

**IN THE CIRCUIT OF THE SEVENTEENTH JUDICIAL
CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA**

**STATE OF FLORIDA,
(Plaintiff)**

V.

Case No: 98-5739CF10A

**ERNESTO BEHRENS,
(Defendant)**

MOTION FOR REHEARING

The Defendant, Pro Se, respectfully moves for rehearing pursuant to Rule 3.853(e), Florida Rules of Criminal Procedure, on the grounds that the Court overlooked controlling points of law and fact. In support of the Motion, the Defendant states:

1). This Court denied the Defendant's Rule 3.853 Motion without conducting an evidentiary hearing and stated its reasons for denial in an order dated July 27, 2004. Relying upon the State's Response To The Defendant's Motion For DNA Testing Per Rule 3.853, the Court based its decision upon its finding that "the green fitted sheet was already tested, and matched Defendant's DNA." (See Court's Denial attached hereto).

2). The Court has apparently overlooked the fact that the Defendant alleged in his sworn Motion that previous DNA testing results were inconclusive and that subsequent scientific developments in DNA testing techniques likely would produce a definitive result. (See Defendant's Rule 3.853 Motion).

3). Either the Court has overlooked this fact or the Court has assumed incorrectly that the Defendant must not allege in his Motion that the DNA test conducted was “inconclusive”. In order to obtain testing under Rule 3.853 the Defendant must include “a statement that the evidence was not tested previously for DNA, or a statement that the results of previous DNA testing were inconclusive and that subsequent scientific developments in DNA testing techniques likely would produce a definitive result.” Fla.R.Crim.P., 3.853(b)(2). In his 3.853 Motion, under the heading STATEMENT REGARDING PREVIOUS DNA TESTING FLA.R.CRIM.P. 3.853 (b)(1)[SIC] (should read 3.853 (b)(2)), the Defendant refers back to his statement on page 9 of his Motion when he alleges that the previous test results were inconclusive as the test itself was not scientifically possible. In support of his sworn allegations the Defendant showed the following:

- A. Trial testimony proved that Ms. Marchese used one single spermatozoa cell, stretched it out six feet, used it to conduct her RFLP DNA test, and that the results of her test were used by another expert at trial to arrive at one to fourteen billion odds. **(See Exhibit A)**
- B. A Sworn Affidavit by the Defendant proves that Ms. Marchese admitted to him and to other witnesses who were present at a pretrial Arthur hearing that she extracted only one single spermatozoa cell from spot #1 on the green filled sheet for purposes of conducting her RFLP DNA test which was used at trial. **(See Exhibit B)**
- C. The Defendant’s trial attorney, Mr. Tyrone Terrell, agreed to submit sworn testimony to this Court saying “I clearly remember her [Donna Marchese] talking about testing one single spermatozoa and how it was intertwined within the fabric of the [green fitted] sheet.” (See letter attached from Mr. Terrell). **(See Exhibit C)**

D. Mr. Anthony Winston, Associate Technical Director for Forensic Identity Testing at LabCorp, which has been endorsed by Florida Courts, swore that it is not scientifically possible to obtain reliable results from a RFLP DNA test using one single spermatozoa cell. (See sworn letter by Mr. Winston attached). (See Exhibit D)

Either the Court overlooked these sworn to allegations or the Court assumed incorrectly that Defendant's definition and interpretation of the word "inconclusive" under Rule 3.853 was insufficient for reasons the Court cited in Newberry v. State, 870 So2d 926 (Fla. 4th DCA 2004). In Newberry the Fourth District Court of Appeal distinguished the term "inconclusive" from "contested" when the Court found that Newberry's statement that the State's DNA tests were "inconclusive" really meant they were "contested", since Newberry presented expert testimony at his trial contesting the reliability of the State's tests but the jury rejected his evidence. The 4th DCA concluded that "neither Rule 3.853 nor the Statute allowing post-conviction testing, Section 925.11 (2)(a), Fla.Stat. (2002), provides for additional testing in such circumstances." Id. at 927.

