratories are under suspicion. For example, in West Virginia, USA, a serologist falsified test results in hundreds of cases over a ten-year period, sentencing hundreds of defendants to lengthy prison terms. In Texas, a pathologist faked autopsy results, resulting in as many as 20 death penalty verdicts. A police chemist elsewhere falsified reports and sent hundreds of innocent people away to jail on rape charges. Most misuse of scientific evidence is pro-prosecution.<sup>17</sup> In American Jurisprudence, the *Frye Test*, *Daubert Standard*, and the *Kumho Doctrine* evolved.

**4.3. The Frye Test.** Scientific evidence is admissible if it was based on a scientific technique generally accepted as reliable in the scientific community.<sup>18</sup> Expert testimony was admitted simply by virtue of the expert's credentials, experience, skill and reputation. Any deficiencies or flaws in the expert's conclusions would be exposed through cross-examination. Applying this rule, the *Frye* court refused to admit testimony based on an early lie detector (polygraph) test reasoning that lie detector testing had not gained general scientific acceptance or recognition at that time.

**4.4. The Daubert Standard (Daubert v. Merrell Dow).** *Daubert* sheds light on shoddy procedures, protocols, and proficiency testing. In *Daubert*, the Supreme Court restated the "general acceptance" test used by trial judges to determine the admissibility of expert testimony.<sup>19</sup> In this case, the plaintiffs sued the defendant drug manufacturer for birth defects allegedly caused by the drug Bendectin. The plaintiffs, in response to a motion for summary judgment, offered experts to testify to the link between the ingestion of Bendectin and certain birth defects. The District Court concluded that the opinions of the plaintiffs' experts were not generally accepted in their field and granted the defendant's motion for summary judgment. The Ninth Circuit Court of Appeals affirmed. On appeal to the Supreme Court, the plaintiffs argued that the "general acceptance" test set forth in *Frye v. United States*, was "superseded by the adoption of the

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<sup>16</sup> *Permanent Savings and Loan Bank v. Velarde*, G.R. No. 140608, 23 September 2004.

<sup>17</sup> <http://faculty.ncwc.edu/toconnor/425/425lect02.ht> (last accessed February 16, 2008).

<sup>18</sup> *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923).

<sup>19</sup> *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S.Ct. 2786 (1993).

Federal Rules of Evidence.”<sup>20</sup> The Court agreed and abandoned the “general acceptance” test used by Federal courts for 70 years. In its place, the Court announced that trial judges have the role of “gatekeeper” to ensure “that any and all scientific testimony or evidence admitted is not only relevant, but reliable.”<sup>21</sup> The Court stated that the trial judge should determine whether the reasoning and methodology is “scientifically valid” and whether “that reasoning properly can be applied to the facts in issue.”<sup>22</sup>

Daubert discussed four specific factors which a trial court may consider in its gate-keeping determination regarding the admissibility of scientific testimony, some or all of which might prove helpful in determining the reliability of a particular scientific “theory or technique,” including: 1) whether a “theory or technique ... can be (and has been) tested;” 2) whether it “has been subjected to peer review and publication;” 3) in respect to a particular technique, the “known or potential rate of error” and the existence or maintenance of “standards controlling the technique’s operation;” and 4) whether the theory or technique enjoys “general acceptance” within a “relevant scientific community.”

Under *Daubert*, the admissibility of expert testimony is to be more rigorously scrutinized by the trial judge to determine whether it meets the requirements of Fed. R. Evid. 702, which provides:

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 Daubert Standards.** All trial courts make a preliminary determination of admissibility. This job involves a preliminary assessment of whether the evidence is relevant, competent, and material. In short, can the evidence be properly applied to the facts in this case? This is the traditional “gatekeeping” function of courts. A number of reliability factors can enter into this and subsequent hearings using the *Daubert* standard:

1. Has the scientific theory or technique been empirically tested?  
According to K. Popper (1989) in *The Growth of Scientific Knowledge*, “the criterion on the scientific status of a theory is its falsifiability,

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<sup>20</sup> *Daubert*, 113 S.Ct. at 2793.

<sup>21</sup> *Id.*, 113 S.Ct. at 2795.

<sup>22</sup> *Id.*, 113 S.Ct. at 2796.

refutability, and testability.”

2. Has the scientific theory or technique been subjected to peer review and publication? This ensures that flaws in the methodology would have been detected and that the technique is finding its way into use via the literature.

3. What is the known or potential error rate? Every scientific idea has Type I and Type II error rates, and these can be estimated with a fair amount of precision. There are known threats to validity and reliability in any tests (experimental and quasi-experimental) of a theory.

4. What is the expert’s qualifications and stature in the scientific community? And does the technique rely upon the special skills and equipment of one expert, or can it be replicated by other experts elsewhere?

5. Can the technique and its results be explained with sufficient clarity and simplicity so that the court and the jury can understand its plain meaning? This is just the *Marx* standard, which is assumed to be incorporated in *Daubert* as it was with *Frye*.

#### Common statements of FRYE and DAUBERT:

<i>Interpretation of Frye:</i>	<i>Interpretation of Daubert:</i>
Where novel scientific evidence is at issue, the Frye inquiry allows the judiciary to defer to scientific expertise precisely as to whether or not it has gained “general acceptance” in the relevant field. The trial court’s gatekeeper role in this respect is conservative, thus helping to keep “pseudoscience” out of the courtroom.	General acceptance is an austere standard absent from and incompatible with the Rules of Evidence. “Scientific knowledge” must be derived from the scientific method supported by “good grounds” in validating the expert’s testimony, establishing a standard of “evidentiary reliability.”

**4.5. Kumho Doctrine - Expansion of Daubert into Technological Testimony.** In *Kumho*, the Supreme Court expanded the scope of the *Daubert* test to include all forms of expert testimony.<sup>23</sup> In this case, the plaintiffs claimed that a defective tire caused their car to overturn. The plaintiffs offered

<sup>23</sup> *Kumho Tire v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167 (1999).

a mechanical engineer to testify that a defect in the tire was the cause of the blowout. The District Court judge, on the defendant's motion, excluded the expert and granted summary judgment. The judge concluded that the expert's testimony was subject to a *Daubert* review even though it was "technical" rather than "scientific," and that, based on such review, the expert's methods were not reliable. The Eleventh Circuit reversed and remanded, finding that the judge erred in applying the *Daubert* test to non-scientific testimony. The Supreme Court reversed, concluding that "it would prove difficult, if not impossible, for judges to administer evidentiary rules under which a 'gatekeeping' obligation depended on a distinction between 'scientific' knowledge and 'technical' or 'other specialized' knowledge, since there is no clear line dividing the one from the others and no convincing need to make such distinctions."<sup>24</sup> The Court then looked at the trial judge's decision to exclude the expert, in light of the *Daubert* test and the wide latitude of discretion granted to trial judges in determining whether an expert's opinion is relevant and reliable. The Court found that the trial judge had not abused his discretion in excluding the expert, noting that the expert met none of the *Daubert* criteria and that the methodologies used could not reliably determine the cause of the tire's separation.

