HC

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

STATE OF FLORIDA,
Plaintiff,

v.

ERNESTO BEHRENS,
Defendant,

_____/

PROVIDED TO HOLMES CI ON
MAY 14 2007
FOR MAILING EB

CASE NO.: 98-5739CF10A
JUDGE: ANDREW SIEGEL

FILED IN OPEN COURT
CLERK CIRCUIT COURT
BROWARD COUNTY, FLA.
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DEFENDANT'S AMENDED AND PROCEDURALLY CORRECTED 3.850 MOTION FOR POSTCONVICTION RELIEF

Defendant, Ernesto Behrens, *pro se*, respectfully submits this, his Amended and Procedurally Corrected Motion for Postconviction Relief, pursuant to Rule 3.850 Florida Rules of Criminal Procedure in the above styled numbered case and as further basis therefore states:

1. Defendant was charged by information in the Seventeenth Judicial Circuit with Count 1: Armed Sexual Battery; Count 2: Burglary of a Dwelling with a Battery.

2. Defendant entered a plea of not guilty and proceeded to jury trial on August 9, 2000. On September 14, 2000 a jury found Defendant guilty as charged in Counts 1 and 2.

3. During the trial proceedings, Judge Alfred Horowitz was the presiding judge. Ty Terrel and Andrea Shelowitz represented Defendant during trial. James Lewis represented Defendant during sentencing proceedings. Dennis Siegel represented state as the prosecuting attorney.

4. Defendant was sentenced on November 13, 2000. Although the 1994 sentencing guidelines scoresheet introduced at sentencing by the State recommended a sentencing range of 115.8 months to 193.0 months the trial court upwardly departed from the above recommendation and imposed two concurrent life sentences to be served without parole.

5. Defendant timely filed a Notice of Appeal on December 4, 2000.

6. Defendant filed a brief for appeal in the Fourth District Court on December 30, 2001.

7. The Fourth District Court of Appeals affirmed Defendant's judgments and convictions on October 30, 2002. See *Behrens v. State*, 830 So.2d 190.

8. Defendant filed a Motion for Rehearing and Clarification on October 30, 2002, and on November 15, 2002 the above motion was denied.

9. Defendant filed for Discretionary Review to the Florida Supreme Court and on April 14, 2003 the review was denied. See, *Behrens v. State*, 845 So.2d 887.

10. Defendant filed a pro se motion for DNA testing (Fla.R.Crim.P. 3.853) on October 22, 2003. The above motion was denied and Defendant did appeal. The Appeal was affirmed on May 25, 2005.

11. Defendant filed a pro se Motion to Correct an Illegal Sentence (3.800 (a)) on January 16, 2004. The above motion was denied and Defendant did appeal. The Appeal was affirmed on July 22, 2005.

12. Defendant filed a Petition Alleging Ineffective Assistance of Appellate Counsel (9.141(c)) to the Fourth District Court of Appeals and the above motion was denied on May 24, 2005.

13. Defendant filed a Motion to Correct Illegal Sentence (3.800 (a)) based upon an Apprendi violation, on March 12, 2007. This motion is currently pending in this court.

14. Defendant's first two Motions for Postconviction Relief were dismissed without prejudice to refile the instant Amended and Procedurally Corrected Motion.

SECTION ONE

SPECIFIC DEFICIENCIES BY THE TRIAL ATTORNEYS TY TERREL AND ANDREA SHELOWITZ, AND RESULTANT PREJUDICE

GROUND I

IN VIOLATION OF THE DEFENDANT'S FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS TRIAL COUNSEL WAS PREJUDICIALLY INEFFECTIVE IN FAILING TO PROPERLY PRESERVE FOR APPELLATE REVIEW THE TRIAL COURT'S ABUSE OF DISCRETION IN DENYING DEFENDANT'S (3) THREE ORAL MOTIONS TO STRIKE THE WHOLE JURY PANEL WHERE DEFENSE COUNSEL DID NOT RENEW HIS PRIOR OBJECTIONS BEFORE THE SWEARING IN OF THE JURY

The Defendant contends that the record clearly shows that trial counsel moved the trial court to strike the whole jury panel during the early stage of the trial. The first time counsel moved to strike the whole jury panel was based on the improper comments made by one of the prospective jurors, Mr. Robbins, during the voir dire examination which tainted the whole jury panel (See Exhibit A). The second time was based on the unlawful, retroactive administration of the voir dire oath that was given to the first panel of prospective jurors (See Exhibit B) and the third time was based on the prejudicial (33) thirty-three days separation of the jury panel between their selection and the beginning of the first day of trial without the jeopardy oath being attached to them (See Exhibit C).

The defendant maintains that the requirement of preservation is central to the trial process. However, the defense objections were not properly preserved, because defense counsel did not renew his objections before the swearing in of the jury (See Exhibit D). Due to the lack of preservation, the District Court of Appeal was without jurisdiction to even consider the issue. The purpose of requiring renewal of the objection is to make it plain to the trial court that the defendant has not abandoned his earlier objection and to give the trial court an opportunity to reconsider its earlier ruling on the jury panel strike. At that point, the trial judge could have exercised discretion to either recall the challenged juror for service on the panel, stricken the entire panel and began anew, or stood by the earlier ruling.

The Defendant alleges that he suffered prejudice from counsel's errors where trial counsel prejudicially waived the above aforementioned jury panel challenges, where defense counsel failed to renew his objections prior to the jury being sworn, and the failure to preserve the challenges to the jury panel by sufficiently bringing the objection to the trial judge's attention resulted in a biased juror, Mr. Manuel Torres, serving on the jury panel that convicted Defendant, and precluded the District Court of Appeals from considering this issue, where a remand with instructions for a new trial would have been obtained if trial court had ultimately denied the motions.

In conclusion to the above referenced ground, supporting argument, and trial transcripts, it is clear that the Defendant's trial counsel was constitutionally deficient, that the Defendant suffered prejudice and that there is a reasonable probability that the outcome would have been different absent counsel's unprofessional errors. This deficient conduct so undermined the proper functioning of the adversarial system and trial that the proceedings cannot be relied upon as having produced a fair trial and just results and therefore, requires a new trial, or in the alternative where the record establishes that an actually biased juror served on the jury without objection, then an evidentiary hearing is appropriate to see if the defense counsel had a tactical reason for not challenging the juror for cause/peremptorily/backstrike or if the Defendant participated in the decision to accept the juror.

SECTION ONE
GROUND II

IN VIOLATION OF THE DEFENDANT'S FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS TRIAL COUNSEL WAS PREJUDICIALLY INEFFECTIVE IN FAILING TO RAISE A CAUSE CHALLENGE TO A BIASED JUROR, MR. MANUEL TORRES, WHO ULTIMATELY SERVED ON THE JURY THAT CONVICTED DEFENDANT

The Defendant contends that where a counsel's incompetence involves the failure to exercise a cause challenge, the proper inquiry for deciding whether prejudice under *Strickland* has occurred is whether the failure to preserve a challenge to a juror by sufficiently bringing the objection to the trial judge's attention resulted in a biased juror serving on the jury panel that convicted the Defendant. Where a claim of ineffective assistance of counsel is grounded in the claim that counsel failed to strike a biased juror, a Defendant must show that the juror was actually biased against him. The nature of the juror's bias should be patent from the face of the record. Only where a juror's bias is so clear can a Defendant show the necessary prejudice under *Strickland*. Thus, if the counsel's error did not reach in the seating of an actually biased juror, the legal equivalent of fundamental error, then postconviction relief is not appropriate.

In this case the record clearly shows that defense counsel persistently objected to the first panel of prospective jurors because the tainted comments made by one of the prospective jurors, Mr. Robbin, during voir dire examination, the improper retroactive administration of the voir dire oath that was given to the first panel of prospective jurors, and the prejudicial (33) thirty-three days separation of the jury panel between their selection and the beginning of the first day of trial without the jeopardy oath being attached to them. Although, trial counsel strongly moved the trial court to strike the whole jury panel, counsel never incorporated the defense strategy to raise a cause challenge to the only biased and contaminated juror that was left from the first panel of prospective jurors that counsel so much wanted to strike out, Mr. Manuel Torres!

The Defendant maintains that the face of the record clearly shows that Mr. Manuel Torres, was one of the jurors of the first panel of prospective jurors that were selected on August 9, 2000 (See Exhibit E), that Mr. Manuel Torres was present during the comments of Mr. Robbins, during voir dire examination which tainted the whole jury panel, that Mr. Manuel Torres was one of the jurors that was improperly, unlawfully, and retroactively sworn for voir dire examination purposes, that Mr. Manuel Torres was one of the jurors allowed to separate for

(33) thirty-three days without being finally sworn, and most importantly of all, that the trial judge said on the record that he was going to ask to the prospective jurors of the first panel before he retroactively swore them in, if they had said the truth the day before and were going to tell the truth in the future (See Exhibit F). But, the record clearly shows that the judge never did ask the jurors nor the trial counsel objected to the failure to ask them, or reminded the judge to ask them as to their truthful statements given the day before and future statements (See Exhibit G). The Defendant contends that where the whole purposes of the voir dire examination is to find the truth, and that the translation from French to English of "Voir Dire" is "to tell the truth," seem to cynical and improper to select a juror that was never properly confronted as to his truthful statements, where a juror is not properly qualified, prejudice must be presumed and the error cannot be harmless.

The Defendant alleges that he suffered prejudice from counsel's errors, where his failure to properly raise a cause challenge to Mr. Manuel Torres allowed the biased juror to serve on the jury panel that convicted the Defendant without objection, and precluded the District Court of Appeals from considering this issue where a remand with instructions for a new trial would have been obtained if the trial court had denied the requested challenge.

In conclusion to the above referenced ground, supporting argument, and trial transcripts, it is clear that the Defendant's trial counsel was constitutionally deficient, that the Defendant suffered prejudice and that there is a reasonable probability that the outcome would have been different absent counsel's unprofessional errors. This deficient conduct so undermined the proper functioning of the adversarial system and trial that the proceedings cannot be relied upon as having produced a fair trial and just results and therefore, requires a new trial, or in the alternative where the record establishes that an actually biased juror served on the jury without objection, then an evidentiary hearing is appropriate to see if the defense counsel had a tactical reason for not challenging the juror for cause/peremptorily/backstrike or if the Defendant participated in the decision to accept the juror.

SECTION ONE
GROUND III

IN VIOLATION OF THE DEFENDANT'S FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS TRIAL COUNSEL WAS PREJUDICIALLY INEFFECTIVE IN FAILING TO SEEK TO BACKSTRIKE, SPECIFICALLY MR. MANUEL TORRES ON SEPTEMBER 11, 2000, BEFORE THE SWEARING IN OF THE JURY PANEL.

The Defendant contends that under Fla.R.Crim.P. 3.310 (a), a party may challenge for cause, or utilize remaining peremptory challenges on the day of trial, if done prior to the time the jurors are sworn. If a jury has been tentatively selected and, sometime thereafter, the defense attorney or the defendant has well formed doubts as to one or more of the jurors and still has peremptory challenges available, as in the instant case, counsel should seek to backstrike jurors as permitted with those available challenges. Likewise, if counsel or the Defendant feels there are grounds for a challenge for cause or a remedy to strike the jury is denied by the court and peremptory challenges remain, counsel and the Defendant can backstrike on the day of the trial as long as the jurors have not been sworn. Further, trial court does not have discretion to infringe

upon a party's right to challenge any jurors, either peremptorily or for cause, prior to the time the jury was sworn.

The Defendant asserts that it was blatant ineffective assistance of counsel when counsel prejudicially failed to specifically backstrike juror Mr. Manuel Torres from the jury panel. First, counsel knew or should have known that under Rule 3.350, 3.350 (c), and 3.350 (d) the Defendant still had peremptory challenges left. Second, counsel knew specifically that juror, Mr. Manuel Torres, was a biased juror because he was tainted by a comment made during voir dire examination. He was unlawfully and retroactively sworn for voir dire purposes. The judge never inquired as to the truthfulness of his statements before retroactively swearing him in, and he was prejudicially separated for (33) thirty-three days without jeopardy attaching to him between his selection and the first day of trial. Third, the whole panel was also prejudicially separated for (33) thirty-three days as well. Fourth, counsel knew that the jurors were not yet sworn in and should have known that under rule 3.310 (a), he was allowed to backstrike jurors.

The Defendant alleges that he suffered prejudice from counsel's errors where his failure to backstrike juror Manuel Torres from the jury panel on the day of the trial, prejudicially allow him, a biased juror, to serve on the jury panel that convicted the Defendant without objection, and precluded the District Court of Appeals from considering this issue where a remand with instructions for a new trial would have been obtained, if trial court had denied the requested backstrike.

In conclusion to the above referenced ground, supporting argument, and trial transcripts, it is clear that the Defendant's trial counsel was constitutionally deficient, that the Defendant suffered prejudice and that there is a reasonable probability that the outcome would have been different absent counsel's unprofessional errors. This deficient conduct so undermined the proper functioning of the adversarial system and trial that the proceedings cannot be relied upon as having produced a fair trial and just results and therefore, requires a new trial, or in the alternative where the record establishes that an actually biased juror served on the jury without objection, then an evidentiary hearing is appropriate to see if the defense counsel had a tactical reason for not challenging the juror for cause/peremptorily/backstrike or if the Defendant participated in the decision to accept the juror.

SECTION ONE
GROUND IV

IN VIOLATION OF THE DEFENDANT'S FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS TRIAL COUNSEL WAS PREJUDICIALLY INEFFECTIVE IN FAILING TO INCORPORATE THE DEFENSE STRATEGY TO BACKSTRIKE JURORS AS PERMITTED WITH THOSE STILL AVAILABLE CHALLENGES ON SEPTEMBER 11, 2000, AND WHEN TRIAL COURT DENIED DEFENDANT'S MOTION TO DISCHARGE, COUNSEL SHOULD HAVE MOVED TO SELECT AS MANY JURORS AS ALLOWED AND BEFORE THE NEW SELECTED PROSPECTIVE JURORS BECAME SWORN IN FOR THEIR VOIR DIRE EXAMINATION, COUNSEL SHOULD HAVE FILED A WRIT OF PROHIBITION BASED ON SPEEDY TRIAL VIOLATION.

The Defendant contends that under Fla.R.Crim.P. 3.310 (a), a party may challenge for cause, or utilize remaining peremptory challenges on the day of trial, if done prior to the time the jurors are sworn as was the case in this instance. If a jury has been tentatively selected and sometime thereafter, the defense attorney or the defendant has well formed doubts as to one or more of the jurors and still has peremptory challenges available, counsel should seek to backstrike jurors as permitted with those available challenges. Likewise, if counsel or the Defendant feels there are grounds for a challenge for cause or a remedy to strike the jury is denied by the court and peremptory challenges remain, counsel and the Defendant can backstrike on the day of the trial as long as the jurors have not been sworn. Further, trial court does not have discretion to infringe upon a party's right to challenge any jurors, either peremptorily or for cause, prior to the time the jury was sworn.

The Defendant asserts that it was a blatant ineffective assistance of counsel when counsel prejudicially failed to incorporate the strategy to backstrike jurors from the jury panel, select as many new jurors as possible and before the jury was sworn in filed a Writ of Prohibition based on Speedy Trial violation, First, counsel knew or should have known that under Rule 3.350, 3.350 (c), and 3.350 (d) the Defendant still had peremptory challenges left. Second, counsel knew that the jurors were not yet sworn in and should have known that under Rule 3.310 (a), he was allowed to backstrike jurors. Third, since defense counsel had filed a Demand for Speedy Trial on June 23, 2000 (See Exhibit H), filed a proper notice of expiration of speedy trial on September 11, 2000 (See Exhibit I), and had filed a Motion for Discharge (See Exhibit J) before the jury panel was finally sworn in, counsel knew without a doubt that the speedy trial limitations had expired. Fourth, counsel should have known that the new jurors that could have been selected after the backstriking would have been too late to satisfy the speedy trial upon demand and therefore he could have filed a Writ of Prohibition based on speedy trial violation, guaranteeing this way the Defendant's discharge forever under the speedy trial rule without proceeding to trial.

The Defendant alleges that he suffered prejudice from counsel's errors where his failure to incorporate the above stated strategy on September 11, 2000, when trial court denied the Defendant's Motion to Discharge prejudicially allowed the trial to proceed, and totally waived

the expiration of speedy trial strategy where a guaranteed discharge forever would have been obtained on both counts of the instant information; precluded the District Court of Appeal from considering this issue where a remand with instructions to discharge forever would have been obtained, if counsel had filed the proper Writ of Prohibition, and would have prevented a biased juror, Mr. Manuel Torres, from ultimately serving on the jury panel that convicted the Defendant without objections.

In conclusion the above referenced ground, supporting argument, and trial transcripts, it is clear that the Defendant's trial counsel was constitutionally deficient, that the Defendant suffered prejudice and that there is a reasonable probability that the outcome would have been different absent counsel's unprofessional errors. This deficient conduct so undermined the proper functioning of the adversarial system and trial that the proceedings cannot be relied upon as having produced a fair trial and just results and therefore, requires a new trial, or in the alternative where the record establishes that an actually biased juror served on the jury without objection, then an evidentiary hearing is appropriate to see if the defense counsel had a tactical reason for not challenging the juror for cause/peremptorily/backstrike or if the Defendant participated in the decision to accept the juror.

SECTION ONE
GROUND V

IN VIOLATION OF THE DEFENDANT'S FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS, TRIAL COUNSEL WAS PREJUDICIALLY INEFFECTIVE IN FAILING TO FILE AND ARGUE AN ADEQUATE MOTION FOR JUDGMENT OF ACQUITTAL AT THE CLOSE OF THE STATE'S EVIDENCE AND PRESERVE FOR DIRECT APPEAL THE INSUFFICIENCY OF THE EVIDENCE AS TO THE ELEMENTS OF THE CRIME CHARGED IN COUNT (I) SEXUAL BATTERY WHILE USING OR THREATENING TO USE A DEADLY WEAPON.

The Defendant contends that an allegation that trial counsel failed to properly articulate, present and argue a Motion for Judgment of Acquittal is a legally sufficient claim to be raised in a Motion for Postconviction Relief. Also, a claim that trial counsel was ineffective for failing to preserve a sufficiency of the evidence claim for appeal by way of adequate Motion for Judgment of Acquittal.

In the instant case, the State had the burden of proving that the alleged knife was a deadly weapon. The State failed to meet its burden since there was no evidence in the record to support a finding that the alleged knife was a deadly weapon by its ordinary use or in the manner in which was used on the victim. No case in Florida has determined that a knife qualifies as a "Deadly Weapon" as a matter of law. Thus, the evidence was legally insufficient to find the Defendant guilty of Sexual Battery while using or threatening to use a Deadly Weapon. Therefore, trial counsel should have filed an adequate Motion for Judgment of Acquittal stating that the perpetrator did not commit Sexual Battery while using or threatening to use a deadly weapon. Instead trial counsel's inadequate Motion for Direct Acquittal and renewal motion were based on DNA evidence and arguments that should have been brought up during a pre-trial Motion to Suppress (See Exhibit K).

The defendant alleges that he suffered prejudice by trial counsel's error, because if indeed the alleged knife did not constitute a Deadly Weapon, Defendant was erroneously convicted of Sexual Battery while using or threatening to use a deadly weapon, rather than being acquitted as to Count (I), where Defendant had properly and timely waived all lesser included offenses during the charge conference (See Exhibit L). Further, an adequately filed Motion for Judgment of Acquittal would have properly preserved the aforementioned issues of insufficiency of the evidence for Appellate review, where reversal with instructions to discharge would have been obtained by the District Court of Appeals, if the trial court had denied the J.O.A. Motion.

In conclusion to the above referenced ground, supporting argument, and trial transcripts, it is clear that the defendant's trial counsel was constitutionally deficient, that the defendant suffered prejudice and that there is a reasonable probability that the out come would have been different absent counsel's unprofessional errors. This deficient conduct so undermined the proper functioning of the adversarial system and trial that the proceedings cannot be relied upon as having produced a fair and just result, and therefore requires a discharge of the above count of the information, a new trial, or in the alternative an evidentiary hearing on this claim.

SECTION ONE
GROUND VI

IN VIOLATION OF THE DEFENDANT'S FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS TRIAL COUNSEL WAS PREJUDICIALLY INEFFECTIVE IN FAILING TO FILE AND ARGUE AN ADEQUATE MOTION FOR JUDGMENT OF ACQUITTAL AT THE CLOSE OF THE STATE'S EVIDENCE AND PRESERVE FOR DIRECT APPEAL THE INSUFFICIENCY OF THE EVIDENCE AS TO THE ELEMENTS OF THE CRIME CHARGED IN COUNT (II) BURGLARY OF A DWELLING WITH A BATTERY.

The Defendant contends that an allegation that trial counsel failed to properly articulate, present and argue a Motion for Judgment of Acquittal is a legally sufficient claim to be raised in a Motion for Postconviction Relief. Also, a claim that trial counsel was ineffective for failing to preserve a sufficiency of the evidence claim for appeal by way of adequate Motion for Judgment of Acquittal.

In the instant case, the state had the burden of proving that the alleged battery stated in Count (II) of the information was in fact committed "in the course of committing" the alleged burglary as required under Fla. Stat. 810.011(4), in other words, in the attempt to commit the alleged burglary, or in the flight after the attempt or commission of such burglary. The state failed to meet its burden since there was no evidence in the record to support a finding that the alleged battery occurred 'in the course of committing.' Thus, the evidence was legally insufficient to find the Defendant guilty of Burglary of a Dwelling with a Battery. Therefore, trial counsel should have filed an adequate Motion for Judgment of Acquittal stating that the perpetrator did not commit Burglary of a Dwelling with a Battery. Instead, trial counsel's inadequate Motion for Direct Acquittal and renewal motion were based on DNA evidence and

arguments that should have been brought up during a pre-trial Motion to Suppress (See Exhibit K).

The Defendant alleges that he suffered prejudice by trial counsel's error because if indeed the alleged Battery was not committed in the course of committing the alleged Burglary, Defendant was erroneously convicted of burglary of a dwelling with a battery, rather than being acquitted as to Count (II), where Defendant had properly and timely waived all lesser included offenses during the charge conference (See Exhibit L). Further, an adequately filed Motion for Judgment of Acquittal would have properly preserved the aforementioned issues of insufficiency of the evidence for Appellate Review where reversal with instructions to discharge would have been obtained by the District Court of Appeals if the trial court had denied the J.O.A. Motion.

In conclusion to the above referenced ground, supporting argument, and trial transcripts, it is clear that the defendant's trial counsel was constitutionally deficient, that the defendant suffered prejudice and that there is a reasonable probability that the out come would have been different absent counsel's unprofessional errors. This deficient conduct so undermined the proper functioning of the adversarial system and trial that the proceedings cannot be relied upon as having produced a fair and just result, and therefore requires a discharge of the above count of the information, a new trial, or in the alternative an evidentiary hearing on this claim.

SECTION ONE
GROUND VII

IN VIOLATION OF THE DEFENDANT'S FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS TRIAL COUNSEL WAS PREJUDICIALLY INEFFECTIVE IN FAILING TO OBJECT DURING CHARGE CONFERENCE AND ALSO DURING JURY INSTRUCTIONS TO THE OMISSION OF THE "IN THE COURSE OF COMMITTING" DEFINITION AND INSTRUCTION WHICH NECESSARILY SUPPORTS THE BATTERY ENHANCEMENT ELEMENT OF THE CRIME CHARGED IN COUNT (II) BURGLARY OF A DWELLING WITH A BATTERY, AND IS REQUIRED TO BE PROVEN BY COMPETENT EVIDENCE.

The Defendant contends that the failure to instruct the jury correctly on essential and material elements of the crime charged and required to be proven by competent evidence is "Fundamental Error," if the omission is pertinent or material to what the jury had to consider in order to convict. The United States Supreme Court held that Due Process requires that every element of the crime charged must be proved, to a jury, beyond a reasonable doubt. Trial court should not give instructions, which are confusing, contradicting, or misleading. Where an instruction is misleading or confusing, prejudicial error occurs where jury might reasonably have been mislead.

Florida Rule of Criminal Procedure 3.390 (d) makes it clear that a party must object to the giving or failure to give a jury instruction in order to preserve that issue for Appellate Review. On the other hand, an Attorney's failure to request jury instructions and failure to object to the trial court's failure to instruct the jury correctly are facially sufficient claims under Postconviction Motion 3.850. Finally, where jury verdict and jury instructions are in conflict as

in the *sub-judice* case, evidentiary hearing is required to determine claim of ineffective assistance of counsel.

In the instant case the "In the Course of Committing" as well as the "Dwelling" definitions and instructions were omitted in Count (II) (See Exhibit M). Yet, trial counsel failed to properly object to the omitted, required and essential instructions of the enhanced elements that were charged in Count (II) and required to be proven by competent evidence (See Exhibit N).

The Defendant alleges that he suffered prejudice by counsel failing to properly object and/or request the proper instructions where the jury could not have understood without the "in the course of committing" definition and instruction, that a conviction for burglary of a dwelling with a battery is only possible, if the alleged battery occurred in the attempt to commit the alleged burglary or in the flight after the attempt or commission of such burglary as required under Fla. Stat. 810.011(4). There is no doubt that if the proper jury instruction would have been properly given, the jury would have acquitted the Defendant as to this Count because Defendant did properly and timely waive all lesser included offenses as to this charge (See Exhibit L). So because there was not evidence to support that a battery occurred "in the course of committing," the jury was obligated to enter a not guilty verdict as to this above count.

In conclusion to the above referenced ground, supporting argument, and trial transcripts, it is clear that the defendant's trial counsel was constitutionally deficient, that the defendant suffered prejudice and that there is a reasonable probability that the out come would have been different absent counsel's unprofessional errors. This deficient conduct so undermined the proper functioning of the adversarial system and trial that the proceedings cannot be relied upon as having produced a fair and just result, and therefore requires a discharge of the above count of the information, a new trial, or in the alternative an evidentiary hearing on this claim.

SECTION ONE
GROUND VIII

IN VIOLATION OF THE DEFENDANT'S FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS TRIAL COUNSEL WAS PREJUDICIALLY INEFFECTIVE IN FAILING TO RAISE AND ARGUE ON A MOTION TO ARREST JUDGMENT OR IN THE FILED MOTION FOR NEW TRIAL, THE INSUFFICIENCY OF THE JURY VERDICT FORM IN COUNT (I) WHERE THE CONSTITUTIONALLY INFIRM VERDICT FORM DID NOT SPECIFICALLY REFLECT OR FIND THE ESSENTIAL ELEMENTS OF "USE OR THREATENED USE OF A DEADLY WEAPON" NECESSARY TO ALLOW A LIFE FELONY CONVICTION.

The Defendant contends that under Fla.R.Crim.P., Rule 3.580 Motions for New Trial are addressed to trial errors and the efficiency of the *verdict.* Under Fla.R.Crim.P., rule 3.610 Motions for Arrest of Judgment address defects on the face of the indictment, information, or *verdict.*

By information, the Defendant was charged with Sexual Battery with the used or threatened use of a Deadly Weapon (See Exhibit O). The jury verdict did not contain the words

"Deadly Weapon" or "Used or threatened to use" anywhere on its face. The jury verdict form simply read "Sexual Battery-Armed. (See Exhibit P)" The verdict form, as stated on its face, is a finding to a nonexistent charge or statutory crime in Florida and the imposition of a judgment and sentence for the nonexistent crime of Sexual Battery-Armed is in itself a fundamental error. Trial counsel failed to raise this issue on the filed Motion for New trial (See Exhibit Q). Florida Courts have held that it is a fundamental matter of due process that the State may only punish one who has committed an offense, which is an act clearly prohibited by lawful authority. A verdict that is not responsive to or consistent with the crime charged in the information, and does not properly include the statutory required essential elements necessary for the enhanced conviction and sentence is illegal and insufficient to support a conviction and a life sentence. Recently the Third District Court of Appeal held that where all elements of the crime charged were not clearly found by the jury, "... the verdict form used was constitutionally infirm." Both the United States and the Florida Supreme Court require specific findings of any facts that will increase the penalty for a crime beyond the statutory maximum. Finally, where jury verdict and jury instructions are in conflict like in this case, evidentiary hearing is required to determine claim of ineffective assistance of counsel. In the instant case the jury was instructed as to Sexual Battery while using or threatening to use a Deadly Weapon, a Life Felony, but the jury returned a guilty verdict as to Sexual Battery-Armed, a nonexistent crime in Florida. Also, it is important to point out that Sexual Battery-Armed is not the legal functional equivalent of Sexual Battery while using or threatening to use a Deadly Weapon.

The Defendant alleges that he suffered prejudice by trial counsel's errors where Defendant was erroneously convicted and sentenced to life in prison for a crime that does not exist in Florida, and for which no instructions were given to the jury by the trial court (See Exhibit M). So if this issue would have been properly brought up in the aforementioned motions the District Court of Appeal would have reversed the conviction and sentence with instructions to discharge the Defendant because there was not sufficient evidence as a matter of law to support the "use of a deadly weapon enhancement." So because the trial counsel's failure to properly incorporate these motions as part of the Record on Appeal, the District Court was without jurisdiction to consider the above infirmity. On the other hand the Defendant was truly found guilty of a lesser included offense which is the functional equivalent to an acquittal, where Defendant had properly and timely waived all lesser included offenses during the charge conference (See Exhibit L).

In conclusion to the above referenced ground, supporting argument, and trial transcripts, it is clear that the defendant's trial counsel was constitutionally deficient, that the defendant suffered prejudice and that there is a reasonable probability that the out come would have been different absent counsel's unprofessional errors. This deficient conduct so undermined the proper functioning of the adversarial system and trial that the proceedings cannot be relied upon as having produced a fair and just result, and therefore requires a discharge of the above count of the information, a new trial, or in the alternative an evidentiary hearing on this claim.

