IN THE SUPREME COURT OF FLORIDA

EARL WYCHE,

Petitioner,

v.

CASE NO. SC05-1509
L.T. No.: 1D03-5211

STATE OF FLORIDA,

Respondent.
_____/

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, Earl Wyche, was the Defendant in the Criminal Division of the Circuit Court of the Third Judicial Circuit, in and for Columbia County, Florida, where he was convicted of burglary of a structure, grand theft, and criminal mischief. Petitioner was the Appellant in the First District Court of Appeal, and will be referred to in this brief as Petitioner or as Earl Wyche. Respondent was the prosecution and Appellee in the lower courts, and will be referred to as State or Respondent.

The issue on appeal is the trial court's denial of Petitioner's motion to suppress saliva swabs and related DNA test results, where the trickery used by police to obtain

Petitioner's consent to the taking of the swabs rendered the consent involuntary.

The record on appeal consists of five volumes. Citations to Volume I, containing copies of the pleadings and orders filed in this cause, shall be by the letter "R" followed by the appropriate page number[s] in parentheses. Citations to Volume II, containing a transcript of the jury selection proceedings; Volumes III and IV, containing a transcript of the jury trial; and Volume V, containing the sentencing proceedings, shall be by the volume number in Roman numerals, followed by the appropriate page number[s] in parentheses. A copy of the June 20, 2005, opinion of the First District Court is attached as an appendix and will be referred to as "App."

All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

Petitioner, EARL WYCHE, was charged by information with Count I, burglary of a structure; Count II, grand theft; and Count III, criminal mischief (R-102). The case proceeded to jury trial.

Prior to trial, defense counsel filed a motion to suppress evidence of saliva swabs taken by Investigator Clint VanBennekom of the Lake City Police Department on December 11, 2001 (R-49-53). The motion alleged *inter alia* that the police used trickery in obtaining Mr. Wyche's consent to the taking of the saliva swabs in violation of his right against unreasonable search and seizure as guaranteed by the Fourth Amendment to the United States Constitution and Article I, Section 12 of the Florida Constitution, citing to ***State v. McCord,*** 833 So.2d 828 (Fla. 4th DCA 2002). Specifically, the motion alleged that on December 11, 2001, while Investigator VanBennekom was investigating an unsolved sexual assault, and after Mr. Wyche was detained by another officer for a violation of probation in Columbia County, VanBennekom used trickery to obtain Mr. Wyche's consent to give two saliva cotton swabs (R-49); that during a deposition on September 29, 2003, Investigator VanBennekom stated that "the courts had not prohibited the use of trickery" at the time that he spoke to Mr. Wyche; that VanBennekom further stated he did not believe he told Mr. Wyche that he was a suspect in a rape

case, but instead talked to him about a burglary at Winn Dixie (R-49-50); and, that the saliva swabs taken from Mr. Wyche were first compared to the samples in Investigator VanBannekom's open sexual assault case, where no match was obtained, and then, at the request of Investigator Moody, VanBennekom had the FDLE compare the swabs to samples from a robbery at the Pink Magnolia, where an alleged match was obtained. The motion further alleged that any use of the saliva swabs taken from Mr. Wyche "or the results thereof" at his trial in this case would "constitute the fruit of the poisonous tree of the prior unconstitutional search," and should be suppressed (R-50). The state filed a response alleging ***inter alia*** that the defense motion to suppress was untimely filed after jury selection; that the motion was unfounded because the objected to seizure occurred on December 1, 2001, when no Florida cases had ruled to suppress evidence obtained by means of trickery; that ***McCord*** was not decided until December 11, 2002; and, that ***"McCord*** not being held to be retrospective in application and, police officers not being expected to be prescient, the motion should be denied on its face." The state further argued that the deception employed by the police here rendered the defendant less likely to consent rather than more likely, and that under the inevitable discovery doctrine, the state could obtain additional DNA samples through discovery (R-71-73).

