Wyche v. State: A Case Analysis

Milton Hirsch∗
WYCHE V. STATE: A CASE ANALYSIS

MILTON HIRSCH*

I. INTRODUCTION ......................................................................................... 137
II. OF DECEIT AND CONSENT ...................................................................... 141
III. HOW DNA BEARS UPON THE SCOPE OF CONSENT TO A SEARCH OR SEIZURE .................................................................................. 157
IV. CONCLUSION ............................................................................................. 165

I. INTRODUCTION

A wretched man, for love of a woman and of "the child she had borne him," finding himself bereft of all resources, had counterfeited money. "[C]ounterfeiting was still punished [by] death" in those days. "The woman was arrested for" spending the very first counterfeit bill the man had printed. She was held, but there was no evidence against anyone else but her. She alone could identify her lover, the source of the counterfeit funds. She refused. The police pressed her. She continued to refuse. Finally the chief investigator had an idea: he insinuated that the woman's lover had become unfaithful to her; he even arranged to present her with scraps of letters to persuade her that there was another woman that her lover was cheating on her. Driven to desperation "by jealousy, she denounced her lover" and confessed everything. The man was doomed. The two would be tried and condemned together.

By playing the jealousy card, the chief investigator had traded truth for anger, justice for vengeance. All this was related to the bishop. He listened in silence. Then he asked, Where will the man and the woman be judged?

At the court of assizes, he was told.

"And where," he asked, "will the chief investigator be judged?"¹

* B.A., University of California, 1974; J.D., Georgetown University, 1982. The author gratefully acknowledges the contributions made in the preparation of this article by Erica Rutner.

Earl Wyche was in custody in small-town Florida on a charge of probation violation. Unbeknown to him, he was also a suspect in a rape case. The police, eager to obtain a Deoxyribonucleic acid (DNA) sample from Wyche for the rape investigation—something they could have done easily without any subterfuge—hit upon an ingenious, if shameful, stratagem.

They lied to him.

What they told him was that a local supermarket had been burgled and that he could exonerate himself by providing a DNA sample. Wyche did not know that the whole thing was a fairy tale: There was no supermarket and there was no burglary. What he did know was that he hadn’t burgled any supermarkets lately, so if that was the reason the police wanted his DNA, well, why shouldn’t he provide it?

They lied to him in another way, too.

The police lied to Wyche by what they didn’t tell him. They didn’t tell him about the rape case they were investigating, and they didn’t tell him that his DNA profile, once obtained, would be made available to other government agencies conducting other investigations at other times and places.

In the event, the DNA test exonerated Wyche of the rape of which he had been suspected. But it implicated him in an unrelated burglary. Prior

---

3. See id.
4. Id. at 1144. The police could have gotten a tissue sample from which Wyche’s DNA could have been profiled in any number of ways. See, e.g., Elizabeth E. Joh, Reclaiming “Abandoned” DNA: The Fourth Amendment and Genetic Privacy, 100 NW. U. L. REV. 857, 860–61 (2006). Recall that Wyche was in custody. Wyche I, 906 So. 2d at 1143. Did he eat with a fork, spoon, or “spork” provided by the jail? See Joh, supra note 4, at 860–61. Did he drink from a glass or cup? See id at 861. Did he throw away the butt of a cigarette, or the crust of an unfinished sandwich? See id. at 860–61. Any of these things would contain cell tissue from which DNA might be recovered, and Wyche would have no assertable legal interest in any of them. See id.; see also discussion infra notes 184, 185, and 190 (regarding FLA. STAT. § 943.325 (2007)).
5. Wyche I, 906 So. 2d at 1143.
6. Id.
7. Id.
9. Id. at 27 (majority opinion).
10. See id. at 27–28 (emphasis added).
11. Id. at 27. As discussed infra note 198, Wyche’s DNA profile is now permanently on display to every CODIS licensee, and may be examined and re-analyzed at any time without notice to Wyche.
12. Wyche I, 906 So. 2d at 1143.
to trial on that burglary he moved to suppress the DNA evidence, arguing that the consent pursuant to which his cell tissue was seized and analyzed was, as a result of the deception worked upon him by the police, no consent at all.14 The motion to suppress was denied, and the ensuing conviction was affirmed on appeal to Florida’s First District Court of Appeal.15

The Supreme Court of Florida has no general criminal appellate jurisdiction.16 It is empowered, however, to review the decision of an intermediate appellate court upon a certification of conflict by that court with a decision of another intermediate appellate court.17 The First District Court of Appeal, in affirming Wyche’s conviction, in the process approving the denial of his motion to suppress,18 certified conflict with the opinion of the Fourth District Court of Appeal in State v. McCord;19 thus providing the jurisdictional basis for the Supreme Court of Florida’s review.20

In a four to three ruling, the Supreme Court of Florida concluded that Wyche’s consent was constitutionally valid, the conduct of the police notwithstanding.21 The Court excerpted with approval the following language from the opinion of the First District:

“[Wyche] was clearly aware of the fact that the officer wanted the DNA sample in order to investigate a crime, and the officer did not misrepresent the fact that he had no search warrant. The officer did not indicate that [Wyche] had no choice regarding whether to provide a DNA sample. [Wyche] did not acquiesce to a claim of lawful authority.”22

In addition, the Supreme Court of Florida noted that “Wyche was not a stranger to police procedure, . . . he knew that his DNA was requested for use in a criminal investigation, [and he] was not deluded as to the import of his consent to search.”23 Viewing these circumstances as relevant, and taking them as a whole, the Court found nothing constitutionally objectionable in Wyche’s consent.24

13. Id.
14. Id.
15. Id. at 1143, 1148.
18. Wyche I, 906 So. 2d at 1143, 1148.
19. 833 So. 2d 828 (Fla. 4th Dist. Ct. App. 2002); Wyche I, 906 So. 2d at 1144.
22. Id. (quoting Wyche I, 906 So. 2d at 1147).
23. Id.
24. Id.
Justice Bell concurred dubitante for himself and Chief Justice Quince.\textsuperscript{25} Justice Bell confessed himself "disturbed by the level of intentional police misrepresentation" visited upon Wyche, and by the prospect that similar police "tactics, if they were to become commonplace, would destroy the integrity of the criminal justice system."\textsuperscript{26} Triumphing over these concerns, however, Justice Bell and Chief Justice Quince voted with the majority.\textsuperscript{27}

It is the thesis of this case note that \textit{Wyche II} is wrong twice over. The law setting forth when and in what circumstances the police may use deceit to obtain consent to search or seize is well-settled. The majority in \textit{Wyche II} ignored that well-settled law, in the process ignoring decisions from a host of jurisdictions, state and federal, that speak with one voice as to that law.\textsuperscript{28} This is more troubling because Florida's Constitution has a dependent, not an independent, guarantee against unreasonable search and seizure.\textsuperscript{29} Although article I, section 12 of the Florida Constitution promises that the "right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures . . . shall not be violated," section 12 was amended in 1982 to add language providing that it was to:

\begin{quote}
be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.\textsuperscript{30}
\end{quote}

In effect, the Florida Constitution instructs the reader, "Where the law of search and seizure is concerned, go consult general American law; I have nothing to add to that."\textsuperscript{31} Yet the court's opinion in \textit{Wyche II} ignores the ample body of American jurisprudence on point—jurisprudence that compels a result at odds with the one reached by the \textit{Wyche II} majority.\textsuperscript{32} Consideration of this jurisprudence, and the outcome it compels on the \textit{Wyche II} facts, forms the first section of this case note.

\textsuperscript{25} \textit{Id.} at 31–32 (Bell, J., specially concurring).
\textsuperscript{26} \textit{Wyche II}, 987 So. 2d at 32.
\textsuperscript{27} \textit{Id.} at 31 (majority opinion).
\textsuperscript{28} \textit{See id.} at 42–43 (Lewis, J., dissenting).
\textsuperscript{29} \textit{See Fla. Const.} art. I, § 12.
\textsuperscript{30} \textit{Id.}
\textsuperscript{31} \textit{See id.}
\textsuperscript{32} \textit{See Wyche II}, 987 So. 2d at 63–64 (Lewis, J., dissenting).
It is apodictic that a search or seizure that exceeds the scope of consent is—unless supported by a warrant—unconstitutional, and the fruits of such a search or seizure inadmissible.\textsuperscript{33} The Supreme Court of Florida's opinion in \textit{Wyche II} gives no more than passing consideration to the problems of scope of consent presented by the \textit{Wyche II} facts.\textsuperscript{34} In a more conventional context, this might be a merely venial sin; no profound legal issues are in play when a court considers—or fails to consider—whether, for example, consent to search the trunk of a car subsumes consent to search packages contained within the trunk.\textsuperscript{35} But the context in which Earl Wyche gave consent was anything but conventional.\textsuperscript{36} He was asked to provide a minute amount of his cell tissue, from which whole libraries of scientific information could and would be derived.\textsuperscript{37} That scientific information, in turn, would be made permanently available for use by the forensic community nation-wide and even world-wide, now and for years to come, for examination in connection with crimes past, present, and future.\textsuperscript{38} The Supreme Court of Florida opinion in \textit{Wyche II} gives no consideration whatever to the scope of consent issues that arise when DNA analysis and data storage is involved.\textsuperscript{39} Those issues are addressed in the second section of this case note.

