IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	:	
Petitioner,	:	
vs.	:	Case No. SC15-367
KYLE QUEIOR,	:	
Respondent.	:	
	:	

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

ANSWER BRIEF OF RESPONDENT ON THE MERITS

HOWARD L. DIMMIG, II
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

RICHARD J. SANDERS
Assistant Public Defender
FLORIDA BAR NUMBER 0394701

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33831
(863) 534-4200
rsande2@tampabay.rr.com
cclark@pd10.state.fl.us

ATTORNEYS FOR RESPONDENT

TOPICAL INDEX TO BRIEF

TABLE OF CITATIONS

PRELIMINARY STATEMENT AND DEFINITIONS

This brief will use "urinalysis" to refer to the type of in-office urine test used in the present case. Courts often refer to such tests as "field tests" or "presumptive tests." *E.g.*, *Carter v. State*, 82 So. 3d 993, 995 (Fla. 1st DCA 2011). These latter two terms will also be expressly defined in this brief.

"Presumptive test" refers to a type of test that is significantly different from a urinalysis. With presumptive tests, the substance itself is directly tested, by mixing it with testing chemicals. This is a crucial distinction. Urinalyses are inherently more complex than presumptive tests, because they contain an additional layer of analysis and potential problems. With urinalyses, one is trying to determine whether there is a trace of a controlled substance (undetectable by the naked senses) in a liquid that contains an unknown variety of other unknown substances (*i.e.*, whatever else might end up in urine after being extracted from something eaten or drunk). With presumptive tests, one is simply trying to determine if a substance one has already found -- generally a solid substance that one already suspects (based on sight, smell, *etc.*) is a particular controlled substance -- is in fact what one suspects it is.

Thus, urinalyses try to determine if there is an invisible needle in a homogeneous liquid haystack; presumptive tests try to determine if the substance one has in hand is in fact the needle that one believes it is. Urinalyses also raise further issues that are not present with presumptive tests, *e.g.*, are there any lawful substances that might cause the same reaction in urine as a controlled substance; what is the concentration of the controlled substance detected in the urine and does a positive urine

test always prove an intentional and knowing ingestion of the controlled substance (as opposed to an accidental or unknowing one, *e.g.*, second-hand marijuana smoke, traces of powder hidden on, or in, an innocent platform).

Together, urinalyses and presumptive tests will be called "field tests" and they will be distinguished from "lab tests." Field tests are designed for individuals who are not expected to (and generally do not) have much background in basic science (particularly the chemistry needed to fully understand how field tests actually work). Field tests provide a quick and easy way for persons "in the field" to get a preliminary result, which is then used to decide whether further action is needed. As relevant here, field tests are used by police and probation officers, to determine if there is reason to believe that some type of drug violation has occurred; and, if a violation is suspected, that officer will then decide whether to initiate formal proceedings (arrest; probation violation). If formal proceedings might be initiated, the officer who performed the field test will generally submit the sample for a lab test by scientifically trained personnel. (Note: Lab tests on urine could also be called urinalyses. In this brief, "lab test" refers to a full test done in a lab and "urinalysis" is limited to in-office field tests).

Field tests "are inherently less precise and controlled" than lab tests. *People v. Newberry*, 652 N.E.2d 288, 292 (Ill. 1995). Because "[t]he appellation 'field' carries with it the connotation that it is to be employed by 'field' personnel without scientific or laboratory skills for making quick decisions[,] the test carries with it a substantial risk of error." *Houston v. State*, 553 N.E.2d 117, 120 (Ind. 1990) (DeBruler, J., dissenting).

With regard to all these types of tests, distinctions must be drawn among three types of expertise: 1) administrative expertise (the ability to perform or administer the test correctly); 2) interpretive expertise (the ability to accurately interpret the test result); and 3) reliability expertise (the ability to determine whether the test reliably measures or ascertains what it is supposed to measure or ascertain). Reliability expertise has two components, abstract reliability and practical reliability. Abstract reliability refers to the validity of the underlying scientific principles on which the test is based. Practical reliability refers to whether the test puts those abstract principles to work in a manner that consistently yields accurate results. Practical reliability doesn't necessarily follow from abstract reliability; one may have a perfect scientific theory but the practical application utterly fails to properly apply it.

Expertise in one area does not automatically prove expertise in another area. The witness's "[q]ualification [as an expert] is distinct from reliability [of the field test] and, therefore, should be evaluated independently." *Gill v.* State, 2012 WL 2127504, *4 (Tex.Ct.App. 2012) (citation omitted). For instance, administrative expertise with field tests is easily obtained and does not, in itself, prove expertise in the other areas. Only rudimentary skills, and little specialized knowledge, are needed to administer a field test. With urinalyses, one must master the following: 1) Get urine sample; 2) dip test stick in urine; 3) remove stick; 4) look at stick. The required skills for presumptive tests are even simpler: 1) Get sample of suspected drug; 2) combine with testing chemical; 3) look at result.

We should also note a distinction between "reading" a test result and "interpreting" it. With field tests, "reading" a result is simply noting the chemically-induced visual change that the test causes (which could be said to be part of administrative expertise). But that visual change, on its face, tells one nothing significant (*e.g.*, "the mixture turned blue"). One must understand what the change means, interpret what the chemical reaction is supposed to prove, to provide meaningful testimony. *See People v. Morales*, 45 P.3d 406, 411 (N.M.Ct.App. 2012) (holding a presumptive test was inadmissible because it was not shown to be scientifically reliable and noting that, while "part of [the officer-witness's] testimony was a report of ... what he observed in the course of the chemical reactions," the "critical portion of his testimony was that the test 'flashed' lavender ... and therefore was positive for heroin.... Explicitly or implicitly, he offered an opinion about the meaning of his observations but without the necessary scientific foundation."), *overruled on other grounds*, *People v. Tollardo*, 275 P.3d 110 (N.M. 2012).

Thus, the question of interpretative expertise as to field tests raises some sticky issues. Field tests are designed to be easily administered, not only because they are to be used "in the field," but because the persons using the tests are not assumed to have the type of general scientific knowledge that the typical lab analyst probably learned in school and uses daily at work. The education and background expertise of police and probation officers, one might assume, probably runs more toward the social sciences (criminology, *etc.*). Whatever they learned in school, the daily activities of these officers do not generally include anything that requires the type of precise control and rigid routine that

characterizes lab work. Most officers who use field tests probably engage in nothing else in their usual work routine that even remotely resembles lab work; the only other example that comes to mind is the collection of evidence (which is often done, not by "field" officers, but by specialists trained in scientific methods).

Thus, the ability, and expertise, of field officers to interpret (as opposed to "read") the results of field tests cannot be assumed to follow simply from their administrative expertise. It is one thing to be able to dip a wooden stick (that contains some type of unknown chemical) into a urine sample and then look at it; it is quite another to understand, with the specialized knowledge required to opine on the subject, the meaning of the perceived changes that one sees on the stick. As one court put it:

> To be considered reliable, evidence based on a scientific theory must satisfy three criteria: (1) the underlying scientific theory must be valid; (2) the technique applying the theory must be valid; and (3) the technique must have been properly applied on the occasion in question.
>
> . . .
>
> ... [A]n expert does not have to be qualified to testify concerning all three [criteria]. [A] police officer who has received training in performing scientific tests may qualify to perform the test and to testify concerning whether the tests were properly performed. In most circumstances involving a "hard science," such as chemistry, a scientist will be required to testify concerning the remaining two prongs: whether the underlying scientific theory is valid and whether the technique applying the theory is valid.

Gill, 2012 WL 2127504 at *6 and n.9 (footnotes omitted); *see also Kessler v. State*, 2011 WL 317673, *2 (Tex.Ct.App. 2012) (holding a presumptive test result was inadmissible because officer was not "qualifi[ed] as an expert"; although officer had "conducted numerous field tests for controlled substances in the past[, which] might qualify [him] to testify regarding the procedure used to perform the field test, it does not necessarily

qualify him to testify as to the identity of the substance tested."); *Smith v. State*, 874 S.W.2d 720, 721 (Tex.Ct.App. 1994) (similar).

As will be seen, this reality raises a significant possible hearsay problem when officers "interpret" field test results. The question here is this: In the absence of a personal understanding about the scientific basis for, and significance of, the chemically-induced changes that constitute the test result, does the officer truly have the interpretive expertise needed to opine on what the changes mean; or is the officer merely parroting what someone else (a representative of the test kit maker; a fellow DOC employee) told the officer (which would be hearsay)?

In sum, interpretive expertise does not necessarily follow from administrative expertise; and reliability expertise goes well beyond interpretive expertise. Interpretive expertise refers to the ability to interpret a perceived result as the test's maker intended. But this tells us nothing about the abstract and practical reliability of the test itself. One may be an expert in interpreting the results of a polygraph -- or an astrology chart or tarot cards --, but that doesn't prove that such tests are based on reliable science. *See Hubbard v. State*, 429 S.E.2d 123, 124 (Ga.Ct.App. 1993) (holding a urinalysis was inadmissible because it was not shown to be scientifically reliable; "despite the fact that [the officer] testified as to his training and skill in administering [urinalyses -- he 'received training and was experienced in administering' the test --], the State presented no evidence as to the characteristics, theory, operation, reliability or scientific acceptability of the test to demonstrate that the test rests upon the laws of nature.").

A further complicating factor here is that all field tests are not

created equal. Initially, there is a wide variety of illegal substances that one might test for, and different substances must be tested with different chemicals. A particular field test may reliably detect marijuana, but that doesn't prove that that test (or a different test, even if made by the same company) reliably detects cocaine.