SECTION ONE
GROUND IX

IN VIOLATION OF THE DEFENDANT'S FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS TRIAL COUNSEL WAS PREJUDICIALLY INEFFECTIVE IN FAILING TO OBJECT AND PRESERVE FOR APPELLATE REVIEW THE CONSTITUTIONALLY INFIRM JURY VERDICT, FINDING THE DEFENDANT GUILTY OF BURGLARY OF A "DWELLING" WITH A "BATTERY" WHERE NO "DWELLING" OR "IN THE COURSE OF COMMITTING" INSTRUCTION WERE GIVEN TO THE JURY FOR THEIR CONSIDERATION.

The Defendant contends that under Fla.R.Crim.P., Rule 3.580 Motions for New Trial are addressed to trial errors and the efficiency of the *verdict.* Under Fla.R.Crim.P., Rule 3.610 Motions for Arrest of Judgment address defects on the face of the indictment, information, or *verdict.*

By information, the Defendant was charged with Burglary of a Dwelling with a Battery (See Exhibit O). The verdict form read "Burglary of a Dwelling with a Battery (See Exhibit R)." Recently the Third District Court of Appeal held that where all the elements of the crime charged were not clearly found by the jury, "... the verdict form used was constitutionally infirm." Both the United States and the Florida Supreme Court require specific findings of any facts that will increase the penalty for a crime beyond the statutory maximum. Finally, where jury verdict and jury instructions are in conflict like in this case, evidentiary hearing is required to determine claim of ineffective assistance of counsel. In the instant case the jury was instructed as *'Structure'* only, no *'Dwelling'* instructions were given to the jury during the burglary instructions in Count (II), and the jury was never instructed either as to the *'in the course of committing'* instruction which necessarily supports the Battery enhancement element of the crime charged (See Exhibit M). However, the jury returned a guilty verdict as to Burglary of a Dwelling with a Battery although they were never properly instructed as to those essential enhanced elements of the crime.

The Defendant alleges that he suffered prejudice by trial counsel's failure to object and preserve for Appellate review the constitutionally infirm jury verdict where the District Court of Appeals would have reversed the conviction with instructions to discharge the Defendant because there was not sufficient evidence as a matter of law to support the Battery enhancement of the Burglary charge, where no Battery was committed *"in the course of committing"* the alleged Burglary and most importantly of all because the Defendant had properly and timely waived all lesser included offenses during the charge conference (See Exhibit L).

In conclusion to the above referenced ground, supporting argument, and trial transcripts, it is clear that the defendant's trial counsel was constitutionally deficient, that the defendant suffered prejudice and that there is a reasonable probability that the out come would have been different absent counsel's unprofessional errors. This deficient conduct so undermined the proper functioning of the adversarial system and trial that the proceedings cannot be relied upon as

having produced a fair and just result, and therefore requires a discharge of the above count of the information, a new trial, or in the alternative an evidentiary hearing on this claim.

SECTION ONE
GROUND X

IN VIOLATION OF THE DEFENDANT'S FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS TRIAL COUNSEL WAS PREJUDICIALLY INEFFECTIVE IN FAILING TO ADEQUATELY CROSS-EXAMINE DURING TRIAL THE ALLEGED VICTIM REGARDING TESTIMONY RELIED UPON TO PROVE THAT PERPETRATOR USED OR THREATENED TO USE A DEADLY WEAPON.

The Defendant contends that the Federal Courts have held that trial counsel must subject prosecution's case to meaningful adversarial testing process. The Florida Supreme Court has explained that "cross-examination is not confined to the identical matters testified to in the State's case-in-chief but extends to the entire subject matter and to all matters that modify, supplement, contradict, rebut, or make clearer the facts testified to in chief."

The Defendant maintains that whether or not an object is a Deadly Weapon is a question of fact to be determined by the jury from the evidence taking into consideration its size, shape, and material and the manner in which it was used or was capable of being used, and whether or not the weapon involved is to be classified as "Deadly" is a factual question to be resolved by the jury under appropriate instructions.

The Defendant alleges that he suffered prejudice from counsel's errors specifically where counsel failed to test the reliability of the State's only evidence regarding the essential element of "used or threatened use of a Deadly Weapon" by not cross-examining the alleged victim adequately and thoroughly, where it is reasonable to conclude that the witness, who testified she "believed" the object in question was a knife, would have admitted through proper cross-examination (not a total of four questions) that the possibility exists that the object could have been something other than a knife. If counsel had conducted a better cross-examination on the alleged victim the jury could have better understood if in fact the perpetrator used or threatened to use a Deadly Weapon but, without the alleged victim's own subjective belief in the object's ultimate shape, size, material, and identity, the jury would not, as a matter of law, have been able to determine that the object was a "Deadly Weapon" or "used or threatened to be used" as such. So without a doubt the jury would have been obligated to acquit the Defendant as to this count since all lesser included offenses were properly waived during the charge conference (See Exhibit L), and there was not sufficient evidence to support the crime charged.

In conclusion to the above referenced ground, supporting argument, and trial transcripts, it is clear that the defendant's trial counsel was constitutionally deficient, that the defendant suffered prejudice and that there is a reasonable probability that the out come would have been different absent counsel's unprofessional errors. This deficient conduct so undermined the proper functioning of the adversarial system and trial that the proceedings cannot be relied upon as having produced a fair and just result, and therefore requires a new trial, or in the alternative an evidentiary hearing on this claim.

SECTION ONE
GROUND XI

IN VIOLATION OF THE DEFENDANT'S FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS TRIAL COUNSEL WAS PREJUDICIALLY INEFFECTIVE IN MISCHARACTERIZING STATE'S ONLY EVIDENCE USED TO PROVE THAT PERPETRATOR "USED OR THREATENED TO USE A DEADLY WEAPON" AND FOR NOT PROPERLY OBJECTING WHENEVER STATE ALSO MISCHARACTERIZED THE EVIDENCE DURING TRIAL.

Before the charge to the jury, defense counsel filed a contemporaneous "Motion to Exclude that a Deadly Weapon was Used," stating as argument, "if you characterize it as a knife, that would be a mischaracterization of the evidence." (See Exhibit S).

The Defendant contends that the alleged victim's testimony was the only evidence presented by the State regarding the existence of a knife, During the State's direct and defense's cross-examination the victim testified that she "believed" the object in question was a knife. But, without the alleged victim's own subjective belief in the objects ultimate shape, size, material, and identity there was a blatant mischaracterization of the evidence specifically where the State had the burden of proving first, that a knife was in fact a deadly weapon. The Defendant asserts that the State failed to meet its burden since there was no evidence in the record to support a finding that even if the alleged object was in fact a knife, the alleged knife was a Deadly Weapon by its ordinary use or in the manner in which it was used on the alleged victim.

The Defendant alleges that he suffered prejudice from counsel's error where the mischaracterization of the State's evidence by trial counsel and State prosecutor, definitely confused and mislead the jury as to what object the perpetrator used during the alleged crime. Also, the trial counsel's failure to properly object every time the State mischaracterized the evidence was harmful and prejudicial to the Defendant where the error was waived and prevented to be reviewed by the Appellate Court, where most definitely an order to discharge the Defendant would have been entered based on the evidence being insufficient as a matter of law to sustain a conviction and because all lesser included offenses were properly and timely waived by the Defendant during the charge conference (See Exhibit L).

In conclusion to the above referenced ground, supporting argument, and trial transcripts, it is clear that the defendant's trial counsel was constitutionally deficient, that the defendant suffered prejudice and that there is a reasonable probability that the out come would have been different absent counsel's unprofessional errors. This deficient conduct so undermined the proper functioning of the adversarial system and trial that the proceedings cannot be relied upon as having produced a fair and just result, and therefore requires a discharge of the above count of the information, a new trial, or in the alternative an evidentiary hearing on this claim.

SECTION ONE
GROUND XII

IN VIOLATION OF THE DEFENDANT'S FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS TRIAL COUNSEL WAS PREJUDICIALLY INEFFECTIVE IN FAILING TO PROPERLY OBJECT, MOVE FOR MISTRIAL, AND PRESERVE FOR APPELLATE REVIEW THE PROSECUTOR'S VIOLATION OF THE COURT'S ORDER IN THE MOTION IN LIMINE WHERE IMPROPER AND PREJUDICIAL TESTIMONIES OF UNRELATED CASE INVESTIGATION WERE INDUCED AND THERE IS REASONABLE PROBABILITY THAT THIS IMPERMISSIBLE, HARMFUL, AND PREJUDICIAL TESTIMONIES CONTRIBUTED TO THE CONVICTION IN THIS CASE.

The Defendant contends that there is no rule governing a Motion in Limine other than the general Rules of Notice and Hearing for motions in general. A Motion in Limine is primarily used pretrial to determine the admissibility of evidence or other anticipated evidentiary issues prior to trial. Such motions are practical in that they allow both sides to get a pretrial hearing on problem issues and resolve them without the necessity of a trial objection. The motion should set forth specifically the issue to be determined by the trial court and the legal basis for it, as well as the relief sought. Florida Statute 90.104 requires that the trial court must rule on the motion.

The Defendant asserts that although all the above procedures were taken, the State prosecutor still induced improper, harmful, and prejudicial testimonies that referred to unrelated case investigation in violation of the trial court's ruling on the Motion in Limine previously filed by the defense counsel (See Exhibit T). Specifically during the testimonies of Detective Moore (See Exhibit U); crime lab DNA technician, Ms. Hinz (See Exhibit V); and Sgt. Butchko (See Exhibit W). Yet trial counsel did not properly object, move for mistrial and preserve for Appellate review these violations of the above mentioned officers referring themselves as Homicide Investigators from the Tamiami Trail murder cases.

The Defendant alleges that he suffered prejudice from trial counsel's errors where counsel knew or should have known that it was imperative to timely object to any of the trial court's previous ruling on a Motion in Limine. The violation could have been "cured" with an appropriate cautionary instruction to the jury. But, because the violations were willful, and the testimonies induced were the very subject of the previously filed Motion in Limine, was unfair and prejudicial. Therefore, trial counsel should have requested a mistrial. In other words, if the trial court would have sustained the Defendant's objection counsel could have requested a mistrial to preserve the issue for Appellate review, where without a doubt the outcome of the trial would have been a reversal of the conviction with an order for a new trial to be conducted.

In conclusion to the above referenced ground, supporting argument, and trial transcripts, it is clear that the defendant's trial counsel was constitutionally deficient, that the defendant suffered prejudice and that there is a reasonable probability that the out come would have been different absent counsel's unprofessional errors. This deficient conduct so undermined the proper functioning of the adversarial system and trial that the proceedings cannot be relied upon as having produced a fair and just result, and therefore requires a new trial, or in the alternative an evidentiary hearing on this claim.

SECTION ONE
GROUND XIII

IN VIOLATION OF THE DEFENDANT'S FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS TRIAL COUNSEL WAS PREJUDICIALLY INEFFECTIVE IN FAILING TO OBJECT, MOVE FOR MISTRIAL, AND PRESERVE FOR APPELLATE REVIEW THE REPEATED INSTANCES OF PROSECUTORIAL MISCONDUCT OF PREJUDICIALLY IMPROPER REMARKS, STATEMENTS AND MISSTATEMENTS OF THE LAW MADE DURING CLOSING ARGUMENTS.

The Defendant contends that a contemporaneous objection is required to preserve improper prosecutorial arguments for Appellate review, although it is sufficient if the objection is made close to the offensive comment and before the closing is concluded. To properly preserve the issue for appeal, counsel must object to the argument, state specific grounds for the objection, move to strike the improper argument, move for a cautionary instruction, or move for a mistrial. If the objection is overruled, counsel is not required to move for mistrial or curative instruction because this would be a futile act, but counsel must object if the offensive comment is repeated, ask for a continuing objection to such arguments, and ask that the court rebuke the prosecutor. On the other hand if the objection is sustained, counsel must move for mistrial. In moving for mistrial, counsel should explain why a curative instruction is not an adequate remedy and why a mistrial is necessary.

The Defendant asserts that trial counsel was prejudicially ineffective by failing to move for a mistrial when the trial court sustained the counsel's objections, especially where the face of the instant record reflects the following prosecutorial misconduct unobjected to during closing arguments: Misstating the law, improper bolstering of the state witnesses, demeaning the defense, attacking the defense witnesses, personal belief in credibility of witnesses, attacking defense counsel, violating the granted Motion in Limine and sympathy for alleged victim (See Exhibit X). The Defendant maintains that the Fourth District Court of Appeal has previously condemned prosecutorial comments of this nature and this court should not find beyond a reasonable doubt that the alleged prosecutor's comments did not contribute to the guilty verdict of this case, where during prosecution's closing arguments he again violates the Motion in Limine which totally and clearly precluded the prosecutor from referring to the officers as being Homicide Detectives and the prejudicial mentioning of the Tamiami Serial Killer and/or Homicide Investigation (See Exhibit Y).

The Defendant alleges that he suffered prejudice from trial counsel's errors where the failure to timely object to improper closing arguments precludes Appellate review unless the comments are so prejudicial as to constitute fundamental error, although repeated instances of prosecutorial misconduct in closing argument can rise to the level of fundamental error, it was too risky and prejudicial to rely on this strategy. Instead, trial counsel should have objected to every improper argument and stated and laid the proper groundwork for the issue on appeal, where a remand for a new trial would have been obtained due to the Defendant's constitutional rights to a fair trial being blatantly violated by prosecutor's improper, harmful, and prejudicial comments during closing arguments.

In conclusion to the above referenced ground, supporting argument, and trial transcripts, it is clear that the defendant's trial counsel was constitutionally deficient, that the defendant suffered prejudice and that there is a reasonable probability that the out come would have been different absent counsel's unprofcssional errors. This deficient conduct so undermined the proper functioning of the adversarial system and trial that the proceedings cannot be relied upon as having produced a fair and just result, and therefore requires a new trial, or in the alternative an evidentiary hearing on this claim.

SECTION ONE
GROUND XIV

IN VIOLATION OF THE DEFENDANT'S FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS TRIAL COUNSEL WAS PREJUDICIALLY INEFFECTIVE IN FAILING TO TIMELY ACT, OBJECT, MOVE FOR MISTRIAL, AND TO PROPERLY PRESERVE FOR DIRECT APPEAL THE REVERSIBLE ISSUE THAT ON AT LEAST (3) THREE DIFFERENT OCCASIONS, JURORS WERE NOTED TO BE SLEEPING DURING PRESENTATION OF TRIAL EVIDENCE AND DNA TESTIMONY.

The Defendant contends that there are an infinite number of objections that can be made at trial and should be timely made when necessary to protect the Defendant's right to a fair trial. The same rules apply for preserving these issues for Appellate review. Whenever making an objection, counsel should make a record of the prejudice resulting from the courts adverse ruling. The face of the record clearly supports the fact that at least on three different occasions jurors were sleeping during trial (Scc Exhibits Z, AA, and BB). The Defendant asserts that the Fourth District Court of Appeals had held that it was improper for trial court to summarily deny a claim on a Postconviction Relief Motion where counsel failed to timely act upon being informed that a juror was sleeping during trial as the *sub-judice* case.

The Defendant alleges that he suffered prejudice from trial counsel's errors where the procedures that were necessary to afford the trial judge the opportunity to consider and correct any alleged error and to preserve the error for Appellate review were prejudicially waived by counsel's failure to properly act by way of objecting timely and specifically, obtaining a rule for the record, and moving for mistrial if what has occurred has prejudiced the Defendant's Constitutional Rights to a fair trial.

In conclusion to the above referenced ground, supporting argument, and trial transcripts, it is clear that the defendant's trial counsel was constitutionally deficient, that the defendant suffered prejudice and that there is a reasonable probability that the out come would have been different absent counsel's unprofessional errors. This deficient conduct so undermined the proper functioning of the adversarial system and trial that the proceedings cannot be relied upon as having produced a fair and just result, and therefore requires a new trial, or in the alternative an evidentiary hearing on this claim.

SECTION ONE
GROUND XV

IN VIOLATION OF THE DEFENDANT'S FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS TRIAL COUNSEL WAS PREJUDICIALLY INEFFECTIVE IN FAILING TO DO DISCOVERY DEPOSITIONS OF STATE WITNESS, CRIME LAB DNA SPECIALIST, SHARON HINZ.

The Defendant contends that taking depositions is usually the best way to discover the facts of a case, since counsel cannot expect the prosecutor to reveal everything he knows about it in discovery, and often times the prosecutor has not interviewed all the potential witnesses and uncovered all the facts. Discovery depositions may be taken at any time after the filing of the charging document, but only of persons authorized under Fla.R.Crim.P., 3.220 (h)(i). Of course, there are strategic decisions involved in whether to take depositions at all. If counsel has a good investigator or adequate time to contact the witnesses, counsel might choose to forego depositions. The danger of this approach is that counsel might not be able to impeach the witness if she says something inconsistent at trial. A deposition transcript is absolutely the best vehicle for impeaching a witness by a prior inconsistent statement.

The Defendant avers that the face of the record clearly supports Defendant's allegations that trial counsel did not take depositions of Ms. Hinz (See Exhibit C), nor trial counsel ever spoke, contacted, or inquired any topics with Ms. Hinz prior to trial although she was listed on the State's witness list.

The Defendant alleges that he suffered prejudice from counsel's errors, specifically in choosing to forego Ms. Hinz's deposition. First, Ms. Hinz's timely depositions would have alerted the defense counsel's needs to locate Mrs. Theresa Merit, another crime lab specialist who allegedly first received Defendant's oral swabs at the Miami Crime Lab, allegedly wrote on an index card the #232 and would have clarified how many oral swabs were in the original packet she received (See Exhibit DD). But, instead the defense was forced to take Ms. Hinz's hearsay testimony to support the admission of highly prejudicial physical evidence, because Mrs. Merit was unavailable during trial. Second, Ms. Hinz's deposition would have also alerted the defense counsel that there was in fact conflicting testimony as to the amounts of oral swabs submitted by Detective Moore (See Exhibit EE), where Detective Moore testified that he collected two oral swabs and Ms. Hinz maintained that there were three or four available. Third, Ms. Hinz's deposition would have altered defense's trial strategy of not taking the stand during trial, where Defendant's testimony on the stand would have been that Detective Moore took only one oral swab from him on March 9, 1995, as Defendant previously testified in prior trials, creating even more conflict with the oral swab evidence. Fourth, Ms. Hinz's deposition would have alerted defense counsel that there were enough reasons to support the filing of a timely Motion to Suppress the DNA evidence based on the existing oral swab's conflicting testimonies, or would have alerted the defense counsel that Defendant was in need to submit new samples to conduct new DNA testing that was reliable and free of conflict.

There is reasonable probabilities to conclude that with Ms. Hinz's depositions being taken the results of the whole trial would have been different where at least the Defendant would

have been able to present during trial new oral swabs free of conflict and most definitely with new exculpatory results.

In conclusion to the above referenced ground, supporting argument, and trial transcripts, it is clear that the defendant's trial counsel was constitutionally deficient, that the defendant suffered prejudice and that there is a reasonable probability that the out come would have been different absent counsel's unprofessional errors. This deficient conduct so undermined the proper functioning of the adversarial system and trial that the proceedings cannot be relied upon as having produced a fair and just result, and therefore requires a new trial, or in the alternative an evidentiary hearing on this claim.

SECTION ONE
GROUND XVI

IN VIOLATION OF THE DEFENDANT'S FOURTH, FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS TRIAL COUNSEL WAS PREJUDICIALLY INEFFECTIVE IN FAILING TO FILE A TIMELY "MOTION TO SUPPRESS" THE ONLY ALLEGED INCULPATORY DNA EVIDENCE AGAINST THE DEFENDANT.

The Defendant contends that Fla.R.Crim.P., 3.190(h) and (i) govern Motions to Suppress. Article I § 12, of the Florida Constitution adopts the Fourth Amendment of the United States Constitution, as interpreted by the United States Supreme Court, as governing search and seizure rights in Florida.

A Motion to Suppress evidence must be made in writing before trial and may be heard either before or during trial. Rules 3.190 (h)(4) and 3.190 (1)(2) allow Motions to Suppress to be filed any time before trial unless the Defendant was unaware of the grounds for the motion or the opportunity to file or hear the motion did not exist. In that case, the issue may be raised by objection at trial. Trial court may grant Motion to Suppress during trial in rare cases. As long as the motion is legally sufficient, i.e., it clearly states the grounds for suppression and the facts in support of the motion, the court is required to hold an evidentiary hearing. Finally, Florida courts have consistently held that the issue on a Motion to Suppress is waived unless the issue is renewed by contemporaneous objection at the time the evidence is introduced at trial (for cases before July 1, 2003).

The Defendant maintains that based on the above aforementioned facts, trial counsel should have filed a timely Motion to Suppress Defendant's only alleged inculpatory DNA evidence at the pre-trial stage of this case when the trial court was still required to hold an evidentiary hearing on this issue. On that hearing the DNA specialist Mrs. Marchese would have testified consistently with her testimony during trial, depositions, and previous statements to the Defendant and defense counsels that while she was looking into the spot #1 with her microscope she saw a sperm cell that was intertwined with fibers of the sheet, then she used her tweezers and pulled the sperm cell out in order to extract the DNA material that she needed out of the cell in order to conduct her DNA testing. During that suppression of evidence hearing that never took place, would have been also clarified the fact that the only evidence allegedly linking the defendant to the alleged crime was one single sperm cell which was allegedly found within spot #1, one of the four spots that were tested in this case. Trial counsel's arguments to support this never filed Motion to Suppress, should have been: First, That based on the DNA quantity

requirements for RFLP and PCR analysis, it was not scientifically possible to obtain reliable results from one single sperm cell using traditional published methodologies. Second, that because the average amount of DNA in a single sperm cell is approximately 3.5 pg (Pico grams) and the average minimum amount of DNA required for RFLP is approximately 50 Ng (Nano grams), it was impossible to obtain reliable results. Third, since 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, was impossible to believe that only one single sperm cell could have been found among all the evidence gathered in this case. However, even if that would have been true, it would have been scientifically impossible to obtain reliable results (See Exhibit FF). On the other hand, the motion that was never filed would have been addressed on the merits and ruled on by the court, which would have been also properly preserved for Appellate review.

The Defendant alleges that he suffered prejudice from counsel's errors where a timely filed Motion to Suppress would have prevented the introduction into evidence during trial of the only alleged inculpatory DNA evidence in this case, and most importantly would have properly preserved this issue for appellate review. In determining whether the erroneous admission of the DNA evidence without a timely filed Motion to Suppress constitutes prejudicial error, the DNA was the *sole* evidence that led to the conviction of the Defendant. So it is impossible to conclude beyond a reasonable doubt that this improperly admitted DNA evidence without a timely filed Motion to Suppress having been filed, had no effect on the verdict in this case, and that without the above evidence the results of this trial would have been the same.

In conclusion to the above referenced ground, supporting argument, and trial transcripts, it is clear that the defendant's trial counsel was constitutionally deficient, that the defendant suffered prejudice and that there is a reasonable probability that the out come would have been different absent counsel's unprofessional errors. This deficient conduct so undermined the proper functioning of the adversarial system and trial that the proceedings cannot be relied upon as having produced a fair and just result, and therefore requires a new trial, or in the alternative an evidentiary hearing on this claim.

SECTION ONE
GROUND XVII

IN VIOLATION OF THE DEFENDANT'S FOURTH, FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS TRIAL COUNSEL WAS PREJUDICIALLY INEFFECTIVE IN FAILING TO PROPERLY AND TIMELY OBJECT TO THE ADMISSIBILITY OF THE ALLEGED VICTIM'S FITTED SHEET IN THAT A PROPER CHAIN OF CUSTODY HAD NOT BEEN ESTABLISHED AND THERE WAS SOME INDICATION OF PROBABLE TAMPERING WITH THE ABOVE EVIDENCE.

The Defendant contends that trial counsel was ineffective in allowing the admission into evidence without an objection to the alleged victim's fitted sheet that had been obtained in the search of the alleged victim's premises because the State failed to establish a proper chain of

custody. Relevant physical evidence is admissible unless there is some indication of probable tampering with the evidence. The Defendant asserts that there were indications of probable tampering with the evidence and the proper chain of custody had not been established where: A) the fitted sheet was not logged into the police evidence room until 3 ½ days after it had been obtained in the search of the alleged victim's premises (See Exhibit GG). B) The fitted sheet was the only evidence that was mysteriously missing from the evidence that first arrived to the crime lab on May 18, 1995. Although the crime scene investigator who collected and transported the evidence to the police station on the day of the crime testified that she put everything in the same white box, the DNA specialist at the lab, Mrs. Marchese, testified that the fitted sheet was not there the day that everything else arrived (See Exhibit HH). C) The fitted sheet was the only evidence that was suspiciously re-submitted to the crime lab on June 30, 1995, forty days later by special request made by Mrs. Marchese (See Exhibit HH). D) The fitted sheet was the only evidence that did not show any big yellowish stain across the sheet on the picture taken by the crime scene investigator, but when viewed before trial and during trial the big stain was clearly visible (See Exhibit II). E) The fitted sheet was the only evidence that the very own alleged victim was not able to recognize as being hers during trial. F) The fitted sheet was the only evidence that caused the State prosecutor to impeach his own witness, Mrs. Marchese during trial as to when the sheet first arrived at the lab (See Exhibit JJ). G) The fitted sheet was the only evidence that allegedly contained Defendant's inculpatory DNA evidence. Although four spots were tested for DNA and the other two much larger spots tested also positive for seminal fluid only within spot #1, Mrs. Marchese was allegedly able to find the single sperm cell that the State ultimately used to conduct their scientifically impossible DNA testing. H) The fitted sheet was the only evidence that contained degraded DNA evidence as Mrs. Marchese stated during her trial testimony when referring as to spots #3 and #4 . I) The fitted sheet was the only evidence that also contained exculpatory evidence, i.e., spots #2, #3, and #4, and the hairs found on it that were never properly tested utilizing the PCR/STR DNA methodology that was available.

The Defendant alleges that he suffered prejudice from counsel's errors specifically by the admission of the alleged victim's fitted sheet that was obtained in the search of her premises, in that the fitted sheet contained seminal fluid and a sperm cell was found allegedly matching the Defendant's DNA profile. Also, by counsel failing to properly object to the admissibility of the above evidence. In determining whether the erroneous admission without objection of the alleged victim's fitted sheet constitutes prejudicial error, the alleged Defendant's DNA profile contained within the fitted sheet was the *sole* evidence that led to the conviction of the Defendant. So it is impossible to conclude beyond a reasonable doubt that this improperly admitted fitted sheet had no effect on the verdict in this case, and that without this evidence being admitted, the results of the trial would have been the same.

In conclusion to the above referenced ground, supporting argument, and trial transcripts, it is clear that the defendant's trial counsel was constitutionally deficient, that the defendant suffered prejudice and that there is a reasonable probability that the out come would have been different absent counsel's unprofessional errors. This deficient conduct so undermined the proper functioning of the adversarial system and trial that the proceedings cannot be relied upon as having produced a fair and just result, and therefore requires a new trial, or in the alternative an evidentiary hearing on this claim.

SECTION ONE
GROUND XVIII

IN VIOLATION OF THE DEFENDANT'S FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS TRIAL COUNSEL WAS PREJUDICIALLY INEFFECTIVE IN FAILING TO MAKE TIMELY, REASONABLE INVESTIGATION AND DISCOVERED RESULTS DERIVED BY THE STATE'S DNA EXPERTS THAT WERE FAVORABLE TO THE DEFENDANT.

The Defendant contends that to make a valid strategic or tactical decision, an attorney has the duty to make reasonable investigations or make a reasonable decision that particular investigations are not necessary. A do nothing strategy is not an acceptable one while counsel engaged in little or no pre-trial investigation.

After the trial concluded on September 14, 2000, the Defendant contacted and hired the services of a private investigator, Mr. Gary M. Kuhau, in order to obtain Detective Steven Geller's missing affidavit to arrest the Defendant, dated May 13, 1997 and document all related DNA tests and amount of DNA swabs pertaining to the Defendant (See Exhibit KK). Since none of the above was accomplished by trial counsel during the pre-trial stage of this case. In Detective Geller's Affidavit to Arrest dated May 13, 1997, the detective outlines in detail the DNA evidentiary link of victims, [redacted] and [redacted] separate cases.

The first part of the investigation resulted in discovering and locating the multiple crime laboratory analysis reports that were generated by the Broward County Sheriff's Office in this particular case. They were performed by DNA Specialist Mrs. Donna Marchese and ultimately resulted in the so call inculpatory evidence of this case (See Exhibit LL). Also, population statistic calculations were generated by BSO crime lab computer. The results were that the probability of selecting an unrelated individual at random from the population having a DNA profile matching the seminal fluid found is, 1 in greater than 5.0 billion (See Exhibit LL).

The second part of the investigation revealed that the Palm Beach County Sheriff's crime lab had also been conducting DNA testing on Defendant's specimens. The PBSO crime lab disclosed new exculpatory evidence. An upgraded PCR/DNA re-testing that was performed by DNA specialist Debrah Glidwell, comparing victim's, [redacted]s evidence with Defendant's DNA standards. The result was *negative* (See Exhibit MM), although prior DNA laboratory test in BSO crime lab produced *positive* result on the exact same evidence tested utilizing the older RFLP/DNA methodology.

The third part of the investigation resulted in obtaining the Defendant's PCR/DNA profile that was generated by PBSO crime lab during their own testing (See Exhibit NN).

The fourth part of the investigation resulted in discovering, also, that the Defendant's PCR/DNA profile generated by the PBSO crime lab, when analyzed for population statistic calculations generated by an independent DNA lab, LabCorp, a laboratory specialized in Forensic DNA evidence testing rendered the extremely low matching probabilities of 1 in 454,000 for the Southeastern Hispanic population (See Exhibit OO). Although prior calculations made by BSO crime lab produced a match of 1 in greater than 5.0 billion.

