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IN THE SUPREME COURT
OF FLORIDA

CASE NO.: 83,935

STATE OF FLORIDA,

Petitioner,

vs.

MIGUEL ANGEL VARGAS,

Respondent/Cross-Petitioner.

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent/Cross-Petitioner Miguel Angel Vargas, will be referred to herein by name or as "respondent" where appropriate and "cross-petitioner" where appropriate. Petitioner, State of Florida, will be referred to herein as the "State" or "Petitioner." References to pleadings and the transcript of proceedings within the Record on Appeal will be made by reference to the appropriate volume and record page cite, Example: [Vol. I, R. 1].

STATEMENT OF THE CASE AND FACTS

The decision of the First District Court of Appeal which is before this Court arises from three cases which were consolidated for appeal.[1] [Vol. VIII, R. 1202; Vargas v. State, 640 So.2d 1139 (Fla. 1st DCA 1994)]. Miguel Vargas raised and preserved for appeal the identical four dispositive issues in each of those three cases.[2]

On January 30, 1992, in circuit court Case No. 90-677 Miguel Vargas pled nolo contendere to one count of burglary of a dwelling with an assault and one count of sexual battery. [Vol. XIII, R. 2005]. In circuit court Case No. 90-686, Miguel Vargas entered a plea of nolo contendere to one count unarmed sexual battery. [Vol. XIII, R. 2005-06]. In exchange, the State nol prossed the remaining counts of the Second Amended Information. [Vol. XIII, R. 2006]. Additionally, in circuit court Case No.

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[1] Cross-Petitioner notes that the Clerk of the Court for Clay County, Florida, incorrectly filed all three of his consolidated cases under Appeal Docket No. 92-556, and further incorrectly reported all three cases as appearing under lower court case number 90-1325-CF. Mr. Vargas informed the Clerk of the First District Court of Appeal of that error and was assured that the lower court's clerk's error would not create a problem with his appeal.

[2] Cross-Petitioner filed a designation to the Clerk of the trial court in each of three cases directing the Clerk to include in the Record on Appeal "any and all pleadings, memoranda, orders and other legal documents." However, the Clerk chose to file a representative pleading or order out of the virtually identical pleadings or orders filed in each of the three cases now before this Court. The State entered into a stipulation with Mr. Vargas in the proceedings before the First District Court of Appeal that the record now before this Court accurately reflects all issues raised in the Proceedings before the trial court.

90-1325, Miguel Vargas also entered a plea of nolo contendere to one count of burglary of a dwelling with an assault, and one count of unarmed sexual battery. [Vol. XIII, R. 2006]. In exchange, the State agreed to nol prosse all remaining counts. [Vol. XIII, R. 2006]. The trial court sentenced Miguel Vargas to 15 years concurrent imprisonment on each of the second degree sexual battery counts and to 22 years on each of the burglaries with an assault to run concurrent with all other sentences imposed. [Vol. XIII, R. 2014]. The trial court expressly recognized that Miguel Vargas had reserved the right to appeal his First, Second and Third Motions to Suppress, along with his Motion in Limine to Exclude Novel Scientific Evidence in each of his cases. [Vol. XIII, R. 2014].

The charges against Miguel Vargas stemmed from Clay County Sheriff's Detective Lee Harris having obtained a search warrant to seize and search blood and saliva from Mr. Vargas on February 23, 1990. [Vol. I, R. 58-64]. As grounds in the affidavit for search warrant, Detective Harris swore:

> Your affiant is a detective with the Clay County Sheriff's Office. Your affiant has been assigned to investigate a series of Sexual Assaults that occurred on Wells Road in Orange Park, Clay County, Florida.
> Your affiant has talked to [redacted]. According to Ms. [redacted] on October 16, 1989 at approximately 6:00 A.M. while she was sleeping a white male entered her first floor apartment at [redacted] Orange Park, through a sliding glass door. Ms. [redacted] is a single white educated female who lives alone.
> According to Ms. [redacted] the suspect licked her body, and performed oral and vaginal sex on Ms. [redacted] The suspect asked Ms. [redacted] numerous questions about her personal life and her education. The suspect indicated that he had been watching Ms. [redacted] and that she needed to get curtains. When the suspect left he taped her hands and mouth loosely with cellophane tape. The

suspect appeared to have some knowledge of the Navy. At some time the suspect took a small jewelry box, apparently as a souvenir.

According to Ms. [redacted] the suspect wore a ski mask to cover his face. He wore cloth gloves and a dark waist length coat. The coat prevented Ms. [redacted] from being able to tell much about the suspect's size. However according to Ms. [redacted] when the suspect kissed her he was close to her height which is approximately 5'5".

After the assault Ms. [redacted] was taken to Humana Hospital for a physical examination. According to Dr. Wood large amounts of semen were found in the victim's vaginal area. Samples of these have been preserved.

Your affiant has also reviewed a police report prepared by Detective Rodger Gainey of the Clay County Sheriff's Office detailing a Sexual Assault that occurred to [redacted]. According to Ms. [redacted] on November 10, 1989 at approximately 5:40 A.M. while she was sleeping a white male entered her first floor apartment at [redacted] Orange Park, through a sliding glass door. [redacted] intersects with [redacted] Road. A flashlight was shined into Ms. [redacted] eyes. Ms. [redacted] is a single white educated female who lives alone. According to Ms. [redacted] the suspect performed oral and vaginal sex on her. He asked Ms. [redacted] numerous questions about her personal life and education. He seemed very interested in knowing about her boyfriend who is in the Navy. The suspect indicated that he had been watching Ms. [redacted] and she needed to be more careful about security. During the assault, the suspect taped Ms. [redacted] hands and mouth loosely with cellophane tape. At some time the suspect took a white sleeveless net tee shirt, apparently as a souvenir.

Ms. [redacted] was unable to get a look at the suspect to make any determinations as to height or weight.

After the assault, Ms. [redacted] was taken to Humana Hospital for a physical examination. According to Dr. Wood, semen was found in the victim's vaginal area. Samples were preserved.

Your affiant has also reviewed a police report prepared by C. J. Snyder, a deputy with the Clay County Sheriff's Office. Deputy Snyder investigated an Attempted Burglary that occurred on January 15, 1990. At approximately 7:20 A.M. Deputy Snyder arrested MIGUEL ANGEL VARGAS after he attempted to break into the sliding glass door of the first floor apartment of [redacted] located at [redacted], Orange Park. Ms. [redacted] is a single white educated female who lives alone. She is dating a man in the Navy. Deputy Snyder chased Vargas and caught him as he tried to throw a

> flashlight and gloves into his vehicle. Tape and screwdrivers were also found in the vehicle as well as a dark waist length jacket.
>
> Based on the above information your affiant has reason to believe MIGUEL ANGEL VARGAS committed the Sexual Assaults on [redacted] and [redacted] It is now possible to compare the DNA molecules found in cells and semen samples collected from Sexual Assault victim within the known blood samples of suspected assailants. According to Diane Hanson, and expert serologist, a serology analysis from [redacted] and [redacted] contains semen and sperm of a sufficient quantity to attempt a DNA comparison. In order to do so it is necessary to obtain blood samples from the suspect.

[Vol. IV, R. 494-95; Vol. V, R. 637-38] (emphasis added). A search warrant was issued on the basis of this affidavit to search and seize Miguel Vargas' blood and saliva. [Vol. IV, R. 492-93; Vol. V, R. 635-36].

On February 27, 1990, Clay County Detective Harris entered Cecil Field Naval Air Station, a federal reservation (hereinafter "Cecil Field"), located in Duval County to seize Mr. Vargas and execute the search warrant for his blood. [Vol. I, R. 64; Vol. XIII, R. 1591-1592, 1602; Vargas, 640 So.2d at 1141]. Harris is not a member or sworn officer of the Jacksonville (Duval County) Sheriff's Office or a federal military officer. [Vol. XI, R. 1591, 1601-1602, 1607]. Detective Harris took Mr. Vargas from Cecil Field Naval Air Station to Mr. Vargas' home in Duval County. [Vol. XI, R. 1597]. Subsequent to Mr. Vargas' home being searched, Detective Harris transported Mr. Vargas to University Hospital which is also located in Duval County, Florida. [Vol. XI, R. 1614; Vargas, 640 So.2d at 1140]. At University Hospital, Mr. Vargas was taken into an examination

room by Detective Harris where a nurse, at Harris' direction, took blood and saliva from Mr. Vargas. [Vol. XI, R. 1598, 1614-1616; Vargas, 640 So.2d at 1140]. During that search and seizure, Detective Baer a Jacksonville Sheriff's Office officer was somewhere about the grounds of the hospital but was not present in the room where Mr. Vargas' blood was withdrawn. [Vol. XI, R. 1614-15; Vargas, 640 So.2d at 1140. A forensic test, known as a deoxyribonucleic acid (DNA) profiling test, was subsequently carried out by Dr. James Pollock of the Florida Department of Law Enforcement (FDLE) upon Miguel Vargas' seized blood. [Vol. XI, R. 1682-83, 1688; Vol. XII, 1731-32].

Miguel Vargas filed Defendant's First Motion to Suppress Evidence, hereinafter, "Facial Validity Motion," challenging the facial validity of the search warrant which authorized the search and seizure of his blood. [Vol. III, R. 411-13; Vol. VII, 960-62]. Mr. Vargas' facial validity attack was submitted to the trial court on the basis of argument set forth within appellant's Facial Validity Motion and the memorandum of law in support of that motion. [Vol. III, R. 411-13; Vol. IV, R. 445-599; Vol. VI, R. 830-845; Vol. XI, R. 1582- 83]. The trial court subsequently denied appellant's Facial Validity Motion and the First District Court of Appeal upheld the denial of that motion. [Vol. VI, R. 846; Vol. VII, 993-994; Vargas, 640 So.2d at 1140].

Mr. Vargas also filed his Second Motion to Suppress and Incorporated Memorandum of Law, hereinafter, "Franks Motion," through which he attacked the veracity of the affiant. [Vol. V, R. 600-731; Vol. VII, R. 965-66]. The trial court subsequently

denied Mr. Vargas a hearing on his Franks motion and denied that motion. [Vol. VI, R. 846; Vol. VII, 993-94]. The First District Court of Appeal affirmed the trial court's Order denying that motion. Vargas, 640 So.2d at 1140 (Fla. 1st DCA 1994)

Mr. Vargas also filed a Third Motion to Suppress Evidence, hereinafter, "Jurisdictional Motion," in each of the cases now before this Court. [Vol. VII, R. 895-913]. Cross-Petitioner Vargas challenged the authority and manner in which the search warrant at issue was executed. [Vol. VI, R. 895-913]. Following an evidentiary hearing held upon cross-petitioner's Jurisdictional Motion, the trial court denied that motion. [Vol. XI, R. 1585-1641; Vol. VI, R. 900]. The trial court also denied appellant's Motion to Admit Defendant's Exhibit Number 2 into Evidence (Third Motion to Suppress). [Vol. VII, R. 934-54; Vol. VII, R. 1128-29]. The First District affirmed the denial of cross-petitioner's Jurisdictional Motion. Vargas, 640 So.2d at 1141-41. However, the First District certified the following question regarding cross-petitioner's Jurisdictional Motion to Suppress to this Court:

> WHETHER A SEARCH WARRANT FOR A BLOOD SAMPLE IS PROPERLY SERVED AND EXECUTED IN THE PRESENCE OF AN OFFICER WHO IS WITHIN THE TERRITORY NAMED IN THE SEARCH WARRANT, WHEN THE OFFICER WHO READS THE WARRANT TO THE ACCUSED, TRANSPORTS THE ACCUSED TO THE HOSPITAL FOR THE BLOOD TEST, AND TAKES CUSTODY OF THE BLOOD SAMPLE, IS NOT WITHIN THE SCOPE OF THE WARRANT?

Id. at 1142. The First District also certified a question to this Court concerning cross-petitioner's Motion in Limine.

