

## DNA

### **Defendant Does Not Have Right to Appeal Order Denying Relief After Hearing on Results of Post-Conviction DNA Testing**

*State v. Norman*, \_\_\_ N.C. App. \_\_\_, 688 S.E.2d 512 (2 February 2010).

The defendant filed a motion for post-conviction DNA testing under G.S. 15A-269. Testing was conducted, a hearing was held on the results, and the trial court denied relief. The defendant filed a notice of appeal challenging the denial of relief. The court noted that G.S. 15A-270.1 provides a defendant with the right to appeal a denial of a defendant's motion for DNA testing. However, there is no statutory provision providing a right to appeal the denial of relief after a hearing on the DNA test results. The court dismissed the defendant's appeal. The court also ruled, based on *Bailey v. State*, 353 N.C. 142 (2000), that the court is without authority to issue a writ of certiorari or to suspend the appellate rules under Rule 2 to review the denial of relief.

### **Lab Analyst's Testimony Concerning DNA Tests Performed by Other Non-Testifying Analysts Did Not Violate Confrontation Clause**

*State v. Mobley*, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (3 November 2009).

The court ruled, distinguishing *State v. Locklear*, 363 N.C. 438 (2009), that a lab analyst's testimony concerning DNA tests performed by other non-testifying analysts did not violate *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), and the Confrontation Clause. The analyst testified not just to the results of other experts' tests, but to her own technical review of these tests, her own expert opinion of the accuracy of the non-testifying experts' tests, and her own expert opinion based on a comparison of the original data. The court stated that *Crawford v. Washington*, 541 U.S. 36 (2004), noted that evidence offered for purposes other than proof of the matter asserted did not violate the Confrontation Clause. In this case, the underlying report by the non-testifying analysts was used as a basis for the opinion of the testifying expert who independently reviewed and confirmed the results and was therefore not offered for the proof of the matter asserted.

### **No Constitutional Right to Obtain Postconviction Access to State's Evidence for DNA Testing**

*District Attorney's Office v. Osborne*, 129 S. Ct. 2308, 174 L. Ed. 2d 38 (18 June 2009).

The Court ruled that, assuming a convicted person's claims can be pursued under § 1983, he had no constitutional right to obtain postconviction access to the state's evidence for DNA testing. [Author's note: G.S. 15A-269 provides a statutory right to postconviction DNA testing.]

### **Trial Court Properly Denied Defendant's Motion to Suppress DNA Evidence Involving Alleged Expunction of Conviction**

*State v. Swann*, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (19 May 2009).

In 2006, the defendant was arrested and charged with offenses, and incident to his arrest officers obtained a buccal swab containing a sample of his DNA. The defendant's DNA profile was logged into the SBI's DNA database. A prosecutor later voluntarily dismissed the charges. The defendant's DNA profile matched DNA evidence in other cases, which led to his indictment in January 2007 for various offenses. In November 2007, the defendant filed a petition to expunge the 2006 charges and all DNA evidence incident to those charges. The defendant made a motion to suppress the DNA evidence used to bring the 2007 charges and offered the petition for expunction into evidence. The court ruled that the trial court properly denied the defendant's suppression motion based on three separate and independent reasons: (1) the appellate record was devoid of any ruling on the defendant's petition for expunction; (2) expunction of DNA records under G.S. 15A-146(b1) and (b2) requires a trial court dismissal and the 2006 charges were dismissed by a prosecutor, and the reasons for expunction also did not exist under G.S. 15A-148(a) (requires appellate court reversal and dismissal of conviction or pardon of innocence); and (3) even assuming an order of expunction was entered in November 2007, it operates only prospectively. It does not retroactively expunge DNA records that had been used by law enforcement to identify the defendant that resulted in the January 2007 indictments.