Finally, the fifth and last investigation revealed that the Defendant's RFLP/DNA testing results obtained by BSO crime lab, and introduced during trial as the only inculpatory evidence

was a scientific impossibility because the single sperm cell allegedly found by Mrs. Marchese and used to extract the DNA in this case, was of insufficient quantity to meet the requirements for RFLP and PCR DNA analysis using traditional published methodologies as stated by LabCorp (See Exhibit FF).

The Defendant concludes that all the above post-verdict findings and discoveries made by the Defendant with the assistance of a private investigator could have been timely found and discovered by trial counsel prior to trial, if counsel had conducted a reasonable investigation as to the only inculpating evidence of this case, DNA!

The Defendant alleges that he suffered prejudice from counsel's errors where crucial testimony from the State's DNA experts added weight to the State's circumstantial evidence case. Nevertheless, knowing that the State's DNA experts would have testified, trial counsel underestimated the potential impact of a DNA expert testimony on behalf of the Defendant and made insufficient efforts to discover if there was any DNA evidence favorable to the Defendant of if any flaws within the State's DNA evidence existed. Furthermore, if trial counsel had made a timely, reasonable investigation and discovered not only all the above aforementioned exculpatory evidence previously stated, but also the necessity to timely change his defense strategies, trial counsel could have been in a better position to properly represent his client. In determining whether the lack of DNA evidence investigation constitutes prejudicial error, the DNA was the *sole* evidence that led to the conviction of the Defendant. So it is impossible to conclude beyond a reasonable doubt that this lack of investigation had no effect on the verdict in this case and that without this lack of investigation the results of the trial would have been the same.

In conclusion to the above referenced ground, supporting argument, and trial transcripts, it is clear that the defendant's trial counsel was constitutionally deficient, that the defendant suffered prejudice and that there is a reasonable probability that the out come would have been different absent counsel's unprofessional errors. This deficient conduct so undermined the proper functioning of the adversarial system and trial that the proceedings cannot be relied upon as having produced a fair and just result, and therefore requires a new trial, or in the alternative an evidentiary hearing on this claim.

SECTION ONE
GROUND XIX

IN VIOLATION OF THE DEFENDANT'S FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS TRIAL COUNSEL WAS PREJUDICIALLY INEFFECTIVE IN FAILING TO CALL DEFENSE DNA EXPERT WITNESSES, DR. JIN-XIONG SHE AND DR. LESLIE SUE LIBERMAN, OR ANY OTHER DNA EXPERT IN THEIR FIELD OF EXPERTISE, THAT WOULD HAVE PROVIDED EXCULPATORY TESTIMONIAL EVIDENCE THAT WOULD HAVE REFUTED AND/OR CONTRADICTED THE STATE'S DNA EXPERTS TESTIMONIES GIVEN DURING TRIAL.

The Defendant contends that the failure to call, subpoena or secure attendance of witnesses that could have provided exculpatory evidence constitutes ineffective assistance of counsel when the testimony may have cast doubt of the Defendant's guilt.

In compliance with the failure to call witnesses' allegations criteria under Postconviction Relief Motion, the Defendant states as follows:

1) The Witnesses Names Are:

- Dr. Jin-Xiong She, his field of expertise is on DNA Molecular Biology and Chemistry.

- Dr. Leslie Sue Liberman, her field of expertise is on DNA Population Frequency Statistics.

2) The Witnesses Were Available:

- Dr. Jin-Xiong She could have been reached at: University of Florida, P.O. Box 100275, Gainesville, Florida. 32610-0275

- Dr. Leslie Sue Liberman could have been reached at: University of Florida, P.O. Box 17305, Gainesville, Florida. 32611

The Defendant further states that the above aforcmentioned witnesses were properly listed on Defendant's Amended Witness list (See Exhibit PP). Also, that the trial court had previously granted two separated orders to pay for DNA experts (See Exhibit QQ) and that previous Discovery depositions were taken of those witnesses. They were available!

3) The Substance of Their Testimonies:

- Dr. Jin-Xiong She's testimony would have clarified and emphasized to the jury that the DNA testing process consisted of two distinct steps. The first step of the DNA

testing process relies upon principles of Molecular Biology and Chemistry. In oversimplified terms, he would have explained to them that the results obtained through this first step in the DNA testing process simply indicates that two DNA samples look the same, if the DNA testing process has been properly conducted.

Certainly, Dr. She would have testified that the requirement of admissibility was not met in this case, where BSO crime lab, who conducted tests and performed initial review found test to be positive, but PBSO crime lab, who performed second test reached opposite conclusions. One of the elements of second independent review is to ensure that results of initial review are reliable, and if two analysts disagree, like in the present case, the test should be deemed inconclusive absent of further analysis. On the other hand, he would have also testified that based on the DNA quantity requirements for RFLP analysis it was not scientifically possible to obtain reliable results from a single sperm cell using traditional published methodologies, and most definitely would have otherwise presented and argued to the jury issues to refute State's expert witnesses testimony given during trial.

- Dr. Leslie Sue Liberman's testimony would have clarified and emphasized to the jury that the second step of the DNA testing process does not rely upon principles of Molecular Biology or Chemistry. Instead, the Calculation of Population Frequency Statistics is based on principles of statistics and population genetics. In oversimplified terms, She would have explained to them that this second step is needed to give significance to a match because to say that two patterns match, without providing any scientifically valid estimate of the frequency with which such matches might occur by chance, is meaningless.

Certainly, Dr. Liberman would have testified as to the techniques and methods utilized in both steps of the DNA testing process. Would have presented the reliable principles or theories to the jury in order to create doubts and open the jury's mind e.i., That the use of the "product rule" in the calculation of population frequency statistics did not adequately adjust for the possibility of population substructures, like Defendant's, that the creation of a "ceiling principle" and a "modified ceiling principle" resulted in extremely conservative calculations meant to prevent the traditional "product rule" from underestimating a random match in population substructures, and could have alerted the jury by letting them know that multiple reasonable deductions when all are based on generally accepted principles of population genetics and statistics are allowed to be presented and argued to the jury, and most definitely would have otherwise presented and argued to the jury issues to refute state's expert witnesses testimony given during trial.

Dr. She and Dr. Liberman's combined testimonies would have further stated that the whole procedure followed by the Miami Crime Lab in collecting, transporting, testing, and releasing the Defendant's oral swabbing was tainted and would have necessitated suppression of the oral swabbing in that the proper chain of custody was never properly established and there was some indication of probable tampering with the oral swabbing where Defendant gave one swab, Det. Moore states that he submitted two to the lab and crime lab technician. Ms. Hinz maintains that there were three or four still available. On the other hand, they would have also stated that Defendant was a member of a population substructure and the State's statistics were not properly established, and that a new DNA testing and calculations statistics was required

before the presentation to the jury of the prejudicial 1 in 14 billion match generated by the State's DNA expert. But, most importantly of all they would have testified that any DNA evidence extracted from the alleged victim's fitted sheet was not reliable to obtain a conviction, where the fitted sheet also contained degraded DNA evidence, specifically, spots #3 and #4, probably resulting from leaving the fitted sheet out of the police evidence room for three and a half days in a wrong environment which most likely contributed to the degradation

4) How the Omission of the Testimonies Prejudice the Outcome of the Trial:

The Defendant alleges that he suffered prejudice from counsel's errors in that, in a circumstantial evidence case, like this one, only a properly qualified DNA expert witness could have provided scientific exculpatory testimonial evidence that would have refuted and/or contradicted the State's expert witnesses testimonies given during trial about the Defendant's tainted oral swabbing, alleged victim's fitted sheet, and the DNA evidence allegedly derived from it would have scientifically discredited the only DNA evidence linking the Defendant to the crime. In determining whether the omitted DNA expert testimony constitutes prejudicial error, the presented DNA evidence was the *sole* evidence that led to the conviction of the Defendant. So it is impossible to conclude beyond a reasonable doubt that this omitted expert testimony had no effect on the verdict in this case, and that without this omission the results of the trial would have been the same.

In conclusion to the above referenced ground, supporting argument, and trial transcripts, it is clear that the defendant's trial counsel was constitutionally deficient, that the defendant suffered prejudice and that there is a reasonable probability that the out come would have been different absent counsel's unprofessional errors. This deficient conduct so undermined the proper functioning of the adversarial system and trial that the proceedings cannot be relied upon as having produced a fair and just result, and therefore requires a new trial, or in the alternative an evidentiary hearing on this claim.

SECTION TWO

SPECIFIC DEFICIENCIES BY THE SENTENCING ATTORNEY JAMES LEWIS AND RESULTANT PREJUDICE

GROUND I

IN VIOLATION OF THE DEFENDANT'S FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS, SENTENCING COUNSEL WAS PREJUDICIALLY INEFFECTIVE IN FAILING TO PROPERLY REVIEW MATERIAL CENTRAL TO DEFENDANT'S SENTENCING, AND THUS OVERLOOKED THAT THE REASON GIVEN BY THE PROSECUTOR TO SUPPORT THE UPWARD DEPARTURE SENTENCE WAS NOT LEGALLY SUFFICIENT BECAUSE IT WAS BASED ON A PRIOR CONVICTION ALREADY CONSIDERED IN THE CALCULATION OF DEFENDANT'S PRESUMPTIVE GUIDELINE SENTENCE, AND PREJUDICIALLY INEFFECTIVE FOR FAILING TO ADEQUATELY PRESERVE THIS UNLAWFUL SENTENCE FOR APPELLATE REVIEW.

On November 13, 2000, during Defendant's sentencing hearing, the trial court upwardly departed from the sentencing guidelines, and sentenced the Defendant to a term of natural life in Florida State Prison without parole (See Exhibit RR). The court did so based on the State's position that a departure was proper due to Defendant's prior record of criminal history, i.e., his prior conviction for Armed-Burglary. As written justification of aggravating circumstances, the trial court relied on the State's Motion for Upward Departure (See Exhibit SS), which states in pertinent part:

> *Primary offense is scored at level 7 or higher and the Defendant has been convicted of one or more offenses that scored, or would have scored, at an offense level of 8 or higher.*

The applicable principles for departure sentences based on aggravating circumstances are as follows. A trial court may impose an aggravated departure sentence only when a Defendant's conduct is so extraordinary or egregious as to be beyond the ordinary case. Moreover, where factors are already taken into account in calculating a guideline score, those same factors *may not* also be used as aggravating circumstances for a departure sentence. As the First District explained: "We find a lack of logic in considering departure from the guidelines when the same factor is included in the guidelines for purposes of furthering the goal of uniformity."

The Defendant contends that his prior convictions should not have been used as a basis for departing from the presumptive sentence under sentencing guidelines, where prior record has been used in arriving at point total for presumptive sentence range on Defendant's scoresheet (See Exhibit TT). The Defendant states that his prior convictions could not be used for the basis of aggravation, pursuant to Fla. Stat. 921.0016 (3)(R), (1994), within the same sentencing

scheme (See Exhibit UU). Thus, criminal activities already included on the Defendant's scoresheet may not be considered a second time for departure reasons.

To allow the trial judge to depart from the guidelines based on a factor that has already been weighed in arriving at the recommended guidelines sentencing range would in fact be counting that factor twice.

The Defendant alleges that he suffered prejudice from sentencing counsel's errors and that the errors were prejudicial due to the ultimate results of a life sentence being imposed. The errors alleged went to the core of the sentencing court's determination to upwardly depart. Without the mistake of using Defendant's prior record as a valid reason to support the upward departure sentence, the Defendant's maximum sentence under the 1994 sentencing guidelines would have been 193 months in Florida State Prison, not life without parole. So the face of the record clearly supports Defendant's allegations that the reason given to support the upward departure sentence was not legally sufficient, yet sentencing counsel failed to properly review material central to Defendant's sentencing (State's Motion to Upward Depart, Scoresheet, PSI and supporting case law that were available at the time of Defendant's sentencing and that were in conflict with the State's given reason for upward departure). Also, failed to adequately preserved this unlawful sentencing issue for Appellate review where the District Court would have reversed the life sentence erroneously imposed and would have ordered the trial court to impose a sentence within the 1994 sentencing guidelines.

In conclusion to the above referenced ground, supporting argument, and trial transcripts, it is clear that the Defendant's sentencing counsel was constitutionally deficient, that the Defendant suffered prejudice, and that there is a reasonable probability that the outcome would have been different absent sentencing counsel's unprofessional errors. This deficient conduct so undermined the proper functioning of the adversarial system and sentencing that the proceedings cannot be relied upon as having produced a fair and just result and, therefore, requires a resentencing within the 1994 sentencing guidelines, or in the alternative an evidentiary hearing on this unlawful sentence imposed.

Respectfully Submitted,

5/14/07

Defendant, *Pro Se*

UNNOTARIZED OATH

Under penalties of perjury, I swear or affirm that I have read the foregoing 3.850 Motion for Postconviction Relief and that all facts contained herein are true.

Ernesto Behrens DC# 732564
Holmes Correctional Institution
3142 Thomas Drive
Bonifay, Florida 32425

EXHIBIT A

FELONY
2007 MAY 22 AM 11:16
RECEIVED
CLERK, CIRCUIT COURT
BROWARD COUNTY, FL

happened to you?

MS. FRUEHE: I would have to say, no. I just want to be honest.

MR. SEGAL: I appreciate that. Thank you, Ms. Fruehe.

MR. TERRELL: We have no questions.

THE COURT: Thank you very much, Ma'am. The Court is going to excuse you from service on this jury and you will receive back your juror ID card and go to the jury assembly room.

MS. FRUEHE: Do I come back tomorrow?

THE COURT: No. You're done with us. You go back to the jury assembly room. Thank you very much. Okay. The record will reflect Mr. Behrens, all counsel are present.

MR. TERRELL: I would like to propose an objection on the record. It was Mr. Robbins, the police officer, who said he knows for a fact that 90 percent of the people arrested are guilty of the crimes. I'm really troubled with that. I'm troubled because he tainted the jury in my view. I don't know whether or not he knows that is right or wrong but they just heard. It was distinct, 90 percent of the people arrested are guilty. I have a problem with that, Judge. I think that him

stating that tainted the jury. I would move to start with anew tomorrow with 30 new jurors.

THE COURT: The Court gets an opportunity, but unfortunately the transcript can never show the manner one says something, but I did not take Mr. Robbins to make his comment in any authoritative context other than off the cuff sort of way, so I don't believe this remaining panel was tainted so I am respectfully denying your request. The question is; how many do you wish to try to get up here tomorrow?

MR. SEGAL: I think the same amount because I expect that maybe these many people obviously will be stricken for cause or will try to get out of this. I would say about the same amount.

MR. TERRELL: That's fine.

THE COURT: We will have 30 scheduled. We have them at 9:30 because that's the earliest we can get them. We'll have 30 tomorrow at 9:15, so be present at 9:00 o'clock tomorrow and on the notice make sure it reflects on there the defendant is on trial so he will be dressed for trial. Thank you. See you all tomorrow morning at 9:00.

(Thereupon Court is in recess.)

if after carefully considering and weighing all the evidence there's not an abiding conviction of guilt and if having a conviction is one which is not stable but one which waiver or vacillates, then the charges have not been proved beyond every reasonable doubt and you must find the defendant not guilty because the doubt is reasonable.

Having just told you how the law defines reasonable doubt, is there anyone here who feels that either they cannot follow that instruction or feel there is too much conflict with your own personal feelings? Raise your hands for me. Keep your hands up for one second. Mr. Robbins?

MR. ROBBINS: Yes.

THE COURT: Can I hear your thoughts on that, please?

MR. ROBBINS: Well, I served as a police officer up north. My father was a cop. I also did one year of college in police administration and from what I've learned, 90 percent of the people who are arrested are guilty so in my opinion, the defense swayed me 90 percent and the district attorney only has swayed me ten percent.

THE COURT: Again, all we want is people to be candid and forthright with us. There's no

such thing as wrong feelings or wrong opinions. You've heard me say there's no burden of proof upon Mr. Behrens to prove his innocence or disprove anything. Can you appreciate the fact that the burden rests solely on Mr. Segal to prove each and every element of these charges charged beyond and to the exclusion of every reasonable doubt?

MR. ROBBINS: Yes.

THE COURT: If Mr. Segal finishes and the State rests their case, are you going to then require Mr. Behrens to prove or disprove anything in order to give him a fair trial?

MR. ROBBINS: It's not his obligation.

THE COURT: Exactly. It's not his obligation. As a matter of fact, your personal feelings because of your background, family and law enforcement in your mind are you going to require Mr. Behrens to prove or disprove anything?

MR. ROBBINS: That's a judgment call. I have to wait and see. I guess, it depends how the case works out.

THE COURT: Anybody else have anything they want to tell me relative to the reasonable doubt instruction I read to you? I don't see any show of hands in that regard. Now, the attorneys

EXHIBIT B

THE COURT: Fine.

MR. SEGAL: -- as opposed to a homicide detective?

THE COURT: That's fine.

Mr. Terrell, you had some other motions and matters you wanted to address at this point?

MR. TERRELL: Yes, judge, if I could have one quick second. Yes, judge --

THE COURT: Again, the record will reflect Mr. Behrens has been continuously present throughout our court session today. He remains present now.

MR. TERRELL: Judge, I just would like to make a record. We're still objecting. We're moving now to strike the entire panel that was picked, plus the new alternate. It's our position that it was not done properly. The voir dire panel, the potential jurors, were not sworn at the time they gave testimony. I know the court retroactively the next day sweared them in.

It's our position that that is not proper procedure and because it's not proper procedure, it wasn't done right. We filed our Motion for Expiration of Speedy Judgement. Right now, as we're speaking, we'll be filing a Motion for

Discharge with the court and supplying the state with a copy.

We move first to discharge this case forever. And if the court's in a position to decline that, we'll move to strike the panel and pick new jurors.

THE COURT: Okay. I'm going to respectfully deny your motions to strike the panel and deny your Motion for Discharge. And the prior rulings we've made will remain in effect.

MR. TERRELL: Okay.

THE COURT: What's next?

MR. TERRELL: Judge, I understand there's two people out there in the audience here are victims on prior cases. One of them testified here at a Williams Rule not too long ago.

THE COURT: I recall the woman on my left.

MR. TERRELL: Right. And that'll leave the woman on the right is from a prior trial of Ernesto Behrens. Judge, respectfully, it's a public place. They can come in and they can watch. I would ask that they be cautioned to speak to any jurors or to speak with any witnesses in this case would be against the law and there

EXHIBIT C

have no contact at all with them period. No contact at all with the jurors. That would be highly inappropriate.

And also, I don't know, you perhaps may know who some of these witnesses in the case are but they're independency to trial. You're not to have contact with the witnesses that may testify in the case.

And the final thing that I would mention is that -- and, you know, and I can appreciate that to some extent, there may be times during the trial that it may be emotional and I understand that but I will ask that you try as best as you can to -- Mr. Segal, if you'd be kind enough to go to one side or the other. But that throughout the trial, if you'll just, you know, make every effort that you can to avoid any kind of facial expression or any kind of outward display of emotion. I'd appreciate that, okay.

With that in mind, I'm happy to have you throughout this trial. You're certainly welcome to be here, like anybody else in the community.

What's next, Mr. Terrell?

MR. TERRELL: Finally, judge -- well, not finally but I made the objection to strike or move

to strike the panel. You denied it. But on another ground to strike the panel, judge. We still object to this 30, I think it's now 33 days, since we originally picked this jury. They weren't sworn in. They've been in the community. We think that such a high profile case with so much that's at stake, it's too prejudicial to the defendant, that 33 days, and we move to strike this panel and start anew at this time.

THE COURT: I'm going to respectfully deny your motion.

Anything else we have to address pre-trial?

MS. SHELOWITZ: Judge, I have a -- I filed a motion in limine. I did supply a copy to the state. Some of these are throughout the trial. I don't know if the court's going to address them all at this time.

The first thing is that there was a few names, Seru Andalon, Keith Evans -- and Keith Evans which we had -- one of them was an FBI agent which we talked to the state attorney about before. They said they were not going to call them. I just want to see if that's still true, if they'll stipulate to that.

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

STATE OF FLORIDA,

Plaintiff,

vs.

ERNESTO BEHRENS,

Defendant

_____/

Case #:98-5739 CF 10A

Judge: HOROWITZ

Filed In Open Court
CLERK OF THE CIRCUIT COURT
ON AUG 09 2000
BY

MEMORANDUM TO THE HONORABLE JUDGE HOROWITZ

REQUEST FOR RECONSIDERATION OF DEFENDANT'S ASSERTION OF HIS RIGHT TO PROCEED TO TRIAL

Defendant respectfully reasserts his objection to the choosing and impaneling of a jury on August 9, 2000, and the setting of the actual trial date for September 11, 2000, thirty-three days later. (And potentially later depending on jury availablity.)

Defendant filed a demand for speedy trial on June 23, 2000, and has at all times maintained his readiness, availability and desire for trial.

Defendant agrees that a trial commences for speedy trial purposes upon the swearing of the jury panel for voir dire examination, and agrees to a trial date within the speedy trial limit. Moore v. State, 368 So.2d 1291 (Fla. 1979)

According to Compo v. State, 525 So.2d 505 (Fla. 2nd DCA 1988) under a circumstance such as the present where the speedy trial rule will have been complied with, but there has been an interruption in the progress of the trial, the defendant relies on McDermott v. State, 383 So.2d 712 (Fla. 3d DCA 1980) in order to prevent such prejudice and loss of due process from occurring in the above styled cause.

The McDermott Rule is based upon the state's interest in the integrity of the jury system and the assurance that an impaneled jury will remain free of any extraneous influence.

Among the factors assessed are the:
1)length and reason for delay,
2)the defendant's assertion of his right to proceed to trial, and 3)possible prejudice.

1) Defendant asserts that thirty-three days is an undue and unreasonable separation of the jury.

"Armstrong contends that a jury separation of some fifty-two days during his trial shows the existence of circumstances capable of prejudicing the deliberative functions of the jury. We agree and reverse..." Armstrong v. State, 426 So.2d 1173 (1983)

In State v. White, 129 Vt. 220 (1971), a delay of sixty-two days constituted a sufficient period of time so as to warrant reversal of the defendant's judgement of conviction.

In McDermott a fifty-five day separation of jurors resulted in discharge.

2) Defendant asserts that as the seriousness of the charges decreases, so does the tolerable length of delay. In the instant case, the charges filed are punishable by life, allowing little or no tolerance.

3) The state has not shown good cause to warrant a continuation, other than personal vacation time. As you may remember, this court agreed to allow defense counsel, as an officer of the court, to assure the presence of defendant's ex-wife, a state witness.

4) The Judge has not shown good cause to warrant a continuation, other than personal vacation time, and general congestion of the docket.

5) Defendant contends that it is a violation of his Constitutional due process rights to proceed to trial without interruption.

"A separation between the selection of the jury and the commencement of the actual trial is highly undesirable and should be avoided wherever possible. ...Absent a bona fide emergency or some genuinely exigent circumstance, the court ordinarily should proceed with the criminal trial." A. v. State, 572 So.2d 969 (1990)

"A trial will normally proceed from the impaneling of the jury on through rendition of the verdict without undue interruption. A continuance during the progress of the trial, which results in protracted jury separation must be based upon a real and substantial need which is supported by a showing of due diligence and good faith..." Armstrong v. State, 426 So.2d 1173 (Fla. 5th DCA 1983)

6) Error would be assigned to the refusal of the court to cause prospective jurors to be sworn to try the issues in accordance with defendant's requests, contrary to demand by state which has no valid cause for refusal. Kennick v. State (1958)

In Raines v. State, 65 So.2d 558 (Fla. 1953) only 15 hours was necessary to prompt a reversal, where the proper admonitions were not given.

* The defendant asserts that such an extended lapse of time coupled with no cause shown by the state or the Judge, alone, would overcome the defendant's need to show that separation of the jury prejudiced his rights.

However, courts have held that the party claiming to be aggrieved by the undue delay in presentation of a case to the jury need only show the existence of circumstances capable of prejudicing the deliberate functions of the a jury. McDermott

In this case the alleged crime occurred May 12, 1995.

Defendant was arrested in Broward County on March 28, 1998.

7) More than five years has passed since the occurrence of this alleged incident. Defendant has already been unduly prejudiced by the death of a key defense witness in July of 1999, whose whereabouts were previously unknown.

8) Additionally, the court has been advised that the defendant's alibi witness would be unavailable after August 27, 2000. This witness has already postponed trips on several occasions to accomodate the previously set trial dates, and did agree one last time to be available during the speedy trial window. (The speedy trial window, although having been met by the picking of the jury on August 9, 2000, would have ended on August 22, 2000.)

9) The court has also been advised that the defendant's key witness, a doctor, who had performed surgery on defendant on May 8, 1995, will apparently be unavailable all of September, October and possibly longer, as he is returning to his native country of Haiti, and is also doing some other extensive travelling.

10) Even the state's own witness, Michelle Neumann, the former wife of defendant, has declared availability until August 31, 2000. She will be in Amsterdam for an unknown period of time.

Clearly there is fact of prejudice by the undue separation of jury, and this court has been forewarned in ample time to make proper arrangements by either rearranging dockets, and/or transferring this case to a judge that could accomodate the speedy trial window.

This memorandum having been duly discussed with my defense counsel, and with agreement by them to help preserve my rights to the fullest extent of the law, including any further necessary actions, is respectfully submitted to the Honorable Judge Horowitz this 3rd day of August, 2000 for his prompt attention and reconsideration.

Sincerely,

Ernesto Behrens, #5098-6793
North Broward County Jail
1550 NW 30th Ave.
Pompano Beach, Florida 33069

Defense Counsel: Mr. Ty Terrell
489-2204

cc: Judge Rothschild
Dennis Siegel, P.A.
Clerk of Court

EXHIBIT D

Bring them in, please.

THE SHERIFF: Jurors coming in, your honor.

[WHEREUPON, the jury panel entered the courtroom]

THE COURT: Good afternoon, ladies and gentlemen.

THE JURY PANEL: Good afternoon.

THE COURT: Appreciate your patience. Appreciate you all getting here as you did.

Let me just make sure that everybody is where they're supposed to be.

Mr. Torres?

MR. MANUEL TORRES: Yes.

THE COURT: Mr. Harmon?

MR. JEFFREY HARMON: Here.

THE COURT: Mr. Walker?

MR. WILLIAM WALKER: Here.

THE COURT: Ms. -- Mr. Sigal?

MR. SETH SIGAL: Yes.

THE COURT: Mr. Hartnik?

MR. JOEL HARTNICK: Yes.

THE COURT: Ms. Rivera?

MS. DORCAS RIVERA: Here.

THE COURT: Ms. Kettle.

MS. JO-ANN KETTLE: Yes.

THE COURT: And Ms. Daye.

MS. OLIVE DAYE: Here.

THE COURT: Okay. Everybody is present. Would you swear our panel in please, Karen.

THE CLERK: Would you all stand and raise your right hand, please.

[WHEREUPON, the jury panel was sworn]

THE CLERK: Please be seated.

THE COURT: Okay. Ladies and gentlemen, you have now been selected and sworn as the jury to try the case of the State of Florida versus Ernesto Behrens.

This is a criminal case Mr. Behrens, as I read to you earlier, is charged with two counts: One, armed sexual battery and two, burglary of a dwelling with a battery. The definition of the elements of armed sexual battery and burglary of a dwelling with a battery will be explained to you later.

