DNA EVIDENCE

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Introduction:

DNA evidence is a very complex and ever changing area of law. Since these cases rarely go to trial, I will not attempt to do an extensive analysis in this outline. By the time you actually have to prepare for a trial, the material would likely be outdated. For the sake of simplicity, this chapter will be comprised of an exhaustive list of Florida appellate decisions which discuss the admissibility of DNA evidence. I have also included a list of case law from the other states. This list was provided to me by the American Prosecutor's Research Institute. If you should need further information on DNA evidence, I have compiled a separate DNA notebook that contains various outlines and articles which are very helpful. A copy of this will be available in the library. It should also be noted that the primary resource in this are is a book entitled DNA Technology in Forensic Science. This book was produced by the National Research Council. As noted in the Hayes opinion below, the Florida Supreme Court relies on this work to determine if a particular procedure or method is generally accepted in the scientific community. You should consult this book prior to any legal motions concerning the admissibility of DNA.

Florida Supreme Court:

In re: Amendments to Florida Rules of Criminal Procedure3.170 and 3.172, 953 So.2d 513
(Fla. 2007):

> Discusses new rule regarding DNA inquiry by courts prior to accepting guilty or nolo contendere plea.

In Re: Amendments to Florida Rule of Criminal Procedure to Extend Time Limitations for Filing Motion for Post conviction DNA Testing, 935 So.2d 1218 (Fla. 2005):

> This deals with proposed revisions in the rules regarding the time to file post-conviction DNA motions.

Fitzpatrick v. State, 900 So.2d 495 (Fla. 2005):

> Locating capital murder defendant's DNA was inevitable, and thus even if blood sample was involuntarily seized from defendant as a result of police misconduct, sample would have been admissible under inevitable discovery rule; requesting blood sample or obtaining sample through a warrant would have been a normal investigative measure as police had initiated an investigation of defendant prior to requesting a blood sample, and record revealed that the police considered defendant a suspect prior to requesting a blood sample from him based on evidence that defendant was the last person to be seen with victim alive.

Kokal v. State, 901 So.2d 766 (Fla. 2005):

> Defendant failed to preserve on appeal his argument that his due process rights were violated by State's failure to preserve evidence that could have potentially been subjected to DNA testing, where he did not present the argument to the trial court.

Robinson v. State, 865 So.2d 1259 (Fla. 2004):

> No error in denying motion for DNA testing of certain evidence when defendant failed to allege with specificity how DNA testing of each item requested to be tested would give rise to reasonable probability of acquittal or lesser sentence.

Hitchcock v. State, 866 So.2d 23 (Fla. 2004):

> Movant, in pleading requirements of rule 3.853, must lay out with specificity how DNA testing of each item requested to be tested would give rise to a reasonable probability of acquittal or a lesser sentence.
>
> Movant must demonstrate nexus between the potential results of DNA testing on each piece of evidence and the issues in the case.
>
> Defendant’s motion was insufficient where motion gave only a general reference and identification of the type of item for which testing was requested, without any other relevant information.

Butler v. State, 842 So.2d 817 (Fla. 2003)

No error in trial court's finding that DNA expert was qualified to testify to the frequency with which DNA profiles occurred in population, although expert was not involved in the creation of the database.

Expert's use of product rule to determine population frequencies was not erroneous and expert's testimony was based on proven scientific principles.

Murray v. State, 838 So.2d 1073 (Fla. 2002):

New trial required where state failed to meet its burden of proving that testing procedures used in analyzing DNA evidence were generally accepted in scientific community; and the unreliability of the testing procedures was compounded by fact that state's expert used all DNA found in hair, rendering it impossible for defendant to conduct independent analysis, and fact that there was general sloppiness in documenting tests which even the analyst admitted was below standards normally accepted, making it impossible for experts retained by defense to adequately review test results.

In order for DNA testing to be generally accepted as reliable within scientific community, there must be independent review by second qualified analyst.

This requirement was not met where scientist who conducted tests and performed initial review found tests were inconclusive, and scientist's supervisor reached opposite conclusion.

One of elements of second independent review is to ensure that results of initial review were reliable, and if two analysts disagree, tests should be deemed inconclusive in absence of further analysis.

Further, analyst failed to properly document required controls of test by taking picture of control strips which would have shown whether tests had been contaminated.

Butler v. State, 842 So.2d 817 (Fla. 2002):

No error in trial court's finding that DNA expert was qualified to testify to the frequency with which DNA profiles occurred in population although expert was not involved in the creation of the database.

Expert's use of product rule to determine population frequencies was not erroneous and expert's testimony was based on proven scientific principles.

Gudinas v. Moore, 816 So.2d 1095 (Fla. 2002):

No error in denying relief on claims that trial counsel was ineffective during guilty phase for agreeing to not argue the lack of DNA evidence if state did not introduce DNA evidence at trial or failing to subject semen and saliva that were discovered at rice scene to DNA testing. It was a legitimate strategic decision.

No error in denying order directing state to release physical evidence found at murder scene for DNA testing using PCR method based on determination that defendant did not establish sufficient basis for the testing.

Darling v. State, 808 So.2d 145 (Fla. 2002):

No merit to claim that DNA expert who was not a statistician was not qualified to testify regarding statistical analysis which was conducted.

No merit to claim that because defendant is Bahamian, a Bahamian database, rather than FBI's African-American population database, should have been employed.

King v. State, 808 So.2d 1237 (Fla. 2002):

No error in concluding that there was no bad faith on part of state regarding destruction of vaginal washings and rectal swab of victim in case where defendant sought post-conviction testing of DNA.

No error in denying motion for mitochondrial DNA testing of hair fragment found on victim's nightgown and three hairs obtained in pubic hair combing of victim or in denying additional and independent testing using STR DNA method of fingernail scrapings taken from victim.

No error in trial court's determination that defendant had not made required showing, pursuant to rule 3.853, for testing hairs or for re-testing fingernail scrapings .

Ford v. State, 802 So.2d 1121 (Fla. 2001):

> Prosecutor's reference to ``flesh'' found inside defendant's folding knife during direct examination of state's DNA expert appears to be inadvertent and, in light of court's curative instruction, does not appear to be so prejudicial that no reasonable person would have allowed the trial to continue.

Overton v. State, 801 So.2d 877 (Fla. 2001):

> Where defense was informed by the state and the Virginia laboratory that performed DNA tests that the requested manuals, tests, and studies were much too voluminous to copy and ship, defense was invited to review the material at the lab, defense declined to visit the lab, phone its director, set a deposition, or even question director at *Frye* hearing with respect to the information defense sought, and continuance sought by defense was not to visit lab but in the event the court were to grant the motion to compel, no abuse of discretion in deciding that no discovery violation occurred and denying motion for continuance.

Sireci v. State, 773 So.2d 34 (Fla. September 7, 2000):

> Claim that DNA testing would be able to provide battery identification with regard to hairs found in towels at motel room and demonstrate that girlfriend's involvement in murder was more than she led jury to believe is time-barred where final amended version of 3.850 motion raising DNA issue was filed approximately nine years after DNA testing was recognized in Florida.
>
> Assuming claim was not time barred, evidence was not of such nature, that it would probably produce acquittal on retrial.

Brennan v. State, 754 So.2d 1 (Fla. 1999):

> Error in admitting testimony of State's DNA expert without first establishing that the expert's source for calculation was generally accepted in the scientific community was not reversible in light of all the evidence of guilt.

