IN THE SUPREME COURT
OF FLORIDA

CASE NO.: 83,935

STATE OF FLORIDA,

Petitioner,

vs.

MIGUEL ANGEL VARGAS,

Respondent/Cross-Petitioner.

RESPONDENT'S REPLY BRIEF

Wm. J. Sheppard, Esquire
Fla. Bar No. 109154
SHEPPARD AND WHITE, P.A.
215 Washington Street
Jacksonville, FL 32202
(904) 356-9661

Michael R. Yokan, Esquire
Fla. Bar No. 852856
500 North Ocean Street
Jacksonville, FL 32202
(904) 353-8295

COUNSEL FOR RESPONDENT/CROSS-
PETITIONER

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF CITATIONS.	ii
PRELIMINARY STATEMENT	iv
I.	
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.	1
II.	
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	9
III.	
THE SEARCH WARRANT PURSUANT TO WHICH CROSS-PETITIONER'S BLOOD WAS SEIZED WAS FACIALLY INVALID	18
IV.	
DEMONSTRATED MATERIAL MISREPRESENTATIONS IN AND OMISSIONS FROM THE SEARCH WARRANT AFFIDAVIT ENTITLED CROSS-PETITIONER TO A HEARING AND REQUIRED SUPPRESSION OF EVIDENCE	23
CONCLUSION	32
CERTIFICATE OF SERVICE.	33

TABLE OF CITATIONS

Cases	Page(s)
Beck v. Ohio, 379 U.S. 89 (1964)	20
Doggett v. United States, __ U.S. __, 120 L.Ed. 520 (1992)	5, 6
Dorman v. State, 492 So.2d 1160 (Fla. 1st DCA 1986)	28
Drake v. State, 400 So.2d 1217 (Fla. 1981)	20, 21
Florida v. Royer, 460 U.S. 491 (1983)	13
Franks v. Delaware, 438 U.S. 154 (1978)	8, 23, 24
Hesselrode v. State, 369 So.2d 348 (Fla. 2d DCA 1979)	12, 15, 17
Lawrence v. Florida East Coast Railway Co., 346 So.2d 1012 (Fla. 1977)	7
Morris v. State, 622 So.2d 67 (Fla. 4th DCA 1993)	15, 16, 17
Overfelt v. State, 434 So.2d 945 (Fla. 4th DCA 1983) rev'd in part, aff'd in part, 457 So.2d 1385 (Fla. 1984)	29
Ramer v. State, 530 So.2d 915 (Fla. 1988)	15
Reynolds v. State, 592 So.2d 1082 (Fla. 1992)	13
Schmerber v. California 384 U.S. 757 (1966)	18-19, 22-23
State ex rel. Wilson v. Quigg, 17 So.2d 697 (Fla. 1944)	15
State v. Beney, 523 So.2d 744 (Fla. 5th DCA 1988)	26

TABLE OF CITATIONS (Continued)

Cases	Page(s)
State v. Casal, 410 So.2d 152 (Fla. 1982)	13
State v. Gayle, 573 So.2d 968 (Fla. 5th DCA 1991)	10
State v. Marrow, 459 So.2d 322 (Fla. 3d DCA 1984)	26
State v. Robinson, 132 So.2d 156 (Fla. 1961)	14
United States v. Leon, 468 U.S. 897 (1984)	15
Vargas v. State, 640 So.2d 1139 (1st DCA 1994)	2
Whiteley v. Warden of Wyoming State Penitentiary, 401 U.S. 560 (1971)	28, 29
Winston v. Lee, 470 U.S. 753 (1985)	19, 20

IN THE SUPREME COURT
OF FLORIDA

CASE NO.: 83,935

STATE OF FLORIDA,

Petitioner,

vs.

MIGUEL ANGEL VARGAS,

Respondent/Cross-Petitioner.

RESPONDENT'S REPLY BRIEF

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].

ARGUMENT

I.

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 State grossly misconstrues the record of this case as grounds for its argument that the First District correctly remanded the issue regarding novel scientific evidence. Specifically, the State contends that in his Motion for Rehearing Mr. Vargas "did not complain that the Court could not properly remand the matter to the trial court for further proceedings." [State's Reply, 27]. The State makes that misrepresentation as grounds for its argument that this Court should not review issues outside of those certified by the First District. However, the record shows that in his Motion for Rehearing and Rehearing En Banc in the District Court of Appeal, the cross-petitioner asserted:

> In its opinion as to admission of alleged novel scientific evidence, the Panel overlooked or misapprehended certain law and facts that compel a determination that this case should not be remanded for further proceedings. This Court overlooked or misapprehended that appellant's Motion in Limine to Exclude Novel Scientific Evidence was an issue that was dispositive of this case [Panel Opinion, 3, n.1], rendering remand inappropriate. This Court found that the population frequencies of one in 30 million and one in 60 million which the State sought to introduce at trial against the appellant were "not generally accepted in the relevant scientific community. Therefore, those population frequencies are not admissible." [Panel Opinion, 29]. The panel misapprehended relevant law by not ending its analysis there and holding that appellant's conviction must be reversed.

[Motion for Rehearing and Rehearing En Banc, attached as Exhibit "A" to cross-petitioner's First Motion to Supplement Record on Appeal]. Thus, contrary to the State's unfounded assertion, the First District was presented with the question cross-petitioner has presented to this Court.