At a hearing on the motion, the court stated that defense counsel should be allowed to respond to the state's argument that the motion should be denied on its face, adding, "And we'll see if we even get to the motion to suppress" (III-7). Defense counsel disagreed with the state's assertion that the motion to suppress was not timely filed, pointing out that the motion was based on the testimony of Officer VanBennekom at his deposition on September 29th and was filed just two weeks later. Counsel went on to explain that while the officer stated in that deposition that he engaged in trickery which, at the time he did so, had not been "outlawed or prohibited," this statement alone was not enough for a motion to suppress. She immediately began trying to find out what VanBennekom had been referring to, or to find any case law that outlawed trickery. However, it was not until she was reviewing cases in preparation for trial that she came across ***McCord***, which she then determined was most likely what Officer VanBennekom had been referring to when he made that statement (III-8). As to the motion being filed after jury selection, counsel pointed out that the jury had not been sworn and the proceedings were still in pre-trial, thus double jeopardy had not attached (III-8-9). Counsel next pointed out that this was a legitimate issue for Mr. Wyche, and, that depending on how the court ruled on the motion to suppress, it would be an issue for appeal (III-9). After stating it was going

to hold under advisement the state's reply to the motion to suppress, "which is to deny it on its face," the court asked if counsel for the State and Mr. Wyche could stipulate as to the undisputed facts in their respective motions. Defense counsel stated that the defense would stipulate "that the testimony it would elicit from Officer VanBennekom would be that he engaged in trickery in order to get Mr. Earl Wyche to consent to a saliva swab. And that was the basis for the motion" (III-10). The prosecutor stated that Officer VanBennekom had been investigating a rape, but told Mr. Wyche that he was investigating a burglary at Winn Dixie, one that did not exist and was thus fictitious (III-11). The court clarified this, stating, "He [VanBennekom] related that to the defendant and asked for some type of swab to get DNA sample, and the defendant then consented to that. And actually, he was trying to obtain the swabs for a rape investigation" (III-11). At this point, defense counsel addressed the remaining objections in the state's reply. As to the argument that the "trickery" employed by Officer VanBennekom was "no harm/no foul," counsel argued that what ***McCord*** implies is that, had the consent to the initial swab been voluntary rather than obtained by the use of what counsel characterized as "voluntary trickery," the swab could have been used for any other open investigations (III-12). Counsel noted that in ***McCord*** the court actually refers to

Washington v. State, 653 So.2d 362, 364 (Fla.1994), where the police obtained the defendant's consent to obtain some type of physical evidence for an active case without telling the defendant that they were actually going to use it, not only for that case but for other active cases as well, and the court said that in those circumstances it was allowed. Counsel pointed out that this was not the same circumstance as occurred in Mr. Wyche's case. Here, Officer VanBennekom was actively investigating a rape case and he engaged in trickery to get Mr. Wyche to consent to giving the saliva swabs for use in that case. The officer was not actively investigating the burglary alleged in the instant case, and, in fact, used a fictitious burglary at Winn Dixie as a ruse in order to get Mr. Wyche's consent. Since the underlying consent was invalid, the state could not then proceed to use the swabs in other ongoing cases, to include the burglary alleged here (III-13). As to the state's inevitable discovery argument, counsel pointed out that the alleged incident occurred on December 5th of 2001, and while there may have been some suspicion that Mr. Wyche was involved, no warrant was issued until they obtained the DNA in October of 2002. Under the State's inevitable discovery argument, they would have had the basis to secure a warrant for Mr. Wyche before waiting for the results of the DNA to come back. Instead, they took the DNA improperly obtained by means of a ruse on

December 11th, seven days after the alleged burglary, and submitted it to FDLE, but did not issue a warrant for Mr. Wyche until after the DNA results came back ten months later. Counsel argued that had this been the product of an actual discovery, they would have issued the warrant early on in the case. Counsel further argued that, since they had no basis beyond vague tips to issue the warrant until the connection with the blood, there would have been no inevitable discovery in this case (III-14). With regard to the State's argument that this was being retroactively applied, counsel pointed out that ***McCord*** "is just clarifying what the law was at the time," in other words, ***McCord*** does not change what the law was in December of 2001, it clarifies what the law was at that time, by explaining "what the law was and has been" (III-13). The court denied the defense motion to suppress and granted the State's motion, then stated for the record that it would have done so, even if the state had not replied to the motion and asked that it be denied on its face (III-20); the court's Order denying the motion states, "Additionally: State motion for denial on its face granted" (R-82).

When the State called Investigator VanBennekom at trial, defense counsel renewed her earlier objection to the introduction of the saliva swabs based on the consent issue, and the court's ruling remained the same (III-157). VanBennekom

testified that he collected a saliva sample from Earl Wyche (III-158-59). After describing the procedure he used when collecting the sample, which was turned into Evidence at the Lake City Police Department (III-159), he testified that the purpose of collecting the sample was to send it to the FDLE crime lab for DNA analysis (III-160). On cross-examination, VanBennekom testified that he took the saliva swab on December 11th (III-163), and that he never actually interviewed Mr. Wyche with regard to this case, the one involving a burglary at the Pink Magnolia (III-164).