McDonald v. State, 743 So.2d 501 (Fla. 1999):

> Claim that trial court failed to determine admissibility of DNA test results and the basis of the statistical comparisons according to standards enunciated in Frye v. United States, was not preserved for appellate review where defense counsel did

not object to admissibility of DNA evidence or request a *Frye* hearing prior to the time the testimony was admitted in evidence.

Nelson v. State, 748 So.2d 237 (Fla. May 27, 1999):

Trial court erred in permitting state's DNA expert to testify regarding a calculation derived from a particular source without first establishing that the source was generally accepted in the scientific community.

Error in permitting state's DNA expert to testify regarding a calculation derived from a particular source without first establishing that the source was generally accepted in the scientific community was harmless, regardless of whether defendant or state bore the burden of establishing error, where expert's use of FBI database, a generally accepted source in the scientific community, instead of the figure given by population geneticist would have reduced the likelihood of anyone else in the general population having the same DNA match as defendant to zero, and where defendant confessed to crime.

Wainwright v. State, 704 So.2d 511 (Fla. 1997):

No abuse of discretion in admitting new DNA test results which revealed three genetic loci in addition to the three revealed to defense counsel before trial where defendant did not allege that state deliberately withheld evidence or committed discovery violation, but simply that state was dilatory in conducting DNA tests; trial court gave defense a twenty four hour continuance to allow its expert to evaluate additional evidence and defense made no subsequent objection.

Walker v. State, 707 So.2d 300 (Fla. 1997):

Objection to admissibility of PCR (DNA) testing on cigarette butt in victim's car which matched 12.2 percent of the African-American population, 6 percent of the Caucasian population, and 4.8 percent of the Hispanic population, as well as the defendant, was properly overruled by trial court because the generality of the test results should go to the weight of the evidence and not to the admissibility.

Kimbrough v. State, 700 So.2d 634 (Fla. 1997):

"When scientific evidence is to be offered which is of the same type that has already been received in a substantial number of other Florida cases, any inquiry

into its reliability for purposes of admissibility is only necessary when the opposing party makes a timely request for such an inquiry supported by authorities indicating that there may not be general scientific acceptance of the technique employed." Since there was not timely request for an inquiry, the evidence was properly admitted.

Brim v. State, 695 So.2d 268 (Fla. 1997):

In order for DNA test results to be admissible, both first step of testing process which relies upon principles of molecular biology and chemistry and second step which involves calculation of population frequency statistics must satisfy test announced in *Frye* for admissibility of new or novel scientific evidence.

Judge is required to determine that basic underlying principles of scientific evidence have been sufficiently tested and accepted by relevant scientific community.

Discussion: This case addressed a conflict between Brim v. State, 654 So.2d 184 (Fla. 2d DCA 1995) and Vargas v. State, 640 So.2d 1149 (Fla. 1st DCA 1994). The *Brim* decision was disapproved to the extent that it determined that DNA population frequency statistics need not satisfy a *Fry* test. This is a rather detailed case and should be read carefully.

Brim v. State, 695 So.2d 268 (Fla. 1997):

The motion for Rehearing filed by Respondent, having been considered in light of the revised opinion, is hereby denied.

Discussion: The reason this case is cited here is to bring your attention to the fact that footnote #8 from the original opinion at 22 Fla. L. Weekly S45a, has been revised. The content of this revision is given in this case. The note concern's the State's motion for rehearing in which it argues that the ceiling principles are not only unnecessary but unreliable. The court explains why it disagrees with this argument.

Murray v. State, 692 So.2d 157 (Fla. 1997):

Trial court erred in failing to determine admissibility of PCR DNA evidence under Frye, that one hair taken from scene of crime matched defendant's instead finding that evidence was more properly evaluated by jury as matter of weight.

Error to fail to conduct step-by-step inquiry to determine whether either PCR method of DNA typing used by state's expert, or probability calculations used to report the test results, could be admitted.

Expert's testimony would not assist jury in understanding DNA evidence where expert did not explain how he performed DNA tests or the basis of statistical conclusions.

Expert was not qualified to report population frequency statistics at issue, where he admitted having no knowledge about the database upon which his calculations were based.

Henyard v. State, 689 So.2d 239 (Fla. 1996):

In order for DNA evidence to be admissible, DNA testing procedures utilized by laboratory need not precisely conform to National Research Council recommendations so long as laboratory's testing procedures meet *Frye* test for reliability.

Discussion: An FDLE serologist testified about blood stains. The defense argued that FDLE testing was unreliable because the laboratory was not in compliance with the recommendations of the NRC in its report on DNA testing and methodology and that the only person who testified as to the reliability of the testing procedures utilized by BDLE was the FDLE employee who conducted the tests. The Supreme Court referred to its previous *Hayes* decision in which it took judicial notice "that DNA test results are generally accepted as reliable in the scientific community, provided that the laboratory has followed accepted testing procedures that meet the *Frye* test to protect against false readings and contamination." In taking judicial notice, the court placed great emphasis on the recommendations of the NRC. In spite of its reliance on the NRC report, "The *Hayes* decision does not hold that testing procedures which do not meet NRC recommendations are per se unreliable and thereby render the test results inadmissible." The trial court held an adequate *Frye* hearing regarding the RFLP method and was justified in admitting the results at trial.

Hayes v. State, 660 So.2d 257 (Fla. 1995):

Judicial notice taken that DNA test results are generally accepted as reliable in scientific community, provided that laboratory has followed accepted testing procedures that meet the *Frye* test.

Although DNA evidence would assist jury in this case, evidence of match between defendant's DNA and DNA found in tank top discovered at scent of murder was inadmissible as a matter of law because "band shifting" technique used by laboratory technician in this case was not sufficiently established to have gained general acceptance in scientific community under the *Frye* test.

Error to admit evidence of DNA match on sample taken from vaginal swab where *Frye* test was not properly applied to methodology used by technician.

Discussion: This is probably the most significant DNA case in Florida. The court notes that "this Court addresses for the first time how deoxyribonucleic acid (DNA) test results may be admitted in the trial courts of this State." The testing in this case was done by Life Codes. Defense counsel presented expert testimony that substantially challenged the procedures used by the company that conducted the DNA tests. The Supreme Court states that the admission into evidence of expert opinion testimony of a new scientific principle requires a four step inquiry. The trial judge must determine whether:

1. expert testimony will assist the jury in understanding the evidence or in determining a fact in issue;

2. the expert's testimony is based on a scientific principle or discovery that is "sufficiently established to have gained general acceptance in the particular field in which it belongs under the *Frye* test.

3. the particular expert witness is qualified to present opinion evidence on the subject in issue.

4. If the answer to the first three questions in the affirmative, the trial judge may proceed to step four and allow the expert to present an opinion to the jury.

In making its ruling, the court relies heavily on the report issued by the National

Research Council of the National Academy of Sciences. The court basically implies that if the testing procedure is not recognized by the NRC then it is not generally accepted in the scientific community. (please note that we have this report in our library) Over one half of the court's opinion quotes directly from the report. In conclusion, the court notes that DNA testing methodology has not yet reached the level of stability of other forms of identification such as fingerprinting comparisons and the testing procedures must strictly comply with accepted standards. Once again, you will have problems if it does not comply with the NRC report. Band shifting is specifically excluded as a methodology until more scientific research is done on the matter. Please read the is case carefully prior to going forward with any DNA case. Pay particular attention to the four assumptions listed in the opinion and their significance.