Also, the fact that one test reliably detects cocaine doesn't prove that all tests intended to detect cocaine are also reliable. Different companies may use different chemicals in their tests; the quality control between companies may be vastly different. Reliability must be determined with regard to that particular test as applied to that particular substance. As one court noted:

> The field of expertise —— chemical identification of trace amounts of a controlled substance —— is an extremely complex field. Chemical identification of a substance cannot be made simply by looking at a compound, because too many substances look exactly the same. All chemical identification requires an analysis, based on knowledge and experience, to identify the substance. Further, not all scientific tests are created equal and, in some tests, accuracy is sacrificed in the name of convenience. An expert is required to differentiate between the accurate tests and the inaccurate tests.

Gill, 2012 WL 2127504 at *5; *see also Grinstead v. State*, 605 S.E.2d 417, 419 (Ga.Ct.App. 2004) (holding a urinalysis result was inadmissible because it was not proven to be scientifically reliable and criticizing trial court's admitting the test because a prior Georgia appellate case upheld the admission of a urinalysis result from a test possibly made by the same company, because 1) "it is not completely clear that the same test was used in [the prior case]," and 2) the two cases involved different substances); *Doolin v. State*, 970 N.E.2d 785, 789 (Ind.Ct.App. 2012) (holding it was error to admit a presumptive test because it was not shown to be

sufficiently reliable and asserting that two prior Indiana appellate cases that allowed marijuana presumptive test results into evidence do not "stand[] for the broad proposition that any unnamed [presumptive] test for marijuana is admissible, so long as the testifying officer states he or she has experience with the test and that the department routinely uses it.");

The final preliminary point here concerns the following language: "While hearsay evidence is admissible in a revocation proceeding, revocation may not be solely based on hearsay." *Queior v. State*, 157 So. 3d 370, 373 (Fla. 2d DCA 2015) (citations omitted). On its face, the first half of this statement is unremarkable and the second half is inaccurate. "Hearsay is admissible in a revocation proceeding" just as it is in any other proceeding, *if* it is within a recognized exception. Similarly, "a revocation *can* be solely based on hearsay," *if* it is within a recognized exception. *Gammon v. State*, 778 So. 2d 390, 392 (Fla. 2d DCA 2001). The special rule that applies in revocation proceedings refers to hearsay *not within a recognized exception*. This brief shall use the term "probation hearsay" to refer to such hearsay.

STATEMENT OF THE CASE AND FACTS IN THE TRIAL COURT

Miller tested Respondent's urine with "a stick test [called 'Drug Check'] that has a strip on it that is placed in the urine ...." RII-274. Asked how it worked, Miller replied: "you place the strip into the urine sample"; the urine "travels up the drug strip and gives the result in the results window ... of the drug strip"; and the tester "see[s] the results ... [n]ext to the window," where there are "two letters, a capital C and a capital T. The C stands for control line, the T stands for test line." RII-274-75. Asked "what would show on the drug test" if someone "has a drug in

their system," Miller replied: "First the control line has to have a red line, indicating that the test is working properly. And then the test line -- if a red line appears it's negative, if a red line does not appear the person is presumptively positive for that particular test." RII-275.

The State asked, "In your ... 24 years [as a probation officer], approximately how many drug test sticks have you administered"; Miller replied: "I probably average 40 or 50 a month." RII-275. Miller said he was "certified by the State in drug testing." RII-275-76. To prove this certification, the State introduced two "certificates of online training that [Miller] took so [he] would understand how to properly use the Drug Check test." RII-276. The first exhibit, labeled a "certificate of completion," is dated 9-2-2009 and is from an organization called "CSS" (the undersigned can't read the full name on his record copy). RII-218. It says Miller "successfully completed the required training program that has been authorized in the performance and interpretation of the Drug Check Dip Drug test." RII-218. It has a stamped signature of a man who is called the "President, CEO," presumably of CSS. RII-218. Under the "instructor" line, the certificate says "online." RII-218. It was never explained how this "certificate of *completion*" proved Miller was "certified *by the State* in drug testing." RII-276 (emphasis added). Nor is it clear what the "training program" encompasses; or what one must do to "successfully complete" it; or who "required" and "authorized" the program and for what purpose.

Also unclear is where Miller's second "certificate" came from. It only has Miller's name and "Certificate of Achievement" at the top, and it "certif[ies]" that Miller "has successfully completed the course Urine Alcohol Dips." RII-220. The perceived relevance of this certificate to drug

urinalyses was not addressed at the hearing.

Asked whether "the drug stick test ... test[s] for just one illegal substance or multiple," Miller first replied "I used a dip six test strip for [Respondent]." RII-275. He later said "I used a six panel and a one panel oxy stick." RII-281. These answers were not amplified in any way. When the State asked Miller "what results did you get" from Respondent's urinalysis, defense counsel objected:

> [The urinalysis] is a scientific test and, therefore, requires a traditional predicate of scientific evidence. The State has not laid the proper foundation regarding the reliability of ... this [urinalysis].
>
> She has laid the foundation for [Miller's] qualification ... by the admission of his two certificates, but has not laid the other qualifications to admit this evidence.

RII-281-82. The State responded:

> [Miller] testified that he's familiar with the drug test, that he's administered it 40 to 50 times in a month, that he's been using [the] test for 24 years ..., and that he understands how the control line and the registration if somebody does test positive or not test positive on the drug test, as well as the name of the specific drug test ....

RII-282. Two points should be noted here.

First, defense counsel conceded that the State had "laid the foundations for [Miller's] qualifications" but objected to the failure to lay "the other qualifications to admit this evidence," *i*.e., the "traditional predicate of scientific evidence ... regarding the reliability of ... this [urinalysis]." RII-218-82. At the very least, counsel challenged Miller's reliability expertise. It is not so clear whether, by conceding Miller's "qualifications," counsel was conceding that Miller had interpretive expertise as well as administrative expertise. Nor is it clear how the State's response -- which at best concerns Miller's administrative

expertise and (possibly) his interpretive expertise -- addresses the objection, *i.e.*, that the urinalysis "is a scientific test [that] requires a traditona1 predicate of scientific evidence," which includes "the proper foundation regarding the reliability of ... this [urinalysis]." RII-281.

Second, Miller didn't exactly say that "he's administered [the test] 40 to 50 times in a month ... for 24 years ...." RII-282. The State asked, "in your 24 years, ... how many drug test sticks have you administered," and he said he "average[d] 40 to 50 a month." RII-275. Nothing else was said about the number of years Miller had used this particular test. Miller's "certificate of completion" shows he was certified to use this test less than four years before the evidentiary hearing. RII-218, 269.

The court overruled the defense objection and Miller testified that Respondent's "testing strip" (not clear if this was the "six panel" or the "one panel oxy stick," RII-275, 281) tested "positive for opiates and oxy." RII-282. When Respondent denied the test's accuracy, Miller sent the urine sample to a lab. RII-277, 283, 286. When the State offered into evidence (through Miller) that lab report, the trial court summarily overruled Respondent's hearsay objection. RII-287. This report says Respondent tested *negative* for Oxycodone and positive for hydromorphone. RII-232.

Although Miller initially said this lab test result was "consistent with [his urinalysis]," he admitted on cross-examination that the two tests were "[n]ot necessarily" consistent. RII-287-88. The following also occurred on cross:

> Q. ... [The] stick test that you use, you place it into ... the urine sample and the urine travels up the stick test to show a result, is that correct?
>
> A. Yes.

Q. You don't know, scientifically, how the urine and the stick interact with each other to show a result, do you?

A. You talking about what happens on a molecular level or I'm not sure what --

Q. What chemicals make a positive result show? Do you know how that works in the stick test?

A. There's a -- a chemical that's implanted on the strip and if the substance being tested for it indicates a positive [*sic*].

Q. And do you know what that chemical is on the strip?

A. No, I do not.

Q. So *all you know is that you poke the stick test into the urine sample and it comes back with a result is basically all you know at this point?*

A. *That's fair.*

. . .

Q. ... [D]uring your ... 24 years as ... a probation officer *have you ever had a presumptive test be positive and then the ... sample be sent to a lab and it come back negative?*

A. *Yes.*

Q. *So you don't know the reliability of the presumptive test or the lab test that is conducted, would that be accurate?*

A. *The lab test is qualitative, the presumptive is not.*

Q. *Do you know how reliable those tests are?*

A. *The presumptive?*

Q. *Yes.*

A. *I don't know the percentage of how many cross reactions occur, but it can occur.*

RII-289-92 (emphasis added). Note that Miller was asked whether he "*ever* had a presumptive test be positive and then the [lab test] come back negative" and he simply answered "yes." He did not say how many times this happened.

Miller did not explain what he meant by "qualitative" or "cross reactions," or how these terms are relevant to the question of the reliability of the urinalysis.

Miller also testified that he got an anonymous phone call in January 2013 (the month of this drug test), in which the caller suggested that Miller test Appellant because, according to the caller, Respondent was "using illegal drugs." RIII-295-97.

At the close of the evidence, defense counsel argued that the evidence was insufficient to prove the charged violations because: 1) Miller's urinalysis result conflicted with the lab test result; 2) Miller "doesn't know what chemical is on the strip in the [urinalysis] that shows [the] result, only that he ... puts the stick test in a urine sample and it comes back positive or negative"; and 3) the urinalysis is "scientific evidence" and Miller "does not know how [it] scientifically work[s] or [its] reliability ...." RII-300-04. The State argued that the evidence was sufficient because Miller has "been on the job for 24 years, [he] has administered the test at least 40 times month, he's familiar with how the drug test works," and Respondent "tested positive for opiates." RII-299. The trial court concluded that the evidence proved a violation because it proved that Respondent "tested positive for drugs." RII-306.

THE DECISIONS IN *TERRY* AND THE PRESENT CASE

The district court certified a conflict with *Terry v. State*, 777 So. 2d 1093 (Fla. 5th DCA 2001). In *Terry*, an opinion of four short paragraphs, the court affirmed a revocation of probation based entirely on a probation officer's testimony about a positive urinalysis result, as follows:

> *Terry did not object to the probation officer testifying as to the results of the field test... Terry sought a judgment of*

> *acquittal arguing that the State failed to introduce competent evidence of his cocaine use*. The trial court denied the motion and we affirm that ruling.
>
> While the probation officer testified that he was not a chemist nor trained in pharmacology, and that he did not know what chemicals were used in the field test, he testified as to the nature of the field test and how it was performed. He further testified that he administers the test fifty times a month, and was certified by the State to administer the test. *The trial court properly concluded that the testimony presented was sufficient to support a finding of violation of probation*.