The trial court held a consolidated hearing on Mr. Vargas' Motion in Limine to Exclude Novel Scientific Evidence, hereinafter, "Motion in Limine." [Vol. VII, R. 995-96; Vol. XII, 1642-1831; Vol. XIII, R. 1832-1995]. Dr. James Pollock testified during direct examination that he believed forensic DNA profiling was generally accepted as reliable by the scientific community. [Vol. XII, R. 1668]. However, during cross examination Dr. Pollock admitted that there was controversy within the scientific community regarding the accuracy of probability calculations like those made by him. [Vol. XII, R. 1758, 1761; Vargas, 640 So.2d at 1146]. Dr. Pollock considers himself to be a "forensic serologist." [Vol. XII, R. 1648]. With the exception of an FBI sponsored statistics course, Dr. Pollock has taken no graduate level courses in statistics. [Vol. XII, R. 1654]. Dr. Pollock, over objection, was found to be qualified as a "DNA analysis expert." [Vol. XII, R. 1660].

Dr. Pollock found that a sample of blood from Miguel Vargas "matched" that of a crime scene sample removed from each of the alleged victims. [Vol. XII, R. 1684-88, 1688-91, 1691-93]. Dr. Pollock utilized databases assembled by the FBI in making probability calculations in the cross-petitioner's cases. [Vol. XII, R. 1694]. During cross-examination, Dr. Pollock admitted that he had no personal knowledge of how the FBI database for "Hispanics" was compiled. [Vol. XII, R. 1712, 1752]. [Vol. XII, R. 1729]. Pollock used the FBI databases comprised of Miami Hispanics, Texas Hispanics, Caucasians and a compilation of Florida, South Carolina and Texas Blacks in the [redacted] and [redacted]

cases. [Vol. XII, R. 1742; Vargas, 640 So.2d at 1146]. In the Ware case Pollock used FBI databases comprised of Blacks, Caucasians, Texas Hispanics and Florida Hispanics. [Vol. XII, R. 1751]. Dr. Pollock calculated that the chance of having another individual from the general population match the same DNA profile as Mr. Vargas' was approximately 1 in 30 million in [redacted] cases. [Vol. XII, R. 1696-97]. Dr. Pollock further calculated that the odds of having an individual from the general population match Mr. Vargas' DNA profile in the Amelia Ware case was approximately 1 in 60 million. [Vol. XII, R. 1697, Vargas, 640 So.2d at 1146].

The State also called Dr. Martin Tracey, a professor of Biological Sciences at Florida International University in Miami. [Vol. XII, R. 1782]. Tracey testified that RFLP analysis is widely accepted as a reliable procedure by the general scientific community. [Vol. XII, R. 1791]. Tracey testified that the concept of applying population genetics to DNA profiles to calculate probabilities of a sample matching a suspect is a reliable procedure that is generally accepted by the scientific community. [Vol. XII, R. 1796]. He also testified that the probability calculation methods utilized by Dr. Pollock are "generally accepted by the forensic science community" as being a reliable procedure. [Vol. XII, R. 1797].

Miguel Vargas also testified at the hearing upon his motion in limine. [Vol. XIII, R. 1838-1840]. Both Mr. Vargas' father and mother were born in Puerto Rico. [Vol. XIII, R. 1839]. Mr. Vargas' maternal grandparents were both born in Puerto Rico.

[Vol. XIII, R. 1839]. Likewise, both of Mr. Vargas' maternal grandparents were born in Puerto Rico. [Vol. XIII, R. 1839]. Miguel Vargas is one hundred percent Puerto Rican. [Vol. XIII, R. 1839].

Dr. Leslie Sue Lieberman, a Professor at the University of Florida in the Departments of Anthropology and Pediatrics since 1976, was called by the cross-petitioner. [Vol. XIII, R. 1842, 43]. She has a Ph.D. in behavior genetics and biological anthropology and is the only woman that has served as President of the Florida Academy of Sciences. [Vol. X, R. 1418; Vol. XIII, R. 1842]. Dr. Lieberman is currently studying the genetic epidemiology of diabetes among minority populations. [Vol. XIII, R. 1843, 1854-55].

Dr. Lieberman's work has taken her to the Caribbean, including Puerto Rico and Jamaica. [Vol. XIII, R. 1846]. Dr. Lieberman was tendered and qualified as an expert in human evolutionary biology, in biomedical anthropology and the phenotypical makeup of the Caribbean populations. [Vol. XIII, R. 1846; Vargas, 640 So.2d at 1146]. She studied the FBI's databases in preparing to testify. [Vol. XIII, R. 1855]. She was aware that the FBI's Hispanic databases were comprised of Texas Hispanics and Dade County, Miami Hispanics. [Vol. XIII, R. 1855]. The 1980 Census showed that 35.7% of the Dade County population was considered Hispanic. [Vol. X, R. 1428; Vol. XIII, R. 1855]. The 1980 Census further showed that 7.9% of the metro Dade County population was Puerto Rican. [Vol. X, R. 1428; [Vol.

XIII, R. 1856]. Dr. Lieberman believes there would be a lower proportion of Puerto Ricans in Miami today due to the influx of Cubans into the Miami area. [Vol. XIII, R. 1856]. The Hispanic population in Texas would primarily be Mexican American. [Vol. XIII, R. 1856; Vargas, 640 So.2d at 1146-47].

Dr. Lieberman explained that Puerto Ricans are a tri-racial population. [Vol. XIII, R. 1858-61]. Initially, Puerto Rico was comprised of Native Americans. The Spanish occupation in the late 1490's almost eliminated the Native American population. [Vol. XIII, R. 1861]. Subsequently, African slaves were imported into Puerto Rico from the year 1511, through sometime in the 1870's. [Vol. XIII, R. 1861]. Thus, there is a long history of tri-racial admixture in Puerto Rico. [Vol. XIII, R. 1861]. Dr. Lieberman demonstrated that the frequency of traditional genetic markers varies between ethnic groups. [Vol. XIII, R. 1857-60]. Dr. Lieberman testified that there is tremendous phenotypical diversity among the Puerto Rican population. [Vol. X, R. 1429-31]. She stated that there would also be genotypical differences among that population. [Vol. XIII, R. 1862]. Dr. Lieberman demonstrated that there are statistically differences in the frequencies of blood markers among tri-racial populations. [Vol. X, R. 1433-34; Vol. XIII, R. 1863-68]. Based on her research and experience, Dr. Lieberman would not expect the Puerto Rican population to be in Hardy-Weinberg equilibrium. [Vol. XIII, R. 1870; Vargas, 640 So.2d at 1146]. Dr. Lieberman defined the theorem in these terms:

> The Hardy-Weinberg equilibrium describes the allele frequencies over a number of generations and populations. These allele frequencies remain stable in terms of their distribution and the genotypes.

[Vol. XIII, R. 1870]. Dr. Lieberman testified that it is generally accepted within the scientific community that for the vast number of alleles the human population is not in Hardy-Weinberg equilibrium. [Vol. XIII, R. 1872]. She would not make the assumption that any allele is in Hardy-Weinberg equilibrium within the Puerto Rican population without seeing established data. [Vol. XIII, R. 1874]. She testified that is also the generally accepted view within the scientific community. [Vol. XIII, R. 1874].

Cross-Petitioner Vargas next called Dr. Edward Kittredge Wakeland. [Vol. XIII, R. 1896]. Dr. Wakeland is and has been a professor at the University of Florida for the past eleven years and specializes in researching the genetics of populations. He is a professor in the following departments of the university: the Department of Pathology and Laboratory Medicine; the Department of Immunology and Medical Microbiology; and the Department of Experimental Pathology. [Vol. XIII, R. 1896]. Dr. Wakeland has a Ph.D. is microbiology from the University of Hawaii. Id. Dr. Wakeland specializes in studying genes and the immune system and polymorphisms of those genes. [Vol. XIII, R. 1896-97]. Dr. Wakeland is the Director of the Division of Basic Sciences in the Department of Pathology and Laboratory Medicine. [Vol. XIII, R. 1897]. He is also the Director of the Center for Immunogenetics in the College of Medicine. Furthermore, he is

the Director of the Immunogenetics course for the medical school and teaches graduate courses in genetics at the University of Florida. [Vol. XIII, R. 1898]. Dr. Wakeland sits on the advisory panel for genetics for the National Science Foundation. [Vol. XIII, R. 1899]. He has published over sixty articles in the areas of immunology, predominantly dealing with the molecular genetics of the genes that affect the immune system. [Vol. XIII, R. 1899].

Prior to Mr. Vargas' counsel contacting Dr. Wakeland, he had never consulted in a case involving the forensic use of DNA. [Vol. XIII, R. 1901]. Dr. Wakeland and his graduate students use laboratory techniques similar to those used in DNA profiling in his laboratory on a daily basis. [Vol. XIII, R. 1902]. Dr. Wakeland was tendered and qualified as an expert in the fields of molecular biology; population genetics; and molecular genetics of polymorphisms. [Vol. XIII, R. 1905, 1954; Vargas, 640 So.2d at-1147].

Dr. Wakeland explained the Hardy-Weinberg equilibrium theory "[is] actually an abstract that works best in computers and has been repeatedly demonstrated not to really accurately represent the situation in most natural populations." [Vol. XIII, R. 1930-31]. The method of making probability calculations utilized by the FDLE assumes that the database is in Hardy-Weinberg equilibrium and linkage equilibrium. [Vol. XIII, R. 1932]. FDLE's probability calculations further assume that mating selection in no way favors certain associations. [Vol. XIII, R. 1933]. Dr. Wakeland discussed the controversy in the scientific

community regarding making probability calculations related to DNA profiling. [Vol. XIII, R. 1933-45; Vargas, 640 So.2d at 1147].

He testified that Miguel Vargas, a Puerto Rican, is a member of an ethnic group that Drs. Lander, Lewontin, Hartl and others are referring to as being part of a substructured population. [Vol. XIII, R. 1944]. Dr. Wakeland testified that Drs. Lewontin, Hartl, Lander and others are stating that the Puerto Rican population is an ethnic group that is not in Hardy-Weinberg equilibrium. [Vol. XIII, R. 1944]. He stated he disagreed with a statement previously made by Dr. Pollock that the only difference in the distribution of polymorphic alleles which are the subject of DNA profiling between "the Hispanic group and Caucasian group" are "minor fluctuations." [Vol. XIII, R. 1945-46]. Dr. Wakeland stated that there is no way to know what the frequency of the VNTR's which the probes used by FDLE detect is within the Puerto Rican population without conducting a large scale study of that population. [Vol. XIII, R. 1953]. He testified there is no way to predict what the affect of compiling subpopulation databases would be because the frequency of alleles within subpopulations at this point is unknown. [Vol. XIII, R. 1968].

Following the hearing on appellant's Motion in Limine, the trial court held the DNA profiling evidence was admissible. [Vol. VII, R. 1126-27]. The First District subsequently held that the population frequencies offered into evidence by the State were "not generally accepted in the relevant scientific

community." Vargas, 640 So.2d at 1150. However, the court then remanded the case for a determination of whether "a more conservative method of calculating population frequencies ... is generally accepted." Id. at 1151-52. The First District also simultaneously certified the following question as one of great public importance:

> IS THE FDLE (FBI) METHOD OF CALCULATING POPULATION FREQUENCIES FOR PURPOSES OF DETERMINING THE POSSIBILITY THAT SOMEONE OTHER THAN DEFENDANT MATCHES THE DNA TAKEN FROM THE CRIME SCENE IN DNA PROFILING GENERALLY ACCEPTED IN THE RELEVANT SCIENTIFIC COMMUNITY FOR USE IN CRIMINAL TRIALS IN FLORIDA; IF NOT; IS A MORE CONSERVATIVE METHOD OF ESTIMATING POPULATION FREQUENCIES GENERALLY ACCEPTED IN THE RELEVANT SCIENTIFIC COMMUNITY FOR USE IN CRIMINAL TRIALS?

Id. at 1152. The State's petition and Miguel Vargas' cross-petition followed.