### **1. Constitutional Law-Due process-Brady decision-Failure to conduct DNA test**

*State v Ryals 179 NCA 733 (2006)*

The **State's failure to conduct a DNA test on hair found on a knit cap discovered at a murder scene did not violate defendant's federal due process rights under *Brady v. Maryland*, 373 U.S. 83 (1963).**

The trial court gave defendant access to the State's physical evidence, including the knit cap, and defendant obtained a DNA analysis on a hair from the knit cap and presented the results at trial.

### **2. Criminal Law-Discovery-Performance of DNA test**

*State v Ryals 179 NCA 733 (2006)*

The discovery statute that required the State to disclose, upon request by defendant, test results and the procedures utilized to reach those results, N.C.G.S. § 15A-903(e), **did not compel the State to perform a DNA test on hair found on a knit cap discovered at a murder scene.**

### **3. Search and Seizure-Non-testimonial identification order-Motion by defendant--DNA test of another**

*State v Ryals 179 NCA 733 (2006)*

The trial **court had no authority** to grant defendant's motion for a nontestimonial identification order requiring the State to test the DNA of

another individual in order to show that a murder was committed by that individual rather than by defendant. N.C.G.S. § 15A-281.

## **5. Evidence--DNA evidence--Common plan scheme or plan to sexually abuse victim**

*State v Bullock 178 NCA 460 (2006)*

The trial court did not err in a multiple first-degree rape of a child under thirteen case by admitting DNA evidence establishing a 99.99 percent probability that defendant was in fact the father of the victim's child even though the victim conceived the child after she left Wake County and thus after each of the incidents for which defendant was convicted in the instant case, because: (1) evidence that defendant engaged in other sexual acts with the victim is admissible to show that he had a common scheme or plan to sexually abuse the victim; and (2) contrary to defendant's assertion, statements made in the closing argument cannot alter the propriety of admitting the evidence under N.C.G.S. § 8C-1, Rule 404(b) at trial.

### **1. Evidence -DNA expert testimony--population statistics**

*State v Watts, 172 NCA 58 (2005)*

The trial court did not commit plain error in a statutory rape case by denying defendant's objection to a witness's testimony concerning his **opinion about population statistics** when he had been tendered as an expert in forensic DNA analysis, because: (1) given that the Court of Appeals has found that a population statistical analysis is the third step in DNA analysis, our case law evidences the admissibility of testimony on population statistics by forensic DNA analysis experts; and (2) defendant cites no authority in support of his argument.

### **1. Evidence--DNA testing--motion to require--denied**

*State v. McNeil 155 NCA 540 (2002)*

Defendant's motion under Brady v. Maryland for DNA testing of hair samples from a cap dropped at the scene of a robbery and kidnapping was properly denied because defendant failed to show that the material he sought meets the requisite level of materiality.

### **1.Evidence--blood drawn for unrelated investigation--DNA testing**

*State v. Barkley 144 NC App 514 (2001)*

The trial court did not err in a first-degree rape and kidnapping prosecution by denying defendant's motion to suppress the results of a blood analysis where defendant contended that his consent to having his blood drawn was limited to analysis for an unrelated murder investigation

and that his Fourth Amendment rights were violated. Once the blood was lawfully drawn, defendant no longer had a possessory interest in the blood and suffered no additional intrusion by the comparison of the DNA characteristics with the evidence in this case. Moreover, the court's findings support the conclusion that a reasonable person would have understood that his blood analysis could be used generally for investigative purposes.

#### **4. Witnesses - expert - mtDNA analyst**

*State v. Underwood, 134 N.C. App. 533 (1999)*

The trial court in a murder and kidnapping prosecution did not err by accepting as an expert in the field of mtDNA analysis the chief of an FBI DNA analysis unit. Although defendant argued that the testimony was of no assistance to the jury, the mtDNA evidence was relevant to show that it was more probable that a hair found in defendant's automobile trunk was the victim's.

#### **5. Evidence - scientific testing - standard for admissibility**

*State v. Underwood, 134 N.C. App. 533 (1999)*

The following factors should be considered in determining whether scientific evidence is reliable: whether the theory or technique can be or has been tested, whether the theory has been subjected to peer review and publication, whether the theory has been submitted to the scrutiny of the scientific community, the known or potential rate of error, and the general acceptance in a Page 534 relevant scientific community. North Carolina emphasizes the reliability of the scientific method and not its popularity within a scientific community.

