IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner/Cross-Respondent,
v.

MICHAEL GIBSON,

Respondent/Cross-Petitioner.

CASE NO. 87,530, 87,543

PETITIONER'S REPLY BRIEF ON THE MERITS AND CROSS-RESPONDENT'S ANSWER ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner/Cross-Respondent, the State of Florida, the Appellee in the First District Court of Appeal and the prosecuting authority in the trial court, will be referenced in this brief as the State. Respondent/Cross-Petitioner, Michael Gibson, the Appellant in the First District Court of Appeal and the defendant in the trial court, will be referenced in this brief as the defendant.

The symbol "R" will refer to the record on appeal, and the symbol "T" will refer to the transcript of the trial court's proceedings; "AB" will designate the Answer Brief of Respondent. Each symbol will be followed by the appropriate page number in parentheses.

All emphasis through bold lettering is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The State accepts the defendant's statement of the case and facts as generally accurate with the following additions and corrections.

The victim testified that once the defendant had gained access into her apartment, she attempted to flee into the bedroom, but he once again got his foot inside the door. (T. 56). He told her not to 'mess with him' because he lost his job and was not in a very good mood; he butted her in the chin with the gun to emphasize his point. (T. 56-57). While the defendant was occupied searching the apartment for items to take, she began calling 911; when the defendant noticed what she was doing, he punched her on the cheek and tore the phone out of the wall. (T. 58).

The defendant forced the victim to perform oral sex on him at gunpoint, before forcing her to undress and vaginally raping her. (T. 62-64). He ejaculated over her stomach and thigh while she was lying on a blue comforter. (T. 64).

After selecting the property from her apartment which he wanted, the defendant again forced the victim at gunpoint to engage in oral sex and intercourse. (T. 66-68). He ejaculated over her back and buttocks. (T. 68).

The victim positively identified the defendant as her attacker in court. (T. 65). She selected a photograph of the defendant from a photo line up nine days after the attack. (T. 77, 86-87).

Charles Brown testified that when he woke up the morning of the 20th, the front door was open and the defendant was standing outside by his car. (T. 116).

DeAnna Ingram testified that when she looked out of the window, she saw an unfamiliar car which resembled a photograph of Brown's car. (T. 130).

Prior to Dr. Pollock's testimony, the defendant noted that Pollock had calculated the frequency two ways. (T. 163). The State agreed that it would not introduce the higher of the two frequency calculations; nevertheless, the defendant challenged the calculation on the grounds that it was not generally accepted within the scientific community as a result of Dr. Pollock's omission of one of the steps recommended by the 1992 NRC Report which suggested that the DNA pattern at issue be individually compared with those comprising the database. (T. 164). The State noted that the method used was not at issue in Vargas v. State, 640 So. 2d 1139 (Fla. 1st DCA 1994).

On cross-examination, Dr. Pollock stated that the NRC suggested the use of an additional procedure, individual

comparison of the DNA pattern with those contained in the given data based. (T. 181-182, 321). He could not do this in this case, since he did not have the raw data available to do so. (T. 182-183, 224-225). Based upon his experience, training and knowledge, Dr. Pollock testified that his omission of the one additional step suggested by the NRC report did not affect the outcome of his results. (T. 229).

The defendant presented no evidence in support of his contention that the method utilized was not generally accepted.

SUMMARY OF ARGUMENT

ISSUE I.

The defendant should not be entitled to discharge with regard to a conviction which was previously deemed valid.

ISSUE II.

This Court should decline to address this issue which was not certified to it by the lower court. The defendant's argument below was limited to whether omission of a step suggested by the 1992 NRC Report caused the results of the analysis to not be generally accepted within the relevant scientific community. Not only is the step not considered to be necessary by the 1996 NRC Report, this Court's decision in Hayes has deemed that DNA evidence is reliable as generally accepted within the scientific community so long as the laboratory protocol has been followed. In this case, the defendant made no objection or challenge to the protocol of the laboratory which found evidence of a match. Any complaint is waived.