It is your solemn responsibility to determine if the state has proved its accusations beyond a reasonable doubt against Mr. Behrens. Your verdicts must be based solely on the evidence

EXHIBIT E

DATE: 08/0 /00 — 17TH JUDICIAL CIRCUIT OF FLORIDA — PAGE: 1

JURY PANEL INFORMATION LIST

PANEL # TS3312 — SELECTED AT: 10:44

CALL # 1 — JUDGE ALFRED J. HOROWITZ — ROOM 518

CASE # 98-5739CF10 — IN-COURT CLERK HAYNIE, KAREN

JUROR #	NAME AND ADDRESS	
TS 4774	MAYS CLIFFORD E	JURY [ ] ALT [ ] CHALL [D]
TS 4554	GRANTHAM KIMBERLY L	JURY [ ] ALT [ ] CHALL [D]
TS 4409	GLASGOW JANET M	JURY [ ] ALT [ ] CHALL [C]
TS 4284	MORRIS KENNETH J	JURY [ ] ALT [ ] CHALL [C]
TS 4185	KOSCIC HELEN M	JURY [ ] ALT [ ] CHALL [C]
TS 4022	GIULIANI DEBRA A	JURY [ ] ALT [ ] CHALL [C]
TS 4470	DIXON JOHN A	JURY [ ] ALT [ ] CHALL [D]
TS 4462	CHANDLER MARGARET I	JURY [ ] ALT [ ] CHALL [C]
TS 4144	BOLTACH WILLIAM S	JURY [ ] ALT [ ] CHALL [S]
TS 4028	NELSON KENT A	JURY [ ] ALT [ ] CHALL [D]
TS 4552	MCLEAN KAREN L	JURY [ ] ALT [ ] CHALL [C]
TS 4594	ROSCO JAMES A	JURY [ ] ALT [ ] CHALL [C]
TS 4310	MONTALVO ROLANDO I	JURY [ ] ALT [ ] CHALL [S]

C ++++ ++++ +++ ++++ ++++ ++++ ||
D ++++ |||
S ++++ ||||

DATE: 08/ / 00 — 17TH JUDICIAL CIRCUIT OF FLORIDA — PAGE: 2

JURY PANEL INFORMATION LIST

PANEL # TS3312 — SELECTED AT: 10:44

CALL # 1 — JUDGE ALFRED J. HOROWITZ — ROOM 518

CASE # 98-5739CF10 — IN-COURT CLERK HAYNIE, KAREN

JUROR #	NAME AND ADDRESS	
TS 4021	FRUEHE CHARLENE G	JURY [ ] ALT [ ] CHALL [C]
TS 4336	GILBERT JARED A	JURY [ ] ALT [ ] CHALL [C]
TS 4024	CANNON MICHAEL C	JURY [ ] ALT [ ] CHALL [C]
TS 4545	TORRES KATHLEEN K	JURY [ ] ALT [ ] CHALL [D]
TS 4451	DOVERSPIKE MICHELLE R	JURY [ ] ALT [ ] CHALL [D]
TS 4425	TRAVIS BRUCE K	JURY [ ] ALT [ ] CHALL [P]
TS 4405	MORGENSTEIN GARY M	JURY [ ] ALT [ ] CHALL [S]
TS 4237	BURDINE MAUREEN A	JURY [ ] ALT [ ] CHALL [C]
TS 4105	TORRES MANUEL A	JURY [ ] ALT [ ] CHALL [1]
TS 4423	WILDER KEITH R	JURY [ ] ALT [ ] CHALL [C]
TS 4418	COLLINS ESTELA	JURY [ ] ALT [ ] CHALL [C]
TS 4304	ROBBINS ANTONIO D	JURY [ ] ALT [ ] CHALL [C]
TS 4221	GRABOWSKI JODI L	JURY [ ] ALT [ ] CHALL [C]

DATE: 08/[illegible]000 17TH JUDICIAL CIRCUIT OF FLORIDA PAGE: 3
JURY PANEL INFORMATION LIST
PANEL # TS3312 SELECTED AT: 10:44

CALL # 1 JUDGE ALFRED J. HOROWITZ ROOM 51B

CASE # 98-5739CF10 IN-COURT CLERK HAYNIE, KAREN

JUROR #	NAME AND ADDRESS	
TS 4023	ASLOU ZYNEB B	JURY [ ] ALT [ ] CHALL [C]
TS 4013	HENDERSON PAUL T JR	JURY [ ] ALT [ ] CHALL [D]
TS 4277	JONES ALTHIA R	JURY [ ] ALT [ ] CHALL [C]
TS 4269	TAYLOR BRUCE A	JURY [ ] ALT [ ] CHALL [C]

JURORS SENT FOR PANEL = 30

DATE: 08/1 J00 — 17TH JUDICIAL CIRCUIT OF FLORIDA — PAGE: 1

JURY PANEL INFORMATION LIST

PANEL # TS3312 — SELECTED AT: 10:44

CALL # 2 — JUDGE ALFRED J. HOROWITZ — ROOM 518

CASE # 98-5739CF10 — IN-COURT CLERK HAYNIE, KAREN

JUROR #	NAME AND ADDRESS	
TS 6140	HARMON JEFFREY W	JURY [ ] ALT [ ] CHALL [D]
TS 6158	DOCTOR TERESA B	JURY [ ] ALT [ ] CHALL [C]
TS 6131	EXANTUS MACKENZIE	JURY [ ] ALT [ ] CHALL [S]
TS 6120	CREGO JON R	JURY [ ] ALT [ ] CHALL [D]
TS 6102	ZIMMER ZACHARRIAH J	JURY [ ] ALT [ ] CHALL [C]
TS 6034	BOWE THOMAS E	JURY [ ] ALT [ ] CHALL [C]
TS 6033	LEE MICHAEL H	JURY [ ] ALT [ ] CHALL [S]
TS 6061	WALKER WILLIAM E	JURY [ ] ALT [ ] CHALL [3]
TS 6173	SIGAL SETH I	JURY [ ] ALT [ ] CHALL [4]
TS 6008	ROBERSON RALPH T	JURY [ ] ALT [ ] CHALL [C]
TS 6149	HARTNIK JOEL B	JURY [ ] ALT [ ] CHALL [5]
TS 6132	DRUCKER SHELLI G	JURY [ ] ALT [ ] CHALL [C]
TS 6126	ROSELL RICK J	JURY [ ] ALT [ ] CHALL [S]

DATE: 06/ /2000 — 17TH JUDICIAL CIRCUIT OF FLORIDA — PAGE: 2

JURY PANEL INFORMATION LIST

PANEL # TS3312 — SELECTED AT: 10:44

CALL # 2 — JUDGE ALFRED J. HOROWITZ — ROOM 518

CASE # 98-5739CF10 — IN-COURT CLERK HAYNIE, KAREN

ROR #	NAME AND ADDRESS	
TS 6108	CRETELLA KEVIN E	JURY [ ] ALT [ ] CHALL [S]
TS 6081	RAMIREZ BIENVENIDO B	JURY [ ] ALT [ ] CHALL [ ]
TS 6067	YORKER JESSE JR	JURY [ ] ALT [ ] CHALL [ ]
6025	GIACALONE LEONARD	JURY [ ] ALT [ ] CHALL [S]
TS 6099	STRONG SHERRY L	JURY [ ] ALT [ ] CHALL [ ]
TS 6137	RIVERA DORCAS	JURY [ ] ALT [ ] CHALL [6]
TS 6116	KETTLE JO-ANN M	JURY [ ] ALT [1] CHALL [ ]
TS 6088	HOLLADAY DEBORAH C	JURY [ ] ALT [ ] CHALL [ ]
TS 6074	CHILDS OWEN D	JURY [ ] ALT [ ] CHALL [ ]
TS 6031	DAYE OLIVE M	JURY [ ] ALT [2] CHALL [ ]
TS 6022	NGUYEN YEN T	JURY [ ] ALT [ ] CHALL [ ]
TS 6012	PERMENTER MAXWELL C	JURY [ ] ALT [ ] CHALL [ ]
TS 6013	SCHULTE FREDERICK S	JURY [ ] ALT [ ] CHALL [ ]

JURY PANEL INFORMATION LIST

PANEL # TS3312 SELECTED AT: 10:44

CALL # 2 JUDGE ALFRED J. HOROWITZ ROOM 518

CASE # 98-5739CF10 IN-COURT CLERK HAYNIE, KAREN

JUROR #	NAME AND ADDRESS	
TS 6019	GEORGE CHRISTOPHER E	JURY [ ] ALT [ ] CHALL [ ]
TS 6029	MORALES JESUS R	JURY [ ] ALT [ ] CHALL [ ]
TS 6059	GEORGE THOMAS J	JURY [ ] ALT [ ] CHALL [ ]
TS 6062	ELLIOTT JENNIFER	JURY [ ] ALT [ ] CHALL [ ]

JURORS SENT FOR PANEL = 30

EXHIBIT F

PROCEEDINGS

THE COURT: Let the record reflect that Mr. Behrens, Mr. Terrell, Ms. Shelowitz and Mr. Segal are present. I'm going to send Karen to get the jury panel.

MR. TERRELL: Can I say one thing very fast? Yesterday when we started voir dire, I don't think the jury was sworn for voir dire purposes. I didn't know if the Court wants to get them and swear them now.

THE COURT: I will retroactively swear them and ask them if what they said was true and what they are going to say in the future is true.

MR. TERRELL: You're bringing in a new thirty; correct?

THE COURT: Yes.

MR. TERRELL: Before we get out this thirty, I'm renewing my objection. I did research last night about the comment of that one gentleman but it sounds like it's the discretion of the trial Court.

THE COURT: Let's see how you do with these thirty. Your motion is denied. Let's move on. I don't know how we are with time if we're okay on time. I may have them have the questions.

EXHIBIT G

everyone will follow behind so there will be no vacant seats. What I'm saying you're going to consolidate yourself and move in close.

Don't leave any personal items. I'm going to give you a stretch break and I want you to be outside these doors no later than ten minutes til 1:00. That's about a 10 minute stretch break. Again, be very mindful of who you are going to be seated by on both ends. Thank you much. I'll see you at those doors at that time. Thank you.

(Thereupon a break was had.)

THE COURT: Mr. Behrens, Mr. Segal, Ms. Shelowitz, Mr. Terrell are present. Bring in the first panel and I'm going to swear them in. Mr. Dixon. Mr. Boltach. Mr. Nelson. Mr. Montalvo. Mr. Gilbert, slide down please. Ms. Torres. Ms. Doverspike. Mr. Travis. Mr. Morgenstein. Ms. Burdine. There is Manuel Torres. Right there if you take that seat. Mr. Henderson and Ms. Jones. You want to raise your right hands please to be sworn.

(Thereupon the prospective jurors were sworn in.)

THE COURT: Please have a seat. Welcome back. Thank you for your patience. I guess, you

EXHIBIT H

6-2

IN THE CIRCUIT C[illegible]T OF
THE SEVENTEENTH JUDICIAL CIRCUIT
BROWARD COUNTY, STATE OF FLORIDA

STATE OF FLORIDA,

vs.

ERNESTO BEHRENS,
Defendant.

CASE NO.: 98-5739CF10A

JUDGE: ROTHSCHILD

C

DEMAND FOR SPEEDY TRIAL

DEFENDANT, in the above cause, through undersigned counsel, demands speedy trial in this cause, pursuant to Florida Rule of Criminal Procedure 3.191(b).

Undersigned counsel further represents that Defendant has a bona fide desire to obtain a trial sooner than otherwise might be provided, and that Defendant is available for trial, has diligently investigated the case, and is prepared or will be prepared for trial within five (5) days, as required by Florida Rule of Criminal Procedure 3.191(g).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished to the Office of the State Attorney, Broward County Courthouse, Ft. Lauderdale, Florida, June 23, 2000.

TY TERRELL, ESQ.
Attorney for the Defendant
1895 W.Commercial Blvd. Ste. 135
Ft. lauderdale, Florida 33309
Fla Bar No. 0077976
(954)489-2204

EXHIBIT I

IN THE CIRCU... COURT OF THE 17TH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

STATE OF FLORIDA,

CASE NO. 98-5739CF10A

vs.

JUDGE: HOROWITZ

ERNESTO BEHRENS,
Defendant.

NOTICE OF EXPIRATION OF TIME FOR SPEEDY TRIAL

Defendant, through undersigned counsel, files this Notice of Expiration of Time for Speedy Trial, pursuant to Fla.R.Cr.P. 3.191(b) and (h), and says as follows:

1. Defendant was magistrated on March 28, 1998 and was charged with armed sexual battery and armed burglary
2. That on June 23, 2000, Defendant filed a Demand for Speedy Trial with this Court. A copy was also served on the State Attorney.
3. On August 9, 2000 a group of 30 prospective jurors were questioned by the Court without being sworn as required by Florida Rule of Criminal Procedure 3.300(a) and (b).
4. On August 10, 2000, the remaining prospective jurors were then sworn in by the Court regarding the previous day of conversation.
5. Therefore the Defendant has not been properly brought to trial within 50 days of the filing of the Demand for Speedy Trial and is, therefore, entitled to the appropriate remedy as set forth in Fla.R.Cr.P. 3.191(p).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was hand delivered to the Office of the State Attorney, Broward County Courthouse, Fort Lauderdale, Florida on this 25th day of August, 2000.

Tyrone A. Terrell, Esquire
Attorney for the Defendant
Florida Bar #0077976
1895 West Commercial Boulevard
Suite 135
Ft. Lauderdale, FL 33309
Phone: (954) 489-2204/Fax: 489-0637

EXHIBIT J

IN THE CIRCUIT COURT OF THE
17TH JUDICIAL CIRCUIT IN AND FOR PALM
BEACH COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff.

Case Number: 98-5739CF10A
Judge: HOROWITZ

vs.

ERNESTO BEHRENS,
Defendant.
_____/

MOTION FOR DISCHARGE

Defendant, in the above cause, pro se, pursuant to Fla. R.Cr.P. 3.191(j)and (p)(3), moves this Court for an Order discharging Defendant from the crime alleged in the Information in the above-styled cause on the following grounds:

1. On August 25,2000, the Defendant filed a Notice of Expiration of Time for Speedy Trial, as required by Fla. R.Cr.P. 3.191(a) and (h).

2. Defendant has not been brought to trial within fifteen (15) days from the date of the filing of a Notice Expiration of Speedy Trial or within ten (10) days of the hearing on said Notice, through no fault of Defendant.

WHEREFORE, the Defendant respectfully requests this Court to enter an Order forever discharging Defendant from the crime, pursuant to Fla. R.Cr.P. 3.191(p)(3).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished by hand to the Office of the State Attorney, 201 S.E. 6th Street, Broward County, Florida 33301 on this 11th day of September, 2000.

Filed In Open Court,
CLERK OF THE CIRCUIT COURT
ON SEP 11 2000
BY

Tyrone A. Terrell, Esquire
Attorney for the Defendant
Florida Bar #0077976
1895 West Commercial Boulevard
Suite 135
Ft. Lauderdale, FL 33309

191

EXHIBIT K

your concern and I appreciate your raising it but I don't think it's my job to speculate on who she talks to or what she does with her notes. That's her perrogative.

Let's address any motions that the defense wishes to present.

MS. SHELOWITZ: Judge, at this time, we move for judgement of acquittal. I want to start by presenting some case law starting with Dodd and Cridlen. Here's copies for the state.

THE COURT: You know -- and I can appreciate every judge is probably somewhat different. It helps me if you'll just give me a moment to look at the case first.

MS. SHELOWITZ: Okay.

THE COURT: And then I'll hopefully be better prepared for your argument.

MS. SHELOWITZ: I can give you the next case that I'm going to use too.

THE COURT: Okay. That would be helpful.

MS. SHELOWITZ: And this is State versus Law.

THE COURT: Okay. Just give me a second then. Okay. I've had a chance to review the law,

Cridlen and Dodd. Let me hear any further argument.

MS. SHELOWITZ: Okay. Now, judge, I know that when you first look at these cases, they're not necessarily judgement of acquittal cases but I'm going to tie them into why I gave you those cases.

To start with, the -- one of the most -- the critical piece of evidence that came into this case was the swabs. We objected to the chain of custody at the time and the court found that even there was a problem with it, that really the jury should determine the weight of that evidence.

But according to Dodd and Cridlen, the state can, as a general rule, bring in people who can testify as -- as Hinz did to what generally happens to evidence. That can happen until the defense shows a -- some indication of probable tampering with the evidence but mere reasonable possibility of tampering is sufficient to require proof of the chain of custody.

Now, here, which has been ir-rebutted, is that Sargeant Moore -- and we have the transcripts -- says that he took two swabs, one from one cheek and one from the other. He called

that one specimen when he put that into evidence, okay, because he considered it as one even though there were two swabs.

After that point, we have Sargeant Moore that puts them into a sealed envelope, you know, puts it into the lab. From there, we are missing several people until we come to a point where Hinz opens it, now has a card that says Ernest Behrens and has four swabs. She then gives those items to Geller.

According to Dodd, in that case, they started out with an officer who arrested somebody for cocaine and had a certain number of grams. He sealed it. He brought it to the lab. He -- there was a special agent that transported it that never testified. When the chemist received it, he testified that there was no tampering with the package. Just like we saw here, it was in a perfect condition. But when he opened it, it was a different amount.

And even in that case, they showed -- well, they had a lot of explanations for it but that's not the standard. The standard is, the state now has the burden of what they didn't originally have to do. Now, they have to bring in

those loose ends. They have to proof the chain of custody, not because the defense necessarily proved that there was tampering but there was this probability that obviously if the amounts have changed, something happened to the evidence.

And there's two things here that shows that something happened to the evidence. The fact that the name is wrong has actually not been explained by the state. They can call it a mistake. They can call it a misspelling. They can call it whatever they want. But they have to bring in that person to testify as to what they did. The state is not presenting the evidence.

THE COURT: Let me ask you this and if I'm interrupting you at an inopportune time, I apologize, but there's two issues that you raised. One, I'm going to call the tampering issue and one the chain of custody issue.

The tampering issue, if I understand your argument, is -- is the discrepancy, if you will, in the number of swabs that people have testified to in terms of what Sargeant Moore said, what Hinz said, perhaps even to an extent what Marchaese may have testified that she had available to her.

I think it was Hinz -- well, I'll just

say there was testimony, I recall, about, you know, whether one packet was two swabs or how that broke down, how generically it was referred to, that sometimes one packet with two swabs was one swab. Sometimes, it was referred to as two swabs.

So I think that factually, it's been presented different than my reading of Dodd which was dealing in grams of contraband. I mean, I understand -- I think I understand your argument but I also am trying to go on my notes and the recollection of how that played out.

MS. SHELOWITZ: Absolutely. The problem is, we aren't allowed to speculate on that. That is --

THE COURT: Go ahead.

MS. SHELOWITZ: And I think if you read the state's redirect during the trial -- and I'm looking at page 21 of the transcript that was transcribed by the court reporter from trial -- the state tried to clear that up. And on the property receipt, it says one swab and it's -- because that's -- and it says: Quantity, one swab. So one can argue there was only one swab. But then there's the issue of: Well, maybe there's two in there.

The state asked:

"Now, on the property receipt, it says one swab specimen; correct?
A. That's correct.

"Q. How many swabs are in a swab specimen?
A. Two, one for the left and one for the right."

So he clarified why he only put one on the property receipt. But there's nowhere where he testified I had two packages with two in each because then the quantity on the property receipt would be two. And because we have that question and nobody has testified -- the person who got it to say: When I opened it, this is how many were in it. We can only guess and we're not permitted to do.

THE COURT: Well, let me ask you this question. If the person in Hinz's office that you say has not been here, if that person has died -- and I used to always hate as a lawyer when any -- whenever anybody would -- would play the what if game with me, you know, and I apologize maybe for doing that. But if somebody had died, is it your position that forever and a day, the case could never go forward because that person is unavailable to testify --

MS. SHELOWITZ: Judge, the reason --

THE COURT: -- in terms of --

MS. SHELOWITZ: First of all --

THE COURT: -- in terms of going through the flow or chain of custody?

MS. SHELOWITZ: I would say, number one, there's been no unavailability shown in this case. Number two, I don't think the defendant would ever have to suffer that prejudice just because a witness died. If you have a possession of cocaine case and an officer gets arrested, which has happened in several cases, and he can't testify --

THE COURT: Sure.

MS. SHELOWITZ: -- the case is nolle proc'd.

THE COURT: What about -- tell me exactly where you see the flaw in the chain of custody.

MS. SHELOWITZ: I believe that the flaw happened somewhere --

THE COURT: I mean, where is the break?

MS. SHELOWITZ: And honestly, with the people who testified, they were here so we have to deal with them. But nobody -- we don't have the person who put the number on it. I don't know if she did it. I don't know if soembody purposely went into the lab. I don't know that. There's

been no evidence that --

THE COURT: Well, you see the way --

MS. SHELOWITZ: Hinz can't testify that it wasn't reopened because it was. In fact, the property receipt went to a separate building than the property itself at one point.

THE COURT: When that issue came with the -- with the generating of the item number and the writing of Ernest and the handwritten numerical listing of name from those 3,000 swabs, the way I viewed that at the time was that if Hinz testified -- and I think she did to my satisfaction -- that she was otherwise familiar with the internal workings of her office from her 11 years there, whatever it may have been, and that she knew that there was a person whose mission in life was to generate that number, she testified as to the familiarity with the handwriting of this woman who generated the list, I think the -- the -- the hearsay rule provides that it's not only a custodian of records, which I don't think she was, but it's not only a custodian of records but it's a person who a court would find otherwise trustworthy, I think can testify those things from which they can be admitted.

MS. SHELOWITZ: Absolutely. And that's the general rule that Dodd refers to. But the exception to the general rule is when the probability that something has happened is shown, then that rule doesn't apply anymore because I don't know if the person misnumbered.

I don't know if the person wrote the wrong name. And I don't know if the person that's not sitting here is the one who tampered with the evidence. And I don't know if she got up from her desk at any point -- I can't ask her -- and someone could have swiped the swabs. And I shouldn't have to speculate. I should be able to -- she should appear.

And that's the purpose of these cases. In this cocaine case, they don't know. Maybe the scale was calibrated wrong. But the defense had the right to have that witness on the stand to ask: Well, when was the last time you -- you. calibrated -- not what protocol is but when did you calibrate that scale. Maybe she was out the week before and she knew everything was off that week. We don't know.

But we don't have to speculate. That's what Dodd is about. That's what Cridlen's about.

It's about -- if there's that hole and there's a discrepancy in the evidence, well then the state doesn't have the right to use the general rule, that people just generally testify. At that point, the defense has to say -- the state has to say: Here's the people you needed to talk to so that you don't have a doubt as to how the evidence changed its form through time.

THE COURT: Mr. Segal.

MR. SEGAL: Judge, what Mr. -- Ms. Shelowitz is ignoring is the fact that, in evidence, the property receipt from sargeant Moore, number 232 is written on there as the item -- as the item number. That number 232 is written on the property receipt, if the court wants to see, for the swabs

THE COURT: Well, sargeant Moore -- that property receipt, if I recall, was generated after he delivered it to the Crime Lab. Am I -- am I chronologically off?

MR. SEGAL: You're off because it's sargeant Moore's property receipt. If you look at it, it's Sargeant Moore's property receipt. The number 232 is written on the property receipt, not by sargeant Moore but the number 232 is written on

the property receipt, as Ms. Hinz said, by the intake people at the lab. That number followed these swabs all the way through. You saw the documentation that existed, that 232 was assigned to Ernesto Behrens and then it followed it to the lab.

THE COURT: When you say Sargeant Moore's property receipt, is it Sargeant Moore's property receipt or the lab's property receipt?

MR. SEGAL: Sargeant Moore's property receipt.

MS. SHELOWITZ: Judge, he did not that number. That was not Hinz's testimony.

MR. SEGAL: The court -- the court's question was, was it his property receipt. And it was his report receipt. State's Exhibit 18 is his property receipt as both --

THE COURT: Property -- I have 18 as a property receipt from the Crime Lab.

MR. SEGAL: No. It's a property receipt to the Crime Lab.

THE COURT: Okay.

MR. SEGAL: And the number 232 is affixed to that. The testimony in the documentation, including State's Exhibit 19, shows that 232

followed those swabs through the lab. It came out as 232. That's what was done by Ms. Hinz at the -- at the lab before she turned it over to sargeant -- Detective Geller. Number 232 stayed with it all the way through.

There is no problem of tampering in this. Ms. Hinz testified to the fact that the police officers routinely mischaracterize how many swabs or specimen, whatever, and they do that. That's all -- that's all this is, is a mischaracterization, as she testified to, as Ms. Marchaese tried to testify to but that didn't come out for the jury. That's all it is, your honor. There's no problem with tampering here.

If the court looks at the case law -- well; first of all, the cases, as Ms. Shelowitz cited, about the chain of custody, even if there was a problem which clearly there is not, but if there was a problem, that's not a basis for a motion for a judgement of acquittal. These cases are not judgement of aquittal cases.

The rules for judgement of acquittal is whether the evidence can sustain the verdict. The evidence is in. The court -- all that's been in. The swabs are in evidence. It's there. To try

and go back now and undo and say, let's ignore the evidence that's been admitted --

THE COURT: Was there any suppression, motion to suppress this physical evidence previously filed in this case?

MR. SEGAL: No.

MS. SHELOWITZ: No. But there doesn't have to be, judge.

THE COURT: I understand. I'm just wondering.

MS. SHELOWITZ: And, judge, if we have to, let's read the transcript because I am a hudnred percent positive and the court has -- has already through their own rendition said, the number 232 was the computer-generated number at the lab, not by sargeant Moore. He never testified to that. That is the computer-generated number. That is the number that follows.

And the number they're claiming is consistent but they have not spoken to the number of swabs. They are speculating that that's what happened. They are guessing that that's what sargeant Moore did. But that is not what Sargeant Moore testified to. He was very clear on the number.

The state crossed him on re-direct themselves. They tried to rehabilitate their own witness and that was the answer they stuck with. They never said: Well, is it possible you made a mistake on the number? He asked about the property receipt that says one specimen. And, in fact, he said: Well, when we say one specimen, it's because there's one but there's two in it.

sargeant Moore wasn't -- he's not a dummy. He's done this 400 something times. He knows how many -- how many Q tips. He sat there claiming that while Ernesto came, he didn't go to his car. He didn't do anything. He knows the number. This isn't an officer who's guessing. The state has not -- and they can argue to their heart's content. The bottom line is, nobody but those missing people can explain.

And as far as these not being judgement of acquittal cases, that is their evidence. So if we go to the next step and talk about a prima facie case, if that's the best they have, which shouldn't even have been admitted in the first place, then there is no prima facie case.

And that was going to be my second argument but I think first, we need to address the

fact that this evidence came in to begin with.

THE COURT: Let me hear the rest of your argument.

MS. SHELOWITZ: The second part of my argument goes into the Law case in that the only thing that the state has given us is circumstantial evidence because even if you allow those swabs into evidence, everything is circumstantial at this point as to whether it's happened. There has been no direct proof.

Nobody can say he did it. Nobody -- there's -- there's nobody that -- he couldn't rebutt every reasonable hypothesis of innocence, which is what this case says. This case is not made.

You know, I'm not trying to sit here and tell the state that they have to prove that we're wrong on everything but they do have to present their side of the story that somewhat rebutts ours, which is what this case is about. They have to show something that is inconsistent with the defendant's theory of events.

Now, we haven't even put on our case yet. But the state has not shown any evidence inconsistent with our assertion that there are a

different number of swabs, that the name Ernest Behrens is wrong. The attempt by the state to cure that was an officer, a captain, from Miami who worked on this case five years ago who supposedly eight months ago took a look at the list.

That is not even close to rebutting the fact -- he had no personal knowledge. If he had come in here and said: No. I know what happened in this case and what happened was this. That might have been an attempt at rebutting. But there was absolutely no attempt at rebutting the theory of innocence.

THE COURT: Let me ask you this. Is it your position that the only evidence in this case is circumstantial?

MS. SHELOWITZ: Yes. And therefore, the motion for a judgement of acquittal should be granted in a circumstantial case where the state fails to present evidence from which a jury can conclude every reasonable hypothesis of that guilt. If they don't offer evidence inconsistent with our hypothesis, which has only been even shown through cross. We haven't even put a defense on. And this is looking in the light most

favorable to the state, then judgement of acquittal must be granted.

In addition to that, there has been no scientific evidence whatsoever of any type of penetration in this case. The only thing we have is from [redacted] [redacted] testimony which she was three times at a minimum impeached during that trial, trying to change her testimony.

They have not put a -- there's no evidence that there was any semen in her mouth, any type of physical trauma. The sexual -- the person from the Sexual Assault Treatment Center could give no testimony whatsoever that presented any type of evidence that penetration had occurred in this case.

THE COURT: Mr. Segal.

MR. SEGAL: The logic of Ms. Shelowitz's last argument is the logic that applies all the way through this. The logic that there's no evidence of oral sex, therefore, there's no proof of it.

Well, I think anybody, using their normal mind -- and Ms. Swaby testified to it -- virtually never is there physical evidence of oral sex. There's no type of tearing, ripping or anything of

that nature that occurs during oral sex. It's a penis going into a mouth which normally doesn't disturb or destroy your mouth in any kind of fashion.

Secondly, Ms. [redacted] testified there no ejaculation in her mouth. No semen is expected to be found in somebody's mouth if there's no ejaculation. She clearly testified that the penetration occurred. That's all that's necessary.

Given the light that -- in the most -- given the evidence in the light most favorable to the state, which I can give the court case law on all of that, you should deny the motion for judgement of acquittal. In all logical inferences therefrom, in the light most favorable to the state, penetration occurred that she testified to.

Going back to the circumstantial evidence arguments, if the court reads Law on page 189, left column in the middle, which says: "The state is not required to rebutt conclusively every possible variation of events which could be inferred from the evidence but only to introduce competent evidence which is inconsistent with the defendant's theory of events."

Addressing the chain of custody issue, which shouldn't be addressed on a motion for judgement of acquittal but assuming the court's going to do that because the swabs are already in evidence, the state has presented a theory of events rebutting there that somebody swiped swabs, somebody altered swabs. There's an Ernest Behrens that gave the swabs that are used here.

Detective Butchko testified that there was no Ernest Behrens that gave swabs. That takes care of that argument.

The number 232 stayed with the these swabs all the way through from the intake into the Miami Dade Police Department to when Ms. Hinz released them to Detective Geller. That takes care of that theory, rebutts that theory. It doesn't have to, you know -- it just has to rebutt it. And that is rebutting.

Even if we're supposed to -- need to do that, which I contend we don't. But if the court thinks we must, it is rebutting. Again, it doesn't have to be rebutting conclusively every possible variation of events going -- to introduce competent evidence which is inconsistent with the defendant's theory of events. It does not need to

was their evidence but we also rebutted our own evidence. Well, then there is no competent evidence to rely on.

And I think that whether we bring up the -- we've been objecting to these swabs coming in from the beginning of this trial. The bottom line is, if it was wrongly brought in, whether I'm saying -- call it a judgement of aquittal. I can call it whatever I want. If it was wrongly entered, it's reverseable error. And that's uncontroverted by the case law

MR. SEGAL: Judge, there's one other principle the court should apply, especially for a judgement of acquittal. I can give the court this case from the Florida Supreme Court, Marvin versus State. It says: "When Barr moved for judgement of acquittal, he admitted the facts in evidence in every conclusion favourable to the state and the jury might fairly and reasonably infer from the evidence."

Given this situation, it is clear that if you view everything in the light most favorable to the state, those swabs that Sargeant Moore took in, which the number 232 was assigned to, swabs with 232, assigned to them, left and were tested

by Ms. Marchaese. And there's no Ernest Behrens involved in this.

THE COURT: Anything else, Ms. Shelowitz, Mr. Segal?

MR. SEGAL: No.

MS. SHELOWITZ: We have nothing further.

THE COURT: Okay. I've had an opportunity to listen to your respective arguments and review the case law that each of you have presented to the court. Recognizing the standard of review at this time, I'm going to respectfully deny the defense motion.

Is the defense ready to proceed?

MR. TERRELL: Judge, have we got the jury yet?

THE COURT: I'm sorry?

MR. TERRELL: Have we -- is the jury outside?

THE COURT: No. Karen's going to go down now and get them.

