IN THE DISTRICT COURT OF APPEAL

FOURTH DISTRICT

ERNESTO BEHRENS,

Appellant,

v. Case no. 4D04-4156

STATE OF FLORIDA,

Appellee.

_____/

RESPONSE TO ORDER TO SHOW CAUSE

Appellee, the State of Florida, by and through undersigned counsel, states:

To obtain additional DNA testing in a post-conviction setting, Appellant must set forth facts that reveal DNA testing will exonerate him or mitigate his sentence. See Fla. R. Crim. P. 3.853(b)(3). Unless the motion provides specifics which explain how the items sought to be tested will either establish his innocence or release his level of criminality, the defendant's motion is legally insufficient. Robinson v. State, 865 So. 2d 1259, 1264-65 (Fla. 2004).

Appellant concedes that the perpetrator broke into the victim's apartment, entered the bedroom where the victim was sleeping and then ejaculated on her thigh (Defendant's motion p. 2). A rape kit and several other items, including bedding were taken into evidence. Id. at 2-3. Appellant concedes his DNA

was matched to seminal fluid found on a green fitted sheet recovered from the victim's bed. Id. at 3. Appellant admits that the DNA evidence showed that the odds of someone other than the defendant committing the crime were 1 in 14 billion. Id. at 3. The victim testified that she had placed clean linens on the bed two weeks prior to the assault and that no one but her assailant and herself had been in the bedroom in the four and one half months prior to the assault. Id. at 4.

Appellant claims that additional DNA testing of several items recovered from the scene will exonerate him or reduce his sentence. Id. at 4-5. That claim is refuted by the record. Appellant did not contend at trial and does not allege here that he had consensual sex with the victim. The discovery of previously unidentified DNA would not alter the conclusive evidence establishing Appellant's semen on the victim's bed. It would not exonerate him or reduce the penalty he faced.

Appellant is attempting to use Rule 3.853 as a method to obtain further testing to challenge the original DNA results. This is not permitted by Rule 3.853. See Newberry v. State, 870 So. 2d 926, (Fla. 4th DCA 2004)(results that are contested by the defendant do not fit within the meaning of the term "inconclusive" in Rule 3.853). See also King v. State, 808 So. 2d 1237, 1249 (Fla. 2002)(Rule 3.853 does not provide for retesting when the defendant is unhappy with the results).

Among the remaining items Appellant seeks to test is a black and white print dress which was examined with special lighting and failed to reveal any potential sources for DNA. (Appendix to State's Response, Exhibit A, pp. 11-13). Appellant claims that "Conclusive DNA testing of the dress would bear on the question of the defendant's guilt or innocence because it would settle the issue of whether sperm exists on the dress and, if so, whether the sperm belongs to the defendant." (Defendant's motion, p. 6). Appellant's motion is merely a "fishing expedition," at taxpayer's expense, which is not permitted by Rule 3.853. See Chesire v. State, 872 So. 2d 427, 428 (Fla. 5th DCA 2004) and Hitchcock v. State, 866 So. 2d 23, 27 (Fla. 20004).

WHEREFORE, the trial court's order denying relief should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished by mail to: Ernesto Behrens, #732564, Calhoun Correctional Institution, 19562 Institutional Drive, Dorm H-11160, Blountstown, FL 32424-9700, on April 11, 2005.

Of Counsel