IN THE SUPREME COURT OF FLORIDA

**THE STATE OF FLORIDA,**

Petitioner/Cross-Respondent,

v. CASE NO. 83,935

**MIGUEL ANGEL VARGAS,**

Respondent/Cross-Petitioner.
_____/

PETITIONER'S REPLY/CROSS-ANSWER BRIEF ON THE MERITS

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## PRELIMINARY STATEMENT

The Petitioner/Cross-Respondent, **THE STATE OF FLORIDA,** readopts the designations utilized in its initial brief. References to the Respondent's Answer Brief will be by the letters "AB" followed by the appropriate page number(s).

## STATEMENT OF THE CASE AND FACTS

The State readopts the Statement of the Case and Facts as set forth in its initial brief as to the issue it has raised in this appeal.

As to the remaining question certified by the district court and other matters raised by Vargas in his answer brief, the State asserts the following matters:

At the hearing on the third motion to suppress on September 19, 1991, Detective Lee Harris of the Clay County Sheriff's Department testified that he was the affiant for a search warrant issued in Duval County for blood and saliva samples from Vargas. (R 1590). Harris was present when the warrant, which directed Duval County Officers to serve it, was executed. (R 1590-91). Harris enlisted the assistance of Detective Baer, an Officer with the Duval County sexual crimes unit, to serve the warrant. (R 1591).

Initially, Harris went to Cecil Field with Detective Jarosz where they met with NIS agent Tim Karuth; no Duval Officers were present. (R 1591-2). Karuth arranged for Harris to have access to the base where Vargas was employed in a civilian capacity. (R 1593-4). Harris met with Vargas at his place of employment and informed Vargas that he had a search warrant for Vargas' house and person. (R 1594-5). Harris gave Vargas the option of going with either him and Detective Jarosz, or calling a Duval County Officer to transport Vargas to the house. (R 1594-5). Had Vargas stated that he wished to wait for a Duval County Officer to accompany him, Detective Harris would have permitted Vargas to do so. (R 1596, 1619). Detective Harris had previously spoken with Sergeant Nail

of the Duval County Sheriff's Department who had requested that Harris advised him when Harris and Vargas were enroute so that Nail could have a Duval County detective meet them at Vargas' home. (R 1595).

Vargas voluntarily agreed to accompany Harris without reservation. (R 1596-97, 1619). The search warrant had not yet been executed. (R 1597). Both of the search warrants were executed at Vargas' home by Detective Baer; Harris read the warrants to Vargas with Baer's authorization. (R 1597, 1600, 1619). Harris did not read the warrant to Vargas at Cecil Field. (R 1602, 1605). Baer executed the warrant with Harris' and Jarosz's assistance. (R 1599).

From Vargas' home, they went to the hospital; Baer met them there because Baer was in a separate vehicle. (R 1598). Baer was not in the examination room where the samples were taken, but was at the Sexual Assault Treatment Center. (R 1598). The nurse took the samples in Harris' presence, marked them, and then gave the samples to Harris. (R 1615-17). The warrant was for blood and saliva samples; Vargas voluntarily gave hair samples. (R 1620).

The trial court, after considering the evidence and argument of counsel, denied the motion to suppress. (R 990). Vargas, on direct appeal to the First District Court of Appeal, challenged the warrant on the grounds that the warrant directed Duval County officers to serve it and a Clay County Officer executed the warrant. The district court found:

> Appellant contends the cases discussed above,[1] particularly Morris, require a determination that the search warrant in the instant case was invalidly executed in that, although an authorized officer, Officer Baer, was present when Officer Harris read the warrant to appellant, officer Harris drove him to the hospital where the blood was to be drawn, took custody of the blood sample, and signed the inventory. Officer Baer was also present at the hospital, although he was not present in the room when the blood was drawn. In this case, however, neither Harris nor Baer conducted the search at issue in the traditional sense; they both accompanied appellant to the hospital and were present while medical personnel collected the blood sample. On this record, we are not willing to say Officer Baer was simply "out and about the scene" as the Manatee County officers apparently were in Hesselrode, or that he did not in any way act in execution of the search warrant. Recognizing that the warrant named only Duval County officers, Officer Harris had made specific arrangements for Officer Baer to be present both at appellant's home where the search warrant was read and at the Sexual Assault Treatment Center where the blood was to be drawn. Finally, unlike the situation in Morris, where the actual search was conducted by Auditor General employees, only law enforcement officers were involved in the execution of the search warrant here, and unlike the situation in Griffis, an officer named in the search warrant was present. Therefore, we affirm the trial court's ruling on this motion to suppress. However, we certify 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?

640 So. 2d at 1141-1142.

The State disagrees with Vargas' statement: "During that search and seizure, Detective Baer a Jacksonville Sheriff's Office officer was somewhere about the grounds of the hospital but was not

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[1] These cases included Morris v. State, 622 So. 2d 67 (Fla. 4th DCA 1993); State v. Griffis, 502 So. 2d 1356 (Fla. 5th DCA), rev. denied, 513 So. 2d 1063 (Fla. 1987); Hesselrode v. State, 369 So. 2d 348 (Fla. 2d DCA 1979), cert. denied, 381 So. 2d 766 (Fla. 1980).

present in the room where Mr. Vargas' blood was withdrawn." (AB p. 5). The record clearly shows that Harris testified that he and Vargas left the house, and went to the Sexual Assault Treatment Center at University Hospital in order to take Vargas' blood and saliva samples. (R 1597-98). Harris further testified that although Baer drove in a separate vehicle, Baer met Harris and Vargas at the Sexual Assault Treatment Center. (R 1598). Harris further testified that although Baer was not in the room when the nurse took Vargas' blood sample, Baer was at the Sexual Assault Treatment Center. (R 1598). Harris then described the Sexual Assault Treatment Center as an annex of University Hospital located in a small three-story building. (R 1615). Further, Harris testified that the Sexual Assault Treatment Center "itself is a two -- a one-room examination building." (R 1615).

The State also offers the additional facts:

1. The State's memorandum of law concerning Vargas' motions to suppress is found at R 732-42.

2. The trial court in denying Vargas' first motion to suppress and his motion to conduct an evidentiary hearing on the veracity of the affidavit found the following:

> 1. The Affidavit of Detective Lee Harris, submitted in order to obtain a Search Warrant, contained sufficient probable cause for the issuance of the Search Warrant by Judge Charles O. Mitchell, Jr. on February 23, 1990, compelling the production of the Defendant's blood.
>
> 2. Although the Affidavit in Support of the Search Warrant compelling the Defendant's blood contained some factual inaccuracies, none of these inaccuracies were made intentionally or with reckless disregard for the truth. Likewise, none of the omissions from the Affidavit were made in bad faith. Therefore, the defendant is not entitled to an Evidentiary Hearing on the issue of the inaccuracies.
>
> (R 993).

## SUMMARY OF ARGUMENT

ISSUE I: The First District Court of Appeal erred in finding that the trial court improperly admitted DNA evidence on the grounds that the State had allegedly failed to establish the FDLE method of statistical analysis was generally accepted by the relevant scientific community. The district court failed to apprehend the concept of general acceptance within the relevant scientific community and incorrectly reevaluated the views of the scientific community based on a minority challenge, which has since been utterly rejected by the scientific community.

ISSUE II: The district court was not precluded from remanding the matter to the trial court for further evidentiary proceedings. The district court's ruling as to dispositiveness conflicts with this Court's decision in Brown v. State, 376 So. 2d 382 (Fla. 1979), and must be disregarded.

ISSUE III: The record shows by competent and substantial evidence that Detective Baer, a Duval County officer, executed the search warrant inside his territorial jurisdiction. In addition, the record shows by competent and substantial evidence that Det. Baer was active in the warrant's execution and that he was present at the Sexual Assault Treatment Center when the nurse took Vargas' blood and saliva samples. Finally, even if this Court determines that the officers violated the state statutes in executing the search warrant, this Court should decline to apply the exclusionary rule to suppress the evidence in the absence of a Fourth Amendment violation.

**ISSUE IV:** The record shows that the affidavit in the instant case alleges a substantial basis for finding that probable cause existed to issue a search warrant. Moreover, the facts in the instant case show that the police conducted a reasonable search in seizing Vargas' blood and saliva samples because the State's interests in determining Vargas' guilt or innocence of the sexual batteries outweighs his minimal privacy interests.

**ISSUE V:** The record shows that Vargas failed to make a substantial and preliminary showing that Detective Harris knowingly and intentionally, or with a reckless disregard for the truth, included false statements in the affidavit. Thus, the trial court did not abuse its discretion in denying Vargas' motion to conduct an evidentiary hearing on the affidavit's veracity.

## ARGUMENT

### ISSUE I

WHETHER THE FIRST DISTRICT COURT ERRED IN FINDING THAT THE STATISTICAL ANALYSIS UTILIZED BY FDLE IN THIS CASE IS NOT GENERALLY ACCEPTED WITHIN THE RELEVANT SCIENTIFIC COMMUNITY.

Vargas, in his answer brief on the merits, contends that the First District Court of Appeal correctly found that the statistical analysis utilized in this case was not generally accepted by the relevant scientific community and properly reversed the trial court's ruling.

Vargas initially claims that the trial court erred in finding that DNA profiling was not novel scientific evidence. While challenging this finding, Vargas fails to set forth the basis for the ruling. The trial court's order states:

> [f]rom the testimony that was introduced at the hearing, it was determined that as of January 1, 1990, DNA evidence had been admitted in 185 criminal cases in 38 States. Of those cases, 25 were in Florida. Since January 1, 1990 DNA evidence has been admitted in several more criminal cases including several in the Fourth Judicial Circuit of Florida. One can hardly say that DNA evidence is novel at this point in American Jurisprudence.

(R 1126).

The trial court went on to find that "[a]ll of the expert witnesses who testified were in agreement that the DNA testing procedures and the application of population genetics to the test result are generally accepted by the scientific community as reliable." (R 1127). The trial court identified the only point of dispute as being the sufficiency of the databases used to calculate

the probability of someone else in the population having the same DNA profile as Vargas. The trial court deemed that this debate should not result in exclusion of the evidence. (R 1127).