**4.6. Judge as Gatekeepers.** In *Daubert*, the Court provided a general idea as to the nature of the gatekeeping role. "Faced with a proffer of expert scientific testimony, then, the trial judge must determine at the outset, pursuant to Rule 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology properly can be applied to the facts in issue."<sup>25</sup> On remand from *Daubert*, the lower court's unease with this new task was clearly evident: "Our responsibility, then, unless we misread the Supreme Court's opinion is to resolve disputes among respected, well credentialed scientists about matters squarely within their expertise, in areas where there is no scientific consensus as to what is or what is not 'good science,' and occasionally to reject such expert testimony because it was not 'derived by the scientific method.' Mindful of our position in the hierarchy of the federal judiciary, we take a deep breath and proceed with this heady task."<sup>26</sup> By broadening the circle of "experts" to be subjected to the gatekeeping process, *Kumho* has only expanded the unease that judges already may have felt.

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<sup>24</sup> *Id.* at 1174-1175.

<sup>25</sup> *Daubert*, 113 S.Ct. at 2796.

<sup>26</sup> *Daubert v. Merrell Dow*, 43 F.3d 1311, 1316. (9<sup>th</sup> Cir. 1995).

**4.7. *Frye*, *Daubert*, and *Kumho* Cases have Persuasive Effects in Philippine Supreme Court.** Obviously, neither the *Frye-Schwartz* standard nor the *Daubert-Kumho* standard is controlling in the Philippines.<sup>27</sup> At best, American jurisprudence merely has a persuasive effect on our decisions. Here, evidence is admissible when it is relevant to the fact in issue and is not otherwise excluded by statute or the Rules of Court (i.e. competent).<sup>28</sup>

**4.8. Usage of *Frye*, *Daubert* and *Kumho* Doctrines in Philippine Judicial System.** Under the Philippine Rules of Court, evidence is admissible when it is relevant to the fact in issue and is not otherwise excluded by statute or the Rules of Court.<sup>29</sup> The Philippine Courts do not follow the restrictive tests for admissibility established by *Frye-Schwartz* and *Daubert-Kumho*. In Philippine jurisdiction, the restrictive tests for admissibility established by *Frye-Schwartz* and *Daubert-Kumho* go into the **weight of the evidence**.<sup>30</sup>

**4.9. Probative Value of DNA Analysis as Evidence.** In *Herrera v. Alba*,<sup>31</sup> the Supreme Court held that a DNA test is a valid probative tool to determine paternity. The Court said that there is nothing in the rules of evidence or law that prohibits the admissibility of a DNA test. The First Division of the Supreme Court through Justice Carpio has the opportunity to write about the probative value of DNA analysis as evidence. The Court said:

Despite our relatively liberal rules on admissibility, trial courts should be cautious in giving credence to DNA analysis as evidence. The Court reiterates its statement in *Vallejo*:

In assessing the probative value of DNA evidence, therefore, courts should consider, among other things, the following data: how the samples were collected, how they were handled, the possibility of contamination of the samples, the procedure followed in analyzing the samples, whether the proper standards and procedures were followed in conducting the tests, and the qualification of the analyst who conducted the tests.

The Court also repeats the trial court's explanation of DNA analysis used in paternity cases:

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<sup>27</sup> *People v. Joel Yatar*, 428 SCRA 504 (2004).

<sup>28</sup> Rules of Court, Rule 128.

<sup>29</sup> *Id.*

<sup>30</sup> *Herrera vs. Alba*, 460 SCRA 197.

<sup>31</sup> *Id.* at 217.

In a paternity test, the forensic scientist looks at a number of these variable regions in an individual to produce a DNA profile. Comparing next the DNA profiles of the mother and child, it is possible to determine which half of the child's DNA was inherited from the mother. The other half must have been inherited from the biological father. The alleged father's profile is then examined to ascertain whether he has the DNA types in his profile, which match the paternal types in the child. If the man's DNA types do not match that of the child, the man is **excluded** as the father. If the DNA types match, then he is **not excluded** as the father.

It is not enough to state that the child's DNA profile matches that of the putative father. A complete match between the DNA profile of the child and the DNA profile of the putative father does not necessarily establish paternity. For this reason, following the highest standard adopted in an American jurisdiction, trial courts should require at least 99.9% as a minimum value of the Probability of Paternity ("W") prior to a paternity inclusion. W is a numerical estimate for the likelihood of paternity of a putative father compared to the probability of a random match of two unrelated individuals. An appropriate reference population database, such as the Philippine population database, is required to compute for W. Due to the probabilistic nature of paternity inclusions, W will never equal to 100%. However, the accuracy of W estimates is higher when the putative father, mother and child are subjected to DNA analysis compared to those conducted between the putative father and child alone. DNA analysis that excludes the putative father from paternity should be conclusive proof of non-paternity. If the value of W is less than 99.9%, the results of the DNA analysis should be considered as corroborative evidence. If the value of W is 99.9% or higher, then there is **refutable** presumption of paternity. This refutable presumption of paternity should be subjected to the *Vallejo* standards.

**4.10. Breakthrough on the Philippine Rule on DNA Evidence.** The Supreme Court of the Philippines adapted the key concepts of *Frye*, *Daubert* and *Kumho* Doctrines. In 02 October 2007, the Supreme Court of the Philippines resolved and acted on the recommendation of the Chairperson and Members of the Subcommittee on Evidence submitting for the Court's consideration and approval the proposed Rule on DNA Evidence, the Court Resolved to APPROVE the same. The 2007 Rules on DNA Evidence [A.M. No. 06-11-5-SC] took effect in 15 October 2007 after its full publication in a newspaper

of general circulation. Sections 7, 8, 9, and 12 of the Rule on DNA Evidence gave the following Rules in the assessment of probative value of DNA evidence, reliability of DNA testing methodology, evaluation of DNA testing results, and the preservation of DNA evidence respectively:

Section.7. *Assessment of probative value of DNA evidence.*—

In assessing the probative value of the DNA evidence presented, the court shall consider the following:

(a) The chain of custody, including how the biological samples were collected, how they were handled, and the possibility of contamination of the samples;

(b) The DNA testing methodology, including the procedure followed in analyzing the samples, the advantages and disadvantages of the procedure, and compliance with the scientifically valid standards in conducting the tests;

(c) The forensic DNA laboratory, including accreditation by any reputable standards-setting institution and the qualification of the analyst who conducted the tests. If the laboratory is not accredited, the relevant experience of the laboratory in forensic casework and credibility shall be properly established; and

(d) The reliability of the testing result, as hereinafter provided. The provisions of the Rules of Court concerning the appreciation of evidence shall apply suppletorily.

Section.8. *Reliability of DNA Testing Methodology.*—In evaluating whether the DNA testing methodology is reliable, the court shall consider the following:

(a) The falsifiability of the principles or methods used, that is, whether the theory or technique can be and has been tested;

(b) The subjection to peer review and publication of the principles or methods;

(c) The general acceptance of the principles or methods by the relevant scientific community;

(d) The existence and maintenance of standards and controls to ensure the correctness of data generated;

(e) The existence of an appropriate reference population database; and

(f) The general degree of confidence attributed to mathematical calculations used in comparing DNA profiles and the significance and limitation of statistical calculations used in comparing DNA profiles.