A laboratory analyst with the FDLE crime lab in Tallahassee testified that during the course of his duties he received some evidentiary samples from the Lake City Police Department for DNA comparison. He identified State's Exhibit 2 as the items he had received (IV-176-77). When the state sought to introduce the contents of the exhibit into evidence, defense counsel renewed her earlier objection. The court's ruling remained the same, and the exhibit was admitted (IV-178). After being received as a serological expert in the explanation of DNA (IV-178-79), the witness testified that two of the three samples tested positive for the presence of blood, while one of the samples did not (IV-184-86). He then identified State's Exhibit 3 as a cotton swab taken from the inside of Mr. Wyche's cheek to be used as a "standard" for purposes of DNA analysis (IV-186). He testified

that he performed DNA analysis on State's Exhibits 2 and 3 and compared the two profiles (IV-187-88). When the State offered into evidence printouts of the DNA profiles, the court noted defense counsel's continuing objections to the admission of this and all related evidence (IV-189-90). The witness then testified that once he had determined there was a match between the two samples, he performed a statistical analysis "to generate a frequency of occurrence of that particular profile" (IV-200), and, based on the match between the profile identified as being from Mr. Wyche and the other two samples, a frequency of occurrence for the Black population was estimated "as 1 in 3.8 quintillion" (IV-201).

Defense counsel renewed her objection to the admission of the saliva swabs when the State rested its case, and again at the close of all evidence, at which time the court stated it would adhere to its previous ruling (IV-205, 297-98).

The jury found Mr. Wyche guilty of all three counts as charged in the information (IV-347; R-83).

As to burglary as charged in Count I, Mr. Wyche was sentenced as an habitual felony offender to 10 years in the Department of Corrections, with credit for 220 days time served; as to Count II, he was sentenced as an habitual felony offender to 5 years probation; and, as to Count III, he was sentenced to 220 days time served (V-22-23; R-120-27).

On direct appeal to the First District Court of Appeal, Petitioner's conviction and sentence were affirmed in an opinion dated June 20, 2005, certifying conflict with ***McCord.***[1] ***Wyche v. State***, 906 So.2d 1142, 1148 (Fla. 1st DCA 2005).

Notice of intent to seek discretionary review was filed by Petitioner on August 22, 2005; amended notice was filed on August 26, 2005.

On August 25, 2005, this Court issued an order postponing its decision on jurisdiction and directing Petitioner to file his initial brief on the merits on or before September 19, 2005; upon Petitioner's motion, the time for filing the initial brief was extended until October 11, 2005.

This brief follows.

[1] ***State v. McCord***, 833 So.2d 828 (Fla. 4th DCA 2002).

SUMMARY OF THE ARGUMENT

Petitioner contends that the police officers in his case used trickery to obtain a waiver of constitutional rights. The record reflects that Petitioner moved to suppress evidence of two saliva swabs, and DNA test results related to those swabs, on grounds that the police impermissibly used trickery to obtain his consent to the taking of the saliva swabs, citing to ***State v. McCord***, 833 So.2d 828, 829 (Fla. 4th DCA 2002)(affirming the trial court's order suppressing saliva samples and DNA evidence taken from the defendant by means of police trickery, based on a finding that the defendant did not "freely and voluntarily consent to the search of his body" when he gave the saliva samples). The relevant facts alleged in Petitioner's motion (R-49-50), and as summarized by the First District Court in its opinion affirming the trial court's denial of that motion, are as follows:

> While Wyche was detained in Columbia County for a probation violation, Lake City Police Department Investigator Clint VanBennekom asked Wyche for a saliva sample, stating that he was suspected of committing a burglary at a Winn-Dixie supermarket. In fact, VanBennekom had manufactured the fictitious Winn-Dixie burglary in order to obtain Wyche's consent to take swabs for a sexual-assault investigation. No DNA match was obtained in the sexual-assault case; as a consequence, Wyche was exonerated as to it.
>
> During VanBennekom's investigation, Lake City Police Department Investigator Joseph Moody was also investigating a robbery of The Pink Magnolia, a gift shop in Lake City, and asked VanBennekom to send the

> saliva swab that he had obtained to the FDLE lab for a comparison with blood drops taken from the crime scene. FDLE acquired a match. Based on the results, Wyche was accused of the robbery, and his subsequent motion to suppress the evidence, on the ground that it had been obtained by deception, was denied.

Wyche v. State, 906 So.2d 1142, 1143 (Fla. 1st DCA 2005).