The State further erroneously asserts that Miguel Vargas did not challenge whether the State's probability calculations were conservative and favorable to him. [State's Reply, 22]. Apparently, the State has wholly failed to grasp the issues cross-petitioner raised below and which are now before this Court. The First District Court of Appeal found, "The record and materials submitted for our review indicate that the heart of the controversy in this case is the effect of population subgroups on the calculation of statistical probabilities, the third step in the DNA profiling process." Vargas v. State, 640 So.2d 1139, 1144, n.7 (Fla. 1st DCA 1994). Indeed, cross-petitioner's challenge led to the First District's finding that the population frequencies at issue were not generally accepted in the relevant scientific community. Id. at 1150. Cross-petitioner Vargas further relies on his Statement of the Case and Facts, and his arguments, set forth in his Brief on the Merits concerning the DNA issues before this Court as setting forth the challenges which he made before the trial and district courts. The State's assertion is simply without merit.

Significantly, the State does not contest cross-petitioner's assertion that the burden was on the State to prove that the

scientific evidence at issue was generally accepted by the relevant scientific community. [Respondent's Brief on the Merits, 40-41]. The State does not challenge that assertion because it is a correct statement of law. The record conclusively demonstrates that the State did not carry its burden as to any possible alternate method of calculation in this case.

Aside from one reference made by one of the State's experts to a possible alternative solution, which as shown by the cross-petitioner was refuted by his expert, no reference to any possible alternative was made by any of the State's witnesses. [Respondent's Brief on the Merits, 41-42]. At no point in the proceedings before the trial court did the State's counsel argue that it was seeking to introduce anything other than the probability calculations which the First District found were not generally accepted. This Court should estop the State from attempting to backpedal and change its argument at this stage of the proceedings.

This Court should also note that in its argument regarding the stipulations entered into in this case the State does not make even one reference to the record of the proceedings during which the stipulations at issue were entered. [State's Reply, 19-22]. While the State now argues that it might be able to try Mr. Vargas regardless of the admissibility of the DNA evidence, the State did not take that position before the trial court.

At the sentencing hearing, the trial court approved the following stipulation made by the cross-petitioner and the State.

> MR. SHEPPARD: For the record, there have been those four motions which the State agrees that are dispositive. Each and every motion would be dispositive.
>
> MR. MALTZ: The State would agree to that. Of course, the Court denied them, but that if the Court were to have granted any of those motions, that would have been dispositive of this case.

[Vol. XIII, R. 2002]. The court ensured that it understood the terms of the stipulation at the sentencing hearing:

> THE COURT: Alright. Hold on a second here. 90-677.
>
> MR. SHEPPARD: Your Honor, in this case we have tendered pleas of nolo contendere as to the first and third counts, reserving the right to appeal the denial of defendant's First Motion to Suppress, Second Motion to Suppress, Third Motion to Suppress, as well as the Motion in Limine to Exclude Novel Scientific Evidence, all of which the State stipulates are dispositive motions.
>
> MR. MALTZ: <u>The State would so stipulate that if the court were to have granted those motions, they would have been dispositive on this case</u>.
>
> THE COURT: And of course, --
>
> MR. SHEPPARD: And we reserve the right to appeal them.
>
> THE COURT: Reserve the right to appeal and the orders that I entered on all those suppression hearings and limine hearings will apply to all cases today, the right to appeal, correct?
>
> MR. SHEPPARD: Thank, you, sir. Yes, sir.

[Vol. XIII, 2004] (emphasis added). Furthermore, the trial court made sure the cross-petitioner understood the stipulation was an integral part of his plea agreement:

THE COURT: You did also reserve the right in each of these cases to appeal the four motions that were filed on your behalf that the court, meaning me, denied.

THE CROSS-PETITIONER: Yes, sir.

THE COURT: And, of course, the State Attorney has agreed that that can be appealed.

THE DEFENDANT: Yes, sir.

THE COURT: That that was dispositive of the cases had I ruled in your favor on those motions.

THE CROSS-PETITIONER: Yes, sir.

THE COURT: You understand that?

THE CROSS-PETITIONER: Yes, sir.

[Vol. XIII, R. 2010] (emphasis added). Thus, the record conclusively shows that the State and the cross-petitioner stipulated and agreed, and the trial court approved the stipulation and found, that all four issues preserved by the cross-petitioner for appeal were dispositive issues which were part and parcel of Miguel Vargas' plea agreements.

The State may not now retract the bargain into which it entered with the cross-petitioner which was approved by the trial court. Justice Souter, writing for the United State Supreme Court in an opinion addressing the Sixth Amendment right to speedy trial, made an observation regarding the Government's stipulation at trial in that case which is an apropos holding to the issue now before this Court. In Doggett v. United States, ___ U.S. ___, 120 L.Ed. 520 (1992), the Government stipulated in its written plea agreement that the defendant was not aware of an outstanding indictment prior

to his arrest years after the indictment issued. Id. at 529. The Court held:

> While one of the Government's lawyers later expressed amazement that "that particular stipulation is in the factual basis," Tr 13 (March 31, 1989), he could not make it go away, and the trial and appellate courts were entitled to accept the defense's unrebutted and largely substantiated claim of Doggett's ignorance.

Id. at 529. As in Doggett, the State cannot now make the binding stipulations into which it entered with the trial court's approval go away. If this Court were to accept the State's argument that a stipulation between the State and a defendant which is approved by a trial court is not binding on the State before an appellate court, then defendants will have little or no reason to bargain with the State and enter into Ashby nolo plea agreements. The judicial system would be ill-served by such uncertainty.

The record conclusively establishes that the State did not seek to introduce evidence other than the probability calculations which the First District found were not generally accepted. Accordingly, this Court should uphold the terms of the stipulation and plea agreement and find the First District erred in remanding this case to determine whether the State might have been able to present alternative evidence which it never indicated that it could or intended to introduce.