\section*{II. OF DECEIT AND CONSENT}

It is sometimes said that the police may lie to obtain consent to search, and that the ensuing search will not be deemed unlawful by reason of the lie.\textsuperscript{40} In some sense, this is true. Suppose, for example, that a man dressed in ordinary street clothing rings my doorbell in the middle of the night, explains that he is interested in purchasing drugs, and asks if I have any drugs to sell him. If I let him into my house to sell him drugs, my consent to his entry will not be invalidated after the fact when it turns out that he is an undercover detective and I am arrested for possession or sale of narcotics.\textsuperscript{41}

\begin{thebibliography}{99}
\bibitem{33}See, \textit{e.g.}, United States v. Benezario, 339 F. Supp. 2d 361, 368–69 (D.P.R. 2004).
\bibitem{34}See \textit{Wyche II}, 987 So. 2d at 27–28.
\bibitem{36}See \textit{Wyche II}, 987 So. 2d at 27.
\bibitem{37}Id.
\bibitem{38}See \textit{Joh}, \textit{supra} note 4, at 875.
\bibitem{39}See generally \textit{Wyche II}, 987 So. 2d 23 (Fla. 2008).
\bibitem{40}See, \textit{e.g.}, \textit{id.} at 31; \textit{see also} People v. Zamora, 940 P.2d 939, 942 (Colo. App. 1996).
\bibitem{41}See, \textit{e.g.}, Lewis v. United States, 385 U.S. 206, 210 (1966). Once upon a time, in that "antique world, [w]hen service sweat for duty, not for meed," \textsc{William Shakespeare}, \textit{As You Like It} act 2, sc. 3, some courts condemned police deceit even in the undercover context. \textit{See, \textit{e.g.}}, United States v. Reckis, 119 F. Supp. 687, 690 (D. Mass. 1954) ("Reckis cannot be held to have consented to a search before he had any knowledge that the persons he was
Now suppose that when I answer my doorbell I confront, not a scruffy would-be drug buyer, but a uniformed police officer. Suppose further that the officer informs me that he is trying to rescue my neighbor's cat which has become stuck in a tree, and that he would like to look out my back window to get a better view of the cat's plight. Suppose finally that these representations by the officer are all false: There is no cat, there is no tree, and the officer's true purpose is to gain entry to my house to see if I have drugs. The consent I give the officer to enter my house, having been obtained by deceit, is not a knowing and valid consent for Fourth Amendment purposes, and any contraband or evidence seized by the officer in my house will not be admissible at trial. 42 The difference in the two hypothetical's turns on a single, simple legal principle: All citizens have a "duty to cooperate with the police." 43 It therefore must follow that if a police officer comes to me bearing the accouterments of office—uniform, or badge, or formal ID—I can and must rely upon the truth of his representations to me; and if those representations prove to be willfully false, my ensuing consent is a legal nullity. 44 "Access gained by a government agent, known to be such by the person with whom the agent is dealing, violates the [F]ourth [A]mendment's bar against unreasonable searches and seizures if such entry was acquired by affirmative or deliberate misrepresentation of the nature of the government's investigation." 45 Conversely, if the officer comes to me in an undercover disguise, identifying himself not as a member of the constabulary, but as a drug buyer, I deal with him at my peril. 46 I have no duty to cooperate with him, and he has no corresponding duty to tell me the

dealing with were federal officers or that they were there for the purpose of making a search."); see generally Commonwealth v. Wright, 190 A.2d 709 (Pa. 1963). See United States v. Griffin, 530 F.2d 739, 743 (7th Cir. 1976) (noting in dictum that "[t]rickery, fraud, or misrepresentation on the part of the police to gain entry naturally undermines the voluntariness of any consent."). But the essence of undercover operations is deceit. See Lewis, 385 U.S. at 209. For courts to hold that undercover officers may not misrepresent their identities, purposes, etc., would be to hold that undercover operations are per se unreasonable for Fourth Amendment purposes. Id. at 210–11. No opinion of recent vintage has gone so far. See United States v. Montes-Reyes, 547 F. Supp. 2d 281, 289–90 (S.D.N.Y. 2008). Instead, courts have drawn the obvious and meaningful distinction between deceit in the course of an undercover operation and deceit under color of office. See, e.g., United States v. Briley, 726 F.2d 1301, 1304 (8th Cir. 1984).

42. See, e.g., United States v. Little, 753 F.2d 1420, 1438 (9th Cir. 1984).
44. See id.
45. Little, 753 F.2d at 1438 (emphasis added).
46. See SEC v. ESM Gov't Sec., Inc., 645 F.2d 310, 316 (5th Cir. 1981).
truth. If I consent to his entry into my home, I must take the consequences. The Fifth Circuit Court of Appeals drew the distinction with particularity:

When a government agent presents himself to a private individual, and seeks that individual's cooperation based on his status as a government agent, the individual should be able to rely on the agent's representations. We think it clearly improper for a government agent to gain access to records which would otherwise be unavailable to him by invoking the private individual's trust in his government, only to betray that trust.

A ruse entry when the suspect is informed that the person seeking entry is a government agent but is misinformed as to the purpose for which the agent seeks entry cannot be justified by consent. Thus we have disapproved the entry of federal narcotics agents accomplished with the assistance of local law enforcement officers who knocked on the suspect's door and asked permission to investigate a fictitious robbery.

This language from SEC v. ESM Government Securities, Inc., was excerpted with approval by the Ninth Circuit in United States v. Bosse. Distinguishing an earlier Ninth Circuit case, United States v. Allen, the Bosse court drew the undercover-versus-under-color-of-office distinction: the earlier case "is best understood as involving concealment by [an officer] of the fact that he was a government agent, a permissible deception, rather than as involving misrepresentation by a known government agent of his purpose for seeking entry."

The recent opinion of the Supreme Court of Kentucky in Krause v. Commonwealth involves facts not dissimilar to those of Wyche II. Trooper Manar of the Kentucky State Police made an arrest for cocaine

47. See, e.g., id.
48. See id.
49. Id. at 316.
50. United States v. Bosse, 898 F.2d 113, 115 (9th Cir. 1990) (per curiam) (citation omitted).
51. 645 F.2d 310 (5th Cir. 1981).
52. 898 F.2d 113, 115 (9th Cir. 1990) (per curiam).
53. 675 F.2d 1373 (9th Cir. 1980).
54. Bosse, 898 F.2d at 116.
55. 206 S.W.3d 922 (Ky. 2006).
56. See Wyche II, 987 So. 2d 23, 24 (Fla. 2008).
possession. The arrestee told Manar that he had obtained the drugs at Krause's home. Manar then showed up at Krause's residence at four o'clock in the morning with a tale as false as the one given to Wyche: he told Krause "that a young girl had just reported being raped by [Krause's roommate] in the residence. He asked if he could look around in order to determine whether her description of the residence and its furnishings was accurate." Manar's ensuing search turned up drugs and drug paraphernalia, for the possession of which Krause was prosecuted and convicted.

The Krause court recognized the distinction between undercover and under-color-of-office police work. "The use of undercover agents and stratagems in police investigations has long been sanctioned, and we do not question such a practice in this opinion." But clearly Trooper Manar had not been acting in an undercover capacity. He had knocked on Krause's door bearing the customary accouterments of office, and he had asked in his capacity as a law-enforcement officer for Krause's cooperation. Therein lay the problem. "Trooper Manar exploited a citizen's civic desire to assist police in their official duties for the express purpose of incriminating that citizen." Krause was entitled, in deciding whether to consent to Manar's request to search, to rely upon the truth and bona fides of Manar's representations to him.

[If the type of ruse utilized by Trooper Manar was sanctioned by this Court, citizens would be discouraged from "aiding to the utmost of their ability in the apprehension of criminals" since they would have no way of knowing whether their assistance was being called upon for the public good or for the purpose of incriminating them.

57. Krause, 206 S.W.3d. at 923.
58. Id.
59. Id. at 924.
60. Id.
61. See id. at 926–27.
62. Krause, 206 S.W.3d at 927.
63. See id.
64. See id. at 924.
65. See id.
66. Id. at 927.
67. See Krause, 206 S.W.3d at 927.
An appellate court in Washington State reached identical conclusions in *State v. McCrorey.* The *McCrorey* court began by acknowledging the widespread acceptance of "the use of ruse entries in conjunction with undercover police activity." It then drew the critical distinction: "The case at hand is distinguishable, however. It does not present the issue of undercover police activity, but rather the failure to disclose the actual police purpose."

