

IN THE SUPREME COURT OF FLORIDA

**EARL WYCHE,**

Petitioner,

v.

**CASE NO. SC05-1509**

L.T. No.: 1D03-5211

**STATE OF FLORIDA,**

Respondent.

\_\_\_\_\_ /

ON DISCRETIONARY REVIEW FROM THE  
DISTRICT COURT OF APPEAL, FIRST DISTRICT OF FLORIDA

**SUPPLEMENTAL REPLY BRIEF OF PETITIONER**

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TABLE OF CONTENTS

PAGE(S)

TABLE OF AUTHORITIES	ii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND FACTS	2
SUMMARY OF THE ARGUMENT	3
ARGUMENT	4
<u>ISSUE</u> SECTION 943.325, FLORIDA STATUTES, IS INAPPLICABLE TO THE ISSUE BEFORE THE COURT SINCE PETITIONER WAS NOT SUBJECT TO THE REQUIREMENTS OF THAT STATUTE IN DECEMBER OF 2001 WHEN THE POLICE USED TRICKERY TO OBTAIN HIS CONSENT TO THE TAKING OF DNA SWABS.	4
CONCLUSION	6
CERTIFICATE OF SERVICE	7
CERTIFICATE OF COMPLIANCE	7

TABLE OF AUTHORITIES

PAGE(S)

STATUTES

§ 943.325, Fla. Stat. (2001) ..... 4-6

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PRELIMINARY STATEMENT

Petitioner relies upon his preliminary statement as set forth in his amended supplemental brief, with the following additions. Reference to Respondent's brief shall be by the symbol "RB", and any reference to Petitioner's initial brief shall be by the symbol "PB".

## STATEMENT OF THE CASE AND FACTS

Petitioner relies on his statement of the case and facts as set out in the amended supplemental brief, with the following addition.

Petitioner filed his initial supplemental brief on November, 6, 2006. The State filed its supplemental answer brief on November, 9, 2006. By this Court's Order of November 14, 2006, Petitioner was directed to file an amended supplemental brief on or before December 4, 2006. Petitioner filed his brief on December 1, 2006.

On December 7, 2006, upon being advised that Petitioner's reply brief was due on November 27, 2006, pursuant to the Court's initial order of October 19, 2006, in which it directed the parties to serve supplemental briefs, Petitioner now files this reply with attached motion to accept as timely filed.

### **SUMMARY OF THE ARGUMENT**

Petitioner relies on his summary of the argument as set forth in his amended supplemental brief, with the addition of the argument contained herein in response to that made by Respondent in its answer brief.

## ARGUMENT

### ISSUE PRESENTED

SECTION 943.325, FLORIDA STATUTES, IS INAPPLICABLE TO THE ISSUE BEFORE THE COURT SINCE PETITIONER WAS NOT SUBJECT TO THE REQUIREMENTS OF THAT STATUTE IN DECEMBER OF 2001 WHEN THE POLICE USED TRICKERY TO OBTAIN HIS CONSENT TO THE TAKING OF DNA SWABS.

Section 943.325 does not apply to the issue of the trial court's denial of Petitioner's motion to suppress evidence of DNA swabs obtained by the use of police trickery on December 11, 2001, and test results related to those swabs obtained ten months later, as there is documentary evidence establishing that on December 11, 2001, Petitioner had not previously been required to submit samples of his DNA pursuant to section 943.325 based on his convictions prior to that date. Further, notwithstanding Respondent's assertions to the contrary (RB-3,7), on December 11, 2001, under the plain meaning of the language of section 943.325, Petitioner was not subject to the requirements of that statute, even though he was, in fact, being held in jail on an alleged violation of his probation for possession of cocaine in Columbia County case #01-826, since possession of cocaine has never been included in the list of enumerated offenses in paragraph (b) of any version of section 943.325, Florida Statutes.

Further, although Respondent now asserts that the State could have obtained the saliva samples pursuant to section

943.325 without Petitioner's consent (RB-7), the State did not rely on section 943.325 when it opposed Petitioner's motion to dismiss in the trial court, and instead argued that the trickery employed by Officer VanBennekom to obtain Petitioner's consent to the taking of the DNA swabs was a lawful and accepted police practice on December 11, 2001, when there had been no Florida cases ruling that evidence obtained by the use of trickery should be suppressed (III-11; R-71-73). As such, it is fair to say that both the officer and the State were operating under the belief that Petitioner's consent was needed, and that the officer's use of trickery to obtain that consent was lawful at the time. Stated another way, the point at issue in this case has never involved whether there existed in December of 2001 a lawful means by which the State *could* have obtained Petitioner's DNA absent his consent, but rather, whether Petitioner's consent to the taking of the saliva swabs was knowingly and voluntarily given, where it is undisputed in the record that trickery was employed by law enforcement for the express purpose of obtaining that consent.



## CONCLUSION

Petitioner was not subject to the requirements of section 943.325 on December 11, 2001, when Investigator VanBennekom tricked Petitioner by telling him that he was a suspect in a non-existent crime for the express purpose of obtaining his consent to the taking of saliva swabs for DNA testing. Accordingly, this Court should find that section 943.325 has no applicability or impact on the issue raised herein: the trial court's error in denying Petitioner's motion to suppress evidence of the saliva swabs obtained on December 11, 2001, and DNA test results relating to those saliva swabs that were obtained ten months later, where Petitioner's consent to the taking of the saliva swabs was obtained through the use of impermissible police trickery in violation of his constitutional rights.

**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 petitioner, Earl Wyche, #871760, Wakulla W.C., 110 Melaleuca Dr., Crawfordville, FL 32327, on this \_\_\_\_\_ day of December, 2006.

**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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