IN THE FLORIDA SUPREME COURT

STATE OF FLORIDA, :

Petitioner/Cross Respondent, :

v. : CASE NOS. 87,530,87,543

MICHAEL GIBSON, :

Respondent/Cross Petitioner. :

_____ :

ON DISCRETIONARY REVIEW
FROM THE FIRST DISTRICT COURT OF APPEAL

CROSS REPLY BRIEF OF RESPONDENT/CROSS PETITIONER

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ARGUMENT

ISSUE II THE TRIAL COURT ERRED IN OVERRULING RESPONDENT'S FRYE OBJECTION TO TESTIMONY ABOUT THE STATISTICAL SIGNIFICANCE OF A DNA MATCH WHEN THE STATE'S EXPERT OMITTED A STEP OF THE NATIONAL RESEARCH COUNSEL PROCEDURE AND THE STATE FAILED TO ESTABLISH THAT THE PROCEDURE USED, WITHOUT THE OMITTED STEP, IS GENERALLY ACCEPTED IN THE SCIENTIFIC COMMUNITY.

The most significant information in the state's brief answering Issue II, is that the National Research Council has issued a new report, The Evaluation of Forensic DNA Evidence, Prepublication Copy, National Research Council (April, 1996). In the new report, the NRC has abandoned its modified ceiling recommendation, including the step that Dr. Pollack failed to take. A new committee of the National Research Council, at the request of the director of the FBI (See the preface to the 1996

report), has concluded that the 1992 report was too conservative, and has apparently endorsed the simple product rule that Dr. Pollack wanted to use, but did not because of the 1992 NRC report and the decision in Vargas v. State, 640 So. 2d 1139 (Fla. 1st DCA 1994), reversed on other grounds, 667 So. 2d 175 (Fla. 1995). If Dr. Pollack had testified to statistical conclusions obtained from the unmodified product rule, the results would have been more damaging to Gibson than was the statistical evidence Gibson contends was admitted in error.

The NRC's reversal is not dispositive of this issue on appeal, however. First, at the time the trial judge overruled Gibson's Frye objection, the judge erred. At that time, Gibson raised the issue of whether any method other than the NRC's method for determining the statistical significance of a DNA match had general acceptance in the scientific community. The state failed to establish general acceptance of the method Dr. Pollack used. Thus at the time of the trial, the ruling was incorrect.

Second, the change of opinion of the NRC does not establish that the new NRC view is generally accepted. What this Court observed in Hayes v. State, 660 So.2d 257 (Fla. 1995), is that the NRC is so significant a portion of the scientific community that its view of a scientific technique as unreliable compels the conclusion that the technique lacks general scientific

acceptance. It does not follow, however, that the NRC's endorsement of a technique makes that technique generally accepted. There could be significant scientific opposition to the NRC's view. Justice Overton and Wells, dissenting in State v. Vargas, 667 So. 2d 175 (Fla. 1995), indicated that neither the NRC's 1992 report nor the scientific opposition to that report seemed to command general acceptance. It is too soon to know if the 1996 report, not even released except in a prepublication version, will ultimately command general acceptance. In any event, that question should be initially considered by the trial judge upon remand for a new trial.

The state also asserts that there was unrefuted evidence that the method Dr. Pollack used for determining the statistical significance of the DNA match commanded general acceptance in the scientific community. The state ignores, however, Dr. Pollack's failure to follow the first step of the modified ceiling approach prescribed by the National Research Council's 1992 report. There was no evidence that Dr. Pollack's deviation from the NRC procedure was a generally accepted method.

The state also seems to interpret Gibson's position on appeal as attacking the reliability of the NRC method itself. This is a misunderstanding of Gibson's brief. Gibson has asserted, at trial and on appeal, that Dr. Pollack's method failed the Frye test because it failed to follow all of the NRC's

steps.

The state also asserts that Dr. Pollack's failure to compare the profile of the DNA left at the crime scene with the profiles in the FBI database from which statistical conclusions were drawn is immaterial because the step was only a "recommendation." This assertion is without merit. The entire modified ceiling method was the National Research Council's recommendation, and there was nothing in the 1992 NRC report that distinguished between the step Dr. Pollack skipped and rest of the NRC's recommended steps. The NRC recommended all the steps it listed in order to prevent the use of unreliable statistics. The one authority the state cites for the proposition that the first NRC step was not essential, a decision of an intermediate level Arizona appeals court, simply asserts, without analysis, that the first NRC step is not a part of the ceiling principle. The basis for such a conclusion must be that the statistical result generated by the modified ceiling principle can be calculated without conducting the first step. That a number can be arrived at, however, does not imply that the number is reliable. In any event, the issue is not whether the first step prescribed by the NRC is part of the ceiling principle. The issue is whether a calculation of the statistical significance of a match without the first step is a generally accepted method. It was the state's burden to prove that such a method was generally accepted, and the state offered

no evidence of such acceptance.