Zeigler v. State, 654 So.2d 1162 (Fla. 1995):

No error in denying defendant's request for DNA testing of bloodstain evidence that had been introduced at trial, which defendant sought on ground that new testing method might reveal exculpatory evidence establishing his innocence. Defendant should have raised claim for DNA testing in prior post conviction proceeding during which the requested testing method became available.
Even if claim were not procedurally barred, and test results comported with the scenario most favorable to defendant, he still would not have been able to show that evidence would have probably produced an acquittal.

Discussion: The defendant was convicted of murder in 1976 based partly on blood stain evidence which was tested without the benefit of DNA technology. He now wants to have the stains tested for DNA. The court rejects his post conviction arguments.

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

No error in refusal to allow defendant to depose DNA technician where state did not intend to call technician as witness at trial. Testimony of DNA technician's supervisor and technician's affidavit sufficient to lay proper predicate for admission of DNA test results.

Discussion: This case is simply a revised opinion of Washington v. State, 653 So.2d 362 (Fla. 1994):

Washington v. State, 653 So.2d 362 (Fla. 1994):

> Blood samples which defendant voluntarily gave were admissible although samples were obtained for an unrelated case.
>
> Taking of blood is not a violation of self-incrimination clause.
>
> No error in refusal to allow defendant to depose DNA technician where state did not intend to call technician as a witness at trial.
>
> Testimony of DNA technician's supervisor and technician's affidavit were sufficient to lay proper predicate for admission of DNA test results.
>
> Discussion: The defendant objected that the court did not allow him to depose the DNA technician. He also argued that the state failed to lay a proper predicate for admission of the DNA test results by failing to call the technician as a witness. In ruling against the defendant, the Supreme Court noted that the technician submitted an affidavit which stated that she had conducted over 1200 DNA tests, had no specific recollection of the defendant's particular test, and would have to rely on lab notes to discuss the testing procedure. The DNA results were presented through the testimony of the technician's supervisor. The supervisor testifies as to the scientific reliability of the tests, interpreted the "DNA test results, worked as a team with the technician, and supervised her as she conducted the actual test. The supervisor's familiarity with the test, his supervision over the technician's work, and the technician's affidavit laid a proper predicate for admission of the DNA test results. The Supreme Court relied on its own decision in Robinson v. State, 610 So.2d 1288 (Fla. 1992) and ruled:
>
> > In admitting the results of scientific tests and experiments, the reliability of the testing methods is at issue, and the proper predicate to establish that reliability must be laid. If the reliability of a test's results is recognized and accepted among scientists, admitting those results is within a trial court's discretion. When such reliable evidence is offered, 'any inquiry into its reliability for purposes of admissibility is only necessary when the opposing party makes a timely request for such an inquiry supported by authorities indicating that there may not be general scientific acceptance of the technique employed.'

Esty v. State, 642 So.2d 1074 (Fla. 1994):

It was error to permit expert in field of DNA testing to offer opinion without permitting defense counsel to conduct voir dire examination of expert as to underlying data. However, error was harmless.

Discussion: The opinion discusses sections 90.705(1) and (2) which indicate that an expert may testify without disclosing the facts or data upon which an opinion is based, however the opposing party may conduct a voir dire examination prior to the witness giving his opinion.

Wyatt v. State, 641 So.2d 1336 (Fla. 1994):

Court rejects defendant's claim that statistical testimony regarding DNA evidence was improperly admitted. (see footnote 4)

Robinson v. State, 610 So.2d 1288 (Fla. 1992):

Refusal of continuance before DNA experts testified was not abuse of discretion in rape prosecution; defendant had known for a month that DNA testing was being performed, knew results of testing one week before trial, and received copy of that report at least three days before laboratory employees testified.

DNA test results were admissible absent evidence questioning general scientific acceptance of such testimony.

Discussion: The court took special note of defense counsel's lack of authorities indicating that there may not be general scientific acceptance of the technique employed. Counsel merely voir dired the laboratory's employees and cross-examined them, making extensive inquiries as to the standards used in DNA comparisons.

District Courts of Appeal

Mitchell v. State, 2015 WL 7008144 (Fla.App. 4 Dist.,2015)

Motion for postconviction forensic DNA testing of physical evidence was facially sufficient to warrant evidentiary hearing; postconviction court determined that DNA test results excluding defendant as source of semen recovered from victim

would not necessarily exonerate him as a party to the crimes, but victim claimed that all three assailants had raped her, meaning that, if DNA testing revealed that semen containing the DNA profile of three different men was found within the victim, but none of it matched defendant, then he could be exonerated.

Therlonge v. State, 2015 WL 2393283 (Fla.App. 4 Dist.):

Police investigation was not sufficient to trigger the extension of statute of limitations for when DNA evidence was preserved and the identity of the accused was later established in prosecution for lewd and lascivious battery of a person under 16 years of age, where DNA evidence was collected only after defendant was located by police, well after their original investigation was declared inactive.

The facts of this case present a good lesson for officers. Police learned that a 15 year old girl gave birth to a baby. The 29-year-old suspect was listed as the father on the birth certificate. The suspect fled the state when he learned of the investigation. The police classified the case as inactive while they periodically made efforts to locate him. Two years and 9 months later, they found the suspect and got his DNA. They then got DNA from the baby and mother. When the results came back a little past the 3 year statute of limitations, the case was filed. The State argued that 775.15(16) gave them additional time to file. This section states,

> *In addition to the time periods prescribed in this section, a prosecution for [a lewd or lascivious offense] may be commenced at any time after the date on which the identity of the accused is established, or should have been established by the exercise of due diligence, through the analysis of deoxyribonucleic acid (DNA) evidence, if a sufficient portion of the evidence* ***collected at the time of the original investigation*** *and tested for DNA is preserved and available for testing by the accused [.]*

The court ruled that since the DNA was not collected "at the time of the original investigation," this section did not apply. The court noted that the police did not even collect DNA from the mother or the baby during the original investigation.

Smith v. State, 28 So.3d 838 (Fla. 2009):

> Admission of evidence of the results of DNA tests on a known sample taken from defendant and an unknown semen sample taken from minor victim's shirt did not violate defendant's Sixth Amendment right of confrontation at a capital-murder trial even though the biologists who performed the tests did not testify; the supervisor of the DNA-analysis team was the person who evaluated the raw test results, compared the DNA sample found on victim's shirt to the sample taken from defendant, and concluded that defendant's DNA matched the DNA from the shirt, and the supervisor was present at trial and subject to cross examination about the results that she obtained.

Allen v. State, 2011 WL 2200667 (Fla. 4th DCA 2011)

> DNA testing requires a two-step process, one biochemical and the other statistical, and the first step uses principles of molecular biology and chemistry to determine that two DNA samples look alike, and the second step uses statistics to estimate the frequency of the profile in the population, and both steps require use of scientific methods that must satisfy the Frye test.
>
> In context of DNA statistical analysis, a properly qualified expert on population frequency must be able to show that her testimony regarding the statistical methodology used and the database employed will be based on established scientific principles in which she was trained; however, the expert does not have to be a statistician or mathematician to testify as to the statistical results.
>
> Admissibility of expert's DNA statistical analysis is not contingent upon the expert having compiled the database himself, and instead, a sufficient knowledge of the authorities pertinent to the database is an adequate basis on which to render an opinion.
>
> Evidence did not reveal the statistical methodology used by expert to calculate the DNA population frequencies in case because State's expert never testified, either during the voir dire examination or during her direct examination, as to the database or methodology she used to calculate the statistical significance of defendant's DNA profile matching that of samples taken from the crime scene, and thus case would be remanded to trial court for a limited evidentiary hearing,

wherein trial court was to assess State's expert's competence to present the statistical evidence and to clarify the exact methodology and database used for her calculations.