Expert testimony adduced at trial clearly supported the trial court's finding. As noted by defendant's own expert, Dr. Wakeland, DNA analysis was widely used in both criminal forensic and noncriminal forensic areas. (R 1958). Similarly, he conceded that the FBI RFLP method was also widely accepted as a reliable method of conducting DNA analysis. (R 1958). The concept of DNA analysis itself and the application of population genetics to DNA profiles was not novel and was widely accepted in the scientific community. (R 1960). Dr. Wakeland was aware that a large number of crime laboratories in the United States and around the world used FBI databases in applying population genetics to DNA profiles. (R 1960). The sole area of dispute identified by him dealt only with the calculation of probability of a match. (R 1928). Dr. Wakeland agreed the method utilized in this case favored Vargas, since to apply the type of substructure data he promoted would render it more likely that Vargas was the guilty party. (R 1967-68). Dr. Wakeland did not dispute that Vargas' sample matched the forensic samples taken from the victims. (R 1964).

Dr. Lieberman, another defense expert, also admitted that the FBI databases were the ones most widely used in the criminal forensic application of DNA evidence. (R 1878). She, like Dr. Wakeland, indicated that the area of dispute lay within the calculation of probability of a match. Her opinion was based upon the Lewontin-Hartl article, which she conceded did not rebut the

fact that the DNA fingerprinting method utilized had credibility. (R 1886). Their objections related to difficulties with the database, but they acknowledged that alternatives to correct for this alleged problem could be used. (R 1887).

Thus, contrary to Vargas' argument, his own experts testified that the use of DNA evidence was generally accepted. The only area of debate mentioned related to the method by which probability calculations were computed, specifically relating to the databases utilized. Thus, the opinions of Vargas' own experts are clearly in line with the trial court's findings of fact. Vargas again tries to assert that the existence of a controversy, in and of itself, means that the general acceptance standard cannot be met. The argument set forth in the State's initial brief on the merits, however, establishes the falsity of his assertion on that point.

Vargas attacks the expertise and credibility of the State's witnesses, while asserting his own were eminently qualified. He does not address the fact that even the trial court recognized that the forensic application of DNA analysis involved situations and problems which did not exist in clinical study or laboratory conditions. (R 1955). Even Dr. Wakeland, Vargas' own expert witness, admitted that the type of analysis that he recommended could not correct for problems occurring in DNA forensic situations. (R 1956). Vargas, in essence, wants to totally limit the use of experts to population geneticists. While the State does not dispute that this is a relevant field in the analysis of DNA, it is not the only relevant field given the admitted inability of population geneticists to address problems which are inherent in the application of this science to forensic fields.

Vargas criticizes the State's expert, Dr. Pollock, for having only done a limited number of DNA analyses at the time he testified in this case. However, it is undisputed that Dr. Pollock conducted the analysis utilizing a method which Vargas' experts testified was generally accepted. While the record supports the State's contentions that Dr. Pollock was qualified to serve as an expert in this case, it also establishes that neither of Vargas' experts had a similar level of expertise. Dr. Wakeland, for example, had testified in only four cases including Vargas'; in all of those cases, Wakeland had testified as a paid defense expert. (R 1959-1960). His familiarity with the databases used in this case was limited since he conceded that he had not reviewed all of the information pertinent to this case. (R 1961). Dr. Lieberman's expertise was even more questionable than that of Dr. Wakeland. She had never before been qualified as an expert witness in any case. (R 1851). She too was being paid, an undetermined fee, for her services. (R 1877). Although Vargas asserts that the State may not challenge the credentials of his witnesses at this time, he is incorrect. The trial court, in its role as finder of fact, was in the position of determining the credibility of witnesses and the weight to be given their testimony in determining whether DNA evidence was admissible. Without a doubt, the above mentioned factors, in addition to those set forth in the State's initial brief, were before the trial court for its consideration in ruling upon Vargas' motion in limine. Based upon these matters, the trial

court could clearly have found that the State met its burden of proof in establishing that the DNA evidence was admissible.[2]

Vargas contends that the district court correctly found that the trial court had improperly found that the DNA evidence was admissible under the relevancy standard relied upon in Andrews v. State, 533 So. 2d 841 (Fla. 5th DCA 1988). What neither Vargas nor the district court recognize is that the trial court specifically found that even if it were to apply the more rigid analysis required under the Frye standard, it would still find the evidence admissible. (R 1127). Thus, the trial court found that regardless of whether the relevancy or the Frye tests were applied, the evidence was admissible. Furthermore, this Court's decision in Flanagan v. State, 625 So. 2d 827 (Fla. 1993), which was promulgated to end confusion regarding the appropriate standard for the admission of novel scientific evidence, was not available to the trial court at the time of the evidentiary hearing in this case.

Curiously enough, Vargas rejects the State's claim that at the time of the hearing, the trial court did not abuse its discretion in admitting the evidence and instead asserts that the district court could properly conduct a de novo review of the trial court's ruling and consider evidence not before the trial court. In making this assertion, Vargas contends that the State may not present

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[2] While Vargas submitted a memorandum of law in support of his position at the trial court level, the twenty-eight volume collection of notebooks he refers to in his brief are not properly before this Court. These items were never admitted into evidence at the hearing, but were merely marked as exhibits for identification, given the trial court's ruling which sustained the State's objection to their admission. (R 1919).

evidence which was not presented to the district court. Vargas simply may not have it both ways. If it was correct for the district court to review matters which were not before the trial court, this Court clearly may do the same. More importantly, Vargas purposely misses the point of the authorities relied upon in the State's initial brief. The authorities relied upon clearly illustrate that the trend in the scientific community which found DNA evidence and probability calculations generally accepted at the time of the hearing, was only temporarily and unsuccessfully challenged following issuance of the NRC report. The theories underlying that report have been refuted and the statistical methods used are once again recognized as generally accepted by the scientific community.

While Vargas challenges the statement that the NRC report was based upon the Lewontin-Hartl article, it is readily apparent to even the most casual observer, that the report adopted wholesale the principles enunciated in the article, without regard to the composition of the committee membership. The principles set forth in the NRC report and the Lewontin-Hartl article were also adopted by Vargas' experts at trial. (R 1886-7, 1933-34). In support of his contention that the FDLE method was not generally accepted, Dr. Wakeland, for example, testified that Dr. Eric Lander, one of the world's preeminent population geneticists had been critical of the databases used to calculate probabilities and had frequently made the same criticisms of it voiced by Lewontin and Hartl. (R 1940). However, as evidenced by Dr. Lander's recent article "DNA Fingerprinting Dispute Laid to Rest," 371 Nature 735 (October 27,

1994), which was filed as supplementary authority, even Dr. Lander has found that the dispute is over and should not be used as a means of excluding DNA evidence in the courtroom. As noted by Dr. Lander and his coauthor, Dr. Budowle,

> [t]he NRC report, to be sure, has important flaws. The ceiling principle was not elegant solution, but simply a practical way to sidestep a contentious and unproductive debate. The report had more than its share of miswordings, ambiguities and errors, many of which have been corrected by a vigilant commentator. A few poorly worded sentences have been seized upon by lawyers trying to undermine the straightforward calculation of ceiling frequencies (although such arguments have not succeeded). Most important, the report failed to state clearly enough that the ceiling principle was intended as an ultraconservative calculation, which did not bar experts from providing their own 'best estimates' based on the product rule.

Id. at 737.

Drs. Lander and Budowle went on to note that "forensic DNA typing has become a mature field and requires a more systematic approach." Id. at 738. They conclude that:

> [m]ost of all, the public needs to understand that the DNA fingerprinting controversy has been resolved. There is no scientific reason to doubt the accuracy of forensic DNA typing results, provided that the testing laboratory and the specific tests are on a par with currently practiced standards in the field. The scientific debates served a salutary purpose: standards were professionalized and research stimulated. But now it is time to move on.

Id.

Although this article was provided to Vargas immediately upon its publication after the State's initial brief was filed in this Court, Vargas has studiously avoided any mention of the fact that an expert whose opinions he espoused at trial, now claims that the DNA "wars" are over and Vargas lost. Nor does he dispute the fact that the experts have corrected the misapprehension that the

ceiling principle is the sole method by which probability calculations may be made.

The Nature article makes clear the fact that the ceiling principle was adopted by the NRC not because it was the only method which could be used to correct for **potential** substructuring of populations, but rather because it was an ultra conservative method which inhered to the benefit of the accused. Neither Vargas nor the district court in this case acknowledged or even addressed the fact that the FDLE method of calculations was also ultra-conservative both with regard to the binning method used and the fact that Dr. Pollock testified that the probability calculation he used was based upon a conservative analysis. Furthermore, as pointed out in the State's initial brief, the NRC Report urged additional research and study of subgroups to determine if variations did in fact exist. Numerous studies, including the FBI study, have established that the evidence shows that subpopulations do not affect forensic estimates for probability calculations. "A Reassessment of Frequency Estimates of Pvll-generated VNTR Profiles in a Finnish, An Italian, and a General U.S. Caucasian Database: No evidence for Ethnic Subgroups Affecting Forensic Estimates," Budowle, B., Monson, K. L., and Giusti, A. M., 55 Am. J. Hum. Genet. 533-539, (June 1994).

Recent court opinions have also apparently rejected Vargas' point of view. In People v. Soto, 35 Cal. Rptr. 2d 846 (Cal. App. 4 Dist. 1994), Soto appealed his conviction for the attempted rape of an elderly woman who suffered a severe and debilitating stroke following the attack. The sole evidence of the crime consisted of

the DNA evidence and statements made by the victim to third parties after the attack. The victim was, however, unable to testify at trial as a result of the attack.