It is improper for a government agent to gain entry by invoking the occupant's trust, then subsequently betraying that trust. Members of the public should be able to safely rely on the representations of government agents acting in their official capacity. We conclude that police acting in their official capacity may not actively misrepresent their purpose to gain entry or exceed the scope of consent given.

*Krause* and *McCrorey* involved consent to search a residence. *Graves v. Beto,* like *Wyche,* involved consent to the seizure of bodily tissue. *Graves* was arrested "on a charge of public drunkenness." Shortly afterward the police learned "that an elderly woman had been raped" and that "her description of her assailant [matched] Graves." Blood had been recovered from the scene of the rape, so the police chief asked Graves to consent to giving a blood sample, assuring him "that the sample would be used only to determine the alcoholic content of his blood" for purposes of the public drunkenness charge. Graves was then charged with the rape, and evidence that his blood type—derived from the blood he had "consented" to

---

70. *Id.* at 1239.
71. *Id.* at 1240.
72. *Id.* (citations omitted).
73. Krause v. Commonwealth, 206 S.W.3d 922, 923–24 (Ky. 2006); McCrorey, 851 P.2d at 1236.
74. 424 F.2d 524 (5th Cir. 1970).
75. *Id.* at 524. Although this may make the *Graves* facts closer to the *Wyche* facts, it is a distinction without a difference. Whether a law enforcement officer seeks consent to enter and search a home, or consent to seize a tissue sample, the Fourth Amendment considerations are, for purposes of the jurisprudence of consent, the same. *Id.* at 525.
76. *Id.* at 524.
77. *Id.*
78. *Graves,* 424 F.2d at 524.
79. *Id.* at 525.
give—matched that found at the rape scene was offered at trial. On habeas review the federal court found Graves' "consent" to be constitutionally invalid; to hold otherwise "would allow the state to secure by stratagem what the [F]ourth [A]mendment requires a warrant to produce."

The defendants in State v. Petersen were suspected of having stolen certain power tools from their former employer. One of the defendants, Rogers, was approached by police officers, who told him that they wanted his consent to search his car. The reason they gave for wanting to search, however, was not the true one, i.e., their desire to locate the stolen power tools and inculpate Rogers and Petersen for the theft. Instead, the officers told Rogers that they believed that the previous owner of the car, from whom Rogers had only recently purchased it, had stashed something in the vehicle of evidentiary value to another, unrelated, investigation. Rogers "consented to the search only because he was told the officers were searching for an object hidden in the car by a previous owner. Since his consent was obtained by deceit, Rogers cannot be said to have waived his Fourth Amendment rights voluntarily."

The Hay Transportation Assistance Program (HTAP) is a federally-funded rebate program benefiting the agricultural industry. It is of little day-to-day interest in South Florida, but it is of a great deal of interest in the Western District of Wisconsin, venue of United States v. Hrdlicka. In Hrdlicka, Special Agent Lenckus, a criminal investigator in the Office of the Inspector General of the Department of Agriculture, was deputed to determine whether Joseph Hrdlicka, his two brothers, and their businesses—collectively the "Hrdlicka defendants"—had conspired to defraud the government in connection with HTAP claims. Agent Lenckus contacted Joseph Hrdlicka and informed him that he, Lenckus, was conducting a criminal investigation, not into the conduct of the

80. *Id.* at 524.
81. *Id.* at 524–25.
83. *Id.* at 268.
84. *Id.*
85. *See id.*
86. *Id.*
87. *Peterson*, 604 P.2d at 269; *see also* Barnato v. State, 501 P.2d 643, 644 (Nev. 1972) (Consent to an animal control officer’s entry into an enclosed yard for the “ostensible purpose of checking a cat trap . . . did not constitute a waiver of” Fourth Amendment rights when the real reason for the entry was to seize a leaf from a marijuana plant).
88. *See generally In re Voorhees*, 294 N.W.2d 646, 647 (S.D. 1980).
89. 520 F. Supp. 403, 403 (W.D. Wis. 1981).
90. *Id.* at 407. Lenckus came bearing the accouterments of office: He “showed Joseph Hrdlicka his badge and identification card.” *Id.*
Hrdlicka defendants, but into the conduct of others; in that regard, he asked to see the Hrdlicka defendants' books and records. Hrdlicka "asked Lenckus if his investigation would involve [the] Hrdlicka businesses: . . . [t]o this question, Lenckus replied that no audit or investigation of Hrdlicka businesses was contemplated and that the investigation did not pertain to the Hrdlickas' farms, but only to other farmers to whom the Hrdlickas had sold and delivered hay." Relying on Lenckus's representations, Joseph Hrdlicka consented to produce various business records. But "Agent Lenckus's statement to Joseph Hrdlicka . . . that the Hrdlicka businesses and farms were not under investigation was untrue" at the time it was made, and the Hrdlicka defendants were indicted based upon information in the business documents produced to Lenckus.

The district court took it as "well-established that the official use of fraud, trickery or misrepresentation to gain consent to a search 'naturally undermines the voluntariness of any consent,'" and "therefore renders such a search 'unreasonable under the Fourth Amendment.'" The misrepresentations at issue here were described by the court as being both active and passive. "By passive misrepresentations, I refer to Lenckus's conceded failure to inform Hrdlicka that his farms were suspected of having made false duplicate claims under HTAP . . . ." Telling half the truth and leaving a false implication simply isn't good enough when a badge-carrying law enforcement officer asks a citizen to waive the protections of the Fourth Amendment. Lenckus may well have been investigating, or at least interested in information about, HTAP abuses by farmers other than the Hrdlickas. But by failing to inform the Hrdlickas that he was also interested in their putative misconduct, he rendered their ensuing consent a nullity.

The notion that a half-truth by the police is as damning as a complete lie appears again in State v. Schweich. There the police wanted to search the

91.  Id.
92.  Id.
94.  Id. at 408.
95.  Id. at 407.
96.  Id. at 409 (quoting United States v. Griffin, 530 F.2d 739, 743 (7th Cir. 1976)).
97.  Id. (quoting United States v. Tweel, 550 F.2d 297, 299 (5th Cir. 1977)).
99.  Id.
100.  See id.
101.  See id.
102.  Id.
defendant’s home for two reasons: to find a gun belonging to an acquaintance of the defendant, and to see if the defendant had narcotics. In seeking the defendant’s consent, the police told him about the first purpose, but not about the second. This deception by omission—or by less than complete candor—was sufficient to invalidate the defendant’s consent. “[T]he officers intended the scope of their search to include drugs. However, respondent was led to believe the search was necessary only to locate [his friend]’s rifle . . . in connection with the assault charge against” his friend. “The trial court properly suppressed” the narcotics for which the police were looking, and which they found. The police statement to Schweich that they wanted to search his apartment for his friend’s gun or for evidence of his friend’s gun was true, as far as it went; but it didn’t go far enough. The police were obliged to tell Schweich that another purpose of their search was their desire to determine if he was in possession of narcotic drugs. Having withheld this information, the police obtained Schweich’s purported consent on false pretenses, and that consent was a nullity for Fourth Amendment purposes.

The defendant in Commonwealth v. Slaton was the proprietor of a pharmacy. Narcotics detectives presented themselves at the pharmacy, indicated that they were investigating the conduct of one Merriweather in connection with forged prescriptions—which was, at the time, their true purpose—and asked to see Slaton’s pharmacy records. The detectives returned on a second occasion, purportedly for follow-up review of the records. In the interim, however, their investigation had expanded to embrace their suspicions that Slaton himself was involved in the forgeries. This change in focus of the investigation was not communicated to Slaton, who continued to cooperate with what he had been led to believe was an
investigation of someone else. As the Supreme Court of Pennsylvania explained:

[Until the first search was completed, the agents' investigation was focused upon Merriweather, as the agents truthfully disclosed. As a result of this search, however, the focus of the agents' investigation changed, and the agents returned to Slaton's pharmacy with the belief that Slaton's conduct was improper. Notwithstanding this new focus, the agents obtained entry to the premises without any additional disclosure of purpose. One can only conclude that in consenting to the search, Slaton relied on the agents' earlier representations. By permitting him to continue this reliance, the agents obtained Slaton's consent through deception. Such acts amount to implied coercion. Slaton's consent, therefore, was constitutionally invalid, and the search was illegal.