Casica v. State, 24 So.3d 1236 (Fla. 4th DCA 2009):

Defendant was procedurally prejudiced by State's discovery violation, thus warranting new trial; although violation was not willful, state's failure to disclose change in witness testimony materially hindered defendant's trial preparation, defendant's trial strategy with regard to witness would have been materially different had he known of change, instead of moving to strike testimony, defense counsel would have hired expert to rebut testimony, while defendant may have hired expert regardless of discovery violation, he would not have been able to fully prepare expert for trial without knowledge that witness used database for DNA analysis, re-deposing witness in middle of trial, trial court's proposed solution, would not have been adequate to resolve state's discovery violation, defendant still would have been without expert to rebut testimony, and this was especially harmful because primary theory of defense was misidentification.

Morrow v. State, 914 So.2d 1085 (Fla. 4th DCA 2005):

Retroactive application, against defendant who was nearing the end of his probation imposed after he pled guilty to false imprisonment with a deadly weapon, of statute requiring persons convicted of certain crimes and still incarcerated or subject to court supervision to provide blood and other biological samples for DNA testing did not violate ex post facto clause; statute did not alter the elements of defendant's criminal conduct or increase the penalty for his crime.

Gibson v. State, 915 So.2d 199 (Fla. 4th DCA 2005):

State failed to demonstrate that its expert on DNA evidence in robbery and burglary case was qualified to testify as to the statistical significance of a DNA match, although expert had taken courses in statistics and was qualified to operate statistical program, where expert did not explain method she used and did not demonstrate knowledge of authorities pertinent to the database, but merely testified that the formula used to calculate the statistics in the case was recommended by National Research Council.

> DNA testing evidence requires a two-step process to be considered valid, one biochemical and the other statistical; first, a biochemical analysis determines that two samples are alike, and then statistics are employed to determine the frequency in the population of that profile.
>
> Both the biochemical and the statistical steps in the two-step process required for DNA testing evidence must satisfy the *Frye* test for validity.
>
> It is not mandated that a witness testifying as to DNA evidence be a statistician or a mathematician to be qualified to testify as an expert on the statistical significance of a match; however, the qualified expert must demonstrate a sufficient knowledge of the database grounded in the study of authoritative sources.

Jones v. State, 909 So.2d 382 (Fla. 1st DCA 2005):

> Post conviction DNA case.

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

> Deception on the part of police officers, standing alone, does not invalidate consent to a warrantless search; absent coercion, threats, or misrepresentation of authority, deception is a viable and proper tool of police investigation.
>
> Defendant's consent to warrantless search in form of saliva sample, obtained by police officer after he manufactured a fictitious burglary in order to obtain defendant's consent to take saliva sample for sexual assault investigation, was not an acquiescence to claim of lawful authority, and thus consent was voluntary; police deception did not negate consent, defendant was clearly aware of fact that officer wanted DNA sample in order to investigate a crime, officer did not misrepresent fact that he had no search warrant, and officer did not indicate that defendant had no choice regarding whether to provide sample.
>
> Discussion: This issue arises occasionally in sex crimes investigations when a detective wants to obtain consent for a suspect's DNA and thinks he is more likely to get it if a non-existent offense is used as a justification. This case approves such tactics, but points out that it is in conflict with State v. McCord, 833 So.2d 828 (Fla. 4th DCA 2004), which held such misrepresentations of the nature of the investigation *may* provide evidence of coercion. This case contains a good

discussion of existing case law on the topic. Hopefully the Supreme Court will side with the Wyche court.

Everett v. State, 893 So.2d 1278 (Fla. 2004):

"The court did not err in finding the expert qualified to testify on population frequency because her testimony was based on established scientific principles in which she was trained and had experience."

Discussion: The case discusses the qualifications of the witness and the methods she used to calculated DNA population frequency analysis.

Gaffney v. State, 878 So.2d 470 (Fla. 5th DCA 2004):

Post conviction DNA issue.

Cheshire v. State, 872 So.2d 427 (Fla. 5th DCA 2004):

Motion for post-conviction DNA testing was legally sufficient in that it contained all of required allegations listed in Florida Rule of Criminal Procedure 3.853(b), and trial court should have ordered a response from state before deciding whether motion should be summarily denied or set for evidentiary hearing.

If a legally sufficient motion is filed, trial court must order prosecuting authority to respond.

Trial court incorrectly ruled the motion insufficient and then addressed motion on merits.

Merson v. State, 876 So.2d 641 (Fla. 5th DCA 2004):

Record does not support denial of rule 3.853 motion based on finding that any physical evidence that may have contained DNA evidence had been destroyed.

Bevil v. State, 875 So.2d 1265 (Fla. 1st DCA 2004):

Error to permit FDLE crime lab analyst to testify about DNA population frequency statistics derived from FDLE database where state failed to establish that FDLE database was generally accepted in scientific community.

Given testimony of state's own witnesses at *Frye* hearing that errors in FDLE database had caused sufficient concern that a reexamination of the entire database was ordered and that, pending completion of that reexamination only the FBI database was to be used, it was incumbent on state to demonstrate that, notwithstanding that concern, FDLE database was generally accepted in scientific community.

Springer v. State, 874 So.2d 719 (Fla. 5th DCA 2004):

Requirement that defendant give DNA samples as required by section 943.325 does not violate Fourth Amendment right to be free from unlawful searches.

Discussion: This case provides very little discussion, but simply indicates that the issues were resolved by previous opinions.

Olvera v. State, 870 So.2d 927 (Fla. 5th DCA 2004):

Second rule 3.853 motion in which defendant focused on lack of testing of hair samples found in defendant's car properly denied after trial court found that no matter what the outcome of any test of hairs found in defendant's car, fact remained that DNA testing had shown that defendant's semen was found in murder victim's vagina

Even if defendant were procedurally allowed to seek again a re-evaluation of vaginal swab, which he did not succeed in obtaining prior rule 3.853 motion, and even though K3 and K4 samples may have been degraded when one expert examined them, all three experts testified that they found the K2 sample taken from the defendant matched DNA found in the vaginal swab.

Reed v. State, 874 So.2d 648 (Fla. 3d DCA 2004):

Defendant who pleads guilty or nolo contendere may not seek post conviction DNA testing.

Collins v. State, 869 So.2d 723 (Fla. 4th DCA 2004):

> Motion alleging that case was one of mistaken eyewitness identification and that testing of DNA evidence would exonerate defendant and demonstrate that he was not burglar and that it was not defendant's blood at point of entry into victim's apartment was legally sufficient and not conclusively refuted by record. Remand for evidentiary hearing to consider merits of claim and whether evidence is in testable form.

Gonzalez v. State, 869 So.2d 1231 (Fla. 2d DCA 2004):

> Statute requiring defendant to give blood sample for DNA testing is not unconstitutional.
>
> Trial court erred in denying defendant's motion for injunction to prevent state from obtaining blood sample from him for DNA analysis where felony defendant committed, conspiracy to commit sexual battery, is not one of the felonies enumerated in statute.

Crow v. State, 866 So.2d 1257 (Fla. 1st DCA 2004):

> The right to obtain scientific evidence to show that a person was wrongfully convicted is a proper matter for the courts, and statute governing post conviction DNA testing does not prevail over rule on issue of eligibility for post conviction DNA testing.
>
> Trial court erred in summarily denying motion on ground that motion did not allege that identification of the defendant is a genuinely disputed issue, a statement that is required under the statute but not under rule.
>
> Where defendant, who was convicted of first degree murder, admitted that he had stabbed the victim, and state used evidence that the victim had semen in his rectum to support theory of premeditation and to refute defendant's claim of self-defense, defendant was entitled to DNA testing of the semen which allegedly would prove that defendant was not the source of the semen.