ARGUMENT

ISSUE I

WHEN A CONVICTION FOR ATTEMPTED FIRST-DEGREE FELONY MURDER MUST BE VACATED ON AUTHORITY OF STATE V. GRAY, 654 So. 2d 552 (FLA. 1995), DO LESSER-INCLUDED OFFENSES REMAIN VIABLE FOR A NEW TRIAL OR REDUCTION OF THE OFFENSE? (Restated)

The defendant seeks to be discharged for conduct which was accepted as a violation of a criminal statute at the time it was committed and at the time he was convicted for that conduct. The State readopts the argument set forth in its initial brief with respect to this issue, but adds the following matters in response to the defendant's argument.

The defendant, for the first time in this case, asserts the issue of sufficiency of the evidence, despite his concession that he at no time raised this issue at the District Court level. (IB. 13-14). His attempt to raise this issue at the present time, in view of that concession, is totally inappropriate and bars consideration of the issue in this Court.

The State begs to differ with the defendant's apparent assertion that this is a "run-of-the-mill" armed felony in which no one was attacked and no one hurt which was turned into an attempted murder by virtue of the problematic reasoning of

Amlotte v. State, 456 So. 2d 448 (Fla. 1984). Clearly, the record reflects that the defendant broke into the victim's house and while struggling with her, shot her. The use of the phrase "the gun went off" is the victim's and is not an admission on the State's part that the defendant did not intend to shoot the victim.

The defendant's assertion that Fla. R. Crim. P. 3.151 bars a potential retrial of him on a lesser included offense is without merit. The Rule specifically applies to consolidation of related offenses. Both the Rule and cases relied upon differ from the situation presented here in that, in this case, the defendant was convicted of a recognized offense which subsequent to that conviction has been ruled invalid due to difficulty in application, not on grounds of unconstitutionality. The defendant was not convicted of what was deemed to be a nonexistent offense at the time of commission and conviction. State v. Harris, 357 So. 2d 758 (Fla. 4th DCA 1978) presents the situation in which misdemeanor and felony offenses were severed and not tried together in the Circuit Court. After pleading guilty to reckless driving, (another count charging resisting without violence was dropped), a second information charging Harris with aggravated assault was filed. While the Rule

contemplates those situations in which a defendant was actually tried for an existent offense, it simply does not address the instant situation where, by virtue of this Court's ruling in an unrelated case, the statute under which the conduct at issue is charged is deemed void ab initio. As noted by the First District Court in Scalf v. State, 573 So. 2d 202, 204 (Fla. 1st DCA 1991), " ...the provisions of rule 3.151 are inapplicable to double jeopardy claims. Among other things, the rule presumes the existence of *valid*, separate offenses."

The defendant, in his answer brief attempts, in essence to retry the case to determine whether a conviction on a necessary or permissive lesser included offense would stand. It is not the function of this proceeding to engage in such analysis. Rather, the purpose would be to determine, if a directed verdict on such a lesser charged were deemed inappropriate, if retrial were the appropriate recourse. Should the latter course be adopted by the Court, then the defendant would face a jury which would determine the sufficiency of the evidence to support the charged offense.

The defendant ignores the fact that the Florida Legislature has already moved to correct the gap in the law created by Gray by enacting three new felony offenses relating to bodily injuries to persons resulting from the commission of a felony. See, House

Bill 2712 of the 1996 legislative session. The defendant, on retrial, could clearly be convicted of one of these felonies but for the effective date of the statute involved.

The defendant should not be permitted to avoid all criminal liability for actions which, despite his assertion to the contrary, were recognized as valid offense from the decision in Amlotte until Gray.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN ADMITTING DNA EVIDENCE? (Restated)

The defendant contends that the trial court reversibly erred in admitting DNA evidence relating to the statistical frequency of the profile in question on the grounds that the State's expert, Dr. Pollock, omitted a procedure suggested by the NRC's 1992 Report, even though unrefuted evidence established that the modified ceiling principle was used in the calculation and omission of the suggested procedure had no effect whatsoever on the outcome of the results.