As the foregoing sampling of case law indicates, it is the universal American rule that if a police officer comes to a citizen as a police officer, bearing the insignia of a police officer, entitled to the cooperation due to a police officer, there is a correlative duty on the part of that police officer to tell that citizen the truth. Breach of that duty renders any ensuing

117. Slaton, 608 A.2d at 6.
118. Id. at 10.
119. See Boulos v. Wilson, 834 F.2d 504, 508 (5th Cir. 1987) ("[C]onsent to a warrantless search obtained through coercion, duress or trickery, is not sufficient to overcome constitutional infirmities"); United States v. Varona-Algos, 819 F.2d 81, 83 (5th Cir. 1987); United States v. Maudlin, No. 83-1743, 1984 U.S. App. LEXIS 13534, at *7 (6th Cir. Dec. 3, 1984) (citing United States v. Turpin, 707 F.2d 332, 335 (8th Cir. 1983)); McCall v. People, 623 P.2d 397, 403 (Colo. 1981) (en banc). The same principle is applied in federal tax cases in which a revenue agent obtains documents or admissions via consent while at the same time failing to disclose to the taxpayer that the agent's investigation may result in criminal charges. See, e.g., United States v. Tweel, 550 F.2d 297, 298–99 (5th Cir. 1977); see also United States v. Peters, 153 F.3d 445, 450 (7th Cir. 1998); United States v. Little, 753 F.2d 1420, 1438 (9th Cir. 1985).
120. See infra pp. 2–13. There is no more reckless act on the part of the writer of a law review article than to characterize a rule of law as "universal." Of course there is the occasional aporetic voice. In United States v. Montes-Reyes, police obtained entry into Defendant's hotel room by telling him that they were urgently engaged in the search for a missing little girl; once in the room, the officers searched for and found illegal weapons, which had been the object of their investigation all along. 547 F. Supp. 2d 281, 283–84 (S.D.N.Y. 2008). The court canvassed the case law and granted suppression, but was unwilling to characterize as a "per se rule" the doctrine that an officer acting under color of law may not obtain consent by deceit. See id. at 287 n.7. To the same effect, see United
"consent" involuntary. But the Supreme Court of Florida's majority opinion in *Wyche II* makes no reference whatsoever to any of the cases discussed *supra*; not a single citation to, or acknowledgment of, *Little, Bosse, Krause, McCrorey, Petersen, Hrdlicka, Schweich, Slaton, et al.* These authorities are not distinguished. They are not discussed. It is as if they never existed. 121

Writing for the majority in *Wyche II*, Justice Wells framed the issue as, "whether the fact that Wyche consented to the saliva swabs upon being told that the DNA sample was for use in a fictitious burglary investigation requires that the saliva swabs containing Wyche's DNA not be used in the prosecution of an actual burglary." In Justice Wells's view, the question was largely foreclosed by the prior opinion of the Court in *Washington v. State*, in which the Court held that if the police obtained a tissue sample from an arrestee, not by deceit, but by telling him frankly and candidly what use they intended to make of that tissue sample, they could subsequently make additional use of that tissue sample in another, unrelated, case. 125 As Justice Wells and the majority saw it, *Washington* stands for the proposition that:

> [W]hen a defendant validly consents to the giving of the bodily substance, whether saliva, hair, or blood, for use in a criminal

---

121. *See generally Wyche II, 987 So. 2d 23* (Fla. 2008). *Slaton* appears without discussion in a string citation in the dissenting opinion of Justice Anstead, which opinion also gives some consideration to *Krause.* *See id.* at 38–39 (Anstead, J., dissenting). *See also* discussion *infra* note 162 and 164. *Hrdlicka, Bosse,* and *Slaton* rated a single passing reference each in the dissenting opinion filed by Justice Lewis. *Id.* at 48, 52 (Lewis, J., dissenting). The Florida precedent that comes closest to addressing this issue is *Dunnavant v. State,* 46 So. 2d 871, 875 (Fla. 1950), "in which we held that consent had not been established where the officers pretended to be acting under a warrant which authorized the search. . . . There was thus an element of misrepresentation in the case whereby the defendant's consent was in effect fraudulently induced." *Slater v. State,* 90 So. 2d 453, 454 (Fla. 1956). But neither *Dunnavant* nor *Slater* is cited in *Wyche II.* *See generally Wyche II, 987 So. 2d 23* (Fla. 2008).

122. Wyche's brief before the Supreme Court of Florida cited none of these cases either. *See generally Wyche II, 987 So. 2d 23.* Apart from the opinion of the First District Court of Appeal as to which review was sought, and the opinion of the Fourth District Court of Appeal in *State v. McCord,* 833 So. 2d 828, 831 (Fla. 4th Dist. Ct. App. 2002), as to which conflict was claimed, Wyche's brief cited exactly ten cases. Brief of Petitioner at ii, *Wyche v. State* (*Wyche II*), No. SC05-1509 (Fla. Oct. 2005). Three were from the United States Supreme Court; the other seven were from Florida. *Id.*

123. *Wyche II, 987 So. 2d 27.*

124. *653 So. 2d 362* (Fla. 1994) (per curiam).

125. *Id.* at 364; *Wyche II, 987 So. 2d 27.*
investigation, the characteristics of the substance can be used in investigations unrelated to the one for which the defendant was told the sample was collected. This holding is logical because the DNA profile derived from a bodily substance like saliva, hair, or blood is a constant identifying fact that does not change or disappear.\textsuperscript{126}

The first sentence of the excerpted paragraph flies in the face of all American jurisprudence dealing with the scope of consent. Consent to search or seize is a waiver of the constitutional right to be free from warrantless search or seizure.\textsuperscript{127} The citizen is not obliged to consent; if he chooses to consent, he can tailor the terms of the consent as he chooses.\textsuperscript{128} Silly as it sounds, a householder could, as a matter of constitutional law, tell a police officer: "You have my consent to search my house without a warrant for as long as your partner can stand on one foot and yodel".\textsuperscript{129} Anything found within the time that the searching officer's partner remained standing on one leg yodeling would be admissible; anything found after that time would be inadmissible.\textsuperscript{130} If a police officer asks an arrestee to provide a tissue sample for blood- or DNA-typing as to case X, then the scope of the consent is as to case X and as to no other case.\textsuperscript{131} The officer, of course, is free to ask for a tissue sample for testing without limiting the use or purpose to which the sample will be put.\textsuperscript{132} If the arrestee consents on those terms, he is stuck with them; but only if he is asked for, and consents to, something so capacious.\textsuperscript{133} Justice Wells' extrapolation from \textit{Washington} that a consent to provide cell tissue for testing in case X is a consent to the use of that cell tissue in all cases, anywhere and anytime, stands the doctrine of scope of consent on its head.\textsuperscript{134}

\begin{itemize}
  \item \textsuperscript{126} \textit{Wyche II}, 987 So. 2d at 27.
  \item \textsuperscript{127} U.S. CONST. amend. IV.
  \item \textsuperscript{128} See \textit{Florida v. Jimeno}, 500 U.S. 248, 252 (1991) (noting that "[a] suspect may of course delimit as he chooses the scope of the search to which he consents").
  \item \textsuperscript{129} See, \textit{e.g.}, \textit{United States v. Dichiarinte}, 445 F.2d 126, 129–30 n.3 (7th Cir. 1971) (noting that "if government agents obtain consent or a warrant to search for a stolen television set, they must limit their activity to that which is necessary to search for such an item") (emphasis added).
  \item \textsuperscript{130} See \textit{id.} at 129 (quoting that "[a] consent search is reasonable only if kept within the bounds of the actual consent") (citing \textit{Honig v. United States}, 208 F.2d 916, 919 (8th Cir. 1953)).
  \item \textsuperscript{131} \textit{Wyche II}, 987 So. 2d 23, 27 (Fla. 2008).
  \item \textsuperscript{132} See \textit{id}. at 29.
  \item \textsuperscript{133} See \textit{id}.;
  \item \textsuperscript{134} \textit{id}. at 27–28.
\end{itemize}
Nor is this radical reinterpretation of the law of scope of consent salvaged by the second sentence of the excerpted paragraph—that because a DNA profile "is a constant identifying fact that does not change or disappear," it must follow that a defendant's consent to the profiling of his DNA in one case morphs magically into a consent to the profiling of his DNA in all cases. The scope of any consent is fixed by the intent of the human being consenting, not by the nature—permanent or protean—of the object as to which consent is given. The notion of scope of consent is entirely straightforward: The officer must ask for what he wants, and confine himself to what he gets. If he wants a consent broad in scope, but is given a consent narrow in scope, he must confine himself to what he got and not help himself to what he wanted, on pain of suppression. If he wants consent to use a defendant's cell tissue for testing on an ongoing basis, without limitation, but he asks for and gets consent to use a defendant's cell tissue for testing on a single occasion, he must confine himself to that single occasion. His failure to do so is what is known in the law, and to every child, as "lying." And this is true whether the object he seeks to seize or search is as evanescent as the dew or as "constant as the northern star, [o]f whose true-fix'd and resting quality [t]here is no fellow in the firmament."