Delidle v. State, 866 So.2d 748 (Fla. 5th DCA 2004):

Defendant who enters guilty or nolo contendere plea may not seek post conviction DNA testing.

Harris v. State, 868 So.2d 589 (Fla. 3rd DCA 2004):

Trial court did not err in denying motion for post conviction DNA testing upon finding that evidence against defendant was overwhelming and concluding that all physical evidence collected in the case had been tested for DNA and that there was no reasonable probability that the results of those tests would have led to defendant's acquittal at trial.

Schofield v. State, 861 So.2d 1244 (Fla. 2d DCA 2003):

Where defendant's facially sufficient motion for post conviction DNA testing sufficiently alleged that he would be exonerated of murder by DNA testing of evidence, court erred in denying motion in reliance on state's assertion that DNA testing would not exonerate defendant without attaching any portions of trial record or conducting evidentiary hearing to determine issue.

Court could not properly consider discrepancies between defendant's allegations and state's allegations without considering trial record or conducting evidentiary hearing.

Zollman v. State, 854 So.2d 775 (Fla. 2d DCA 2003):

Where if defendant and state disputed whether DNA evidence defendant sought to have tested actually existed, trial court could not, based on state's unsown response, make factual determination that evidence did not exist without affording defendant the benefit of an evidentiary hearing.

Marsh v. State, 852 So.2d 945 (Fla. 2d DCA 2003):

Where defendant claimed that DNA evidence existed, but state denied the claim, factual dispute resulted and evidentiary hearing we required.

Smith v. State, 854 So.2d 684 (Fla. 2d DCA 2003):

Defendant who enters guilty plea or nolo contendere plea is not entitled to post

conviction DNA testing.

Borland v. State, 848 So.2d 1288 (Fla. 2d DCA 2003):

> Error to deny motion for post conviction DNA testing without conducting evidentiary hearing where defendant sought DNA testing of rape kit and clothes allegedly taken from victim at hospital immediately following offense, trial court concluded that motion was facially sufficient and ordered state to respond, and state filed unsworn response to motion claiming that rape kit was not collected from victim and that victim's clothing was never placed into evidence.
>
> State's response created factual dispute as to whether DNA evidence existed. Unsworn allegations in state's response not sufficient to support denial of defendant's motion.
>
> Even affidavit from state would not be sufficient to resolve factual issue, as affidavit serves functional equivalent of testimony which is contradictory to allegations sworn as true by movant and, as such, would be subject to confrontation at evidentiary hearing.

Saffold v. State, 850 So.2d 574 (Fla. 2d DCA 2003):

> In moving for post conviction DNA testing, defendant failed to provide sufficient details of evidence that was introduced at trial or indicate whether he raised misidentification defense or any other defense at trial, and failed to show how DNA testing would exonerate him from unspecified crime or mitigate his sentence.
>
> Fact that movant was identified at trial by victims does not itself lead to conclusion that identification is not a disputed issue.

Manual v. State, 855 So.2d 97 (Fla. 2d DCA 2003):

> Error to summarily deny motion for post conviction DNA testing where there is a reasonable probability that defendant would have been acquitted had DNA evidence demonstrated that semen found on sexual battery victim did not match his DNA.

Motion sufficiently alleged that defendant was innocent of the crimes charged where motion alleged that defendant was at a birthday party at the time of the crimes.

Fact that defendant was identified by victim did not mean that identification is not a disputed issue.

Trial court improperly addressed merits of motion without first obtaining a response from the state, rather than merely determining whether the allegations in the motion were facially sufficient.

Chesire v. State, 848 So.2d 1197 (Fla. 5th DCA 2003):

Notice of appeal filed more than 30 days after rendition of order on post conviction DNA testing, denying rehearing and after second, unauthorized motion for rehearing, was untimely filed.

Although response to appellate court's show cause order alleged that defendant never received copy of order denying first motion for rehearing, order indicated that copy was sent to defendant at his address of record, and defendant did not proffer as evidence the incoming mail log to show the legal mail was not delivered following rendition of order.

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Hudson v. State, 844 So.2d 762 (Fla. 5th DCA 2003):

No error in finding that state proved by preponderance of evidence that expert testifying about DNA statistical and population genetics analysis demonstrated "sufficient knowledge of the database grounded in the study of authoritative sources."

In addition to satisfying this minimum standard, expert had firsthand experience working on the FDLE database, had years of practical experience performing statistical analysis as part of her work as DNA analyst, maintained her certification in DNA analysis, a component of which involves passing regular testing in statistical analysis, and gave detailed explanation of statistical method used ands actual calculation performed in instant case.

Discussion: The defense argued that the analyst, Emily Booth, was not qualified as an expert because, (1) she is not a mathematician; (2) she is not a statistician; (3) she could not establish the scientific reliability of the statistical formulas used; and (4) she lacked sufficient knowledge of the DNA database used. The court rejected these arguments.

Magaletti v. State, 847 So.2d 523 (Fla. 2d DCA 2003):

Defendant contending that state should not have been allowed to introduce evidence of mtDNA analysis performed on single hair found in victim's binding

because mtDNA analysis has been primarily used for genealogical studies and to identify war remains but has not been widely accepted for use in area of forensics.

Evidence admitted at *Frye* hearing conclusively established that method of mtDNA analysis, as well as statistical calculations used to determine rate of exclusion in instant case, satisfy *Frye*.

Stewart v. State, 840 So.2d 438 (Fla. 5th DCA 2003):

Defendant who enters guilty or nolo contendere plea may not seek post conviction DNA testing based on statute providing that defendant who has been "tried" and found guilty of committing a crime may petition court for such testing.

Doss v. State, 840 So.2d 375 (Fla. 1st DCA 2003):

Defendant entitled to belated appeal or order denying motion for DNA testing where order failed to inform defendant of right to take an appeal of order within 30 days.

Huffman v. State, 837 So.2d 1147 (Fla. 2d DCA 2003):

Error to deny motion for post conviction DNA testing on contents of rape kit, without finding whether state had shown that rape kit evidence was still available for testing, after concluding that, based on other evidence introduced at trial, defendant could not show reasonable probability that he would have been acquitted if DNA evidence had been admitted at trial.

DNA testing of evidence would show whether, in fact, defendant was perpetrator of sexual battery, and there is reasonable probability that he would have been acquitted had DNA evidence demonstrated that contents of rape kit were inconsistent with defendant's DNA.

Dedge v. State, 832 So.2d 835 (Fla. 5th DCA 2002):

Denial of rule 3.850 motion as time-barred affirmed without prejudice to filing rule 3.853 motion which contains information required by that rule.

Rule 3.853 supersedes prior supreme court decision in *Ziegler v. State*, in which court held that similar motion was time-barred and successive.

Law of the case doctrine is inapplicable in instant case because there has been intervening legislative action and intervening decisions of higher courts since denial of defendant's prior rule 3.850 motion seeking DNA testing.

Behrens v. State, 830 So.2d 190 (Fla. 4th DCA 2002):

Discrepancies in name on index card to which evidence was attached and confusion as to whether there were two or four swabs of DNA do not show that there was probability of tampering.