Id. at 1093-94 (emphasis added). In the present case, the district court first laid out the facts and then concluded that two of the State's three items of evidence (the unauthenticated lab report and the anonymous phone call) were probation hearsay. *Queior v. State*, 157 So. 3d 370, 371-74 (Fla. 2d DCA 2015). "Therefore," the court continued, "the question ... is whether Mr. Miller's testimony concerning his experience in performing the Drug Check Dip Drug test and in the interpretation of its results constituted competent, nonhearsay evidence sufficient to establish drug use by Mr. Queior." *Id.* at 374. The court concluded it was not:

> Mr. Miller testified that there was a chemical on the Drug Check Dip Drug test strip that would react with Mr. Queior's urine sample to yield a positive or a negative result. However, he was ignorant of the nature of the chemical and could not explain the scientific basis for the field test. Also, Mr. Miller acknowledged that on a prior occasion, he had performed a field test that reflected a positive result for a substance and received a laboratory test result for the same substance that was negative for the same substance. Based on these and other undisputed facts in the record, we conclude that Mr. Miller's testimony about the field test results was not competent, nonhearsay evidence that Mr. Queior had used an opiate in violation of his probation....

Id.[1] After summarizing *Terry*, the court "conclude[d] that *Terry* incorrectly

[1] As noted above, while Miller "acknowledged that on *a* prior occasion, he had performed a field test that reflected a positive result ... and received a laboratory test result for the same substance that was negative," *id.* at 374 -- which is also what occurred in the present case, meaning it has happened at least

equates the probation officer's expertise in performing a field test with scientific testimony about how the test works to establish the test's reliability." *Id.* at 375. The court "certif[ied] ... direct conflict with ... *Terry* ... regarding the sufficiency of a probation officer's testimony about the results of a field test to support a finding of violation of ... probation." *Id.* at 375-76.

(..continued)
twice --, it's not entirely clear that this happened to Miller only *a single* prior time. RII-232, 287-88, 291-92. The question asked was ambiguous – "have you *ever*" had that happen --- and the reply was a simple "yes." RII-291.

SUMMARY OF THE ARGUMENT

The present case does not conflict with *Terry* because both the facts, and the issues preserved and addressed, in the two cases are distinguishable. Neither case sought to establish some precise special rule to be rigidly applied in all in probation revocation proceedings when probation officers testify about urinalyses. Each case applied well-settled basic legal rules to the specific facts in that case. The conclusions the courts reached are consistent with each other (and with other Florida cases). Both results are correct, given the different facts in the cases.

The controlling rules in *Terry* concern issue preservation and evidence sufficiency. Except for fundamental error, an issue can be raised on appeal only if it was properly preserved. In determining whether the evidence was sufficient to support a trial court's factual findings, the record is read in a light most favorable to the prevailing party, to see if there is substantial and competent evidence to support those findings. The *Terry* court applied these rules to conclude that, because there was no objection to the testimony about the urinalysis result, that testimony was sufficient to prove that Terry used cocaine (which proved the violation).

In the present case, the district court applied equally well-settled (but different) rules to a different set of facts. The basic rule used here is that, in the face of a proper objection, the proponent of evidence must lay the required predicate to get the evidence admitted. As discussed below, it may be debatable whether the district court concluded that the proper predicate was not laid because the State failed to prove that: 1) Miller was qualified to give the expert opinion that he gave; or 2) Miller had personal knowledge of the information that he gave about the test

result (and, because he had no personal knowledge, his testimony was probation hearsay). Either way, the district court correctly applied the rules it used; and, more importantly, its decision does not conflict with *Terry*.

Respondent's primary objection in the trial court was to Miller's reliability expertise (although it's not clear whether defense counsel conceded Miller's interpretive expertise). RII-281-82, 300-04. In it's response, the State argued that it proved that Miller had administrative (and perhaps interpretative) expertise. RII-282. The State's unstated assumption is that administrative-interpretative expertise is sufficient to prove reliability expertise. (Note: This is the *only* argument that the State made in the trial court. As will be seen, many of the arguments the State makes in its brief were not preserved).

Unlike the trial prosecutor, the district court in the present case recognized the problem with "incorrectly equat[ing] the probation officer's expertise in performing a field test with scientific testimony about how the test works to establish the test's reliability." 157 So. 3d at 375. But, with all respect, the *Queior* court's conclusion that *Terry* adopted this "incorrect equating" is not an accurate reading of *Terry*. The issues of 1) "the probation officer's expertise in performing a field test," and 2) "the test's reliability" were neither raised nor addressed in *Terry*. *Terry* did note the officer's experience in "performing a field test": He knew "the nature of the field test and how it was performed[, and] he administers the test fifty times a month, and was certified by the State to [do so]." 777 So. 2d at 1094. But the *Terry* court *did not* call this "expertise," much less "equate[that] expertise ... with scientific

testimony about how the test works to establish [its] reliability." *Queior*, 157 So. 3d at 375. In this, the *Terry* court was merely summarizing the facts in the record relevant to the evidentiary sufficiency issue raised on appeal. Given the lack of an objection, all this history and experience is irrelevant to the evidence-sufficiency issue in *Terry*. The officer testified that the urinalysis result showed cocaine; thus, the record (read in the State's favor) contained sufficient evidence to prove that Terry used cocaine (and committed the charged violation). Given the lack of an objection, the result in *Terry* would be the same *even if the officer had never done a urinalysis before*.

The district court in the present case certified conflict with *Terry* "regarding the sufficiency of a probation officer's testimony about the results of a field test to support a finding of violation ...." *Id.* at 375-76. With all respect, to say that this is what both cases "regard" is to view both cases from a very abstract level that ignores the precise facts, and the issues raised, in the two cases. The *only* issue raised in *Terry* was a pure evidence sufficiency issue. The issue in the present case was whether the trial court erred in overruling an objection to the officer's testimony and, if so, was the error harmless, *i.e.*, was the evidence nonetheless sufficient to prove the violation? If this Court's conflict jurisdiction can be based on such abstract "conflicts," then conflict can be found in just about any case that has a written opinion of some length.[2]

[2] *E.g.*, 1) "the cases conflict regarding the admissibility of hearsay as an excited utterance," when one case reverses because the State, upon objection, failed to lay a proper predicate for admission, and the other case affirms because the issue was not preserved; or 2) "the cases conflict regarding the sufficicieny of the evidence to prove possession of cocaine," when one case reverses because the State failed to prove the defendant knew of

We see the same level of abstraction in the State's argument, which is based on the assumption that this case involves some precise rule, to be universally applied, regarding the admissibility of probation officers' testimony about urinalysis results in revocation proceedings. The issue here is much more granular, much less grandiose: Did the State lay a proper predicate to admit the testimony of *this particular officer about this particular test in this particular case*? The dispositive rule here is that the proponent of evidence must lay a proper predicate for its admission.

In sum, the question in this case isn't whether the State "*may* qualify a probation officer experienced and trained in [urinalysis] as competent to testify about [urinalysis] results, including the reliability of those results ...." IB., p.6 (emphasis added). The abstract answer to this abstract question is, of course, "yes." But the question here is whether the State proved that *Miller* was "competent to testify" about *this particular urinalysis*, "including [its] reliability." Routinely applying well-settled rules, the district court correctly concluded that the specific answer to this specific question is "no."

Once we recognize the limited nature of the issue presented here, we clearly see the lack of any conflict with *Terry*, where the issue was simply whether the unobjected-to urinalysis result *in that case* was sufficient to prove the charged violation *in that case*.

(..continued)
the presence of cocaine found hidden in a jointly occupied car, and the other case affirms because the State proved the defendant personally handed cocaine to another; or 3) "the cases conflict regarding the application of the harmless error rule," when one case finds a closing-argument issue to be harmless and the other case finds a jury-instruction error to be harmful; *etc*.

ARGUMENT

ISSUE

THERE IS NO CONFLICT WITH *TERRY*. BOTH CASES APPLIED WELL-SETTLED (AND DIFFERENT) LEGAL RULES TO THE UNIQUE FACTS AND ISSUES IN EACH CASE, AND BOTH CASES REACHED THE RIGHT RESULT (GIVEN THE RESPECTIVE FACTS AND ISSUES). NEITHER CASE ESTABLISHED SOME SPECIFIC RULE CONCERNING THE GENERIC ADMISSIBILITY OF GENERIC URINALYSIS RESULTS ADMITTED THROUGH THE TESTIMONY OF GENERIC PROBATION OFFICERS.

Respondent objected to Miller's testifying about the urinalysis "result" because that test

> is a scientific test and, therefore, requires a traditona1 predicate of scientific evidence. The State has not laid the proper foundation regarding the reliability of ... this Drug Check [urinalysis].

RII-281. The State's response was that Miller "testified that he's familiar with the drug test, that he's administered it 40 to 50 times in a month, that he's been using [it] for 24 years ..., and that he understands how the control line and the registration if somebody does test positive or not test positive on the drug test, as well as the name of the specific drug test ...." RII-281-82.

As noted above, Miller did not expressly say that "he's administered [this test] 40 to 50 times in a month, that he's been using [the] test for 24 years ...." RII-282. There is some ambiguity in his answer here and his own certificate shows he was certified to use this particular test less than four years before the evidentiary hearing. RII-218, 269.

As to Miller's being "familiar with the drug test [and] understanding how the control line and the registration if somebody does test positive or not," it is true that Miller knew "the name of the specific drug test." RII-282. Beyond that, his "familiarity" and "understanding," as relevant

for present purposes, are questionable.