Soto challenged the admissibility of the DNA evidence contending that the product rule had not been sufficiently accepted within the relevant scientific community because it did not account for possible substructuring within the population as reasoned by Drs. Lewontin and Hartl. Following a full Kelly/Frye hearing, at which both sides presented evidence, the trial court rejected Soto's contentions, noting that while there was disagreement within the relevant scientific community, there had always been disagreement. The appellate court recognized that:

> [i]n short, the trial court noted the very nature of science encompasses constant and continuous refinement, improvement and clarification because "no scientific theory, regardless of how well it has been tested, can be considered infallible . . ." (Academic American Encyclopedia (1993) Modern Views of Science, p. 1). However, based on all the evidence presented in this case, the trial court was satisfied the scientific community's general opinion supported the approach and methodology expressed and followed by the prosecution experts.
>
> 1994 WL 657871, at 4.

The Soto court acknowledged that following entry of the judgment in the trial court, the NRC report was issued proposing the use of the ceiling principle and People v. Barney, 8 Cal. App. 4th 798 (1992), was published which recognized a "raging debate" within the scientific community with regard to application of the product rule. The court placed great emphasis on the FBI five-volume study of worldwide VNTR data which rebuts the Lewontin-Hartl presumption that population subgroups affect DNA probability

estimates to a defendant's disadvantage. That study concluded, based upon empirical evidence, that: 1) there is sufficient population data available to determine whether or not forensically significant differences might occur when using different population data bases, 2) that subdivision, either by ethnic group or by U.S. geographic region, within a major population group does not substantially affect forensic estimates of the likelihood of occurrence of a DNA profile, 3) that estimates of the likelihood of occurrence using major population group databases (e.g., Caucasian, Black, Hispanic) provide a greater range of frequencies that would estimate for subgroups of a major population category; therefore, the estimate of the likelihood of occurrence of a DNA profile derived by the current practice of employing the multiplication rule and using general population databases for allele frequencies is reliable, valid, and meaningful, without forensically significant consequences, and 4) that the data does not support the need for alternative procedures such as the ceiling principle approach for deriving statistical estimates of DNA profile frequencies. VNTR Population Data: A Worldwide Study, Budowle, et al., U.S. Dept. Justice, FBI Rep. (1993).

As the Soto court found, the evidentiary foundation of Soto's concerns relating to the multiplication rule have been empirically refuted since publication of the Lewontin-Hartl article and "that refutation has only been bolstered with time." 1994 WL 657871 at 7. As the Court stated "[m]ost importantly, the scientists themselves now proclaim, 'the DNA fingerprinting wars are over.'" [3]

[3] Lander and Budowle, DNA Fingerprinting Dispute Laid to Rest, 371 Nature 736 (October 27, 1994).

Significantly two of the experts relied upon by Vargas in this case, Drs. Lander and Hartl have shifted their position on the issue accepting both the frequency calculations based upon the ceiling principle and the product rule type formulation utilized by Dr. Pollock herein. Id.; see also, Minnesota v. Bloom, 516 N. W. 2d 159 (1994). The Court concluded that:

> RFLP is undisputedly more precise than blood typing. "The technology itself represents, perhaps the greatest advance in forensic science since the development of ordinary fingerprints in 1892, and is soundly rooted in molecular biology." Blood typing evidence can, by statute, be conclusive on the issue of paternity in criminal cases and it likewise requires probability calculations in describing the significance of its findings. It is less precise and yet the courts and Legislature now accept it without hesitation. Because DNA RFLP is so highly reliable and relevant, to "allow a minor academic debate [over what factor is to be used in a calculation re DNA] to snowball to the point that it threatens to undermine the use of it] in court" is throwing the baby out with the bath water.

Id. at 8; see also, People v. Wild, ___ Cal. Rptr. 2d ___ (WL 12504 January 12, 1995). The State asserts that this Court should reverse the district court on this issue.

## ISSUE II

WHETHER THE DISTRICT COURT IS PRECLUDED FROM REMANDING AN ISSUE RELATING TO A PLEA OF NOLO CONTENDERE FOR FURTHER EVIDENTIARY HEARING IN THE TRIAL COURT.

Vargas contends that the district court was without authority to remand the cause back to the trial court for further evidentiary hearings following entry of its order vacating the trial court's order on his motion in limine on the grounds that the parties had entered into a stipulation that the issue was dispositive.

Although the record reflects that the parties entered into a stipulation to the effect that the issues raised in Vargas' motion in limine regarding DNA evidence and motions to suppress were dispositive, the plea agreement in this case is in violation of the principles enunciated in Brown v. State, 376 So. 2d 382 (Fla. 1979), since the issues are not legally dispositive as a matter of law. In Brown, this Court held that "an Ashby nolo plea is permissible only when the legal issue to be determined on appeal is dispositive of the case." Id. at 384. Thereafter, the First District Court of Appeal, in Morgan v. State, 486 So. 2d 1356 (Fla. 1st DCA 1986), discussed the Brown decision construing what constituted a dispositive question. The district court in Morgan found that:

> [a]ppellate review pursuant to an Ashby nolo plea is grounded upon the basic assumption that the issue decided will be dispositive of the case even if the trial court's rulings are reversed on appeal. Brown v. State, 376 So. 2d 382 (Fla. 1979). 'Because of the nondispositive nature of the appeal, the defendant faces the prospect of a trial even if he prevails on appeal.' Id. at 384. An issue is dispositive only if, regardless of whether the appellate court affirms or

> reverses the lower court's decision, there will be no trial of the case.
>
> A typical example of dispositiveness is where the trial court has entered a pretrial order denying [sic] a motion to suppress drugs in a drug case. Such a ruling is dispositive if the state has no other evidence with which it can proceed to trial against the defendant. Tiller v. State, 330 So. 2d 792 (Fla. 1st DCA 1976).

The Brown Court based its decision on the fact that:

> [t]he practice of allowing an appeal after a plea of nolo contendere is grounded upon the belief that "it expedites resolution of the controversy and narrows the issues to be resolved." These purposes are poorly served and, indeed, thwarted when a defendant is permitted to appeal nondispositive pretrial rulings. Instead of expediting resolution of the controversy, the procedure prolongs litigation by sanctioning, in effect, an interlocutory appeal. The inevitable is not avoided but merely postponed, thus further taxing resources of our courts.

Brown, at 384 (quoting State v. Ashby, 245 So. 2d 225, 228 (Fla. 1971)).

In the trial court, Vargas filed one motion in limine and three motions to suppress. The motion in limine sought the exclusion of DNA profiling evidence contending that it was not generally accepted in the scientific community and that its probative value was outweighed by prejudice. (R. 995-6). In the three motions to suppress, Vargas sought to exclude: blood and saliva samples taken from him pursuant to search warrant contending that the affidavit for the warrant failed to establish the existence of probable cause (R. 411-12, 960-61); all evidence seized as the result of execution of a search warrant contending that the affidavit for the warrant contained both intentionally false factual allegations and omitted material factual matters (R. 600-1); and, all evidence seized pursuant to the blood and saliva

search warrant contending that since the warrant directed the sheriff of Duval County to execute it, Deputy Harris of the Clay County Sheriff's Office was without authority to execute the warrant. (R. 895-96).

Although the State, on direct appeal, challenged the appropriateness of the appellate court's consideration of the issues due to their nondispositive nature, the district court rejected the assertion by a terse reference to a prior decision of the court, Zeigler v. State, 471 So. 2d 172 (Fla. 1st DCA), rev. denied, 479 So. 2d 118 (Fla. 1985), which held that parties who voluntarily entered into stipulations relating to the dispositiveness of an issue for purposes of entering a nolo plea were bound thereby. However, this finding by the district court is in direct conflict with this Court's decision in Brown which disallows entry of stipulations and pleas where the issue presented is not dispositive. It also conflicts with the district court's decision in Morgan, which noted that this Court had never embraced, or for that matter discussed, the concept that such a stipulation would be binding upon appellate courts. In fact, the Morgan Court opined that in view of this Court's past "rather conservative path," parties' stipulation on the issue of dispositiveness "might not, in all circumstances, be held binding upon the appellate court." Morgan v. State, 486 So. 2d at 1358 n. 2.

The view expressed in Morgan, is also in keeping with this Court's holdings that "[a]n issue is preserved for appeal on a nolo plea only if it is dispositive of the case." State v. Carr, 438 So. 2d 826 (Fla. 1983)(emphasis added). The dispositiveness of the

issue is the matter which invokes appellate jurisdiction. Here, the State may try Vargas regardless of the admissibility of the DNA evidence.

Vargas, in raising this issue at this point, is seeking to go outside of the questions certified by the district court. While the State acknowledges that this Court, in considering matters presented by certified questions, is entitled to view the entire record, it would nonetheless encourage the Court to limit its review to the issues presented to it by the district court. This is appropriate in view of the fact that while Vargas sought rehearing of matters set forth in the district court's opinion following issuance, he did not complain that the court could not properly remand the matter to the trial court for further proceedings. Thus, the district court was never faced with a challenge to its jurisdictional ability to remand the matter to the trial court for further proceedings. Clearly, the district court should be permitted to address the issue. Additionally, at trial, Vargas did not challenge the evidence presented which established that the method used to determine the probabilities of a match were conservative and favorable to him, nor did he challenge the assertion that an alternative method was available and could be presented to the court for its consideration of both sets of figures. This Court has historically declined to go outside a certified question on which it has based its acceptance of jurisdiction when a defendant presents additional issues. Goodwin v. State, 634 So. 2d 157 (Fla. 1994); Jeffries v. State, 610 So. 2d 440 (Fla. 1992); Wright v. State, 596 So. 2d 456 (Fla. 1992).

It is also undisputed that appellate courts have returned matters to the trial court despite the existence of a stipulation such as the one in this case, where additional evidence was required for a complete determination of the issues presented. For example, in Gomez v. State, 613 So. 2d 119 (Fla. 2d DCA 1993), the defendant entered into a nolo plea conditioned upon the denial of his motion to suppress. The district court in Gomez remanded the matter back to the trial court because of the need to make further factual findings. Thus, the district court's acted properly in remanding the matter in the instant case.