Proceeding on his "consent-for-one-purpose-is-consent-for-all-purposes" premise, Justice Wells quite rightly observed that the only remaining issue "is whether Wyche's otherwise apparently voluntary consent was rendered involuntary by the fact that the Winn-Dixie burglary and investigation were fictitious," or in plain language whether it is permissible for the police, relying upon the duty of all of us to cooperate with them, to lie to all of us. He begins by referencing a case having nothing to do with Fourth Amendment consent, Frazier v. Cupp. Its inapplicability to the

135. See id. at 27.
137. See id. "The scope of a search is generally defined by its expressed object." Id. (quoting United States v. Ross, 456 U.S. 798, 799 (1982)).
138. See Jimeno, 500 U.S. at 252.
139. See id. at 251 (holding "[t]he scope of a search is generally defined by its expressed object").
140. BLACK'S LAW DICTIONARY 140 (8th ed. 2004).
141. WILLIAM SHAKESPEARE, THE TRAGEDY OF JULIUS CAESAR act 3, sc. 1.
142. Wyche II, 987 So. 2d 23, 28 (Fla. 2008).
143. See generally id.
144. Id. at 28.
145. 394 U.S. 731 (1969). Frazier is a confession case, not a consent case. See id. at 737. The Wyche II majority cites repeatedly to confession cases. Id. at 28. See, e.g., Fitzpatrick v. State, 900 So. 2d 495 (Fla. 2005) (per curiam); Conde v. State, 860 So. 2d 930 (Fla. 2003) (per curium); Davis v. State, 859 So. 2d 465 (Fla. 2003) (per curium); Nelson v. State, 850 So.
consent-obtained-by-deceit context was explained four decades ago by Judge Wisdom in his opinion in *Graves v. Beto*.146

*Frazier* involved the admissibility of a confession under pre-*Miranda* standards. When the defendant Frazier refused to confess, the interrogating officer told him falsely that his cousin and companion Rawls had already confessed his part. . . . Frazier ultimately confessed. . . . [T]he confession, which was otherwise voluntary, was not fatally tainted by the interrogator's misrepresentations. But in this case we do not void the consent as to the purpose for which it was given. In the presence of misrepresentation in its acquisition, we simply limit the state to the purposes represented. If *Frazier* were applicable, and if we were considering the quality of the consent, we would note that *Frazier* dealt with the voluntariness of a confession rather than the waiver of a right not to be searched and that in *Frazier* there was a partial warning of constitutional rights whereas *Graves* received no warnings.147

Apart from its reliance on confession jurisprudence, the *Wyche II* Court notes time and again that there was no duress or coercion, no threats or promises, that induced Wyche to consent to the seizure of his DNA.148

[The police] informed Wyche that he was suspected of committing a burglary, albeit a fictitious burglary, and requested a saliva sample. He did not threaten Wyche or make any promises of leniency in exchange for Wyche's consent. Accordingly, no threat or promise influences our evaluation of the totality of the circumstances of Wyche's consent.149

Entirely true—and entirely beside the point.

It is apodictic that consent, to be valid, must be voluntary and knowing.150 "Consent" obtained at the business end of a Louisville slugger is not voluntary.151 "Consent" obtained by mendacious and deceitful

---

146. 424 F.2d 524 (5th Cir. 1970).
147. *Id.* at 525 n.2.
149. *Id.* at 31.
151. *See, e.g.*, *Wyche II*, 987 So. 2d at 31.
exploitation is not knowing.\textsuperscript{152} To Wyche's claim that his purported consent was anything but knowing—to his claim that he was deliberately, outrageously, and successfully hoodwinked—the Supreme Court of Florida answers, in effect, "well, at least you weren't beaten with a Louisville slugger."\textsuperscript{153} Entirely true—and entirely beside the point.

But what is more fundamentally troubling is the Wyche II majority's failure to consider the substantial body of case law addressing this question—case law from a host of jurisdictions, state and federal, that speaks with one voice and sets forth one rule: "[A]ccess gained by a government agent, known to be such by the person with whom the agent is dealing, violates the [F]ourth [A]mendment's bar against unreasonable searches and seizures if such entry was acquired by affirmative or deliberate misrepresentation of the nature of the government's investigation."\textsuperscript{154} As noted previously, all citizens have a "duty to cooperate with the police."\textsuperscript{155} It therefore must follow that if a police officer comes to me bearing the signs and symbols of his office, I can and must rely upon the truth of his representations to me; and if those representations prove to be willfully false, the consent he elicits from me is a legal nullity.\textsuperscript{156} The Wyche II court does not consider this rule and reject it; it fails to consider it at all.\textsuperscript{157}

Even more disappointing is some of the language appearing in Justice Bell's opinion: "My hope is that law enforcement will resist the temptation to interpret this decision as an endorsement of intentional deception as acceptable, routine police practice."\textsuperscript{158} But it requires no interpretation to read the majority opinion "as an endorsement of intentional deception as acceptable, routine police practice;" the majority opinion is "an endorsement of intentional deception as acceptable, routine police practice."\textsuperscript{159} And surely Justice Bell is aware of how such things filter down to the level of the officer on the street: The lengthy rescript authored by the jurist is read and reduced to ever-more distilled versions by a succession of prosecutorial and law enforcement authorities. By the time it reaches the station-house, it takes the form, "Hey, the Supreme Court of Florida says it is okay to lie to the bad guys to get them to consent!" If that was a result Justice Bell hoped to avoid, his duty was to dissent, not to beat his breast while concurring.

\begin{itemize}
\item \textsuperscript{152} \textit{Id.} at 29 n.6 (citing Thomas v. State, 456 So. 2d 454, 458 (Fla. 1984)).
\item \textsuperscript{153} \textit{See, e.g., id.} at 28.
\item \textsuperscript{154} United States v. Little, 753 F.2d 1420, 1438 (9th Cir. 1984).
\item \textsuperscript{155} United States v. Washington, 151 F.3d 1354, 1357 (11th Cir. 1998).
\item \textsuperscript{156} \textit{See SEC v. ESM Gov't Sec., Inc.}, 645 F.2d 310, 316 (5th Cir. 1981).
\item \textsuperscript{157} \textit{See Wyche II}, 987 So. 2d at 28.
\item \textsuperscript{158} \textit{Id.} at 32 (Bell, J., concurring).
\item \textsuperscript{159} \textit{Id.} (emphasis added).
\end{itemize}
Conceding as a prefatory matter that Florida “case law has done little to provide concrete examples of when . . . trickery or intentional deception will render a consent involuntary,” Justice Anstead offered a dissent joined by Justice Pariente centered around the theme “that the degree and the flagrant nature of the deception intentionally used by the police to secure Wyche’s consent” rendered that consent invalid. Justice Anstead was prepared to hold as a matter of law “that consent is not voluntary where the government obtains it by intentionally and falsely informing a person in custody that the person is suspected of a completely fabricated crime.”

Justice Lewis, in an even more protracted dissent—also joined by Justice Pariente—took the opposite approach: For him, the question was not one of law but of fact, and required an examination of the totality of

160. Wyche II, 987 So. 2d at 38 (Anstead, J., dissenting). Justice Anstead’s dissent relied upon Krause v. Commonwealth, 206 S.W.3d 922 (Ky. 2006). See id. at 39–40. It also referenced United States v. Carter, 884 F.2d 368 (8th Cir. 1989) and United States v. Andrews, 746 F.2d 247 (5th Cir. 1984). See id. at 37 n.11. Carter concerns itself exclusively, or nearly so, with the Fifth Amendment law of confession, not the Fourth Amendment law of consent. See Carter, 884 F.2d at 373–74. The Andrews court, after attempting to avoid the force of its own precedent in both the United States v. Tweel line of cases and the Graves v. Beto line of cases, concludes tepidly that although “the district court could have found from the evidence that [the police] did trick Andrews . . . [and that therefore] this Court might remand to the district court for such a determination,” it would not do so. Andrews, 746 F.2d at 249 n.3.