The cross-petitioner recognizes that this Court has declined in some appeals to address issues raised by the parties which lie beyond the scope of a certified question. However, this Court has also recognized that it is this Court's "prerogative to consider

any error in the record once [this Court has] it properly before [the Court for its] review." Lawrence v. Florida East Coast Railway Company, 346 So.2d 1012, 1014 n.2 (Fla. 1977). In Lawrence, this Court reviewed and ruled on an evidentiary issue going to the merits of a negligence case while the question certified dealt with whether a special verdict should have been submitted on a comparative negligence issue. In this case, the First District certified two questions for review by this Court. The first question dealt with whether the First District correctly found that novel DNA profiling evidence at issue was not generally accepted for admission at trial. The second question dealt with whether evidence should have been suppressed when an unauthorized officer executed a search warrant outside of his territorial jurisdiction. The cross-petitioner has raised three additional issues for review by this Court all of which are intertwined with the two questions certified by the First District.

The First District simultaneously with certifying the general acceptance issue to this Court, remanded the case to the trial court for a determination of whether the State might be able to introduce probability calculations other than those which the State had sought to introduce at trial. The cross-petitioner expressly challenged the First District's right to remand the issue regarding novel scientific evidence. This Court should review the question of whether the First District erred by simultaneously remanding the case because the dispositive nature of a stipulated plea agreement and the application of a limited de novo standard of review are

important issues which are likely to arise again in the courts of this state. Thus, the courts of this state and the public will be well served by this Court addressing intertwined issues which the parties have thoroughly briefed for this Court.

Likewise, the facial validity and Franks issues which the cross-petitioner asks this Court to review gave rise to and relate to the certified question concerning execution of the warrant at issue. The facial validity and Franks issues address important issues concerning the right an individual has to privacy regarding her or his genetic makeup. Those issues also raise the question of the appropriate standard of probable cause which is necessary to pierce an individual's skin, withdraw that person's blood and delve into that person's genetic makeup. This Court has always vigorously protected the privacy interests of the citizens of the State of Florida. The questions presented by cross-petitioner in his facial validity and Franks arguments are likely to repeat themselves in light of the continued and expanding attempts of the State to obtain and use blood and genetic evidence in criminal cases. Accordingly, the judiciary and the public would be well served by this Court exercising its prerogative and addressing those important issues which relate to the search and seizure question which the First District certified.

II.

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 State having been unable to respond to cross-petitioner's showing that Duval County Detective Baer did not participate in the seizures and search at issue now makes blanket characterizations that Duval County Detective Baer was "active" in those seizures and search. [State's Reply, 31, 35]. The State also characterizes Detective Baer as having been "present" when the seizures and search at issue transpired. [State's Reply, 31, 35]. As well, the State argues that Detective Baer "executed" the warrant at issue. [State's Reply, 28, 35]. All of the State's assertions regarding Detective Baer's participation are wholly unsupported by either fact or law. The State repeatedly cites to record page 1597 as grounds for its contention that Detective Baer was present and executed the warrant at issue. [State's Reply, 28, 35, 39]. The reference on which the State places such great reliance is Detective Harris' testimony during direct examination regarding what happened after he transported Miguel Vargas to his home. As the record reflects:

> Q What happened after the defendant went with you and Sergeant, or Detective Jarosz, now Sergeant Jarosz?
>
> A We went to the defendant's home where I met with Detective Baer. The search warrant--both search warrants were executed at that time.

Q When you say they were executed at that time, how were they executed?

A They were executed by Detective Baer and I read them to the defendant.

[Vol. XI, R. 1597] (emphasis added). Similarly, when asked which officers executed the warrant, Detective Harris testified, "It was Duval County officers actually executing the warrant." [Vol. XI, R. 1599]. However, on cross-examination, Detective Harris testified, "Executing is when it is served on the defendant." [Vol. XI, R. 1600]. When asked how he serves a warrant, he testified, "I would read the search warrant to you." Id. Thus, the State seeks to justify the search at issue, which was outside of the unauthorized officer's territorial jurisdiction, by relying on that own officer's self-serving conclusion. Furthermore, the State cites to no authority indicating that a search warrant is executed when it is read as opposed to the taking of items in the warrant into custody or entering the premises to be searched. See, State v. Gayle, 573 So.2d 968, 971 (Fla. 5th DCA 1991) (search warrant not invalidly executed, even though officer entered premises without possession of warrant where warrant was in nearby police vehicle).

Contrary to the State's attempts to distort the record, the record clearly shows that it was the unauthorized officer, Clay County Detective Harris, who executed the warrant at issue. Cross-petitioner asks this Court to look at his statement of the record and legal arguments concerning the search to which the State was not able to respond. Specifically, the State does not attempt to

controvert cross-petitioner's record statement that the record shows the unauthorized officer, Detective Harris, was the sole investigative officer; he was the only individual who sought and procured the search warrant; he was the sole officer who took Mr. Vargas into custody at Cecil Field; he was the sole officer who transported Mr. Vargas to University Hospital in Duval County; he was the sole officer who was present in the room for and directed the seizure of Mr. Vargas' blood; he was the sole officer who collected and transported the evidence samples, including Mr. Vargas' blood, and placed them in his agency's property room located in Clay County; and he was the sole officer who signed the inventory receipt to the warrant attesting to the fact that he was the executing officer. [Respondent's Brief on the Merits, 4-5, 48-50, 53-54]. The State makes nothing other than unsupported conclusory assertions that it was Duval County Detective Baer who served and executed the warrants, for the simple reason that the record does not support its argument.

The State asserts in its statement of facts that Detective Harris transported Mr. Vargas to the hospital in Duval County because "Baer was in a separate vehicle." [State's Reply, 3]. The record shows that Detective Harris testified, "He met us there. He was in a separate vehicle." [Vol. XI, R. 1598]. Common sense dictates that if Baer was the active officer executing the warrant, he should have been the officer to transport Miguel Vargas and should have been the officer giving directions and not simply following the directions of an unauthorized Clay County officer.