On these facts, Petitioner contends that the police impermissibly used trickery to get him to waive his constitutional rights, specifically, his right to be free from unreasonable search and seizure as guaranteed by the Fourth Amendment to the United States Constitution and Article I, section 12 of the Florida Constitution. Further, Petitioner maintains his reliance on ***McCord***, and contends that under the rationale and holding of the Fourth District in that case, the trial court reversibly erred in denying his motion to suppress.

ARGUMENT

ISSUE PRESENTED:

THE TRIAL COURT REVERSIBLY ERRED IN DENYING PETITIONER'S MOTION TO SUPPRESS WHERE POLICE USED TRICKERY TO GET PETITIONER TO WAIVE HIS CONSTITUTIONAL RIGHTS.[2]

The police officers in Petitioner's case used trickery to obtain a waiver of constitutional rights. The record reflects that Petitioner moved to suppress evidence of two saliva swabs, and DNA test results related to those swabs, on grounds that the police impermissibly used trickery to obtain his consent to the taking of the saliva swabs, citing to ***State v. McCord***, 833 So.2d 828, 829 (Fla. 4th DCA 2002)(affirming the trial court's order suppressing saliva samples and DNA evidence taken from the defendant by means of police trickery, based on a finding that he did not "freely and voluntarily consent to the search of his body" when he gave the saliva samples). The relevant facts alleged in Petitioner's motion (R-49-50), and as summarized by the First District Court in its opinion affirming the trial court's denial of that motion, are as follows:

[2]This issue is preserved for appeal by Petitioner's motion to suppress evidence of the saliva swabs and related DNA test results (R-53), which was denied by the trial court (III-20), Further, the issue is preserved by defense counsel's objection when the state sought to introduce that evidence at trial (111-157), as well as numerous renewals of that objection (IV-178, 205, 297-98, R-86-88), and by the filing of a comprehensive motion for new trial, which was likewise denied (R-86-88, 131).

> While Wyche was detained in Columbia County for a probation violation, Lake City Police Department Investigator Clint VanBennekom asked Wyche for a saliva sample, stating that he was suspected of committing a burglary at a Winn-Dixie supermarket. In fact, VanBennekom had manufactured the fictitious Winn-Dixie burglary in order to obtain Wyche's consent to take swabs for a sexual-assault investigation. No DNA match was obtained in the sexual-assault case; as a consequence, Wyche was exonerated as to it.
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Wyche v. State, 903 So.2d 1142, 1143 (Fla. 1st DCA 2005).

On these facts, Petitioner contends that the police impermissibly used trickery to get him to waive his constitutional rights, specifically, his right to be free from unreasonable search and seizure as guaranteed by the Fourth Amendment to the United States Constitution and Article I, section 12 of the Florida Constitution. Further, Petitioner maintains his reliance on ***State v. McCord***, 833 So.2d 828 (Fla. 4th DCA 2002), and contends that under the rationale and holding of the Fourth District in that case, which is supported by relevant authority, the trial court reversibly erred in denying his motion to suppress.

Standard of Review and Legal Principles

While appellate courts should accord a presumption of correctness to the trial court's rulings on motions to suppress with regard to the trial court's determination of historical facts, the reviewing court "must independently review mixed questions of fact and law that ultimately determine constitutional issues arising from the Fourth and Fifth Amendment, and, by extension, article I, section 9 of the Florida Constitution." ***Conner v. State***, 803 So.2d 598, 608 (Fla.2001).

> Although a warrantless search is per se unreasonable under the Fourth Amendment, the search will be considered lawful if conducted pursuant to consent which was given voluntarily and freely. *Norman v. State*, 379 So.2d 643 (Fla.1980). When we addressed this issue in *Reynolds v. State,* 592 So.2d 1082 (Fla.1992), we held that:
>
> > The question of whether a consent is voluntary is a question of fact to be determined from the totality of the circumstances. "**[W]here the validity of a search rests on consent, the State has the burden of proving that the necessary consent was obtained and that it was freely and voluntarily given**, a burden that is not satisfied by showing a mere submission to a claim of lawful authority."...

Washington v. State, 653 So.2d 362, 364 (Fla.1995).

