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**IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, STATE OF FLORIDA**

STATE OF FLORIDA,
Plaintiff,

v.

Case No: 98-5739CF10A
Judge: Andrew Siegel

ERNESTO BEHRENS,
Defendant. /

**MOTION FOR POST-CONVICTION RELIEF AND REQUEST FOR
APPOINTMENT OF COUNSEL**

COMES NOW, the Defendant, Ernesto Behrens, *pro-se*, hereby files this Motion for Post-Conviction Relief and Requests for Appointment of Counsel, pursuant to Florida Rule of Criminal Procedure 3.850 and Graham v. State, 372 So.2d 1363 (Fla. 1979), and requests this Honorable Court to appoint counsel and vacate the conviction entered in this case and as grounds therefore states the following:

1. The claim to this motion involves DNA evidence against the Defendant.

Litigation involving DNA evidence is inherently complex. The claim requires an evidentiary hearing because the “Inappropriate use of the statistic known as combined Probability of Inclusion,” miscalculated the statistical significance of the DNA evidence used to convict the Defendant.

2. In Graham v. State, 372 So.2d 1363 (Fla. 1979), the court recognized that although there is no absolute right to counsel in post-conviction relief processings, the post-conviction court must determine the need for counsel and resolve any doubt in favor of the appointment of counsel for the defendant. The court stated:

The question in each processing of this nature before this court should be whether, under the circumstances, the assistance of counsel is essential to accomplish a fair and thorough presentation of the petitioner's claims. Of course, doubts should be resolved in favor of the indigent petitioner when a question of the need for counsel is presented. Each case must be decided in the light of the Fifth Amendment due process requirements. The adversary nature of the proceeding, its complexity, the need for an evidentiary hearing, or the need for substantial legal research are all important elements which may require the appointment of counsel. This appointment authority is discretionary, with any doubts being resolved in favor of an indigent defendant. *Id.* at 1365-1366. Because an evidentiary hearing is necessary that will involve complex scientific evidence, due process requires the appointment of counsel.

3. the Defendant was convicted by jury on September 14, 2000.
4. The Defendant did not testify at trial or any pretrial proceedings.
5. The Defendant was convicted of:
- Sexual Battery – Armed
 - Burglary of a Dwelling with a Battery
6. The Defendant was sentenced to serve two concurrent terms of life in Florida State Prison.

7. The Judgment of conviction and sentence were entered in the 17th Judicial Circuit Court, in and for Broward County, Florida.
8. The Defendant was represented by:

Andrea Shelowitz and
Ty Terrel, Attorneys at law
9. The Defendant's conviction and sentence was appealed to the Fourth District Court of Appeal. *See* Case No: 4D00- 4484. The Appellate Court affirmed with an opinion the Defendant's conviction and sentence. *See* Behrens v. State, 830 So.2d 190 (Fla. 4th DCA 2002). The mandate issued on December 17, 2002.
10. The Defendant has filed multiple prior post-conviction motions.
11. The Defendant has not previously filed a Motion for Post-Conviction Relief based on the newly discovered evidence contained in the State's Notice regarding DNA evidence set forth below. This Motion is timely filed within two years of the State's Notice.
12. The Defendant's conviction was based solely and exclusively on DNA evidence listed by the State in its discovery submission.
13. The Defendant received a Notice pursuant to Rule 3.220(b)(4) from the State Attorney stating that the Broward Sheriff Office's Crime Lab utilized improper DNA testing protocol. Rule 3.220(b)(4) requires the State to

disclose “Any material information within the State’s possession or control that tends to negate the guilt of the defendant as to any offense charged.”

Specifically, the notice states:

“Please be advised that on April 12, 2016, the Broward Sheriff’s Office (BSO) DNA Crime Laboratory was advised by the American Society of Crime Laboratory Directors/Laboratory Accreditation Board that there was, “(I)nappropriate use of the statistic known as the Combined Probability of Inclusion (CPI) to calculate statistical significance of occurrence of genetic profiles when allelic dropout is known and/or suspected to have occurred.” We have been advised that CPI calculations were only used by the BSO DNA Crime Lab in complex DNA mixture cases. Documents regarding this matter may be found at http://www.sao17.state.fl.us/BSODNA_ASCLD.pdf

This notice is being sent to you because our records indicate that you were a party in this case and there may have been DNA evidence tested by the Broward Sheriff’s Office Crime Laboratory. If there was DNA evidence in your case, there has not been a determination whether the CPI calculations were utilized or whether the evidence was relevant in your particular case. This matter is being brought to your attention because the DNA population genetic calculations may have been inaccurately tabulated. Please contact your attorney to further discuss this information.”