Newberry v. State, 870 So.2d 926 (Fla. 4th DCA 2004): *on motion for rehearing*

Previous DNA test results not "inconclusive" within meaning of rule 3.853 where DNA tests were performed, experts testified as to reliability and defendant's DNA matched the DNA found on sexual battery victim, but defendant offered contrary evidence challenging reliability of prior testing methods. Under such circumstance, tests were not inconclusive, but merely contested.

Perdomo v. State, 829 So.2d 280 (Fla. 3rd DCA 2002):

Expert's testimony regarding his education and experience, the database and the methodology used to compute the frequency statistics was insufficient to establish his qualification to testify as to the population frequency statistics of DNA match.

Remand for trial court to conduct limited evidentiary hearing to assess expert's competence to present statistical evidence and to determine whether expert used the accepted product rule method to calculate the DNA statistics.

Knighten v. State, 829 So.2d 249 (Fla. 2d DCA 2002):

Error to deny post conviction DNA testing of pubic hair found at crime scene that was identified at time of trial, based on microscopic visual inspection, as being consistent with defendant's pubic hair and that was heavily relied upon by state to rebut defense of misidentification.

Trial court's rationale that identity was not disputed because victims identified defendant at trial ignores both rule's purpose and general problems with eyewitness identification.

In case at issue, there were significant problems with eyewitness identification and no corroborating evidence other than now-challenged hair.

A claim is facially sufficient with regard to exoneration issue if alleged facts demonstrate that there is a reasonable probability that defendant would have been acquitted if DNA evidence had been admitted at trial.

Yisrael v. State, 827 So.2d 1113 (Fla. 4th DCA 2002):

Results from analysis made using short tandem repeat with machine and Profiler testing kit manufactured by Perkin-Elmer corporation was subjected to testing by scientifically reliable test kit with general acceptance in relevant scientific community, and results of that testing were admissible.

Coombs v. State, 824 So.2d 958 (Fla. 3d DCA 2002):

No error in denying motion for post conviction DNA testing where motion did not state that defendant was innocent, how DNA testing requested by motion would exonerate defendant of crime, or how DNA testing would mitigate sentence received as required by rule 3.853.

Brim v. State, 827 So.2d 259 (Fla. 2d DCA 2002):

DNA evidence presented at defendant's trial satisfied *Frye* standard and was properly admitted.

Defendant conceded that *Frye* standard was satisfied as to ladder used to perform DNA test as well as specific probes used in his case and in the FBI frequency table which was applied to him.

With regard to appellate court's inquiry regarding lack of direct testimony concerning level of uncertainty in population frequency calculations, evidence supports trial court's finding that it has been generally accepted practice not to require disclosure of the degree of uncertainty in population frequency tables.

Zollman v. State, 820 So.2d 1059 (Fla. 2d DCA 2002):

Error to summarily deny motion of defendant, who had been convicted of sexual battery, kidnapping, and robbery, for postconviction DNA testing of contents of rape kit, victim's clothing, and cigarette butts found at scene of rape, on ground that motion was facially insufficient.

Motion was sufficient to allege that identification was genuinely disputed issue at trial.

Fact that victim identified defendant as her assailant at trial does not mean that identity was not genuinely disputed at trial for purposes of postconviction DNA testing.

Because defendant alleged that he is innocent, and DNA testing of contents of rape kit would bear directly on defendant's guilt or innocence, motion was sufficient to allege that DNA testing would exonerate defendant.

Hudson v. State, 820 So.2d 1070 (Fla. 5th DCA 2002):

Where defendant objected to DNA expert's testimony about population frequencies on basis that she wasn't qualified as an expert in population genetics, trial court erred in overruling the objection without inquiring into witness's expertise in this area.

Trial court must specifically determine if expert can ``demonstrate a sufficient knowledge of the database grounded in the study of authoritative sources".

Expert's trial testimony was not sufficient to demonstrate the statistical methodology employed; beyond simple multiplication, there was no testimony demonstrating that the methodology used was generally accepted in scientific community; and there was not sufficient information to demonstrate ``sufficient knowledge of the database grounded in the study of authoritative sources."

State v. Orick, 807 So.2d 759 (Fla. 1st DCA 2002):

Error to suppress blood samples taken from defendant and all information resulting from testing of samples based on determination that blood was illegally seized because defendant did not meet criteria enumerated in section 943.325.

> Defendant who was previously convicted of sexual battery and was subject to registration requirements of section 775.13 was subject to collection requirement of 943.325 where it was undisputed that none of the exemptions contained in section 775.13 applied.

Arnold v. State, 807 So.2d 136 (Fla. 4th DCA 2002):

> Trial court erred when it admitted DNA evidence at trial over defendant's objection without having held *Frye* hearing to determine whether PCR DNA testing method employed by state met *Frye* test for admissibility at trial and whether population data used in probability calculations met *Frye* test for admissibility.
>
> Case remanded for *Frye* hearing…If trial court determines that there was sufficient basis to admit DNA evidence presented at trial, conviction and sentence to be reinstated, if not, a new trial is ordered.

Hartline v. State, 806 So.2d 595 (Fla. 5th DCA 2002):

> Trial court properly found that there was no reasonable probability of acquittal if DNA evidence was reexamined. Defendant's identity was not in question, and based on sexual activity with child victim which defendant admitted performing, the victim's testimony, and acts described by eyewitness, even exculpatory DNA results would not have been given any weight by jury.

Lemour v State, 802 So.2d 402 (Fla. 3d DCA 2002):

> Polymerase Chain Reaction/Short Tandem Repeat triplexing method is generally accepted by scientific community.
>
> PCR/STR test kit does not have to be subjected to *Frye* analysis to determine scientific reliability.
>
> Failure to follow Technical Working Group on DNA Analysis Methods recommendations as to developmental validation does not render DNA test results inadmissible.

Galloway v. State, 802 So.2d 1173 (Fla. 1st DCA 2002):

No error in denial of rule 3.853 motion concerning post conviction DNA testing where allegations that defendant's DNA would not match DNA found at scene of crimes and on body of sexual battery victim do not sufficiently state how the DNA testing would exonerate defendant of the crime.

L.S. v. State, 805 So.2d 1004 (Fla. 1st DCA 2001):

Trial court properly found that section 943.325, Florida Statutes, which requires ``any person" convicted of enumerated offense who is incarcerated or under court-ordered supervision to submit blood samples for DNA analysis is constitutional as applied to juvenile who committed offense of burglary.

Convicted person, as defined in statute, has no reasonable expectation of privacy with respect to taking of a blood sample for DNA testing that outweighs state's interests in identifying convicted felons in a manner that cannot be circumvented, in apprehending criminals, in preventing recidivism, and in absolving innocent persons from harm.

Butler v. State, 801 So.2d 993 (Fla. 2d DCA 2001):

Although defendant correctly contended that section 943.325(1)(a) did not apply to him because he was not incarcerated for one of the offenses enumerated in statute, blood was drawn pursuant to search warrant, and appellate court is persuaded after reviewing warrant and application that good faith exception to exclusionary rule saved DNA evidence from suppression.

Discussion: This opinion provides few facts to help us completely understand the ruling.

Miles v. State, 799 So.2d 367 (Fla. 4th DCA 2001):

No abuse of discretion in rejecting defendant's challenge to admission of DNA samples on ground that state submitted samples to FBI for analysis, in contravention of court order limiting release of samples to state attorney's office and police department.

Section 943.325 relating to confidentiality of DNA test results does not apply to samples taken from defendant prior to conviction.

Submission of samples to FBI did not constitute willful disregard of court's order or privacy where it was undisputed that police department lacked ability to analyze the DNA samples.

Wynn v. State, 791 So.2d 1258 (Fla. 5th DCA 2001):

No error in determination that procedure used to analyze mixed DNA samples met *Frye* standard.