Detective Baer's failure to transport Mr. Vargas or play any active role in the search at issue was exactly the abdication of duty prohibited by the court in Hesselrode v. State, 369 So.2d 348 (Fla. 2d DCA 1979), and the other authorities which cross-petitioner cited in his Brief on the Merits. The State also makes the incorrect assertion that Detective Baer was in the examination room where the blood, saliva, and hair samples were taken. [State's Reply, 3]. The State supports this claim by contending that Detective Harris described the Sexual Assault Treatment Center as a three-story building consisting of two rooms. [State's Reply, 5, 35]. In fact, Detective Harris testified:

> The Sexual Assault Treatment Center is an annex of the University Hospital. Located beside it is a small three-story building. The Sexual Assault Treatment Center itself is a two -- a one-room examination building.

[Vol. XI, R. 1615] (emphasis added). Contrary to the State's assertion, the record clearly shows that Detective Harris described the Sexual Assault Treatment Center as a one-room building. Thus, judging by any commonly-accepted definitions of "present" (i.e. "being in view or at hand" or "constituting the one actually involved, at hand or being considered"), since Detective Baer was not in the one room building where the examination took place, the State's assertion to the contrary is clearly unfounded.

While the State at length correctly cites the proposition that the trial court's factual findings are entitled to deference, this Court has never interpreted that standard to mean that it will close its eyes to patently erroneous findings. The record clearly

demonstrates that the trial court and the First District misconstrued the record in this case. For example, as in its other arguments, the State without record support asserts that Mr. Vargas voluntarily agreed to accompany Detective Harris. [State's Reply, 3, 28]. The record as set forth by the cross-petitioner, and not controverted by the State, clearly shows that Harris took Miguel Vargas into custody and compelled him to leave Cecil Field pursuant to the authority of the search warrant which he believed gave him that power. [Respondent's Brief on the Merits, 4, 48]. Detective Harris conceded that at Cecil Field he seized Miguel Vargas' body and Mr. Vargas was not free to leave. [Vol. XI, R. 1607-08; 1612-13]. The following exchange occurred at the proceedings below:

> Q In effect, his body was seized by virtue of those court orders that you had?
> A Yes.
> Q And that occurred when he got in your car and you left?
> A Right.

[Vol. XI, R. 1613]. The record further undisputedly shows that if Miguel Vargas in any fashion agreed to leave Cecil Field with Detective Harris, it was a mere acquiescence to a display of authority. See, e.g., Florida v. Royer, 460 U.S. 491, 497 (1983) (consent to seizure and search not voluntary and valid when it is nothing more than a mere submission to claim of authority); Reynolds v. State, 592 So.2d 1082, 1086 (Fla. 1992); State v. Casal, 410 So.2d 152, 155 (Fla. 1982) (consent invalid where owner of boat asked officer if officer had search warrant and officer responded that he did not need one and then owner of boat allowed search). Furthermore, the State fails to counter or even respond

to the simple reality that a search warrant to seize body fluids, occurs when the defendant is taken into custody and continues until the body fluids are withdrawn and defendant is released from custody. Given the fact that Mr. Vargas was seized at Cecil Field by unauthorized Clay County Detective Harris it is clear that the warrant was improperly executed. Even assuming that such a warrant is not executed until the blood is withdrawn the record is clear that given the plain meaning of the word "present" Detective Baer was clearly not present when the blood was withdrawn as required by Florida statute.

Finally, the State abandons its attempt to distort the record in hopes of avoiding cross-petitioner's arguments that Mr. Vargas was improperly seized at Cecil Field and that the lack of Detective Baer's true presence when the blood was withdrawn warrants suppression. The State shifts its hope of success upon the erroneous contention that this Court should not apply the exclusionary rule in this case because it will not serve the Fourth Amendment interest. The State argues that the evidence should not be excluded because Detective Harris acted in good faith in executing the warrant. [State's Reply Brief, 36-39]. However, the State overlooks the simple fact that the execution violations at issue in this case are statutory and not based on the Fourth Amendment per se. This Court has long held that the statutes authorizing the issuance of warrants must be strictly construed and that violations of those statutes mandate suppression. See, e.g., State v. Robinson, 132 So.2d 156, 157-58 (Fla. 1961) (upholding

decision of Second District Court of Appeal in Robinson v. State, 124 So.2d 714 (Fla. 2d DCA 1960), finding suppression was required where justice of peace did not have jurisdiction to issue a search warrant to a dwelling not located within his territorial jurisdiction); State ex rel. Wilson v. Quigg, 17 So.2d 697, 702-03 (Fla. 1944) (en banc) (holding, "statutes authorizing searches and seizures must be strictly construed" and suppressing evidence where statutes did not authorize a circuit judge to issue a search warrant for violation of a municipal ordinance, and where statutes did not authorize a circuit judge to make a search warrant returnable to a municipal court judge); and Ramer v. State, 530 So.2d 915, 916-18 (Fla. 1988) (holding trial court correctly suppressed evidence where a municipal police officer searched and seized a vehicle outside of his municipal territory). In fact, the State even reluctantly acknowledges that the two lead cases concerning officers' violation of Florida's execution of search warrant statutes, Hesselrode and Morris, have held that violation of these statutes warrants suppression of the evidence seized pursuant to the warrants. [State's Reply, 40].