## ISSUE III

WHETHER THE TRIAL COURT PROPERLY DENIED VARGAS' THIRD MOTION TO SUPPRESS?

Vargas argues that the trial court erred in denying his third motion to suppress the blood, saliva, and hair samples based on two grounds: 1) Detective Harris, a Clay County officer, unlawfully executed the search warrant outside his territorial jurisdiction, thus violating section 933.07, Florida Statutes (1989); and 2) Detective Harris unlawfully executed the search warrant because the warrant did not authorize him to collect the samples, thus violating section 933.08, Florida Statutes (1989).

Vargas' argument is without merit because the record shows that: 1) Detective Baer, a Duval County officer, executed the search warrant inside his territorial jurisdiction, thus complying with section 933.07; and 2) Detective Baer was present at the Sexual Assault Treatment Center when the nurse withdrew Vargas' blood sample and when Detective Harris took custody of Vargas' blood, saliva, and hair samples, thus complying with section 933.08. Finally, even if this Court determines that the officers violated either section 933.07 or section 933.08 in executing the search warrant, this Court should decline to apply the exclusionary rule to suppress the evidence in the absence of a Fourth Amendment violation. Thus, the record clearly supports the trial court's ruling denying Vargas' motion to suppress.

Before addressing the merits of Vargas' argument, it is appropriate to set out the proper burden of proof and standard of appellate review in examining a trial court's ruling on a motion

to suppress. First, a trial court's ruling on a motion to suppress is clothed with a presumption of correctness. Johnson v. State, 608 So. 2d 4, 9 (Fla. 1992), cert. denied, ___ U.S. ___, 113 S. Ct. 2366, 124 L. Ed. 2d 273 (1993)(citing Owen v. State, 560 So. 2d 207 (Fla.), cert. denied, 498 U.S. 855, 111 S. Ct. 152, 112 L. Ed. 2d 118 (1990)). Second, an appellate court must interpret the evidence, reasonable inferences, and deductions in a manner most favorable to sustaining the trial court's ruling. Johnson, 608 So. 2d at 9. Furthermore, an appellate court should defer to the fact-finding authority of the trial court and not substitute its judgment for that of the trial court. Gilbert v. State, 629 So. 2d 957, 958-59 (Fla. 3d DCA 1993); see also Wasko v. State, 505 So. 2d 1314, 1316 (Fla. 1987). The appellate court's review of a trial court's factual findings is limited to determining whether competent and substantial evidence supports the trial court's ruling. Tibbs v. State, 397 So. 2d 1120, 1123 (Fla. 1981), aff'd, 457 U.S. 31, 102 S. Ct. 2211, 72 L. Ed. 2d 652 (1982). Finally, because a motion to suppress involves a mixed question of law and facts, there are two appropriate standards of review. United States v. Harris, 928 F.2d 1113, 1115-16 (11th Cir. 1991). First, the standard of review for the trial court's factual findings is whether competent and substantial evidence supports the trial court's finding. Tibbs, 397 So. 2d at 1123. Second, the standard of review for the trial court's application of the law to those facts is de novo. Harris, 928 F.2d at 1116 (11th Cir. 1991).

**A. The record shows that Detective Baer, a Duval County law enforcement officer, lawfully executed the search warrant in compliance with section 933.07.**

Vargas' argument that Detective Harris illegally executed the search warrant outside his territorial jurisdiction assumes that the detective executed the search warrant at Cecil Field, Vargas' place of employment. (AB p. 52). However, viewing the evidence in the light most favorable to sustaining the trial court's ruling, the record shows that Detective Baer, not Harris, properly executed the search warrant within his territorial jurisdiction.

Section 933.07 sets out the procedure to be followed in issuing a search warrant, and states in pertinent part the judge shall issue the search warrant "to any sheriff and his deputies, or any police officer or other person authorized by law to execute process . . . ." Courts interpreting this provision have held that the search warrant must be executed by an officer within his or her territorial jurisdiction. See State v. Gonzalez, 447 So. 2d 1015, 1017 (Fla. 3d DCA 1984)(upholding trial court's order suppressing evidence seized by officers acting outside the officers' jurisdiction); see also, State v. Hills, 428 So. 2d 715 (Fla. 4th DCA 1983)(holding search warrant validly executed by municipal police officers, who executed the warrant outside their municipality, because the State Attorney's office authorized officers to execute search warrants pursuant to sections 27.251 and 27.255, Florida Statutes (1981)).

In State v. Griffis, 502 So. 2d 1356 (Fla. 5th DCA), rev. denied, 513 So. 2d 1063 (Fla. 1987), the Fifth District Court of Appeal addressed whether a search warrant was improperly served by

a municipal police officer acting outside the officer's territorial jurisdiction. Griffis, 502 So. 2d at 1357. In Griffis, a Titusville municipal police officer applied for a search warrant to search a defendant's residence in Cocoa, Florida. Id. The judge issued the search warrant and directed the Brevard County Sheriff or his deputies and all Titusville police officers to search the defendant's residence. Id. A Titusville municipal police officer accompanied by a Cocoa municipal police officer executed the search warrant. Id. The trial court found the search warrant invalid because the officers did not properly serve the warrant, and thus the trial court suppressed the evidence. Id.

On appeal, the district court in Griffis recognized that "section 933.07 authorizes a judge to issue a search warrant to 'any police officer.'" Griffis, 502 So. 2d at 1357. However, the district court also noted that with limited exceptions "a municipal police officer has no power to act as a police officer outside the territorial limits of [the officer's] municipality." Id. (citations omitted). Consequently, the district court reasoned that the phrase "any police officer" as used in section 933.07 "must be construed to mean any police officer with power to act." Id. at 1358. The district court held that the search in Griffis was invalid because the officer, who was authorized by the warrant, executed the search warrant outside his territorial jurisdiction; therefore, the district court affirmed the trial court's order suppressing the evidence. Id. Accordingly, under section 933.07 and Griffis, the law is that a search warrant must

be executed by an officer acting within his or her territorial jurisdiction.

Turning to the facts in the instant case, the record supports by competent and substantial evidence the trial court's finding that Detective Baer, a Duval County officer, properly executed the search warrant within his territorial jurisdiction. First, the record shows that the search warrant directed Duval County Sheriff's deputies to execute the search. (R 493, 1590-91). Second, the record shows that Detective Baer, a Duval County Sheriff's deputy, executed the warrants at Vargas' house which is located in Duval County. (R 1597, 1599). The finding that Detective Baer executed the warrants is supported by Harris' testimony that Baer executed the warrants at Vargas' house. (R 1597). Moreover, Harris' testimony that he did not execute the search warrants at Cecil Field is supported by his testimony that he informed Vargas that Vargas had an option of either going with him or waiting for a Duval County officer, and that Vargas voluntarily accompanied him to the house. (R 1594-95, 1607, 1619). In addition, the record shows that Vargas voluntarily went with the officers. (R 1596-97). In fact, during the ride to the house, Vargas sat in the police car's front seat without handcuffs. (R 1612-13, 1619). Finally, the record shows that upon arriving at Vargas' house, Detective Baer executed the search warrants, and that Harris read the warrants to Vargas. (R 1597). Harris testified that he had contacted Duval County officers to meet him at Vargas' house because Harris was concerned about complying with the search warrant's terms. (R 1611, 1618-19).

Based on the foregoing facts, there is competent and substantial evidence that Detective Baer executed the search warrants within his territorial jurisdiction.

Vargas' argument that the conflict between Harris' deposition testimony and the detective's motion to suppress testimony supports the conclusion that Harris executed the search warrant at Cecil Field is erroneous. The fact that Harris' deposition testimony conflicted with his motion to suppress testimony created a question of fact for the trial court to resolve. By denying Vargas' third motion to suppress and rejecting Vargas' argument that the warrant was served by an officer outside his territorial jurisdiction, the trial court found that Detective Baer properly executed the search warrant. (R 990). Furthermore, Vargas' argument that the trial court erred in denying his motion to consider Detective Jarosz's deposition testimony that Harris read both search warrants to Vargas at Cecil Field is also without merit. Vargas fails to establish that the trial court abused its discretion in excluding Jarosz's deposition testimony from his third motion to suppress.[4] Because competent and substantial

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[4] The record shows that the State opposed the defense's motion to admit Detective Jarosz's deposition into evidence. (R 963). In support of its position, the State listed the following reasons for denying the defense's motion to introduce Jarosz's deposition into evidence:

1. On September 19, 1991 a hearing was held on the Defendants [sic] Third Motion to Suppress.

2. The defense had adequate notice of the hearing.

3. The defense failed to call Detective Jarosz as a witness at the time, nor did it attempt to introduce his deposition.

evidence supports the trial court's factual finding that Detective Baer executed the search warrant, this Court should not substitute its judgment for that of the trial court. Wasko, 505 So. 2d at 1316; see also Tibbs v. State, 397 So. 2d at 1123.

Finally, Vargas' reliance on Griffis is misplaced because the instant case is factually distinguishable from Griffis. Unlike Griffis, the record in the instant case shows that Detective Baer, an officer designated by the search warrant, executed the search warrant within his territorial jurisdiction. First, the record shows that the search warrant directed Duval County Sheriff's deputies to execute the search. (R 493, 1590). Second, the record shows that Detective Baer is a Duval County sheriff's deputy. (R 1591). Third, the record shows that Detective Baer

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> 4. The defense had the burden of proof in this motion since the search and seizure was presumed reasonable, because it was done pursuant to a search warrant.
>
> 5. Detective Jaroszs' [sic] deposition is not admissible since it is hearsay, and not the type of hearsay that is admissible in this situation.
>
> 6. Even if the Court were to find that Detective Jaroszs' [sic] deposition was acceptable hearsay, the defense nevertheless has failed to properly authenticate the deposition as required by law. No proper foundation was laid by the defense for the introduction of the Deposition.
>
> 7. The time to hear evidence in this case was on September 19, 1991. The mere fact that the defense later realized that it should have done something different does not permit the defense to come back weeks later and attempt to introduce evidence. There needs to be finality to these matters.