SUMMARY OF ARGUMENT

The First District correctly found that DNA profiling evidence at issue was not generally accepted by the scientific community for use at trial. However, after finding the evidence at issue was not generally accepted, the First District erred by remanding Mr. Vargas' cases for further proceedings to consider whether a new technique for calculating the probability of other individuals having a similar DNA profile is generally accepted by the scientific community.

It was the State's burden to establish that the novel scientific evidence at issue was generally accepted. The State failed to carry its burden and the district court erred in giving the State a second chance to carry its burden after the parties,

with the trial court's approval, stipulated that Miguel Vargas' Motion in Limine raised a dispositive question. Additionally, the State now vigorously argues that the new method referred to by the First District is not generally accepted. Cross-Petitioner Vargas agrees with that assessment and thus even if it were proper there would be no point in remanding these proceedings. Accordingly, this Court should affirm the First District's finding that the evidence at issue was not generally accepted and this Court should vacate Miguel Vargas' convictions on that basis.

This Court should also find that the First District erred in affirming the denial of cross-petitioner's Jurisdictional Motion to Suppress. The record conclusively shows that an officer not authorized by the warrant at issue executed the warrant in a county in which he is not a sworn officer. This Court should not sanction such a gross violation of the statutory restrictions on the execution of warrants.

Furthermore, the First District also erred in affirming the denial of Mr. Vargas' Facial Validity and Franks suppression motions. At the very least, the First District erred in not holding that Miguel Vargas was entitled to a hearing on his Franks motion. The Fourth Amendment was designed to bar intrusive searches based on an officer's naked hunch. The record of this case shows that the officer that procured the warrant at issue acted on a bare hunch. The warrant application failed to establish probable cause under the traditional test, and it clearly failed to meet the heightened standard of probable cause

set forth in Schmerber v. California, 384 U.S. 757 (1966). The record also shows that the affiant intentionally or recklessly misrepresented and omitted material information from his warrant application in order to act on his hunch. Accordingly, this Court should reverse the First District's denial of cross-petitioner's suppression motions and should vacate Miguel Vargas' convictions.

I.

THE FIRST DISTRICT COURT OF APPEAL CORRECTLY HELD THAT THE DNA PROFILING EVIDENCE OFFERED BY THE STATE WAS NOT GENERALLY ACCEPTED BY THE SCIENTIFIC COMMUNITY

Testimony adduced at the hearing on respondent's Motion in Limine below showed that DNA profiling testing was conducted by Dr. James Pollock of the Florida Department of Law Enforcement (FDLE). [Vol. XI, R. 1682-83, 1688; Vol. XII, R. 1731-32; Vargas; 640 So.2d at 1145]. Pollock testified that he utilized, with some modifications, the testing method developed and used by the FBI. [Vol. XII, R. 1708; Vargas, 640 So.2d at 1145]. A detailed account of how the FBI's DNA profiling test is conducted may be found in United States v. Yee, 134 F.R.D. 161, 169-73 (N.D. Ohio, 1991). The trial court entered its order denying respondent's Motion in Limine on January 29, 1992. [Vol. VII, R. 1126-27]. The First District Court of Appeal reversed the trial court holding that the probability evidence offered by the State was not generally accepted by the scientific community. Vargas,

640 So.2d at 1150. The State now contends without any reference to the trial court's order that the trial court was correct.

In denying respondent's motion, the trial court erroneously held that the DNA profiling evidence at issue was not novel. [Vol. VII, R. 1126]. However, counsel for FDLE and counsel for the State indicated that this was FDLE's first case experience with DNA evidence. [Vol. X, R. 1516-17]. Even the State's main witness, Dr. Pollock, testified that he had only testified in "approximately 10" cases involving DNA evidence. [Vol. XII, R. 1654].[3] On review the First District correctly found that no Florida appellate case prior to this one "considered a challenge to the adequacy of the data bases used to calculate the probability that someone other than the defendant might have the same DNA 'fingerprints' as defendant." Vargas, 640 So.2d at 1143. The court further found that Mr. Vargas had made the evidentiary showing required by this Court's holding in Correll v. State, 523 So.2d 562, 567 (Fla. 1988)(recognizing a Frye hearing must be held "when the opposing party makes a timely request for such an inquiry supported by authorities indicating that there may not be general scientific acceptance of the technique employed."). Vargas, 640 So.2d at 1141-42. The State concedes that the trial court was wrong as to that issue by not challenging that finding.

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[3] The State has foregone the disingenuous argument it made to the First District to the effect that the hearing before the trial court was merely "to determine if the testing (Footnote Continued)

The First District Court of Appeal also correctly found that the trial court erred in holding the probability evidence at issue was admissible under the relevancy standard relied upon in Andrews v. State, 533 So.2d 841 (Fla. 5th DCA 1988). Vargas, 640 So.2d at 1143. The First District held that this Court's decision in Flanagan v. State, 625 So.2d 827 (Fla. 1993), mandates that the Frye test of general acceptance be applied when determining the admissibility of novel scientific evidence in Florida. The State does not challenge that holding, however, the State now seeks to persuade this Court that the First District improperly applied the Frye test.

The State now reasserts its argument, which the First District rightly rejected, Vargas, 640 So.2d at 1146, n. 10, that only "forensic scientists" are qualified to give an opinion on general acceptance of scientific evidence. Notably, the majority of articles submitted by the State in the appendix to its Merits Brief were authored by academics and not by "forensic scientists." Furthermore, one of the State's two witnesses below, Dr. Martin Tracey, is a professor employed by Florida International University. [Vol. XII, R. 1782]. While Dr. Tracey frequently testifies for the prosecution, there is no evidence in the record that he is employed by the State in any other capacity than as an expert witness. [Vol. XII, R. 1801-03; see also, Commonwealth v. Rodgers, 605 A.2d 1228, 1234-36, (Pa. Super.

(Footnote Continued)
laboratory substantially performed the scientifically accepted tests and techniques." [State's Answer Brief, 25].

1992)(hearing on admissibility of DNA evidence in April, 1990 in which Dr. Tracey, Jr., testified for the State). Dr. Tracey testified that he has never been involved in a case "prior to the extraction of DNA and preparation of the autoradiographs." Vol. XII, R. 1803]. Thus, Dr. Tracey can hardly be called a "forensic scientist," unless the State defines forensic scientists as those scientists who support the State's position on any given forensic issue.

In Flanagan v. State, 625 So.2d 827 (Fla. 1993), this Court recently carried out a de novo review in determining whether evidence of a sex offender profile was generally accepted. This Court concluded, "After examining relevant academic literature and case law, we find that sexual offender profile evidence is not generally accepted in the scientific community and does not meet the Frye test for admissibility." Id. at 828. See also, Stokes v. State, 548 So.2d 188, 195 (Fla. 1989)(holding, "[A] review of the available literature shows the views of the scientific community have either remained divided or are leaning towards disapproval of hypnosis as a reliable means of accurately enhancing memory."); Ramirez v. State, 542 So.2d 352, 355 (Fla. 1989)(holding testing method which formed basis of evidence technician's testimony was not generally accepted finding, "The only evidence received was the expert's self-serving statement supporting this procedure.); and Ramos v. State, 496 So.2d 121, 123 (Fla. 1986)(holding dog scent discrimination lineup was not generally accepted where, "The only evidence presented regarding the reliability of ... the lineup was the testimony of the dog

handler and the police officer."). See also, Thompson, Evaluating the Admissibility of New Genetic Identification Tests: Lessons from the `DNA War,' 84 J. of Crim. Law & Criminology 22, 95 (discussing reticence of DNA test developers to disclose protocols and data which opened them to criticism). Thus, this Court has clearly rejected narrowly defining the relevant scientific community as the State now proposes.

In a case raising issues akin to the ones before this Court, the District Court of Appeal for the District of Columbia held:

> We specifically decline the government's invitation to hold that the position of one group of distinguished scientists (those favoring the government's position) is more persuasive, on a matter of molecular biology or genetics, than the position of an apparently equally distinguished group of scholars who have reached an opposite conclusion; indeed, we view the government's position on this issue as contrary to Frye.

United States v. Porter, 618 A.2d 629, 631 (D.C. App. 1992). In accord with Porter, this Court's precedent is also consistent with that of other states which have recognized that the proponent of a test may be too closely involved with it to take an objective view. See, People v. Brown, 40 Cal.3d 512, 530 (1985)(recognizing that courts applying Frye must look to experts who are "'impartial,' that is, not so personally invested in establishing the technique's acceptance that he might not be objective about disagreements within the relevant community."); and People v. Young, 425 Mich. 470, 483, 391 N.W.2d 270, 275-76 (Mich. 1986)(holding reliance on testimony of practitioner/

promoter to establish general acceptance of forensic test was error). Thus, the First District correctly decided the issues below by focusing on the testimony adduced at the hearing and also by looking to outside commentaries. The respondent's experts are two highly qualified individuals with knowledge in the relevant scientific fields. Neither of the State's experts had comparable credentials. As in Porter, this Court should reject the State's argument that its forensic expert's opinion should carry more weight than the respondent's academic experts.

The State also now fluctuates between arguing that the First District erred in considering the Report of the National Research Council of the National Academy of Sciences, DNA Technology in Forensic Science, National Academy Press (1992), hereinafter "NRC Report," which was issued subsequent to the hearing on respondent's Motion in Limine and arguing that this Court should consider recent decisions and publications. [State's Merits Brief, 18, 26-40]. The State cannot have it both ways. De novo review of the admissibility of scientific evidence has traditionally provided a safety net to catch instances in which novel scientific evidence has been prematurely introduced. The history of forensic science is replete with instances in which scientific techniques, after being used in court, later turn out to be less reliable, less valid and less probative than originally believed. See, Neufeld and Colman, When Science Takes the Witness Stand, 262 Scientific American 46 (1990). One striking example, cited by Neufeld and Colman, is the Greiss test for detecting gunpowder residue, which was used in court a number

of years before new evidence showed that it produced "false positive" indications when exposed to tobacco and plastic residues.

Similarly, when first introduced in the courtroom, DNA tests were said to be incapable of producing false positive outcomes. See e.g., Andrews v. State, 533 So.2d 841, 850 (Fla. 5th DCA 1988)(finding, "[I]f there was something wrong with the process, it would ordinarily lead to no result being obtained rather than an erroneous result.)"; and State v. Harris, 866 S.W.2d 583, 587 (Tenn.Cr.App. 1992)(FBI Agent Dwight Adams testified in 1989 rape trial "that with the stringent protocol measures used by his department, it would be impossible to get a false DNA match."). However, the scientific community now accepts that false positives do occur in DNA profiling and scientists are presently debating what the magnitude of the error is and how to account for it. See, NRC Report, at 88-89; Koehler, DNA Matches and Statistics, Important Questions, Surprising Answers, 76 Judicature 222, 229 ("[B]ased on the little evidence available to date, a reasonable estimate of the false positive error rate is 1-4 percent."); Koehler, Error and Exaggeration in the Presentation of DNA Evidence at Trial, 34 Jurimetrics 21, 26 (1993)(proficiency testing shows error rate of 1-4%); Donald Berry, Comment, 9 Stat. Sci. 252, 253 (1994)("Only the frequency and type of errors are at issue."); and Lewontin, Comment: The Use of DNA Profiles in Forensic Contexts, 9 Stat. Sci. 259 (1994)(discussing sources of error). One commentator, Professor Richard Lempert specifically cites the danger of confusion and

prejudice as a reason for presenting only the error rate statistic in cases where the probability of a false positive greatly exceeds the probability of a coincidental match. Professor Lempert asserts, "[J]urors ordinarily should receive only the laboratory's false positive rate as an estimate of the likelihood that the evidence DNA did not come from the defendant." Lempert, Some Caveats Concerning DNA as Criminal Identification Evidence: With Thanks to the Reverend Bayes, 13 Cardozo L. Rev. 303, 325. Thus, DNA profiling evidence has already been proven to be the specific type of evidence for which de novo review is particularly appropriate and the First District was correct in carrying out a de novo review.