The defendant fails to acknowledge that this same issue was presented to the District Court for its consideration, but that Court, in its opinion, dismissed the issue stating:

> In affirming the convictions in Count I and Count Iv through VIII, we have concluded that the trial court did not err when it overruled the defense's objection to the state's expert testimony about the statistical significance of a D.N.A. match. See Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) (to be admissible, novel scientific evidence must be generally acceptable within the relevant scientific community and found to be reliable); Ramirez v. State, 651 So. 2d 1164 (Fla. 1995) (setting forth a four-step test for determining the admissibility into evidence of expert testimony concerning a new or novel scientific principle); Flanagan v. State, 625 So. 2d 827, 829 n. 2 (Fla. 1993) (Florida adheres to the Frye test for admissibility of expert testimony relying on some scientific principle or test); Brim v. State, 654 So. 2d 184 (Fla. 2d DCA),

rev. granted, 663 So. 2d 629 (Fla. Oct. 26, 1995); Crews v. State, 644 So. 2d 338 (Fla. 1st DCA 1994)(on motion for rehearing).

The Court did not find this issue to be of significance and thus did not present it in addition to the other matter certified presented for the review of this Court.

Although this Court certainly has the authority to consider the issue should it chose to do so, it may exercise its jurisdiction to refuse to consider it. State v. Burgess, 326 So. 2d 441 (Fla. 1976), Stein v. Darby, 134 So.2d 232 (Fla. 1961) The State respectfully urges this Court to exercise its discretion and decline to review this issue, Coffin v. State, 374 So. 2d 504, 508 (Fla. 1979), given the increasing tendency of defendants to seek review of issues which have been found to be without merit by tacking them onto questions certified by a district court. This tendency, which adversely impacts upon the workload of this Court and the State of Florida, should be curbed.

Even if this Court should chose to consider the issue despite this fact, it is apparent that the defendant cannot prevail. The defendant ignores the fact that the unrefuted evidence which was presented at the trial was that the method utilized was generally accepted by the relevant scientific community and that omission

of the raw data comparison did not impact upon the results of the analysis in any fashion. Thus, the State presented evidence of general acceptance. While the defendant, through argument of counsel, took issue with that evidence, he at no time presented expert testimony or other evidence which refuted the State's assertion of general acceptance.

The defendant's reliance on this Court's decision in Vargas v. State, 640 So. 2d 1139 (Fla. 1st DCA 1994), quashed on other grounds, 667 So. 2d 175 (Fla. 1995) is misplaced. The defendant cites to the dissenting opinion of Justice Overton in support of his contention, made for the first time in the instant appeal, that the use of the ceiling principle was not itself generally accepted in the scientific community. This contention may not be addressed on appeal since it was not presented below to either the district court or trial court. Steinhorst v. State, 312 So. 2d 332 (Fla. 1982). Additionally, reliance upon a dissenting opinion is inappropriate. Only an opinion which is joined in by a majority of the court constitutes a decision of binding precedential value. Santos v. State, 629 So. 2d 838 (Fla. 1994); Greene v. Massey, 384 So. 2d 24 (Fla. 1980). Also see: Goodhart, "Determining the Ratio Decidendi Of A Case," 40 Yale L.J. 161 (1930); Cohen, How to Find the Law, pp. 7-11 (West Pub. Co.

1976). This Court's decision in Vargas reversed the District Court on an issue unrelated to DNA and did not, in its majority opinion address that issue.[1]

Below, and at trial, the defendant's basis of objection was Dr. Pollock's failure to follow a recommended step set forth in the 1992 NRC Report which suggested that a visual comparison between the DNA profile of the subject and those set forth in the database utilized for computational purposes. This suggestion was set forth in Section 3.7.2 of that Report to indicate the rarity of the subject DNA pattern. As noted above, however, that step was a recommended one, not a mandatory procedure which constituted an integral part of the procedure designed to correct for population substructure, i.e., the ceiling principle. The failure to follow this recommended step has not been found to constitute reversible error in any case. In State v. Johnson, 905 P.2d 1002 (Ariz. App. Div. 2 1995), for example, Johnson urged that the government's expert utilized deficient methodology by failing to search the database for a match as recommended by