(R 963). Based on the foregoing reasons, it is clear that the trial court did not abuse its discretion in determining not to admit Jarosz's deposition into evidence.

executed the search warrant at Vargas' house which is located in Duval County. (R 1597, 1601). Consequently, it is clear that Detective Baer, an officer designated by the search warrant, properly executed the warrant within his territorial jurisdiction. Thus, Griffis is not applicable to the facts in the instant case.

**B. The record shows that Detective Baer was present and actively participated in the warrant's execution for Vargas' blood and saliva samples .**

Vargas' second argument that Detective Harris violated section 933.08 is based on the premise that Detective Baer, a Duval County officer, was not present and active in the search warrant's execution for Vargas' blood and saliva samples. Vargas' second argument is erroneous because viewing the record in the light most favorable to sustaining the trial court's ruling, the evidence shows that Detective Baer was present and active in the search warrant's execution. Therefore, the trial court properly denied Vargas' motion to suppress.

The crux of the second argument is whether Detective Baer was present and acting in the warrant's execution under section 933.08. Section 933.08 states:

> The 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 officer requiring it, said officer being present and acting in its execution.

Two lead cases addressing section 933.08 have held that in order to properly execute a search warrant, the officer authorized in the warrant must be present and actively participate in the search. Hesselrode v. State, 369 So. 2d 348 (Fla. 2d DCA 1979), cert. denied, 381 So. 2d 766 (Fla. 1980), and Morris v. State, 622 So. 2d 67 (Fla. 4th DCA 1993).

In Hesselrode, the Second District Court of Appeal addressed whether municipal police officers improperly executed a search warrant when the warrant only authorized officers from the sheriff's department to execute the search. 369 So. 2d at 349. In Hesselrode, Longboat Key municipal police officers sought and obtained a search warrant. Id. The State Attorney's office drafted the search warrant, and directed the Manatee County Sheriff and/or deputies to execute the search. Id. After receiving the warrant, the Longboat Key municipal police officers executed the search warrant and discovered contraband. Id. at 350. The defendant filed a motion to suppress, and argued that the search warrant was defective because the warrant did not authorize the municipal officers to execute it. Id. The trial court denied that portion of the defendant's motion to suppress. Id. at 349.

On appeal, the district court in Hesselrode recognized that search warrants must strictly conform to the constitutional and statutory provisions authorizing the issuance of the warrant. Id. at 350. The district court found that the record showed that "this investigation was solely the work of the Longboat Key Police Department and only incidentally others." Id. Further, the district court found that "[n]o member of the Manatee Sheriff's Office . . . participated in this investigation, the execution of the warrant or the search of the premises subject to the warrant." Id. In fact, the district court described the Manatee deputies, who were present at the search, as "passive observers." Id.

Thus, the district court held that the trial court erred in denying the defendant's motion to suppress. Id. at 351.

Similar to Hesselrode, the Fourth District Court of Appeal in Morris, addressed "whether an official of a police agency authorized to serve a search warrant must participate in or supervise a search conducted pursuant to the warrant." Morris, 622 So. 2d at 67. In Morris, a judge issued a search warrant directed to several police agencies, including the Fort Lauderdale municipal police, to search a physician's office for evidence of Medicaid fraud. Id. at 67-68. Subsequently, six employees of the Auditor General's Office accompanied a Fort Lauderdale municipal police officer to the physician's office. Id. at 68. The officer provided the physician's receptionist with a copy of the warrant and then waited in the reception area while the Auditor General's employees conducted the search of the physician's office. Id. Further, the district court found that the officer did not take part in the search or take custody of any of the records. Id. In fact, after the search, the officer signed an inventory sheet of the seized items, but did not check its accuracy. Id. The trial court found the search valid and denied the motion to suppress. Id. at 67.

On appeal, the district court in Morris recognized that because of the importance of the citizen's constitutional right to be free from unreasonable searches and seizures, the statutes authorizing searches and seizures should be strictly construed. Id. at 68. Consequently, the district court concluded that a strict construction of section 933.08 required 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." Id. However, the district court also recognized that section 933.08 expressly permitted civilians to assist a law enforcement officer in executing a search warrant "if the law enforcement officers specified in the warrant need aid, provided, 'said officer being present and acting in its [the warrant's] execution.'" Id. at 69 (quoting section 933.08). The district court stated that under section 933.08 an officer "must participate in or supervise the search even where [the officer] requires the assistance of others" in conducting the search. Id. The district court reasoned that the essential purpose of section 933.08 is to "limit the execution of a search warrant to the police officials designated in the warrant." Id. Moreover, because police officers are sworn to uphold the law, section 933.08 protects a citizen's privacy rights by insuring that searches are conducted by individuals "especially charged and trained to see that the search is carried out properly, lawfully, and in accord with the provisions of the warrant." Id. at 69.

Applying the law to the facts in Morris, the district court found that "the authorized police agency did not participate in or supervise the actual search at all." Id. In fact, the district court found that "the Auditor General employees conducted the entire search unsupervised and unobserved by the officer authorized to conduct the search." Id. Thus, the district court held that the search in Morris violated section 933.08, and thus, reversed the trial court's order denying the defendant's motion to

suppress. Id. at 70. Accordingly, under section 933.08 and the decisions in Hesselrode and Morris, the law requires that the officer authorized by the search warrant be present and active in executing the warrant.

Turning to the facts in the instant case, the record shows by competent and substantial evidence that Detective Baer was present and that he actively participated in the execution of the search warrant. First, the record shows that Detective Baer executed the search warrants at Vargas' house. (R 1597). The record next shows that Detectives Baer and Harris acted properly in obtaining the nurse's assistance in order to seize Vargas' blood sample because police officers are not generally trained in medical techniques, such as taking blood samples.[5] Second, the record shows that Detective Baer was present at the Sexual Assault Treatment Center when the nurse took the blood and saliva samples from Vargas. (R 1597-98). Furthermore, the record shows that the Sexual Assault Treatment Center is an annex of University Hospital located in a small three-story building, and that the Center itself is a "two -- one room examination building." (R 1615). Because the record shows that the Sexual Assault Treatment Center is in a two room area and that Detective Baer was at the Center, it is reasonable to infer that Detective Baer was present or within the immediate surroundings as the nurse took Vargas' blood sample. As the district court concluded in the instant case, the

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[5] In fact, as the United States Supreme Court stated in Schmerber v. California, 384 U.S. 757, 772, 86 S. Ct. 1826, 1836, 16 L. Ed. 2d 908 (1966), to tolerate police officers taking blood samples from defendants at the stationhouse "might be to invite an unjustified element of personal risk of infection and pain."

facts do not show that "Officer Baer was simply 'out and about the scene' as the Manatee County officers apparently were in Hesselrode, or that he did not in any way act in execution of the search warrant." Vargas, 640 So. 2d 1139, 1141 (Fla. 1st DCA 1994).

**C. Even if this Court finds that the officers executed the search warrant in violation of Florida Statutes, this Court should decline to apply the exclusionary rule.**

The exclusionary rule involves search and seizure issues; therefore, the proper starting point for the analysis is article I, section 12 of the Florida Constitution. Article I, section 12 of the Florida Constitution states in part that the "right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures . . . shall not be violated." Further, a 1982 amendment to article I, section 12 requires that state courts construe that right "in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court." In discussing the 1982 amendment to article I, section 12, this Court in State v. Lavazzoli, 434 So. 2d 321 (Fla. 1983), stated that prior to the amendment "the courts of this state were free to provide its citizens with a higher standard of protection from governmental intrusion than that afforded by the federal constitution." Id. at 323. This Court explained that prior to the amendment state courts could give citizens greater protection because the "state exclusionary rule was specifically articulated in our constitution and hence part of organic law." Id. However, this Court recognized that the 1982 amendment to article I, section 12 linked

Florida's exclusionary rule to the federal exclusionary rule; and thus, the amendment changed the state exclusionary rule from being constitutionally required to a "creature of judicial decisional policy." Id. Thus, under article I, section 12 and Lavazzoli, the decision of whether to apply the exclusionary rule is controlled by the rules of law developed by the United States Supreme Court. See Bernie v. State, 524 So. 2d 988, 991 (Fla. 1988)(stating that "an exclusionary rule that was once constitutionally mandated in Florida can now be eliminated by judicial decision of the United States Supreme Court.")

The United States Supreme Court has stated that the "primary justification for the exclusionary rule is . . . the deterrence of police conduct that violates Fourth Amendment rights." Stone v. Powell, 428 U.S. 465, 486, 96 S. Ct. 3037, 3048, 49 L. Ed. 2d 1067 (1976). Consequently, the Supreme Court has stated that the exclusionary rule is "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." United States v. Calandra, 414 U.S. 338, 348, 94 S. Ct. 613, 620, 38 L. Ed. 2d 561 (1974). Further, the Supreme Court has recognized that the decision of whether to apply the exclusionary rule in a particular case is "an issue separate from the question of whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct." Illinois v. Gates, 426 U.S. 213, 223, 103 S. Ct. 2317, 2324, 76 L. Ed. 2d 1386 (1983). The Supreme Court has explained that:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies

> law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

Johnson v. United States, 333 U.S. 10, 13-14, 68 S. Ct. 367, 369, 92 L. Ed. 436 (1948)(footnote omitted). Consequently, the Supreme Court has held that the decision of whether to apply the exclusionary rule when a search warrant is found to be invalid "must be resolved by weighing the costs and benefits of preventing the use in the prosecution's case in chief of inherently trustworthy tangible evidence obtained in reliance on a search warrant issued by a detached and neutral magistrate that ultimately is found to be defective." United States v. Leon, 468 U.S. 897, 907, 104 S. Ct. 3405, 3412, 82 L. Ed. 2d 677 (1984).