Certainly, Miller is "familiar" with the test in the sense that he regularly uses it. But this type of familiarity proves nothing about the scientific reliability of the test, or about Miller's understanding of how the test actually works. Miller may "understand how the control line and the registration if somebody does test positive or not," RII-282, to the extent that he has been told (presumably by someone connected with the test kit's maker) what the maker counts as "testing positive or not." But this proves nothing about whether the maker's positive-or-not conclusions are scientifically reliable, in both the abstract and practical sense.

In effect, the State responded to Respondent's reliability-expertise objection by arguing that it has established Miller's administrative and (possibly) interpretative expertise. But such expertise does not prove reliability expertise.

Turning to the State's brief, the State first asserts that it "*may* qualify a probation officer experienced and trained in field testing as competent to testify about field test results, including the reliability of those results ...." IB., p.6 (emphasis added). As a general matter, this is an accurate statement. But the State did *not* qualify *Miller* as being "competent to testify" about *this* urinalysis result, "including its reliability." Miller did not know: 1) "scientifically, how the urine and the stick interact with each other to show a result"; or 2) "[w]hat chemicals make a positive result show"; or 3) "the reliability of the [urinalysis]." RII-289, 291. He *did* know that "cross reactions" (whatever they are) "can occur," and at least once in the past, he "had a [urinalysis] be positive and then [the lab test] come back negative." RII-

291-92. Indeed, in the present case, the urinalysis showed positive for Oxycodone but the lab test was negative for that substance (and positive for hydrocodone). RII-287-88. Miller conceded that "all [he] know[s] is that you poke the stick test into the urine sample and it comes back with a result ...." RII-289. Given this, the State did not prove that Miller was "competent to testify about [this] field test result[], including [its] reliability ...." IB., p.6

The State asserts "*Terry* is consistent with other Florida decisions holding that the State ***may*** *qualify a probation officer to testify to the results of a [urinalysis] based on the officer's training and experience.*" IB, pp. 6-7 (emphasis added). Again, in the abstract the emphasized principle is indisputable. Again, the issue here is the application of the principle to the facts of this case. Again, even if the State qualified Miller to "testify to the results of [*this* urinalysis]" (interpretive expertise), it did not qualify him to testify -- and he did not testify -- about the *reliability* of this urinalysis (reliability expertise).

The State does not identify the "other Florida decisions" that it believes are "consistent with" *Terry*. Again, *Terry* simply holds that an unobjected-to urinalysis result is sufficient to prove the nature of the substance tested. Regardless of how many other Florida cases are "consistent with" that rule, there is nothing *in*consistent in the present case. The facts in the present case are quite different from those in *Terry*: It's not clear whether that the same urinalysis test was given in both cases, and the issue that succeeded in the present case was neither raised nor addressed in *Terry*. The district court in the present case did

not say (or even suggest) that "the State [*cannot*] qualify a probation officer to testify to the results of a [urinalysis] based on the officer's training and experience." IB, pp. 6-7. That court merely said that the State *did not* qualify Miller to opine on *this* urinalysis result.

The State devotes much time to rebutting an argument that the district court may not have accepted: That Miller's testimony interpreting the test result was probation hearsay. The district court began its legal analysis by asserting: "While hearsay evidence is admissible in a revocation proceeding, revocation may not be solely based on hearsay.... [H]earsay may be used in such proceedings to supplement or explain *competent,* non-hearsay evidence." *Queior*, 157 So. 3d at 373 (citations omitted). Recognizing that two of the three items of evidence the State produced (the anonymous phone call and the lab report) were probation hearsay, the court then said "the question ... is whether Mr. Miller's testimony concerning his experience in performing the Drug Check Dip Drug test and in the interpretation of its results constituted competent, nonhearsay evidence sufficient to [prove the charged violation]." *Id.* Because Miller "was ignorant of the nature of the chemical and could not explain the scientific basis for the [urinalysis] test," and he "acknowledged that on a prior occasion, he had performed [that] test that reflected a positive result for a substance and received a laboratory test result for the same substance that was negative for the same substance," the court concluded that "Miller's testimony about the [urinalysis] results was not *competent, nonhearsay* evidence that [Respondent] had used an opiate ...." *Id.* (emphasis added).

There are two ways to interpret this latter statement, depending on

which of the two emphasized words one stresses. The statement could mean that Miller's testimony was insufficient to prove the charged violations because it was not *competent* nonhearsay evidence; and it was not competent evidence because Miller was not shown to be qualified to opine on the reliability of the urinalysis test and its result.

Or the statement could mean that Miller's testimony was not competent *nonhearsay* evidence, *i.e.*, it was probation hearsay. This conclusion would be based on the logic that, because Miller had no independent knowledge of the scientific principles that undergird the urinalysis, his interpretive expertise was based entirely on what someone else told him. Thus, *he* wasn't interpreting the test; he was repeating someone else's interpretation.

Initially, note that, when the district court first used the phrase "*competent*, non-hearsay evidence," *id.* at 373 (emphasis in original), the court emphasized "competent," not "non-hearsay." This may mean that the court concluded Miller was not qualified to give the expert testimony that he gave.

If the district court concluded that Miller's opinion testimony was probation hearsay, that conclusion conflicts with no other Florida case (including *Terry*). Further, the record and the law support that conclusion.

This "hearsay" problem comes into sharper focus if we assume that, when Miller was asked about the urinalysis result, he replied: "I have no scientific background and no idea how to interpret the meaning of the changes I saw on the test stick. Susan, who works for the company that makes the test kit, was in the office that day and I showed her the test stick and she told me that the changes meant that the urine tested positive for opiates and oxy." Surely, such testimony would be probation hearsay.

The facts in the present case are distinguishable, but it would seem that this probation-hearsay conclusion would also be drawn if the last portion of Miller's testimony was: "At a training session a week ago, Susan told me that, when I saw the type of change that I saw on the test stick, that means that the urine tested positive for opiates and oxy." The question here is whether there is any real difference between Miller's actual testimony (regarding when and where he obtained his interpretive expertise) and the hypothetical testimony.

The State asserts that Miller's testimony was "based on personal knowledge and experience ... and observations," and thus was not hearsay. IB., pp. 8, 10. Miller can certainly testify to what he "personally observed," which is that he dipped a stick into urine and certain changes occurred on the stick. But these observations are meaningless in themselves. One must "interpret" those perceived changes to find any evidence of value. It is this need to "interpret" what was observed that creates the possible hearsay problem. *See Morales*, 45 P.3d at 411 (holding a presumptive test was inadmissible because it was not shown to be scientifically reliable and rejecting the argument that the officer-witness "merely testified to his observations" about the test; although "part of [his] testimony was a report of ... what he observed in the course of the chemical reactions," the "critical portion of his testimony was that the test 'flashed' lavender ... and therefore was positive for heroin.... [Witness] testified to more than mere observations. Explicitly or implicitly, he offered an opinion about the meaning of his observations but without the necessary scientific foundation."), *overruled on other grounds*, *People v. Tollardo*, 275 P.3d 110 (N.M. 2012).

Miller's knowledge of what those perceived changes mean appears (as far as the record reveals) to have come entirely from information he got over the Internet. We have no idea who put that information on there or what that person might know about the information put on there. Presumably, the information was put there by someone connected with the test kit maker, and it was put there in order to facilitate the "certification" of anyone interested in "administering and interpreting" the test kit. Of course, the maker has every incentive to "certify" as many people as possible as being qualified to give its tests. The more "certified" testers, the more tests that can be given; the more tests that can be given, the more that can be sold; *etc.* Given this, even the mildly skeptical might wonder about the scientific reliability of all this. In light of the indisputable ability of the profit motive to corrupt even the best intentions of pure science, we cannot simply assume the scientific validity of the information that Miller got from the anonymous source on this company website.

While it may be true that "most knowledge is based on information obtained from other people" and "[k]nowledge acquired through others may still be personal knowledge," *Agfa-Gevaert, A.G. v. A.B. Dick Co.*, 879 F.2d 1518, 1523 (7th Cir. 1989), it doesn't follow from this that anything that another tells us becomes our own personal knowledge when the other stops speaking. Nor does it necessarily become our own personal knowledge simply because some amount of time has passed since the other stopped speaking.

Note the remaining portion of the *Agfa-Gevaert* quote: "hearsay ... is the repetition of a statement made by someone else—a statement *offered on the authority of the out-of-court declarant and not vouched for as to truth by the actual witness*." *Id.* at 1523 (emphasis added). In the present case,

Miller conceded that he knew nothing of the scientific principles that support the urinalysis test he used (RII-289-92), and thus he knew how to "interpret" the test results only because someone (whose identity, and scientific qualifications, are unknown) on the Internet told him how to do so. In short, Miller "offered" his opinion on the test result "on the authority of the [unknown] out-of-court declarant" and he did not -- and could not -- "vouch for [its] truth." *Id.*

Here we might note *Jordan v. State*, 694 So. 2d 708, 716 (Fla. 1997):

> There is no absolute prohibition against qualifying an expert based upon "his or her study of authoritative sources without any practical experience in the subject matter." ... The problem in this case is that [the witness] did not demonstrate ... a sufficient study of the scientific literature. *Simply reading large amounts of scientific literature, all of which falls well outside a person's area of educational expertise, cannot serve to create an expert out of a non-expert*. [Emphasis added] [citation omitted].

There is no practical difference between "simply reading large amounts of scientific literature" and "simply being told large amounts of scientific information." The Internet may have conveyed to Miller whatever "amounts of scientific information" he needed to learn how to "interpret" the urinalysis result as the test's maker intended. But little-to-no *scientific* information is needed for that. "Dip the stick in the urine and if X happens, that means Y substance is in the urine"; what "amounts of scientific information" are conveyed by such instruction? A marginally clever twelve-year-old could be taught such interpretive skills in about 10 minutes. Being taught how to "interpret" the test in this fashion does not qualify one as an expert -- or as one with personal knowledge -- on the abstract or practical reliability of the test.