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[1] Vargas, also presented a challenge to the utilization of an Hispanic ethnic database which Vargas alleged did not adequately deal with the question of population substructure given his Puerto Rican descent. The defendant has made no such challenge to the database utilized in this case.

the 1992 NRC Report. In rejecting that challenge by Johnson, the Court stated:

> A review of the NRC report reflects that database sample comparison is part of the NRC's suggested procedure for indicating the rarity of the subject DNA pattern, NRC Report § 3.7.2, but it clearly is not an element of the ceiling method.

Thus, error did not result in that case merely because this step was omitted. This result is further supported by the manner in which the 1996 NRC Report deals with its earlier suggestion:

> The 1992 Report stated (p 91) that 'the testing laboratory should check to see that the observed multilocus genotype matches any sample in the population database. Assuming that it does not, it should report that the DNA pattern was compared to a database of N individuals from the population and no match was observed, indicating its rarity in the population.' The Committee noted that if there were no occurrences of a profile in 100 samples, the upper confidence limit is 3%. It went on to say (p 76) that 'such estimates produced by straightforward counting have the virtue that they do no depend on theoretical assumptions, but simply on the sample's having been randomly drawn from the appropriate population. However, such estimates do not take advantage of the full potential of the genetic approach.'
>
> The ceiling method uses random-mating theory but does not make full use of population data. The counting method does not even combine allele frequencies and thereby loses even more information. In addition, very small probabilities cannot be estimated accurately from samples of realistic size; modeling is required. In fact, most profiles are not found in any database, so there must be a convention as to how to handle zeros. Since we believe that the abundant data make the ceiling principle unnecessary, this is true *a fortiori* for the direct counting method.

The Evaluation of Forensic DNA Evidence, page 5-33, National Research Council, Prepublication Copy, National Academy Press 1996.

The ceiling principle was adopted by the 1992 NRC Report based upon the assumption that substructure within populations existed and impacted upon the calculation of allele frequencies. This assumption was made to correct for the absence of any significant database studies on the subject, something which the Committee urged be corrected forthwith. The 1996 Report finds that the ceiling principle which was designed as an ultraconservative method of calculation inuring to the benefit of defendants, is no longer necessary due to the abundance of data in different ethnic groups within the major races and the genetically and statistically sound methods recommended by the report.

While the ceiling principle calculation was utilized in the instant case, the defendant is not entitled to reversal on this point. In the first instance, it is universally recognized that the ceiling principle is an ultraconservative calculation and that its use yields figures which are extremely beneficial to the defendant. Secondly, the defendant at no time contested that the ceiling principle was not generally accepted or that the State had failed to present the figures calculated in accordance therewith in an accurate manner. Thus, he waives any such

assertion at the present time. As noted by Dr. Eric Lander, a preeminent population geneticist and a participant in the 1992 Committee,

> The ceiling principle was not elegant solution, but simply a practical way to sidestep a contentious and unproductive debate... the report failed to state clearly enough that the ceiling principle was intended as an ultraconservative calculation, which did not bar experts from providing their own 'best estimates' based on the product rule.

Lander and Budowle, "DNA Fingerprinting Debate Laid to Rest," 371 Nature 735, 737 (October 27, 1994).

This Court has already taken judicial notice of the fact that DNA test results are generally accepted as reliable in the scientific community provided that the laboratory involved has followed accepted testing procedures that meet the Frye test to protect against false readings and contamination. Hayes v. State, 660 So. 2d 257, 264-265 (Fla. 1995). The defendant in the instant case has not challenged the laboratory methods utilized in this case. As previously established, the only challenge made was with regard to the omission of the comparison of the profile to those contained in the relevant database.