Notwithstanding the fact that the issue at hand involves statutory suppression, the State incorrectly argues that Detective Harris acted in good faith and therefore the evidence should not be suppressed pursuant to United States v. Leon, 468 U.S. 897 (1984). [State's Reply, 38]. As noted, this Court has consistently held that when statutes enacted to protect the privacy of citizens, and ensure that police act within their specified powers, are violated,

suppression is required. Even assuming arguendo that the good faith doctrine applies, the State once again relies on unauthorized Detective Harris' self-serving testimony as to whether he executed the warrant at issue. [State's Reply, 39]. The full record shows that, Detective Harris knowing he was not authorized by the terms of the search warrant, went ahead and executed the warrant outside of his territorial jurisdiction. Such blatant disregard for the laws controlling the issuance and execution of search warrants is clearly not an act of good faith.

The State further incorrectly argues that this Court should not exclude the evidence at issue because Miguel Vargas was not prejudiced by the seizures and search at issue and therefore argues that suppression would not serve the purposes of the exclusionary rule. [State's Reply, 39-41]. Contrary to the State's arguments, as the court noted in Morris v. State, 622 So.2d 67 (Fla. 4th DCA 1993), where there was also no evidence that the defendant was "prejudiced," the court found that exclusion was the appropriate remedy. As the court reasoned:

> It is not by accident that the statute limits the execution of a search warrant to the police officials designated in the warrant. This is the essential purpose of section 933.08. Police officers are sworn officers of the law who take appropriate oaths to carry out the provisions of the federal and state constitutions and the laws of the state and nation. This oath is of no small moment as a protection to our citizens when their privacy is lawfully intruded upon by a search pursuant to a warrant. In other words, it is of great importance that the police authorized to conduct the search do so .... There is no provision in section 933.08 nor anywhere else that would permit this responsibility [of

> executing a warrant] to be delegated to an unauthorized person. This delegation, in effect, strips away the citizen's protection provided for in the statute.

Id. at 69. The reasoning of the Morris court squarely applies in this case. Exclusion is mandated in this case because to hold otherwise would be to sanction police officers who disregard the statutory and judicial constraints on the issuance and execution of search warrants. Furthermore, despite the State's contention that exclusion would be "indiscriminate and may well generate disrespect for the law and the administration of justice" this contention was specifically rejected in Hesselrode and Morris where the court stated:

> Occasionally, when a court suppresses evidence gathered by law enforcement agencies after many hours of hard labor, one is led to believe it is the fault of the court for the loss of the evidence, even though the court was not present when the evidence was seized and had nothing to do with the direction of the officers as they accomplished the task. It would be too easy for the court to approve the procedure used herein, but the record cries out that the procedure contravened the statute and was wrong .... A court is reluctant to suppress evidence, which if obtained in a lawful fashion, would have been of compelling importance to the prosecution for felony. But there is no other course by which a court can insist upon compliance by police officers with the requirements of law with respect to searches and seizures than to suppress evidence illegally obtained ... [A]s keepers of the law [courts] must maintain the integrity of our constitution adopted by the people and statutes given to us by our legislatures.

Morris, 622 So.2d at 70, quoting, Hesselrode, 369 So.2d at 351. Accordingly, this court should hold that the search at issue was

unlawful and should vacate the decision of the First District.

III.

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

The State incorrectly argues that the trial court properly denied the defendant's First Motion to Suppress blood samples on the grounds that the search warrant was based on probable cause and that the search and seizure of the defendant's blood was reasonable.[1] However, the State conveniently ignores the heightened standard of probable cause imposed by the United States Supreme Court in Schmerber v. California, 384 U.S. 757 (1966), when the search of a person's body beneath the surface of that person's body is the subject of the requested search. In Schmerber, the driver of an automobile who was in an accident was forced to submit to a blood test against his will to determine whether he was intoxicated. Id. The Supreme Court held:

> The interests in human dignity in privacy which the Fourth Amendment protects forbid any such intrusions [beyond the body's surface] on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search.

Id. at 769-70 (emphasis added). Thus, the Court created a

---

[1] While the seizure of saliva is not at issue because the State did not seek to use such as evidence below, the State's argument that a warrant was properly issued authorizing seizure of cross-petitioner's saliva demonstrates the State's faulty reasoning. The warrant affidavit is silent in regards to saliva.

heightened standard of probable cause which must be established before the State can search beneath an individual's skin. Recognizing the necessity of a warrant obtained by a neutral and detached magistrate, the Court further stated, "The importance of informed, detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt is indisputable and great." Id. at 770. Schmerber requires the issuing judge to give special consideration to the decision of whether the search of an individual's body is justified.

Additionally, in Winston v. Lee, 470 U.S. 753, 767 (1985), the Supreme Court held:

> Where the Court has found a lesser expectation of privacy, or where the search involves a minimal intrusion of privacy interests, the Court has held that the Fourth Amendment's protections are correspondingly less stringent. Conversely, however, the Fourth Amendment's command that searches be "reasonable" requires that when the State seeks to intrude upon an area in which our society recognizes a significantly heightened privacy interest, a more substantial justification is required to make the search "reasonable."

(citations omitted). In Winston, the Court affirmed an order which prevented the State of Virginia from forcing a defendant to undergo surgery in order to remove a bullet for use as evidence. Id. at 776. The Court held, "The reasonableness of surgical intrusions beneath the skin depends on a case-by-case approach, in which the individual's interests and privacy and security are weighed against society's interests in conducting the procedure." Id. at 669. In Winston, although the State of Virginia clearly had probable cause

to conduct the search, it failed to establish that the intrusion was reasonable. Id. at 763, 766.