162. Id. at 42. In the first post-Wyche II case, State v. Bartling, the Fourth District appeared to apply elements of both the majority holding in Wyche II and Justice Anstead’s dissent. See State v. Bartling, 989 So. 2d 757, 759 (Fla. 4th Dist. Ct. App. 2008). In Bartling, Deputy Castando, eager to search Bartling’s residence for drugs, obtained permission to enter by claiming falsely “that he had received an anonymous tip that someone was dragging a dead body in a rug outside of the apartment. When [Bartling was] asked if he would mind if [the police] looked for a dead body, he permitted them to enter the . . . apartment.” Id. at 758–59. Exploiting this pretext, the police searched for and found the drugs for the possession of which Bartling was subsequently prosecuted. Id. at 759. Affirming the trial court’s grant of Bartling’s motion to suppress, the Fourth District purported to cite Wyche II for the proposition that where, as here, the lie told by the police was such a whopper—“we recognize . . . [Bartling’s] understandable desire to clear his . . . name of the stigma of a rape accusation,”—suppression remains the appropriate remedy. Id. at 762. By implication, then, the Fourth District understands Wyche II to mean that when the police tell a reasonable lie—as, presumably, they did to Earl Wyche—suppression is excessive. See id. Whether other Florida courts will embrace this distinction is a nice question. The Bartling court based its decision on a second ground: that of scope of consent. Bartling, 989 So. 2d at 762. Mr. Bartling’s consent to the police entry and search was predicated upon an alleged need to find a dead body. Id. at 758–59. The “cocaine and drug paraphernalia” which the officers found, and which subsequently formed the basis of Bartling’s prosecution, were in a cigarette pack. Id. at 759. “[T]he search clearly exceeded the scope of consent when the police searched for a dead body in a cigarette pack.” Id. at 762. This argument seems a good deal more forcible.
circumstances, including but certainly not limited to the circumstance of the police having lied to Wyche.\footnote{163 Wyche II, 987 So. 2d at 64–65 (Lewis, J., dissenting). Although Justice Lewis cited to cases involving the law of confession, he clearly appreciated the distinction drawn in Frazier v. Cupp between that law and the law governing consent. \textit{Id.} at 49–50 (citing Frazier v. Cupp, 394 U.S. 731 (1969)). Dilating on Frazier, which upheld the admissibility of a confession obtained after the defendant had been falsely told by the police that his codefendant had already confessed, Justice Lewis offered this highly engaging and instructive explanation: This form of police deception is fair because it is similar to merely bluffing in a poker game: It does not compel suspects to incriminate themselves any more than a large bet in a poker game compels an opponent to believe that the betting player has a stronger hand and that he or she should correspondingly fold. \textit{Id.} at 56.} Examples of other circumstances considered relevant by Justice Lewis include: “[T]he [nature] and extent of the police deception”; “whether the defendant was informed of” any relevant rights; “whether the defendant was in custody” at the relevant time; “whether the police possessed probable cause” as to the crime under investigation and the defendant’s role in it; and whether the police made any promises or representations to the defendant to induce his consent.\footnote{164 Id. at 59 (Lewis, J., dissenting).} Applying this totality of circumstances test, Justice Lewis would have found Wyche’s consent involuntary.\footnote{165 Id. at 43 (Anstead, J., dissenting).}

Although both Justice Anstead’s involuntary-as-a-matter-of-law dissent\footnote{166 Id. at 43 (Anstead, J., dissenting).} and Justice Lewis’s involuntary-in-the-circumstances dissent\footnote{167 Id. at 44, 46 (Lewis, J., dissenting).} have much to commend them, they suffer from the fundamental infirmity that also characterizes the majority opinion: They overlook the unifying principle behind the considerable body of case law prohibiting the conduct visited upon Wyche. When the police ask us—you, me, Earl Wyche—for help or information, we have a public duty to help them if we can do so without infracting our own rights. But the police—when we know it is the police with whom we are dealing—have a correlative duty to be truthful in framing their requests for help or information. Breach of their duty of truthfulness deracines our duty of cooperation. Nothing could be more destructive of the role of the constabulary in a free society than a general perception that the police exploit the appurtenances of their office to deceive and trap, and that therefore only a fool would provide help or truthful information to an officer who sought those things of him.

Thus, if \textit{Wyche} is considered solely in light of existing precedent and traditional principles governing the jurisprudence of consent—precedent and
principles as to which there is national consensus—it fails. But a diacritical feature of the Wyche case—the fact that the object of the police search and seizure was a tissue sample from which a DNA profile was to be derived—gives rise to a separate, albeit equally irrefragable, refutation of the reasoning and result in Wyche.

III. HOW DNA BEARS UPON THE SCOPE OF CONSENT TO A SEARCH OR SEIZURE

The time was 9:05 on September 10, 1984. Professor Sir Alec Jeffreys remembers the moment distinctly. The X-ray films of his tests had just emerged from the machine. “At first the images looked [like] a complicated mess,” he recalls. “Then the penny dropped. We had found a method of DNA-based biological identification.”

“The ‘double helix’ discovery” of the nature and structure of DNA was made by Watson and Crick at Cambridge in 1953.” Sir Alec Jeffreys’ DNA identification technique was first employed in a British deportation proceeding in 1985, and shortly thereafter in a paternity dispute. It leapt onto the stage of history in what the British press rejoiced to refer to as, “the infamous Enderby murder case.”

Since Sir Alec’s epiphany in 1984, forensic DNA science has advanced at a forced-march pace. By 1994, the obvious relevance of DNA science to criminal investigation and prosecution prompted Congress to pass the Violent Crime Control and Law Enforcement Act, authorizing the FBI to

168. Id. at 44, 46 (Lewis, J., dissenting).
169. Wyche II, 987 So. 2d at 44 (Lewis, J., dissenting).
171. Id.
172. Id.
173. Id.

The case had begun with the murder and rape of Lynda Mann, 15, in 1983 in the Leicestershire village [of Enderby]. Dawn Ashworth, 15, died in a copycat killing three years later. Police arrested a man who confessed to the second murder but denied the first. The DNA showed that the same man had murdered both girls but he was not the prime suspect. Some 5,000 local men gave blood samples. One, Colin Pitchfork, eventually confessed; he had persuaded a friend to give blood on his behalf. His DNA was a match.

Id.
establish a national index of DNA samples from convicted offenders. The FBI exercised this authority by linking databanks via the Combined DNA Index System (CODIS), a software infrastructure. All fifty state legislatures "enacted statutes requiring convicted offenders to provide DNA samples for . . . entry into the CODIS system." CODIS enables crime laboratories around the country "to exchange and compare DNA profiles electronically in an attempt to link evidence from crime scenes for which there are no suspects to DNA samples of convicted offenders on file in the system."

In December of 1998, "the FBI requested that Congress enact [more explicit] statutory authority" to allow the FBI to take DNA samples from federal offenders for inclusion in CODIS. On December 19, 2000, Congress passed the DNA Analysis Backlog Elimination Act. Pursuant to this statute, individuals "convicted of a qualifying Federal offense" must provide "a tissue, fluid, or other bodily sample" for analysis. After a

---


175. See FEDERAL BUREAU OF INVESTIGATION, PRIVACY IMPACT ASSESSMENT: NATIONAL DNA INDEX SYSTEM, (Feb. 24, 2004), http://foia.fbi.gov/ndispia.htm [hereinafter NATIONAL DNA INDEX SYSTEM]. It is a mistake, albeit a common one, to conceive of CODIS as a databank, a database, a computer or group of computers. See President's DNA Initiative, What is CODIS?, http://www.dna.gov/uses/solving-crimes/cold_cases/howdatabasesaidcodis/ (last visited Oct. 26, 2008). It is no such thing. See id. Such databanks and databases do exist. See NATIONAL DNA INDEX SYSTEM, supra. The databank of DNA profiles maintained by the FBI is NDIS, the national DNA index system. Id. Around the country various local crime labs—in Florida, the Miami-Dade Crime Lab, for example, or the Palm Beach County Crime Lab—maintain their own databanks; these are referred to as LDIS's, local DNA index systems. NGA.ORG, IMPROVING PUBLIC SAFETY BY EXPANDING THE USE OF FORENSIC DNA, http://www.nga.org/Files/pdf/0702FORENSICDNA.PDF. Each such LDIS in Florida supports and feeds into the SDIS in Tallahassee, the state DNA index system maintained by the Florida Department of Law Enforcement. See id. CODIS "is the automated DNA information processing and telecommunications system that supports," links, and unifies the various LDIS/SDIS/NDIS databases. President's DNA Initiative, Advancing Justice Through DNA Technology, Levels of the Database, http://www.dna.gov/uses/database/levels (last visited Oct. 26, 2008).


177. Id.

178. Id. at 9.


sample is collected and analyzed, the resulting DNA profile is input into CODIS, and thereafter is available to CODIS licensees.\textsuperscript{181}

Similarly, \textit{Florida Statute} section 943.325 provides for, as to every person convicted of a felony,\textsuperscript{182} compulsory drawing of blood, DNA analysis, and DNA data banking.\textsuperscript{183} Pursuant to the statute, the Florida Department of Law Enforcement (FDLE), Florida’s statewide police agency,

and the statewide criminal laboratory analysis system shall establish, implement, and maintain a statewide automated personal identification system capable of, but not limited to, classifying, matching, and storing analyses of DNA. . . . The system shall be available to all criminal justice agencies.\textsuperscript{184}

DNA profiles are to be expunged from the CODIS system by the FBI director only if the director receives a final court order establishing that the conviction giving rise to the DNA profile has been overturned.\textsuperscript{185} As a condition of CODIS licensure, states are also directed to expunge DNA records of an individual if his conviction is overturned.\textsuperscript{186} There is, however, so far as appears in the statute, no enforcement mechanism as to this requirement.\textsuperscript{187} Neither the FBI nor any other federal entity audits the SDIS’s to confirm that states are meeting their obligation to expunge records as to defendants who were acquitted or whose convictions were overturned.