The Court's recognition in Hayes regarding the general reliability of DNA evidence is in conformity with the weight of case law on the subject. Given that recognition, the Court

should also recognize that scientific evidence of this type is not constant, but is instead in an ever developing state. Thus, the presentation of statistical analysis should be reserved for the experts each side wishes to present in support of its contentions as to the meaning of the statistics.

For example, with regard to bite mark evidence or fingerprint examination, this Court has found that once the scientific fields involved have been recognized as generally accepted within the relevant scientific community, the parties may then present experts in the field who support their analysis of the evidence and it is then a function of the jury to determine what it will believe. In Bundy v. State, 455 So. 2d 330 (Fla. 1984), cert. denied, 476 U.S. 1109, 106 S. Ct. 1958, 90 L. Ed. 2d 366 (1986), this Court addressed the admissibility of expert testimony in the field of odontology, i.e., the comparison of bite marks on a victim to models of Bundy's teeth. This Court stated:

> Bundy also challenges the trial court's ruling that permitted the state to present the testimony of dental experts who analyzed the bite inflicted on murder victim Lisa Levy and compared it to the models of appellant's teeth. Before trial the defense moved to exclude such evidence **on the ground that the comparison techniques were not reliable.** Dental experts for the state and the defense testified at the motion hearing.....
>
> The trial court found that the science of odontology, which is based on the discovery that the

characteristics of individual human dentition are highly unique, is generally recognized by scientists in the relevant files and therefore is an acceptable foundation for the admissibility of expert opinions into evidence. **The court in effect ruled that since the proffered evidence met this criterion the details of the comparison techniques were matters of credibility and weight of the evidence for the jury to determine....**

Appellant contends that the bite mark comparison evidence and expert testimony should not have been admitted into evidence **because it was not shown that the comparison techniques were reliable and that accepted standards of comparison were used....**

The evidence in question is based on the examination of impressions made by human teeth and their comparison with models of known human teeth for the purpose of determining whether the impressions were or probably were or could have been made by a particular individual. Bite mark comparison evidence differs from many of the 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 analysis) 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. People v. Slone, 76 Cal. App. 3d 611, 143 Cal. Rptr. 61 (Cal. Ct. App. 1978); People v. Marx, 54 Cal. App. 3d 100, 126 Cal. Rptr. 350 (Cal. Ct. App. 1975).

As the trial court found, **the basis for the comparison testimony -- that the science of odontology makes such comparison possible due to the significant uniqueness of individual dental characteristics -- has been adequately established. Appellant does not contest this supposition. Forensic odontological identification techniques are merely an application of this established science to a particular problem.** People v. Marx. The technique is similar to hair comparison evidence, which is admissible even though it does not result in identifications of absolute

> certainty as fingerprints do. Jent v. State, 408 So. 2d 024 (Fla. 1981), cert. denied, 457 U.S. 1111, 102 S. Ct. 2916, 73 L. Ed. 2d 1322 (1982); Peek v. State, 395 So. 2d 492 (Fla. 1980), cert. denied, 451 U.S. 964, 101 S. Ct. 2036, 68 L. Ed. 2d 342 (1981). Its probative value to the case is for the trier of fact to determine.
>
> **The trial court also found that the comparison techniques actually used in this case were reliable enough to allow the experts to present their materials and their conclusions to the jury.** Bundy has presented no basis for finding that the trial judge abused his discretion in doing so. 455 So. 2d at 348-349.

The Court in Hayes, as it did in Bundy, determined that the underlying scientific principle was generally reliable, so long as laboratory protocols were followed to eliminate the possibility of error or contamination. Thus, the only remaining issue relates to differing, but equally acceptable deductions which may be made from that evidence. The existence of such differing deductions or views of the evidence does not mandate that the evidence must be excluded. Such a conclusion is totally at odds with principles of admissibility relating to other forms of scientific evidence. Expert testimony on many scientific matters has been found admissible in Florida and has not been found reversible error on appeal. See: Campbell v. State, 571 So. 2d 415 (Fla. 1990) (serology expert testified that when knife with bloody handle hits bone, the grip of the person holding it may slip causing individual to cut his hand); Grossman v. State,