In this case, the State of Florida not only failed to demonstrate that it had probable cause to conduct the search but likewise failed to show that the intrusion was reasonable under Article I, Section 12, of the Florida Constitution and the Fourth Amendment to the United States Constitution. The State incorrectly contends that the issuing judge, had a substantial basis for believing probable cause existed to issue the search warrant. The affiant gave no indication that the attempted burglary for which the defendant was arrested was such an unusual event to justify suspecting any given attempted burglar of prior sexual batteries in the same general vicinity. Indeed the State makes much of the fact that the two described sexual battery victims and the alleged attempted burglary victims, all lived in first floor apartments with sliding glass doors. [State's Answer Brief, 51]. Common sense dictates that there is nothing unique about that fact.[2] This Court should heed the Supreme Court's directive and not allow "anyone with a prior criminal record to be arrested at will." Beck v. Ohio, 379 U.S. 89, 96-97 (1964). As to the descriptions of the victims, there is nothing extraordinary about being a single, white, educated female living alone. Likewise, the mere fact that tape was found in the defendant's vehicle certainly does not

---

[2] Notably this Court in another context has found that crimes must be virtually identical to have any probative value. See, Drake v. State, 400 So.2d 1217 (Fla. 1981) (holding, "A mere general similarity will not render the similar facts legally relevant to show identity.").

support a finding of probable cause.

The fact that cellophane tape was used to tie the victims hands in two sexual batteries at issue might have led a reasonable man to believe those crimes were related. However, the significance of that similarity was limited. Indeed, this Court expressly noted in Drake v. State, 400 So.2d 1217 (Fla. 1981), that, "Binding of the hands occurs in many crimes involving many different criminal defendants." Id. at 1219. Thus, the presence of duct tape in Mr. Vargas's vehicle would not have led a reasonable man to conclude he was likely involved in the two prior crimes of an entirely different nature.

The few similarities that did exist were not meaningful and certainly did not establish probable cause. Indeed, the State has been unable to answer cross-petitioner's challenge to cite any controlling authority supporting a finding of probable cause based on such attenuated circumstances. In addition to there not having been probable cause for the seizures and searches at issue, the seizures and searches were also invalid because they were unreasonable.

The State inappropriately reasons that the DNA test used in the instant case is a "highly effective means of determining whether Vargas [was] the perpetrator of the two sexual batteries." [State's Reply, 52-53]. The State further improperly contends that since there was no victim identification of the alleged perpetrators of the sexual batteries, the samples were needed to identify whether the cross-petitioner was the alleged perpetrator.

[State's Reply, 53]. In essence, the State argues that it has a compelling interest in taking a blood sample of anyone that it suspects might be a sexual assailant. In other words, the State would have this Court justify the seizure of blood on the mere chance that it would identify the perpetrator.

However, the Fourth Amendment prohibits a search of a person's body "on the mere chance" that evidence might be obtained. Schmerber, supra at 770. In the instant case, the affidavit alleged merely the possibility of an attempt to obtain a comparison of DNA samples and blood. [Vol. IV, R. 494-95; Vol. V, R. 637-38]. The search warrant was issued without any factual basis to support a clear indication that evidence of a crime was likely to be obtained through the issuance of the search warrant as required by the United States Supreme Court. Schmerber, supra at 770.

The Supreme Court also explicitly held that the Fourth Amendment's reasonableness standard requires that the blood test to be performed be "highly effective." Schmerber, supra at 771. The State's unsupported declaration that DNA testing is highly effective was insufficient to establish any degree of reliability. The record of this case demonstrates that DNA profiling was not a highly effective test at the time in question. The State concludes its argument concerning the body searches by falsely stating that the defendant's interest in his blood and body were minimal. [Answer Brief, 53]. This misleading statement demonstrates the State's total misreading of Schmerber, wherein the Court repeatedly recognized that the "integrity of an individual's person is a

cherished value of our society." Schmerber, supra at 772. Indeed, it is a "fundamental human interest." Id. at 770. The cross-petitioner's interest in his body, blood and his very genetic makeup cannot be characterized as a minimal one.

The State should not be allowed to seize a person's blood and ferret out that individual's genetic essence absent a demonstration of an extremely compelling need. Since the State could not demonstrate a clear indication that an intrusion into the defendant's body by taking blood samples would produce desired evidence, the State failed to satisfy its burden required by the Supreme Court in Schmerber. For these reasons, the District Court of Appeal erred by affirming the trial court's denial of the defendant's First Motion to Suppress Evidence, and its affirmance should be reversed.

IV.

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

Reading the State's responses to the cross-petitioner's facial validity and Franks arguments in tandem reveals the vacuousness of the State's arguments. The State contends in its response to Miguel Vargas' facial validity attack that a number of statements in the warrant affidavit served to establish probable cause. Yet, the State either fails to address reckless misrepresentations regarding those same factual allegations, or contends those factual allegations were of no significance to a finding of probable cause in responding to Mr. Vargas' Franks challenge.

The State stresses in its probable cause analysis that all three victims were single, educated white females who lived alone. [State's Reply Brief, 51]. Yet, in its response to Mr. Vargas' Franks challenge, the State asserts that it is of no significance that the affiant did not have any basis for stating that the attempted burglary victim was single, educated, or lived alone. [State's Reply, 56]. While the State contends that Detective Harris' inability to recall where he got that information does not establish a showing of recklessness, the State fails to address the fact that Detective Harris' only source of information concerning [redacted] as stated in the warrant affidavit itself, was his review of Patrolman Snyder's burglary report. [Vol. IV, R. 495; Vol. V, R. 638]. Thus, regardless of whether Detective Harris attempted to explain away his baseless statement, it remained a material allegation without any factual basis.

The cross-petitioner filed the deposition of Detective Lee Harris in its entirety as an exhibit in support of his second motion to suppress. [Vol. VI, R. 840].[3] While the State contends that Detective Harris simply could "not recall where he got ... information" the record demonstrates that he could not testify to any basis for numerous statements contained in his affidavit because none existed. The following exchange occurred at deposition:

---

[3] The record in this case contains excerpts from the deposition of Lee Harris filed by the cross-petitioner. [Vol. V, R. 701]. As well, Detective Harris' entire deposition is attached to the State's Memorandum of Law in Opposition to the Defendant's First and Second Motions to Suppress. [Vol. VI, R. 732-839].