> A warrantless search does not violate the Fourth Amendment if the search is conducted pursuant to a consent freely and voluntarily given. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 219 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). To determine whether a consent is voluntary, the totality of the circumstances must be examined. *See id.* at 227, 93 S.Ct 2041; *accord*

> *Washington v. State*, 653 So.2d 362, 364 (Fla.1994). Those circumstances include whether the person is detained; the length of the detention; any subtly, coercive police questions; the education, intelligence, and possible vulnerable subjective state of the person; and the lack of effective warnings. *See Schneckloth*, 412 U.S. at 226, 229 and 248. **A detective's misrepresentation as to the nature of the investigation may provide evidence of coercion.** *See U.S. v. Briley*, 726 F.2d 1301, 1304 (8th Cir. 1984). A critical factor... is whether the officer's deception undermined the voluntariness of [the] consent.

McCord, 833 So.2d at 829-30.

A criminal defendant may waive his fundamental constitutional rights, but only if the waiver is made knowingly and voluntarily. A waiver of constitutional rights "not made knowingly and voluntarily, is the equivalent of no waiver at all. *Carnley v. Cochran*, 369 U.S. 506, 516, 82 S.Ct. 884, 890, 8 L.Ed.2d 70 (1962)." ***Allen v. State,*** 463 So.2d 351, 359 (Fla. 1st DCA 1985).

DISCUSSION

Petitioner based his motion to suppress on the reasoning of ***State v. McCord***, 833 So.2d 828, 829 (Fla. 4th DCA 2002), which not only affirmed the suppression of DNA swabs taken from a defendant by means of police trickery, but also clarified the law with regard to the circumstances under which this kind of

deception in obtaining consent is such that it invalidates the consent. ***Id.*** at 829-30.[3]

In ***McCord***, the State appealed the trial court's order granting a defense motion to suppress under facts virtually identical to those in Petitioner's case. While McCord was in the county jail, having been arrested on unrelated charges, a detective who was investigating a series of armed robberies told McCord that he was a suspect in a rape case. The detective then convinced McCord that if he provided a saliva swab it could exclude him from the rape investigation. The detective, who, in fact, wanted the sample to make a DNA comparison with blood recovered at the scene of one of the robberies, at no time told McCord that he was a suspect in any armed robberies. After McCord was charged in the robberies, he moved to suppress the DNA evidence obtained from the saliva samples "on the ground that his consent was involuntary and obtained in violation of

[3]The record reflects that no actual suppression hearing was held. Instead, only argument by counsel for the state and defense was heard, followed by the court's ruling denying the motion to suppress (III-7-20), and its Order stating, "Additionally: State motion for denial on its face granted" (R-82). Thus, in denying the motion to suppress, the court made no factual findings and, in effect, ruled that the motion was without legal merit. Further, given that the denial appears to have been predicated upon a finding that, as urged by the state, ***McCord*** did not apply to appellant's case (R-71-73), denial of the motion to suppress in this instance was solely a ruling on the law.

his due process rights as a result of the detective's deceitful tactics." ***Id.*** at 829. At the suppression hearing, the detective acknowledged that the sexual battery never occurred, and "that he completely fabricated the story to obtain McCord's consent." The State argued that the trickery did not render the consent invalid because McCord was not coerced and voluntarily gave his consent to the taking of the saliva samples. The trial court disagreed, and based on its determination that McCord's consent had not been freely and voluntarily given, the court suppressed the DNA evidence. On appeal by the State, suppression based on the involuntariness of the consent was upheld. In its opinion, the Fourth District initially discussed the use of police trickery in the context of obtaining a confession ***Id.*** at 830. After stating that "the use of police trickery may result in the exclusion of the confession depending upon the level of trickery employed," the court, in contra-example, cited to cases such as ***Frazier v. Cupp,*** 394 U.S. 731 (1969); and ***Washington v. State,*** 653 So.2d 362 (Fla.1994). In ***Frazier***, the defendant was a suspect in a murder case. He was read his rights and brought in for questioning, during which police officers misrepresented to him that his cousin had already confessed to the murder, and he then confessed. There, the Supreme Court held that the misrepresentation was not sufficient to render the confession inadmissible. ***Frazier,*** 394 U.S. at 739. In referring to this

case, the ***McCord*** court noted that the defendant there, unlike McCord, "knew he was being questioned about the murder and that his cousin's statements related to that murder." ***Id***. at 830. Similarly, in ***Washington***, the defendant was a suspect in both a murder case and an unrelated rape case. After interviewing Washington with respect to the rape case, police officers read him his ***Miranda*** rights and obtained his consent to take hair and blood samples "by telling him it would prove or disprove his guilt in the rape case." They then compared those samples with the evidence in the murder case. There, this Court held that the officers were not precluded from using the samples in the murder case once they were "validly obtained in the rape case." ***Washington***, 653 So.2d at 363-64. In referring to this case, the ***McCord*** court noted that the officers were never untruthful with Washington, "they simply did not tell him that they also could use the samples in the murder case." ***Id.*** at 830. The ***McCord*** court went on to clearly distinguish the trickery employed in ***Frazier*** and ***Washington,*** pointing out that neither of those police officers lied to the defendants "regarding the crimes for which they were suspects," whereas, the detective in McCord's case "fabricated a rape charge to obtain McCord's consent." The court stated its agreement with the trial court that the detective's deception, "while McCord was in jail, was so manipulative that his 'consent' did not 'validate the search.'"