Section 9. *Evaluation of DNA Testing Results.*—In evaluating

the results of DNA testing, the court shall consider the following:

(a) The evaluation of the weight of matching DNA evidence or the relevance of mismatching DNA evidence;

(b) The results of the DNA testing in the light of the totality of the other evidence presented in the case; and that

(c) DNA results that exclude the putative parent from paternity shall be conclusive proof of non-paternity. If the value of the Probability of Paternity is less than 99.9%, the results of the DNA testing shall be considered as corroborative evidence. If the value of the Probability of Paternity is 99.9% or higher, there shall be a disputable presumption of paternity.

Section 12. *Preservation of DNA Evidence.*—The trial court shall preserve the DNA evidence in its totality, including all biological samples, DNA profiles and results or other genetic information obtained from DNA testing. For this purpose, the court may order the appropriate government agency to preserve the DNA evidence as follows:

(a) In criminal cases:

i. for not less than the period of time that any person is under trial for an offense; or,

ii. in case the accused is serving sentence, until such time as the accused has served his sentence; and

(b) In all other cases, until such time as the decision in the case where the DNA evidence was introduced has become final and executory. The court may allow the physical destruction of a biological sample before the expiration of the periods set forth above, provided that:

i. A court order to that effect has been secured; or

ii. the person from whom the DNA sample was obtained has consented in writing to the disposal of the DNA evidence.

## V. LANDMARK CASE AND SUPREME COURT JURISPRUDENCE ON THE ADMISSIBILITY AND PROBATIVE VALUE OF DNA ANALYSIS AS EVIDENCE

**5.1. Landmark Case.** The first real breakthrough of DNA analysis as admissible and authoritative evidence in Philippine jurisprudence came in 2002 with the *en*

*banc* decision of the Supreme Court in *People v. Vallejo*<sup>32</sup> where the rape and murder victim's DNA samples from the bloodstained clothes of the accused were admitted in evidence. This may be considered a 180 degree turn from the Supreme Court's wary attitude towards DNA testing in the 1997 *Pe Lim* case,<sup>33</sup> the Supreme Court reasoned that "the purpose of DNA testing was to ascertain whether an association existed between the evidence sample and the reference sample. The samples collected were subjected to various chemical processes to establish their profile."

In *Vallejo*,<sup>34</sup> the DNA profile from the vaginal swabs taken from the rape victim matched the accused's DNA profile. The high Court affirmed the accused's conviction of rape with homicide and sentenced him to death. The Supreme Court declared:

In assessing the probative value of DNA evidence, therefore, courts should consider, among other things, the following data: how the samples were collected, how they were handled, the possibility of contamination of the samples, the procedure followed in analyzing the samples, whether the proper standards and procedures were followed in conducting the tests, and the qualification of the analyst who conducted the tests [431 Phil. 798 (2002)].

*Vallejo* discussed the probative value, not admissibility, of DNA evidence. By 2002, there was no longer any question on the validity of the use of DNA analysis as evidence. The Court moved from the issue of according "official recognition" to DNA analysis as evidence to the issue of observance of procedures in conducting DNA analysis.<sup>35</sup>

**5.2. Philippine Supreme Court Jurisprudence.** The following cases have a significant impact on jurisprudence on DNA testing.

**5.2.1 *People v. Yatar*.**<sup>36</sup> In *Yatar*, a match existed between the DNA profile of the semen found in the victim and the DNA profile of the blood sample given by appellant in open court. The Court, following *Vallejo's* footsteps, affirmed the conviction of appellant because the physical evidence, corroborated by

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<sup>32</sup> 382 SCRA 192 (2002).

<sup>33</sup> 270 SCRA 1 (1997).

<sup>34</sup> 382 SCRA 192 (2002) at 209.

<sup>35</sup> *Herrera v. Alba*, 460 SCRA 197 (2005).

<sup>36</sup> 428 SCRA 504 (2004) at 515-516.

circumstantial evidence, showed appellant guilty of rape with homicide. The Supreme Court affirmed the conviction of the accused for rape with homicide, the principal evidence for which included DNA test results. The Supreme Court did a lengthy discussion of DNA, the process of DNA testing and the reasons for its admissibility in the context of the Rules of Evidence:

In the case at bar, Dr. Maria Corazon Abogado de Ungria was duly qualified by the prosecution as an expert witness on DNA print or identification techniques. Based on Dr. de Ungria's testimony, it was determined that the gene type and DNA profile of appellant are identical to that of the extracts subject of examination. The blood sample taken from the appellant showed that he was of the following gene types: vWA 15/19, TH01 7/8, DHFRP29/10 and CSF1PO 10/11, which are identical with semen taken from the victim's vaginal canal. Verily, a DNA match exists between the semen found in the victim and the blood sample given by the appellant in open court during the course of the trial.

Admittedly, we are just beginning to integrate these advances in science and technology in the Philippine criminal justice system, so we must be cautious as we traverse these relatively uncharted waters. Fortunately, we can benefit from the wealth of persuasive jurisprudence that has developed in other jurisdictions. Specifically, the prevailing doctrine in the U.S. has proven instructive.

In *Daubert v. Merrell Dow* (509 U.S. 579 (1993); 125 L. Ed. 2d 469) it was ruled that pertinent evidence based on scientifically valid principles could be used as long as it was relevant and reliable. Judges, under *Daubert*, were allowed greater discretion over which testimony they would allow at trial, including the introduction of new kinds of scientific techniques. DNA typing is one such novel procedure.

Under Philippine law, evidence is relevant when it relates directly to a fact in issue as to induce belief in its existence or non-existence. Applying the *Daubert* test to the case at bar, the DNA evidence obtained through PCR testing and utilizing STR analysis, and which was appreciated by the court *a quo* is relevant and reliable since it is reasonably based on scientifically valid principles of human genetics and molecular biology.

Significantly, the Supreme Court upheld the constitutionality of compulsory DNA testing and the admissibility of the results thereof as evidence. In that case, DNA samples from semen recovered from a rape victim's vagina were used to positively identify the accused Joel

“Kawit” Yatar as the rapist.

**5.2.2. *In re: The Writ of Habeas Corpus for Reynaldo de Villa.***<sup>37</sup>

In *De Villa*, the convict-petitioner presented DNA test results to prove that he is not the father of the child conceived at the time of commission of the rape. The Court ruled that a difference between the DNA profile of the convict-petitioner and the DNA profile of the victim's child does not preclude the convict-petitioner's commission of rape.

**5.2.3. *Tecson, et al. v. COMELEC.***<sup>38</sup> The Supreme Court *en banc* was faced with the issue of filiation of then presidential candidate Fernando Poe Jr., the Supreme Court stated:

In case proof of filiation or paternity would be unlikely to satisfactorily establish or would be difficult to obtain, DNA testing, which examines genetic codes obtained from body cells of the illegitimate child and any physical residue of the long dead parent could be resorted to. A positive match would clear up filiation or paternity. In *Tijing vs. Court of Appeals*, this Court has acknowledged the strong weight of DNA testing...

**5.2.4. *People v. Janson.***<sup>39</sup> The Supreme Court acquitted the accused charged with rape for lack of evidence because “doubts persisted in our mind as to who were the real malefactors. According to the Court, yes, a complex offense had been perpetrated but who were the perpetrators? How we wish we had DNA or other scientific evidence to still our doubts!”