\textsuperscript{181} See id. § 14135a(b). The list of qualifying federal offenses was expanded to include any felony by the Justice for All Act of 2004. Justice For All Act of 2004, Pub. L. No. 108-405, § 203(b)(d)(1), 118 Stat. 2260, 2269-70.
\textsuperscript{182} See generally FLA. STAT. § 943.325 (2007). The statute also extends to juvenile offenders, who under Florida law are found “delinquent” rather than “guilty.” Id. § 943.325(10)(d). Florida Statutes section 947.1405(7)(a)10 and 948.03(1)(n) apply the same requirements—redundantly, at least in part—to inmates admitted to controlled release programs, probation, and community control. FLA. STAT. §§ 947.1405(7)(a)9, 948.03(1)(n) (2007).
\textsuperscript{183} FLA. STAT. § 943.325. The chief judges of Florida’s Fifteenth Judicial Circuit (the felony trial court having jurisdiction over Palm Beach County) and Seventeenth Judicial Circuit (the felony trial court having jurisdiction over Broward County, the county located between Palm Beach and Miami-Dade) have entered administrative orders tracking the language of the statute. In re: Required DNA Testing for Non-Sexual Offenders, Fla. Admin. Order No. III-OO-J-1 (Aug. 9, 2000); In re: Required DNA Testing for Non-Sexual Offenders, Fla. Admin. Order No. 4.045-8/99 (Sept. 2, 1999); see In re: Required DNA Testing for Certain Sexual Offenders & Sexual Predators, Fla. Admin. Order No. 4.044-8/99 (Sept. 1, 1999).
\textsuperscript{184} FLA. STAT. § 943.325(8).
\textsuperscript{186} Id. § 14132(d)(2).
\textsuperscript{187} See id. § 14132.
on appeal. The burden to seek expunction is on the defendant, but no provision of Florida law obliges any judge or any other player in the criminal justice system to inform a defendant whose case was dismissed or conviction overturned that he may seek, and should obtain, expunction of his DNA profile from the CODIS system. Thus, the clear requirement of the federal statute notwithstanding, it is unlikely that any Floridian has ever benefitted from a record expunction.

Such protection against information abuse as exists comes in two forms. First, access to CODIS data is limited for use by criminal justice agencies for use in judicial proceedings, and for use in research and development of identification methods and quality control purposes. Disclosure of data for any other purpose is a misdemeanor. Second, forensic analysis is done by decoding sequences of what is referred to as "junk DNA," DNA believed not to be associated with physical or medical characteristics (other, of course, than the characteristics sufficient to identify the donor of the DNA).

This is gossamer armor. The universe of people employed by or affiliated with "criminal justice agencies" of one kind or another who can lawfully root around in CODIS and its databases is large and growing; so is

188. See generally id.
189. A Floridian convicted of a felony does not merely forfeit forever whatever expectation of privacy he once had in his DNA profile; he actually pays for the privilege. See Fla. Stat. § 943.325(12). Section 943.325(12) provides that unless he "has been declared indigent by the court, the convicted person shall pay the actual costs of collecting the blood specimens" from which his DNA profile will be derived. Id. By operation of Florida Constitution Art. I § 19, however, such costs cannot be collected until the conviction upon which they are based becomes final, i.e., until it is affirmed on appeal. Fla. Const. art. I § 19. Thus, the State of Florida can force a needle into a convicted felon's arm, withdraw his life's blood, analyze that blood, post the fruits of that analysis to data banks from which they will never be removed, and where they can be examined who-knows-when by who-knows-whom, all before the first step has been taken in an appellate process designed to determine whether the conviction in question was lawful. But the state of Florida cannot demand payment of the few dollars in costs associated with the blood-drawing process until the court of appeal has satisfied itself that the conviction in question was lawful. See id.
191. Id. § 14133(b)(1)(A)–(B).
192. Id. § 14133(b)(2). A defendant may also obtain access to his data and the samples from which the data were derived for criminal defense purposes. Id. § 14133(b)(1)(C).
193. Id. § 14135e(c).
the population of those who may have occasion to employ CODIS-type data for research and development.\textsuperscript{196} The defendant who compliantly provides a piece of himself for DNA analysis—Wyche, for example—\textsuperscript{197} likely does not know that the fruits of that analysis will remain in databases until the end of time.\textsuperscript{198}

A year from now, or two years, or twenty, unknown and unknowable pairs of hands and eyes, in unknown and unknowable locations, may access that data for good or bad reasons. The Floridian [—Wyche, for example— whose DNA records they are] will never learn that [those] records have been examined, or when, or where, or by whom, or for what reason. . . . And perhaps next year, or the year after that, as DNA science leaps forward, the data stored in CODIS will enable an informed examiner of that data to know if [a given donor, Wyche, for example,] has a genetic disposition toward [jaywalking], Aretifism, or rooting for the Chicago Cubs. "No one [yet] knows what sort of information—such as propensity to disease or psychological characteristics—will eventually be able to be extracted from DNA."\textsuperscript{199}

Nor is there great comfort to be taken from the statutory promise that such valuable and sensitive data will be seen only by those authorized to see it.\textsuperscript{200} CODIS is relatively neoteric; the internal controls intended to guard it, even more so. But as the data it contains burgeon, and the number of authorized users burgeons, the chances for and likelihood of a loss of control

\begin{itemize}
  \item \textsuperscript{196} See Milton Hirsch, A Nation of Suspects, CHAMPION MAG., Apr. 2007, at 52.
  \item \textsuperscript{197} Section 943.325 of the Florida Statutes concerns itself with convicted Floridians. See FLA. STAT. § 943.325(1)(a), (b). But Rule 3.220(c)(1)(G) of the Florida Rules of Criminal Procedure may result in the permanent recordation of the DNA profile of an arrested Floridian, even if he is later exonerated. See FLA. R. CRIM. P. 3.220(c)(1)(G) (granting Florida courts discretion to require from a defendant "samples of defendant's blood, hair, and other materials of defendant's body . . . after the filing of the charging document"). And because Wyche "consented" to the analysis of his DNA, his DNA profile will remain in the CODIS system in perpetuity, whether or not he had been convicted, whether or not his conviction had been affirmed on appeal. See Hirsch, supra note 197.
  \item \textsuperscript{198} Hirsch, supra note 197, at 52.
  \item \textsuperscript{199} Hirsch, supra note 197, at 52–53 (quoting Stewart Tendler, DNA Pioneer Accuses the Police of Being Overzealous, THE TIMES (London), Nov. 2, 2006, at 7). Under the present state of the law, such a convicted person has no protected Fourth Amendment expectation of privacy in the data derived from analysis of his biological tissue. See Hirsch, supra note 197, 54; see also United States v. Stewart, 468 F. Supp. 2d 261, 281 (D. Mass 2007) (stating "a 're-search' of the DNA database once constructed may not implicate the Fourth Amendment") (citing Johnson v. Quander, 440 F.3d 489, 498 (D.C. Cir. 2006)).
  \item \textsuperscript{200} See FLA. STAT. § 943.325(7).
\end{itemize}
of data, whether intentional or negligent, must be assumed to burgeon as well. 201

It is against the foregoing backdrop, and not in a more traditional context, that Wyche’s putative consent to the seizure of his genetic material and its subsequent analysis must be considered. In the more traditional context, cases involving consent issues were often, as Abraham Lincoln said of his politics, “short and sweet, like the old woman’s dance.” 202 If the police pull the next Earl Wyche over and ask to search his car, that search will take a matter of minutes. The search will reveal something of interest to the police or it won’t. If it does, Wyche will be arrested or investigated further. If it doesn’t, Wyche will be sent along his way. When the search is over, it’s over. There will be no sequelaes, no residual consequences. 203

If Wyche’s cell tissue is seized by the police, the seizure is a matter of minutes. But there the similarity ends. The cell tissue will, as discussed supra, be sent to the local crime lab where it will be DNA-profiled. 204 The cell tissue itself will be preserved by the crime lab in perpetuity. 205 The DNA profile will be uploaded to CODIS. 206 As of November 2005, all fifty American states and 39 sites in 24 countries—“Belgium, Botswana, Canada, Chile, Colombia, Croatia, Czech Republic, Denmark, England, Estonia, Finland, France, Hong Kong, Hungary, Italy, Netherlands, Norway, Poland, Portugal, Singapore, Slovakia, Spain, Sweden, and Switzerland”—had received the CODIS software from the FBI and thus had access to the system. 207 Wyche’s DNA profile will remain in the system unless and until it is removed, which is to say that in all likelihood it will remain in perpetuity. 208 If the local crime lab which holds Wyche’s tissue sample wants to re-test it next year, or the year after that, employing some new test designed to elicit new information, Wyche is entitled to neither notice nor hearing and will receive neither. 209 If any crime lab, anywhere, wants to

201. See generally Hirsch, supra note 197. In England, “[t]wo computer disks bearing addresses, bank account numbers and other details of about 25 million people—almost half the British population—were popped into internal government mail and never arrived.” Jill Lawless, Data on 25M People Lost in the Mail, DESERET NEWS, Nov. 22, 2007, at A04.
203. See Hirsch, supra note 197, at 53.
204. See FLA. STAT. § 943.325(5).
205. Hirsch, supra note 197, at 54.
206. See FLA. STAT. § 943.325(6).
208. See, e.g., Hirsch, supra note 197, at 54.
209. See id.
examine or analyze Wyche’s DNA profile next year, or the year after that, employing some new test designed to elicit new information, Wyche is entitled to neither notice nor hearing and will receive neither.210

