



C H R O N O L O G I C A L I N D E X

TUESDAY, JULY 6, 1999 ..... 1

Witness for the people:

MIHALOVICH, JENNIFER  
Direct examination by Mr. Kindall ..... 7  
Cross examination by Mr. Sherriff ..... 64  
Redirect examination by Mr. Kindall ..... 149  
Recross examination by Mr. Sherriff ..... 151

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Monday, July 6, 1999, 10:10 a.m.

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The matter of the People of the State of California versus Duane Robert Hackney, defendant, case number 97F02466, continued on this day before the Honorable Richard K. Park, Judge of the Superior Court of California for the County of Sacramento, sitting in the said Superior Court in Department 39 thereof.

The people of the State of California were represented by Eric Kindall, Deputy District Attorney for the County of Sacramento, State of California.

The defendant, Duane Robert Hackney, was represented by Karol Repkow, Assistant Public Defender for the County of Sacramento, State of California, and Jim Sherriff, Attorney at Law, Sacramento, California, acting as his counsel.

The following proceedings were had:

(The following proceedings were held in open court outside the presence of the jurors.)

THE COURT: Good morning.

MR. SHERRIFF: Good morning, Your Honor.

MS. REPKOW: Good morning.

THE COURT: The record should reflect that Mr. Hackney is present, and with him are his two lawyers, Ms. Repkow and Mr. Sherriff.

Mr. Kindall is here on behalf of the

1 people.

2 When we last met I agreed that I would  
3 review the testimony of Dr. Owen that was given in  
4 the case of People versus Bertsch and Hronis before  
5 finally ruling on the Kelly-Frye issues in this  
6 case.

7 And I have done that.

8 And recently the defense also asked me to  
9 review a transcript of the testimony of Dr. Kenneth  
10 Berger which was given in the same case last week.

11 And I have reviewed that transcript as  
12 well.

13 And as we discussed off the record a few  
14 minutes ago my view that I expressed last time  
15 remains unchanged -- that what we are going to  
16 conduct will be a Kelly-Frye prong three hearing  
17 only under whether proper procedures were used in  
18 the analysis in this case.

19 The last time we met I'm not sure whether I  
20 made a record of all of the matters that I have  
21 considered in terms of judicial notice. So I want  
22 to make sure that I do that today.

23 I have read the opinions from the other  
24 states that deal with STR testing.

25 I have read the trial court decisions by  
26 Judges Dondero and Kramer in San Francisco.

27 I have reviewed the five binders of the  
28 scientific literature that the people submitted with

1 their brief, all of which was summarized and  
2 highlighted in their brief as well.

3 As indicated I have reviewed the testimony  
4 of Drs. Henke, Owen, and Berger.

5 And I've also taken note over defense  
6 objection the recent opinion in People versus Alton  
7 Allen giving endorsement to PCR testing of STR loci.

8 As I indicated in chambers it appears to me  
9 that Dr. Owen's testimony is indeed more favorable  
10 to the prosecution than to the defense. We can all  
11 read it for ourselves.

12 But -- in summary he takes issue with the  
13 310 machine, but it appears to me only because he  
14 had a unsatisfactory experience with it three years  
15 ago. And he conceded that it is a generally  
16 accepted machine in the community. It's used in a  
17 variety of places throughout Canada. He indicated  
18 that he uses essentially the same kind of software  
19 with his 377 machine that is used for the 310  
20 machine, that it is generally accepted.

21 He doesn't take any significant quarrel  
22 with capillary electrophoresis as opposed to a gel  
23 form of electrophoresis.

24 He doesn't take any issue with using the  
25 Profiler Plus type kit.

26 And indeed he says at least two times, once  
27 in response to the judge's own questions, that the  
28 310 machine along with the software and the Profiler

1 Plus typing kit are all generally accepted means of  
2 effectuating the analysis of these STR loci.

3 So I am still of the same position I was  
4 last time. The literature that I have reviewed  
5 shows that the 310 machine itself along with the  
6 Profiler Plus typing kit are used widely throughout  
7 the entire world in clinical, forensic, and medical  
8 settings by physicians concerned with health care,  
9 by researchers by professors, and indeed by crime  
10 labs as well.

11 It appears to me that, therefore, that not  
12 only is STR DNA PCR testing generally accepted, but  
13 that the means in which the typing was done in this  
14 case through this equipment has also also been  
15 generally accepted.

16 Of course there is also an argument to make  
17 that the people wouldn't even have to show that this  
18 kind of hardware or software and machinery is  
19 required to meet Kelly-Frye's prong one standard --  
20 that that's a prong three issue in any case.

21 But apart from that it appears to me it has  
22 met the prong one standards.

23 Therefore, we shall deal in advance of  
24 trial only with the more narrow and limited question  
25 of whether or not the procedures used in this case  
26 were proper -- so-called prong three analysis  
27 recognized in the Kelly-Frye analysis.

28 On that point are we ready to proceed?

1 MR. KINDALL: Yes, Your Honor.

2 THE COURT: Oh, I'm sorry.

3 I forgot to comment on the most recent  
4 transcript I reviewed -- that of Dr. Kenneth Berger.

5 In a sense it's little unfair to ask me  
6 take judicial notice of his testimony when his  
7 direct hasn't even been completed, much less his  
8 cross examination.

9 But the tenor of the direct that I've heard  
10 so far is that he is critical of the validation  
11 studies performed by Perkin-Elmer, which  
12 manufactured the -- the kit and the 310 genetic  
13 analyzer machine in this case.

14 But notably nowhere does he say that those  
15 things are not generally accepted. He doesn't say  
16 they don't work, that they're not valid. They don't  
17 produce good results. All he does is take a  
18 theoretical disagreement with the manner in which  
19 they conducted their validation studies.

20 And in my opinion that -- that does not  
21 demean the presentation of the people that these  
22 items have all been generally accepted.

23 Who's going to be your first witness?

24 MR. KINDALL: Thank you, Your Honor.

25 The People call Ms. Jennifer Mihalovich.

26 MS. REPKOW: Your Honor -- before she comes  
27 to the stand, Judge, could I just make a comment for  
28 the record that Mr. Hackney has been making an