Turning to the facts in the instant case, it is clear that this Court should not apply the exclusionary rule because applying the rule will not further Fourth Amendment interests. The facts in the instant case show that Detective Harris' filed a detailed affidavit setting out specific facts in support of his seeking the search warrant. (R 492-97, 636-40). Moreover, the record shows that a neutral and detached judge examined Harris' affidavit, and determined that probable cause existed to search Vargas' house for specific items and to seize blood and saliva samples from Vargas. (R 492-97, 636-40). Because the record shows that a neutral and detached judge considered Harris' detailed affidavit and issued a search warrant based on probable cause, the search in the instant case did not violate the Fourth Amendment.

The record also shows that the police acted in good faith in executing the search warrants and that Vargas was not prejudiced by the officers' alleged violations of the search warrant statutes. First, the record shows that Detective Harris testified that he contacted the Duval County officers to execute the warrant at Vargas' house because he was concerned about complying with the search warrant's terms. (R 1611, 1619). Second, the record shows that Detective Baer met Harris and Vargas at the house, and later at the Sexual Assault Treatment Center for the taking of Vargas' blood and saliva samples. (R 1597-98). Based on these facts, the record shows that Detectives Harris and Baer acted in good faith in executing the search warrant; thus, this Court should not punish the police by applying the exclusionary rule.

Further, Vargas cannot show any prejudice from the alleged violations of the state statutes. First, even if Detective Harris' executed the warrant outside his territorial jurisdiction, the record shows that Duval County officers could have executed the search warrant at Cecil Field, if Vargas had indicated that he wanted to wait for Duval County officers. (R 1594, 1595, 1607). Thus, if Harris improperly executed the warrant, Vargas was not prejudiced by the error. The search would have occurred regardless. The only change would be the officer conducting the search. Finally, as Professor LaFave states "provisions to the effect . . . that the warrant must be executed by an officer who is within his territorial jurisdiction . . . [is] not generally viewed as being important enough to merit enforcement through the exclusionary rule." 1 Wayne R. LaFave, Search and Seizure section 1.5(b), at 105 (2d Ed. 1986).

Similar to the discussion of the first alleged violation, the record does not show that Detective Baer's absence from the examination room as the nurse withdrew Vargas' blood and took Vargas' saliva sample resulted in any prejudice. For example, Vargas has not claimed that the search exceeded the scope authorized by the search warrant or that the evidence was mishandled in some way. Absent some Fourth Amendment violation, or at least some prejudice, applying the exclusionary rule in the instant case would be indiscriminate and may well "'generat[e] disrespect for the law and administration of justice.'" Leon, 468 U.S. at 907 (quoting Powell, 428 U.S. at 491). Thus, this Court should decline to apply the exclusionary rule to the facts in the instant case.

Finally, the State recognizes that the two lead cases concerning officers' violations of state statutes in executing search warrants, Hesselrode and Morris, have held that the evidence gathered during the search should be suppressed. However, the Hesselrode and Morris holdings are not applicable to the facts in the instant case. First, the district court's decision in Hesselrode occurred prior to the 1982 constitutional amendment to article I, section 12 that linked Florida's exclusionary rule with that of the United States Supreme Court. Thus, Hesselrode is no longer good law. Next, an examination of Morris shows that the district court did not discuss the applicability of the exclusionary rule. Moreover, the district court's application of the exclusionary rule in Morris does not support an application of the rule in the instant case. As

discussed earlier, the facts in Morris show that the officer, who was authorized to conduct the search, completely abdicated any responsibility in executing the search warrant. In contrast, the facts in the instant case show the officers acted in good faith in trying to execute the search warrant. Thus, the exclusionary rule should not be applied under the particular facts of the instant case.

## ISSUE IV

WHETHER THE TRIAL COURT PROPERLY DENIED VARGAS' FIRST MOTION TO SUPPRESS BLOOD AND SALIVA SAMPLES BECAUSE THE SEARCH WARRANT IS FACIALLY VALID?

Vargas argues that the trial court erred in denying his first motion to suppress because Detective Harris' affidavit failed to set forth any factual basis to justify finding probable cause and the affidavit failed to show "a heightened standard of probable cause" to justify a blood test. Vargas' argument is without merit because the affidavit shows that probable cause existed to issue a search warrant to take samples of Vargas' blood and saliva. Moreover, the facts in the instant case show that the police conducted a reasonable search in seizing Vargas' blood and saliva samples. Thus, the trial court properly denied Vargas' motion to suppress.

Issue IV raises a question of whether the trial court properly denied Vargas' first motion to suppress; consequently, the rules of law outlining the burden of proof and standard of appellate review in Issue III are also applicable here.

In Schmerber v. California, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966), the Supreme Court addressed whether the police violated the Fourth Amendment by compulsorily taking a blood sample from a defendant suspected of driving while intoxicated. 384 U.S. at 766-67. The facts in Schmerber show that the defendant suffered injuries when the automobile that he was driving struck a tree. Id. at 758 n.2. While the defendant was at the hospital, the police arrested him for driving while intoxicated. Id. at 758.

Despite the defendant's objection, the police directed a physician to withdraw a blood sample from the defendant. Id. A chemical analysis of the defendant's blood revealed a percentage of alcohol which indicated that he was intoxicated when the physician took the blood sample. Id. at 759. The defendant argued to the state courts that the police had violated the Fourth Amendment by withdrawing his blood; and thus, the evidence should be suppressed. Id. The state courts rejected the defendant's argument and upheld the seizure. Id. The Supreme Court granted certiorari in part to address the validity of the search under the Fourth Amendment. Id.

The Supreme Court recognized that the compulsory administration of a blood test plainly constituted a search and seizure within the Fourth Amendment. Id. at 767. Moreover, the Supreme Court noted that the proper function of the Fourth Amendment is to constrain "against intrusions which are not justified in the circumstances, or which are made in an improper manner." Id. at 768. Consequently, the Supreme Court stated that the facts in Schmerber presented two questions for the Court to decide: 1) "whether the police were justified in requiring [the defendant] to submit to the blood test"; and 2) "whether the means and procedures employed in taking [the defendant's] blood respected relevant Fourth Amendment standards of reasonableness." Id.

In determining whether the police were justified in requiring the defendant to submit to the blood test, the Supreme Court found that, under the facts presented, the police had probable cause to arrest the defendant and charge him with driving while intoxicated. Id. The Supreme Court noted that the Fourth Amendment forbid

searches beyond the body's surface on the "mere chance that desired evidence might be obtained." Id. 770. In fact, in these types of searches the Supreme Court stated that the Fourth Amendment required a "clear indication" that the evidence will be found. Id. The Supreme Court noted that the facts indicated that probable cause existed, but the question remained "whether the arresting officer was permitted to draw these inferences himself, or was required instead to procure a warrant before proceeding with the test." Id. The Supreme Court then stated that:

> Search warrants are ordinarily required for searches of dwellings, and absent an emergency, no less could be required where intrusions into the human body are concerned. The requirement that a warrant be obtained is a requirement that inferences to support the search "be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." 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 (citations omitted). Under the facts in Schmerber, the Supreme Court found that the officer "might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant" would result in the destruction of evidence because of the defendant's body was dissipating the alcohol. Id. Given these exigent facts, the Supreme Court held that "the attempt to secure evidence of blood-alcohol content in this case was appropriate incident to [the defendant's] arrest." Id. at 771.

The Supreme Court next examined the second question of whether the police used reasonable means and procedures in taking the

defendant's blood. The Supreme Court first stated that it was "satisfied that the test chosen to measure [the defendant's] blood-alcohol level was a reasonable one." Id. at 771. Moreover, the Supreme Court recognized that the extraction of blood samples is a "highly effective means of determining the degree to which a person is under the influence of alcohol." Id. In fact, the Supreme Court further found that blood tests are common and "for most people the procedure involves virtually no risk, trauma, or pain." Id. Finally, the Supreme Court noted that the blood test in Schmerber was performed in a reasonable manner because the record showed that a physician withdrew the defendant's blood in a hospital environment according to accepted medical practices. Id. Based on these factors, the Supreme Court held that the compulsory blood test administered in Schmerber did not violate the Fourth Amendment. Id. at 772.

The Supreme Court further clarified the rules of law from Schmerber in Winston v. Lee, 470 U.S. 753, 105 S. Ct. 1611, 84 L. Ed. 2d 662 (1985), which addressed whether the Fourth Amendment permitted a State to compel a defendant to undergo a surgical procedure in order to remove a bullet from the defendant's chest that might have been evidence of a crime. Winston, 470 U.S. at 758. The facts in Winston show that as the victim was closing his shop, he noticed someone armed with a gun coming toward him from across the street. Id. at 755. The victim, who was also armed, drew his gun. Id. The other armed person told the victim to freeze. Id. The victim shot at the other person, who returned his fire. Id. The victim was hit in the legs, while the other

individual, who appeared to be wounded in the left side, ran from the scene. Id. The police arrived shortly thereafter, and took the victim to the emergency room at a nearby hospital. Id. at 756. Approximately 20 minutes later, the police found the defendant eight blocks from where the earlier shooting had occurred. Id. The defendant had a gunshot wound to his left chest area, and he told police that he had been shot by two individuals attempting to rob him. Id. The ambulance took the defendant to the same emergency room where the victim was being treated. Id. When the defendant entered the emergency room, the victim identified the defendant as "the man that shot me." Id. After an investigation, the police decided that the defendant's story that two men had shot him was false, and thus charged the defendant with robbery. Id.

The Commonwealth shortly thereafter filed a motion in state court to require the defendant to undergo surgery in order to remove an object thought to be a bullet under his left collarbone. Id. The state court conducted several evidentiary hearings on the motion and authorized the removal of the bullet. Id. at 757. The defendant brought an action in the federal district court to enjoin the surgery on Fourth Amendment grounds. Id. The federal district court conducted an evidentiary hearing and subsequently enjoined the surgery. Id. at 758. The federal circuit court of appeals affirmed the federal district court's order enjoining the surgery. Id. The Supreme Court granted certiorari to consider whether the Commonwealth could compel the defendant to undergo surgery. Id.