Traditionally, “[t]he standard for measuring the scope of a suspect’s consent [to a search or seizure] under the Fourth Amendment is that of ‘objective’ reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?”211 In Florida v. Jimeno,212 the United States Supreme Court distinguished the opinion of the Supreme Court of Florida in State v. Wells.213

There the Supreme Court of Florida held that consent to search the trunk of a car did not include authorization to pry open a locked briefcase found inside the trunk. It is very likely unreasonable to think that a suspect, by consenting to the search of his trunk, has agreed to the breaking open of a locked briefcase within the trunk, but it is otherwise with respect to a closed paper bag.214

Whether it is reasonable to understand a consent to search a trunk to include a paper bag in that trunk, but not to include a locked briefcase in that trunk, is something that can be resolved by reference to common experience and common expectations of privacy.215 With respect to DNA profiling and the CODIS system, there is little or no common experience and less common understanding. Earl Wyche was not told that the DNA sample he was asked to give would result in information that would be available to and examined by the police department that ultimately arrested him, for the crime for which he was ultimately arrested; nor that it would remain available for comparison to crime-scene evidence past, present, and future by police departments all over the country and the world.216 He was told that he was giving a DNA sample that could be used to exonerate him as to a burglary that neither he nor anyone else actually committed.217 That is all he was told.218 In the words of the Wyche II majority:

210. See id.
212. Id. at 248.
213. 539 So. 2d 464 (Fla. 1989), aff’d on other grounds, 495 U.S. 1 (1990).
214. Jimeno, 500 U.S. at 251–52.
215. See, eg., id. at 251–52.
216. See Wyche II, 987 So. 2d 23, 27 (Fla. 2008).
218. Id.
Wyche was asked to consent and did consent to the saliva swabs for use in a burglary investigation. [The lead investigator] truthfully represented that the police desired a sample of Wyche’s DNA for purposes of an ongoing investigation. Wyche was informed that the requested evidence could match or exclude him in respect to a crime and that he was a suspect in a police investigation.\footnote{Wyche II, 987 So. 2d at 30 (Fla. 2008) (emphasis added).}

Wyche was told he was consenting to the testing of his DNA in a burglary investigation, a particular burglary investigation.\footnote{Id. at 24 (emphasis added).} He was told that there was an ongoing investigation, a particular investigation of a particular burglary.\footnote{Id. (emphasis added).} He was told that DNA testing would match or exclude him as to a crime, the particular crime as to which there was a police investigation already in train.\footnote{Id. at 30 (emphasis added).} He was never told—he was deliberately prevented from knowing—that information derivative from his DNA would be examined in connection with other pending crimes as to which the police were presently interested, and other future crimes any time the police became interested.\footnote{See id. at 27.} At the end of the paragraph captioned above the Supreme Court of Florida concluded that “Wyche was not deluded as to the import of his consent.”\footnote{Wyche II, 987 So. 2d at 30.} It would be impossible for him to have been more deluded. Wyche was led, deliberately, to believe that he was consenting to the one-time examination of his DNA for the purposes of determining his involvement or non-involvement in one crime.\footnote{See id.} His consent extended to that one examination for that one purpose, not to any other examination for any other purpose.\footnote{See id.} Yet he was convicted based upon the comparison of his DNA in another case, a comparison not within the scope of his consent.\footnote{See id.}

The Wyche II court and parties were not unaware of section 943.325 of the Florida Statutes.\footnote{See Amended Supplemental Brief of Petitioner, supra note 217, at 1.} On October 19, 2006, the court entered an order “directing the parties to serve supplemental briefs specifically addressing the applicability and impact of section 943.325, Florida Statutes.”\footnote{Id.} Wyche took the position that as section 943.325 of the Florida Statutes read at the
time of his prior convictions he had not been obliged to provide tissue samples, and his orders of judgment and sentence had not required him to do so.230 That being the case, the police had no statutory authority to compel his genetic material, and could obtain such material only pursuant to consent—or, of course, a warrant; which concededly was not employed here.231 Because, in Wyche's view, his consent was constitutionally defective, the resulting DNA profile was "fruit of the poisonous tree;" and section 943.325 of the Florida Statutes was inapplicable and irrelevant.232 The prosecution took the position that the version of section 943.325 of the Florida Statutes in effect at the time when Wyche's tissue samples were taken provided that such samples could be taken from a probationer presently in custody, and that therefore the police were empowered to obtain Wyche's genetic material for DNA profiling with or without his consent.233

In the event, none of the opinions in Wyche II made reference to section 943.325 of the Florida Statutes. The majority opinion, as well as the two dissenting opinions, confined themselves to the certified conflict between the First and Fourth District Courts of Appeal on the constitutionality of consent obtained by gross deceit under color of law.234 Whatever the proper interpretation of former iterations of section 943.325 of the Florida Statutes, Earl Wyche's DNA profile is now in the CODIS system to stay, available for inspection by all CODIS licensees at all times, for all reasons, or even for no reason.235 Whatever Earl Wyche consented to, he never consented to that.236

IV. CONCLUSION

Whatever else can be said of the Supreme Court of Florida's decision in Wyche II, this much can be said with certainty: Justice Bell's professed fears

230. Id. at 16-17.
231. See id. at 18.
232. Id. at 4.

Neither of Wyche's prior criminal judgments required him to provide blood or other specimens. When he committed the 1995 burglary, he was not required to do so under the 1995 version of § 943.325. However, the requirement that he do so, in the 2001 version of § 943.325, was in place when [the police] requested consent to the swabs.

Id. (citation omitted).

234. See generally Wyche II, 987 So. 2d 23 (Fla. 2008). As noted, Justice Bell's concurring opinion, for himself and Chief Justice Quince did not discuss the merits of the case but simply posed concerns about how the majority opinion would be interpreted and applied.

Id. at 32 (Bell, J., concurring).

235. See, e.g., Hirsch, supra note 197.
236. See Wyche II, 987 So. 2d at 25.
will surely be realized. The Reader's Digest version of the *Wyche II* holding—that police are free to tell any lie, however outrageous, however false, to obtain a valid waiver of a homeowner's or suspect's Fourth Amendment rights—will race through the Florida law enforcement community like wildfire. This is no criticism of the police. On the contrary; the police are permitted, indeed they are obliged, to avail themselves of all investigative techniques expressly determined by the courts to be lawful. Police officers would be recreant in their duty if they failed to employ the extraordinary weapon that *Wyche II* has made available to them. That *Wyche II* is at odds with all American jurisprudence in all American jurisdictions to consider the question is of no concern to the officer on the street.

The holding in *Wyche II* is no doubt of profound concern to judges on Florida's trial and intermediate appellate benches. But with respect to the issue actually addressed and resolved by *Wyche II*, little remains to be said or done. Absent the use or threat of brute force, consents obtained as a result of police deception will be valid consents, and evidence obtained as a result of such consents will be admissible evidence.237

Perhaps more consequential, however, is the issue that the *Wyche II* majority opinion did not address: That of scope of consent.238 Trial and appellate judges before whom that issue comes must look beyond *Wyche II*.

Such judges should begin by acknowledging that consent to the seizure of biological material for purposes of DNA profiling is a qualitatively different thing from consent to the search of a car or a house. The homeowner who is asked by the police, "May we search your house?" can be expected to understand the consequences of his assent: The police will search, and if they find evidence or contraband it will be seized, and if evidence or contraband is seized the householder will likely be going to jail. The suspect who is asked by the police, "May we have a cheek swab or a blood sample?" cannot be expected to understand the consequences of his assent: His DNA will be profiled, and the resulting profile will be posted to interlinked databases around the country and around the world where it may be analyzed without notice to him in connection with any and every crime that has been, or may some day be, committed.239 The householder almost certainly has an accurate understanding of the scope of his consent. The donor of a tissue sample almost certainly has none. Florida courts must acknowledge that distinction, and its consequences.

238. See generally *Wyche II*, 987 So. 2d at 23 (emphasis added).
DNA science, to the extent that it makes the criminal justice system a less blunt instrument for separating the speckled flock from the clean, is a boon and a blessing. As DNA science becomes more refined, its power to aid the criminal justice process will become more profound. But the increased sophistication and complexity of the science will increase the gap by which the ordinary arrestee—the next Earl Wyche—will fall short of understanding what, exactly, he is consenting to when he consents to the seizure of his flesh. That shortfall cannot be ignored. The law must place the burden squarely upon the prosecution and its law enforcement functionaries to make sure that each of us understands the material consequences of his consent. Failure to do so would be a betrayal of a core purpose of the Fourth Amendment and its traditional protection of individual choice as to matters implicating privacy and personal security.