> Q: Did you speak with Patrolman Snyder personally about his reports, or was your information on that affidavit based --
>
> A: The information on this was based on the report.

[Vol. V, R. 713; Vol. VI, R. 783, Harris, 35]. When asked where he derived the information that Ms. [redacted] was a single white educated female that lived alone Detective Harris replied, "I don't recall where I got she was single." [Vol. V, R. 702; Vol. VI, R. 785; Harris, 37]. When asked whether any information regarding Ms. [redacted] being single, white, educated or dating a man in the Navy appeared in the reports that Detective Harris reviewed, Detective Harris responded that the only category indicated was that Ms. [redacted] was white. [Vol. V, R. 702-703; Vol. VI, R. 785-788; Harris, 37-38]. When asked if any other categories of that information appeared in the reports he reviewed he stated, "I don't see it in the report." [Vol. V, R. 703; Vol. VI, R. 786; Harris, 38]. Furthermore, Detective Harris clarified that defendant's exhibit four to his deposition were the reports he reviewed. [Vol. V, R. 703; Vol. VI, R. 786; Harris, 38]. Thus, the State misrepresents the record by suggesting that the search was proper because the affiant may have known unstated information regarding sworn material facts from sources other than those he identified in his affidavit. The record does not support that contention.

Furthermore, the State misapprehends relevant law by contending that if Detective Harris had a source of information other than that specified in his warrant affidavit that the search

would be lawful. However, if Detective Harris obtained information from sources other than those he identified, his failure to have identified any such

source or sources was in itself an intentional or reckless misrepresentation. In State v. Marrow, 459 So.2d 322 (Fla. 3d DCA 1984), the court was faced with that exact situation. Also see, State v. Beney, 523 So.2d 744 (Fla. 5th DCA 1988).

In Marrow, it was disclosed at an evidentiary hearing that the affiant had never spoken with the informant he identified as his source of information. Id. at 322. The court held:

> We affirm the trial court's order suppressing the evidence seized pursuant to the search warrant upon a holding that (1) where, as here, the affiant clearly implied that the critical conversation discussed in the affidavit was between the confidential informant and him, even though he did not expressly state that he "personally" spoke to or interviewed the informant ... the affiant's statement is at least recklessly false; (2) the fact that probable cause existed and could have been readily shown by a truthful affidavit stating that the affiant's information came from a fellow officer does not change the result, since it is the truth of the affiant's statement, not the truth of the confidential informant's statement, that is material to the magistrate's decision....

Id. (citations omitted). As in Marrow, this Court should reject the State's argument that possible other sources of information alleviated the taint of recklessness or intentional misrepresentation.

The State also asserts in its probable cause analysis that the fact that cellophane tape was used in two sexual batteries and the fact that tape was found in Mr. Vargas' vehicle served as a

material basis to find probable cause. [State's Reply, 51]. Yet, the State again seeks to downplay Detective Harris' material omission of the fact that the tape found in Mr. Vargas' vehicle was duct tape by asserting that Detective Harris' failure to indicate that it was duct tape was "just an oversight." [State's Reply, 57]. Again, cross-petitioner demonstrated in his motion to suppress that the only basis of knowledge the detective had regarding the tape found in Mr. Vargas' vehicle was Patrolman Snyder's report. [Vol. V, R. 648]. The police report from which Detective Harris obtained his information regarding the tape described it only as "green duct tape." [Clay County Sheriff's Incident Report, dated 1-15-90, Vol. V, R. 647-48]. The State begs the question by asserting that Detective Harris' omission was at most a negligent or innocent mistake. The issue is whether Mr. Vargas made a substantial demonstration that Detective Harris had intentionally or recklessly withheld material information. The cross-petitioner demonstrated that the affiant withheld material information regarding whether a similarity existed between the modus operandi of an unknown assailant and the facts reported concerning the alleged attempted burglary which he contended was similar enough to justify searching Mr. Vargas' blood. That showing entitled him at the very least to an evidentiary hearing.

The State also stresses the importance of an alleged modus operandi similarity, namely a connection with the Navy, in its facial validity analysis. [State's Reply, 51]. Yet, the State again asserts that Detective Harris not having had any basis for

that information did not show that the statement was made with reckless disregard for the truth. [State's Reply, 57]. Thus, the State once more conveniently fails to address that Miguel Vargas demonstrated to the trial court that all information Detective Harris had obtained concerning [redacted] came from Patrolman Snyder's report.

Similarly, the State again asserts that Detective Harris merely did not recall where he had obtained the information that [redacted] described her assailant as a white male. [State's Reply, 58]. In fact when asked if he had obtained that information from a conversation with Ms. [redacted] Harris replied, "I got it from somewhere, and I don't recall specifically her telling me that it was a white male." [Vol. VI, R. 775]. However, moments before Detective Harris testified that his information concerning Ms. [redacted] came from his review of Detective Gainey's report which does not state that Ms. [redacted] described her assailant as white. [Vol. VI, R. 774-75]. Indeed, Harris identified his source of information concerning that assault in the search warrant affidavit as having been Detective Gainey's report. [Vol. V, R. 637-38]. The State's reference to what Ms. [redacted] testified to in her deposition as to what she told other police is of no significance. She clearly did not tell Detective Harris that her assailant was white.