14. After receipt of the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD) conclusions, the BSO Crime Lab ceased any DNA testing of complex DNA mixtures until it remedied the violations.

15. This Motion is timely filed within the two years of receipt of the State's Notice.

16. The Defendant believes that inaccurate CPI calculations were used in determining the statistical significance of the State's evidence in this case. The Defendant's conviction was induced by the inappropriate and inaccurate statistical significance attributed to the DNA evidence.

17. The Notice received from the State constituted newly discovered evidence and Brady evidence. The miscalculated statistical significance of the DNA evidence listed in the Defendant's discovery and the finding by ASCLD that the BSO Crime Lab inappropriately used the combined probability of inclusion to calculate the statistical significance of the DNA evidence was unknown by the Defendant and could not have been discovered with due diligence. The ASCLD letter was issued, and the suspension of complex DNA testing by the Crime Lab occurred, after the Defendant's conviction. See Wyatt v. State, 71 So.3d 86, 99-100 (Fla. 2011).

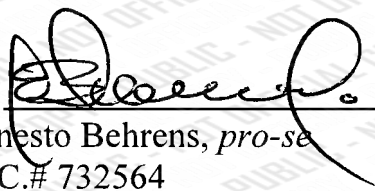
18. The fact that the sole inculpatory DNA evidence admitted at trial was based on miscalculated statistic which affected statistical significance of the DNA evidence is of such a nature that it would probably lead to an acquittal on retrial. DNA evidence was received by a jury as true, and the newly

discovered evidence that it was miscalculated would have caused the jury to disregard the DNA evidence and probably acquit the Defendant.

19. Should this Honorable Court determine that the ASCLD letter and suspension of complex DNA testing by the Crime Lab does not constitute newly discovered evidence, then counsel's failure to discover that the Crime Lab was engaging in inaccurate statistical analysis of DNA evidence constitutes ineffective assistance of counsel.

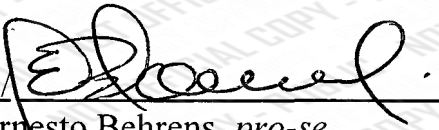
WHEREFORE, the Defendant respectfully requests this Honorable Court appoint counsel in this matter, allow counsel time to amend this *pro-se* Motion, and grant the Motion For Post-Conviction Relief.

Respectfully Submitted,

/s/ 
Ernesto Behrens, *pro-se*
D.C.# 732564

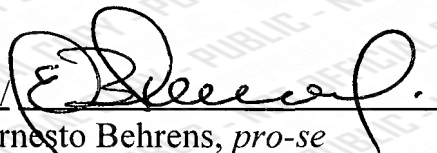
OATH

UNDER PENALTIES OF PERJURY, and administrative sanctions from the Department of Corrections, including forfeiture of gain time if this motion is to be found frivolous or made in bad faith, I certify that I understand the contents of the foregoing motion, that the facts contained in this motion are true and correct, and that I have a reasonable belief that the motion is timely filed. I certify that this motion does not duplicate previous motions that have been disposed of by the Court. I further certify that I understand English and have read the following Motion.


/s/ Ernesto Behrens, *pro-se*
D.C.# 732564

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to: The Office of the States Attorney Michael J. Satz at 201 SE Sixth Street, Fort Lauderdale, FL 33301 by U.S. Mail this 6th day of MAY, 2017.


/s/ Ernesto Behrens, *pro-se*
D.C.# 732564
Martin Correctional Institution
1150 S.W. Allapattah Road
Indiantown, Florida 34956

ERNESTO BEHRENS, DL # 732564 (A11040)

Martin Correctional Institution
Law Library
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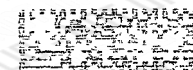
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CLERK OF CIRCUIT COURT
(CRIMINAL DIVISION)
BROWARD COUNTY MAIN COURTHOUSE
201 SE 6TH STREET
FORT LAUDERDALE, FL. 33301

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