In affirming the trial court's suppression of the saliva swabs and DNA evidence in McCord's case, the majority reasoned:

> A warrantless search does not violate the Fourth Amendment if the search is conducted pursuant to a consent freely and voluntarily given. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 219 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). To determine whether a consent is voluntary, the totality of the circumstances must be examined. *See id.* at 227, 93 S.Ct 2041; *accord Washington v. State*, 653 So.2d 362, 364 (Fla.1994). Those circumstances include whether the person is detained; the length of the detention; any subtly, coercive police questions; the education, intelligence, and possible vulnerable subjective state of the person; and the lack of effective warnings. *See Schneckloth*, 412 U.S. at 226, 229 and 248. **A detective's misrepresentation as to the nature of the investigation may provide evidence of coercion.** *See U.S. v. Briley*, 726 F.2d 1301, 1304 (8th Cir. 1984). A critical factor in this case is whether the officer's deception undermined the voluntariness of [the] consent.

McCord, 833 So.2d at 829-30. Further, in his concurring opinion, Judge Gross began by stating that he found the analysis in McCord's case to be difficult given "the different focus that applies in coerced confession cases." He acknowledged the holding of the Supreme Court in ***Schneckloth***[2] that the voluntariness of a defendant's consent to search is to be analyzed by a test "essentially like that which had been used by the Court for years in the coerced confession cases." ***McCord,*** 833 So.2d at 891 (Gross, J. concurring)(quoting Wayne R. LaFave, Search and Seizure § 8.2 (3d ed.1996)), and discussed a number

[4]412 U.S. 218 (1973).

of cases in which police deception was not deemed to compel the exclusion of statements given after the misrepresentation. However, he noted that there is a difference between the confession cases and the consent to search cases, in that this Court appears to place greater emphasis "on whether the police deception has rendered confessions 'unreliable'" in the confessions cases, citing to ***Escobar v. State***, 699 So.2d. 984, 987 (Fla.1997), *abrogated on other grounds*, ***Connor v. State***, 803 So.2d 598, 607 (Fla.2001). He then distinguished the emphasis as applied to the consent to search cases.

> The bottom line in this consent case is, as Professor LaFave has written, that the test the court has applied is "to ask if the deception is 'fair,' . . . the question which must be asked under the *Schneckloth* formulation." LAFAVE, § 8.2(n). As the Court noted in *Schneckloth:*
>
> There is no "ready definition of the meaning of 'voluntariness'"; rather, that term merely reflects an accommodation between the need for effective enforcement of the criminal law and "society's deeply felt belief that the criminal law cannot be used as an instrument of unfairness." LAFAVE, § 8.2(n)(quoting *Schneckloth*, 412 U.S. at 223-25, 93 S.Ct. 2041).

McCord, 833 So.2d at 831-32 (Gross, J., concurring). Further, Petitioner contends there exists a more fundamental difference between the confession cases and the consent to search cases. Although the courts are generally in agreement that police trickery is permissible in obtaining admissions and confessions, assuming such admissions and confessions are voluntarily given, Petitioner is unaware of any cases which hold that the use of

police trickery is permissible in obtaining a waiver of ***Miranda***[3] rights, the effect of which is a waiver of Fifth Amendment rights. It therefore stands to reason that the use of police trickery and deception to obtain consent, the effect of which is a waiver of Fourth Amendment rights, should likewise be viewed with disdain by the courts.

No such distinctions were considered by the First District Court when Petitioner appealed the trial court's denial of his motion to suppress saliva swabs obtained from him by police trickery, which, under the rationale and holding of ***McCord,*** rendered his consent involuntary. The court agreed that the police trickery alleged by Petitioner did, in fact, occur, to wit: that Investigator VanBennekom was investigating a sexual-assault, but told Petitioner that he was a suspect in a fictitious burglary at Winn Dixie in order to get Petitioner's consent for saliva swabs which were then actually used in the sexual-assault investigation. However, the court disagreed that the deception negated Petitioner's consent. ***Wyche***, 906 So.2d at 1143-44. Specifically, the court cited to cases from the Supreme Court and other federal jurisdictions in support of it's position that such deception, "[a]bsent coercion, threats, or misrepresentation of authority," has long been recognized by the courts "as a viable and proper tool of police investigation."