**5.2.5. *Agustin v. Court of Appeals.***<sup>40</sup> The Court said “for too long, illegitimate children have been marginalized by fathers who choose to deny their existence. The growing sophistication of DNA testing technology finally provides a much needed equalizer for such ostracized and abandoned progeny. The court has long believed in the merits of DNA testing and have repeatedly expressed as much in the past. This case comes at a perfect time when DNA testing has finally evolved into a dependable and authoritative form of evidence gathering. The Court therefore takes this opportunity to forcefully reiterate our stand that DNA testing is a valid means of determining paternity.”

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<sup>37</sup> 442 SCRA 706.

<sup>38</sup> 424 SCRA 277, at 345.

<sup>39</sup> 400 SCRA 584 (2003) at 601.

<sup>40</sup> 460 SCRA 315, at 39.

**5.2.6. *Herrera v. Alba*.**<sup>41</sup> The Court said “in the Philippines, evidence is admissible when it is relevant to the fact in issue and is not otherwise excluded by statute or the Rules of Court. Evidence is relevant when it has such a relation to the fact in issue as to induce belief in its existence or non-existence. Section 49 of Rule 130, which governs the admissibility of expert testimony, provides as follows: The opinion of a witness on a matter requiring special knowledge, skill, experience or training which he is shown to possess may be received in evidence. This Rule does not pose any legal obstacle to the admissibility of DNA analysis as evidence. Indeed, even evidence on collateral matters is allowed “when it tends in any reasonable degree to establish the probability or improbability of the fact in issue.”

**5.2.7. *Andal v. People*.**<sup>42</sup> **DNA Tests; When Deemed Unnecessary or Too Late to Consider; Case at Bar.** The issue of “DNA tests” as a more accurate and authoritative means of identification than eye-witness identification need not be belabored. The accused were all properly and duly identified by the prosecution’s principal witness, Olimpio Corrales, a brother-in-law of accused Jury and Ricardo Andal. DNA testing proposed by petitioners to have an objective and scientific basis of identification of “semen samples to compare with those taken from the vagina of the victim” are thus unnecessary or are forgotten evidence too late to consider now.

**5.2.8. *Gan v. Pondevida*.**<sup>43</sup> Petitioner Gan filed a Motion for Reconsideration to his petition for certiorari with the Supreme Court, earlier the Court of Appeals denied his Motion to Direct Parties to Submit to DNA Testing.” It appears that petitioner failed to file his Answer to the Complaint for Support filed against him by the respondents, thus the latter were allowed to present evidence ex-parte. The trial court ruled that respondents had sufficiently established Francheska’s illegitimate filiation based on the relationship of the petitioner and Bernadette Pondevida from May 1987 to July 1994; photographs and letters circa 1987, 1988 and 1990; and Bernadette Pondevida’s testimony that petitioner impregnated her and that she had no other affair with any man except petitioner before and during the conception of Francheska. Petitioner prayed that the resolution of the appeal be held in abeyance until the results of the DNA testing are submitted for the appellate Court’s evaluation.

The Court of Appeals, in a Resolution dated April 11, 2003, denied

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<sup>41</sup> 460 SCRA 197 (2005).

<sup>42</sup> 307 SCRA 650 (1999).

<sup>43</sup> 382 SCRA 357 (2004).

petitioner's Motion, ratiocinating that petitioner has long been declared in default, since he failed to file his Answer to the Complaint for Support. Having been declared as such, he forfeited his right to be heard and present evidence in his favor. The Supreme Court resolves to deny the petitioner's Motion for Reconsideration. The High Court states that "as properly stated by the Court of Appeals, in view of petitioner's default, he is precluded from adducing evidence on appeal."

**5.2.9. IN RE: Petition to take the 1999 Bar Exams.**<sup>44</sup> Cesar passed the 1999 Bar Examinations but was not allowed to take the lawyer's oath on 3 May 2000 in view of the Letter-Complaint dated 24 January 2000 of TM Castro charging him with Immorality and Grave Misconduct. Castro alleged that she and petitioner were former lovers that she bore him a son named Michael Angelo Castro on 5 May 1999. The issue before the Supreme Court is whether petitioner possesses the good moral character required to be admitted to the Philippine Bar. Complainant presented *prima facie* evidence tending to show that petitioner does not possess such character since he refused to give financial support to a child he has legally acknowledged to be his own. But petitioner claims otherwise, that is, he possesses the good moral character required to be admitted to the Bar since his refusal to give support is entirely justified by valid reasons. Aside from the fact that he was merely forced into acknowledging paternity of Michael, he wanted to remove first his reasonable doubts regarding the child's paternity through **DNA Testing**.

The Court judicial notice of the fact that DNA typing or deoxyribonucleic acid (the cellular component identified as the vehicle of generational transference of heritable traits) typing is fast becoming an important procedure not only in the field of medical science but in criminal law and paternity disputes as well.

Considering the foregoing and the fact that petitioner promised to abide by the result of the DNA test as well as to shoulder the expenses therefor, the Supreme Court find petitioner's proposal for a DNA testing to be quite reasonable and complainant's aversion to the test surprising. If her claim that petitioner fathered her child is really true, she has no reason to fear the result of the test for it would be another evidence in her favor. Moreover this case should be decided on a strong foundation of truth and justice rather than on blind adherence to *prima facie* rules. The Court preferred to regard this administrative case as a quest for truth and justice rather than as a mere game of rules. No rule is intended to be so rigid as to embarrass the administration of justice in its endeavor to ascertain the truth.

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<sup>44</sup> B.M. No. 984. June 25, 2002.

## VI. RIGHT AGAINST SELF-INCRIMINATION IS APPLICABLE TO TESTIMONIAL EVIDENCE, NOT WHEN OBTAINING DNA SAMPLES

Obtaining DNA samples from an accused in a criminal case or from the respondent in a paternity case, contrary to the belief of respondent in this action, will not violate the right against self-incrimination.

**6.1. *People v. Yatar.***<sup>45</sup> Yatar claimed that the compulsory extraction of his blood sample for DNA testing, as well as the testing itself, violated his right against self-incrimination, as embodied in both Sections 12 and 17 of Article III of the Constitution. The Supreme Court addressed this as follows:

The contention is untenable. The kernel of the right is not against all compulsion, but against testimonial compulsion. The right against self-incrimination is simply against the legal process of extracting from the lips of the accused an admission of guilt. It does not apply where the evidence sought to be excluded is not an incrimination but as part of object evidence.

The Court ruled in *People v. Rondero* [G.R. No. 125687, 9 December 1999, 320 SCRA 383] that although accused-appellant insisted that hair samples were forcibly taken from him and submitted to the National Bureau of Investigation for forensic examination, the hair samples may be admitted in evidence against him, for what is proscribed is the use of testimonial compulsion or any evidence communicative in nature acquired from the accused under duress. Hence, a person may be compelled to submit to fingerprinting, photographing, paraffin, blood and DNA, as there is no testimonial compulsion involved. Under *People v. Gallarde*, [G.R. No. 133025, 27 February 2000, 325 SCRA 835] where immediately after the incident, the police authorities took pictures of the accused without the presence of counsel, we ruled that there was no violation of the right against self-incrimination. The accused may be compelled to submit to a physical examination to determine his involvement in an offense of which he is accused.

**6.2. *Herrera v. Alba.***<sup>46</sup> The First Division of the Supreme Court through Justice Carpio has the opportunity to write about the probative value of DNA analysis as evidence. The Court said:

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<sup>45</sup> 428 SCRA 504 (2004) at 518.