In applying the Newberry decision to the Defendant in the instant case this Court stated, "the Rule does not provide for additional testing based on contested testing methods." (Court's Denial, p. 2) However, it appears the Court has assumed incorrectly that the Defendant's jury settled or decided the issue of whether the DNA test were scientifically impossible, thus inconclusive, does not invade the province of the jury's verdict since the jury never weighed evidence that the Defendant now alleges in his Motion. Nor does the Defendant's use of the term "inconclusive", under the Rule, hold the same meaning as that given it by the 4th DCA in Newberry under different factual circumstances.

4). This Court apparently overlooked that in Newberry the Court stated that "there is no case law interpreting what is meant by 'inconclusive.'" Id. at 927.

With regard to this term, the Defendant finds it difficult to imagine circumstances under which a DNA test is any more “inconclusive” than it was here. Under the Rule the Defendant alleged that the original DNA test was not definitive: a scientifically impossible test cannot define its goal much less show the Defendant was the assailant in this crime. A new DNA test, however, would definitively exonerate the Defendant because it would contain sufficient amount of sperm from the crime scene to perform a scientifically possible test the results of which would conclusively prove that the Defendant’s DNA does not match the sperm and thus the Defendant did not commit the crime. Had the Defendant’s jury known the original test was scientifically impossible and that a new DNA test showed the sperm did not belong to the Defendant, then the Defendant would have been acquitted/exonerated of this crime because DNA evidence was the only evidence the State presented at trial as proof that Defendant committed the crimes for which he was convicted.

5). It further appears that the Court has assumed incorrectly that the Defendant’s post-conviction DNA Motion is insufficient based upon the fact that the Defendant adequately alleged in his Motion that the previous DNA test was inconclusive. The Court may have overlooked as well that the purpose of the Statute and Rule allowing for Motion for post-conviction DNA testing is to provide Defendant’s with a means by which to challenge convictions when there is a “credible concern that an injustice may have occurred and DNA testing may resolve the issue.” See Zollman v. State, 820 So2d 1060 (Fla. 2nd DCA 2002).

First, the injustice presently was that a scientifically impossible test and result pointing to one in fourteen billion odds was used at Defendant’s trial as the only proof of guilt. Second, this concern raised by the Defendant is credible considering all of the alleged facts in the sworn Motion have not been refuted in the State’s Response or the Court’s Denial. Third, the Defendant’s convictions,

unlike Newberry's, were obtained without the jury's consideration during deliberation on the verdict that one single spermatozoa cell stretched six feet cannot possible serve under science as the basis for obtaining reliable, or conclusive, results using RFLP DNA technology. Although the jury may have believed Ms. Marchese when she told them that one sperm cell contained enough amounts of DNA to enable her to arrive at her results, this Court has overlooked the fact that the Rule requires the Court to conduct an evidentiary hearing on the sworn allegations in the Motion or to summarily deny it on the merits by attaching portions of the record refuting the Defendant's sworn allegations. See Cheshire v. State, 872 So2d 427 (Fla. App. 5th Dist. 2004, citing Cf. Manual v. State, 855 So2d 97 (Fla. 2nd DCA 2003)); See also Fla.R.Crim.P. 3.853 (e)(3).

Apparently the Court, in relying upon the State's Response, overlooked that the State completely ignored the Defendant's sworn statement that previous DNA test results were inconclusive. Although the Court allowed Ms. Marchese's sworn pretrial deposition to its order denying Defendant's Motion, the Court may have assumed incorrectly that parts of the deposition refute the Defendant's claim that Ms. Marchese used one single spermatozoa cell to conduct her test. If so, then the Court has overlooked that Ms. Marchese's pretrial deposition admits that she saw several sperm cells on the initial "shake out" from spot #1 on the green fitted sheet but that she destroyed these cells and did not use them to conduct her RFLP DNA test.