Consistent with this Court's precedent, other appellate courts have also consistently carried out de novo reviews in general acceptance cases. In People v. Barney, 10 Cal. Rptr. 2d 731 (Cal. App. 1992), the court held:

> The existence of 'general acceptance' is subject to limited de novo review on appeal. Ordinarily, the appellate court will confine its review to the record, independently determining from the trial evidence whether the challenged scientific technique is generally accepted. Occasionally, however, it may be necessary for the appellate court to review scientific literature outside the record. The goal is not to decide the actual reliability of the new technique, but simply to determine whether the technique is generally accepted in the relevant scientific community. If the scientific literature discloses the technique is deemed unreliable by 'scientists significant either in number or expertise...,' the court may safely conclude there is no general acceptance.

Id. at 737 (citations omitted); and Commonwealth v. Curnin, 565 N.E.2d 440, 443 (Mass. 1991)(recognizing, "In these circumstances, an appellate court makes its own determination [of whether a technique is generally accepted] without regard to the conclusions of the trial or motions judge.").

The State erroneously characterizes the NRC Report issued in 1992 as having been "based upon" Lewontin's and Hartl's article, Population Genetics in Forensic DNA Typing, 254 Science 1745, 1749 (1991). [State's Merits Brief, 18]. The National Academy of Science was established by President Lincoln as a body that would assist the government in undertaking research on important and controversial scientific issues. The National Research Council is the research arm of the Academy and commissions in-depth studies on scientific issues of national importance. The NRC Report, DNA Technology in Forensic Science, was commissioned in response to a "crescendo of questions concerning DNA typing [that] had been raised in connection with some well-publicized criminal cases," and "calls for an examination of the issues" from the "scientific and legal communities." NRC Report, at ix. The Committee that authored the report consisted of preeminent scientists in the fields of population and molecular genetics, forensic science, legal academics, ethicists and a federal judge (The Honorable Jack B. Weinstein). The NRC Report was peer reviewed by a group other than the authors on a confidential basis and the final report was written and approved by the Committee members themselves. Six of the scientists had previously testified for the prosecution in favor of the

admission of DNA evidence and only one had testified for the defense against the admission of the evidence.

The respondent agrees with the State that Lewontin's and Hartl's article and the NRC Report "fueled" a "ground swell of opposition." [State's Merit's Brief, 18]. However, respondent Vargas does not believe that the First District Court of Appeal, to the extent it did, erred in considering the NRC Report. The First District only considered the NRC Report regarding the issue of general acceptance to the extent that other recent cases discuss the Report. Notably, all of those cases, as did the First District, focus on the testimony adduced at the trial level. Vargas, 640 So.2d 1145-50. Furthermore, the NRC Report while published after the hearing on Miguel Vargas' Motion in Limine in January, 1992, does summarize and reflect the controversy which existed at the time of the hearing in Mr. Vargas' cases. Few courts, including this Court, have had to address the issue of what time period an appellate court should look to when considering whether novel scientific evidence was admissible. The reason for that is that technology seldom changes as rapidly as it has in the DNA profiling arena. For example, this Court would likely reach the same conclusion today under Frye regarding the admissibility of polygraph evidence as it did over forty years ago in Kaminski v. State, 63 So.2d 329 (Fla. 1953).

In Fishback v. People, 851 P.2d 884 (Co. 1993)(en banc), the court found:

> [F]rye mandates that if scientific evidence is generally accepted in the relevant scientific community at the time it is offered, then it is admissible. Consequently, it is the task of an appellate court reviewing a Frye determination to assess whether novel scientific evidence was generally accepted in the relevant scientific communities at the time it was offered into evidence at trial.

Id. at 891 (emphasis added). The Fishback court's logic is sound. Trials and rulings on stipulated dispositive motions are meant to result in final determinations. A basic tenet of appellate law is that a party can only raise on appeal those issues which he or she raised before the trial court. There is no reason to disturb that tenet when reviewing a decision on general acceptance. The State, after citing a series of post-January, 1992 articles, asserts that "[n]ew cases which are not caught in the approximately two year time warp" support its contention that the FBI's frequency calculations are now generally accepted. [State's Merits Brief, 31].[4] This Court should reject the State's assertion that the First District's decision should be vacated, and that it should be allowed to re-litigate an issue, because scientific opinion has changed

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[4] The case cited by the State in specific support of its argument, State v. Futrell, 436 S.E.2d 884 (N.D.App. 1993), does not support the State's contention. The defendant in Futrell, judging from the date of the crime and the court's reference to the 1988 North Carolina General Statutes as controlling the issues preserved for appeal, apparently proceeded to trial in 1989. The defendant merely challenged the relevancy and prejudice resulting from introduction of DNA profiling evidence. Id. at 889. The court expressly found that the defendant had not presented any expert testimony at the hearing on his motion in (Footnote Continued)

since the time of the hearing on Miguel Vargas' Motion in Limine.[5] This Court should reject the State's argument because to hold otherwise would allow proceedings such as this one to potentially continue on indefinitely. Accordingly, this Court should follow the Fishback court and assess whether the First District was correct in concluding that the DNA profiling evidence sought to be introduced by the State was not generally accepted in January, 1992.

Significantly, the State does not cite a single Florida case in its entire Merits Brief. Rather, the State argues that the First District should have applied a more lenient test for admissibility. The State relies on United States v. Bonds, 12 F.3d 540 (6th Cir. 1993), for its proposition. While conceding elsewhere in its brief that the court, in Bonds, applied a relevance standard, [State's Merits Brief, 16-17], the State touts the Bonds court's analysis of the general acceptance test.

The Bonds court found that a general acceptance analysis is a factor which a court in the Sixth Circuit may consider in

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(Footnote Continued)
limine and that he had abandoned the right to challenge the reliability of the State's DNA evidence. Id. at 891.

[5] The respondent disagrees with the State's assertion that the FBI's probability calculations are now generally accepted. As noted by the State, the NRC is taking the unusual step of forming a new committee that will meet at some future time to take up once again the controversy over DNA statistical issues - both the continuing controversy over the probability of coincidental matches and the issue of laboratory error rates. See, NAS Takes Fresh Look at DNA Fingerprinting, Science, Vol. 256, August 26, 1994, at 1163. That action further shows that the DNA profiling evidence at issue is not presently generally accepted.

determining the admissibility of evidence under Federal Rule of Evidence 702. Id. at 56-61. The court stated:

> The general acceptance test is designed only to uncover whether there is a general agreement of scientists in the field that this scientific data is not based on a novel theory or procedure that is 'mere speculation.' [United States v. Brown, 557 F.2d 541, 559 (6th Cir. 1977)]. In some instances, there may be several different theories or procedures used concerning one type of scientific evidence, all of which are generally accepted. None may have the backing of the majority of scientists, yet the theory or procedure can still be generally accepted. And even substantial criticism as to one theory or procedure will not be enough to find that the theory/procedure is not generally accepted.

Id. at 562. (emphasis added). This Court has never applied such a deferential test in its prior decisions. The correct application of the Frye test in this state is a settled question which does not require looking to any other jurisdictions. Not surprisingly, in proposing a new relaxed general acceptance test the State again avoids any reference to the trial court's decision.

The trial court, after citing Frye v. United States, 293 F. 1013 (D.C. Cir. 1923 and Stokes v. State, 548 So.2d 188 (Fla. 1988), cited United States v. Jakobetz, 955 F.2d 786 (2nd Cir. 1992), as supporting its conclusion that the probability evidence at issue was generally accepted. [Vol. VII, R. 1127]. The First District correctly rejected the trial court's conclusion, finding the court, in Jakobetz, merely commented in dicta that while it was applying a relevancy test it believed the evidence was also admissible under the Frye test. Vargas, 640 So.2d at 1150;

Jakobetz, 955 F.2d at 799. Jakobetz is clearly distinguishable from Mr. Vargas' case in that the defendant in Jakobetz did not present any evidence that he was a member of an ethnic group potentially affected by substructure. United States v. Jakobetz, 747 F.Supp. 250, 262, 262 n.23 (D.Ver. 1990). Furthermore, Jakobetz involved a Caucasian defendant whose motion in limine was heard at some point in 1990. Id. The State, in this case, does cite Jakobetz and a string of other relevancy jurisdiction cases in support of its argument that this Court should apply a relaxed Frye test. [State's Merits Brief, 16]. Those cases apply an inapplicable test and this Court should accordingly reject the State's proposed relaxed general acceptance test.

Likewise, this Court should reject the State's assertion that the cases it cites, as examples of DNA profiling evidence having been admitted in Frye jurisdictions, undermine the First District's holding. [State's Merits Brief, 16]. In the majority of cases cited by the State the defense did not present any expert testimony in opposition to the DNA profiling evidence at issue. Furthermore, the majority of cases cited by the State do not address the concrete probability issue raised by Mr. Vargas, and the trial in all of the cases cited by the State predated the hearing on Miguel Vargas' Motion in Limine. People v. Wesley, 611 N.Y.S.2d 97, 99, (N.Y. 1994)(Court expressly limited its opinion to holding that DNA profiling evidence was generally accepted "at the time of the proceedings in this case in 1988 and 1989." Case involved DNA testing performed by Lifecodes Corporation in relation to a black defendant.); People v.

Stremmel, 630 N.E.2d 1301, 1309 (Ill. App. 2nd Dist. 1994)(Case apparently tried in 1990 involving FBI probability calculations concerning a Caucasian defendant. Court found the defendant "essentially conced[ed] that the FBI's ... probability estimates meet the Frye standard." Issue was whether a stricter standard of admissibility controlled.); Fishback v. People, 851 P.2d 884, 891-92, 894-95 (Col. 1993)(en banc)(The case involved DNA profile of a black defendant by Cellmark laboratory. Defendant presented no expert testimony. Court found DNA statistical frequency evidence was generally accepted as of October 1989, however, court left it to trial courts to determine whether that is currently the case "in light of events which have occurred subsequent to trial."); State v. Johnson, 498 N.W.2d 10 (Minn. 1993)(held, trial court did not err in allowing in limited evidence of FBI statistics regarding DNA match following a hearing in August, 1991. "[T]he trial court prohibited the state's DNA expert from testifying as to the probability that the semen found in the victim was the defendant's, and even from saying how unlikely it was that it came from someone else."); State v. Kalakosky, 852 P.2d 1064, 1072 (Wash. 1993)(holding trial court did not err in admitting Lifecodes DNA evidence in trial which apparently occurred in 1987 where defendant did not "raise issues regarding the general acceptance of forensic DNA evidence, the RFLP test or the statistical components of the test."); State v. Montalbo, 828 P.2d 1274, 1280-82 (Haw. 1992)(held trial court properly admitted FBI's declaration of a DNA match and statistical probability calculations under Hawaii's

relevance test in December, 1990 trial.); Harris v. Commonwealth, 846 S.W.2d 678, 680-81, 683 (Ky. 1992)(held trial court did not err in admitting FBI's DNA profile evidence and probability statistics in a trial which apparently occurred in early 1990 where defense did not present any expert testimony. Dissenting opinion states, "[T]rial court did not allow [prosecution expert witness] to state the opinions of those who disagree with the accuracy of forensic DNA analysis."); Smith v. Deppish, 807 P.2d 144, 159 (Kan. 1991)(held statistical evidence of a DNA match attained by Lifecodes and presented in a January, 1989 trial properly admitted. Defendant presented no expert testimony challenging the DNA evidence.); State v. Harris, 866 S.W. 583 (Tenn. Cr. App. 1992)(held in 1989 trial where indigent defendant was denied an independent expert that it was not error to admit FBI DNA profiling evidence. No discussion of any challenge to probability calculations.); and Commonwealth v. Rodgers, 605 A.2d 1228, 1234-36, 1236, n. 10 (Pa. Super. 1992)(affirmed trial court's holding following a motion in limine hearing in April, 1990 that DNA profiling evidence produced by Lifecodes was admissible. Only the State presented expert witnesses and trial court applied a relaxed Frye standard focusing on the underlying techniques.). All other cases cited by the State as examples of DNA evidence having been admitted under a Frye analysis considerably pre-date the evidentiary hearing held on Miguel Vargas' Motion in Limine and thus are not persuasive authority regarding the issues now before this Court.