Brim v. State, 779 So.2d 427 (Fla. 2d DCA October 11, 2000):

This opinion discusses the very complex appellate journey of Mr. Brim which concludes by sending the case back to the trial court once again to conduct an additional evidentiary hearing.

This is a very lengthy opinion with a detailed discussion of the DNA process. It is a very good reference source.

Hall v. State, 754 So.2d 70 (4th DCA 2000):

Ineffectiveness of counsel claim for failing to depose and call as witness the sheriff's DNA expert who allegedly would have testified as to absence of defendant's DNA on victim or in any relevant area cannot be resolved without evidentiary hearing.

Neither State's contention that decision not to call DNA expert was a strategic decision nor argument that DNA testimony would have been cumulative to testimony of sexual assault nurse practitioner who examined victim after alleged sexual battery support denial of claim without evidentiary hearing.

Timot v. State, 738 So.2d 387 (Fla. 4th DCA 1999):

Claim that State failed to establish statistical method employed in determining population frequency statistics not preserved for Appellate review where no objection was made at trial to absence of proof as to particular statistical method employed. Error in allowing DNA testimony to be heard by a jury prior to court making determination of its admissibility not preserved for Appellate review or

defendant did not object to expert testifying without a separate Frye hearing being held first and defendant did not request a Frye hearing pretrial.

Allowing jury to hear DNA testimony prior to a determination of its admissibility was error; the purpose of a *Frye* hearing is to determine the admissibility of scientific evidence before the jury is permitted to hear it.

Lomax v. State, 727 So.2d 376 (Fla. 5th DCA 1999):

No error in admitting DNA opinion evidence even though state's expert witnesses did not personally compile population statistics used in formulating their conclusions.

Discussion: This is a very brief opinion with no discussion of the facts of the case.

Dedge v. State, 723 So.2d 322 (Fla. 5th DCA 1998):

Trial court erred in refusing to allow convicted defendant the opportunity to test DNA evidence to prove his innocence.

Discussion: The defendant was convicted of two counts of sexual battery in 1984. He now wants to have the original evidence tested for DNA to prove he was wrongfully identified. The trial court refused to release the evidence to him, stating the claim was barred under FRCP 3.850, which has a two-year limitation for newly discovered evidence. The appellate court basically ruled that the procedure is too important to exclude on a technicality. This opinion has a good discussion about the development of DNA law and the differences between PCR and RFLP testing.

Morris v. Crawford, 718 So.2d 354 (Fla. 4th DCA 1998):

Error to admit DNA test results in paternity case where proper predicate for admissibility was not established. Affidavit of laboratory director did not comply with requirements of section 90.803(6) where affidavit did not reflect that results were compiled in course of regularly conducted activity by someone with knowledge or from information transmitted by someone with knowledge that the practice of the business activity was to keep such records and that opinion of

paternity contained in the report would be admissible under sections 90.701-90.705.

Miles v. State, 694 So.2d 151 (Fla. 4th DCA 1997):

Trial court failed to make necessary findings that statistical methodology was generally accepted or that DNA expert was qualified to present statistical results, therefore case was remanded for trial court to asses expert's competence to present statistical evidence and clarify the exact methods used in calculating the DNA statistics and then conduct hearing to determine the general acceptance of the employed statistical techniques.

Gibson v. State, 667 So.2d 884 (Fla. 1st DCA 1996):

No error in overruling defendant's objection to state's expert testimony concerning statistical significance of DNA match. (Short opinion)

Clark v. State, 679 So.2d 321 (Fla. 5th DCA 1996):

In prosecution for lewd assault, evidence supported determination that DNA match probability calculations rendered under the "product rule" were admissible. Evidence based upon the "ceiling principle is not."

Discussion: The DNA in this case proved that the defendant was the father of the victim's child. The trial court conducted an extensive *Frye* hearing with three nationally recognized experts. The appellate court supports its findings by the 1996 report of the National Research Council. Make sure you know the difference between the ceiling principle and the product rule.

Raupp v. State, 678 So.2d 1358 (Fla. 5th DCA 1996):

Where victim initially reported that she thought that defendant had performed oral sex upon her, and victim did not mention that fact during direct examination, trial court erred in precluding defendant from impeaching victim's testimony with results of DNA test that were negative for presence of defendant's DNA in victim's vaginal area.

State could not prevent defendant from bringing out victim's initial reports of oral contact by simply not charging defendant with that crime.

Vargas v. State, 667 So.2d 175 (Fla. 1995):

> Where search warrant for blood sample was directed to sheriff and deputy sheriffs of Duval County, but officer from Clay County executed warrant by taking defendant into custody, read warrant to defendant, transferred defendant to medical facility, and was present in room where blood was extracted while Duval County deputy sheriff remained outside room, warrant was improperly executed.
>
> Although authorized officer may recruit assistance in performing search-related tasks, authorized officer may not assign every basic duty involved in execution of warrant.
>
> Discussion: The rationale for this decision rests on the need for a supervisory detective to be present to ensure that the terms of the warrant are carried out properly. Only the officer directly involved in the case can effective accomplish that.
>
> This case also contains a very interesting dissent by Justice Overton with was also adopted by Justice Wells. As you may have noted, this case was discussed in my Sex Crimes Manual in the DNA chapter. The Supreme Court refused to address the DNA issue because of the initial search of the blood was illegal. Overton discusses the problems with the FBI (FDLE) probability calculation techniques and whether they are generally accepted in the scientific community. He also notes that there is some scientific debate about the procedures outlined in the National Research Council report. He did not come to a final conclusion, however, in that he feel that more information needs to be presented in an evidentiary hearing.

Cade v. State, 658 So.2d 550 (Fla. 5th DCA 1995):

> Abuse of discretion to deny defendant's request for appointment of DNA expert where DNA evidence was central to state's case, remaining evidence was not overwhelming, defendant was diligent in seeking appointment of expert, and request for expert was specific.

State v. Grady, 657 So.2d 1254 (Fla. 2d DCA 1995):

> Claim that defendant was prejudiced by fact that semen sample used to obtain positive DNA comparison had biologically degraded to the extent that no further

testing by the defendant was possible was not supported by a proffer of what benefit defendant expected to derive from further testing, any allegation that further testing would have yielded results favorable to defendant, or any showing that semen sample would have been available to defendant had he been charged earlier.

Discussion: The state completed its investigation in 1989, but did not file an information until 1991. This case was decided on due process grounds.

Brim v. State, 654 So.2d 184 (Fla. 2d DCA 1995):

The existence of two differing views concerning proper population frequency statistics to be applied does not render DNA analysis itself inadmissible nor does it render differing views inadmissible, so long as each view or approach is shown to be generally accepted by a typical cross-section of the relevant scientific community.

Discussion: This case provides a rather detailed discussion of the subject. The DNA testing in this case was performed by FDLE. They used FBI procedures. The defense claimed that this procedure was flawed and that there was another accepted population frequency test called the "modified ceiling principle" which provides more conservative results. The court ruled that both tests were admissible under the *Frye* test. The case was then certified to the Florida Supreme Court because it conflicted with the case of Vargas v. State, 640 So.2d 1139 (Fla 1st DCA 1994). On another issue, the court ruled that DNA obtained in one case can be used in another case even without establishing probable cause.

State v. Trummert, 647 So.2d 966 (Fla. 4th DCA 1994):

State's negligent failure to proceed with DNA testing at an earlier time was not a discovery violation.