MR. TERRELL: Okay. Great. One thing --

THE COURT: In fact, why don't you do that now, Karen.

MR. TERRELL: The first witness that we're going to call -- I don't know if they're

MR. SEGAL: Judge, just give me one second because they -- this is a whole different situation.

MS. SHELOWITZ: We always catch him off guard.

THE COURT: It happens.

MR. SEGAL: No, your honor.

THE COURT: Okay. At this time then, what I'd like to do is, I'd like you to take the remaining time this morning -- actually, let me address any additional motions the defense wishes to present at this time.

MS. SHELOWITZ: Judge, we'd like to renew our motion for judgement of aquittal. At this time, the standard is different, that reasonable minds could differ.

In addition, I would adopt all of my argument from the beginning from my first initial motion and apply it to the new standard now.

In addition, I would say that this alibi is uncontroverted. It was -- although there may have been some type of impeachment on or attempt at impeachment on whether she ate in or out or not and the type of pain he was in, there has been no evidence to controvert the fact that she says

that's where he is. She can identify him. She's the only person who has personal knowledge as to where Ernesto Behrens was at the time this crime was discussed.

Everything else, as we discussed, was circumstantial. You know, in addition to the problems with the chain of custody and nobody can personally testify that they ever took a swab from Ernesto Behrens. This witness personally knows where he was and that's uncontroverted.

In addition, to what our conversation before as far as oral penetration, now there's yet another witness that is unrebutted that Mr. Behrens does not normally engage in that type of sexual behavior because of the fact of the discomfort and his issue of being not circumsized.

Therefore -- and, you know, my arguments go to both Counts 1 and Count 2 as to completing the elements of proving Mr. Behrens is guilty of those two crimes.

THE COURT: Okay. I thank you.

I've had an opportunity to listen to the argument to evaluate it. And again, the court recognizes a different standard of review and I'm still familiar with the case law you've previously

presented. I am going to respectfully deny your motion at this time.

I would like to suggest that you take collectively the benefit of this time among yourselves to review proposed jury instructions and verdict forms, in particular, lesser includeds. Let's just take a minute and look at this.

MR. SEGAL: Judge, the issue of lesser includeds. There's a statute of limitation. You have to have a colloquay with the defendant if he wants to go for lessers. He's got to affirmatively waive them. There's a colloquay that the Florida Supreme Court set forth in a case -- I could get ahold of it but I don't have it with me, so --

THE COURT: You mean, if he wants to waive them?

MR. SEGAL: Essentially; yeah. He has to waive the Statute of Limitations -- the Statute of Limitations that applies to this for any lessers. So again, there's a colloquay that's required.

THE COURT: Well, let me -- before we get there, has the defense made any decision on the issue of lessers? So what you're saying is,

EXHIBIT L

Mr. Segal, that the Statute of Limitations would normally preclude any lessers?

MR. SEGAL: Yes, your honor.

MR. TERRELL: Judge, at this time, the defense would request no lesser included offences.

THE COURT: Okay. So they're not requesting any waiver of any Statute of Limitation.

MR. TERRELL: Correct.

THE COURT: Does the defense agree with Mr. Segal's presentment to the court that the Statute of Limitations would otherwise bar any lessers?

MS. SHELOWITZ: I haven't -- to be honest, I haven't seen any case law that says that if the lessers were given and the jury found guilty of that, that that guilty verdict would be void because of the Statute of Limitations. I don't know if that exists.

MR. SEGAL: It does, judge. I can provide it, if Ms. Shelowitz wants to see it.

MS. SHELOWITZ: I just ask that we are provided it.

THE COURT: Okay. So perhaps during the lunch break, you can pull that case, if that's --

if that's the circumstance, show it to Ms. Shelowitz afterwards and we'll readdress that issue.

But right now, I gather it's Mr. Behrens' intention not to have any lessers?

MS. SHELOWITZ: Correct.

THE COURT: And, of course, the state's position is they're -- they're gone by the Statute of Limitations anyway. So we have just -- the verdict forms then would be pretty straightforward: Two verdict forms, Count 1 and Count 2, guilty as charged in the information and not guilty.

Just very briefly and let's -- let's just go through the West Book because now I think we're going to be somewhat streamlined. I'm starting on page 1337.

Again, the record will show Mr. Behrens remains present, has been continuously present.

I anticipate I'll read 1.02, 2.01, 2.02.

MS. SHELOWITZ: Judge, I'm sorry. I didn't get to the page.

THE COURT: I apologize. 1337.

MS. SHELOWITZ: In which book?

MR. SEGAL: West Book.

EXHIBIT M

committing the burglary, he committed a battery upon [redacted] So the element -- one of the elements or one of the things that need to be done here is that a battery is committed during the course of it

THE COURT: Okay. I understand what Mr. Segal's saying. After I read structure, I would then suggest that I read: An act is committed in the course of committing --

MS. SHELOWITZ: Judge, he doesn't have -- has has to prove a battery occurred. He has to prove a sexual battery occurred. The definition of battery is irrelevant. He's charging --

THE COURT: Well, Count 2 is that he intended to commit a sexual battery but, in fact, committed a battery.

MR. SEGAL: But all Count 2 charges is the unlawful entry with an intent. That's the intent to commit sexual battery. And then in the course thereof, committed battery. So Count 2, there's no need to prove a sexual battery.

MR. TERRELL: But the only battery committed was a sexual battery. That's what he's charged with.

MR. SEGAL: Well, actualy, any time he

BURGLARY

Burglary F.S. 810.02 [Amended]

Before you can find the defendant guilty of Burglary, the State must prove the following three elements beyond a reasonable doubt:

Elements

1. *(Defendant)* [entered] [remained in] a [structure] [conveyance] owned by or in the possession of *(person alleged)*.
2. *(Defendant)* did not have the permission or consent of *(person alleged)*, or anyone authorized to act for him, to [enter] [remain in] the [structure] [conveyance] at the time.
3. At the time of [entering] [remaining in] the [structure] [conveyance] *(defendant)* had a fully-formed, conscious intent to commit the offense of (*crime alleged*) in that [structure] [conveyance].

Note to Judge Give whichever bracketed language applies

Define the offense that was the object of the burglary.

A person may be guilty of this offense [if he or she originally entered the premises at a time when they were open to the public, but remained there after he or she knew that the premises were closed to the public]

[or]

[if he or she entered into or remained in areas of the premises which he or she knew or should have known were not open to the public].

if he or she had the intent to commit the crime described in the charge.

Comment: The committee believes that the additional language is necessary in certain factual situations. See *Dukes v. State*, 545 So.2d 939 (Fla 3d DCA 1989). Further, we recommend bracketing the two phrases with a note that only the applicable language be given.

F.S. 810.07

Proof of the entering of a [structure] [conveyance] stealthily and without the consent of the owner or occupant may justify a finding that the entering was with the intent to commit a crime if, from all the surrounding facts and circumstances, you are convinced beyond a reasonable doubt that the intent existed.

The entry necessary need not be the whole body of the defendant. It is sufficient if the defendant extends any part of the body far enough into the [structure] [conveyance] to commit *(crime alleged)*.

Proof of intent

The intent with which an act is done is an operation of the mind and, therefore, is not always capable of direct and positive proof. It may be established by circumstantial evidence like any other fact in a case.

Even though an unlawful [entering] [remaining in] a [structure] [conveyance] is proved, if the evidence does not establish that it was done with the intent to commit *(crime alleged)*, the defendant must be found not guilty.

Proof of possession of stolen property

Proof of unexplained possession by an accused of property recently stolen by means of a burglary may justify a conviction of burglary with intent to steal that property if the circumstances of the burglary and of the possession of the stolen property, when considered in the light of all evidence in the case, convince you beyond a reasonable doubt that the defendant committed the burglary.

Definitions; give as

"Structure" means any building of any kind, either temporary or permanent, that has a roof over it, and the enclosed space of ground and outbuildings immediately surrounding that

applicable F.S. 810.011(1)

structure.

F.S. 810.011(3)

"Conveyance" means any motor vehicle, ship, vessel, railroad car, trailer, aircraft or sleeping car; and to enter a conveyance includes taking apart any portion of the conveyance.

Enhanced penalty; give if applicable

The punishment provided by law for the crime of burglary is greater if the burglary was committed under certain aggravating circumstances. Therefore, if you find the defendant guilty of burglary, you must then consider whether the State has further proved those circumstances.

With an assault

If you find that in the course of committing the burglary the defendant made an assault upon any person, you should find him guilty of burglary during which an assault has been committed. An assault is an intentional and unlawful threat either by word or act to do violence to another at a time when the defendant appeared to have the ability to carry out the threat and his act created a well-founded fear in the other person that the violence was about to take place.

While armed

If you find that in the course of committing the burglary the defendant was armed or armed himself within the structure with explosives or a dangerous weapon, you should find him guilty of burglary while armed.

Structure is a dwelling

If you find that while the defendant made no assault and was unarmed, the structure entered was a dwelling, you should find him guilty of burglary of a dwelling.

Human being in structure or conveyance

If you find that while the defendant made no assault and was unarmed, there was a human being in the [structure] [conveyance] at the time he [entered] [remained in] the [structure] [conveyance], you should find him guilty of burglary of a [structure] [conveyance] with a human being in the [structure] [conveyance].

With no aggravating circumstances

If you find that the defendant committed the burglary without any aggravating circumstances, you should find him guilty only of burglary.

F.S. 810.011(4)

An act is committed "in the course of committing" if it occurs in the attempt to commit the offense or in flight after the attempt or commission.

F.S. 790.001(5)

"Explosive" means any chemical compound or mixture that has the property of yielding readily to combustion or oxidation upon application of heat, flame, or shock, including but not limited to dynamite, nitroglycerin, trinitrotoluene or ammonium nitrate when combined with other ingredients to form an explosive mixture, blasting caps, and detonators.

Note to Judge

If necessary, see exceptions set out in F.S. 791.01 and Chapter 552.

A "dangerous weapon" is any weapon that, taking into account the manner in which it is used, is likely to produce death or great bodily harm.

"Dwelling" means a building [or conveyance] of any kind, including any attached porch, whether such building [or conveyance] is temporary or permanent, mobile or immobile, which has a roof over it and is designed to be occupied by people lodging therein at night, together with the enclosed space of ground and outbuildings immediately surrounding it.

Therefore, if you find the defendant guilty of burglary, it will be necessary for you to state in your verdict whether the defendant *(insert aggravating circumstances charged)*.

Possession of Burglary Tools F.S. 810.06

Before you can find the defendant guilty of Possession of Burglary Tools, the State must prove the following four elements beyond a reasonable doubt:

Elements

1. (Defendant) had in [his] [her] possession a [tool] [machine] [implement].
2. (Defendant) intended to use the tool in the commission of a burglary or trespass.
3. (Defendant) intended to commit a burglary or trespass.
4. (Defendant) did some overt act toward the commission of a burglary or trespass.

other supporting evidence, evidence which doesn't lie. People can fabricate. People can say things when there's no support for it.

But the DNA evidence again which doesn't lie, is not mistaken, and the other evidence supporting it has shown clearly beyond a reasonable doubt that that defendant is guilty as sin of breaking into Ms. [redacted]'s house, terrorizing her, sexually assaulting her, in the dead of night, when she's home alone, with a knife. He is guilty as charged.

Thank you very much.

THE COURT: Thank you, Mr. Segal.

Members of the jury, thank you for the attention which you've given during this trial. Please now pay attention to the instructions on the law that I'm about to give you.

Ernesto Behrens, the defendant in this case, has been accused of the crimes of sexual battery while armed and burglary of a dwelling with a battery. As I did earlier in this case, let me read to you again from the information filed in this case.

It reads: The State of Florida versus Ernesto Behrens. In the name and by the authority

of the State of Florida, Michael J. Satz, State Attorney, of the 17th Judicial Circuit of Florida, as prosecuting attorney for the State of Florida, in the County of Broward, by and through his Undersigned Assistant State Attorney, charges that Ernesto Behrens on the 12th of May, 1995, in the county and state aforesaid, did commit sexual battery upon [redacted] a person 12 years of age or older, without her consent, by causing his sexual organ to penetrate or unite with the mouth and/or tongue of [redacted] and in the process thereof, Ernesto Behrens used or threatened to use a deadly weapon, to wit a knife or other sharp object, contrary to Florida Statute 794.0.

And Count 2 reads: Michael J. Satz, State Attorney of the 17th Judicial Circuit of Florida, as prosecuting attorney for the State of Florida, in the County of Broward, by and through his undersigned Assistant State Attorney, charges that Ernesto Behrens on the 12th day of May, 1995, in the county and state aforesaid, did unlawfully enter or remain in a structure, to wit a dwelling or the cartilage thereof, located at [redacted] property of [redacted] with the intent to commit

the offense of sexual battery therein and in the course thereof, did commit a battery upon [redacted] by actually and intentionally touching or striking [redacted] against the will of [redacted] contrary to Florida Statute 810.02(2).

Before you can find the defendant guilty of sexual battery upon a person 12 years of age or older with the use of a deadly weapon, the state must prove the following four elements beyond a reasonable doubt: One, that [redacted] was 12 years of age or older. Two, Ernesto Behrens committed an act upon [redacted] in which the sexual organ of Ernesto Behrens penetrated or had union with the mouth of [redacted] Three, Ernesto Behrens in the process used or threatened to use a deadly weapon. And four, the act was done without the consent of [redacted]

Consent means intelligent knowing and voluntary consent and does not include cohersed submission. Union means contact. A weapon is a deadly weapon if it is used or threatened to be used in a way likely to produce death or great bodily harm.

Before you can find the defendant guilty of burglary with a battery, the state must prove

the following three elements beyond a reasonable doubt: One, that Ernesto Behrens entered and/or remained in a structure owned by or in the possession of [redacted] Two, that Ernesto Behrens did not have the permission or consent of [redacted] or anyone authorized to act for her to enter and/or remain in the structure at the time. And three, at the time of entering and/or remaining in the structure, Ernesto Behrens had a fully formed conscious intent to commit the offense of sexual battery in that structure and in the course thereof committed a battery upon [redacted]

A battery is defined as the intentional touching or striking of another person against their will. Proof of the entering of a structure stealthfully and without the consent of the owner or or occupant may justify a finding that the entering was with the intent to commit a crime if from all the surrounding facts and circumstances, you are convinced beyond a reasonable doubt that the intent existed.

The entry need not be the whole body of the defendant. It is sufficient if the defendant extends any part of the body far enough into the

structure to commit the crime of sexual battery.

The intent with which an act is done is an operation of the mind and therefore is not always capable of direct and positive proof. It may be established by circumstantial evidence like any other fact in the case.

Even though when unlawful entering and/or remaining into a structure is proved, if the evidence does not establish that it was done with the intent to commit the crime of sexual battery, the evidence must be found not guilty.

Structure means any building of any kind, either temporary or permanent, that has a roof over it and the enclosed space of ground and outbuildings immediately surrounding that structure.

An issue in this case is whether the defendant was present when the crime allegedly was committed. If you have a reasonable doubt that the defendant was present at the scene of the alleged crime, it is your duty to find the defendant not guilty.

The defendant has entered a plea of not guilty. This means you must presume or believe the defendant is innocent. The presumption stays

EXHIBIT N

or not guilty, must be unanimous. The verdicts must be the verdicts of each juror, as well as the jury as a whole.

In closing, let me remind you that it is important that you follow the laws spelled out in these instructions in deciding your verdicts. There are no other laws that apply to this case. Even if you do not like the laws that must be applied, you must use them. For two centuries, we have agreed to a constitution and to live by the law. No one of us has the right to violate rules we all share.

Counsel, can I see you briefly please?

[WHEREUPON, the following sidebar discussion was commenced]

THE COURT: Do either of you have any objection to the instructions as read?

MR. TERRELL: No.

MS. SHELOWITZ: No.

MR. SEGAL: No.

THE COURT: Okay. Thank you.

[WHEREUPON, the sidebar discussion was concluded]

THE COURT: All right. Ladies and gentlemen, gather together your personal items.

EXHIBIT O

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

STATE OF FLORIDA

vs.

ERNESTO BEHRENS

AMENDED
INFORMATION FOR

I. - SEXUAL BATTERY-ARMED
II. - BURGLARY OF A DWELLING WITH A BATTERY

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

MICHAEL J. SATZ, State Attorney of the Seventeenth Judicial Circuit of Florida, as Prosecuting Attorney for the State of Florida in the County of Broward, by and through the undersigned Assistant State Attorney, charges that ERNESTO BEHRENS

on the 12th day of May, A.D. 1995, in the County and State aforesaid, did commit Sexual Battery upon [redacted] a person twelve (12) years of age or older, without her consent by causing his sexual organ to penetrate or unite with the mouth and/or tongue of [redacted] and in the process thereof ERNESTO BEHRENS used or threatened to use a deadly weapon, to-wit: a knife or other sharp object, contrary to F.S. 794.011(3).

COUNT II

MICHAEL J. SATZ, State Attorney of the Seventeenth Judicial Circuit of Florida, as Prosecuting Attorney for the State of Florida in the County of Broward, by and through the undersigned Assistant State Attorney, charges that ERNESTO BEHRENS

on the 12th day of May, A.D. 1995, in the County and State aforesaid, did unlawfully, enter or remain in a structure, to-wit: a dwelling, or the curtilage thereof, located at 750 N.W. 91st Terrace, Plantation, Florida, property of [redacted] with the intent to commit the offense of Sexual Battery therein, and in the course thereof did commit a Battery upon [redacted] by actually and intentionally touching or striking [redacted] against the will of [redacted] contrary to F.S. 810.02(2)

COUNTY OF BROWARD
STATE OF FLORIDA

Personally appeared before me ***DENNIS SIEGEL,*** duly appointed as an Assistant State Attorney of the 17th Judicial Circuit of Florida by MICHAEL J. SATZ, State Attorney of said Circuit and Prosecuting Attorney for the State of Florida in the County of Broward, who being first duly sworn, certifies and says that testimony has been received under oath from the material witness or witnesses for the offense(s), and the allegations as set forth in the foregoing Information would constitute the offense(s) charged, and that this prosecution is instituted in good faith.

Dennis Siegel
Assistant State Attorney, 17th Judicial Circuit of Florida

SWORN TO AND SUBSCRIBED before me this 15th day of June, A.D. 1999

ROBERT E. LOCKWOOD

Clerk of the Circuit Court, 17th Judicial Circuit,
Broward County, Florida

By Denise R. Clark
Deputy Clerk

To the within Information, Defendant pleaded not guilty 9/3/98

ROBERT E. LOCKWOOD

Clerk of the Circuit Court, 17th Judicial Circuit,
Broward County, Florida

By Laura Hayes
Deputy Clerk

DS:emb 06-15-05 ds

Filed In Clerk's Office
ROBERT E. LOCKWOOD
Clerk
ON 6/16/99
BY

EXHIBIT P

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

CASE NO: 98-5739 CF10 (A)

JUDGE: Alfred J. Horowitz

STATE OF FLORIDA,

Plaintiff,

vs.

ERNESTO BEHRENS,

Defendant.

VERDICT

COUNT I

WE, THE JURY, find as follows as to the Defendant in this case: (Check only one)

✓ A. The Defendant is Guilty of Sexual Battery-Armed, as charged in the Information.

____ B. The Defendant is Not Guilty.

SO SAY WE ALL, this 14 day of September, A.D. 2000, at Fort Lauderdale, Broward County, Florida.

Filed In Open Court,
CLERK OF THE CIRCUIT COURT
ON 9/14
BY K Hayes

FOREPERSON

205

EXHIBIT Q

IN THE CIRCUIT COURT OF THE SEVENTEENTH
JUDICIAL CIRCUIT
BROWARD COUNTY, STATE OF FLORIDA

STATE OF FLORIDA,

vs.

ERNESTO BEHRENS,

Defendant.

_____/

CASE NO.: 98-5739CF10A

JUDGE: HOROWITZ

FELONY

2000 SEP 21 PM 3:12

RECEIVED
CIRCUIT COUNTY COURT
CLERK
BROWARD COUNTY, FL.

MOTION FOR NEW TRIAL

The Defendant, in the above cause, through undersigned counsel, pursuant to F.R.Cr.P 3.580 through 3.610, moves this Honorable Court to order a new trial, or for such other and further relief as is proper, on the following grounds:

1. The Defendant was tried in this cause beginning on August 9, 2000 and concluding on September 14, 2000, before the Honorable Judge Horowitz.

2. The verdict in this case was contrary to law and the weight of the evidence.

3. The State failed to bring forth competent and unrebutted evidence of Defendant's guilt.

4. State failed to provide any evidence or rebut the testimony of the defense's alibi witness.

5. The Court erred in the decision of matters of law during the course of the trial.

6. The Court erroneously admitted evidence presented by the State, specifically, oral swabs, without proof of chain of custody, despite the probable tampering asserted by the defense.

7. The Court erroneously admitted a hand written list of names produced by the State, for the first time during the trial, thus, prejudicing the defense and violating discovery rules.

8. The Court failed to strike the potential jurors, after defense's objection to an overly prejudicial statement by a juror who was subsequently struck for cause.

9. The Defendant was prejudiced by the way in which the trial was commenced.

10. The Court failed to properly swear to venire panel before voir dire commenced.

11. The Court erroneously permitted the trial for the Defendant to be delayed. The jury in this case was picked on August 10, 2000. The chosen panel, which was not sworn, was then told to return on September 11, 2000 for opening statements. This delay severely prejudiced the Defendant's case.

12. Defendant did not receive a fair trial, as the defense has received information, which may amount to jury tampering.

13. Personal attacks by State Attorney during closing arguments were highly prejudicial, thus denying defendant a fair trial.

14. Other grounds to be argued ORE TENUS.

WHEREFORE, the Defendant respectfully requests this Honorable Court grant this Motion for New Trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered via inter-office mail to the Office of the State Attorney, Dennis Seigel, Esq., Broward County Courthouse, Fort Lauderdale, Florida on: September 21, 2000

Andrea Shelowitz, Esq.
Bar No. 0092622
Shelowitz & Shelowitz, P.A.
1895 West Commercial Blvd. Ste. 135
Ft. Lauderdale, FL 33309
(954) 489-2204

EXHIBIT R

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

CASE NO: 98-5739 CF10 (A)

JUDGE: Alfred J. Horowitz

STATE OF FLORIDA,

Plaintiff,

vs.

ERNESTO BEHRENS,

Defendant.

VERDICT

COUNT II

WE, THE JURY, find as follows as to the Defendant in this case: (Check only one)

✓ A. The Defendant is Guilty of Burglary of a Dwelling with a Battery, as charged in the Information.

____ B. The Defendant is Not Guilty.

SO SAY WE ALL, this 14 day of September, A.D. 2000, at Fort Lauderdale, Broward County, Florida.

FOREPERSON

Filed In Open Court,
CLERK OF THE CIRCUIT COURT
9/14/00

EXHIBIT S

THE COURT: I'm not going to read the heading. I'm just trying to reference it so they get to the right page.

MR. SEGAL: Or physical force in there, too.

THE COURT: Right. It obviously with the use of a deadly weapon. I would not be reading the words physical force. I'm in the introductory paragraph. Then we're looking at the elements. We've got [redacted] as the listed victim, was 12 years of age or older. Then let me look at two.

It would be subparagraph A: Ernesto -- Ernesto Behrens committed an act upon [redacted] in which the sexual organ of Ernesto Behrens penetrated or had union with the mouth of [redacted]

Is defense with me on that?

MS. SHELOWITZ: Yes.

THE COURT: Okay. Then element three: Ernesto Behrens, in the process, used or threatened to use a deadly weapon.

Element four is, you know, just as it's written. I'll read the consent.

MR. TERRELL: Judge, excuse me. At this time, the defense is going to make a motion to

exclude that a deadly weapon was used. There was no testimony of which object was usesd. We can't characterize what it is because she didn't know what it was. She didn't see it. All she said is, she felt a metal on her stomach and it had a sharp point to it. It doesn't mean it's a knife. If you characterize it as a knife, that would be a mischaracterization of the evidence. Therefore, because there was no evidence, we ask that that part be excluded from the jury instruction.

THE COURT: Well, I think that -- I think the testimony is sufficient to leave that question to the jury as to whether or not that's a deadly weapon. I'm going to respectfully deny your motion.

I don't think I need to read the next sentence about the victim's mental incapacity or defect. I don't believe that's applicable. I don't believe I need to read mentally incapacitated or mentally defective.

I will read union means contact. I'll read a weapon is a deadly weapon if it is used or threatened to be used in any way like to produce death or great bodily harm.

MR. TERRELL: Judge, in using that

EXHIBIT T

was eliminated. He had nothing to do with that. You know, it was made real clear. They said he had nothing to do with that.

THE COURT: I think the fact -- I think the fact that he -- that there was a sample taken from him, you know, suggesting him as a suspect and these were some high profile murders down there for awhile, I think suggesting that he was even a suspect in these murders is -- would be highly prejudice as to whether or not he committed this sexual battery.

So I think the issue is -- I can understand the need of, you know, tying up this chain of custody. I understand that. And I think if we have this person testify, I would perhaps grant you some latitude in your maybe phrasing some leading questions a little bit. I don't know yet. But I'd grant you some latitude in that regard.

And if, through cross-examination, if a door were open, addressing the issue of why are you from Dade County, you know, injecting yourself in this case, then perhaps I would revisit my thinking a little bit.

MR. SEGAL: Judge, can I do it maybe in

this way. Having the witnesses that would testify about why that swab came into existence say basically, there was a major investigation going on in Dade County. They were not -- not that he was a suspect but basically they were getting samples from thousands of people.

THE COURT: Well, let me ask you this question. If -- if the testimony is that, did you have -- I'm really oversimplifying but, did you have occasion to -- to come into custody of a sample from Mr. Behrens, presumably he's going to say yes. And what did you do with it? He's going to say: I took it to a lab. And that's that.

In other words, the concern would be the chain of custody. And I think you ought to be able to address the chain of custody without bringing into this trial the fact that Mr. Behrens may have been a suspect, however high up in the ladder he was doesn't mean anything.

But the fact that he was suspect to Dade County matters really has nothing to do with whether or not he's guilty of this crime.

MR. SEGAL: Do you want me to say basically that he -- that the swab was taken from him by the Dade County Police?

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THE COURT: That's -- that's fine. I mean, I don't have any problem with that in my mind. And again, if cross-examination should create that issue, then I would, you know, be receptive perhaps to, you know, saying that the door's been open for you to come back and say why Dade County was involved.

But I don't see -- unless it's somehow brought out through cross-examination, I don't see where that -- I guess what it comes down to, I think the prejudicial effect of these unrelated cases outweighs the probative value that they would give in this case.

MR. SEGAL: Just basically say that a swab was collected from him by the Miami-Dade Police Department?

THE COURT: A swab was collected. And I think that addresses your chain of custody.

But I've got to go back to one other thing before we even get there. I can understand that, you know, you'll be able to give Mr. Terrell and I don't recall whether you said his actual testimony or deposition in these other cases.

MR. SEGAL: He was never deposed. His trial testimony.

door is open to the Tamiami murders.

THE COURT: Just say that statement again to me.

MR. TERRELL: I just trying to understand your last statement was, Dr. Khan will not --

THE COURT: In other words, Dr. Khan -- and, Mr. Segal, I'm going to instruct him this way, that he's not to testify, certainly on direct examination, that he's not to testify that a swab was taken or that Mr. Behrens in some way remote or otherwise was a suspect in these Tamiami murders. He's not to testify to that.

But I am saying that if, on your cross-examination, you open that door, then that's going to be something we'll have to address at the time.

MR. TERRELL: Okay. Just for the record, my objection.

MR. SEGAL: Just a supplement to that, to clarify one thing. The detective that took the swab from the defendant is a homicide detective with the Metro Dade -- Miami-Dade Police Department. Do you want me to have him testify that he's just a detective with the Miami-Dade Police Department --

THE COURT: Fine.

MR. SEGAL: -- as opposed to a homicide detective?

THE COURT: That's fine.

Mr. Terrell, you had some other motions and matters you wanted to address at this point?

MR. TERRELL: Yes, judge, if I could have one quick second. Yes, judge --

THE COURT: Again, the record will reflect Mr. Behrens has been continuously present throughout our court session today. He remains present now.

MR. TERRELL: Judge, I just would like to make a record. We're still objecting. We're moving now to strike the entire panel that was picked, plus the new alternate. It's our position that it was not done properly. The voir dire panel, the potential jurors, were not sworn at the time they gave testimony. I know the court retroactively the next day sweared them in.

It's our position that that is not proper procedure and because it's not proper procedure, it wasn't done right. We filed our Motion for Expiration of Speedy Judgement. Right now, as we're speaking, we'll be filing a Motion for

EXHIBIT U

SARGEANT MOORE: My name is Archie Moore, M-o-o-r-e.

DIRECT EXAMINATION

BY MR. SEGAL:

Q. Sir, how are you employed?

A. I'm a police sargeant with the Miami-Dade Police Department, Homicide Bureau.

Q. And how long have you had that position?

A. I've worked in the Homicide Bureau for about 15 years.

Q. And how long have you been a sargeant?

A. For two years.

Q. Okay. Were you so assigned back in early 1995?

A. I worked as a detective in the Homicide Bureau at that time.

Q. Now, back during that timeframe, were you part of a group or task force investigating serial homicides occurring in Miami-Dade?

A. Yes, I was.

Q. And were these homicides occurring in a particular part of town?

A. Yes. In the Southwest H Street area of Dade County.

Q. And how many homicides did you have?

A. There were a total of six.

Q. Now, did you all have, as part of your investigation of those homicides, some potential DNA evidence?

A. Yes, we did.

Q. Now, in order to -- first of all, in the early stages, did you all have a particular suspect or a person that did this?

A. No, we did not.

Q. What were you doing as far as trying to -- to try to see if you could find somebody that would match the DNA evidence that you had?