After making the arguments which are addressed above, the State argues that the First District erred in finding there was not general acceptance of the tendered probability evidence. [State's Merits Brief, 22-25]. In light of the overwhelming record evidence that the evidence at issue was not generally accepted by the relevant scientific community, this argument is disingenuous at best. Indeed, the trial court judge recognized that the State had not carried its burden of proving general acceptance when the court stated, "I understand it's a hot debate and I understand that some of these professional people that are medically trained in that area or scientifically trained, I guess, don't necessarily buy into it...." [Vol. XII, R. 1771]. The trial court also stated, "[Y]our witness has already testified to that, that there is a whole host of folks that are considered to be experts in that scientific area that do not agree at this time." [Vol. XIII, R. 1913]. Similarly, counsel for the State conceded, "The defense has already made reference to a large number of treatises, articles, etc., that let us know the population genetics issues are hotly debated issues or somewhat controversial in some fields...." [Vol. XII, R. 1773]. Once again, the State avoids quoting the trial court's own findings, because the trial court's express findings eviscerate the State's argument. The trial court expressly found, "The dispute among the expert witnesses addressed the sufficiency of the data bases used to calculate the probability that someone else in the population would have the same DNA

profile as that identified for the defendant." [Vol. VII, R. 1127].

Mr. Vargas filed an extensive brief with his Motion in Limine which summarized the conflict regarding the acceptance of DNA profiling for use in criminal trials within the scientific community. [Vol. VII, R. 1008-1105]. Along with his memorandum, the respondent submitted twenty-eight notebook volumes - which are now before this Court as materials proffered into evidence - as evidentiary exhibits in support of his motion. Dr. Edward Wakeland testified that respondent's memorandum and the accompanying exhibits accurately summarized the scientific communities view of the use of DNA profiling evidence in criminal trials. [Vol. XIII, R. 1911].

The State now attacks Dr. Edward Wakeland's testimony on the basis that he had no experience in "forensic DNA work." [State's Merits Brief, 25]. Thus, the State attempts to again revive its "forensic scientist" argument. The record shows that Dr. Wakeland was eminently qualified to assess the general acceptance within the scientific community of the evidence at issue. The State also attacks Dr. Wakeland contending he did not know how the FBI's databases were compiled and did not know how the FBI's probability calculations were made. The latter assertion is patently untrue. Dr. Wakeland was well aware of the tenets which the FBI relies on in making its calculations. [Vol. XIII, R. 1932]. The State overlooks that the manner in which the FBI's different "ethnic" databases have been compiled has in itself engendered considerable criticism. The State also overlooks that

its chief witness, Dr. Pollock, testified that he did not "have any personal knowledge of how [the FBI assembled its data bases]." [Vol. XII, R. 1752]. Thus, the State's belated attempts to challenge the significance of Mr. Vargas' experts' testimony is of no import.

The record shows that when asked if he agreed with the comment of the editor of Science that Lewontin and Hartl "have the support of numerous colleagues" Dr. Wakeland replied:

> I would accept his statement of it and also it's consistent with my own observations or my own surmisal of the data which I reviewed for this case in which I've seen a number of eminent population geneticists and read their comments on DNA fingerprinting databases and there is a tremendous amount of opinion among population geneticists that this is not, at this point, an accurate estimate technique.

[Vol. XIII, R. 1937-38]. Dr. Wakeland also responded as follows:

> Q: If you're talking in terms of general acceptance within the scientific community; population geneticists and molecular biologists, would they generally agree that is acceptable for use in criminal casework in trials?
> A: They would agree that there is tremendous dispute about the accuracy of these estimates and that they may be actually be very incorrect with respect to the way they are being calculated.
>
> * * *
>
> Q: In other words, it's not generally accepted that such statistics are appropriate for use in criminal cases?
> A: It's not generally accepted, I agree.

[Vol. XIII, R. 1939; Vargas, 640 So.2d at 1147]. Thus, respondent established that a considerable dispute existed within

the relevant scientific community regarding the use of such statistical evidence.

The State erroneously contends that Dr. Pollock established that the "general population approach" he used was generally accepted. [State's Merits Brief, 23]. What Dr. Pollock described as a "general population approach" was nothing more than him using the FBI's existing Hispanic, Black and Caucasian databases from which he used the highest overall frequency for each multi-locus DNA profile. The State fails to comprehend that it is the specific use of the FBI's limited data bases which is the very heart of the dispute regarding population substructure.

When questioned further about Science's editor's summary of Lewontin's and Hartl's article and its impact in the scientific community, Dr. Pollock replied, "I would agree that in -- that there are geneticists, human geneticists, that disagree, but they are not forensic scientists." [Vol. XII, R. 1762](emphasis added). Thus, the State failed to carry its burden of establishing general acceptance because Dr. Pollock merely testified that "forensic scientists" did not dispute the appropriateness of such statistics. The State now cites Dr. Tracey apparently for the proposition that he downplayed any controversy. Dr. Tracey merely testified that he checked Dr. Pollock's calculations and found Dr. Pollock had done "the arithmetic properly." [Vol. XII, R. 1798; Vargas, 640 So.2d at 1146]. On cross-examination Dr. Tracey conceded, "There is a great deal of argument about whether or not two data bases for subpopulations, principally within ethnic or within racial

groups, are adequate to calculate adequate statistics." [Vol. XII, R. 1812]. Thus, Dr. Tracey's testimony did not establish general acceptance for the State.

The State further misapprehends its burden and the record below by attacking Dr. Leslie Sue Lieberman's testimony. The State did not challenge Dr. Lieberman's credentials or the relevancy of her testimony before either the trial court or before the First District. The State fails to understand that the traditional genetic blood markers which she has studied are alleles just as are the RFLPs which DNA profiling identifies. [Vol. XIII, R. 1858]. Neither of the State's experts had any knowledge of the frequencies of alleles within the native Puerto Rican population. [Vol. XII, R. 1777, 1824; Vargas, 640 So.2d at 1146]. The State also criticizes Dr. Lieberman for not knowing the nature or accuracy of the FBI's databases, yet, as stated above, neither did Dr. Pollock. Dr. Lieberman's testimony that based on her research of traditional genetic markers within the Puerto Rican population that she would not expect the alleles profiled by the FDLE to be in Hardy-Weinberg equilibrium was very significant testimony. [Vol. XIII, R. 1860-62, 1872-741891-92]. The record establishes that the First Distinct was correct in finding that the State failed to prove the evidence at issue was generally accepted.

The State also contends that a lack of general acceptance of the State's probability evidence only went to the weight of that evidence and not to its admissibility. [State's Merits Brief, 17-20]. The State cites no authority other than Bonds - the

trial court similarly cited no authority - for the proposition that the dispute within the scientific community goes to weight and not admissibility. In stark contrast, the First District in a well reasoned opinion analyzed recent case law and concluded that because the population frequencies offered into evidence by the State were not generally accepted that, "Those population frequencies are not admissible." Vargas, 640 So.2d at 1150. The First District's holding is overwhelmingly supported by recent opinions commenting on this issue.

In United States v. Porter, 618 A.2d 629 (D.C. App. 1992), the court in excluding DNA profiling evidence rejected the argument made by the State in this case, holding, "since the probability of a coincidental match is an essential part of the FBI's calculation, we decline to hold that the defense objections to that precise calculation go only to its weight." Id. at 640. Similarly, in People v. Barney, 10 Cal.Rpt. 731 (Cal.App. 1st Dist. 1992), the court rejected the argument that the scientific dispute regarding statistical frequencies did not affect admissibility. The court, in Barney, held:

> To end the Kelly-Frye inquiry at the matching step, and leave it to jurors to assess the current scientific debate on statistical calculation as a matter of weight rather than admissibility, would stand Kelly-Frye on its head. We would be asking jurors to do what judges carefully avoid -- decide the substantive merits of competing scientific opinion as to the reliability of a novel method of scientific proof.

Id. at 742. The court concluded:

> The evidence produced by DNA analysis is not merely the raw data of matching bands on

> autoradiographs but encompasses the ultimate expression of the statistical significance of a match in the same way that polygraph evidence is not merely the raw data produced by a polygraph machine but encompasses the operator's ultimate expression of opinion whether the subject is telling the truth.

Id. (citations omitted). The logic of the Porter and Barney decisions are sound. The Frye test would have little meaning if the State were allowed to introduce into evidence ultimate conclusions which are not generally accepted for use at trial. Accordingly, this Court should hold the First District correctly held that the probability evidence offered below was not admissible because it was not generally accepted.

II.

THE FIRST DISTRICT ERRED IN HOLDING THAT VACATING THE TRIAL COURT'S DENIAL OF CROSS-PETITIONER'S MOTION IN LIMINE DID NOT REQUIRE REVERSAL OF HIS CONVICTIONS

The record conclusively supports the First District's finding that respondent's Motion in Limine to Exclude Novel Scientific Evidence was a dispositive motion. [Vol. XIII, R. 2002, 2004, 2010; Vargas, 640 So.2d at 1140, n. 1]. The State does not contest that it stipulated, with the trial court's approval, that Mr. Vargas' Motion in Limine raised a dispositive question. While not contesting the stipulation, the State now requests this Court to remand this case for further proceedings for it to again attempt to establish that the evidence it sought to introduce is now generally accepted. [State's Merits Brief, 40-41]. Thus, the State is inappropriately asking for a second

bite at the apple. Nothing in the record suggests that the State sought leave in the trial court to supplement at a later time the evidentiary record developed during the hearing on Vargas' Motion in Limine. In fact, the State vigorously objected to the trial court considering anything other than the testimony presented to the court. [XIII, R. 1191-21].

This case is unique in that all Frye hearing cases which have previously reached this Court have involved challenges to evidence raised by a defendant in cases which went to trial. In this case, Miguel Vargas and the State stipulated that respondent's Motion in Limine was dispositive and Mr. Vargas did not proceed to trial. A stipulation between the State and a defendant that an issue is dispositive is binding and must be so considered during the course of appellate proceedings. Zeigler v. State, 471 So.2d 172, 175-76 (1st DCA 1985). Indeed, "A stipulation is the parties' recognition that, for whatever reason, they have presented all of the evidence that they care to and each is willing to abide the appellate consequences regarding the grant or denial of the motion to suppress." Finney v. State, 420 So.2d 639, 642 (Fla. 3rd DCA 1982)(emphasis added). Thus, remand for further evidentiary proceedings is not only unnecessary, but is also precluded as a matter of law because of the State's stipulation in the trial court. This Court should find that the First District erred in not ending its analysis after concluding that the population frequency evidence the State sought to introduce at trial was "not generally accepted in the relevant scientific community" and therefore inadmissible.

Vargas, 640 So.2d at 1150. While the court had the authority to carry out a de novo review as to evidence offered at trial, the First District did not have the jurisdiction to consider what other evidence the State might now be able to present.

The panel found that it could not "ignore the expert testimony presented by the State in this case indicating that it is possible to calculate more conservatively the population frequencies, and thereby account for the problems resulting from the possible effects of population substructure." Vargas, 640 So.2d at 1150. The First District further found that Dr. Tracey's statement about possible alternatives seemed to correspond to the modified ceiling principle. Id. at 1150-51. The court then erroneously concluded that the defense did not "conclusively refute" the possibility that a more conservative probability calculation could me made. Id. at 1151.