As the First District Court of Appeal stated in Dorman v. State, 492 So.2d 1160, 1161 (Fla. 1st DCA 1986), "[I]t is, of course, elementary that facts which are unknown before the seizure

cannot be relied upon to supply the necessary probable cause." Similarly, as the United States Supreme Court noted in Whiteley v. Warden of Wyoming State Penitentiary, 401 U.S. 560, 565 (1971), "Under the cases of this court, an otherwise insufficient affidavit cannot be rehabilitated by testimony concerning information possessed by the affiant when he sought the warrant but not disclosed to the issuing magistrate." As the court further noted, "A contrary rule would, of course, render the warrant requirements of the Fourth Amendment meaningless." Id. What is at issue in this case is whether the affiant had any basis whatsoever for numerous material statements he made. The record clearly shows he did not.[4]

The State correctly states that Detective Harris testified he had reviewed reports concerning the assault of Ms. [redacted] One of those reports does indicate that her assailant was a white male. However, the State also correctly notes that Detective Harris, who stated in his warrant affidavit that the basis of his information concerning the assault of Ms. [redacted] came from an interview with her, repeatedly testified that he did not recall Ms. [redacted] having attributed any race to her assailant. [Vol. VI, R. 710-11, 754,

---

[4] Notably, the State accepted cross-petitioner's statement of facts in the proceeding before the First District Court of Appeal. Accordingly, the State should be estopped from attempting to controvert the cross-petitioner's statement of facts regarding any matters at issue in this cause. See e.g. Overfelt v. State, 434 So.2d 945, 949 (Fla. 4th DCA 1983) rev'd in part, aff'd in part, 457 So.2d 1385 (Fla. 1984) (If the State concedes that appellant's factual statement is correct, then this court will not make an independent inspection of the transcript to determine whether the State was remiss in accepting the opposing factual statement.)

758-59, 763]. Thus, the cross-petitioner again made a substantial preliminary showing that the affiant made a statement regarding a material fact without having any apparent basis for that statement. The cross-petitioner was entitled to inquire in the evidentiary hearing whether Detective Harris had any basis for that statement or any of his other multiple unsupported statements.

Contrary to the State's assertion, Miguel Vargas did make a substantial preliminary showing that Detective Harris misrepresented facts regarding a small jewelry box which he alleged Ms. [redacted] assailant took in his warrant affidavit. The cross-petitioner presented Detective Harris' deposition testimony to the trial court which demonstrates that Detective Harris at best waffled on the question of whether Ms. [redacted] ever stated that her assailant took the small jewelry box. Detective Harris was asked, "Did she attribute it as to -- did she say, I believe my assailant took it?" Detective Harris replied, "She believes it was possible." [Vol. VI, R. 769]. Additionally, the cross-petitioner presented the deposition testimony of [redacted] to the trial court which demonstrates that Ms. [redacted] never stated that her assailant took the missing jewelry box. Notably, Detective Harris discussed with Ms. [redacted] whether she was missing any property after she had moved and over four months after her assault. [Vol. VI, R. 769-770]. Cross-petitioner further presented the testimony of [redacted] in which she replied when asked whether she attributed the missing item to her assailant, "No. I just reported that that is something that I have not been able -- it's missing." [Vol. V,

R. 621]. [redacted] further clarified that she made her report after she moved and that she reported, "that was the only thing that I could find that was missing from all my stuff, and I couldn't explain why it was missing, and I just said, well, you know, this is missing." Id. Thus, the cross-petitioner once again demonstrated that the affiant had made a material misrepresentation in his search warrant affidavit.

The State contends that Detective Harris was merely negligent in not determining that the police were in possession of a knit tee shirt which he swore had been taken by Ms. [redacted]s assailant. [State's Answer Brief, 60]. The State asserts that Detective Harris interviewed Ms. [redacted] and that she told him she was missing a white sleeveless knit tee shirt. Id. The State has failed to address the point made by the cross-petitioner in his brief on the merits that the only thing that Detective Harris asked her was whether she was "missing" a tee shirt. However, the cross-petitioner demonstrated to the trial court that Detective Harris testified he had reviewed the police reports concerning Ms. [redacted]s assault prior to his seeking a search warrant. Thus, Mr. Vargas made a substantial preliminary showing that Detective Harris had once again either intentionally or recklessly dropped the ball and as a result made a material misrepresentation in his warrant application. Surely, overlooking obvious evidence in one's own hands, especially in light of the cumulative number of bungles, must be classified as recklessness.

CONCLUSION

The grounds set forth in respondent's/cross-petitioner's Brief on the Merits dictate that this Court affirm the First District's finding that the novel scientific evidence at issue was not generally accepted for use at trial. The respondent/cross-petitioner has further established in his Brief on the Merits and in this Reply Brief that controlling law compels that under the facts of this case that this Court find the First District erred in affirming the denial of each of Miguel Vargas's motions to suppress. Accordingly, this Court should vacate the respondent's/cross-petitioner's convictions.

Respectfully submitted,

Wm. J. Sheppard, Esquire
Fla. Bar No. 109154
SHEPPARD AND WHITE, P.A.
215 Washington Street
Jacksonville, FL 32202
Phone: (904) 356-9661
Facsimile: (904) 356-9667

Michael R. Yokan, Esquire
Fla. Bar No. 852856
500 North Ocean Street
Jacksonville, FL 32202
Phone: (904) 353-8295
Facsimile: (904) 353-1341

COUNSEL FOR RESPONDENT/
CROSS-PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to **James W. Rogers, Esquire**, Bureau Chief, Office of the Attorney General; and to **Giselle Lylen Rivera, Esquire**, Assistant Attorney General, Office of the Attorney General, The Capitol, Tallahassee, Florida 32399-1050, by U.S. Mail, this 27th day of March, 1995.

ATTORNEY

/rw.34