One may assume that the people doing lab tests have some educational

background and some experience that qualifies them for that work. There is no such assumption regarding probation officers doing urinalyses. What they know about urinalyses is what they've been told, either by someone from the company that sells the test kit or from someone at DOC (who was probably told by someone from that company). The probation officer's knowledge of urinalysis does not come from long study of scientific principles and observed chemical reactions; rather, it comes from what someone told the officer in summary form. A probation officer may, over a period of time, repeatedly perform urinalyses and "interpret" the results as the test's maker intends; but this adds nothing to the officer's knowledge of the science at work. One may "know," because one has been told, that punching certain keys on a keyboard in a certain order will cause certain changes on a computer screen. But that hardly qualifies one to opine on computer programming or the inner workings of the machine. And punching those same keys to get the same result over a long period of time adds nothing to one's knowledge of computer programming or innards (not to mention, to complete the metaphor, if one sometimes punches those same keys and, for some unknown reason, gets a different result on the screen, which is analogous to a lab test proving that a urinalysis was inaccurate, even though the tester followed the usual instructions).

Regardless of exactly how we draw the line of where information originally obtained from another passes from being hearsay to personal knowledge, the State did not prove that Miller crossed that line here. At best, Miller's "personal knowledge" of the how to "interpret" the test is based entirely on what an unknown someone else told him, and he knows nothing of the scientific principles on which the test kit is based

(assuming the test *is* based on science of some sort, a fact not proven in the trial court). Thus, Miller had no personal knowledge regarding the interpretation of the test result. As the proponent of the testimony, the State had to prove the required predicate. The State failed to do so.

In sum, even if the district court concluded that Miller's testimony was hearsay, that conclusion is valid. Further, that conclusion does not conflict with any other Florida cases (including *Terry*); in fact, it is consistent with the only cases on point. *Bray v. State*, 75 So. 3d 749, 749-50 (Fla. 1st DCA 2011) (holding "the urinalysis conducted by [two probation officers]" was insufficient to prove defendant used cocaine because, "[w]hile both officers testified that they had conducted hundreds of urinalyses, neither testified as to any expertise as to narcotics or drug testing. Under such circumstances, their testimony was hearsay"); *Rothe v. State*, 76 So. 3d 1010, 1011-12 (Fla. 1st DCA 2011) (concluding "the [probation] officer's testimony about the results of the [urinalysis] she performed on Rothe is hearsay for she admitted ... that she has no specialized training, expertise or certification in drug testing.").

The State cites two cases dealing with probation officers' testimony about urinalysis results in revocation proceedings. Neither is similar to the present one; neither addressed the issues raised here.

The State cites *Isaac v. State*, 971 So. 2d 908 (Fla. 3d DCA 2007) for the proposition that "where a probation officer testifies based on 'personally conduct[ing] a [urinalysis] (positive for cocaine and marijuana),' the court's finding of a violation was not based exclusively on hearsay." IB, p. 10. In that case, the district court affirmed the revocation and rejected the defendant's argument that the violation finding

was based entirely on hearsay:

> The sole testimony was by the probation officer.... [T]he laboratory test in question (showing that Isaac was positive for cocaine) was hearsay, but in probation violation hearings such tests are admissible[, although] a violation may not be sustained *solely* on the basis of hearsay evidence. [Citations omitted].
>
> The trial court's determination was not based exclusively on hearsay, however. Isaac's *probation officer testified regarding his other violations*, and she also personally conducted a [urinalysis] (positive for cocaine and marijuana) before the urine sample was sent out for laboratory analysis. Although the laboratory results differed from the probation officer's test in one respect-the laboratory test was negative for marijuana-the trial court properly concluded that *the testimony was sufficient to support a violation*. *See Terry* ....

971 So. 2d at 909 (emphasis added). There was no indication that Isaac raised any objection to the urinalysis. The court did not address the issue of the admissibility of urinalysis results if a defendant objects to its scientific reliability or to the tester's interpretative expertise. The district court said Isaac's probation officer "testified regarding his *other violations*" and "the trial court properly concluded that the testimony was sufficient to support *a violation*." *Id.* (emphasis added). Thus, it's not clear that this court expressly concluded that the evidence was sufficient to prove the drug-related violation(s). Rather, the sum of the court's conclusion is simply that "the trial court's determination [of a violation of some type] was not based exclusively on hearsay ...." *Id.*

The second case the State cites here is *Monroe v. State*, 679 So. 2d 50 (Fla. 1st DCA 1996), which the State reads as concluding that, "[b]ecause the probation officer testified that he performed a positive [urinalysis] on [the probationer], the outside lab report was not the sole evidence of [his] drug use and, consequently, the outside lab report was admissible." IB, p. 10 (internal quotation marks omitted). The perceived

relevance of this case is unclear. No pertinent facts were given; the district court affirmed the revocation; and in a footnote, the court rejected the State's cross-appeal -- which the court initially summarized as "[t]he state ... asserts error in the trial court's *exclusion of a positive 'in-office' drug test*" -- as follows:

> The state's cross-appeal is not essential to our holding. However, we note that the trial court erroneously *excluded a hearsay report from an outside lab* establishing appellant's positive drug test. Because the probation officer testified that he performed a positive "in-office" test on appellant, the outside lab report was not the sole evidence of appellant's drug use. Consequently, the hearsay lab report was admissible.

679 So. 2d at 52, n.2 (emphasis added). Not only are any relevant statements in *Monroe* dicta, but it's not clear whether the court was commenting upon the admissibility of the urinalysis or the lab test. This case did not address any issues concerning the reliability of any urinalysis or the interpretive expertise of the tester.

Both *Isaac* and *Monroe* are irrelevant to the issues raised in the present case. Neither case conflicts with the present case.

The State cites four cases from other jurisdictions that, it asserts, "recognized that a probation officer's testimony about personally administering and interpreting a field test [is not] hearsay." IB, p. 10. These cases are irrelevant to the issue of any conflict in Florida cases, they are factually distinguishable, and none addresses the hearsay issue raised here.[3]

---

[3] In *Hurd v. Howes*, 2014 WL 793631, *7 (E.D.Mich. 2014), the court rejected a Confrontation Clause argument to the admission of a lab report and, when addressing the harmlessness of any possible error, noted:

> The lab report was cumulative evidence of what was already established by the [presumptive] test [on the

Citing *Terry*, the State asserts "Florida's district courts have recognized that a probation officer can be qualified to interpret field test results, even though the officer may lack scientific knowledge or scientific training." IB, p. 12. Again, *Terry* stands for the simple rule that an unobjected-to urinalysis result is sufficient to prove the nature

(..continued)

> substance itself]. Non-hearsay testimony from a police officer who *witnessed* the field test established that the [presumptive] test showed the substance was ... cocaine [citation to record omitted]. *The accuracy of the preliminary test was not disputed*. The later crime lab report had an identical conclusion. [Emphasis added].

Two of the other three cases the State cites rejected a hearsay argument based on facts identical to those in *Hurd, i.e.*, the testifying officer testified about watching another officer do a presumptive test. *United States v. Soto-Beniquez*, 356 F.3d 1, 36 (1st Cir. 2004) (holding the witness's testimony was not hearsay even though he "did not perform the [presumptive] test himself," because that officer "did not testify about an out-of-court statement ... but about his personal observation of the [presumptive] test."); *People v. Williams*, 2005 WL 1539266 (N.Y. City Ct. 2005) (holding "the testimony of [one officer] relat[ing] to his own personal observations of the [presumptive] test conducted by [a second officer]" was not hearsay). These cases are distinguishable: 1) The present case involves a urinalysis, not a presumptive test; 2) the objection in the present case was to the tester's testimony, not to a test-eyewitness's testimony; 3) no objection was raised in these cases to the personal knowledge (or to the interpretative expertise) of either the eyewitness or the tester; and 4) in the present case, the "accuracy of the preliminary test *was* ... disputed." *Hurd,* 2014 WL 793631 at *7.

Finally, in *State v. Morris*, 2004 WL 1427020, *2 (Del.Super.Ct. 2004), the court rejected a post-conviction challenge to a DUI conviction, holding that an "officer's testimony regarding his observations ... of defendant's performance on the various field tests was not hearsay." While we have here the coincidence of the use of the word "field test," *Morris* involved a field test of an entirely different sort (the tests used to determine intoxication, *e.g.*, walk-a-straight-line, *etc.*). *Morris* is irrelevant to the present case, where "field test" involves the meaning of a perceived chemical reaction, not simply watching another perform physical tasks to determine the other's level of coordination and ability to follow direction.

of the substance tested. *Terry* did not, in itself, "recognize[] that a probation officer can be qualified to interpret field test results, even though the officer may lack scientific knowledge or scientific training," much less purport to establish that principle for all of "Florida's district courts." IB, p. 12. No objection to the probation officer's "scientific knowledge or training" was made in *Terry*. Further, the primary issue in the present case concerns Miller's reliability expertise, not his interpretive expertise. Finally, the district court in the present case did *not* say that "a probation officer can[*not*] be qualified to interpret field test results [*unless*] the officer [has] scientific knowledge or training." Put another way, the decision in the present case is perfectly consistent with a rule that "a probation officer *can* be qualified to interpret field test results, even though the officer may lack scientific knowledge or scientific training." IB, p. 12. Again, the problem here is that the State failed to prove Miller *was in fact* so qualified.