The burden was on the State to prove that the evidence at issue was generally accepted by the relevant scientific community. See e.g., Ramirez v. State, 542 So.2d 352, 355 (Fla. 1989) (holding state had failed to establish the requisite predicate for admission of identification evidence); and Copeland v. State, 566 So.2d 856, 858 (Fla. 1st DCA 1990) (excluding evidence where, "The state presented no evidence to the trial court of general acceptance by the scientific community."). In this case, the State clearly did not establish by Dr. Tracey's mere reference to possible alternatives that any alternative method of calculating probability statistics would lead to admissible evidence. The evidence which the State indicated it

intended to introduce at trial in response to respondent's demand for discovery was the statistical evidence which the First District found was not generally accepted. [Vol. I, R. 20-21]. At no point did the State indicate that it intended to introduce any other DNA profiling evidence. Indeed, the State admits that the mere reference by Dr. Tracey to a possible alternative was not a reference to the ceiling principle. [State's Merits Brief, 22].

The First District failed to consider Dr. Wakeland's testimony in full regarding Dr. Tracey's allusion to a possible alternative. Id. at 1151, n.15. In order to carry out the alternative calculations alluded to by Dr. Tracy, Dr. Wakeland testified:

> There would have to be an element of it that would need to be, probably, -- in order to get an accurate estimate, according to Hartl and Lewontin which seems like a good idea to me, which would need to be probably a Puerto Rican data base, a data base perhaps of Cubans and of several other sub-populations in the Hispanic ethnic group.

[Vol. XIII, R. 1955]. Furthermore, when asked if he had applied the alternative calculation method alluded to by Dr. Tracy, Dr. Wakeland testified, "It's not possible to do that." [XIII, R.1966] (emphasis added). Dr. Wakeland explained:

> What they are referring to here is the idea of having a database of Puerto Ricans and Cubans and South Americans and all of the various subpopulations that make up the Hispanic group and then calculating based [on] the highest frequency in each of those groups. That data is not available, so it's not possible to do it.

Id. (emphasis added). Indeed, Dr. Tracy admitted, "[T]here has been no specify [sic] study of Puerto Ricans in San Juan or any other Puerto Rican city." [XII, R. 1824]. Accordingly, the First District erred in remanding this case for further hearing on possible alternative frequency calculation methods. The State did not prove at the hearing before the trial court, nor did the State even proffer, that other frequency calculations might be generally accepted. Accordingly, this Court should hold that the First District erred in not vacating Mr. Vargas' convictions.

As set forth in the foregoing section of this Merits Brief, a new heated controversy over the admission of DNA profiling evidence concerning laboratory error rates has recently arisen. Cross-Petitioner Vargas did not attempt to raise that issue before the First District because it was not the proper forum in which to raise a new issue. While the First District was free to take judicial notice of scholarly articles and case law, the court was not free to consider, or raise of its own accord, issues which were not presented to the trial court. The First District transgressed the bounds of its review powers when the court sought to effectively vacate a stipulation between the parties, which was approved by the trial court, regarding what was dispositive of the case.

Furthermore, the State vigorously argues that the ceiling principle is not generally accepted. [State's Merits Brief, 32-34]. Cross-Petitioner Vargas agrees the ceiling principle is not generally accepted. Thus, even if remand were proper there would be no point in remanding this case because both parties

agree that the ceiling principle is not a generally accepted alternative. Accordingly, this Court should vacate Miguel Vargas' convictions.

III.

THE SEARCH WARRANT PURSUANT TO WHICH CROSS-PETITIONER'S BLOOD WAS SEIZED WAS UNLAWFULLY EXECUTED BOTH BECAUSE IT WAS SERVED BY AN OFFICER OUTSIDE OF HIS JURISDICTION AND BECAUSE IT WAS SERVED BY AN OFFICER WHO WAS NOT AUTHORIZED BY THE TERMS OF THE WARRANT TO EXECUTE IT

The search warrant directed to respondent's body stated in pertinent part:

> IN THE NAME OF THE STATE OF FLORIDA TO: ALL AND SINGULAR THE SHERIFF OR DEPUTY SHERIFFS OF DUVAL COUNTY, FLORIDA
>
> NOW THEREFORE, you or either of you, with such lawful assistance as may be necessary, are hereby commanded in the daytime or in the nighttime, or on Sunday, as the exigencies of the occasion may require, to take a blood and saliva sample from the aforementioned Miguel Angel Vargas ....

[Vol. IV, 492, Vol. V, 635] (emphasis added). Although the search warrants were directed only to the Duval County Sheriff and his Deputy Sheriffs, Clay County Sheriff's Detective Lee Harris served and executed the search warrant on February 27, 1990. [Vol. I, R. 58-64; Vol. V 636, 41]. Unaccompanied by any officers from the Duval County Sheriff's Office, Clay County Sheriff's Detective Lee Harris located respondent at his place of work at the United States Naval Station located in Duval County and executed the search warrants by taking respondent into his

custody. [Vol. XI, R. 1591-92, 1594, 1597-1598, 1608, 1613]. Respondent was then transported by the Clay County officers to his home for the purpose of conducting a search of respondent's residence pursuant to a search warrant which is not at issue in this appeal. [Vol. XI, R. 1597]. At respondent's home Clay County Detective Lee Harris met with Officer Baer, a Duval County Sheriff officer and the search of the home occurred. [Vol. XI, R. 1597. 1613. 1622; Vargas, 640 So.2d at 1140].

Following the search of the home, Clay County Detective Lee Harris, unaccompanied by Duval County Officer Baer or any other officers from the Duval County Sheriff's Office transported respondent to University Hospital in Duval County for the sole purpose of having respondent's blood drawn pursuant to the search warrant. [Vol. XI, R. 1614; Vargas, 640 So.2d at 1140]. At University Hospital, Clay County Detective Lee Harris, unaccompanied by Officer Baer or any other officers from the Duval County Sheriff's Office, was in the room as respondent's blood was drawn, at his direction, pursuant to the search warrant. [Vol. XI, R. 1598, 1614-1616]. At the time the blood was drawn, Officer Baer had arrived at the hospital but was not present in the room as respondent's blood was drawn. [Vol. XI, R. 1614-1615]. Following the removal of respondent's blood, Clay County Sheriff's Detective Lee Harris personally seized body hairs from respondent. [Vol. XI; R. 1616]. After the seizure of hair, blood and saliva, Detective Harris maintained exclusive control over the seized evidence. [Vol. XI; R. 1616].

On August 23, 1991, respondent filed his Third Motion to Suppress Evidence asserting that the evidence at issue should have been suppressed both because the officer who executed the warrant did so outside of his territorial jurisdiction and because the executing officer was not authorized pursuant to §933.08, Fla. Stat. to execute the warrants [Vol. VI, R. 895-913]. On October 22, 1991, the trial court entered its order denying respondent's Third Motion to Suppress. [Vol. VII, R. 990]. The First District Court of Appeal, subsequently affirmed the trial court's ruling on respondent's Third Motion to Suppress concluding that the warrants were properly executed under §933.08, Fla. Stat. because Duval County Deputy Sheriff Baer was present when the search warrant was read at respondent's home and, although not in the room when the blood was drawn, was "present" at the hospital. Vargas, 640 So.2d at 1140-41. The First District Court of Appeal certified as of great public importance the following question:

> WHETHER A SEARCH WARRANT FOR A BLOOD SAMPLE IS PROPERLY SERVED AND EXECUTED IN THE PRESENCE OF AN OFFICER WHO IS WITHIN THE TERRITORY NAMED IN THE SEARCH WARRANT, WHEN THE OFFICER WHO READS THE WARRANT TO THE ACCUSED, TRANSPORTS THE ACCUSED TO THE HOSPITAL FOR THE BLOOD TEST, AND TAKES CUSTODY OF THE BLOOD SAMPLE, IS NOT WITHIN THE SCOPE OF THE WARRANT?

Vargas, 640 So.2d at 1142.

The issuance and execution of search warrants in the State of Florida is controlled by statute. Section 933.07, Florida Statutes (1989), titled, "Issuance of Search Warrants," provides:

> The judge, upon examination of the application, and proofs submitted, if satisfied that probable cause exists for the issuing of the search warrant signed by him with his name of office, to any sheriff and his deputies or any police officer or other person authorized by law to execute process, commanding the officer or person forthwith to search the property described in the warrant or the person named, for the property specified, and to bring the property and any person arrested in connection therewith before the magistrate or some other court having jurisdiction of the offense.

§933.07, Fla. Stat. (1989) (emphasis added). Additionally, §933.08, Fla. Stat. titled, "Search Warrants to be Served by Officers Mentioned Therein," provides "A search warrant shall in all cases be served by any of the officers mentioned in its direction, but by no other person except in aid of the officers requiring it, said officers being present and acting in its execution." §933.08, Fla. Stat. (1989) (emphasis added).

A. Warrant Unlawfully Executed Because Serving Officer Outside His Jurisdiction

Florida statutory and case law has established that law enforcement officers have no authority to execute a search warrant outside their territorial jurisdiction. State v. Griffis, 502 So.2d 1356 (Fla. 5th DCA 1987). In Griffis, a Titusville Police Department officer obtained a search warrant to search a defendant's residence in Cocoa, Florida. Griffis, 502 So.2d at 1357. The search warrant in question directed, "THE SHERIFF OF BREVARD COUNTY, FLORIDA, OR HIS DEPUTIES AND ALL TITUSVILLE POLICE OFFICERS IN BREVARD COUNTY, FLORIDA," to search the suspect's premises in Cocoa, Florida. Id. The Titusville

police department officer who obtained the warrant served and executed the warrant on the defendant in Cocoa while accompanied by Cocoa and Titusville police officers. Id.

The court held that since the search warrant was executed by a Titusville Police officer outside his territorial jurisdiction the warrant was improperly executed under §933.07, Fla.Stat. Id. at 1358. In upholding the suppression the court noted:

> It is true that Section 933.07, authorizes a judge to issue a search warrant to 'any police officer.' However, with certain limited exceptions not applicable here, a municipal officer has no power to act as a police officer outside the territorial limits of his municipality.
>
> * * *
>
> Therefore, the phrase "any police officer" as used in [Section 933.07] must be construed to mean any police officer with power to act. There is no statute which authorizes a police officer to serve a warrant outside the boundaries of his territorial jurisdiction.

Id. at 1357-1358 (emphasis added). The Griffis court concluded that "without some other valid basis, the execution of a search warrant by a police officer outside of his jurisdiction is invalid." Id. at 1358. See also State v. Carson, 374 So.2d 621, 622 (Fla. 4th DCA 1979) (upholding suppression of evidence where "[a]rrest was made by a municipal officer outside of his territorial jurisdiction.").

Contrary to the District Court of Appeal's opinion, the search warrant for the seizure of respondent's body was initially served and executed when Clay County Detective Lee Harris took respondent into custody in Duval County at the Cecil Field Naval

Air Station and not only when the search warrants were read at respondent's home or when the blood was withdrawn. Detective Harris went to Cecil Field with both search warrants in his possession with the sole purpose of locating respondent in order to serve and execute the warrants. [Vol. I, R. 64; Vol. XIII, R. 1591-1592, 1602].

Detective Harris testified at the suppression hearing that respondent was not free to leave from the time he confronted him at Cecil Field. [XI, R. 1607-08]. Detective Harris further stated that respondent "had no options. He was under court order. He was going to go either with me or Duval County." [XI, R. 1612]. At the suppression hearing Detective Harris made it clear that respondent was not free to leave because of the search warrant authorizing the seizure of respondent's body. [Vol. XI, 1612-13]. Common sense dictates that when a search warrant authorizes the seizure of blood, the seizure occurs and the warrant is executed not only when the blood is removed but also when the suspect is taken into custody for the purpose of transporting him to a facility where the blood can be withdrawn.[6] The body is the container which holds the blood and the blood is

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[6] In fact, it would arguably be unlawful for the blood to have been drawn without respondent first being transported to the hospital. See Schmerber v. California, 384 U.S. 757, 771 (1966) (Supreme Court questions validity of search involving the withdrawal of blood if made by person other than medical personnel or in other than a medical environment - for example, if it were administered by police in the privacy of the station house. As the Supreme Court noted "to tolerate searches under these conditions might be to invite an unjustified element of personal risk of infection and pain.")

seized when the body is seized. See Hayes v. Florida, 470 U.S. 811 (1985) (Fourth Amendment seizure occurs when suspect picked up and transported to police station for fingerprinting not when fingerprints actually taken). Therefore a warrant to seize blood is initially executed when the individual named in the warrant is picked up by the executing officer and transported to a facility which can safely withdraw the blood.