Next, the state asserts that because the science for determining that there has been a DNA match is generally accepted, evidence of the statistical significance of such match should be admissible without meeting the Frye test. The state cites for this proposition Hayes, and Bundy v. State, 455 So.2d 330 (Fla. 1984), cert.den., 476 U.S. 1109 (1986).

The state says that Hayes holds DNA evidence admissible so long as the laboratory procedure was proper, and since Gibson's challenge does not deal with laboratory procedure, under Hayes, Gibson's objection must fail. According to the state's reading, Hayes would have the same effect on any aspect of DNA evidence that Stokes v. State, 548 So. 2d 188 (Fla. 1989), had on evidence of the battered woman syndrome. Stokes held that the battered woman syndrome satisfies Frye, and Stokes explicitly stated that there would be no need for a Frye hearing in future battered woman syndrome cases. Hayes says nothing of the kind, and in fact, Hayes makes it clear that it does not deal with the admissibility of the statistical part of DNA evidence:

> [Brim v. State, 654 So. 2d 184 (Fla. 2d 1995)] and Vargas each deal with the admissibility of evidence concerning the statistical likelihood that someone other than the defendant has a DNA pattern that matches the DNA taken from the crime scene. This particular aspect of the admissibility of DNA evidence is not at issue in the instant case.

660 So.2d 262, fn 1.

Bundy did hold that differing opinions could be admitted as to whether or not the defendant's teeth matched the bite mark left on the victim without finding that there was a generally accepted method for doing such a comparison. Bundy was decided at a time when Frye v. United States, 293 F. 1013 (D.C.Cir.1923), was not a part of Florida law, however, as this Court recognized in Bundy. In holding that there was no need to decide whether the Frye test or the competing relevance test applied to the admissibility of hypnotically enhanced testimony, this Court repeated without contradiction the observation of the First District:

> In [Brown v. State, 426 So.2d 76 (Fla. 1st DCA 1983)], the district court of appeal pointed out that Frye has never authoritatively been adopted by the courts of Florida as the test for the admissibility of scientific evidence generally.

455 So. 2d 341. Frye was not adopted in Florida until 1989, by Stokes, and the adoption of Frye was confirmed in Flanagan v. State, 625 So. 2d 827 (Fla. 1993), and Ramirez v. State, 651 So. 2d 1164 (Fla. 1995). Thus, the 1984 decision in Bundy cannot be said to be an application of the Frye test at all.

Also, Bundy's decision to allow the bite mark comparison was based on a special consideration not present with DNA:

> Bite mark comparison evidence differs from many other kinds of scientific evidence such as blood tests, "breathalyzer" tests, and

> radar (as well as from inadmissible techniques such as the polygraph and voice-print analyses) in that these various techniques involve total reliance on scientific interpretation to establish a question of fact. With bite marks evidence, on the other hand, the jury is able to see the comparison for itself by looking directly at the physical evidence in the form of photographs and models.

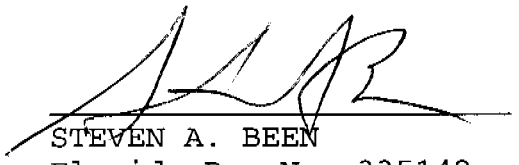
455 So. 2d 349. Neither Hayes nor Bundy relieves the state of its burden of showing that the DNA statistical conclusions it seeks to present are based on methods that are generally accepted in the pertinent scientific community.

Of the other cases cited by the state, Campbell v. State, 571 So.2d 415 (Fla. 1990), and Grossman v. State, 525 So.2d 833 (Fla. 1988), cert.den., 489 U.S. 1071 (1989), do not deal with Frye issues. Both deal with whether the expert testimony was within the area of the witness's expertise. Mitchell v. State, 527 So.2d 179 (Fla. 1988), cert.den., 488 U.S. 960 (1988), disposes of a claim of fundamental error that was apparently based only on the defense's bite mark expert having testified that he was unable to draw any conclusion, while the state's expert found a match. None of these cases bears on the Frye issue raised here.

CONCLUSION

Gibson's convictions should be reversed and remanded for new trial based on the trial court's error in admitting statistical conclusions without a showing that the method used to draw those conclusions was generally accepted in the scientific community.

Respectfully submitted,



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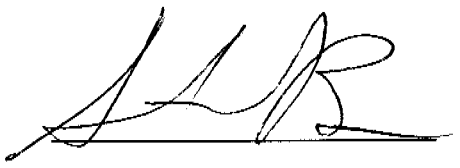
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by delivery to Assistant Attorney General Giselle Lylen Rivera, Office of the Attorney General, The Capitol, Plaza Level, Tallahassee, Florida, this 26th day of June, 1996.



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