<sup>46</sup> 40 SCRA 197, at 218-219.

Section 17, Article 3 of the 1987 Constitution provides that “no person shall be compelled to be a witness against himself.” Petitioner asserts that obtaining samples from him for DNA testing violates his right against self-incrimination. Petitioner ignores our earlier pronouncements that the privilege is applicable only to testimonial evidence. Again, we quote relevant portions of the trial court’s 3 February 2000 Order with approval:

Obtaining DNA samples from an accused in a criminal case or from the respondent in a paternity case, contrary to the belief of respondent in this action, will not violate the right against self-incrimination. This privilege applies only to evidence that is “communicative” in essence taken under duress (*People vs. Olvis*, 154 SCRA 513, 1987). The Supreme Court has ruled that the right against self-incrimination is just a prohibition on the use of physical or moral compulsion to extort communication (testimonial evidence) from a defendant, not an exclusion of evidence taken from his body when it may be material. As such, a defendant can be required to submit to a test to extract virus from his body (as cited in *People vs. Olvis*, *Supra*); the substance emitting from the body of the accused was received as evidence for acts of lasciviousness (*US vs. Tan Teng*, 23 Phil. 145); morphine forced out of the mouth was received as proof (*US vs. Ong Siu Hong*, 36 Phil. 735); an order by the judge for the witness to put on pair of pants for size was allowed (*People vs. Otadora*, 86 Phil. 244); and the court can compel a woman accused of adultery to submit for pregnancy test (*Villaflor vs. Summers*, 41 Phil. 62), since the gist of the privilege is the restriction on “testimonial compulsion.”

The policy of the Family Code to liberalize the rule on the investigation of the paternity and filiation of children, especially of illegitimate children, is without prejudice to the right of the putative parent to claim his or her own defenses. [*Mendoza v. Court of Appeals*, G.R. No. 86302, 24 September 1991, 201 SCRA 675] Where the evidence to aid this investigation is obtainable through the facilities of modern science and technology, such evidence should be considered subject to the limits established by the law, rules, and jurisprudence.

**6.3. *Agustin v. Court of Appeals*.**<sup>47</sup> Justice Corona said:

Over the years, the Supreme Court has expressly excluded several kinds of object evidence taken from the person of the accused

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460 SCRA 315 (2005), at 329-330.

from the realm of self-incrimination. These include photographs, [*People v. Gallarde*, 382 Phil. 718 (2000)] hair, [*People v. Rondero*, 378 Phil. 123 (1999)] and other bodily substances. [*U.S. v. Tan Teng*, 23 Phil. 145 (1912)]

The Supreme Court have also declared as constitutional several procedures performed on the accused such as pregnancy tests for women accused of adultery, [*Villaflor v. Summers*, 41 Phil. 62 (1920)] expulsion of morphine from one's mouth [ *U.S. v. Ong Siu Hong*, 36 Phil. 735 (1917)] and the tracing of one's foot to determine its identity with bloody footprints. [*U.S. v. Salas*, 25 Phil. 337 (1913)] In *Jimenez v. Cañizares*, [109 Phil. 273 (1960)] the Supreme Court even authorized the examination of a woman's genitalia, in an action for annulment filed by her husband, to verify his claim that she was impotent, her orifice being too small for his penis. Some of these procedures were, to be sure, rather invasive and involuntary, but all of them were constitutionally sound. DNA testing and its results, per our ruling in *Yatar*, [G.R. No. 150224, 19 May 2004] are now similarly acceptable.

Nor does petitioner's invocation of his right to privacy persuade us. In *Ople v. Torres*, [354 Phil. 948 (1998)] where the Supreme Court struck down the proposed national computerized identification system embodied in Administrative Order No. 308, the Supreme Court said:

*In no uncertain terms, we also underscore that the right to privacy does not bar all incursions into individual privacy. The right is not intended to stifle scientific and technological advancements that enhance public service and the common good... Intrusions into the right must be accompanied by proper safeguards that enhance public service and the common good.*

Historically, it has mostly been in the areas of legality of searches and seizures, [*Republic v. Sandiganbayan, et al.*, G.R. No. 104768, 21 July 2003, 407 SCRA 10] and the infringement of privacy of communication [*Waterous Drug v. NLRC, et al.*, 345 Phil. 982 (1997); *Zulueta v. CA, et al.*, 324 Phil. 63 (1996)] where the constitutional right to privacy has been critically at issue. Petitioner's case involves neither and, as already stated, his argument that his right against self-incrimination is in jeopardy holds no water. His hollow invocation of his constitutional rights elicits no sympathy here for the simple reason that they are not in any way being violated. If, in a criminal case, an accused whose very life is at stake can be compelled to submit to DNA testing, the Supreme Court said

*that it see no reason why, in this civil case, a person who does not face such dire consequences cannot be ordered to do the same.*

## VII. FOREIGN JURISPRUDENCE ON DNA ANALYSIS CITED IN PHILIPPINE CASE LAWS

**7.1. *Agustin v. Court of Appeals*.**<sup>48</sup> The Supreme Court had the chance of enumerating and discussing United States Jurisprudence on DNA analysis in the following way:

DNA paternity testing first came to prominence in the United States, where it yielded its first official results sometime in 1985. In the decade that followed, DNA rapidly found widespread general acceptance. [*Greco v. Coleman*, 615 N.W. 2d 218 (Mich. 2000)] Several cases decided by various State Supreme Courts reflect the total assimilation of DNA testing into their rules of procedure and evidence.

The case of *Wilson v. Lumb* [181 Misc 2d 1033 (1999)] shows that DNA testing is so commonly accepted that, in some instances, ordering the procedure has become a ministerial act. The Supreme Court of St. Lawrence County, New York allowed a party who had already acknowledged paternity to subsequently challenge his prior acknowledgment.

DNA testing also appears elsewhere in the New York Family Court Act: [NYSCL, Ch. 686, Article 5, Part 3, Section 532]

§532. Genetic marker and DNA tests; admissibility of records or reports of test results; costs of tests.

a) The court shall advise the parties of their right to one or more genetic marker tests or DNA tests and, on the court's own motion or the motion of any party, shall order the mother, her child and the alleged father to submit to one or more genetic marker or DNA tests of a type generally acknowledged as reliable by an accreditation body designated by the secretary of the federal department of health and human services and performed by a laboratory approved by such an accreditation body and by the commissioner of health or by a duly qualified physician to aid in the determination of whether the alleged father is or is not the father of the child. No such test shall be ordered,

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<sup>48</sup> 460 SCRA 315 (2005), at 330-337.

however, upon a written finding by the court that it is not in the best interests of the child on the basis of *res judicata*, equitable estoppel, or the presumption of legitimacy of a child born to a married woman. The record or report of the results of any such genetic marker or DNA test ordered pursuant to this section or pursuant to section one hundred eleven-k of the social services law shall be received in evidence by the court pursuant to subdivision (e) of rule forty-five hundred eighteen of the civil practice law and rules where no timely objection in writing has been made thereto and that if such timely objections are not made, they shall be deemed waived and shall not be heard by the court. If the record or report of the results of any such genetic marker or DNA test or tests indicate at least a ninety-five percent probability of paternity, the admission of such record or report shall create a rebuttable presumption of paternity, and shall establish, if un rebutted, the paternity of and liability for the support of a child pursuant to this article and article four of this act.