At the suppression hearing Detective Harris initially testified that he did not read the warrants at Cecil Field. [Vol. XI, R. 1602]. However, when impeached by his prior deposed testimony stating that he did read the warrants at Cecil Field he changed his testimony and stated that he could not recall whether he read the warrants to respondent at Cecil Field. [Vol. XI, R. 1602-1606]. Following Detective Harris' changed testimony that he did not remember reading the warrants, respondent filed a motion to admit respondent's Exhibit No. 2 into evidence (Respondent's Third Motion to Suppress). [Vol. VIII, R. 1128-29]. Respondent sought to introduce the sworn deposition testimony, taken prior to the hearing, of Clay County Sheriff Sergeant Jarosz to refute Detective Harris' changed testimony regarding whether he read the search warrant to the respondent at Cecil Field. [Vol. VII, R. 934-36]. Sergeant Jarosz, who was present at Cecil Field when respondent was seized, testified that both warrants were read to respondent at Cecil Field. [VII, R. 947; Initial Brief, 63 and n.3]. The significance of Sergeant Jarosz' testimony was not apparent until Detective Harris changed his prior sworn deposition testimony at the hearing. Sergeant

Jarosz' deposition testimony was admissible hearsay and the trial court erred in not admitting Detective Jarosz' deposition testimony. The trial court's exclusion of this impeachment testimony was overlooked by the First District Court of Appeal when it erroneously concluded that the warrants were first read at respondent's residence as opposed to at Cecil Field. Furthermore, regardless of when the warrant was first read, Harris clearly executed the warrant when he informed Mr. Vargas that he was not free to leave because of the court order authorizing the seizure of his body. [Vol. XI, 1612-13].

Based on Griffis, the execution of the warrant and the seizure of respondent's body at Cecil Field, a United States Naval Station, located in Duval County, Florida was unlawful since it was performed by Clay County Sheriff's Detective Lee Harris outside his territorial jurisdiction. Additionally, Detective Harris also executed the warrant outside his territorial jurisdiction because the execution and seizure occurred at Cecil Field, a federal military reservation. The United States government acquired the majority of the United States Naval Station, Cecil Field by effecting a taking of the property in November, 1942. United States of America v. 2426.1 Acres of Land, Case No. 527-J-Civ, (S.D. Fla. 1942). Clay County Detective Lee Harris testified that he was present at Cecil Field by virtue of the search warrant. [XI, R. 1607]. Thus, Harris clearly acted outside of his territorial jurisdiction.

As was the case in Griffis, where a municipal officer did not have the authority to execute a warrant outside of his

municipality, a deputy sheriff similarly does not have the power to execute a warrant outside of his county. See §30.15(1)(b), Fla.Stat. (1993) ("Sheriffs in their respective counties, in person or by deputy shall ... execute such other writs, processes, warrants and other papers directed to them, as may come to their hands to be executed in their counties".) As such, even assuming arguendo, that the warrant for respondent's blood was not executed until it was read at respondent's home and when the blood was drawn at the hospital both occurrences were still outside of Detective Harris' jurisdiction of Clay County because both events occurred in Duval County. Therefore, Detective Lee Harris' execution of the search warrant outside his jurisdiction was invalid and the District Court of Appeal committed reversible error in upholding the denial of respondent's Third Motion to Suppress.

B. Warrant Unlawfully Executed Because Executing Officer Was Not Authorized To Execute Warrant

Suppression is also mandated because Clay County Detective Lee Harris acted in contravention of §933.08, Fla. Stat. (1989), by executing a warrant which did not authorize him to do so. Morris v. State 622 So.2d 67 (Fla. 4th DCA 1993); Hesselrode v. State, 369 So.2d 348 (Fla. 2d DCA 1979) rev. denied 381 So.2d 766 (Fla. 1980). Florida courts interpreting §933.08 have consistently held that "the persons authorized in a warrant to conduct a search and seize the items described must actually execute the warrant and conduct the search." Morris, 622 So.2d at 68 also see Stewart v. State, 389 So.2d 1231, 1233 (Fla. 2d

DCA 1980); Hesselrode, 369 So.2d at 350; State v. Dotson, 349 So.2d 770, 771 (Fla. 3d DCA 1977); Nofis v. State, 295 So.2d 308, 309 (Fla. 2d DCA 1974); Sharon v. State, 156 So.2d 677, 679 (Fla. 3d DCA 1963).

Florida courts have also consistently held that under section 933.08 an officer authorized to execute the warrant may be assisted by unauthorized individuals but more than mere presence by the authorized officer is required to save an otherwise unlawfully executed warrant. Hesselrode. 369 So.2d at 349-350; Morris, 622 So.2d at 69. As Justice Anstead explained in Morris:

> Under [section 933.08], the officer authorized by the warrant to conduct the search and seize the evidence designated must participate in or supervise the search even where he requires the assistance of others to do so. While the level of supervision and participation may vary depending upon the circumstances, it is absolutely essential that the officer authorized be present when and where the search is conducted and carry out his responsibility to see that the warrant is properly executed and that its authorization is not exceeded. It is not enough that the authorized officer wait in another room while the search is conducted by others.

Morris, 622 So.2d at 69 (emphasis added). Since the warrant for the seizure of Miguel Vargas' blood was served and executed at Cecil Field in Duval County when respondent was taken into custody by Clay County Detective Harris, outside the presence of any Duval County officers, the warrant was unlawfully executed under § 933.08. Even assuming that the warrant was not executed until the blood was withdrawn from respondent's body, the

execution of the warrant was still unlawful under Florida Statute §933.08 (1989).

The First District Court of Appeal erroneously held that the execution of the warrant for the seizure of respondent's blood was valid because "neither Harris nor Baer conducted the search at issue in the traditional sense; they both accompanied [cross-petitioner] to the hospital and were present while the medical personnel collected the blood sample." Vargas, 640 So.2d at 1141. (emphasis added). Paradoxically, the court found both that Baer "was not present in the room when the blood was drawn" and that he "[was] present while medical personnel collected the blood sample." Id. Similarly, the record shows that Harris drove Mr. Vargas across Duval County to the hospital without any Duval County officer's presence or assistance. [Vol. XI, R. 1614-15]. Yet, while finding that Officer Harris drove Mr. Vargas, the court also found that "Baer accompanied appellant to the hospital." Vargas, 640 So.2d at 1141. Those conflicting findings underlie the court's faulty legal conclusion. Likewise, the First District also based its holding on the erroneous conclusion that a nurse's participation relieved the authorized officer of his duty to participate. Clearly, officers cannot escape the statutory and judicial strictures placed upon them regarding execution of warrants by wholly delegating their responsibilities to non-officers.

The First District Court of Appeal's conclusion also contradicts the plain meaning of the word "present." Webster's New Collegiate Dictionary defines "present" as "being in view or

at hand" or "constituting the one actually involved, at hand, or being considered. Officer Baer's mere arrival at University Hospital, did not constitute "being in view or at hand" or "actually involved" when the warrant was executed.

Duval County Officer Baer was at most a passive observer to the execution of the warrant and therefore the warrant was unlawfully executed. Morris, 622 So.2d at 69; Hesselrode, 369 So.2d at 349. The record of this case demonstrates that Clay County Sheriff's Detective Lee Harris was the sole investigative officer; the individual who sought and procured the search warrants; the sole officer who took respondent into custody at Cecil Field; the sole officer who transported respondent to University Hospital in Duval County; the sole officer who was present in the room for and directed the seizure of respondent's blood; and the sole officer who collected and transported the evidence samples including the blood and placed them in the property room located in Clay County. [Vol. VI, R. 493-98; V. XI, R. 1590, 1584, 1597-98; 1600-01; 1607; 1613-17]. Furthermore, Detective Harris' signature appears on the warrant's Inventory and Receipt as the executing officer attesting to the material seized pursuant to the warrant. [Vol. IV; R. 498] See Byers v. State, 109 So.2d 382, 384-85 (Fla. 2d DCA 1959) (recognizing that an inventory return indicates which officer executed a warrant).

Officer Baer's presence at Mr. Vargas' home and at University Hospital was only upon the direction of Detective Harris, further evidencing the fact that Baer did not supervise

or actively participate in the seizure and search. [Vol. XI, R. 1591, 1597, 1618-19]. Thus, it is abundantly clear that Clay County Detective Harris executed the warrant and that Duval County Sheriff Officer Baer played no real role in the execution of the warrant. Likewise, in Morris, the court invalidated a search under §933.08 where a search warrant was issued and directed to several police agencies to search Morris' office and unauthorized individuals actually conducted the search. Morris, 622 So.2d at 68. Subsequent to the issuance of the warrant, Morris' office was searched by employees of the Auditor General's Office who were not authorized under the warrant to conduct the search. Id. One officer who was authorized under the terms of the warrant was present at the office at the time of the search but remained outside the room being searched, did not observe the search, and did not take custody of any of the items seized pursuant to the warrant. Id.

In suppressing the evidence seized pursuant to the warrant the court concluded that based on the facts before the court:

> It is undisputed that the Auditor General employees conducted the entire search unsupervised and unobserved by the officer authorized to conduct the search. In short, the current case is not one of aiding the officer authorized to conduct the search but rather displacing that officer. In our view, this displacement is not authorized by the provisions of section 933.08.

Morris, 622 So.2d at 69 (emphasis added). As in Morris, in this case Officer Baer simply "waited in another room while the search [was] conducted by others." Morris, 622 So.2d at 69.

Harris did not aid Officer Baer, rather he clearly displaced Baer from the role of the authorized officer in contravention of §933.08, Fla. Stat. (1989). Because Detective Harris executed the warrant for seizure of respondent's body outside of his territorial jurisdiction and because he was not authorized under §933.08, Fla. Stat. (1989) to execute the warrant, the First District Court of Appeal erred in upholding the trial court's denial of cross-petitioner's motion to suppress. Accordingly, this Court should vacate the First District's holding and cross-petitioner's convictions.

IV.

THE SEARCH WARRANT PURSUANT TO WHICH CROSS-PETITIONER'S BLOOD WAS SEIZED WAS FACIALLY INVALID.

The district court erred in summarily affirming the trial court's denial of Mr. Vargas' First Motion to Suppress Evidence. See Vargas v. State, 640 So.2d 1139, 1140 (1st DCA 1994). The affidavit of Clay County Sheriff's Office Detective Lee Harris in support of his application for the search warrant fails to establish probable cause for the issuance of the February 23, 1990 search warrant. The affidavit failed to set forth any factual basis sufficient to justify a finding of probable cause to believe that evidence of a felony would be found in the appellant's blood, in violation of the Fourth and Fourteenth Amendments to the Constitution of the United States and Article I, Section 12 of the Florida Constitution. The warrant further authorized an unreasonable search in violation of those

constitutional provisions. In Schmerber v. California, 384 U.S. 757, 768-70 (1966), the Supreme Court required that a heightened standard of probable cause must be met in order to justify a search beneath a person's skin. No facts were presented in the affidavit in this case which satisfied the normal standard of probable cause, yet alone the heightened showing required by Schmerber.

In this case, the only facts related by the affiant relating to a showing of probable cause were that Mr. Vargas had been arrested on a charge of attempted burglary in a generalized geographic area within which two sexual batteries had occurred a number of months previously. [Vol. IV, R. 492-497; Vol. V, R. 636-40]. The only similarities among the reported offenses other than tenuous geographical proximity were the gender, education, living and dating status of the alleged victims, and the use or discovery of cellophane or other unspecified tape. Id. In all other respects, the affiant's accounts of the three incidents are materially dissimilar, and any similarities are either so vague or so attenuated as to be immaterial. Cross-Petitioner challenges the State to cite any controlling authority supporting a finding of probable cause for the search of an individual's blood based on such attenuated circumstances. No such authority exists. Accordingly, this Court should reverse the District Court of Appeal with respect to this dispositive issue.