[5] 384 U.S. 436, 86 S.Ct 1602; 16 L.Ed.2d 694 (1966).

The court declined to follow ***McCord,*** which it said "equated deception with coercion," as "[t]here is no threat of force or other compulsion involved in deception." ***Wyche***, 906 So.2d at 1144. It went on to affirm the trial court's ruling on Petitioner's motion to suppress, concluding that Petitioner "was clearly aware of the fact that the officer wanted the DNA sample in order to investigate a crime;" that "the officer did not misrepresent the fact that he had no search warrant;" that the officer did not indicate that Petitioner "had no choice regarding whether to provide a DNA sample;" and, that Petitioner "did not acquiesce to a lawful claim of authority." ***Wyche***, 906 So.2d at 1147. As such, it would appear that the court misapprehended the rationale and holding of ***McCord,*** and in the process, missed the point entirely.

While ***McCord*** acknowledged that police trickery is sometimes permissible, at least in the context of obtaining a confession, and "depending upon the level of trickery employed," it made clear that lying to a defendant about the crimes for which he is a suspect in order to obtain his consent is not. Further, the court considered the critical fact in this analysis to be whether the police officer's deception undermined the voluntariness of the defendant's consent. ***McCord***, 833 So.2d at 830. Here, Investigator VanBennekom lied to Petitioner about the crime he was suspected of committing for the express purpose of

getting him to consent to the taking of the DNA swabs. It therefore stands to reason that Petitioner, in custody on a VOP and not knowing what new crime he was suspected of committing, could not have made a "knowing" waiver of his constitutional rights. It is axiomatic that a decision of this magnitude made unknowingly[4] cannot be deemed voluntary. As such, Petitioner's consent to the taking of the DNA swabs was not voluntary, and the resulting search unlawful. This Court said as much in ***Washington:*** "the search will be considered lawful *if* conducted pursuant to consent with was given voluntarily and freely." ***Washington,*** 653 So.2d at 364. It was therefore the rationale, and ultimately the holding, of ***McCord*** that police deception in the form of a totally fabricated charge relayed to a defendant who is in custody, for the sole purpose of obtaining his consent to the taking of DNA swabs, is so manipulative as to undermine the voluntariness of the consent and render the search invalid. ***McCord***, 833 So.2d at 830. Further, it was this rationale, after apparently being dismissed offhand by the majority when reviewing Petitioner's case, that was adopted by Judge Ervin in his dissenting opinion.

> I question whether it can be accurately said that all that was involved in acquiring the saliva sample from appellant was the deception of Investigator

[4]"Knowingly. With knowledge; consciously; intelligently; willfully; intentionally." Blacks Law Dictionary 784 (5th ed. 1979).

> VanBennekom. Instead, it appears to me that in addition to the officer's intentional deception representing that appellant was a suspect in a fabricated burglary, and that the sample would be used to determine his culpability in such crime, the officer promised, expressly or impliedly, that if no DNA match were obtained, the defendant would be cleared of any involvement in the offense which the officer knew was concocted, and the defendant knew he had not committed, all of which led to the inducement of the consent.

Wyche, 906 So.2d at 1148 (Ervin, J., dissenting). Judge Ervin went on to note that the Fourth District in ***McCord*** "did not limit its inquiry to the voluntariness of the defendant's consent solely upon the investigating officer's deception, but took into account as well all relevant factors including 'the level of trickery employed.'" ***Id.*** at 830. He further noted that a "strong determinative factor" emphasized by that court in reaching its decision was that, unlike in ***Frazier*** and ***Washington*** where the defendants' consent was held to have been voluntarily obtained, "McCord was not a suspect in the crime for which he was questioned, and, in fact, the crime itself was fabricated for the unquestioned purpose of obtaining his consent." ***Wyche,*** 906 So.2d at 1148. After acknowledging the long established rule "that deception and trickery alone will not invalidate a confession," Judge Ervin noted that courts have made an important distinction "between police misstatements which delude a defendant as to his the import of his or her confession, and are thus improper, and police misstatements of relevant facts,