(b) Whenever the court directs a genetic marker or DNA test pursuant to this section, a report made as provided in subdivision (a) of this section may be received in evidence pursuant to rule forty-five hundred eighteen of the civil practice law and rules if offered by any party.

(c) The cost of any test ordered pursuant to subdivision (a) of this section shall be, in the first instance, paid by the moving party. If the moving party is financially unable to pay such cost, the court may direct any qualified public health officer to conduct such test, if practicable; otherwise, the court may direct payment from the funds of the appropriate local social services district. In its order of disposition, however, the court may direct that the cost of any such test be apportioned between the parties according to their respective abilities to pay or be assessed against the party who does not prevail on the issue of paternity, unless such party is financially unable to pay. (emphasis supplied)

In *R.E. v. C.E.W.* [752 So. 2d 1019 (Miss. 1999)] a decision of the Mississippi Supreme Court, DNA tests were used to prove that H.W., previously thought to be an offspring of the marriage between A.C.W. and C.E.W., was actually the child of R.E. with whom C.E.W. had, at the time of conception, maintained an adulterous relationship.

In *Erie County Department of Social Services on behalf of Tiffany M.H. v. Greg G.*, [273 AD 2d 919 (NY 2000)] the 4<sup>th</sup> Department of

the New York Supreme Court's Appellate Division allowed G.G., who had been adjudicated as T.M.H.'s father by default, to have the said judgment vacated, even after six years, once he had shown through a genetic marker test that he was not the child's father. In this case, G.G. only requested the tests after the Department of Social Services, six years after G.G. had been adjudicated as T.M.H.'s father, sought an increase in his support obligation to her.

In *Greco v. Coleman*, [Greco v. Coleman, 615 N.W. 2d 218 (Mich. 2000)] the Michigan Supreme Court while ruling on the constitutionality of a provision of law allowing non-modifiable support agreements pointed out that it was because of the difficulty of determining paternity before the advent of DNA testing that such support agreements were necessary:

As a result of DNA testing, the accuracy with which paternity can be proven has increased significantly since the parties in this lawsuit entered into their support agreement (current testing methods can determine the probability of paternity to 99.999999% accuracy). However, at the time the parties before us entered into the disputed agreement, proving paternity was a very significant obstacle to an illegitimate child's access to child support. The first reported results of modern DNA paternity testing did not occur until 1985. ("In fact, since its first reported results in 1985, DNA matching has progressed to 'general acceptance in less than a decade'"). Of course, while prior blood-testing methods could exclude some males from being the possible father of a child, those methods could not affirmatively pinpoint a particular male as being the father. Thus, when the settlement agreement between the present parties was entered in 1980, establishing paternity was a far more difficult ordeal than at present. Contested paternity actions at that time were often no more than credibility contests. Consequently, in every contested paternity action, obtaining child support depended not merely on whether the putative father was, in fact, the child's biological father, but rather on whether the mother could prove to a court of law that she was only sexually involved with one man--the putative father. Allowing parties the option of entering into private agreements in lieu of proving paternity eliminated the risk that the mother would be unable meet her burden of proof.

In *Rafferty v. Perkins*, 757 So. 2d 992 (Miss. 2000) the Supreme Court of Mississippi ruled that DNA test results showing paternity were sufficient to overthrow the presumption of legitimacy of a child

born during the course of a marriage:

The presumption of legitimacy having been rebutted by the results of the blood test eliminating Perkins as Justin's father, even considering the evidence in the light most favorable to Perkins, we find that no reasonable jury could find that Easter is not Justin's father based upon the 99.94% probability of paternity concluded by the DNA testing.

In *S.J.F. and J.C.F. v. R.C.W.*, 615 N.W. 2d 533 (ND 2000) the North Dakota Supreme Court upheld an order for genetic testing given by the Court of Appeals, even after trial on the merits had concluded without such order being given. Significantly, when J.C.F., the mother, first filed the case for paternity and support with the District Court, neither party requested genetic testing. It was only upon appeal from dismissal of the case that the appellate court remanded the case and ordered the testing, which the North Dakota Supreme Court upheld.

The case of *Kohl v. Amundson*, 620 N.W.2d 606 (SD 2001) decided by the Supreme Court of South Dakota, demonstrated that even default judgments of paternity could be vacated after the adjudicated father had, through DNA testing, established non-paternity. In this case, Kohl, having excluded himself as the father of Amundson's child through DNA testing, was able to have the default judgment against him vacated. He then obtained a ruling ordering Amundson to reimburse him for the amounts withheld from his wages for child support. The Court said "(w)hile Amundson may have a remedy against the father of the child, she submit(ted) no authority that require(d) Kohl to support her child. Contrary to Amundson's position, the fact that a default judgment was entered, but subsequently vacated, (did) not foreclose Kohl from obtaining a money judgment for the amount withheld from his wages."

In *M.A.S. v. Mississippi Dept. of Human Services*, 842 So. 2d 527 (Miss. 2003) another case decided by the Supreme Court of Mississippi, it was held that even if paternity was established through an earlier agreed order of filiation, child support and visitation orders could still be vacated once DNA testing established someone other than the named individual to be the biological father. The Mississippi High Court reiterated this doctrine in *Williams v. Williams*. 843 So. 2d 720 (Miss. 2003).

**7.2. Herrera v. Alba**<sup>49</sup> The First Division of the Supreme Court through Justice Carpio said:

In *Frye v. U.S.* [54 App.D.C. 46, 293 F. 1013 (1923)], the trial court convicted Frye of murder. Frye appealed his conviction to the Supreme Court of the District of Columbia. During trial, Frye's counsel offered an expert witness to testify on the result of a systolic blood pressure deception test made on defendant. The state Supreme Court affirmed Frye's conviction and ruled that "the systolic blood pressure deception test has not yet gained such standing and scientific recognition among physiological and psychological authorities as would justify the courts in admitting expert testimony deduced from the discovery, development, and experiments thus far made." The *Frye* standard of general acceptance states as follows:

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.

In 1989, *State v. Schwartz* [447 N.W.2d 422 (Minn. Sup. Ct. 1989)] modified the *Frye* standard. Schwartz was charged with stabbing and murder. Bloodstained articles and blood samples of the accused and the victim were submitted for DNA testing to a government facility and a private facility. The prosecution introduced the private testing facility's results over Schwartz's objection. One of the issues brought before the state Supreme Court included the admissibility of DNA test results in a criminal proceeding. The state Supreme Court concluded that:

While we agree with the trial court that forensic DNA typing has gained general acceptance in the scientific community, we hold that admissibility of specific test results in a particular case hinges on the laboratory's compliance with appropriate standards and controls, and the availability of their testing data and results.

In 1993, *Daubert v. Merrell Dow Pharmaceuticals, Inc.* [509 US 579, 113 S.Ct. 2786 (1993)] further modified the *Frye-Schwartz*

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<sup>49</sup> 460 SCRA 197 (2005), at 213-215.

standard. *Daubert* was a product liability case where both the trial and appellate courts denied the admissibility of an expert's testimony because it failed to meet the *Frye* standard of "general acceptance." The United States Supreme Court ruled that in federal trials, the Federal Rules of Evidence have superseded the *Frye* standard. Rule 401 defines relevant evidence, while Rule 402 provides the foundation for admissibility of evidence. Thus:

Rule 401. "Relevant evidence" is defined as that which has any "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 402. All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

Rule 702 of the Federal Rules of Evidence governing expert testimony provides: 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.