The State asserts the present case "conflict[s] with these decisions ['these decisions' meaning *Terry*, apparently] by incorrectly requiring scientific knowledge as a predicate to qualifying a probation officer to interpret field test results ...." IB, p. 12. Again, interpretative expertise is not the crucial issue here; Miller's reliability expertise is. Also, the State cites nothing in the district court opinion in the present case to support its assertion that that court "required *scientific* knowledge." What that court required, what every Florida court has always required in any case where expert testimony is admitted, is a showing by the proponent of the testimony that the witness is qualified to give it:

> A witness may be qualified as an expert through specialized knowledge, training, *or* education, which is not limited to

> academic, scientific, or technical knowledge. An expert witness may acquire this specialized knowledge through an occupation or business or frequent interaction with the subject matter.... However, *general knowledge is insufficient. The witness must possess specialized knowledge concerning the discrete subject related to the expert opinion to be presented*....
>
> . . .
>
> Although an expert may also be qualified through study or practical experience, rather than education or formal training, *there must be sufficient development of specialized knowledge in the subject matter.... The expert must have adequate experience with the subject matter*.

Chavez v. State, 12 So. 3d 199, 205-06 (Fla. 2009) (citations omitted) (emphasis partially added). As the district court correctly concluded, the State did not prove that Miller had the "specialized knowledge concerning the discrete subject related to the expert opinion to be presented [or] adequate experience with the subject matter," *id.*, to give the opinions that he gave. He admitted he knew nothing of how the urinalysis actually worked and his only interpretive expertise came from an anonymous online source of unknown reliability.

And Miller *never actually opined* on the issue that was the primary basis of Respondent's objection: the reliability of the urinalysis. Even if the district court *did* "requir[e] scientific knowledge as a predicate to qualifying a probation officer to *interpret* field test results," IB, p. 12 (emphasis added), that is irrelevant to the main issue in this case (which is that the State did not prove the reliability of the test and its result and thus did not lay a proper predicate for its admission).

The State hints that Miller's testimony may be admissible as lay witness opinion. IB, p. 12-14. This argument not made in the lower courts. It is also meritless; interpreting urinalysis results requires "special

knowledge, skill, experience, or training." §90.701, Fla. Stat. (2014).[4]

[4] *See Gill*, 2012 WL 2127504 at *4, n.6 (rejecting argument that officer testifying about presumptive test result was offering lay witness opinion; "[officer] was testifying concerning a chemical identification of traces of [cocaine] on a defendant's clothes. Such testimony must be testified to by a qualified expert."). Courts in other jurisdictions seem to be unanimous in concluding that the interpretation and reliability of field tests requires expert testimony. The undersigned has looked at about two dozen cases (many cited herein) that have considered the admissibility of field test results. None say expertise is not needed. All use the principles regarding expert testimony to analyze whatever issues are raised. Many cases simply assume the point; others expressly say that such testimony is expert testimony. *State v. Martinez*, 69 A.3d 975, 989, 992 (Conn.Ct.App. 2013) ("testimony about the field test results is 'scientific evidence'"; "Although few courts in other jurisdictions have addressed the scientific reliability of narcotics field tests, the majority view appears to be that, to be admissible, field tests must meet reliability standards for scientific evidence."); *Kessler*, 2011 WL 317673 at *2 ("the admissibility of the results of a field test for a controlled substance is properly the subject of expert testimony."); *Smith*, 874 S.W.2d at 721 ("[an officer's] testimony about the performance and results of a field test is expert testimony.").

For examples of how other courts apply the principles regarding expert testimony to field tests, see:

1. *Martinez*, 69 A.3d at 990-93 (holding it was error to allow testimony about presumptive test result; "While [the officer] testified to her training in administering the field tests, she also acknowledged that she could not explain the underlying chemical reaction except to state that the tests work by breaking the capsules containing 'some sort of acidic liquid' inside the tube and confirming whether the resulting color the substance turns matches the color on the ... box of the test. She further testified that the tests can produce false positives"; this "testimony [was] insufficient [to prove] the reliability of field tests"; "that this evidence has been admitted in our courts previously ... does not conclude our analysis, especially because it appears that none of the defendants in those previous cases had challenged field test evidence on [reliability] grounds"; "the record discloses no testimony or other evidence to [prove] that the methodology used in the field tests is well established") (applying "*Daubert*" analysis).

2. *Grinstead v. State*, 605 S.E.2d 417, 419 (Ga.Ct.App. 2004) (holding a urinalysis result was inadmissible because it was not proven to be scientifically reliable because the officer "did not have the expertise necessary to testify to the accuracy of the test nor could he assure that it did not give false readings"; criticizing trial court's admitting the test because a prior Georgia appellate case upheld the admission of a urinalysis result from a test possibly created by the same company, because

(..continued)
1) "it is not completely clear that the same test was used in [the prior case]," and 2) the two cases involved different substances).

3. *People v. Hagberg*, 703 N.E.2d 973, 976-77 (Ill.Ct.App. 1998) (holding presumptive test result was insufficient to prove identity of substance beyond reasonable doubt; the evidence "failed to demonstrate the reliability of the field test .... [Officer's] testimony included a general description of the test he performed in terms of placing the substance in a test vial with another substance and observing the color that appeared. However, [he] could not name and did not otherwise identify the test [and he] could not recall what color reaction he looked for when he performed the test.... The State also failed to present any evidence showing whether the field test ... was a specific test for the presence of cocaine or whether the test was nonspecific. If the test was nonspecific, it proved only that the substance ... could be cocaine but could also be one of an unknown number of other substances (not necessarily illegal) that produce similar results when tested.").

4. *Barnhart v. State*, 15 N.E.3d 138, 144-45 (Ind.Ct.App. 2014) (holding urinalysis result was properly excluded when witness admitted she did not know "whether or not the underlying principles of the testing method were scientifically valid, whether the technique is capable of being tested repeatedly in order to show its performance over time, whether or not it had been subject to peer review and publication, whether there was a known potential error rate, or whether there existed a maintenance or standard in performing the technique of the test.") (applying "*Daubert*" analysis).

5. *Doolin v. State*, 970 N.E.2d 785, 789 (Ind.Ct.App. 2012) (holding it was error to admit a presumptive test because it was not shown to be sufficiently reliable; although the testifying officer's "department routinely utilizes the field test, he did not provide any specific name or otherwise identify the test, indicate its reliability or rate of accuracy or error, note the scientific principles on which it is based, or recognize any standards regarding its use and operation"; asserting that two prior Indiana appellate cases that allowed marijuana presumptive test results into evidence do not "stand[] for the broad proposition that any unnamed [presumptive] test for marijuana is admissible, so long as the testifying officer states he or she has experience with the test and that the department routinely uses it.") (applying "*Daubert*" analysis).

6. *Morales*, 45 P.3d at 411-12 (holding a presumptive test was inadmissible because it was not shown to be scientifically reliable; officer who administered the test "knew nothing about the chemical features of the field test and how it produced a certain color that identified heroin [and he] had no scientific evidence about the percentage reliability of the field test"; "testimony by a [police] officer will not, without more, be sufficient to support admission of the results, when the officer cannot explain the scientific principles that the test uses, the percentage of false positives or negatives that the test will produce, or the factors that may produce those false results";) (applying "*Daubert*" analysis), *overruled on other grounds*, *People v. Tollardo*, 275 P.3d 110 (N.M. 2012).

The State asserts "no Florida appellate court has ever expressly held that either section 90.701 or 90.702 applies during a probationary proceeding, and neither the trial court nor the Second District expressly applied either statute ...." IB, p. 14. But neither court was asked by the State to "expressly apply either statute"; indeed, the trial prosecutor implicitly conceded that this was a subject for expert testimony (by not challenging defense counsel's assertion to that effect, RII-281-82). Further, the State suggests no line of logic or authority that might lead a Florida court to "hold that sections 90.701 and 90.702 do not apply during a probationary proceeding."

The controlling provision here is section 90.702, Florida Statutes (2015), which allows expert testimony if: 1) it "will assist the trier of fact"; 2) the witness is "qualified as an expert"; 3) the testimony "is based upon sufficient facts or data [and] is the product of reliable principles and methods"; and 4) the witness "has applied the principles and methods reliably to the facts of the case." The State did not prove that: 1) Miller was "qualified as an expert," at the least as to reliability expertise; 2) his testimony was "the product of reliable principles and

(..continued)

7. *Hernandez v. State*, 116 S.W.3d 26, 28, 30-31 (Tex.Crim. App. 2003) (holding it was error to admit urinalysis result; although witness "had worked as a urinalysis lab technician for two and a half years[,] he had thirty-two hours of specialized training on the ADx analyzer and about two and a half weeks of extensive on-the-job training," and he "couldn't say" how many urinalyses he had done because "[i]t's so many," he also "conceded that he did not know the technical aspects of the machine's operation"; "The State had the burden ... to show ... that the ADx analyzer is a reliable method of determining the presence of marijuana in a person's body. It failed to offer *any* testimony, *any* scientific material, or *any* published judicial opinions from which the trial court might take judicial notice of its scientific reliability.") (applying "*Daubert*" analysis).

methods"; or 3) he "applied the principles and methods reliably to the facts of the case."