525 So. 2d 833, 837 (Fla. 1988), cert. denied, 489 U.S. 1071, 109 S. Ct. 1354, 103 L. Ed. 2d 822 (1989) (blood spatter expert's testimony that spatters caused by a high velocity weapon admissible); Burch v. State, 480 So. 2d 639 (Fla. 1985) (effects of PCP on the body); Mitchell v. State, 527 So. 2d 179, 181 (Fla. 1988), cert. denied, 488 U.S. 960, 109 S. Ct. 404, 102 L. Ed. 2d 392 (bite mark evidence).

Given this Court's ruling in Hayes which has deemed that evidence relating to DNA is generally accepted, so long as laboratory protocol has been followed, this Court has found that the subject matter at issue is one which is appropriate to expert testimony. As noted by Professor Erhardt in Florida Evidence, § 702.3, p. 512 (West 1994), "when expert testimony relates to a topic which has been judicially recognized as a proper subject of expert testimony, the court need only consider the level of understanding of the jury." The admission of testimony relating to DNA has, by virtue of this Court's holding in Hayes, reached this level.

In Stokes v. State, 548 So. 2d 188, 193 (Fla. 1989), this court addressed the admissibility of evidence relating to battered women's syndrome. Applying the standard enunciated by

Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923), the Court stated:

> Because the scientific principles underlying expert testimony relative to the battered woman's syndrome are now firmly established and widely accepted in the psychological community, we conclude that the syndrome has now gained general acceptance in the relevant scientific community as a matter of law.... We held that expert testimony regarding battered woman's syndrome is henceforth admissible, subject to its relevancy and the qualification of the expert in any individual case... There will be no further need for a case-by-case determination as to whether the state of the art or scientific knowledge relative to the battered woman's syndrome is sufficiently developed to permit a reasonable opinion by an expert.

Thus, in Stokes, the Court adopted the Frye test stating that the results of scientific tests are admissible, so long as the field from which the deduction is made is sufficiently established to have gained general acceptability in the area in which it belongs. Hayes has granted the field of DNA analysis recognition of this level of general acceptance by virtue of the Court's having taken judicial notice of reliability in the relevant scientific community. In this case, no challenge was made to the reporting lab on the grounds that it had failed to follow laboratory protocol in its analysis of the DNA evidence. To the contrary, the sole challenge presented was to the analyst's failure to adhere to a suggested procedure of the 1992

NRC Report to conduct a visual comparison of the suspect's DNA profile with the profiles contained in the database, a step which unrefuted testimony established had no impact whatsoever on the test results. Additionally, as previously noted, the 1996 NRC Report rejects this step as being necessary. The defendant in this case failed to make an appropriate objection which would sufficiently challenge the reliability of the instant DNA analysis. If the reliability of a test's results is recognized and accepted among scientists, admitting those results is within a trial court's discretion. When such reliable evidence is offered, "any inquiry into its reliability for purposes of admissibility is only necessary when the opposing party makes a timely request for such an inquiry supported by authorities indicating that there may not be general scientific acceptance of the technique employed." Robinson v. State, 610 So.2d 1288, 1291 (Fla.1992) (quoting Correll v. State, 523 So.2d 562, 567 (Fla.1988)), cert. denied, --- U.S. ----, 114 S. Ct. 1205, 127 L. Ed.2d 553 (1994) (citations omitted). The trial court did not abuse its discretion in admitting the evidence.

CONCLUSION

Based on the foregoing, the State respectfully submits the defendant should be certified question should be answered in the affirmative and the Court should decline to address the additional question raised by the defendant.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing PETITIONER'S REPLY BRIEF ON THE MERITS has been furnished by U.S. Mail to Steven A. Been, Esq.; Assistant Public Defender; Leon County Courthouse, Suite 401, North; 301 South Monroe Street; Tallahassee, Florida 32301, this 11th day of June, 1996.

Giselle Lylen Rivera

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Assistant Attorney General

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