The Supreme Court recognized that "[t]he reasonableness of surgical intrusions beneath the skin depends on a case-by-case approach, in which the individual's interests in privacy and security are weighed against society's interests in conducting the procedure." Id. at 760. The Supreme Court stated that Schmerber provided a framework of analysis for cases concerning the reasonableness of surgical intrusions. 470 U.S. at 760. The Supreme Court first stated that Schmerber recognized that "the ordinary requirements of the Fourth Amendment would be the threshold requirements for conducting this kind of surgical search and seizure." 470 U.S. at 760. In particular, the Supreme Court noted the importance of having a neutral and detached magistrate determine whether probable cause existed to conduct the search. 470 U.S. at 760-61. Next, the Supreme Court recognized that beyond this probable cause determination, Schmerber required an examination of a number of factors in determining the reasonableness of the procedure or test. 470 U.S. at 761.

In examining the reasonableness of the individual's privacy interests, the Supreme Court stated that two crucial factors in analyzing the intrusion in Schmerber were "the extent to which the procedure may threaten the safety or health of the individual," and "the extent of intrusion upon the individual's dignitary interests in personal privacy and bodily integrity." 470 U.S. at 761. The Supreme Court then stated that "[w]eighed against these individual interests is the community's interest in fairly and accurately determining guilt or innocence." 470 U.S. at 762. The Supreme Court then identified three factors from Schmerber that

demonstrated society's interest in fairly and accurately determining the defendant's guilt or innocence: First, the Supreme Court recognized that it had found that the "blood test is 'a highly effective means of determining the degree to which a person is under the influence of alcohol'"; Second, the Supreme Court noted that the facts showed a "clear indication" that evidence would be found if the blood test were undertaken; and Third, the Supreme Court recognized that the difficulty of proving drunkenness by other means shows that the blood tests were of "vital importance if the State were to enforce its drunken driving laws." 470 U.S. at 762-63 (quoting Schmerber, 384 U.S. at 771). Thus, the Supreme Court stated that in Schmerber "we concluded that this state interest was sufficient to justify the intrusion, and the compelled blood test was thus 'reasonable' for Fourth Amendment purposes." 470 U.S. at 763.

Applying the rules of law from Schmerber to the facts in Winston, the Supreme Court found that the facts in Winston showed that probable cause existed to conduct the search and that the defendant had been given full procedural protection. Id. at 763. Consequently, the Supreme Court focused its inquiry "on the extent of the intrusion on [the defendant's] privacy interests and on the State's need for the evidence." Id. As to the defendant's privacy interests in Winston, the Supreme Court noted that the lower federal courts had found that the surgery had certain risks and that under general anaesthesia, the defendant would be totally divested of control over his body. Id. at 763-65. In contrast to the defendant's privacy interests, the Supreme Court found that

the Commonwealth did not show that it needed the bullet for its prosecution. Id. In fact, the Supreme Court found that under the facts in Winston the Commonwealth had "available substantial evidence that respondent was the individual who accosted [the victim] on the night of the robbery." Id. The Supreme Court stated, for example, that no one suggested that the victim's spontaneous identification of the defendant in the emergency room as his assailant was inadmissible. Id. The Supreme Court held that in weighing the various factors in Winston, the Commonwealth had failed to demonstrate that the search would be reasonable under the Fourth Amendment. Id. at 768. Thus, the Supreme Court affirmed the lower federal courts orders enjoining the search. Id.

Reading Schmerber and Winston together, the law requires a court to conduct a two step process in determining whether the State can compel a person to give blood or saliva samples. First, the State must meet the threshold showing that the probable cause exists to compel the person to give a blood and saliva sample. Second, if probable cause exists, the court must determine whether the search is reasonable within the Fourth Amendment by weighing the individual's privacy interests against the community's interests in fairly and accurately determining the defendant's guilt or innocence. Thus, this Court must address two questions: 1) whether the affidavit supports a finding of probable cause; and 2) whether requiring Vargas to give blood and saliva samples is reasonable within the Fourth Amendment.

**A. The affidavit shows that probable cause existed to issue the search warrant.**

In Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983), the United States Supreme Court articulated the roles of the magistrate and reviewing court in determining whether probable cause exists to issue a warrant by stating that:

> The task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . conclud[ing]" that probable cause existed.

Id. at 238-39 (quoting Jones v. United States, 362 U.S. 257, 271, 80 S. Ct. 725, 736, 4 L. Ed. 2d 697 (1960)). Moreover, the Supreme Court stated that an "after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of de novo review" and the magistrate's decision should be given "great deference by reviewing courts." Id. at 236. Finally, the reviewing court's inquiry is confined to the four corners of the affidavit. Schmitt v. State, 590 So. 2d 404 (Fla. 1991).

Turning to the facts in the instant case, the record clearly shows that a neutral and detached judge examined Detective Harris' affidavit supporting the search warrant. (R 493-97, 745-47). Furthermore, an examination of the affidavit shows that the judge had a substantial basis for concluding that probable cause existed to issue the search warrant. The affidavit in the instant case clearly sets out a group of similarities between the two sexual batteries and Vargas' attempted burglary: 1) All three crimes

occurred in Orange Park, Florida in the same general vicinity of Wells road; 2) All three crimes occurred in the early morning hours ([redacted]s sexual battery at 6:00 am, [redacted]'s sexual battery 5:40 am, and [redacted] attempted burglary at 7:20 am); 3) All three victims lived in first floor apartments with sliding glass doors; 4) In the two sexual batteries, the assailant entered the victim's apartment through the sliding glass door. Similarly, in the attempted burglary Vargas tried to enter [redacted] apartment through the sliding glass door; 5) All three victims were single educated white females who lived alone; 6) The first sexual battery victim told the police that her assailant wore a ski mask, cloth gloves, and a dark waist length coat. The second sexual battery victim told the police that her assailant shined a flashlight in her eyes. The police caught Vargas fleeing from the scene of the attempted burglary, as he threw a flashlight and gloves into his vehicle. The police also found a dark waist jacket in Vargas' vehicle; 7) The assailant in the two sexual batteries bound the victim's hands and mouth with cellophane tape. Similarly, the police found tape inside Vargas' vehicle when they arrested him for the attempted burglary; 8) In all three crimes, the victims had a connection with the Navy. In fact, the affidavit shows that the second sexual battery victim, [redacted], and the attempted burglary victim, [redacted] dated men in the Navy. (R 495-96, 745-46). Based on all of the circumstances listed in the affidavit, the judge had a substantial basis for finding probable cause. Because the record shows that a substantial basis supports the judge's determination of probable

cause, the next focus is on the extent of the intrusion on Vargas' privacy interests weighed against the State's need for the evidence.

**B. The record shows that the warrant compelling Vargas to give blood and saliva samples was reasonable within the Fourth Amendment.**

The taking of Vargas' blood and saliva samples did not significantly intrude on his privacy rights. First, like the search in Schmerber, the search in the instant case involved withdrawing blood. As the Supreme Court recognized in Schmerber, the withdrawal of blood for tests is "commonplace in these days of periodic examinations" and the procedure "involves virtually no risk, trauma, or pain." Schmerber, 384 U.S. at 771. Moreover, like Schmerber, the facts in the instant case show that a trained medical personnel took the blood sample; thus reducing any personal risk of infection or pain. Consequently, based on Schmerber, the nurse's withdrawal of Vargas' blood did not significantly intrude upon Vargas' privacy interests. Significantly, Vargas does not claim any privacy interests in giving the saliva sample. Certainly, the giving of the saliva samples is even less intrusive than requiring the blood sample. Thus, the search warrant did not significantly intrude upon Vargas' privacy interests.

Weighted against Vargas' privacy interests is the State's important interest in determining Vargas' guilt or innocence of the sexual batteries is great. First, like the blood test in Schmerber, the DNA test in the instant case is a highly effective means of determining whether Vargas is the perpetrator of the two

sexual batteries. Second, the striking factual similarities between the sexual batteries and the attempted burglary gives a clear indication that evidence disclosing Vargas' identity as the perpetrator of the sexual batteries would result from comparing Vargas' DNA from a blood sample with DNA from semen found after the two sexual batteries. Finally, the record shows that the State has a compelling need for this DNA evidence to establish Vargas' identity as the perpetrator of the two sexual batteries. Unlike the facts in Winston where the victim identified his attacker, the State does not have a victim identification tying Vargas to the sexual batteries. Consequently, the State had a compelling need for the DNA blood test to establish Vargas' identity as the sexual battery perpetrator. In sum, the record shows that Vargas' privacy interests in the blood tests are minimal in contrast to the State's compelling need for the evidence; therefore the search in the instant case was reasonable. Thus, the trial court properly denied Vargas' first motion to suppress challenging the facial validity of the search warrant.

## ISSUE V

WHETHER THE TRIAL COURT PROPERLY DENIED VARGAS' MOTION FOR AN EVIDENTIARY HEARING TO EXAMINE THE VERACITY OF DETECTIVE HARRIS' AFFIDAVIT IN SUPPORT OF THE SEARCH WARRANT

Vargas argues that his second motion to suppress made "a substantial preliminary showing that [Detective Harris] 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 [in] this case." (AB p. 59). Consequently, Vargas contends that the trial court erred in denying his motion to hold an evidentiary hearing. Therefore, Vargas concludes that this Court should reverse the trial court's denial of his request for an evidentiary hearing.

Vargas' argument is clearly without merit because the record shows that Vargas failed to make a substantial preliminary showing that Detective Harris knowingly and intentionally, or with a reckless disregard for the truth, included false statements in the affidavit. Thus, the trial court did not abuse its discretion in denying Vargas' motion to conduct an evidentiary hearing.