"Although the revisions to section 90.702 came into force after the filing of this appeal," they "indisputably appl[y] retrospectively. *See Windom v. State,* 656 So. 2d 432, 439 (Fla. 1995) (holding that a statute which only relates to the admission of evidence is procedural in nature and does not violate the prohibition against ex post facto laws); *Alamo Rent-A-Car, Inc. v. Mancusi,* 632 So. 2d 1352, 1358 (Fla. 1994) ('Procedural or remedial statutes ... are to be applied retrospectively and are to be applied to pending cases.')." *Perez v. Bell South Telecommunications, Inc.*, 138 So. 3d 492, 498 (Fla. 3d DCA 2014); *accord*, *Conley v. State,* 129 So.3d 1120, 1121 (Fla. 1st DCA 2013). The State seeks to avoid the application of section 90.702 to the present case by asserting that this Court "suggested" in *Zakrzewski v. State*, 147 So. 3d 531, 2014 WL 2810560 (Fla. 2014) that the new section 90.702 does not apply retroactively. IB, p. 14. *Zakrzewski* was an appeal from the denial of a successive post-conviction motion in a capital case. Nothing in *Zakrzewski* suggests that this Court did anything other than apply the well-settled rules used in this context: New procedural rules (including rules of evidence) apply to pending cases not yet final on direct review. *E.g., Yisrael v. State*, 993 So. 2d 952, 955, n.5 (Fla. 2008). The conviction in *Zakrzewski* became final years before the most recent appeal.[5]

[5] The State did not argue in the trial court, and does not argue in this Court, that Miller's testimony was admissible under the "pre-*Daubert*" Florida rules regarding expert testimony. Miller's testimony was clearly not what would be considered "pure opinion" under the old rules, and nothing was established in the record regarding its admissibility under the *Frye* standard. *See generally* Charles W. Ehrhardt, *Florida Evidence*, §702.4 (2015

The State cites several cases that stand for the proposition that "witnesses can be qualified as 'experts' to ... identif[y] certain substances based on experience and training" "even though [they] may lack specialized scientific knowledge or training." IB, pp. 14-15. Respondent has no quarrel with this principle, which is that "a person who is experienced with [a] controlled substance as either a dealer, user, [police officer, *etc.*] *may* ... be qualified to express ... opinion testimony regarding the identity of alleged controlled substances [*themselves*]." *Brooks v. State*, 762 So. 2d 879, 893 (Fla. 2000) (emphasis added). But Miller did not opine on the identity of a controlled substance itself. He opined on the scientific meaning of chemically-induced changes that he saw on a wooden stick that he dipped into urine, an opinion that *does* require "specialized scientific knowledge or training." IB, p. 15. The State attempts to draw an analogy to cases like *Brooks* by asserting it

(..continued)
ed.) ("*Frye* was interpreted by the Florida courts as requiring that not only must the evidence be based on a scientific principle, theory, or methodology that is scientifically valid, the procedures followed to apply the technique or process must also be generally accepted in the relevant scientific community"; "when evidence rests upon a scientific principle, test, or methodology, *Frye* seeks to ensure that the evidence possess a certain minimal level of reliability. Simply because the test or theory has existed for some period of time or because evidence based upon that theory has been admitted in other legal actions does not mean that the evidence possesses the level of reliability demanded by *Frye*. The better view, is that until the principle, test, or methodology has been subjected to a thorough *Frye* analysis in Florida, it should be subject to *Frye* testing.") (footnotes omitted). No Florida case has subjected urinalyses in general (or this particular test) to a *Frye* reliability analysis. The Florida cases that have expressly considered the reliability of urinalyses *in cases where a challenge was properly raised* (a category that does not include *Terry*) are unanimous in concluding, as did the district court in the present case, that the tests were not shown to be sufficiently reliable. See cases discussed in footnote 7, below.

"established a sufficient predicate to qualify ... Miller to testify ... regarding his *interpretation* of field test results, even though he lacked scientific knowledge or training." IB, p. 16. But in cases like *Brooks*, the witness is not "interpreting" anything other than what was directly perceived about the substance itself through the witness's own senses. In the present case, Miller *was* interpreting something -- the meaning of the irrelevant-in-itself chemically-induced change on the test stick --, and it is precisely the lack of "scientific knowledge or training" that shows Miller did *not* have this interpretive expertise. It doesn't matter how many tests Miller gave over what period of time. Each time he gave the test, he did not know how that test worked or whether it was accurately measuring what it was supposed to measure. Further, again, even if Miller has interpretive expertise, that does not prove reliability expertise.

It is true that Miller testified he was "certified by the State in drug testing." IB, p. 16. And it may be true that "[d]efense counsel never questioned in the trial court Miller's testimony that he was certified by the State in drug testing," IB, p. 16 (although it is not clear why defense counsel should be criticized for failing to question something the State didn't prove). But it is equally true that the certificates Miller produced do not support his "certified by State" testimony. More importantly, defense counsel *did* "question in the trial court" Miller's interpretive and reliability expertise. Miller's being "certified by the State in drug testing" (whatever that might mean; this was never explained) does not prove that the urinalysis test is reliable.

The State asserts Miller's "interpretation of the field test result was based on his training and experience in regularly administering random

drug tests as well as on his review of outside lab test results performed to verify the in-office tests." IB, p. 17. Again, the primary issue here is reliability expertise, not interpretive or administrative expertise. Regardless of whether Miller "regularly administer[s] random drug tests," and even if Miller's administrative expertise necessarily proves interpretive expertise (a debatable point), neither type of expertise proves reliability expertise (an issue Miller never addressed anyway).

As to Miller's "review of outside lab test results performed to verify the in-office tests," IB, p. 17, the State did not raise this issue in the lower courts and it cites nothing in the record regarding Miller's "review" of any outside lab test results. The only such "review" noted in the record did *not* "verify the in-office tests" on an unknown number of occasions (including the present case). RII-287-88, 291-92.

The State asserts the "record shows that Miller was trained and experienced in this area, and that he possessed knowledge, based on his experience, regarding the reliability of the [urinalysis]." IB, p. 17. The State cites nothing in the record to support its assertion that Miller "possessed knowledge ... regarding the reliability of the [urinalysis]." Nothing in Miller's testimony addressed the reliability of the test. He conceded that he did not know, "scientifically," how the test worked or its reliability; "all [he] know[s] is that you poke the stick test into the urine sample and it comes back with a result" (along with the facts that: 1) he "had a presumptive test be positive and then [the lab test] come back negative"; and 2) "cross reactions ... can occur"). RII-289-92.

The State asserts "the detail with which the probation officer can testify about [the test's reliability] goes to the weight of his or her

testimony and not its admissibility." IB., p. 17. This issue was not raised in the lower courts and the State cites no Florida authority as support. To introduce expert testimony, a certain predicate must be laid. The failure to lay that predicate it is a question of admissibility not weight. *See Gill*, 2012 WL 2127504 at *4 (holding a presumptive test was not shown to be scientifically reliable and rejecting the argument that "the admissibility of an expert's testimony does not depend on the expert's qualifications [and] an expert's qualifications only affect the weight of the evidence, not its admissibility"; "It is well established that an expert's qualifications determine whether the expert testimony is admissible. An expert witness must have both a sufficient specialized knowledge in a particular field, and that specialized knowledge 'must be tailored to the specific area of expertise in which the expert desires to testify.'") (citation omitted).

The two cases the State cites here (*Newman v. United States*, 49 A.3d 321 (D.C.Ct.App. 2012) and *Commonwealth v. Zapata*, 2004 WL 1237734 (Mass.Ct.App. 2004)) are not to the contrary, are distinguishable from the present case, and are irrelevant to any possible jurisdictional conflict in the present case.[6]

[6] Both cases involve presumptive tests, not urinalyses. 49 A.3d at 325; 2004 WL 1237734 at *2. The scientific-reliability argument was not raised in the trial court in *Zapata*. 2004 WL 1237734 at *2. Nor does it seem to have been expressly raised in *Newman* -- the precise issue on appeal was hearsay-based --, although the officer's lack of scientific knowledge was brought out during cross-examination. 49 A. 3d at 326. Affirming an *attempted* possession conviction, the *Newman* court rejected the argument that the officer's testifying about the result of his own test was hearsay and further noted:

> Cross-examination revealed that [officer] knew little about the science on which the field test

The State asserts "[s]cientific knowledge ... was not necessary for the probation officer to testify about the reliability of the field test to identify narcotics in test samples in his or her experience." IB, p. 18. Once again, strictly speaking, this statement is essentially accurate in the abstract but not dispositive as applied to this case. While *scientific* knowledge is not always necessary, any witness put on the stand to offer expert opinions must be shown to have "adequate experience with the subject matter" or some "specialized knowledge concerning the discrete subject related to the expert opinion to be presented." *Chavez*, 12 So. 3d at 205-06. The State did not prove that Miller had the "adequate experience" or "specialized knowledge" to opine as he did. Further, Miller did *not* "testify about the reliability of [this test] to identify narcotics in test samples in his experience." IB, p.18. In fact, he admitted that he could not opine on reliability and his testimony about his experience with this urinalysis test showed it was *not* reliable. RII-287-92.

The State cites *Weaver v. State*, 543 So. 2d 443 (Fla. 3d DCA 1989) for the proposition that "[p]roof of identification of contraband does not require scientific tests[, although] it must be reliable and based on the observations of witnesses with experience and training." IB, p. 18. As in

(..continued)

> depended or about the rate of false positives. These complaints affect the weight of the evidence, not its admissibility. *Ultimately appellant's arguments boil down to a claim that the officer's testimony about the field test was insufficient to prove that the substance was marijuana. But the field test was not necessary to prove attempted possession*. The appearance, smell, and packaging of the substance, and appellant's eagerness to discard it, amply [proved] that he believed the green weed-like material to be marijuana.

49 A.3d at 326 (emphasis added, footnote omitted, alterations in original).

Brooks, et al., *Weaver* is referring to a witness's ability to identify the substance itself, not its presence in urine. Further, *Weaver* held the evidence was insufficient to prove a probation violation because

> the only non-hearsay evidence introduced ... showing that the white substance ... was ... heroin, was the testimony of Agent Brinson who said he conducted a field test on the substance .... [H]owever, Brinson could not remember the name of the field test and ... he did not know whether such a test is reliable.

Id. at 443. *Weaver* supports Respondent's position; it was cited as such in the district court. 157 So. 3d at 374-75. (Note: To return to an earlier point, this latter fact indicates that the district court concluded that Miller's testimony was not "competent, nonhearsay evidence sufficient to [prove the violation]," *id.* at 374, because Miller was not proven to be "competent" to provide the expert testimony that he gave, and *not* because his testimony in this regard was probation hearsay. The district court's conclusion in this regard may also be based, not simply on whether Miller was qualified to *testify as he did*, but the fact that he *failed to testify* about a crucial predicate fact: the test's reliability). It is true that "[p]roof of identification of contraband does not require scientific tests," IB, p. 18, when a witness identifies the substance itself. But Miller did not identify the substance in Respondent's urine by sight, *etc.*, based on his prior experiences with the substance itself.