A. What we were doing, we were contacting -- the detectives were following up on anybody that was contacted by the police in the area of Southwest H Street.

Q. You just trying to find people from Southwest H Street generally to see if they would voluntarily give you a DNA sample?

A. That is correct.

Q. Now, as part of that work, did there come a time when you were assigned to try to get a DNA swab from a Ernesto Behrens?

A. Yes, I was.

Q. And had you -- were you the original

person that had contacted Mr. Behrens or had somebody else done that and you were assigned to follow up with that?

A. Uniformed officers had first made contact with Mr. Behrens back in February of '95. At that time, they prepared a field interview report. That report was then forwarded to the homicide unit for follow-up. And as a result, I was given that.

Q. And you were assigned to follow up on that particular contact?

A. Yes.

Q. Okay. As a result of that, did you make an attempt to contact Ernesto Behrens?

A. In March of '95. That's correct.

Q. Do you know the exact date that you did that?

A. March 9th.

Q. Okay. Were you provided, as a result of the field contact by the uniformed officer, with an address to contact Ernesto Behrens?

A. Yes, I was.

Q. And where was that address?

A. [redacted].

Q. Okay. And on March 9th, 1995, did you follow up that lead and go to that address?

A. Yes, I did.

Q. And what did you have with you in order to get the DNA swab that you wanted?

A. I had a consent form, had the cotton applicator swabs that we were using to collect the sample, evidence bag, property receipt.

Q. Okay. And you went to that address --

A. Yes.

Q. -- in Lauderhill?

A. Yes.

Q. Okay. Do you remember approximately what time it was that you got there?

A. About 9:30 in the morning.

Q. Okay. When you got there about 9:30 that morning, did you make contact with Ernesto Behrens?

A. Yes.

Q. Do you see him here in court today?

A. Yes. Mr. Behrens is here.

Q. Just point out --

A. The gentleman sitting in the middle. His hair's a lot longer now.

MR. SEGAL: Okay. For the record, the

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courtroom]

THE COURT: Welcome back, ladies and gentlemen. Again, thank you for your patience.

Okay. Mr. Segal, call your next witness.

MR. SEGAL: Sharon Hinz.

THE COURT: Good afternoon. If you'll please come up to the witness stand right up here, come around, raise your right hand, Karen will swear you in.

Thereupon,

SHARON DENISE HINZ, a witness herein, and having been first duly sworn by the court clerk and cautioned to tell the truth of HER knowledge as to the within matters, was thereupon examined and testified upon HER oath as follows:

THE CLERK: Please be seated. State your full name and spell your last name for the record.

THE WITNESS: My name is Sharon Denise Hinz, H-i-n-z.

DIRECT EXAMINATION

BY MR. SEGAL:

Q. Thank you. Ms. Hinz, where are you employed?

A. Miami-Dade Police Department Crime Laboratory Bureau in the Forensic Biology Section.

Q. What is the Forensic Biology Section?

A. Basically, we deal with evidence of a biological nature, blood and other body fluids.

Q. And what is your position with that section?

A. I'm what's called a Criminalist 2.

Q. And what do you do in that position?

A. In that position, basically what I do is, I examine evidence when it comes first into the laboratory in its bulk form, bags and boxes. I take it: Blood, body fluids, any type of biological material, and then I repackage it and send it for DNA testing.

Q. And how long have you been in that position?

A. It's been about seven and a half years, doing that particular function.

Q. Okay. Were you so employed back in March of '95 going up through June of '97?

A. Yes, I was.

Q. Now, back in March of '95, in that time period, were you at all involved with any of the DNA people involved in an investigation of a serial murder that was down on Southwest H Street?

A. Yes, we were.

Q. And were you participating in that investigation in the processing of the swabs, of the thousands of swabs that you all were receiving?

A. Yes, I was.

Q. Okay. And you were familiar with the recordkeeping procedures that were occurring as far as the swabs that were coming in?

A. Yes, I am.

Q. Okay. And the packaging of the swabs and how that was done?

A. Yes, I was. Basically, most of the swabs in those different cases were assigned to me to repackage for further testing.

Q. Okay. Now, when you received the swabs from the detectives or whoever obtained the swabs, how -- what did you all do as far as assigning numbers or letters or anything to keep track of the swabs?

A. When the swabs first come into the laboratory, they were assigned a specific case number that they were attributed to. At this point, it was a Miami-Dade Police case number assigned to a particular one of the individuals that was part of the homicide -- the grouping of

homicides that we had in Dade County so it came under -- under one of those specific case numbers from their person.

It's their function in the laboratory to give each item an item number so they would have given the item number in this case a case number and item number. And that same item number would follow through in our laboratory.

Q. And what other records were made of the log number that was assigned to each particular set of swabs or swab?

A. And then as each package was opened up, each individual item was opened, it was put on a sheet of paper as to the date and then the item number and then the individual that that sample came from.

Q. Okay. Now, as part of the case, did you become familiar or aware that samples had come into the lab from Ernesto Behrens?

A. Yes.

Q. How were those samples packaged when they were received in the lab?

A. Basically, the samples would have been received in a brown bag packaging and then the swabs would be in -- actually, in like their

EXHIBIT W

having been first duly sworn by the court clerk and cautioned to tell the truth of HIS knowledge as to the within matters, was thereupon examined and testified upon HIS oath as follows:

THE CLERK: Please be seated. State your full name and spell your last name for the record.

THE WITNESS: My name is John Butchko. It's spelled, B-u-t-c-h-k-o.

DIRECT EXAMINATION

BY MR. SEGAL:

Q. Okay. Sir, how are you employed?

A. I'm a detective with the Miami-Dade Police Department in the Homicide Bureau.

Q. Okay. How long have you been with the Miami-Dade Police Department or whatever its earlier names were?

A. Yes. It was called the Metro Dade Police Department. Actually, when I first started, it was 1980. It was called the Public Safety Department. Two years later, it changed to the Metro Dade Police Department. And now currently, it's the Miami Dade Police Department. I started there in -- in -- I'm sorry -- in July, 1980.

Q. So whatever name it was, you've been working for them for 20 years?

A. Yes, sir.

Q. Okay. And your current assignment is a homicide detective?

A. Yes, sir.

Q. How long have you been had that position?

A. Since November 22nd, 1982.

Q. So that's approximately 18 years or 17 and a half years --

A. Yes, sir.

Q. -- almost 18.

Okay. During the course of time that you were a homicide detective, did you become one of the or the lead investigator into serial murders that were taking place in Tamiami area back in the 1995 or so timeframe?

A. Yes. I was assigned as a lead detective in the case and I had a co-lead on the case.

Q. Okay. Now, as the lead case in the case or lead investigator in the case, were you responsible for looking at all the leads and possible people that were contacted to provide DNA in your investigation?

A. Yes, sir.

Q. And did you familiarize yourself with all the people that were -- that were contacted to

give DNA swabs for the investigation?

A. Yes, sir.

Q. Okay. And while you were doing that, did you note that one of the detectives working on the case had contacted an Ernesto Behrens?

A. Yes. That's correct.

MR. TERRELL: Your honor, I'm going to object. He has no personal knowledge of this. This is all hearsay at this point.

THE COURT: I'm going to sustain the objection unless you can otherwise establish his personal knowledge.

BY MR. SEGAL:

Q. Okay. Did you review reports, investigations, et cetera, that established that an Ernesto Behrens had been contacted?

A. Yes.

MR. TERRELL: Objection, judge. It's hearsay.

THE COURT: Sustained. It sounds like that's based on hearsay.

BY MR. SEGAL:

Q. Okay. Do you work with Detective Archie Moore.

A. Yes, sir, I do.

Q. Were you working with Detective Archie Moore on that case?

A. Yes, sir.

Q. Okay. Now, as part of your review of all the invest -- the people that had been contacted, did you ever see a person by the name of Ernest Behrens who was ever contacted to be provided swabs?

A. Yes.

Q. Ernest Behrens?

A. No, no. I'm sorry. Ernesto Behrens.

Q. Okay. Ernesto --

MR. TERRELL: Your honor, object and sidebar at this point.

THE COURT: You may come up.

[WHEREUPON, the following sidebar discussion was had]

MR. TERRELL: Judge, at this time, I'm moving to strike all this testimony and moving to strike this witness. He had absolutely no personal knowledge of the facts of this case. He has never met Ernesto Behrens. None of this goes to DNA. It's irrelevant. We ask that it be excluded.

MR. SEGAL: I didn't ask him one question

about this case. I asked him if there was an Ernest Behrens that ever provided swabs in the Tamiami case investigation. Big deal about the O being left off of something. And they're intimating that there is an Ernest Behrens that provided these swabs. I'm asking him questions, which is perfectly permissible, to show there was never an Ernest Behrens that was contacted for swabs in that case.

MR. TERRELL: First of all, unless he took the swabs from all 5,000 people, then anything he would have read off of sheets is hearsay, simply hearsay. As far as the Ernest Behrens, that's on the card. And we're getting into the -- we're getting into the facts of the Tamiami case. That's ridiculous.

He has -- again, unless he has personally taken swabs from every single person of the 5,000 people, that if he read any reports that says, well, I never -- I read the reports and I didn't see an Ernest Behrens, it's hearsay unless he generated the reports.

MR. SEGAL: Your honor, the absence of something is not hearsay. The absence of something is hearsay if a statement is admitted

for the truth of the matter therein. We're talking about the absence of anything. That is not a hearsay assertion.

THE COURT: Well, based on the -- what I gather is the scope of your inquiry is the Ernest Behrens/Ernesto Behrens question. I'm going to overrule your objection. I'm not trying those Tamiami cases and I'm not going to go into those cases.

MR. SEGAL: I'm not asking one --

MS. SHELOWITZ: But his testimony is based on hearsay. If they wanted to bring in somebody who personally knew who was on those lists, how does he know. He doesn't have the lists here. He's just -- again, this case is being tried on people who are testifying to protocol.

Yesterday, we sat through Hinz who had no personal knowledge of anything except protocol and today again we're allowing it. At this point, we're highly prejudiced. Nobody has come in here with any personal knowledge. Everybody is testifying as to what generally happens and this case cannot be tried in a vacuum that way.

Either the states brings in witnesses

with personal knowledge or it should be sustained and struck from this trial.

THE COURT: I'm going to overrule the objection.

[WHEREUPON, the sidebar discussion was concluded]

BY MR. SEGAL:

Q. Again, Detective Butchko, the investigation into those serial murders, was there ever an individual by the name of Ernest Behrens that was ever contacted to provide a swab?

A. No, sir. Not by the name of Ernest; no.

MR. SEGAL: Okay. Thank you very much.

CROSS-EXAMINATION

BY MR. TERRELL:

Q. Detective, can you tell us the number of swabs that were collected?

A. The exact number?

Q. Yes.

A. I couldn't. It was in excess of 3,000. We had 5,000 leads.

Q. Are you -- it's -- and, in fact, you received almost 5,000 swabs total; is that correct?

A. I don't recall the exact number.

Q. When was the last time you reviewed the list of the 5,000 people that were talked to in this case?

A. Approximately eight months.

Q. About eight months ago. And you reviewed all 5,000 people on that list?

A. I -- I at one point have seen all people that have been swabbed. I've seen their names.

MR. TERRELL: Okay. No further questions.

THE COURT: Anything else, Mr. Segal?

MR. SEGAL: No, your honor.

THE COURT: Thank you, sir. You may step down.

THE WITNESS: Thank you.

[WHEREUPON, the witness was stood down]

THE COURT: Call your next witness, please.

MR. SEGAL: Detective Steve Geller.

THE COURT: Good morning. If you'll please come up to the witness stand, just stand, raise your right hand and be sworn in.

Thereupon,

DETECTIVE STEVE GELLER, a witness herein, and having been first duly sworn by the court

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house, a break-in.

Why did the person break in? Well, I'm going over it, the elements of burglary that the court will instruct you about. Why did the person break in? What was the intent of the person who broke into her house, this home invader. It was obvious that he intended to commit a sexual battery on [redacted]

There was no evidence at all in this case that anything was taken from [redacted] home. Therefore, there was no intent to steal from her. The intent was what the person did: Went up to her room and committed sexual battery against her.

Now, in the course of committing that burglary, the break-in, the person who broke in committed a battery upon [redacted] by unlawfully touching her, and the court will tell you about. It's uncontradicted again that the home invader pushed this knife or this sharp object against her stomach, her uncovered stomach, molested her by rubbing her buttocks area and back, in that area of her that she described and by putting his penis in her mouth.

All unlawful touching. All a battery committed against her during the course of this

break-in. That's the burglary charge in Count 2 and all the elements of that. It's uncontradicted that that occurred.

Similarly, it's uncontradicted that the sexual battery charged -- the armed sexual battery charged in Count 1 occurred. Again, [redacted] testified uncontradicted that the home invader sexually terrorized her while she's laying in her bed, alone, in the early morning hours, in the dark, by sticking his penis in her mouth without her permission. In the dead of night, when she's frightened and lying alone there.

It's uncontradicted that when he did it, he was armed with a deadly weapon. [redacted] felt that sharp, metallic blade against her stomach. And she knew the handle was non-metallic and wider than a blade, all of which indicates that it was a knife. That's a deadly weapon.

He pushed it against her stomach and told her to feel this immediately before he started the sexual assault against her. Therefore, he used that deadly weapon in the course of the sexual assault against her. That's the armed sexual battery charge in Count 1 of the information. The evidence that that crime occurred is

at random from the population, who would have the same DNA profile as was found in the DNA testing, is one in 14 billion. One in 14 billion that anybody else pulled from the population would have the same genetic profile.

What's the population of the earth? Five, six billion people, something like that. It is virtually impossible, in fact, totally impossible to find any other person on this earth, on this planet who on May 12th, 1995, who had the same DNA profile as the defendant and the DNA profile found on the sheet, much less another male with an Hispanic accent of described age in Broward County.

Furthermore, the DNA evidence doesn't lie. It's a scientific test. It doesn't have biasses in there. It doesn't have motives. It doesn't have reasons to fabricate. It's just a scientific test. It is a well recognized and accepted scientific test which was reviewed and analyzed by knowledgeable, experienced people: Donna Marchaese and Professor Martin Tracey. Ms. Marchaese and Professor Tracey have no motive whatsoever to fabricate anything they said.

What else supports the DNA evidence?

that situation. And then she said five, seven to five, nine. You folks have walked in here and seen the defendant standing: Five, ten, five, 11. Not exact but given the circumstances, it's pretty close.

Where did the defendant live at the time? He lived in Lauderhill. That's where Sargeant Moore testified that he went to get the oral swabs from the defendant two months earlier. And Ms. Turgeon testified that he lived in Lauderhill. Where's Lauderhill in relation to Plantation? Two towns away. Lauderhill, Sunrise, Plantation.

That all indicates, the DNA supported by the -- by the -- by that other evidence, that this defendant here, he's the one that sexually terrorized her, invaded her home during those early morning hours while she's alone, in bed.

Let's examine the alibi defenses or defense that they've tried to present, they wanted to sell to you. They want you to believe that he wasn't there, that he was off with his girlfriend in Lighthouse Point. Well, let's go through all that.

First of all, Ms. Turgeon had every motive in the world to fabricate her testimony.

There was nothing in evidence to support what she said, just her words. What's the motive to fabricate? She has a romantic relationship with the defendant. She has a business relationship with the defendant.

Did you all observe the way she was smiling at him when she was testifying up here and he was seated over there? Did you all see that? She provided money for his defense. She still cares about him. In fact, she cares enough about him to be here now while this closing argument's going on. She still cares about him. She wants him to be found not guilty.

Now, what did she say. She says that she clearly recalls this night, specifically this night, among the hundreds and hundreds and hundreds and hundreds of nights that she spent with him. That several years later, when she learned about the defendant's arrest, she was able to reconstruct exactly that night among these hundreds and hundreds and hundreds of nights, dating from September of 1989, I think it was, until February of 1997.

Yet, she's unable to recall whether she even spoke to the defendant the next day.

as Dr. Duran stated, he's a thorough notetaker and he would record the complaints. The only complaint was, not able to shower.

May 12th, the day of the crime, when he goes to see Dr. Duran that afternoon. This man, who complains for attention, who has a low tolerance for pain, who wasn't sleeping well, who was in excruciating pain the entire week, depressed, the pain medication wasn't doing its job. He was still in excruciating pain. 5/12/95: No complaints. No complaints.

If what Ms. Turgeon had to say was the truth, you know, using your common sense -- and I'll get to that in a second. You're allowed to use your common sense. You know, using your common sense, that this defendant would have complained to his friend, Dr. Duran, about the pain, not sleeping well, needing more medication, being depressed because he complained about not taking a shower -- not being able to shower. He was -- he was able to complain about that. But not one word mentioned in that medical reports about complaints about the pain, being depressed or anything of these other things that Ms. Turgeon said.

The fact the complaining that the defendant did about pain -- even Dr. Duran testified to that. I forget the medical term used, hyperalgic or something, but it stands for low tolerance to pain. Dr. Duran and Ms. Turgeon both said that.

Drs. Duran -- Dr. Duran's notes, he testified did not change, which were accurate, tell you, using your common sense, that Ms. Turgeon's story, the alibi she's trying to sell to you, is false. None of that happened. He didn't spend the night with her. Or if he did spend the night with her, he got back like six o'clock or whatever, after he committed this crime.

Because it didn't happen the way she said. There was no severe pain. He was not there the entire night. Remember, you can only rely on what she says. There's nothing to support what she said. And, in fact, what exists contradicts what she said, what Dr. Duran's notes say.

Her inability to recall the significant evening of May 12th and whether she spoke to him but can't recall everything else also shows that she's fabricating this alibi she's trying to sell

to you all. People can fabricate to cover up for somebody they care about. Scientific evidence does not fabricate. Scientific evidence doesn't care. Scientific evidence is just science. That's what that DNA evidence proved, the scientific evidence.

Now, let's go over some of the things that the defense attorney is probably going to talk to you about. They're probably going to try to tell you all that the swabs --

MS. SHELOWITZ: Judge, I'm going to object. This is improper argument.

THE COURT: Overruled.

MR. SEGAL: They're probably going to tell you that the swabs that Ms. Marchaese used for the testing are not the defendant's swabs.

Another instruction the court's going to give is as follows, about the common sense. You should use your common sense in deciding which is the best evidence and which evidence should not be relied upon in considering your verdict. Let's use our common sense in looking at this evidence.

It's again uncontradicted, Sargeant Moore, as part of that serial homicide investigation down in Dade County, goes to the

Department Crime Laboratory.

Then Detective Geller contacts Ms. Hinz in June of 1997, after they get a lead that the defendant may be the person who did this and he learns about the swabs being down there, contacts Ms. Hinz and goes down there to collect the swabs.

Ms. Hinz testifies, she pulls out the swabs under 232 and transfers to the swabs to a card and on that card writes 232, the same number that's been assigned to the defendant's swabs throughout this, 232. And she writes Ernest Behrens, leaves out the O. We'll get to that in a minute. Ernest Behrens, 232. She made a mistake. She left the O off. Everything else is the same. Every other letter in the first name is the same, in the same order. The last name is exactly the same and the item number is the same.

Then you further heard from Detective John Butchko, who was one of the key lead investigators in the Tamiami serial murders down there, that he reviewed all the leads in the case. He saw who submitted swabs in the course of that investigation. And he testified without contradiction that there was never a swab obtained from anybody named Ernest Behrens. There was no

Ernest Behrens involved in the Tamiami investigation. It was Ernesto Behrens. An O was left off. It was a simple mistake. Now, I'll get to this in a second.

And they're probably going to get you to believe that these swabs were not Ernesto Behrens' swabs. They were somebody else's swabs: Ernest Behrens who doesn't exist. That's what they going to try to get you to believe.

So the court's going to instruct you as follows and I ask you to listen to this instruction. A reasonable doubt is not a possible doubt, a speculative, imaginary or forced doubt. Such a doubt must not influence you to return a verdict of not guilty if you have an abiding conviction of guilt.

Their effort to have you believe that those swabs were submitted by somebody else is nothing but their effort to try to raise the possibility. Possibility or possible doubts are not reasonable doubts. Have you speculate or imagine. Speculative or imaginary doubts are not reasonable doubts. Or force you to conjecture. Forced doubts are not reasonable doubts, that somebody else provided these swabs. There's no

offering this opinion. Her belief.

And look at the circumstances that [redacted] was in when this occurred. This poor woman is exhausted after working a long, stressful day. She had just gotten to sleep and has only been asleep for a short time. She's awoken in the dead of night, in her dark room, terrorized by this person.

Do you think that under those circumstances, that a woman's going to sit there and say: Okay. Let me just ignore everything else and figure out whether the person who's sexually assaulting me is circumsized or not because that's clearly the most important thing and I'm going to find that out while all this is happening to me.

It is easy -- easy for [redacted] to make a mistake as to circumsized or uncircumsized. Her boyfriend or fiance, who she lives voluntarily with, she can't tell the difference when he's arounsed. How is she going to tell the difference in the conditions that she was in?

Well, another thing. Ms. Turgeon says that the defendant didn't like oral sex because his penis is tender because he's uncircumsized.

Yet, he frequently -- frequently engages in vaginal intercourse with her. Well, how much friction takes place between a man's penis and the lips and the walls of a woman's vagina when intercourse takes place?

I hate to be graphic about this but unfortunately that's the kind of case this is. It's back and forth, back and forth, back and forth. That's okay. That's not too sensitive. He's not too sensitive for that. He can do that. But he hates oral sex. He would never do that. Another indication that what Ms. Turgeon told you is fabrication.

Folks, this defendant is guilty, guilty of breaking into the privacy of [redacted] home when she was alone, exhausted and asleep. And he then woke her and sexually terrorized her, threatened her with that knife. He stuck his penis into her mouth against her will while she was there, terrorized in her bed, in the early morning hours, home alone.

The DNA, the other supporting evidence in this case, has clearly proven that this defendant is guilty of the armed sexual battery and the burglary with the battery that he's charged with

analysis came in and testified. She's the one that had created -- who came up with the DNA results. What's a report going to do?

Then as far as the point of entry being the window as opposed to the sliding door. We brought in Marjorie Hanlon. She came in. She took the pictures. You saw the pictures. That's the person that said the point of entry was the window. [redacted] said the point of entry was the window. The people that testified in that came in. I don't know what she wants the police officers to come in with their reports to say.

Then Ms. Shelowitz starts making stuff up. There were four fingerprints of value. Logic says that the freshest fingerprints belong to the perpetrator. The four fingerprints that were compared today were the freshest fingerprints.

Well, the person that testified to that was Marjorie Hanlon, the person that said: I'm trained in fingerprint comparison through the FBI and all, through her experience. She said very clearly: You can't date fingerprints. You can't say how old fingerprints are.

Ms. Shelowitz was saying they were the freshest fingerprints. I don't know where she got

that from. That's not the evidence. Folks, rely on your recollection of the evidence, not what Ms. Shelowitz tells you it is because she tells you wrong. Those four fingerprints could be years old.

She talked about: Well, the person that did this clearly wasn't wearing gloves and the fingerprints had to be that person's. Well, first of all, we have no evidence at all as to whether the person who broke in had -- wore gloves or socks covering their hands or anything else because Ms. [redacted] saw that person in a silhouette, in the dark, for a few seconds. That person very easily could have taken the gloves or the socks or whatever he had on and put them in a pocket while he was doing this.

The only time she ever had any visions -- observations of or perception of this man's hands is when he's fondling her. And if a man's going to sexually assault somebody, he's not going to be wearing gloves when he's doing that. He's getting his sexual thrills by the touching. He's not going to be wearing gloves or socks or whatever he had on his hands.

Furthermore, you had I think it was

She talks about: Well, the fitted sheet came in in June of '95, whereas the other evidence came in in May of '95. So what's the point? What's she trying to say? Is she trying to say that because it came in a month later, that somebody somehow in the intervening time put the defendant's semen all over the sheet? Who had a vial of the defendant's semen to put on the sheet? Where did that come from? Do the police just keep a locker of everybody's semen and just pour it on there when they feel like it? There were semen on the sheet. Nobody poured it on there except the man that sexually assaulted her by ejaculating onto the sheet.

Then interestingly enough, Ms. Shelowitz has answered everybody's mistakes, jumping down everybody's throats about mistakes, says that Mr. Terrell made a mistake in cross-examining [redacted] by being a little aggressive with her. That was a mistake. That's okay. Mr. Terrell's mistakes are okay. That's okay.

MR. TERRELL: Judge, I object. I don't think I'm the one on trial here.

MR. SEGAL: Not --

THE COURT: Sustained. Let's move on.

isn't going to be any because those acts don't require any stress, any trauma, anything of that nature. I don't know what the point of bringing that up was.

She attacked the processing of the swab by the Metro Dade Police Department. Of course, the processing of the swab was okay when it eliminated the defendant as being involved in the Tamiami murder. But for our purposes, it's a horrible thing. Attack the whole thing about one swab, two swabs, the whole thing.

And again, yeah, I mean, there's no two ways about it. There was some confusion about that. But what the truth is, is what Ms. Hinz said, that police officers routinely, constantly confuse the swabs, the number of swabs.

And that was nowhere more clear than in Sargeant Moore's testimony. He said he took a swab and he wrote down one on the property receipt. Then later on in his testimony, he said two swabs, one from one side and one from the other side.

There's nothing clearer about how the police routinely mischaracterize or misnumber the amount of swabs in a DNA situation than what

Sargeant Moore did. He's not making stuff up, lying, trying to -- trying to fabricate stuff. He's a police officer with the normal confusion that Ms. Hinz testified to.

Then Ms. Shelowitz says: Ernesto is not Ernest. And she does the whole bunch of other names, the name game. Well, Detective Butchko testified uncontradicted, uncontradicted. He's the lead investigator in that investigation that as part of his job, he reviewed all the leads, everybody who provided the swabs.

And you know, if two people virtually the same name separated by one o, he would have remembered that. He said that he reviewed all that stuff and there was nobody named Ernest Behrens that provided a swab. And there was no evidence whatsoever that contradicts that. Trying to force a doubt which the jury instruction says is not a reasonable doubt.

Then she says somebody's messing with the swabs. No evidence of that. That's speculative, imaginary, possible, forced doubts which, as the jury instruction says, are not reasonable doubts. There's no evidence anybody messed with those swabs.

Somehow Sargeant Moore, Ms. Hinz, Detective Butchko were all coming in here, lying about stuff because I guess they're all part of this grand conspiracy to get the defendant. This two count conspiracy to get the defendant that involves the Plantation Police Department, the Metro Dade Police Department, the Broward Sheriff's Office Crime Laboratory, all out to get this defendant for no known reason. There's no reason. There is no conspiracy. They testified to the truth. Detective Butchko is not wrong. There is no Ernest Behrens.

She goes after Ms. Marchaese because she works for the Broward Sheriff's Office in their Crime Laboratory. Well, first of all, the Broward Sheriff's Office is not the Plantation Police Department. They're entirely different agencies.

Furthermore, Dr. Khan, who eliminated the defendant as a suspect in the Tamiami serial murders --

MR. TERRELL: Judge, there's never -- there's no testimony from a Dr. Khan in this trial.

THE COURT: Sustained.

MR. SEGAL: Your honor, can we come

sidebar?

THE COURT: Certainly.

[WHEREUPON, the following sidebar discussion was commenced]

MR. SEGAL: Your honor, their Dr. Khan processed the swab and there was testimony that the defendant was eliminated as a suspect in this case. Therefore, I can certainly argue that my opinion --

MS. SHELOWITZ: Judge, this was a motion in limine that was brought up and that it was stipulated to before this case started, that his name wouldn't even come up in closing.

THE COURT: There was no testimony, that I can recall, as to what agency Dr. Khan worked for. And I think --

MR. SEGAL: Your honor, it was brought up very clearly in the transmittal form to Ms. Hinz talking about, these were the DNA samples that were submitted to Dr. Khan for testing. It was clearly discussed.

THE COURT: I think it was discussed that they were submitted to him for testing and then he was exonerated from the Tamiami murders. There was no testimony as to where he worked and the

transmittal form is not in evidence. I'm going to sustain the objection.

MS. SHELOWITZ: We ask the court that you instruct the jury to disregard the last comment.

[WHEREUPON, the sidebar discussion was concluded]

THE COURT: You may proceed, Mr. Segal.

MR. SEGAL: Thank you, your honor.

Ms. Shelowitz suggested that somehow in that 30 day period that it -- or approximately 30 day period that it took to get the Queen fitted sheet into the Sheriff's Office Crime Laboratory, that the defendant's semen was deposited on it.

Well, if somebody's working to frame him for no known reason, then why didn't they just get him right off? Why didn't they get a swab from him right in the beginning and arrest him in 1995 because they're out to get him? Just do it right then and there. Why wait two years later? Because nobody's out to frame him. Nobody's dripping his semen all over the sheets. Nobody's doing that. That's absurd.

Ms. Marchaese -- Ms. Shelowitz said it takes 30 seconds to recheck your work. I don't remember any evidence that it takes 30 seconds to

chair and going through the window. But recall, that somehow she was implying that any testimony to this effect, that certainly there would be pus or whatever Dr. Shelowitz said would happen by climbing --

MR. TERRELL: Judge, I'm going to object to these personal attacks now. We've got to stop this and keep it to the evidence in this trial.

THE COURT: I'm going to sustain that one.

MR. SEGAL: Okay.

THE COURT: Continue on.

MR. SEGAL: Ms. Shelowitz is not a doctor. Ms. Shelowitz is not a witness. Her saying that pus would form when somebody climbs into a window has no basis in the evidence. Also -- and you can look at Dr. Duran's notes on the translation part, wherever that got to. It's here somewhere. Oh, I'm sorry.