Q. What did you do with those sperm cells?

A. Do you mean the sperm cells or do you mean the cutting?

Q. Did you save those also?

A. The sperm cells?

Q. Yeah.

A. No.

Q. Why not?

A. We don't save those, what we do is we make an extract, we take it and we put it on a microscope slide, once it's positive it gets thrown out or discarded.

Q. You didn't throw away the first test spot [No. 1], did you?

A. The extract and the microscope slide, yes.

(Marchese depo., pp. 25-26).

As the Defendant alleges in his Motion Ms. Marchese found one single spermatozoa cell on the remaining cut from spot #1 and used it to conduct her RFLP DNA test. Ms. Marchese admitted in the deposition, however, that subsequent scientific STR developments in DNA testing techniques likely would produce definitive results on sperm from the sheet which she was unable to define using RFLP technology due to deficient quantities of sperm available.

6). Finally, in overlooking the Defendant's sworn allegations under Rule 3.853 (b)(2), the Court apparently merely rested upon the results of the original DNA test to deny the Defendant's request for additional DNA testing based upon the argument that the new test would not alter the fact that the first test established that the Defendant was at the scene of the crime, citing Galloway v. State, 806 So2d 595, and thus would not exonerate the Defendant, citing King v. State, 808 So2d 1237 (Fla. 2002). It's the Court's own determination that the original test was not inconclusive that permits the Court to argue that Galloway and King apply to Defendant. Yet the Court has overlooked that it is no longer possible to stand upon the results of the original test in light of the Defendant's allegations that the results of the test were inconclusive. Accordingly, the Court has missed an important point: unless the Court can refute the Defendant's allegations the Court must grant the Defendant the relief to which he is entitled under Rule 3.853 or

conduct an evidentiary hearing on the Motion. For this reason the Court should grant rehearing and withdraw the original decision and opinion.

Wherefore, the Defendant prays this Honorable Court will grant his Motion for rehearing.

Respectfully Submitted,

// _____
Ernesto Behrens, Pro Se
19562 S.E. Institution Drive
Unit 1
Blountstown, Florida 32424

I hereby certify that a true copy of the foregoing Motion For Rehearing has been placed into prison official's hands to be mailed by U.S. Mail to the Party listed below this 9th day of August, 2004.

Ernesto Behrens, Pro Se

PARTIES SERVED:

Clerk of the Circuit Court, (Howard Forman)
Broward County Courthouse
201 SE Sixth Street
Fort Lauderdale, Florida 33301

Office of the State Attorney, (Michael J. Satz)
201 SE Sixth Street
Fort Lauderdale, Florida 3301

EXHIBIT

“A”

EXHIBIT

“B”



MARC A. SHELOWITZ*
ANDREA SHELOWITZ
TY TERRELL
DONALD GELIN
ANDREW M. COFFEY
*Admitted to New York Bar

THE LAW OFFICES OF
SHELOWITZ, SHELOWITZ & TERRELL, P.A.

1801 SOUTH PERIMETER ROAD, SUITE 180 • FORT LAUDERDALE, FLORIDA 33309

TELEPHONE: 954.489.2204 • FAX: 954.489.0637
WWW.SSTLAWOFFICE.COM

October 6, 2003

Ernesto J. Behrens
D.C. # 732564
Mailing No.: G110U
Caihoun Correctional Institution
19562 S.E. Institution Drive
Blountstown, Florida 32424

Dear Ernesto:

I am in receipt of your letter wherein you are requesting an affidavit from me regarding statements from Donna Marchese regarding spermatozoa and DNA testing. First of all, I have reviewed the statute you speak of (3.853) and feel you do have a viable claim for relief under that statute. Although I intend to help you where I can, I don't see where you need an affidavit from me in order to proceed forward with the post conviction relief.