*Daubert* cautions that departure from the *Frye* standard of general acceptance does not mean that the Federal Rules do not place limits on the admissibility of scientific evidence. Rather, the judge must ensure that the testimony's reasoning or method is scientifically valid and is relevant to the issue. Admissibility would depend on factors such as (1) whether the theory or technique can be or has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error; (4) the existence and maintenance of standards controlling the technique's operation; and (5) whether the theory or technique is generally accepted in the scientific community.

Another product liability case, *Kumho Tires Co. v. Carmichael*, [526 U.S. 137, 119 S.Ct. 1167 (1999)] further modified the *Daubert* standard. This led to the amendment of Rule 702 in 2000 and which now reads as follows:

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, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

### VIII. SALIENT POINTS ON THE RULE ON DNA EVIDENCE

The Rule on DNA Evidence provides for the scope, the procedure in the application and order for DNA Testing, the Court's assessment of the probative value of DNA evidence, the evaluation of the reliability of the methodology used in DNA Testing, the evaluation of DNA Testing results, post-conviction DNA Testing, and the confidentiality of the DNA Evidence.

**8.1. Scope of the Rule on Evidence.** This Rule shall apply whenever DNA evidence is offered, used, or proposed to be offered or used as evidence in all criminal and civil actions as well as special proceedings (Section 1 of Rule on DNA Evidence). Furthermore, Rule 2 provides the application of other Rules on Evidence:

Section 2. *Application of other Rules on Evidence.*—In all matters not specifically covered by this Rule, the Rules of Court and other pertinent provisions of law on evidence shall apply.

**8.2. Application for DNA Testing Order.** Under the Rule, the appropriate court may, at any time, either *motu proprio* or on application of any person with a legal interest in the matter in litigation, order a DNA testing after due hearing and notice to the parties. Additionally, the Rule does not preclude the conduct of DNA Testing before the commencement of a suit or proceeding, as this may be done even without prior court order at the behest of any party, including law enforcement agencies. Sections 4 and 5 further state the following:

Section 4. *Application for DNA Testing Order.*—The appropriate court may, at any time, either *motu proprio* or on application of any person who has a legal interest in the matter in litigation, order a DNA testing. Such order shall issue after due hearing and notice to the parties upon a showing of the following:

- (a) A biological sample exists that is relevant to the case;
- (b) The biological sample: (i) was not previously subjected

to the type of DNA testing now requested; or (ii) was previously subjected to DNA testing, but the results may require confirmation for good reasons;

(c) The DNA testing uses a scientifically valid technique;

(d) The DNA testing has the scientific potential to produce new information that is relevant to the proper resolution of the case; and

(e) The existence of other factors, if any, which the court may consider as potentially affecting the accuracy or integrity of the DNA testing. This Rule shall not preclude a DNA testing, without need of a prior court order, at the behest of any party, including law enforcement agencies, before a suit or proceeding is commenced.

Section 5. *DNA Testing Order*.—If the court finds that the requirements in Section 4 hereof have been complied with, the court shall —

(a) Order, where appropriate, that biological samples be taken from any person or crime scene evidence;

(b) Impose reasonable conditions on DNA testing designed to protect the integrity of the biological sample, the testing process and the reliability of the test results, including the condition that the DNA test results shall be simultaneously disclosed to parties involved in the case; and

(c) If the biological sample taken is of such an amount that prevents the conduct of confirmatory testing by the other or the adverse party and where additional biological samples of the same kind can no longer be obtained, issue an order requiring all parties to the case or proceedings to witness the DNA testing to be conducted.

An order granting the DNA testing shall be immediately executory and shall not be appealable. Any petition for *certiorari* initiated therefrom shall not, in any way, stay the implementation thereof, unless a higher court issues an injunctive order. The grant of a DNA testing application shall not be construed as an automatic admission into evidence of any component of the DNA evidence that may be obtained as a result thereof.

**8.3. Post Conviction DNA Testing.** The Rule provides that post-conviction DNA Testing will be available to the prosecution or any person convicted by final and executory judgment, without prior need of court order, in cases wherein a biological sample relevant to a case exists and the testing thereof would probably result in the reversal or modification of a judgment

of conviction. Should the test results prove favorable to the convict, either the convict or the prosecution may file a petition for a writ of *habeas corpus* in the court of origin. The court shall then determine after due hearing whether the petition is meritorious, and if so, shall reverse or modify the judgment of conviction and order the convict's release unless the latter is being detained for some other lawful cause.

The Rule states that an order granting DNA Testing shall be immediately executory and shall not be appealable. It emphasizes that any petition for *certiorari* initiated in this respect shall not stay the implementation of the order, unless a higher court issues an injunctive writ. Sections 6 and 10 further clarify:

Section 6. *Post-conviction DNA Testing.*—Post-conviction DNA testing may be available, without need of prior court order, to the prosecution or any person convicted by final and executory judgment provided that (a) a biological sample exists, (b) such sample is relevant to the case, and (c) the testing would probably result in the reversal or modification of the judgment of conviction.

Section 10. *Post-conviction DNA Testing. Remedy if the Results Are Favorable to the Convict.*— The convict or the prosecution may file a petition for a writ of *habeas corpus* in the court of origin if the results of the post-conviction DNA testing are favorable to the convict. In case the court, after due hearing, finds the petition to be meritorious, it shall reverse or modify the judgment of conviction and order the release of the convict, unless continued detention is justified for a lawful cause.

A similar petition may be filed either in the Court of Appeals or the Supreme Court, or with any member of said courts, which may conduct a hearing thereon or remand the petition to the court of origin and issue the appropriate orders.

**8.5. Probative Value, Reliability, Evaluation, and Preservation of DNA Evidence.** The grant of a DNA Testing application shall not be construed as an automatic admission into evidence of any component of the DNA evidence that may be obtained as a result thereof. The appropriate court is likewise empowered by the Rule to impose reasonable conditions on DNA testing to protect the integrity of the biological sample, the testing process, and the reliability of the test results. Sections 7, 8, 9, and 12 provide the following:

Section. 7. *Assessment of probative value of DNA evidence.*— In assessing the probative value of the DNA evidence presented, the court shall consider the following:

(a) The chain of custody, including how the biological samples were collected, how they were handled, and the possibility of contamination of the samples;

(b) The DNA testing methodology, including the procedure followed in analyzing the samples, the advantages and disadvantages of the procedure, and compliance with the scientifically valid standards in conducting the tests;

(c) The forensic DNA laboratory, including accreditation by any reputable standards-setting institution and the qualification of the analyst who conducted the tests. If the laboratory is not accredited, the relevant experience of the laboratory in forensic casework and credibility shall be properly established; and

(d) The reliability of the testing result, as hereinafter provided. The provisions of the Rules of Court concerning the appreciation of evidence shall apply supplementarily.

Section 8. *Reliability of DNA Testing Methodology.*—In evaluating whether the DNA testing methodology is reliable, the court shall consider the following:

(a) The falsifiability of the principles or methods used, that is, whether the theory or technique can be and has been tested;

(b) The subjection to peer review and publication of the principles or methods;

(c) The general acceptance of the principles or methods by the relevant scientific community;

(d) The existence and maintenance of standards and controls to ensure the correctness of data generated;

(e) The existence of an appropriate reference population database; and

(f) The general degree of confidence attributed to mathematical calculations used in comparing DNA profiles and the significance and limitation of statistical calculations used in comparing DNA profiles.

