IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT
STATE OF FLORIDA

ERNESTO BEHRENS
(Appellant)

DCA Case No: 4D04-4156
L.T. Case No: 98-5739CF10A

v.

STATE OF FLORIDA
(Appellee)
_____/

APPELLANT'S REPLY TO STATE'S RESPONSE TO ORDER TO SHOW CAUSE

The Appellant, Ernesto Behrens, Pro Se and in compliance with this court's order dated March 23, 2005, now timely files a Reply to the State's Response and states:

1). On March 23, 2005, this court directed the State to show cause why Appellant's 3.853 appeal should not be remanded to the trial court for an evidentiary hearing. This order was predicated upon this court's conclusion that the Appellant's 3.853 Motion was legally sufficient and the lower tribunal's denial lacked sufficient merit to sustain the continued denial of the Appellant's claims therein.

2). The State's response is the functional equivalent to the lower tribunal's rational and raises no new merits or arguments to support a continued denial of this cause.

3). Further, the State has failed to address the following facially sufficient claims raised in the Appellant's 3.853 Motion:

A). The sworn affidavit from Anthony Winston, associate Technical Director For Identity Testing at LabCorp that in regards to the method of DNA testing used to render results used to convict the Appellant at trial, that the results of the outdated RFLP DNA test done on one single spermatozoa cell can only be *inclusive* based on the fact that the alleged results are scientifically *impossible* to be derived on this small amount of DNA material.

B). The conflict that exists between the BSO crime lab test results and those results obtained by PBSO crime lab on the Appellant's identical DNA material.

C). The fact that the proper trial record conflicts with the sworn deposition of Donna Marchese on which the State continues to rely upon to conclude that it would be impossible to test other related physical evidence (i.e. black & white print dress, hairs, etc.). The trial transcript record supports the Appellant's claim wherein Ms. Marchese concedes it is "very possible" that there is semen on the dress (Vol. 18, TT895-898) and that it [semen] might be below her lab's detection capabilities available at that time. (Vol. 18, TT952-958). Further, Ms. Marchese stated on the record that currently accepted PCR DNA testing capabilities were not available to her at the time testing was done on the Appellant's DNA. (Vol. 19, TT991-992). Last, Ms. Marchese concedes that under her lab capabilities at the time, she could not do PCR or Mithocondrial DNA testing on the trace evidence (hairs). (Vol. 19, TT960-964).

4). The State continues to incorrectly aver that the Appellant concedes that the "odds" or population frequency statistics of 1 in 14 billion are correct. To the contrary, the Appellant had attached as Exhibit K to the 3.853 Motion that a conflict does exist in this data. Dr. Marcia Eisenberg, (LabCorp), states that a closer random selection on related DNA profiles are 1 in 454,000. The entire argument of the Appellant is that the methodology used to arrive at this calculation is inconclusive based on the documented scientific impossibility of a reliable finding using one single spermatozoa cell with outdated RFLP DNA method.

5). The Appellant contends that since he has sufficiently shown and supported with documentation that the results rendered on the one single spermatozoa cell are scientifically impossible and therefore inconclusive, further testing by PCR DNA methodology on the previously tested DNA material and now on other evidenced materials would exonerate the Appellant of the crimes charged and therefore is a proper claim under Rule 3.853.

6). The Appellant is not simply "unhappy with the results" as alleged by the State's citing **King v. State**, 808 So2d 1237, 1249 (Fla. 2002), but rather, the Appellant claims his actual innocence of the crimes charged and proper method PCR DNA testing will completely exonerate the Appellant of the crimes charged.

This is not a "fishing expedition" as trumped by the State, but a factual and facially sufficient claim that requires an evidentiary hearing where the claims presented by the Appellant have not been conclusively refuted by the record or rebutted by the State.

7). Last, the State concludes that the relief sought of further DNA testing "at taxpayer's expense" is not permitted by Rule 3.853. The Appellant, to prove his actual innocence and to be completely exonerated of the crimes charged,

will fully incur all costs of any DNA testing without compliant.

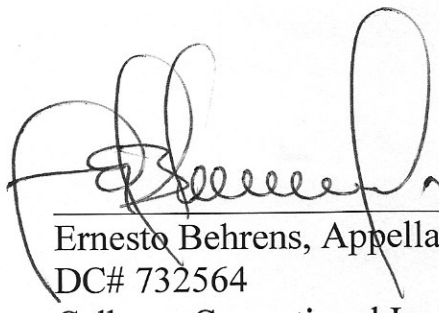
In conclusion, the State has failed to conclusively refute the Appellant's claims from the record nor has the State sufficiently addressed all the claims or rebutted the factual and documented allegations in the appellant's 3.853 Motion by encompassing the repeated rationale of the State Attorney in the lower tribunal.

Further, where there is documented conflict with the findings using the Appellant's same DNA oral swabs between BSO and PBSO and further the conflict is compounded by the exculpatory findings by LabCorp as documented in the 3.853 Motion, where analyst disagree, tests should be deemed inconclusive in absence of further analysis. See: **Murry v. State**, 838 So2d 1073 (Fla. 2002).

Accordingly, the Appellant respectfully moves this Honorable Court to reverse and remand this cause to the trial court for further proceedings in the form of an evidentiary hearing, or in the alternative, grant the relief requested of conducting further DNA analysis in this case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply has been timely placed in Department of Corrections' official's hands to be forwarded by U.S. Mail to the Office of the Attorney General, Criminal Appeals Division, 1515 N. Flagler Drive, 9th Floor, West Palm Beach, Florida 33401-3432, done this 20 day of April, 2005.



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