In Franks v. Delaware, 438 U.S. 154, 155, 98 S. Ct. 2674, 2676, 57 L. Ed. 2d 667 (1978), the Supreme Court addressed whether a defendant in a criminal proceeding had the right to challenge the truthfulness of factual statements made in an affidavit supporting the warrant. The Supreme Court held that:

> where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the alleged false statement is necessary to the

finding, the Fourth Amendment requires that a hearing be held at the defendant's request.

438 U.S. at 155-56. The Supreme Court explained that an obvious assumption of the Fourth Amendment's demand that a factual showing establish probable cause is that there be a "'truthful showing'." Id. at 165 (quoting United States v. Halsey, 257 F. Supp. 1002, 1005 (S.D. N.Y. 1966), aff'd, Docket No. 31369 (2d Cir., June 12, 1967)(unreported). Further, the Supreme Court stated that the showing "is to be 'truthful' in the sense that the information put forth is believed or appropriately accepted by the affiant as true." Franks, 438 U.S. at 165. The Supreme Court stated that in order to mandate an evidentiary hearing "[t]here must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof." Id. at 171. Furthermore, the Supreme Court noted that "[a]llegations of negligence or innocent mistake are insufficient" in order to mandate an evidentiary hearing. Id. Finally, the Supreme Court stated that if, "when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required." Id. at 171-72 (footnote omitted).

Under Franks, it is clear that the trial court's decision of whether to allow an evidentiary hearing challenging an affidavit hinges on the trial court's factual finding that the defendant made a substantial preliminary showing that the affiant included false statements in the affidavit either knowingly and intentionally, or with a reckless disregard for the truth.

Because the trial court's decision of whether to conduct the evidentiary hearing is based on the court's factual finding, the standard of review is whether the trial court's finding is supported by competent and substantial evidence. Tibbs, 397 So. 2d at 1123. Thus, the narrow focus in the instant case is whether competent and substantial evidence supports the trial court's determination that Vargas failed to make a substantial preliminary showing that Detective Harris made false statements in the affidavit knowingly and intentionally, or with a reckless disregard for the truth. An examination of each of Vargas' claims shows that he failed to meet the threshold burden to mandate an evidentiary hearing.

**1. Veracity of statement that [redacted] was single, educated, and lived alone.**

The record does not support Vargas' contention that Harris "admitted at deposition that he had no basis whatsoever for stating that Ms. [redacted] was either single, or educated, or lived alone." (AB p. 61). In contrast to Vargas' contention, Harris testified at his deposition that he did not recall where he got the information that [redacted] was single, educated, or lived alone. (R 785-86). Certainly, Harris not recalling where he obtained the information is a far cry from deliberate falsity or a reckless disregard for the truth.

**2. Veracity of statement describing the "tape" police discovered in Vargas' vehicle after his arrest for attempted burglary.**

The record does not support Vargas' contention that Harris' failure to describe the "tape" that the police found in Vargas' vehicle as green duct tape was "either an intentional misrepresentation or a false statement made with reckless disregard for the truth under these circumstances." (AB p. 62). Harris testified that he considered the fact that Vargas had tape in his vehicle a significant fact because tape had been used in the two sexual batteries. (R 788). However, Harris further testified that he did not think it was significant that the two sexual batteries involved cellophane tape, and the police found green duct tape in Vargas' vehicle because "tape's tape." (R 788-89). Finally, Harris testified that the difference between the cellophane and green duct tape was "just an oversight" on his part. (R 790). Consequently, at most, the failure to note that the police found green duct tape in Vargas' vehicle is negligence or innocent mistake, not the result of a deliberate falsity or reckless disregard for the truth.

**3. Veracity of statement that [redacted] was dating a man in the Navy.**

The record does not support Vargas' contention that Harris "admitted at deposition that he had no basis whatsoever for alleging that [redacted] was 'dating a man in the Navy.'" (AB p. 62). Harris testified that he did not know where he got the information that [redacted] was dating a man in the Navy. (R 786). Harris' answer does not show that the statement is a deliberate falsehood or made with a reckless disregard for the truth.

4. **Veracity of statement that [redacted] assailant was a white male.**

The record does not support Vargas' contention that Harris' statement that [redacted]s assailant was a white male as a deliberate falsehood or made with a reckless disregard for the truth. Although Harris did not recall [redacted] telling him her assailant was a white male, he stated that he had obtained the information from somewhere. (R 775). In fact, [redacted]s deposition testimony that supports Harris' testimony that he received the information that [redacted] assailant was a white male. (R 724). [redacted] testified that she felt like her assailant was white "because he kept telling me he was black, and tried to sound black." (R 724). Furthermore, [redacted] testified during the sexual battery her assailant's speech pattern deviated, and that towards the end of the battery he did not sound black. (R 724). Finally, [redacted] testified that when she first woke up, she saw that the assailant was wearing a dark mask and that she might have told someone that she saw white skin around the holes in the ski mask. (R 724). Based on these factors, Vargas did not meet the threshold burden of showing that Harris' statement that [redacted] assailant was a white male was false, much less a deliberate falsehood or made with a reckless disregard for the truth.

5. **Veracity of statement that [redacted]s assailant was a white male.**

The record does not support Vargas' contention that Harris made the statement that [redacted]s assailant was a white male as a

deliberate falsehood or with a reckless disregard for the truth. Harris prepared the search warrant after interviewing [redacted] and reviewing police reports of her sexual battery. (R 763). Harris testified that he interviewed [redacted] in February 1990, and that during the interview she was unable of describe her assailant's race. (R 710-11, 754, 758-59). However, the record also shows that Harris reviewed Gainey's report concerning [redacted]s sexual battery, and the police report shows that [redacted]s assailant was white male. (R 650, 761, 763). Further, the record shows that Gainey prepared his report about [redacted]s sexual battery on October 16, 1989, the date of her sexual battery. (R 650). Accordingly, Vargas has failed to show that Harris' statement that [redacted]s assailant was a white male was false, much less a deliberate falsehood or made with a reckless disregard for the truth.

6. **Veracity of statements that the sexual battery assailant took "souvenirs" from [redacted] and [redacted].**

The record does not support Vargas' contention that Harris had no basis to allege that [redacted]s assailant took her jewelry box as a souvenir. Harris specifically stated that he derived this information from [redacted]s statement to him. (R 769). In fact, Harris asked [redacted] whether she was missing any items, and [redacted] said she was missing a particular jewelry box. (R 770). Furthermore, Harris testified that [redacted] attributed the missing jewelry box to her assailant. (R 770). Consequently, the record shows that Vargas did not meet his burden of showing that Harris made a false statement about the missing jewelry box, much less that the statement was a deliberate falsehood or made with a reckless disregard for the truth.

Finally, the record does not support Vargas' contention that Harris either recklessly or intentionally disregarded the truth by stating that [redacted]'s assailant "took a white sleeveless net tee shirt, apparently as a souvenir." (R 746). Harris interviewed [redacted] about her sexual battery, and she told him that since the battery she was missing a white sleeveless net tee shirt. (R 780). The record also shows that the Clay County Sheriff's department property record indicated that the police had "1 knitt shirt" [sic] in reference to [redacted]s sexual battery. (R 653). Furthermore, Harris testified that he had gone over the reports prior to applying for the warrants, and that if he had realized that this "knitt shirt" was the white sleeveless net tee shirt, he would not have used it in the search warrant. (R 781). Finally, the excerpt from [redacted]s deposition shows that she told the police that she was missing the white sleeveless net tee shirt. (R 726). Based on these facts, the record does not support Vargas' contention that Harris intentionally included the false statement or that he made the statement with a reckless disregard for the truth. At best, the statement only shows that Harris may have been negligent in not determining whether the "knitt shirt" described in evidence technician's report was [redacted]s missing white sleeveless net tee shirt. Thus, Vargas failed to make a substantial preliminary showing to mandate an evidentiary hearing.

Moreover, even if Harris acted with a reckless disregard for the truth by including the statement about the white sleeveless net tee shirt in the affidavit, setting the statement to one side,

there remains sufficient facts in the affidavit to support a finding of probable cause. The affidavit still contains facts showing that: 1) All three crimes occurred in Orange Park, Florida in the same general vicinity of [redacted] road; 2) All three crimes occurred in the early morning hours ([redacted] sexual battery at 6:00 am, [redacted] sexual battery 5:40 am, and [redacted] attempted burglary at 7:20 am); 3) All three victims lived in first floor apartments with sliding glass doors; 4) In the two sexual batteries, the assailant entered the victim's apartment through the sliding glass door. Similarly, in the attempted burglary Vargas tried to enter [redacted] apartment through the sliding glass door; 5) All three victims were single educated white females who lived alone; 6) The first sexual battery victim told the police that her assailant wore a ski mask, cloth gloves, and a dark waist length coat. The second sexual battery victim told the police that her assailant shined a flashlight in her eyes. The police caught Vargas fleeing from the scene of the attempted burglary, as he threw a flashlight and gloves into his vehicle. The police also found a dark waist jacket in Vargas' vehicle; 7) The assailant in the two sexual batteries bound the victim's hands and mouth with cellophane tape. Similarly, the police found tape inside Vargas' vehicle when they arrested him for the attempted burglary; 8) In all three crimes, the victims had a connection with the Navy. In fact, the affidavit shows that the second sexual battery victim, [redacted] and the attempted burglary victim, [redacted] dated men in the Navy. (R 495-96, 745-46). Because the remaining facts still establish probable cause,

the trial court did not abuse its discretion in denying Vargas' motion for an evidentiary hearing. Thus, this Court should affirm the district court's holding affirming the trial court's ruling.

## CONCLUSION

Based on the above cited legal authorities, the State respectfully requests that this Honorable Court reverse the district court's decision as to Issues I, and affirm the district court's decision as to Issues II, III, IV, and V.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to **MR. WILLIAM SHEPPARD**, Esquire, **MR. MICHAEL YOKAN**, Esquire, and **MR. GRAY THOMAS**, Esquire, Sheppard & White, P.A., 215 Washington Street, Jacksonville, Florida 32202-2808, this 15th day of February, 1995.

Thomas Crapps

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