State's failure to proceed at earlier time and its delinquency in complying with court orders did not warrant sanction of exclusion of what may be crucial evidence.

Short additional continuance required to complete DNA testing, documentation, and disclosure to defendant would not impinge on defendant's constitutional right to speedy trial.

Discussion: This case was tried before Judge Goldstein. The defendant in this homicide case was incarcerated on June 27, 1992. At a status conference on March 31, 1994 the State requested a two month continuance to allow completion of the DNA testing. Failure to conduct the testing earlier was apparently an oversight. The defendant filed a demand for speedy trial on April 7, 1994 and her trial was set for May 23, 1994. The State handed the defendant the DNA analysis and the name of the new witness related to its admission. The defendant argued that she was being forced to choose between her right to a speedy trial and her right to discovery. Judge Goldstein agreed, the 4th DCA did not. The appellate court noted that "the interests of the citizens of the State of Florida should not be jeopardized by imposing the extreme sanction of exclusion of what may well be crucial evidence, particularly where the only prejudice of the accused is a slight additional delay."

Crews v. State, 644 So.2d 338 (Fla. 1st DCA 1994):

Decision holding that method used to calculate population frequencies in connection with introduction of DNA profile evidence in case against a Puerto Rican defendant was not generally accepted in the scientific community did not render admission of DNA evidence in Caucasian defendant's case erroneous.

Discussion: The defendant relied on the case of Vargas v. State, 640 So.2d 1139 (Fla. 1st DCA 1994) to argue the population frequencies in DNA analysis are not generally accepted in the scientific community. The appellate court ruled that the ruling in Vargas was limited to the Hispanic population and did not apply to Caucasians.

Olvera v. State, 641 So.2d 120 (Fla. 5th DCA 1994):

No error in failing to conduct *Frye* hearing regarding DNA testing where defendant failed to introduce articles challenging reliability of DNA testing, and defendant's expert witness did not question FBI's testing methodology, but merely questioned lack of controls at the FBI laboratory.

Discussion: Once again, a defendant tried to base his appeal on the case of Vargas v. State. The court distinguished this case from Vargas and noted that the decision in Vargas was limited to the narrow issue of the adequacy of the data base used by the state to calculate the probability that someone else had the same DNA fingerprint as Vargas. The Vargas decision clearly indicated that DNA

could have been admissible if a different data base had been used. Olvera did not challenge the data base, but claimed generally that the trial court erred in failing to conduct a *Frye* hearing.

Vargas v. State, 640 So.2d 1139 (Fla. 1st DCA 1994):

Defendant was entitled to challenge DNA profile evidence as novel scientific evidence because he complied with requirement of making timely request for such inquiry supported by authorities indicating that there may not be general scientific acceptance of the technique employed

Defendant successfully demonstrated that method used to arrive at probabilities of one in 60 million and one in 30 million of finding an unrelated individual having same DNA profile, using FBI data bases, was not generally accepted in relevant scientific community, and therefore, those population frequencies were not admissible evidence.

DNA profile evidence would be admissible only if more conservative calculation would minimize possible substructure problem with calculation of DNA probability statistics arising from FBI method of calculating population frequencies from its databases for purposes of determining statistical probabilities, which did not satisfy Frye.

Discussion: The problem in this case was related to the possible effects of population substructures. The defendant in this case happened to be Puerto Rican . Based on this ethnic substructure problem, a more conservative form of statistical analysis should have been used. This is a very good article to obtain reference information about scientific articles as well as cases law reviews. It should be noted that the various districts do not agree on in this area. For instance, the Brim opinion indicates that either the more conservative "modified ceiling principle" or the standard used by the FBI is admissible. Other districts have limited the Vargas decision to Hispanic defendants. The opinion was certified to the Supreme Court, so there should be some finality in the future. Please read this case carefully. Not only is it filled with a great deal of information, but it is frequently used by defendants to attack the reliability of DNA. It should also be noted that Dr. Martin Tracey testified in this case and was cited in the opinion.

Teemer v. State, 615 So.2d 234 (Fla. 3rd DCA 1993):

DNA test that revealed that semen swabbed from victim's vagina and cervix was not defendant's semen should have been admitted in prosecution for sexual battery and other offenses as relevant to defendant's claim of misidentification, rather than excluded under Rape Shield Statute, though victim testified that she had been anally penetrated, where physician who examined victim found no evidence of trauma to her anus and did not find any semen in her anal cavity, and defense proffered that physician would testify that sexual battery victims often think they have been anally penetrated, when in fact they have not been.

Discussion: This is actually a Rape Shield case, but it highlights an important point in the use of DNA. It appears that the State did not obtain an elimination sample from the victim's boyfriend. The victim indicated that she had sex with her boyfriend four hours before the rape. Had his DNA been matched with the semen found in the victim's vagina, the defense could not have used it as proof that a third person was responsible for the rape. The lessen of this case is to ask your victim if they have recently had sex with anyone other than the defendant. If so, get his blood for elimination purposes.

Pettit v. State, 612 So.2d 1381 (Fla. 2d DCA 1992):

Even if trial court believed that defendant did not timely receive protocol of company which did DNA testing for state, exclusion of testing evidence was too harsh remedy.

Private company which did DNA testing for state could not be required to create a particular document for the defense, namely, photographs of sizing gels used for bed sheet sample and values on autoradiographs, when company did not mark those values.

Even if company did not provide defendant with scientific journals upon which company relied, state did not have to produce things that were as readily available to defendant as to the state.

Discussion: This is primarily a discovery case. The defense raised numerous objections because Lifecodes lab was not providing them with everything they wanted. The court ruled for the State on most issues.

Toranzo v. State, 608 So.2d 83 (Fla. 1st DCA 1992):

Expert testimony that DNA profile on evidence from the scent matched that of defendant and that the probability of obtaining the same match from another individual from the Hispanic population was approximately one in 24 million was admissible in prosecution for armed burglary and armed sexual battery with a deadly weapon.

Martinez v. State, 549 So.2d 694 (Fla. 5th DCA 1989):

Genetic fingerprint evidence which matched defendant's DNA configuration with DNA configuration of semen recovered from victim's clothing and found probability of another such match to be one in 234 billion was admissible; statistical probability of obtaining same match from another person was both relevant and probative to assist jury in making final decision and did not remove issue of alleged rapist's identity from jury.

Hill v. State, 535 So.2d 354 (Fla. 1st DCA 1988):

Sexual battery defendant was entitled to continuance where he was not permitted to interview and depose expert witnesses who had performed test to determine whether DNA match could be obtained until 5:00 p.m. on Sunday before Monday trial; defendant had due process right to have witnesses disclosed and made available to him in sufficient time to permit reasonable investigation regarding proposed testimony.

Andrews v. State, 533 So.2d 841 (Fla. 5th DCA 1988):

Where a form of scientific expertise has no established "track record" in litigation, courts may look to a variety of factors that may bear on reliability of evidence, including novelty of new technique, i.e., its relationship to more established modes of scientific analysis; existence of specialized literature dealing with technique; qualifications and professional stature of expert witnesses, and nonjudicial uses to which scientific technique are put.

DNA evidence was admissible in that it appeared to be based on proven scientific principles, there was testimony that the evidence had been used to exonerate those suspected of criminal activity, and the test was administered in conformity with accepted scientific procedure so as to ensure to greatest degree possible a reliable result.

Discussion: This case is an excellent reference tool for understanding the basics of DNA evidence. The opinion gives a nice summary of the different aspects of a DNA case. There is also extensive discussion on the development of case law concerning new scientific techniques. Many references are cited.