Section 9. *Evaluation of DNA Testing Results.*—In evaluating the results of DNA testing, the court shall consider the following:

(a) The evaluation of the weight of matching DNA evidence or the relevance of mismatching DNA evidence;

(b) The results of the DNA testing in the light of the totality of the other evidence presented in the case; and that

(c) DNA results that exclude the putative parent from paternity shall be conclusive proof of non-paternity. If the value of the Probability of Paternity is less than 99.9%, the results of the DNA

testing shall be considered as corroborative evidence. If the value of the Probability of Paternity is 99.9% or higher, there shall be a disputable presumption of paternity.

Section 12. *Preservation of DNA Evidence.*—The trial court shall preserve the DNA evidence in its totality, including all biological samples, DNA profiles and results or other genetic information obtained from DNA testing. For this purpose, the court may order the appropriate government agency to preserve the DNA evidence as follows:

(a) In criminal cases:

i. for not less than the period of time that any person is under trial for an offense; or,

ii. in case the accused is serving sentence, until such time as the accused has served his sentence; and

(b) In all other cases, until such time as the decision in the case where the DNA evidence was introduced has become final and executory. The court may allow the physical destruction of a biological sample before the expiration of the periods set forth above, provided that:

(a) A court order to that effect has been secured; or

(b) The person from whom the DNA sample was obtained has consented in writing to the disposal of the DNA evidence.

**8.5. Confidentiality of DNA Evidence.** The Rule provides that DNA profiles and all results or information obtained from DNA testing shall be treated as confidential, and should only be released to persons authorized by the Court. Any unauthorized disclosure of a DNA profile will be treated as indirect contempt court. Section 11 of the Rule provides the following:

Section 11. *Confidentiality.*—DNA profiles and all results or other information obtained from DNA testing shall be confidential. Except upon order of the court, a DNA profile and all results or other information obtained from DNA testing shall only be released to any of the following, under such terms and conditions as may be set forth by the court:

(a) Person from whom the sample was taken;

(b) Lawyers representing parties in the case or action where the DNA evidence is offered and presented or sought to be offered and presented;

- (c) Lawyers of private complainants in a criminal action;
- (d) Duly authorized law enforcement agencies; and
- (e) Other persons as determined by the court.

Whoever discloses, utilizes or publishes in any form any information concerning a DNA profile without the proper court order shall be liable for indirect contempt of the court wherein such DNA evidence was offered, presented or sought to be offered and presented.

Where the person from whom the biological sample was taken files a written verified request to the court that allowed the DNA testing for the disclosure of the DNA profile of the person and all results or other information obtained from the DNA testing, the same may be disclosed to the persons named in the written verified request.

## IX. JURISPRUDENCE LAID DOWN AFTER THE EFFECTIVITY OF THE RULE ON DNA EVIDENCE

**9.1. *People v. Umanito*.**<sup>50</sup> The Supreme Court recently applied for the first time the *Rule on DNA Evidence* after the *Rule* took effect last October 15. The Supreme Court through Justice Dante O. Tinga remanded the case against Umanito to the Regional Trial Court (RTC) for reception of evidence in appropriate hearings, ruled that “the determination of whether the appellant is the father of the rape victim’s child [born from the alleged rape], which may be accomplished through deoxyribonucleic acid testing, is material to the fair and correct adjudication of the instant appeal. Under Section 4 of the Rule on DNA Evidence, the courts are authorized, after due hearing and notice, *motu proprio* to order a DNA testing.” This is what the High Court availed of this measures.

The Court ruled that the RTC must first determine the feasibility of DNA testing in accordance with the standards set in the *Rule*. Upon receipt of the test results, it shall be incumbent upon the parties to avail of it and the RTC to assess such results as evidence in keeping with Sections 7 and 8 of the Rule. The Court also enjoined the RTC to observe the requirements of confidentiality and preservation of the DNA evidence under Sections 11 and 12 of the said Rule.

Furthermore, the High Court stated the following:

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<sup>50</sup> GR No. 172607, October 26, 2007.

In assessing the probative value of DNA evidence, the RTC shall consider, among other things, the following data: how the samples were collected, how they were handled, the possibility of contamination of the samples, the procedure followed in analyzing the samples, whether the proper standards and procedures were followed in conducting the tests, and the qualification of the analyst who conducted the tests.

Moreover, the court *a quo* must ensure that the proper chain of custody in the handling of the samples submitted by the parties is adequately borne in the records, *i.e.*: that the samples are collected by a neutral third party; that the tested parties are appropriately identified at their sample collection appointments; that the samples are protected with tamper tape at the collection site; that all persons in possession thereof at each stage of testing thoroughly inspected the samples for tampering and explained his role in the custody of the samples and the acts he performed in relation thereto.

**9.2. Estate of Ong v. Diaz.**<sup>51</sup> A Complaint for compulsory recognition with prayer for support pending litigation was filed by minor Diaz represented by her mother. RTC rendered a decision declaring Minor Diaz to be the illegitimate child of defendant Ong with plaintiff Jinky Diaz, and awarded support *pendente lite*. Ong appealed to the Court of Appeals. During the pendency of the case, Ong died and hence Estate of Ong was substituted as the respondent. The Court of Appeals rules “The case is hereby REMANDED to the court *a quo* for the issuance of an order directing the parties to make arrangements for DNA analysis for the purpose of determining the paternity of plaintiff minor Diaz, upon consultation and in coordination with laboratories and experts on the field of DNA analysis.”

The issues raised before the Supreme Court is “whether or not the Court of Appeals erred when it remanded the case to the court *a quo* for DNA analysis despite the fact that it is no longer feasible due to the death of Ong.”

The Supreme Court through Justice Chico-Nazario stated that the death of the petitioner does not *ipso facto* negate the application of DNA testing for as long as there exists appropriate biological samples of his DNA. Thus, even if Ong already died, any of the biological samples as enumerated above as may be available, may be used for DNA testing. In this case, petitioner has not shown the impossibility of obtaining an appropriate biological sample that can be utilized for the conduct of DNA testing and even the death of Rogelio cannot bar the conduct of DNA testing.

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<sup>51</sup> G.R. No. 171713, December 17, 2007.

## X. CONCLUSION

DNA evidence can be admissible in Court if it is both relevant to the fact in issue and is not otherwise excluded by statute or the Rules of Court (i.e. competent) (Section 3, Rule 128). The admissibility of evidence should not be equated with weight of evidence. The admissibility of evidence depends on its relevance and competence while the weight of evidence pertains to evidence already admitted and its tendency to convince and persuade, or the reliability of the DNA evidence.

In Philippine jurisdiction, the restrictive tests for admissibility established by *Frye-Schwartz* and *Daubert-Kumho* go into the weight of the DNA evidence or the probative value of DNA evidence. Sections 7, 8, 9, and 12 of the Rule on DNA Evidence provide the Rules in the assessment of probative value of DNA evidence, reliability of DNA testing methodology, evaluation of DNA testing results, and the preservation of DNA evidence, respectively.