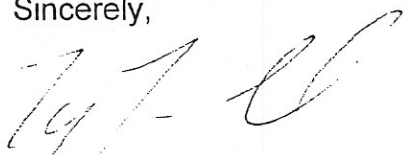
As for the affidavit, I am very uncomfortable signing an affidavit that could end up in the Supreme Court which details a conversation that I may have had with Donna Machese in 1999 when I simply don't remember the "verbatim" words she used during one of our many conversations. Ernesto, I clearly remember her talking about testing one single Spermatozoa and how it was intertwined within the fabric of the sheet, but I do not remember exactly what words she used and the rest of our conversation on the issue. I spoke with Donna Marchese several times and we spoke about DNA testing several times while viewing the sheet, both in and out of court. I can not positively remember if I first saw the sheets in court the day of the Arthur Hearing or if it was in the jail while they were being shown to you. I spent a lot of time on your case including meetings with experts, viewing the physical evidence, taking many trips to the jail, and a

week of trial and I just can not remember the specific time and place and words used when Donna Marchese was talking about the single spermatozoa.

I don't mean to be an obstacle in your quest for freedom, and I will help where I can, but the exact content of an affidavit that you want me to produce, I just can't do. On the other hand, if you want an affidavit with the information contained in this letter, I will be happy to provide you with that. Think it over and let me know if you still want an affidavit or some alternative assistance.

I am sorry this correspondence does not meet with your expectations.

Sincerely,

A handwritten signature in black ink, appearing to read 'Tyrone A. Terrell', with a stylized flourish at the end.

Tyrone A. Terrell, Esquire

EXHIBIT

“C”

SWORN AFFIDAVIT

Mr. Ernesto Behrens-732564 [G-1110U]
Calhoun Correctional Institution
19562 S.E. Institution Drive
Blountstown, Florida 32424

TO: The Seventeenth Judicial Circuit Court In And For Broward County, Florida

REF.: STATE OF FLORIDA v. ERNESTO BEHRENS CASE NO.: 98-5739 CF10A

To The Honorable Court,

This sworn affidavit is being submitted in conjunction with the instant DNA Post Conviction Motion in support of and to notify this Honorable Court of such material witnesses are willing to corroborate via testimonial statement [s] as to the specific facts therein the instant (DNA) motion.

1. On December 17, 1999 an "Arthur" hearing was held where the Honorable Judge: Ronald J. Rostchild presided over, this specific hearing.

2. During this "Arthur" hearing there were several key individual [s] present, and they are listed as follows: State Attorney- Mr. Dennis Siegel, State's Expert Witness- Serologist- Ms. Donna Marchese, Honorable Court's Bailiff- (Male), Defense Attorney-Mr. Ty Terrel and Ms. Andrea Shelowitz, and the defendant- Mr. Ernesto Behrens.

3. During such review of the specific evidence that the State of Florida intended to present at trial. There was a conversation that ensued between the State's Expert Witness Ms. Donna Marchese and the defense concerning a specific exhibit, a spot cut from the" victim's fitted sheet."

4. Ms. Donna Marchese, Serologist, made the following statement:

"While using my microscope I was able to find one (1) spermatozoa cell, that was entwined into the fiber of the fitted sheet". She further stated she pulled the cell from the fabric, and performed a (RFLP) DNA testing. That resulted into a match of this defendant's DNA make-up.

5. In preparation of my post-trial DNA motion I have been able to obtained sworn statement [s] from the DNA/ Forensic Community. That has stated it is scientifically impossible to conduct a (RFLP) DNA testing with a single spermatozoa cell. Indicating apparent variance to the State's Expert witness testimony' resulting into "questionable" evidence in this instant case.

6. Hereafter, I contacted Mr. Ty Terrel, my trial attorney on September 5, 2003 round about [1:40 p.m.] by phone, inquiring as to his recollection of the 12-17-99 "Arthur" hearing. Upon him affirming that he recall such proceeding, I further inquired as to his specific recollection of the State of Florida's Expert Witness specific testimony pertaining to the spermatozoa cell that was allegedly a "match" to my (DNA) make-up?