#### **6. Evidence - mtDNA testing - admissible**

*State v. Underwood, 134 N.C. App. 533 (1999)*

Testing of mtDNA is sufficiently reliable to warrant admission into evidence.

#### **4. Evidence and Witnesses 2211 (NCI4th) inconclusive DNA tests exclusion of ninety-four percent of black population relevancy**

*State v. Best, 342 N.C. 502 (1996) \_\_\_ S.E.2d \_\_\_*

Testimony by a DNA expert that DNA tests performed on semen taken from the victim's vagina and blood taken from the defendant were inconclusive in that they did not exclude defendant but that they eliminated ninety-four of one hundred persons in the black population was relevant in a prosecution of defendant for murder and rape since the testimony made it more likely that defendant committed the crimes if the

tests eliminated ninety-four percent of the black population but not defendant.

### **3. Evidence and Witnesses § 2211 (NCI4th) DNA qualification of witness as expert**

*State v. Hairston, 123 N.C. App. 753 (1996) 475 S.E.2d 242*

The trial court did not err in a prosecution for armed robbery, burglary and rape by qualifying as an expert in forensic DNA analysis a witness who was currently the assistant director of the forensic identity unit at Roche Bio-medical Laboratories in the Research Triangle Park; at the time of the crime she was a special agent with the SBI and worked in the DNA analysis unit of the serology section; she had a degree in biology and a master's in genetics from North Carolina State; she had approximately a year and a half of in-house training consisting of learning to perform forensic DNA analysis, performing hundreds of blood samples and other kinds of samples, taking a series of proficiency tests and participating in a case internship program under the direction of another trained and qualified DNA analyst; she attended two DNA classes specifically focusing on forensic DNA analysis at the FBI Academy in Quantico, Virginia; and she has previously testified in court and given her opinion as an expert witness in forensic DNA analysis.

### **8. Evidence and Witnesses 2211 (NCI4th) DNA test results expert testimony tests performed by another -right of confrontation - evidence rules not violated**

*State v. Daughtry, 340 N.C. 488 (1995) \_\_\_ S.E.2d \_\_\_*

### **5. Evidence and Witnesses 2211 (NCI4th) - DNA testimony - statistical probability of DNA matching -evidence admissible**

*State v. Hill, 116 N.C. App. 573 (1994) \_\_\_ S.E.2d \_\_\_*

The trial court in a rape case did not err in allowing a DNA expert to testify to the statistical probability of another individual having the same DNA profile as defendant where the evidence showed that the expert possessed the requisite skill to form an opinion concerning the statistical probability of the DNA matching, and defendant had adequate opportunity to cross-examine the witness and to produce scientific evidence to impeach the witness at trial.

### **10. Evidence and Witnesses 2211 (NCI4th) murder and rape - DNA testing - exclusion of others**

*State v. Moseley, 338 N.C. 1 (1994) \_\_\_ S.E.2d \_\_\_*

The trial court did not err in a prosecution in which defendant was convicted of first-degree murder, first-degree rape, and first-degree sexual offense by allowing an SBI serologist to testify that DNA testing excluded

two individuals as donors of the semen found in the victim where the agent testified that DNA samples were taken from the victim's former boyfriend, her friend's boyfriend, and defendant, that DNA analysis excluded the other two men,

**2. Evidence and Witnesses 2211 (NCI4th) - rape - DNA analysis - matching sample - conflicting expert testimony - State's evidence admissible**

*State v. Futrell, 112 N.C. App. 651 (1993) 436 S.E.2d 884*

5. Constitution Law 349 (NCI4th); Evidence and Witnesses 2170 (NCI4th) - rape - DNA testing – results not presented by technician performing tests – admissible

*State v. Futrell, 112 N.C. App. 651 (1993) 436 S.E.2d 884*