which can be proper." ***Id.*** at 1148-49 (Citations omitted). However, he then stated that he had been unable to find a single case where the admission of the defendant's confession was permitted, "notwithstanding an officer's use of a factual misrepresentation," where the misstatement "involved a complete fabrication of the crime the defendant was advised he was suspected of committing." Instead, he found cases such as ***Johnson v. State***, 660 So.2d 637 (Fla.1995), where a factual misrepresentation occurred during the investigation of an actual offense, when the suspect, who was a target of that investigation, was being questioned about that offense. In ***Johnson***, this Court admitted the defendant's confession despite a misrepresentation by police that he had failed a polygraph which he had consented to take. Although the Court ruled "that such deception by itself did not render the statement inadmissible," it went on to say that "egregious police misconduct, such as 'physical or psychological coercion, *intentional deception*, or a violation of a constitutional right' could cause the statement to be suppressed." ***Wyche***, 906 So.2d at 1149 (quoting ***Johnson***, 660 So.2d at 642)(emphasis in the original). Judge Ervin concluded by setting forth the reasons for his break with the majority in Petitioner's case as follows:

> In my judgment, the present case is a classic example of police overreaching that requires suppression of the DNA sample. The officer's deliberate

> misrepresentation was not a factual misstatement in an ongoing case in which appellant was a suspect, but its purpose was to delude him of his true position by informing him he was a suspect in a crime that had never been committed so that incriminating evidence might be obtained from him in an altogether unrelated case, which, as events developed, also revealed his non-complicity. It was not until the investigation of yet another unrelated case that the officer's deception bore fruit and a match was finally obtained. Such crime shopping, in my opinion, cannot be condoned in an ordered society. I would therefore reverse the conviction and remand the case with directions to suppress the evidence obtained from appellant by the intentional fabrication of the police.

Wyche v. State, 906 So.2d 1142, 1149 (Fla. 1st DCA 2005) (Ervin, J., dissenting). Petitioner contends that under the undisputed facts of this case as summarized by the majority, he was entitled to nothing short of this result.

Petitioner further contends there can be no doubt as to the harm resulting from the trial court's refusal to suppress evidence of the saliva swabs and related DNA test results that were obtained pursuant to an invalid waiver of his constitutional rights. The state's case was entirely circumstantial. As defense counsel pointed out in moving judgment of acquittal, there was no direct evidence in this case tying Mr. Wyche to a burglary at the Pink Magnolia, or to the jewelry that was taken in that burglary, or to a broken window. Specifically, no one saw him enter the building at night, no one saw him break the window, and no one saw him take anything from that structure (IV-207). There can be no doubt that the most

damaging circumstantial evidence at trial was the admission of test results comparing DNA from blood samples found inside the Pink Magnolia with DNA from the saliva swabs taken from Mr. Wyche 10 months earlier while he was in custody on an unrelated charge (III-14; IV-199-201). Under these facts, the prejudice to Petitioner as a result of the denial of his motion to suppress is not only obvious, it requires a new trial.

Accordingly, Petitioner contends that the trial court reversibly erred in admitting evidence of saliva swabs and DNA evidence related to those swabs, where the use of police trickery and deception in obtaining his consent to the taking of the swabs rendered that consent involuntary, in violation of his right against unreasonable search and seizure as guaranteed by the Fourth Amendment to the United States Constitution and Article I, section 12 of the Florida Constitution. As it cannot be said beyond a reasonable doubt that the trial court's error did not affect the jury's verdict, a new trial is required. ***State v. Diguilio***, 491 So.2d 1129 (Fla. 1986); ***State v. Knowles***, 848 So.2d 1055, 1058-59 (Fla. 2003)(reaffirming "that the ***DiGuilio*** standard remains the benchmark of harmless error analysis.").

CONCLUSION

Based upon the foregoing argument and authorities cited therein, Petitioner respectfully requests this Honorable Court quash the opinion of the First District Court and adopt the opinion of the Fourth District in ***State v. McCord***, 833 So.2d 828 (Fla. 4th DCA 2002). Accordingly, Petitioner requests that the Court reverse his convictions for burglary, grand theft, and criminal mischief, and remand this cause to the trial court with directions to suppress the evidence of the saliva swabs and the DNA test results related to those swabs, and conduct a new trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail to Charlie McCoy, Assistant Attorney General, Criminal Appeals Division, The Capitol, PL-01, Tallahassee, Florida, 32399-1050, and to appellant, Earl Wyche, #871760, Graceville W.C., 5230 Ezell Rd., Graceville, FL 32440, on this ____ day of October, 2005.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using Courier New 12 point font in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

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