The only instruction that he wrote in his notes, the thorough notetaker, that he gave to the defendant on May 8th, when he did the operation, was: Advised to keep wound dry and clean. He didn't write on there: Avoid strenuous activity. Avoid working. Avoid climbing, anything of that nature. It was not written on there. Only to

EXHIBIT Y

to you all. People can fabricate to cover up for somebody they care about. Scientific evidence does not fabricate. Scientific evidence doesn't care. Scientific evidence is just science. That's what that DNA evidence proved, the scientific evidence.

Now, let's go over some of the things that the defense attorney is probably going to talk to you about. They're probably going to try to tell you all that the swabs --

MS. SHELOWITZ: Judge, I'm going to object. This is improper argument.

THE COURT: Overruled.

MR. SEGAL: They're probably going to tell you that the swabs that Ms. Marchaese used for the testing are not the defendant's swabs.

Another instruction the court's going to give is as follows, about the common sense. You should use your common sense in deciding which is the best evidence and which evidence should not be relied upon in considering your verdict. Let's use our common sense in looking at this evidence.

It's again uncontradicted, Sargeant Moore, as part of that serial homicide investigation down in Dade County, goes to the

Department Crime Laboratory.

Then Detective Geller contacts Ms. Hinz in June of 1997, after they get a lead that the defendant may be the person who did this and he learns about the swabs being down there, contacts Ms. Hinz and goes down there to collect the swabs.

Ms. Hinz testifies, she pulls out the swabs under 232 and transfers to the swabs to a card and on that card writes 232, the same number that's been assigned to the defendant's swabs throughout this, 232. And she writes Ernest Behrens, leaves out the O. We'll get to that in a minute. Ernest Behrens, 232. She made a mistake. She left the O off. Everything else is the same. Every other letter in the first name is the same, in the same order. The last name is exactly the same and the item number is the same.

Then you further heard from Detective John Butchko, who was one of the key lead investigators in the Tamiami serial murders down there, that he reviewed all the leads in the case. He saw who submitted swabs in the course of that investigation. And he testified without contradiction that there was never a swab obtained from anybody named Ernest Behrens. There was no

Ernest Behrens involved in the Tamiami investigation. It was Ernesto Behrens. An O was left off. It was a simple mistake. Now, I'll get to this in a second.

And they're probably going to get you to believe that these swabs were not Ernesto Behrens' swabs. They were somebody else's swabs: Ernest Behrens who doesn't exist. That's what they going to try to get you to believe.

So the court's going to instruct you as follows and I ask you to listen to this instruction. A reasonable doubt is not a possible doubt, a speculative, imaginary or forced doubt. Such a doubt must not influence you to return a verdict of not guilty if you have an abiding conviction of guilt.

Their effort to have you believe that those swabs were submitted by somebody else is nothing but their effort to try to raise the possibility. Possibility or possible doubts are not reasonable doubts. Have you speculate or imagine. Speculative or imaginary doubts are not reasonable doubts. Or force you to conjecture. Forced doubts are not reasonable doubts, that somebody else provided these swabs. There's no

EXHIBIT Z

torn or no apparent tampering with it?

A. No, there was not.

Q. Okay. What did you do with that top sheet?

A. Again, I did a visual exam. I did find one small stain that I did test for acid phosphatase and it was negative. At that point, I again went and I did a laser examination with negative results.

There was also some trace evidence. And what I mean by that, hairs and fibers that I collected and I packaged and I put back in with the bag. I'm sorry. Back with the sheet.

Q. Okay. How long did it take you to do the testing on the sheet and the dress?

A. Probably about an hour.

Q. Okay. So you did it all in the same day?

A. Yes, I did.

THE COURT: Counsel, can I see you briefly for one second?

[WHEREUPON, the following sidebar discussion was had]

THE COURT: I'm just catching in the corner of my eye, I think it's the last juror, it looks like he's getting ready to nod.

MR. TERRELL: I can't imagine why.

THE COURT: So is this an appropriate time to take a break?

MR. SEGAL: Is it me?

THE COURT: No. You're titilating. So is this a good time -- is this a good time to break?

MR. SEGAL: Sure. That's fine.

[WHEREUPON, the sidebar discussion was concluded]

THE COURT: Okay. Ladies and gentlemen, I think this is probably a good time that we take a stretch break. A couple of comments.

First of all, don't discuss this case among yourselves. Don't discuss it with anybody else. And certainly, don't form any definite or fixed opinion on the merits of this case.

Please be outside these doors no later than 10:30 and make sure you have your personal items with you. Thank you.

[WHEREUPON, the jury panel left the courtroom]

MR. TERRELL: I see what's going on here, your honor. You want them refreshed before we get to the evidence.

THE COURT: Actually, I thought I saw his head moving and it hurt my neck.

[WHEREUPON, a short recess was taken]

THE COURT: All right. Let the record show that Mr. Behrens, Mr. Segal, Ms. Shelowitz, Mr. Terrel are present.

Ms. Marchese -- is that how you pronounce it --

THE WITNESS: Yes.

THE COURT: -- is present.

Henry, are they all out there?

THE SHERIFF: Yes, judge.

THE COURT: Okay. Bring in the jury, please.

MR. SEGAL: There's one missing.

THE COURT: One missing.

MR. TERRELL: Judge, before he gets the jury, my office has made contact with Dr. Shea with Mr. Segal's knowledge. He is going to be available by phone to explain that to me so I can explain it to Mr. Segal from a quarter to 12:00 until quarter after 12:00 so if there's any way within that half hour that we can dismiss for lunch, I'll be able to get that information for Mr. Segal.

EXHIBIT AA

indeed the correct antibiotic.

So it's in wide use.

Q. Okay. Again, RFLP testing was done in this case.

Can you kind of briefly explain what RFLP testing accomplishes, how that works as far as the forensic DNA analysis?

A. Sure. There -- the acronym, RFLP, simply says Restriction Fragment Length Polymorphism. And what that means is, a fragment is a piece of something. Restriction is a tool that we've used for probably 25 or 30 years in molecular biology now. It's an enzyme that cuts at a very, very specific place. Human beings have strands of DNA that are comprised in total of three billion base pairs or DNA letters.

Q. Base pairs -- I'm taking advantage of your time?

THE COURT: Mr. Segal, can I see counsel for one second, please? I'm sorry.

[WHEREUPON, the following sidebar discussion was commenced]

THE COURT: You're certainly not to take this personally but this is probably an appropriate time to take a stretch break.

MR. TERRELL: The one juror was asleep, wasn't he?

THE COURT: He wasn't asleep. Okay. We'll take a break.

[WHEREUPON, the sidebar discussion was concluded]

THE COURT: Okay. At this time, ladies and gentlemen, we're going to take a brief stretch break.

A couple of comments. First of all, don't leave any personal items in the jury box. Make sure you take your personal things with you. Don't discuss this case among yourselves. Don't discuss it with anybody else. And certainly don't form and definite or fixed opinion on teh merits of the case.

Please be outside these doors no later than, let's say, quarter after 3:00. Thank you very much.

[WHEREUPON, the jury panel left the courtroom]

THE COURT: All right. Let's just -- the record will show the jury's left the courtroom.

And, doctor, I'll just please instruct you not to discuss your testimony with anybody

during our break.

MR. SEGAL: Judge, can we argue about which one of us put him to sleep?

[WHEREUPON, a short recess was taken]

THE COURT: Let the record show that Mr. Behrens, Ms. Shelowitz, Mr. Terrell, Mr. Segal are present and our witness is present.

Again, Mr. Behrens is present, Mr. Segal, Mr. Terrell, Ms. Shelowitz, our witness is present.

THE SHERIFF: The jury coming in.

[WHEREUPON, the jury panel entered the courtroom]

THE COURT: Okay. Welcome back, ladies and gentlemen. Just before we begin, for those of you who don't have anything to drink, does anybody want to get any water? Okay. Help yourself.

Okay, Mr. Segal.

BY MR. SEGAL:

Q. Does that show the structure of the DNA molecule?

A. Yes. The -- actually, the letters that I was referring to, that we three billion pairs in each cell, are the spheres on either side so they come in pairs and they're tied together by little

EXHIBIT BB

then pick the most common one. And the most common here is one out of 14 billion.

MR. TERRELL: Judge, may I have a brief sidebar, please?

THE COURT: Yes.

[WHEREUPON, the following sidebar discussion was commenced]

MR. TERRELL: I see one juror -- at least one juror who is sleeping. I suggest that maybe we could take a break because cross is going to start after this and I want them to be a little bit fresh. This is really important stuff.

THE COURT: All right. Let's finish this.

[WHEREUPON, the sidebar discussion was concluded]

BY MR. SEGAL:

Q. So the multiple databases are calculated and used if basically there's no -- there's no specific evidence as to the race or the heritage or the ethnicity of the person that committed the crime; correct?

A. That's correct.

MR. SEGAL: Okay. I have nothing further, your honor.

EXHIBIT CC

Mr. Terrell, what's the discovery issue you want to present to me?

MR. TERRELL: Judge, I was -- just received a long list of names and numbers. And I don't know who it's prepared by but I've never seen it prior to today and the state I think is trying introduce this into evidence or use this as an exhibit. I've never been informed of it. I haven't had time to question -- to look into it to see the accuracy of it and who prepared it.

THE COURT: Can I just take a look at it for one second?

MR. TERRELL: Sure.

MR. TERRELL: And what significance it has.

THE COURT: Here you go. Well, let me ask first. What's your position, Mr. Segal, as to whether or not this is or is not a discovery violation?

MR. SEGAL: Judge, he has not seen it before. Of course, Ms. Hinz has been on the witness list since the beginning of the case. They never took her deposition that I'm aware of, never asked her questions, never explored at all in any fashion the processing of this evidence.

They never took a -- they had the opportunity to do so. They never did. Never expressed an interest in that. Never did so.

THE COURT: Let me ask this and then we'll come back to that. Was Ms. Hinz deposed?

MR. TERRELL: No, judge.

THE COURT: Okay. Let me ask this question. Why don't you inquire of Ms. Hinz at least to establish for the court as part of the Richard hearing what in fact this piece of paper is. Why don't you go ahead and --

MR. SEGAL: Okay. She already said a couple of things before but I'll do it again.

DIRECT EXAMINATION

BY MR. SEGAL:

Q. This paper here is called a list for a case number; is that correct?

A. Right.

Q. The case number is at the top of the paper?

A. Right.

Q. Is that one of the case numbers that's assigned to the homicides that were being investigated?

A. Right.

EXHIBIT DD

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BROWARD COUNTY, FL

that in front of the jury. Assuming you do that in front of the jury, you can certainly --

MR. TERRELL: And she's not an expert in handwriting.

THE COURT: It's a question of familiarity. Thank you.

[WHEREUPON, the sidebar discussion was concluded]

THE COURT: So at this time, I'm going to sustain the objection.

You may proceed, Mr. Segal.

BY MR. SEGAL:

Q. Ms. Hinz, State's Identification U for identification, who wrote all these names and numbers in there?

A. That would have been Theresa Merit.

Q. Who is Theresa Merit?

A. She is -- was a criminalist that was assigned to the same position that I was, that she examined evidence when it first came into the laboratory and then would prepare the samples for DNA. She's no longer with our laboratory. She retired about two years ago, I think it was.

Q. Okay. And she lives out of Florida somewhere?

A. Yes, she does.

Q. Now, how do you know that's her handwriting?

A. I recognize her handwriting. And then also, she has her initials on the property receipt to show that -- that she also saw those samples and the property receipt.

Q. But how long did you work with Theresa Merit?

A. I've been there almost 11 years and I think it was two years ago she retired so I would have known her for about actually nine years that I was working there permanently and then I knew her for a couple of years before that when I worked in college as an internship.

Q. With the Crime Lab?

A. I've known her longer than eight years.

Q. Okay.

A. I mean, longer than 11 years. I'm sorry.

Q. Okay. Of the 11 years or so years that you've known her, have you seen her writing on an ongoing basis for that 11 years?

A. Yes.

Q. And is there any doubt in your mind that the handwriting on here is Theresa Merit's --

A. No.

Q. -- from the 11 years that you've seen her writing?

A. No, no doubt.

MR. SEGAL: Your honor, at this time, I'd move this into evidence.

THE COURT: Mr. Terrell?

MR. TERRELL: Same objection.

THE COURT: Okay. I'm going to overrule the objection and State's U for identification will be admitted as State's No. 19.

[STATE'S EXHIBIT NO. 19 admitted into evidence]

MR. SEGAL: Thank you.

BY MR. SEGAL:

Q. And again, in the lower right-hand portion of this running list, it has 232, Ernesto Behrens?

A. It has number 232, Ernesto Behrens; yes.

Q. Okay. And was that item one of the items you probably used in preparing the card that the Plantation Police picked up?

A. I would say yes, that I relied on any of the items that had number 232 on them in order to formulate that this item 232 must be from Ernesto

EXHIBIT EE

this period of time back in 1995; correct?

A. Yes.

Q. Okay. And you processed the swab, if I understand it right, what you do is, you take it into the lab.

You separate the swabs from the property receipt; correct?

A. I don't particularly do that; no.

Q. Okay. But they are separated?

A. Right.

Q. Okay. And at one point or another, these swabs were separate -- I'm sorry -- those swabs were separated from the property receipt that it came in with; correct?

A. Right, right.

Q. Somebody takes those swabs and they attach them to a three by five index card; correct?

A. Right.

Q. So that we're absolutely clear. You did not do that to those swabs; correct?

A. Right.

Q. Somebody else handled those swabs?

A. Right.

Q. We see two of those on the index card;

correct?

A. Right.

Q. But that's not the number of swabs that came into the lab; is that correct?

A. Right.

Q. Okay. Detective Moore submitted only two swabs to the Miami-Dade Police Department Crime Lab; correct?

A. No. He -- I believe there were either three or four swabs submitted.

Q. Are you sure he submitted three or four swabs as opposed to two swabs?

A. Yes. There were have been two swab packets but there would have been within each packet two one or two swabs because some packets we did see only had one swab in it so we only received three swabs total.

Q. If you you didn't receive the swabs and you did not process the swabs and Detective Moore says he submitted two swabs, how can you say that there's three or four swabs ?

MR. SEGAL: Your honor, I'm going to object to him asking Ms. Hinz to characterize somebody's else testimony.

THE COURT: I'm going to overrule the

objection. I don't think that's what he's asking.

THE WITNESS: I'm sorry. Can you repeat it?

BY MR. TERRELL:

Q. Okay. If -- if Detective Moore submitted two swabs to the laboratory and you did not process those swabs but now you're saying that there's three or four swabs, how can you say the number of swabs that came into Miami-Dade?

A. I can tell you the number -- if I look at the card, I can tell you how many we have on our card and how many are on that card.

Q. Well, how many do you have on your card?

A. There's either one or two left on my card.

Q. Where's your card?

A. My card is in the laboratory.

Q. Okay. You didn't bring your card?

A. No.

Q. So you're absolutely positively, there was more than two swabs submitted by Detective Moore?

A. Yes.

Q. No matter what anybody says, you're positive of that?

A. Yes. Because --

Q. Would you agree that if Detective Moore only submitted two swabs and yet you say: Well, I gave two to Broward and I kept one or two to myself, which makes three or four, then there's a problem?

MR. SEGAL: Objection.

THE COURT: Sustained.

THE WITNESS: I wouldn't say there's --

THE COURT: No. Just wait, ma'am.

THE WITNESS: Oh, I'm sorry.

BY MR. TERRELL:

Q. Would it be normal for a person to submit two swabs and then they multiply while they're at the lab?

A. I would say they didn't multiply. I would say that if you ask most detectives how many swabs they submit, routinely they might say two when there's actually four because they refer to swab packets and they do not realize that there are two packets in a packet. That's from my experience, having been there almost 11 years.

Q. Okay. But you're certainly not sitting there, suggesting that that's exactly what Sargeant Moore did, are you?

EXHIBIT FF

SWORN AFFIDAVIT

FROM: LAB CORP, LABORATORY CORPORATION OF AMERICA
MRS. EISENBERG, PH.D
P. O. BOX 13973
1912 ALEXANDER DRIVE
RESEARCH TRIANGLE PARK, NORTH CAROLINA 27709

TO: IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CURCUIT IN AND FOR BROWARD COUNTY, FLORIDA

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

To Whom It May Concerns:

The following questions have been presented to us for explicit answers by Mr. Ernesto Behrens, therefore, based on Lab Corp's exclusive pride and mission statement, we answer the following questions in their entirety.

1. Would it be scientifically possible and reliable to conduct a (RFLP) DNA testing and a (PCR) DNA testing using one single spermatozoa cell? Yes or No, Please explain your answer.

2. What is the size of one spermatozoa cell?

3. What is the nanogram or picogram weight of one spermatozoa cell?

4. What is the minimum amount of spermatozoa cell [s] required to perform a reliable scientific test using (RFLP) and (PCR)? Please explain your answer.

5. Is there a minimum required size of DNA sample[s] needed to perform a (RFLP) DNA test versus a (PCR) DNA test? Yes or No, Please explain your answer.

6. Upon a normal, healthy male ejaculation, approximately how many spermatozoa cells are released?

7. Based upon the DNA protocol community is it possible to recheck/retest evidence that has been (RFLP) tested, with the new (PCR) test? Please explain your answer.

8. When viewing (RFLP) or (PCR) DNA forms of tests individually, the National Resource Council recommends the use of which test when the forensic evidence is old, small, and partially degraded? Please explain your answer.

9. Is its possible to extract DNA from human hair? Yes or No

10. What is the specific type of DNA test that must be used when the evidence is human hair? Please explain your answer.

11. Is the (PCR) test a more sophisticated test in opposed to the (RFLP) test? Yes or No, Please explain your answer.

12. Would it be safe to say that this company recommends that all evidence collected from the crime scene be DNA tested, and not just partial evidence? Please explain your answer.

Based on the articulate facts therein the cover letter attached to this questionnaire it would be wise and parallel to this corporation recommendation to perform a (PCR) DNA test on the remaining untested evidence, to corroborate the reliability of the previous?

LabCorp
Laboratory Corporation of America

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

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 _____.

EXHIBIT GG

A. Yes. I believe that's entered.

MR. SEGAL: It's not been offered into evidence.

THE COURT: It's not been offered into evidence.

BY MS. SHELOWITZ:

Q. Can you tell the ladies and gentlemen of the jury what time that went into evidence?

A. The same day, on the 15th. I would have turned it all in as one composite. I believe I turned it in this white box that's here. It was all put in one box.

Q. So looking at your property receipt where there is no time and date that it was collected, all we know is that it was turned into evidence three days after the crime, on the 15th?

A. That's correct.

Q. The fingerprints that were of value, you never tested them against a Bobby Keis?

A. That name does ring a bell.

Q. And you never tested them to a Rick Vance, did you?

A. I did not. I can tell you for sure because I normally mark on the back of the envelope the suspect names that I check it

POLICE DEPARTMENT
PLANTATION, FLORIDA

PROPERTY RECEIPT 91867

1. ☐ Trial Evidence ☐ Safekeeping ☐ Found Property ☒ Lab Evidence (Attach Memo) ☐ Recovered Property

2. CASE NO.	3. DATE - TIME RECEIVED	4. BIN NO.	5 TYPE OF CASE
11a9-9505			Sexual Battery

6. ADDRESS WHERE PROPERTY IMPOUNDED (GIVE EXACT LOCATION WHERE FOUND)
8750 NW 91 Ter Plantation FL

7. FOUND BY	ADDRESS	CITY	STATE	TEL. #
~~Unknown~~ M Hanlon	457 NW 70 Ter	Plantation	FL	797213

8. SUSPECT(S) (GIVE FULL NAME)	RACE/SEX	DOB	ARRESTED	NTA	CITATIONS
~~Denise Wood~~	W/F	Unknown	☐ YES ☐ NO	☐ YES ☐ NO	☐ YES ☐ NO ☐ PENDING

9. VICTIM	ADDRESS	CITY	STATE	TEL. #
Denise Wood	750 NW 91 Ter	Plantation		

10. OWNER'S NAME	ADDRESS	CITY	STATE	TEL. #
Same as #9				

11. ITEM NO.	12. QTY	13. DESCRIPTION
1	1	Black & white print dress / used to clean up semen

[redacted]

14. SPECIAL INSTRUCTIONS
☐ PROCESS FOR FINGERPRINTS
☐ DESTRUCTION PURPOSE ONLY
☐ OTHER (Specify) Check for Semen, Hairs, Fibers
☐ RELEASE UPON PROOF OF OWNERSHIP

15. I hereby acknowledge that the above list represents all property taken from my possession and that I have received a copy of this receipt.

Signature (X) _____

16. I hereby acknowledge that the above list represents all property impounded by me in the official performance of my duty as a Police Officer.

Division D. PL # 8826

Impounding Officer Signature
x Marjorie Hanlon

Print Name Marjorie Hanlon

17. RECEIVED BY Print Name	Signature	REASON	DATE AND TIME RECEIVED
K. Amabile	K. Amabile	Evid.	5-15-95 11:15
K. Amabile		tst BSO Lab	5-18-95 11:1
J Kattal		lab	5/18/95 114
Donna Thacker		Analysis	6-13-95
K. Amabile		ret. to P.D.	6-21-95 11:5

18. FINAL DISPOSITION	AUTHORITY	DATE AND TIME OF DISPOSITION

POLICE DEPARTMENT
PLANTATION, FLORIDA

PROPERTY RECEIPT

1. ☐ Trial Evidence ☐ Safekeeping ☐ Found Property ☒ Lab Evidence (Attach Memo) ☐ Recovered Property

2. CASE NO.	3. DATE - TIME RECEIVED	4. BIN NO.	5. TYPE OF CASE
1699505	5/12/95 0800		Sexual Battery 9186F

6. ADDRESS WHERE PROPERTY IMPOUNDED (GIVE EXACT LOCATION WHERE FOUND): 750 NW 91 Ter Plantation Fl

7. FOUND BY: M Hanlon ADDRESS: 451 NW 70 Ter CITY: Plantation STATE: FL TEL. #: 797-2132

8. SUSPECT(S) (GIVE FULL NAME): Unknown RACE/SEX DOB ARRESTED ☐ YES ☐ NO NTA ☐ YES ☐ NO CITATIONS ☐ YES ☐ NO ☐ PENDING

[redacted]

10. OWNER'S NAME: Hmg Ast 7 ADDRESS CITY STATE TEL. #

11. ITEM NO.	12. QTY	13. DESCRIPTION
1	1	[illegible] Sweater - folded inward Envelope
2	1	Pillow Case - [illegible] inside out
3		[illegible] Sheet - Green folded inward Envelope
4	1	Fitted Sheet Green folded inward Envelope
[redacted]		

14. SPECIAL INSTRUCTIONS
☐ PROCESS FOR FINGERPRINTS
☐ DESTRUCTION PURPOSE ONLY
☒ OTHER (Specify) Check for semen hairs [illegible]
☐ RELEASE UPON PROOF OF OWNERSHIP

15. I hereby acknowledge that the above list represents all property taken from my possession and that I have received a copy of this receipt.

Signature (X) ____________

16. I hereby acknowledge that the above list represents all property impounded by me in the official performance of my duty as a Police Officer.

Division SD PL # 8820

Impounding Officer Signature
X Marjorie Hanlon

Print Name MARJORIE HANLON

17. RECEIVED BY Print Name / Signature	REASON	DATE AND TIME RECEIVED
K. Amabile / K. Amabile	Evid	5-15-95 11:15
K. Amabile / K Amabile	to BSO Lab	5-18-95 11:15
J Kattak	Lab	5/18/95 1140
[illegible]	analysis	6-13-95
K Amabile	ret to P.D.	6-21-95 11:5[illegible]

18. FINAL DISPOSITION | AUTHORITY | DATE AND TIME OF DISPOSITION

POLICE DEPARTMENT
PLANTATION, FLORIDA

PROPERTY RECEIPT

1. ☐ Trial Evidence ☐ Safekeeping ☐ Found Property ☒ Lab Evidence (Attach Memo) ☐ Recovered Property

2. CASE NO.	3. DATE	TIME RECEIVED	4. BIN NO.	5. TYPE OF CASE
1619505	5/12	95 0800		Sexual Battery 794.011

6. ADDRESS WHERE PROPERTY IMPOUNDED (GIVE EXACT LOCATION WHERE FOUND)
750 NW 91 Ter Plantation FL

7. FOUND BY	ADDRESS	CITY	STATE	TEL #
M Hanlon	451 NW 70 Ter	Plantation	FL	797232

8. SUSPECT(S) (GIVE FULL NAME)	RACE/SEX	DOB	ARRESTED	NTA	CITATIONS
Unknown			☐ YES ☐ NO	☐ YES ☐ NO	☐ YES ☐ NO ☐ PENDING

[redacted]

10. OWNER'S NAME ADDRESS CITY STATE TEL #
Same As #9

11. ITEM NO.	12. QTY	13. DESCRIPTION
1	1	Multicolored Comforter - folded inward Envelope
2	1	Pillow Case - removed suicide note
3	1	Top Sheet - Green - folded inward Envelope
4	1	Fitted Sheet - Green folded inward Envelope

Sheet ret to PD 10-18-95
10:30 K. Amabile

I have received envelopes 1-4 only

14. SPECIAL INSTRUCTIONS
☐ PROCESS FOR FINGERPRINTS
☐ DESTRUCTION PURPOSE ONLY
☒ OTHER (Specify) Victim's brown hair sample
☐ RELEASE UPON PROOF OF OWNERSHIP

15. I hereby acknowledge that the above list represents all property taken from my possession and that I have received a copy of this receipt.

Signature (X) _____

16. I hereby acknowledge that the above list represents all property impounded by me in the official performance of my duty as a Police Officer.

Division D PL # 8820

Impounding Officer Signature
X Marjorie Hanlon

Print Name MARJORIE HANLON

17. RECEIVED BY Print Name	Signature	REASON	DATE AND TIME RECEIVED
K. Amabile	K. Amabile	Evid.	5-15-95 11:15
Sheet K. Amabile	K. Amabile	tot BSO Lab	5-18-95 11:15
J Kattel		LS	5/18/95 1140
[illegible]		Analysis	6-13 [illegible]
K. Amabile		ret to P.D.	6-21-95 11:15
SHEET ONLY M KEENAN	M Keenan	DOT LAB	6-30-95 11:32

18. FINAL DISPOSITION AUTHORITY DATE AND TIME OF DISPOSITION

POLICE DEPARTMENT
PLANTATION, FLORIDA

PROPERTY RECEIPT 9186F

1. ☒ Trial Evidence ☐ Safekeeping ☐ Found Property ☒ Lab Evidence (Attach Memo) ☐ Recovered Property

2. CASE NO.	3. DATE - TIME RECEIVED	4. BIN NO.	5 TYPE OF CASE
1619-95-05	051295-0830		Sexual Battery

6. ADDRESS WHERE PROPERTY IMPOUNDED (GIVE EXACT LOCATION WHERE FOUND)
1216 SE 1 Ave Ft. Lauderdale

7. FOUND BY — ADDRESS — CITY — STATE — TEL. #
Same as undersigned

8. SUSPECT(S) (GIVE FULL NAME) — RACE/SEX — DOB — ARRESTED ☐ YES ☐ NO — NTA ☐ YES ☐ NO — CITATIONS ☐ YES ☐ NO ☐ PENDING
UK

[redacted]

10. OWNER'S NAME — ADDRESS — CITY — STATE — TEL. #
State of Florida

11. ITEM NO.	12. QTY	13. DESCRIPTION
1	1	Rape kit
		[redacted] Last Item

14. SPECIAL INSTRUCTIONS
☐ PROCESS FOR FINGERPRINTS
☐ DESTRUCTION PURPOSE ONLY
☒ OTHER (Specify) _____
☐ RELEASE UPON PROOF OF OWNERSHIP

15. I hereby acknowledge that the above list represents all property taken from my possession and that I have received a copy of this receipt.
Signature (X) X [signature]

18. I hereby acknowledge that the above list represents all property impounded by me in the official performance of my duty as a Police Officer.
Division CID PL # 8601
Impounding Officer Signature X [signature]
Print Name Brian Hagar

17. RECEIVED BY (Print Name / Signature)	REASON	DATE AND TIME RECEIVED
D Redwood [signature]	EVID.	5-16-95 13:3
RECEIVED BY: Q Marrero [signature]	REASON: To Lab	DATE AND TIME RECEIVED: 5-15-95 10:5
RECEIVED BY: J Kafka	REASON: Lab	DATE AND TIME RECEIVED: 5/15/95 1100
RECEIVED BY: [signature]	REASON: Analysis	DATE AND TIME RECEIVED: 5/16/95
RECEIVED BY: K. Amabile	REASON: ret. to PD	DATE AND TIME RECEIVED: 5-18-95 12:0
RECEIVED BY	REASON	DATE AND TIME RECEIVED
18. FINAL DISPOSITION	AUTHORITY	DATE AND TIME OF DISPOSITION

EXHIBIT HH

A. The fitted sheet came into the laboratory on the 30th of June. I did not do an analysis -- of 1995.

Q. Okay.

A. I did not look at it until the 18th of September, 1995.

Q. You just testified that it came in -- the fitted sheet came in on the 30th of June of 1995; correct?

A. Yes.

Q. And can you tell the ladies and gentlemen of the jury when the other evidence came in: The pillowcase, the top sheet, the rape kit?

A. The rape -- the rape kit came in on the 15th of May --

Q. Okay.

A. -- 1995. Originally, the only thing that came in was the -- well, I'm sorry. I was looking at this property sheet -- would be the flat sheet. And that was the 18th of May, 1995.

Q. Okay.

A. The black and white print dress also came on the 18th of May, 1995.

Q. Okay. So would you agree that by the 18th of May, 1995, you received all the evidence

except for this fitted sheet?