The State asserts that the district court "erred ... in requiring that a probation officer possess particularized knowledge or training to testify about the interpretation of field test results." IB, p. 20. But the only "particularized knowledge or training" that the district court "required" was a showing of the type of specialized knowledge needed to

support expert testimony. The State does not explain why it was error for the district court to require the proponent of expert testimony to lay a proper predicate for that. Further, again, whether Miller could "testify about the interpretation of field test results" is not the crucial issue here; his reliability expertise is.

The State attempts to distinguish the First District cases that are consistent with the present case. The goal of this effort is unclear; if these cases are distinguishable, then they do not conflict with the present case (an argument the State doesn't make anyway).

In any event, the State says these First District cases conclude "that an officer's testimony regarding drug tests was insufficient or unreliable by itself to establish a violation ...." IB, p. 18. None of these cases stand for such a broad proposition. The issue in those cases (as in the present case) is whether the State proved that a particular officer was qualified to testify about a particular test given in a particular case.

The State tries to distinguish the First District cases on the ground that, in those cases, "there was very little evidence that showed an officer's expertise in conducting the drug test." IB, pp. 18-19. But "an officer's expertise in *conducting* the drug test" -- *i.e.*, administrative expertise -- is not the issue in the present case; reliability and interpretive expertise are the issues. Expertise in "conducting the drug test" -- a modest achievement, as discussed above -- tells us nothing about these other areas of expertise.

Because any factual distinctions between these First District cases and the present case are irrelevant to what this Court needs to decide,

these cases will noted in the footnote.[7]

The State asserts:

> [W]ithout expressly holding that such testimony is subject to section 90.702, the Second District has arguably required that a probation officer be qualified as a scientific expert in order to interpret presumptive field test results and to testify about the reliability of those results. In certifying conflict with *Terry*, the Second District stated that *Terry*

---

[7] In *Bray*, 75 So. 3d at 749-50, the court held that the testimony of two probation officers about the positive urinalysis they conducted was insufficient to prove the charged violation because, "[w]hile both officers testified that they had conducted hundreds of urinalyses, neither testified as to any expertise as to narcotics or drug testing. Under such circumstances, their testimony was hearsay." The court did not address the issue of the test's reliability.

In *Rothe*, 76 So. 3d at 1011, the court said the urinalysis was insufficient to prove a violation because "the officer's testimony about the results ... is hearsay [because] she admitted ... that she has no specialized training, expertise or certification in drug testing." No further facts were given, it's not clear what objections were raised in the trial court, and the court did not address the issue of the test's reliability.

Finally, in *Carter*, 82 So. 3d at 995-96, the court held that the urinalysis was insufficient to prove the charged violation because Carter objected to the "lack of foundation to the reliability of the test" and the State failed to lay that foundation because: 1) the probation officer "did not know the name of the field test ... or how it worked scientifically [and] he only knew 'if it comes back positive or ... negative'"; 2) "two years earlier [the officer] performed another field test and obtained positive results which were not ... borne out by the lab results"; 3) the officer "gave no indication that he was certified to administer the test, or had in fact administered it with any frequency"; 4) the officer "did not ... demonstrate any expertise concerning or understanding of the workings of the test, and could not offer an opinion about the significance of the test results"; and thus 5) the officer "was not qualified to interpret the results of the field test ...." *Carter* is factually consistent with the present case in some ways, distinguishable in others, but this only further proves the point repeatedly made in this brief: That the admissibility of a particular officer's testimony regarding a particular field test is determined by the particular facts in the particular case.

Like the present case, the First District cases do not lay down rigid rules regarding when "an officer's testimony regarding drug tests [i]s insufficient or unreliable by itself to establish a violation," IB, p. 18, other than that the proponent of evidence must establish the proper predicate for its admission.

> "incorrectly equates the probation officer's expertise in performing a field test with scientific testimony about how the test works to establish the test's reliability." *Id.* at 375. This reasoning ignores both the probation officer's personal experience in interpreting field tests and also ignores established law holding that lay witnesses may be qualified in certain circumstances to offer opinion testimony based on personal experience.... Miller was undisputedly available to testify regarding the reliability of the field test based on his experience.... Miller's experience included comparing in-office tests against independent lab tests. Based on [his] experience and training, scientific knowledge was not necessary to show that he was qualified to interpret the field test results.

IB, pp. 19-20. There are several problems here.

If the State is suggesting that Miller's testimony may qualify as valid lay witness opinion -- "is [not] subject to section 90.702, IB, p. 19 --, that issue was not raised below and, in any event, is meritless.

The State cites nothing in the district court opinion to suggest that it might have "arguably required" that "a probation officer [must] be qualified as a *scientific* expert in order to interpret [urinalysis] results and to testify about the reliability of those results." IB, p. 19 (emphasis added). Further, even if that court did "arguably require" this, the State seems to believe that this is a startling proposition, utterly at odds with existing Florida law. In fact, although the State overstates it, the thrust of this "arguable requirement" is fundamental. If we eliminate the State's "scientific" overstatement from this assertion, we get an undisputed truism: "a probation officer [must] be qualified as a[n] expert in order to interpret presumptive field test results and to testify about the reliability of those results." *Any* witness called to offer expert testimony must be properly "qualified as an expert" to do so. *Any* witness called to "interpret [urinalysis] results and to testify about the[ir] reliability"

must be "qualified as an expert" to do so. But, again, that was not done in the present case.

The State seems to suggest that we *should* "equate[] the probation officer's expertise in performing a field test with scientific testimony about how the test works" because, otherwise, we would "ignore[] the probation officer's personal experience in interpreting field tests ...." IB, p. 20. The State conflates administrative expertise, interpretive expertise, and reliability expertise into a homogeneous stew, spiced entirely by the officer's "personal experience." But, as noted earlier, "expertise in performing a field test" is hardly a noteworthy talent and it requires no knowledge whatsoever of "scientific testimony about how the test works." Similarly, an officer detailing his "personal experience in interpreting field tests" is not "scientific testimony about how the test works," particularly when that officer's "personal experience in interpreting field tests" is based entirely on what he was told to do by some anonymous source on a website. (Note: The phrase "how the test works" takes us back to the distinction between "reading" and "interpreting" the test. One might say that the test "works" by dipping a wooden stick into urine and then looking at the changes on the stick. But this tells us nothing about how whatever chemicals are on the test strip "work" when placed into urine to cause the perceived changes on the stick; or how those perceived changes "work" to prove a particular drug is mixed into the urine). Finally, again, even if Miller's "experience and training" showed that he "was qualified to interpret this field test results," IB, p. 20, this interpretive expertise proves nothing about the reliability of the test itself (or about Miller's ability to opine on that).

As to Miller being "undisputedly available to testify regarding the reliability of the field test based on his experience," IB, p. 20, he was certainly "available to testify" in the sense that he was on the witness stand. But the State cites nothing in the record to show Miller was "undisputedly" qualified to testify about the "reliability of the urinalysis"; and he did not in fact do so. To the contrary, he conceded that he didn't know "scientifically" how the test worked or its reliability. RII-289-92. He conceded that "all [he] know[s] is that you poke the stick test into the urine sample and it comes back with a result" (although he also knew that "cross reactions ... can occur." RII-289, 292.

As to Miller's "experience [in] comparing in-office tests against independent lab results," IB, p. 20, all we know about that is: 1) On an unknown number of prior occasions, he "had a presumptive test be positive and then [the lab test] come back negative"; and 2) in the present case, the urinalysis showed positive for Oxycodone but the lab test was negative for that substance (and positive for hydrocodone). RII-287-88, 291.

The State asserts "*Terry* ... acknowledges that an officer's training and experience provide a basis for the officer's testimony in this area," and *Terry* "is consistent with decisions of this Court and other district courts authorizing opinion testimony based on personal experience and knowledge." IB, pp. 20-21. The State cites nothing in *Terry* where that court "acknowledges that an officer's training and experience provide a basis for the officer's testimony in this area." Again, *Terry* stands for the simple proposition that, when the defendant "did not object to the probation officer testifying as to the results of the [urinalysis]," the "trial court [could] properly conclude[] that the testimony presented was

sufficient to support a finding of violation of probation." 777 So. 2d at 1094. Even if *Terry* did "acknowledge" what the State asserts, ... so what? *Any* witness's "training and experience" *might* "provide a basis for testimony" "in this area," *if* that training and experience proves that the witness is qualified to offer expert opinion "in this area." Again, the State didn't prove that *this* "officer's training and experience" qualified him to provide the challenged "testimony in *this* area."

The State does not cite the cases it believes support its assertion that *Terry* "is consistent with decisions of this Court and other district courts authorizing opinion testimony based on personal experience and knowledge." Of course, again, the general principle here -- "opinion testimony can be based on personal experience and knowledge" -- is as unremarkable as it is inapplicable. Again, the issue here is whether the State proved that, "based on *Miller's* personal experience and knowledge," he was qualified to opine on this test result and its reliability. Again, the State did not prove that.

In sum, 1) the district court decision does not conflict with any other Florida cases; and 2) it correctly applies, in a straightforward fashion, well-recognized basic rules (regarding the admission of expert testimony) to the specific facts of this particular case.

CONCLUSION

This Court should either dismiss this case because review was improvidently granted, or it should approve the district court decision.

CERTIFICATE OF SERVICE

I certify that a copy has been e-mailed to the Office of the Attorney General at CrimappTPA@myfloridalegal.com, on this _____ day of June, 2015.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

Respectfully submitted,

/S/ RICHARD J. SANDERS

HOWARD L. "REX" DIMMIG,II
Public Defender
Tenth Judicial Circuit
(863) 534-4200

/S/RICHARD J. SANDERS
Assistant Public Defender
Florida Bar Number 0394701
P. O. Box 9000 - Drawer PD
Bartow, FL 33831
appealfilings@pd10.state.fl.us
rsande2@tampabay.rr.com
cclark@pd10.state.fl.us