Furthermore, the court in Schmerber specifically held that the Fourth Amendment to the United States Constitution prohibits a search of a persons body "on the mere chance" that evidence

might be obtained. Schmerber, 384 U.S. at 770. The affidavit in this case alleged merely the possibility of an attempt to obtain a comparison of DNA samples in blood and semen. [Vol. IV, R. 494-95; Vol. V, R. 637-38]. Accordingly, the search warrant in this case was issued without any factual basis to support a clear indication that evidence of a crime was likely to be obtained by issuance of the warrant. See also, Jones v. State, 343 So.2d 921 (Fla. 3d DCA 1977) (absence of factual allegations showing that evidence sought would be found), and Dorman v. State, 492 So.2d 1160 (Fla. 1st DCA 1986) (officer's belief based on observations and experience failed to provide objective facts for finding probable cause for search of blood).

Similarly, the Fourth Amendment's reasonableness standard requires that the type of blood test to be performed in a given case must be "highly effective." Schmerber, 384 U.S. at 771. In other words, the test to be performed must have a high degree of reliability. In this case, DNA testing had not been generally accepted in the relevant scientific community as producing reliable results, and so failed to be sufficiently reliable to meet the reasonableness standard of the Fourth Amendment. Mayersak, DNA Fingerprinting Problems for Resolution, 36 Medical Trial Technique Quarterly, 441 (Summer, 1990); Lewontin and Hartl, Population Genetics in DNA Typing, 254 Science 1745 (1991); Thompson and Ford, DNA Typing: Acceptance and Weight of the New Genetic Identification Tests, 75 Va.L.Rev. 45, 65-101 (1989); Hoeffel, The Dark Side of DNA Profiling: Unreliable Scientific Evidence Meets the Criminal Defendant, 42 Stanford

L.Rev. 465, 476-495 (1990). See also, infra at 16-38. Accordingly, the lack of reliability of the DNA testing performed on Mr. Vargas' blood as a result of the search warrant demonstrates that the search was unreasonable in violation of Art. I, §12 and the Fourth Amendment. As a result, this Court should reverse the District Court of Appeals' affirmance of the trial court's denial of the defendant's First Motion to Suppress Evidence in this case.

V.

DEMONSTRATED MATERIAL MISREPRESENTATIONS IN AND OMISSIONS FROM THE SEARCH WARRANT AFFIDAVIT ENTITLED CROSS-PETITIONER TO A HEARING AND REQUIRED SUPPRESSION OF EVIDENCE

The District Court of Appeal erred in failing to reverse the trial court's denial of respondent's second motion to suppress. See, Vargas v. State, 640 So.2d 1139, 1140 (Fla. 1st DCA 1994). In that motion, Mr. Vargas made a substantial preliminary showing that the affiant made material representations, either intentionally or with reckless disregard for the truth, and omitted material facts, in the affidavit in support of the search warrant this case. [Vol. V, R. 600-731]. The trial court accepted that Mr. Vargas in his motion demonstrated both factual inaccuracies and omissions in the affidavit. [Vol. VI, R. 846].

However, the trial court denied Mr. Vargas a hearing on the motion, finding that the factual inaccuracies were neither made intentionally or with reckless disregard for the truth, and that the omissions were not made in bad faith. [Vol. VI, R. 846]. The

trial court erred in denying Mr. Vargas' second motion to suppress, in denying an evidentiary hearing on the motion and in making any factual determination whatsoever as to the affiant's state of mind as to intent, reckless disregard and bad faith, without even hearing live testimony from which to make such a determination. Accordingly, this court should reverse the decision of the District Court of Appeal with respect to Mr. Vargas' second motion to suppress.

In Franks v. Delaware, 438 U.S. 154 (1978), the United States Supreme Court held that an evidentiary hearing is required when a defendant makes a substantial preliminary showing that a false statement in an application for a search warrant was made knowingly and intentionally, or with reckless disregard for the truth, where such a false statement was necessary to an initial finding of probable cause by the issuing magistrate. If such a state of mind is established during the evidentiary hearing, the reviewing court must excise the falsities from the affidavit and thereafter determine whether probable cause remains absent such false allegations. Id. Material omissions are treated conversely. A reviewing court must view the search warrant affidavit as if it had included the omitted material facts and thereupon determine whether "a substantial possibility exists that the omission would have altered a reasonable magistrate's probable cause determination." State v. VanPieterson, 550 So.2d 1162, 1164 (Fla. 1st DCA 1989) (citations omitted).

The alleged facts of the attempted burglary for which Mr. Vargas was arrested were substantially dissimilar to the two

alleged sexual batteries for which evidence was sought with the challenged search warrant. The affiant's statements of similarities were false, and were made either intentionally or with reckless disregard for the truth. The affiant described the two sexual battery victims as "single white educated female[s] who live[d] alone." [Vol. IV, R. 494-95; Vol. V, R. 637-38]. The affiant also used the identical description for alleged attempted burglary victim Laura Pitts, however, he admitted at deposition that he had no basis whatsoever for stating that Ms. Pitts was either single, or educated, or lived alone. [See, Vol. V, R. 639; Vol. V, R. 702-703]. Accordingly, the trial court should have stricken from the affidavit those material false statements with regard to Ms. Pitts because, where the affiant had no basis whatsoever for those statements, the statements must have necessarily been made either intentionally or with reckless disregard for the truth.

Likewise, the trial court should have stricken the affiant's reference to "tape" being found in Mr. Vargas' vehicle on the occasion of his arrest for attempted burglary. The affiant described the tape allegedly used in sexual batteries of [redacted] and [redacted] as "a cellophane tape." [Vol. IV, R. 494-95; Vol. V, R. 637-38]. In stark contrast the affiant described the tape found in Mr. Vargas' vehicle only as "Tape," [Vol. IV, R. 494; Vol. V, R. 638], even though the report on which he relied described that tape as "green duct tape." [Clay County Sheriff's Incident Report, dated 1-15-90, Vol. V, R. 647-48]. Whether the word "tape," [Vol. IV, R. 495; Vol. V, R.

638], is stricken entirely or supplemented with an accurate description of the nature of the tape found at the site of the alleged attempted burglary, the dissimilarity of the two distinct types of tapes demonstrates the dissimilarity of the attempted burglary to the reported sexual batteries. The affiant's failure to fully describe the tape found in Mr. Vargas' vehicle can only have been either an intentional misrepresentation or a false statement made with reckless disregard for the truth under these circumstances.

The affiant also stated that [redacted] alleged assailant "appeared to have some knowledge of the Navy." [Vol. V, R. 637]. The affiant further stated that [redacted] alleged assailant "seemed very interested in knowing about her boyfriend who is in the Navy." [Vol. V, R. 638]. Finally, the affiant swore that Laura Pitts was "dating a man in the Navy." [Vol. V, R. 638]. The affiant admitted at deposition that he had no basis whatsoever for alleging that Ms. Pitts was "dating a man in the Navy." [Vol. V, R. 703]. The trial court clearly erred in not finding that this misrepresentation of similarity was either intentionally or recklessly made.

The affiant alleged that [redacted] described her assailant as a "white male." [Vol. V, R. 637]. The affiant further alleged that [redacted] stated that her assailant was a "white male." [Vol. V, R. 638]. The affiant described the appellant as being a "white male." [Vol. V, R. 637]. At deposition, the affiant admitted that Detective Gainey's report - on which affiant stated he based his information relating to

[redacted] - did not contain any reference to [redacted] having described her assailant as a white male. [Vol. V, R. 704]. Furthermore the affiant admitted that he did not recall Ms. [redacted] having told him her assailant was white. [Vol. V, R. 704]. In fact, it appears highly unlikely that Ms. [redacted] described her assailant as a "white male" to the affiant.

Ms. [redacted] stated in deposition that she believed Detective Harris only asked her about a "missing" t-shirt. [Vol. V, R. 729-30]. Furthermore, Ms. [redacted] said in deposition that she could not tell Detective Gainey whether her assailant was white or black, but only that she felt that her assailant was white. [Vol. V, R. 723-24]. Similarly, the affiant also made a material misrepresentation in swearing that "a white male" entered [redacted] apartment. The affiant stated in deposition that [redacted] "was unable to describe the race" of her assailant. [Vol. V, R. 710-11]. The affiant further stated in deposition that he did not "recall her describing to me a particular race." [Vol. V, R. 712]. The trial court erred in not finding that the affiant's statement that "a white male" had entered [redacted] apartment was an intentionally or recklessly made false statement which should have been stricken, and the court of appeal erred in affirming.

The affiant also alleged in respect to [redacted] assailant that, "at some time the suspect took a small jewelry box, apparently as a souvenir." [Vol. V, R. 637]. Likewise, the affiant alleged in respect to [redacted] alleged

assailant that, "at some time the suspect took a white sleeveless net tee-shirt, apparently as a souvenir." [Vol. V, R. 638]. The affiant thus sought to show that the person or persons who assailed Ms. [redacted] and Ms. [redacted] stole an item from each of these alleged victims. The affiant had no basis whatsoever to allege that Ms. [redacted] or Ms. [redacted] respective assailant took anything from either of them and in fact, Ms. [redacted] testified she did not know if anything had been taken:

> Q: Was anything ever taken by the assailant from your apartment?
> A: Not that I know of. Now, I moved, and I am missing this little knickknack. But I don't know you know, I don't know where it is.
>
> * * *
>
> Q: You're not saying this person, the assailant, took it?
> A: No. I just reported that that is something that I have not been able -- it's missing.

[Vol. V, R. 716-18] (emphasis added). Since the affiant interviewed [redacted] in depth he should have been aware that Ms. [redacted] never said her assailant took anything, rather she merely said an item was missing.

Likewise, [redacted] simply reported to the affiant that an item was missing from her apartment and she never said that the assailant took that item. [Vol. V, 725, 731]. It was obvious from the evidence technician's supplemental report which Detective Harris stated he had reviewed, [Vol. V, R. 706], that the reported "missing" net tee-shirt was an item that the evidence technician had taken during the original investigation

of the alleged crime. [Supplemental Report of Wayne Lovett; Vol. V, R. 654]. That alone demonstrates that the affiant either recklessly or intentionally disregarded the truth. Accordingly, the trial court should have stricken the false references and re-evaluated the warrant application, or at the very least should have granted appellant a hearing on his motion, and the court of appeal erred in affirming as to this issue.

The trial court also erred in making an ultimate evidentiary finding that the material misrepresentations and omissions at issue did not affect the validity of the warrant because they were not made in bad faith. If any finding of intent is required regarding material omissions it should be the intentional or reckless disregard standard enunciated in Franks v. Delaware, 438 U.S. 154 (1978). Miguel Vargas clearly made a substantial preliminary showing, and indeed demonstrated, that material omissions were either intentionally or recklessly made by the affiant. Accordingly, this Court should reverse the First District's affirmance of the trial court's denial of Mr. Vargas' Second Motion to Suppress.

rw.31

CONCLUSION

Respondent/Cross-Petitioner Miguel Vargas has established herein that the First District correctly found the novel scientific evidence at issue was not generally accepted. The cross-petitioner has further shown that the First District erred in remanding this case for further proceedings after finding there was not general acceptance. The cross-petitioner has also established that the First District erred in denying his Jurisdictional Motion to Suppress since the record clearly shows that an unauthorized officer executed the warrant outside of his territorial jurisdiction. Likewise, Mr. Vargas has also shown that the First District erred in affirming the trial court's denial of his Facial Validity and Franks motions to suppress. Accordingly, this Court should affirm the First District's finding that the evidence at issue was not generally accepted, and this Court should vacate Miguel Vargas' convictions on that basis. This Court should further hold that the First District erred in affirming the denial of each of cross-petitioner's motions to suppress.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to **Giselle Lylen Rivera, Esquire**, Assistant Attorney General, Office of the Attorney General, The Capitol, Tallahassee, Florida 32399-1050, by U.S. Express Mail, this 6th day of December, 1994.

ATTORNEY