7. Mr. Ty Terrel, quoted back to me via this phone call essentially verbatim as to Ms. Donna Marchese previous testimony, however, Mr. Terrel used words and phrases during our call such as i.e.:

"I clearly remember talking about testing one (1) single spermatozoa cell, and how it the (cell) was intertwined within the fabric of the sheet and her using a microscope to pull the cell from... But, as to Ms. Marchese exact words that she used during the latter portion of her statement then...I (Mr. Terrel) cannot remember."

8. Also, see attached correspondence dated October 6, 2003, where Mr. Terrel has stated the following:

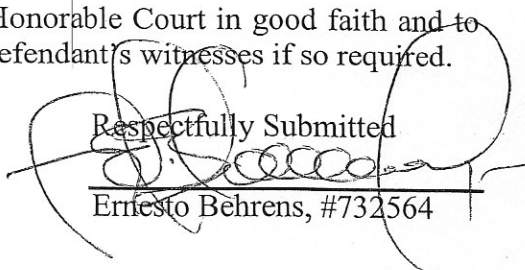
"Ernesto, I clearly remember talking about testing one (1) single spermatozoa cell, and how it the (cell) was intertwined within the fabric of the sheet..."

9. The defendant now states to this Honorable Court that based upon such holding and whereas the defendant continuously asserts his innocent to this specific crime. Not to exclude that the (DNA) community as a whole does not agree with the particularities proffered by the State of Florida's Expert Witness pertaining to the facts of such procedural tested. See attached sworn affidavit.

9. Also, whereas Mr. Ty Terrel and Ms. Andrea Shelowitz, Attorneys-at-Law, located at 1801 S. Perimeter Road Suite 180, Fort Lauderdale, Florida 33309. Will proffer their individual and professional recollection ... of the State of Florida's Expert testimony if this court requires it.

10. This sworn affidavit is being submitted to this Honorable Court in good faith and to provide the court such opportunity to subpoena the defendant's witnesses if so required.

Respectfully Submitted


Ernesto Behrens, #732564

NOTARY

Before, me the undersigned authority, this day personally appeared, Ernesto Behren
Who first being duly sworn, stated that he is the individual that has provided the information
herein, and such facts are true. Thereby, certifying that the forgoing has been thoroughly read and
having personal knowledge of the facts herein are true and correct.

/S/ E. Behren

Sworn to and subscribed before me this 22nd day of October 2003.

/S/ Thomas M. Woodham

My Commission Expires: 9-9-07

Notary No.: DD248679

Notary Public, State of FLORIDA

Type of identification used? Personally known _____, or produced identification ✓.

Department of Corrections
Inmate



Thomas M. Woodham
Commission #DD248679
Expires: Sep 09, 2007
Bonded Thru
Atlantic Bonding Co., Inc.

EXHIBIT

“D”



Laboratory Corporation of America® Holdings
P.O. Box 13973
1912 Alexander Drive
Research Triangle Park, North Carolina 27709

Telephone: 800-533-0567
Fax: 919-361-7737

September 30, 2003

ENB, INC.
2740 NE 47 Street
Lighthouse Point, FL 33064
Attn: Mrs. Holder

RE: Mr. Ernesto Behrens #0-732564
Case No.: 98-5739 CF10A
FS Lab #F03-4525

Dear Mrs. Holder:

Pursuant to your request for answers to the questions that you provided, I am providing the following responses:

1. Based on the DNA quantity requirements for RFLP and PCR analysis it is my opinion that it is not scientifically possible to obtain reliable results from **one** single spermatozoa cell using traditional published methodologies.
2. The human sperm cell consists of a head 0.005 by .003 mm and a tail .05 mm long.
3. The weight of a spermatozoa cell is not a determining fact in RFLP or PCR analysis.
4. The minimum amount of spermatozoa required for RFLP and PCR analysis would depend on the quantity of DNA in each sperm cell. The average amount of DNA in a single sperm cell is approximately 3.5 pg.
5. The average minimum amount of DNA required for RFLP is approximately 50 ng and the average minimum amount of DNA required for PCR is approximately .1 ng. It is possible to get results from samples with less DNA than the suggested amounts of DNA depending on the quality of the DNA.
6. The average amount of seminal fluid in a normal healthy male ejaculation is 2.5 to 3.5 ml containing 200 to 300 million sperm cells.

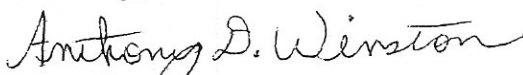
7. If there is enough evidence remaining, you can retest the evidence with PCR using excepted protocols.
8. Do to the lower DNA quantity and quality requirements associated with PCR analysis PCR would be the best method of analysis for old, small and partially degraded samples. Few labs if any are still using RFLP methods.
9. Yes it is possible to extract DNA from human hair.
10. There are two types of PCR methodologies that can be used for hair analysis. If the hair has an intact root it can be tested using **nuclear** DNA methods, if there is not a root present on the hair **mitochondrial** DNA method must be used.
11. No I would not say that PCR testing is more sophisticated than RFLP. They are simply two different types of methodologies used in forensic identity testing. RFLP is an older method of analysis requiring higher quality and quantity of DNA than the PCR method. PCR produces results in days vs. RFLP, which takes months.
12. LabCorp can not suggest to a client that all evidence collected from a crime scene be tested. The type and number samples tested would depend on the particular circumstances involved with that particular case.

Advancements in DNA testing technology have made it possible to obtain results from evidence that in the pass yielded none. Due to the lower DNA quantity and quality requirements for PCR analysis evidence previously analyzed using RFLP yielding no results may now yield results using PCR technology.

Once a case has been accepted for testing the details of that particular case will be reviewed at that time. It is not the policy of LabCorp to suggest to clients what samples they should submit for testing.

Should you need additional information or have any questions, please give me a call at 1-800-533-0567 ext. 3209.

Sincerely,



Anthony D. Winston
Associate Technical Director
Forensic Identity Testing

CERTIFICATE OF SERVICE

I, Anthony D. Winston, the preparer of the answers herein, certify that a copy of this entire document has been placed in Lab Corp's file and the original signed and sworn copy has been placed in the United States Postal Service possession to be delivered to the following individuals:

Mrs. Holder, in the interest State of Florida v. Ernesto Behrens, Case No.: 98-5739CF10A
EBN, INC.
P.O. Box 1592
Pompano Beach, Florida 33061
(954) 786-8619

on this, 1 day of October 2003.

/S/ Anthony D. Winston
Anthony D. Winston
Print Name
LAB CORP, I. D. No.: NA
P. O. BOX 13973
1912 ALEXANDER DRIVE
RESEARCH TRIANGLE PARK,
NORTH CAROLINA 27709

NOTARY

Before, me the undersigned authority, this day personally appeared,
Anthony D. Winston, Associate Technical Director
NAME Title I.D. No.,

Who first being duly sworn, states that he or she is the individual that provided the answers and responses outlined on the answers sheet[s]. Based on the facts and summary provided in the cover letter from EBN INC, in the interest of Mr. Ernesto Behrens, case no.: 98-5739-CF10A. Thereby, certifying that the answers and responses have been thoroughly read and having personal/professional knowledge of the forgoing herein are true and correct.

/S/ Anthony D. Winston
Sworn to and subscribed before me this 1st day of October 2003.

/S/ Julie A. Hnat
Julie A. Hnat
Notary Public, State of North Carolina

My Commission Expires: Oct 31, 2004
Notary No.: _____

Type of identification used? Personally known X, or produced identification _____.