A. Yes. The fitted sheet did not come into the laboratory until the 30th of June. That's correct.

Q. And that's some -- about 40 days later; correct?

A. That was -- yes. That was upon request though by myself.

Q. Okay. And even though it came in in June of 1995, you didn't test it, did you?

A. Not at that time; no.

Q. You had no instructions to test it, did you?

A. No. Originally, they had asked -- or maybe I should back up. It's policy of the laboratory that when a case comes in of a sexual battery nature and a suspect is not listed, that only the rape kit or the SATC kit is analyzed. And that was standard policy.

In this case, they put in a special request for me to analyze additional evidence. And originally, the black and white dress and the top sheet came in and I did that. Then they put in another request. I'm sorry. I asked them to bring me the other sheet and that's what they did

and then I ended up testing that one also.

Q. Did you receive any instructions when you got the fitted sheet?

A. It just says: DNA and possible sheets folded envelope style, inward pillowcase removed, inside out.

Q. Okay. And that was the general instruction to all of it; correct?

A. Yes.

Q. I'm talking specifically about the fitted sheet that you didn't receive until June, did you receive instructions on that sheet to do anything specific to it?

A. Again, on the property receipt, just check for semen, hairs and fibers. Nothing direct.

Q. Okay. Well, let's ask this question.

When did that property receipt -- when did you receive that property receipt?

A. This is the property receipt that came in with the flat sheet.

Q. Which was when?

A. The 18th of May.

Q. Okay. So when you received the fitted sheet in June, did you receive any different

EXHIBIT II

instructions? Let's try it that way.

A. No. Because it was on the same property receipt.

Q. Were there any notations with the fitted sheet like check this or there were wet spots here, anything to that effect?

A. No.

Q. So you receive it in June, 1995.

You don't test it, do you?

A. In June? No, I do not.

Q. Okay. In fact, it sits for another four months; correct?

A. Three months. Yes.

Q. Okay. So you take the sheet out in September, three months later, four months after the incident or five and you do a visual inspection of it; correct?

A. That's correct.

Q. And you notice several stains on this sheet, don't you?

A. Yes, I do.

Q. And is it your testimony that you don't remember a kind of a big yellowish stain right in the middle of the sheet?

A. I don't know if I made mention of that or

EXHIBIT JJ

Q. Let's go back over something, when the lab received the fitted sheet.

A. Okay.

Q. Can you look at your property receipt.

Do you have a property receipt, do you not, that contains all the bedding in this case; correct?

MR. TERRELL: Objection to leading questions, judge.

MR. SEGAL: I'm sorry.

THE COURT: Sustained.

BY MR. SEGAL:

Q. Do you have -- do you have any property receipts that contain all of the bedding in this case?

A. Yes, I do.

Q. What does that property receipt reflect as to when all the bedding -- all the bedding came into the Broward Sheriff's Office Crime Lab?

A. All the bedding did not come into the Sheriff's Office Crime Lab. Originally, the sheet came in. And then afterwards, the fitted sheet came in. The other pieces did not come into the laboratory.

Q. Which other pieces?

A. I'm sorry. The comforter and a pillowcase.

Q. Okay. But the two sheets themselves --

A. Yes.

Q. -- when did the two sheets come into the laboratory?

A. The top sheet came in on the 18th of May, 1995. And then the fitted sheet came in on the 30th of June, 1995.

Q. You gave a deposition in this case, did you not?

A. Yes, I did.

Q. On June 28th of 2000?

A. I believe that was the date; yes.

Q. Okay. I ask you to just read pages 15 and 16 of your deposition. Actually, page 15 and to line 14 on page 16.

MR. TERRELL: Excuse me. What page?

MR. SEGAL: Fifteen and 16.

THE WITNESS: Okay.

BY MR. SEGAL:

Q. Did you refer to the fitted sheet being re-submitted on June 30th?

A. Originally, I had; yes. And then when I looked at the property receipt again, I stated

that -- I'm assuming that the sheet only -- that it came back the second time would be the fitted sheet because that's the one I looked at the second time.

Q. Okay. But you said it had been re-submitted to be looked at the second time; correct?

A. Correct.

Q. Re-submitted means it had been submitted initially; correct?

MR. TERRELL: Objection. Leading.

THE COURT: Overruled.

THE WITNESS: Yes.

BY MR. SEGAL:

Q. Do you know whether that fitted sheet had come in the first time the sheets came in on May 18th?

A. When I look at the property receipt, it only says sheet and that came in on the 18th of May.

Q. Okay. But then back, on June 30th, what terminology is used for what's submitted that time?

A. Sheet only.

Q. Okay. So they used the same term, sheet;

correct?

A. Correct.

Q. So how do you know that the fitted sheet didn't come in on May 18th when it says sheet?

MR. TERRELL: Objection to leading.

THE COURT: Overruled. Overruled. She can answer the question.

THE WITNESS: When the sheet came in on the 18th of May, according to my notes in June, there was only one sheet. I wouldn't have looked at one without the other if they had both come in, so --

MR. SEGAL: That's all right.

THE WITNESS: -- on the 21st of June, that particular sheet goes back to the agency. And then on the 30th of June, a sheet comes back. Well, I would have to make the assumption it wasn't the same sheet. I've already analyzed that one. So that's when the fitted sheet came in. So the top sheet came in. The top sheet went back. The fitted sheet came in.

BY MR. SEGAL:

Q. So a lot of the testimony then about what sheet came in at which time is based on assumptions?

MR. TERRELL: Objection, judge.

THE COURT: Sustained.

BY MR. SEGAL:

Q. You said -- you used the term assumed several times.

Is it your testimony now about when the sheet came in, that -- you used the terminology assumption to mean which sheet came in at which time, is assumption?

A. I make that assumption but I also base it on what I analyzed. Again, I -- I can't imagine why, if both sheets came in, I wouldn't analyze them both at the same time. That would have certainly been more productive, more time-consuming. So again, it is an assumption but I'm assuming that the flat sheet came in. Once I did the analysis, it went back. It was negative. They sent me the fitted sheet to do the analysis on.

Q. Mr. Terrell asked you about if two swabs became four swabs, would it be a problem.

Do you remember those questions?

A. Yes.

Q. Now, if the characterization of an item as a swab, when it's really a packet containing

EXHIBIT KK

AFFIDAVIT OF CARY M. KULTAU

State of Florida vs. Ernesto Behrens
98-5739CF10A

Cary M. Kultau, who after being duly sworn according to law states:

- I am currently a Florida licensed Private Investigator for 13 years. I have prior certified Florida law enforcement experience of 15 years, most of which I served as a crime against person/homicide detective.

- Lengthy investigation resulted in obtaining Detective Steven Geller affidavit to arrest Ernesto Behrens dated May 13, 1997. In this document Detective Geller outlines in detail the DNA evidentiary link of victims, [redacted] and [redacted] separate cases.
  Exhibit A attached

- On October 05, 2000 (post verdict/Denise [redacted] case) I was requested to document all related DNA tests and the amount of DNA swabs pertaining to Ernesto Behrens. I contacted both the Palm Beach County and Dade County Crime laboratories.

- Palm Beach County Sheriff's Laboratory responded timely and disclosed new evidence. An upgraded DNA test had been conducted comparing victim [redacted] evidence with Ernesto Behrens DNA standard. The result was negative, although a prior DNA laboratory test in Broward County produced positive results.
  Exhibit B attached

- I know that the attorneys defending Mr. Behrens in the [redacted] and [redacted] cases were not provided with this newly discovered negative DNA test performed by Palm Beach County Laboratory.

- I personally met with attorney Ty Terrell (defended Ernesto Behrens in the [redacted] case). Terrell reviewed the new evidence and confirmed that the state of Florida never provided this information during the process of discovery. If Terrell knew this, preparing for the trial and the actual trial would have changed in many ways.

- In my professional opinion if this newly discovered evidence was known to the defense this would have altered the case preparation and trial strategy to a great extent. In addition, this new evidence is exculpatory in nature and creates reasonable doubt.

- I took considerable time and efforts contacting Dade County crime laboratory regarding the original DNA standard taken from Ernesto Behrens. A response via fax was received from the laboratory supervisor, Willard "Bud" Stuver, reflecting the only documentation was a property receipt that reads one (1) oral swab specimen of Ernesto Behrens was impounded. Mr. Stuver wrote that the Dade laboratory currently possessed two (2) swabs of the original four (4) specimens. This in fact is not consistent and has no basis compared with the property receipt. My efforts to locate any other Dade County "Behrens" documentation was negative.
  Exhibit C attached

STATE OF FLORIDA
COUNTY OF BROWARD

Cary M. Kultau
Affiant

Sworn to and subscribed before me on this 23rd day of April 2001, by Cary M. Kultau.

G. Cunningham
Notary Public

G. Cunningham
MY COMMISSION EXPIRES April 30, 2003
#CC310130
Bonded thru Troy Fain-Insurance
NOTARY PUBLIC, STATE OF FLORIDA

Docket No. _____ Page _____

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

97-0083 BF10

STATE OF FLORIDA,
Plaintiff,

vs.

ERNESTO JOSE BEHRENS
H/M DOB 11/10/64
Defendant.

AFFIDAVIT TO ARREST

BEFORE ME, Judge of the Circuit Court in and for Broward County, personally came Detective Steven Geller, who, after being duly sworn, deposes and says that on the 12th day of May, A.D. 19 95, in the County and State aforesaid, one Ernesto Jose Behrens did then and there unlawfully:

Victim #1: On September 12th, 1994, the Coral Springs Police Department investigated an armed residential burglary, documented under case number 94-6152, which occurred at 11885 Royal Palm Blvd., Coral Springs, Broward County, Florida. In response to an AFIS hit, on October 25th, 1996, Coral Springs Latent Examiner Joel Geller positively matched latent fingerprints found at the crime scene to Defendant Ernesto Behrens.

Victim #2: On October 21st, 1993 the Coral Springs Police Department investigated an Armed Residential Burglary and Sexual Battery which occurred at [redacted], Coral Springs, Broward County, Florida. This case had remained unsolved until the latent fingerprint identification of Ernesto Behrens in the previous offense. The suspect description matched that of Ernesto Behrens, so Coral Springs Detective Barbara Haydu prepared a photo lineup, incorporating a picture of Ernesto Behrens. The lineup was shown to the victim, [redacted], and without any hesitation and with great emotion, she positively identified Ernesto Behrens as the person who illegally entered her apartment and who committed the offense of Sexual Battery.

On April 21st, 1997 Detective Haydu secured a warrant to arrest Ernesto Behrens for violating Florida State Statute 810.02(2), Burglary, and Florida State Statute 794.011(3), Sexual Battery.

Victim #3: On May 12, 1995, at approximately 0430 hours, the defendant illegally entered the victim's apartment located at 750 N.W. 91 Terrace, Plantation, Broward County, Florida. Entrance into the apartment was gained by the defendant via the kitchen window. Once

Behrens, Ernesto 97-0083-AE

(A)

inside, the defendant went into victim Denise [redacted] bedroom where she was sleeping. He shined a flashlight in her face and when she began to awake, used the light to conceal his identity. The defendant told the victim to place a pillow over her face so she could not see him. The victim reported that she had submitted to his demand out of fear that the defendant would cause her physical harm. The defendant disrobed, climbed on top of the victim and told her to "feel this". At that point, the victim felt what she believed to be a knife on her stomach.

The defendant advised the victim that she was to "jerk" him off and at that point grabbed the victim's hand and placed it on his penis. After being forced to commit that act, the defendant climbed on top of the victim's upper torso and told her to "blow" him until he ejaculated. The defendant then forced his penis into the victim's mouth against her will committing the act of sexual battery. Next, the defendant told the victim to turn over on to her stomach at which time he began to rub her buttocks. A short time later the defendant had the victim turn over on her back. The defendant ordered the victim to expose her vagina and to engage in manual masturbation while the defendant watched.

The victim reported that while she was being forced to touch herself, the defendant ejaculated upon her thigh. The defendant picked up an article of clothing owned by the victim and wiped the semen from the victim's thigh using the clothing article. The clothing article was thrown by the suspect on the floor and was later collected as evidence by this agency. The defendant told the victim to count to 500 before she removed the pillow from her face. The victim reported hearing the defendant dress and leave the room. The victim immediately contacted this agency via 911 to report the incident. Subsequently, the victim was transported to the Sexual Assault Treatment Center where a rape evidence kit was utilized and turned over to this agency. The kit was entered into property as evidence.

Victim Denise [redacted] advised that she did not appear to know the suspect. She did not give him permission at any time to enter her apartment, or perform any of the acts that he committed upon her.

A crime laboratory analysis report from the Broward County Sheriff's Office indicated an identical DNA match from semen collected in the Coral Springs case involving victim #2 [redacted] and the positive identification of Ernesto Behrens, to the unsolved Plantation

The offense(s) set forth in the foregoing Affidavit is/are contrary to the statute(s) in such case made and provided, and against the peace and dignity of the State of Florida.

Sworn to and subscribed before me this _____ day of _____, A.D. 19____.

_____
Affiant

_____ (Seal)
JUDGE, CIRCUIT COURT

Behrens, Ernesto

97-0083-AF

case, number 1619-95-05, involving an Armed Burglary and Sexual Battery of victim #3 [redacted]. In both cases the suspect's semen was collected from the crime scenes and submitted to the Broward County Sheriff's Office Crime Laboratory for analysis.

From this concluding Crime Lab report, probable cause has been developed to believe that the suspect who committed the criminal violation of sexual battery in the Plantation case is the same suspect who committed the sexual battery in the Coral Springs case. Crime lab results indicated that the semen tested provided an identical DNA match to each other.

In addition to an identical DNA match in both cases the suspect operated in a manner so unique and so similar that the offenses were more than likely committed by the same person. For example, both victims described the suspect as a Hispanic male with a slight Spanish accent. Also, in both cases the suspect was armed with a screwdriver or knife, and he placed a pillow over the face of his victims in an effort to conceal his identity. All of the victims were women residing in an apartment complex, and although no accomplice was ever heard or observed, the suspect led the victims to believe that he was not alone. Upon completion of the Sexual Battery, in the Plantation case the suspect demanded that the victim count to 500 before removing the pillow which had been placed over her face. In the Coral Springs case, the suspect ordered the victim to remain in a closet for five (5) minutes. These delays were to afford the suspect ample time to escape.

Therefore, your affiant believes that Probable Cause exists for the arrest of Ernesto Behrens: (1) DNA matches are identical in the case of victim #2 [redacted] and the Plantation Sexual Battery case of victim #3 [redacted] and that (2) victim #2 [redacted] was able to positively identify the suspect as Ernesto Behrens, and that (3) Ernesto Behrens fingeprints were positively matched to victim #1 another case involving a sexual deviant act.

It should be noted that when Ernesto Behrens is taken into custody a DNA sample from his person will be requested through a court order.

BROWARD COUNTY, FLORIDA
I certify this document to be a true and correct copy of the original.
WITNESS MY HAND AND SEAL
5/13/97
ROBERT L. WILKOP, Clerk
D.C.

The offense(s) set-forth in the foregoing Affidavit is/are contrary to the statute(s) in such case made and provided, and against the peace and dignity of the State of Florida.

Sworn to and subscribed before me this 13 day of May, A.D. 19 97.

Steven Sellers
Affiant

JUDGE, CIRCUIT COURT (Seal)
RICHARD D. EADE

97-0083-MF

DATE: 12/22/97 *** PALM BEACH COUNTY SHERIFF'S OFFICE *** PAGE: 1

3228 GUN CLUB ROAD
WEST PALM BEACH, FLORIDA 33406
PHONE (407) 688-4200
RICHARD L. TANTON
LABORATORY DIRECTOR

*** CRIME LABORATORY REPORT ***

SECTION: SEROLOGY

INVEST. AGENCY: BSO	CASE NUM: 108920	AGENT:	DET. GELLER
INVEST. AGENCY:	CASE NUM:	AGENT:	
INVEST. AGENCY:	CASE NUM:	AGENT:	
INVEST. AGENCY:	CASE NUM:	AGENT:	
INVEST. AGENCY:	CASE NUM:	AGENT:	
DATE SUBMITTED: 10/14/97		ANALYSIS COMPLETE: 12/22/97	

*** PRINCIPALS ***

SUSPECT/VICTIM	LAST NAME	FIRST NAME	MI	SF	DOB	RACE	SEX
VICTIM	[redacted]	[redacted]					
SUSPECT	BEHRENS	ERNESTO			11/10/64		

*** EVIDENCE ***

ITEM NO.	QTY	DESCRIPTION
*****		*** SEROLOGY/DNA EVIDENCE ***
PR #1	1	SEALED PAPER BAG CONTAINING:
1-1	2	VAGINAL SWABS IN A SEALED ENVELOPE
1-2	1	BLOOD STANDARD FROM '[redacted]' IN A SEALED ENVELOPE
PR #2		
2-1	2	DNA SWABS FROM ERNESTO BEHRENS IN A SEALED ENVELOPE

*** RESULTS ***

SEROLOGY/DNA RESULTS

1. DNA FROM ERNESTO BEHREN'S STANDARD (2-1) WAS ANALYZED FOR 10 GENETIC MARKERS INCLUDING: AMELOGENIN, DQA1, LDLR, GYPA, HBGG, D7S8, GC, CSF1PO, TPOX, AND THO1 (SEE ATTACHED DATA SHEET).

2. NO DNA RESULTS WERE OBTAINED FROM THE SPERM ON THE VAGINAL SWAB (1-1 SP). DNA WAS RECOVERED FROM [redacted]' BLOOD STANDARD (1-2) AND THE NONSPERM FRACTION ON THE VAGINAL SWAB (1-1 NS).

Debra E. Gladewell

DEBRA E. GLADEWELL
SENIOR FORENSIC SCIENTIST

DATE 12/23/97

Exhibit B

Metro-Dade Police Department
Miami, Florida
USA

FAX COVER SHEET

☐ Confidential requires immediate pick up

TO: MR. CARY M. KULTAU

PHONE: (954)429-9194

FAX: (954)429-0426

FROM: MR. WILLARD "BUD" STUVER, Supervisor - Forensic Biology Section

PHONE: (305) 471-3034

FAX: (305) 471-3478

SUBJECT: PROPERTY RECEIPT OF ORAL SWAB SPECIMEN

TWO (2) **Pages, Including Cover Sheet**

REMARKS: REGARDING YOUR FAX DATED 10/06/2000, THE ONLY DOCUMENTATION REGARDING SWABS FROM MR. ERNEST BEHRENS IS A PROPERTY RECEIPT SHOWING TRANSMITTAL OF THESE SWABS FROM THE IMPOUNDING OFFICER TO THE LABORATORY.

THE MIAMI-DADE POLICE DEPARTMENT CRIME LABORATORY BUREAU IS PRESENTLY IN POSSESSION OF TWO OF THE ORIGINAL FOUR SWABS SUBMITTED WITH THAT RECEIPT.

A COPY OF THAT RECEIPT ACCOMPANIES THIS FAX.

The information contained in this facsimile message is CONFIDENTIAL information intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this communication is strictly PROHIBITED and will be considered as a tortious interference in our confidential business relationships. Additionally, unauthorized dissemination of this confidential information subjects you to criminal and civil penalties. If you have received this communication in error, please immediately notify us by telephone and return the original message to us at the above address via the U.S. Postal Service. Thank you.

PROPERTY RECEIPT

METRO-DADE POLICE DEPT.
9111 N.W. 25th Street
Miami, Florida 33172
(305) 471-2900

METRO-DADE POLICE CASE NO.

TYPE OF CASE

ITEM NO.	QUANTITY	DESCRIPTION (Make • Brand • Model • Serial No. • Size • Caliber • Color • Remarks)	PROPERTY BUREAU ONLY
1	1		

I HEREBY ACKNOWLEDGE THAT THE ABOVE LIST REPRESENTS ALL PROPERTY TAKEN FROM MY POSSESSION AND THAT I HAVE RECEIVED A COPY OF THIS RECEIPT

I HEREBY ACKNOWLEDGE THAT THE ABOVE LIST REPRESENTS ALL PROPERTY SEIZED BY ME IN THE LAWFUL PERFORMANCE OF MY DUTY AS A DEPUTY SHERIFF / LAW ENFORCEMENT OFFICER

CAUTION
BIOHAZARDOUS MATERIAL

PROPERTY & EVIDENCE BUREAU COPY

ORIGINAL

EXHIBIT LL

BROWARD COUNTY SHERIFF'S OFFICE
P.O. Box 9507
Ft. Lauderdale, FL 33310

Lab Number: 09186F

CRIME LABORATORY ANALYSIS REPORT

To: Detective Hager
Plantation Police Department
451 NW 70 Terr.
Plantation, FL 33317

Date: 09/27/95
Agency Case# 1619-95-05

The evidence listed below was submitted to the laboratory:

9. One green fitted sheet.

Contact this lab when a suspect is in custody. Submitted items will be analyzed and entered into the BSO DNA open case file.

The foregoing instrument was respectfully submitted,
acknowledged before me this 27 day of Oct
by Donna J. Marchese
who is personally known to me and who did take an oath.

Donna J. Marchese
Criminalist Specialist
Crime Laboratory

Diana M. Edwards
CC290759
STATE OF FLORIDA, COUNTY OF BROWARD

DIANA M. EDWARDS
MY COMMISSION # CC290759 EXPIRES
May 31, 1997
BONDED THRU TROY FAIN INSURANCE INC.

BROWARD COUNTY SHERIFF'S OFFICE
P.O. Box 9507
Ft. Lauderdale, FL 33310

Lab Number: 09186F

CRIME LABORATORY ANALYSIS REPORT

To: Detective Hager
Plantation Police Department
451 NW 70 Terr.
Plantation, FL 33317

Date: 08/08/96
Agency Case #: 1619-95-05

RE: [redacted] WOOD

The evidence listed below was submitted to this laboratory:

6. One purple top blood vial - Woods
9. Green sheet spot 1.

High molecular weight DNA was obtained from items 6 and 9. Hae III was used as a restriction enzyme.

CONCLUSIONS

The DNA profile from item 9 matches the DNA profiles from the following:

Victim: Renee [redacted]
Lab #: 10392D
Agency: Coral Springs Police Dept.
Agency Case #: 95-10-0005

The foregoing instrument was acknowledged before me this day of [redacted] 1996 by Donna J. Marchese who is personally known to me or who did take an oath.

Diana M. Edwards
CC290759
STATE OF FLORIDA COUNTY OF BROWARD

Respectfully submitted,

Donna J. Marchese
DNA Analyst
Crime Laboratory

BROWARD COUNTY SHERIFF'S OFFICE
P.O. Box 9507
Ft. Lauderdale, FL 33310

Lab Number: 09186F

CRIME LABORATORY ANALYSIS REPORT

To: Detective Steve Geller
Plantation Police Department
451 NW 70 Terr.
Plantation, FL 33317

Date: 07/16/97
Agency Case# 1619-95-05
Victim: DAVID WOOD

SUPPLEMENTAL REPORT

The evidence listed below was submitted to this laboratory:

6. One purple top blood vial - Wood.
9. Green sheet spot 1.
50. Standard - Blood on 903 paper.

High molecular weight DNA was obtained from items 6, 9, and 50.
Hae III was used as a restriction enzyme.

CONCLUSIONS:

DNA from human Locus D1S80, D2S44, D4S139, D5S110, and D10S28 was detected.
The DNA profile from item 9 matched those found in item 50.

Using available Broward County population frequency data, the probability of selecting an unrelated individual at random from the population having a DNA profile matching item 9 is:

1 in Greater than 5.0 Billion

The foregoing instrument was acknowledged before me this 17 day of July, 1997 by Donna J. Marchese who is personally known to me and who did take an oath.

Diana M. Edwards
CC641792
STATE OF FLORIDA, COUNTY OF BROWARD

Respectfully submitted,

Donna J. Marchese
DNA Specialist
Crime Laboratory

Docket No. _____ Page _____

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

97-0083 BF10

STATE OF FLORIDA,
Plaintiff,

vs.

AFFIDAVIT TO ARREST

ERNESTO JOSE BEHRENS
H/M DOB 11/10/64
Defendant.

BEFORE ME, Judge of the Circuit Court in and for Broward County, personally came Detective Steven Geller, who, after being duly sworn, deposes and says that on the 12th day of May, A.D. 19 95, in the County and State aforesaid, one Ernesto Jose Behrens did then and there unlawfully:

Victim #1: On September 12th, 1994, the Coral Springs Police Department investigated an armed residential burglary, documented under case number 94-6152, which occurred at 11885 Royal Palm Blvd., Coral Springs, Broward County, Florida. In response to an AFIS hit, on October 25th, 1996, Coral Springs Latent Examiner Joel Geller positively matched latent fingerprints found at the crime scene to Defendant Ernesto Behrens.

Victim #2: On October 21st, 1993 the Coral Springs Police Department investigated an armed Residential Burglary and Sexual Battery which occurred at [redacted] Broward County, Florida. This case had remained unsolved until the latent fingerprint identification of Ernesto Behrens in the previous offense. The suspect description matched that of Ernesto Behrens, so Coral Springs Detective Barbara Haydu prepared a photo lineup, incorporating a picture of Ernesto Behrens. The lineup was shown to the victim, [redacted], and without any hesitation and with great emotion, she positively identified Ernesto Behrens as the person who illegally entered her apartment and who committed the offense of Sexual Battery.

On April 21st, 1997 Detective Haydu secured a warrant to arrest Ernesto Behrens for violating Florida State Statute 810.02(2), Burglary, and Florida State Statute 794.011(3), Sexual Battery.

Victim #3: On May 12, 1995, at approximately 0430 hours, the defendant illegally entered the victim's apartment located at 750 N.W. 91 Terrace, Plantation, Broward County, Florida. Entrance into the apartment was gained by the defendant via the kitchen window. Once

Behrens, Ernesto 97-0083-BF

97-0083-

AFFIDAVIT TO ARREST
State v. ERNESTO JOSE BEHRENS

Docket No. _____ Page _____

case, number 1619-95-05, involving an Armed Burglary and Sexual Battery of victim #3 [redacted] In both cases the suspect's semen was collected from the crime scenes and submitted to the Broward County Sheriff's Office Crime Laboratory for analysis.

From this concluding Crime Lab report, probable cause has been developed to believe that the suspect who committed the criminal violation of sexual battery in the Plantation case is the same suspect who committed the sexual battery in the Coral Springs case. Crime lab results indicated that the semen tested provided an identical DNA match to each other.

In addition to an identical DNA match in both cases the suspect operated in a manner so unique and so similar that the offenses were more than likely committed by the same person. For example, both victims described the suspect as a Hispanic male with a slight Spanish accent. Also, in both cases the suspect was armed with a screwdriver or knife, and he placed a pillow over the face of his victims in an effort to conceal his identity. All of the victims were women residing in an apartment complex, and although no accomplice was ever heard or observed, the suspect led the victims to believe that he was not alone. Upon completion of the Sexual Battery, in the Plantation case the suspect demanded that the victim count to 500 before removing the pillow which had been placed over her face. In the Coral Springs case, the suspect ordered the victim to remain in a closet for five (5) minutes. These delays were to afford the suspect ample time to escape.

Therefore, your affiant believes that Probable Cause exists for the arrest of Ernesto Behrens: (1) DNA matches are identical in the case of victim #2 Ahladis and the Plantation Sexual Battery case of victim #3 [redacted] and that (2) victim #2 [redacted] was able to positively identify the suspect as Ernesto Behrens, and that (3) Ernesto Behrens fingeprints were positively matched to victim #1 another case involving a sexual deviant act.

It should be noted that when Ernesto Behrens is taken into custody a DNA sample from his person will be requested through a court order.

BROWARD COUNTY, FLORIDA
I certify this document to be a true and correct copy of the original.
WITNESS MY HAND AND SEAL
5/13/97
RUBLIN D. LEVINSON, Clerk
By D. C.

The offense(s) set forth in the foregoing Affidavit is/are contrary to the statute(s) in such case made and provided, and against the peace and dignity of the State of Florida.

Sworn to and subscribed before me this 13 day of May, A.D. 19 97.

Steven Sellers
Affiant

JUDGE, CIRCUIT COURT
RICHARD D. EADE (Seal)

page 3 of 3 pages

97-0083-MF

2

inside, the defendant went into victim [redacted]'s bedroom where she was sleeping. He shined a flashlight in her face and when she began to awake, used the light to conceal his identity. The defendant told the victim to place a pillow over her face so she could not see him. The victim reported that she had submitted to his demand out of fear that the defendant would cause her physical harm. The defendant disrobed, climbed on top of the victim and told her to "feel this". At that point, the victim felt what she believed to be a knife on her stomach.

The defendant advised the victim that she was to "jerk" him off and at that point grabbed the victim's hand and placed it on his penis. After being forced to commit that act, the defendant climbed on top of the victim's upper torso and told her to "blow" him until he ejaculated. The defendant then forced his penis into the victim's mouth against her will committing the act of sexual battery. Next, the defendant told the victim to turn over on to her stomach at which time he began to rub her buttocks. A short time later the defendant had the victim turn over on her back. The defendant ordered the victim to expose her vagina and to engage in manual masturbation while the defendant watched.

The victim reported that while she was being forced to touch herself, the defendant ejaculated upon her thigh. The defendant picked up an article of clothing owned by the victim and wiped the semen from the victim's thigh using the clothing article. The clothing article was thrown by the suspect on the floor and was later collected as evidence by this agency. The defendant told the victim to count to 500 before she removed the pillow from her face. The victim reported hearing the defendant dress and leave the room. The victim immediately contacted this agency via 911 to report the incident. Subsequently, the victim was transported to the Sexual Assault Treatment Center where a rape evidence kit was utilized and turned over to this agency. The kit was entered into property as evidence.

Victim [redacted] advised that she did not appear to know the suspect. She did not give him permission at any time to enter her apartment, or perform any of the acts that he committed upon her.

A crime laboratory analysis report from the Broward County Sheriff's Office indicated an identical DNA match from semen collected in the Coral Springs case involving victim #2 [redacted] [redacted] and the positive identification of Ernesto Behrens, to the unsolved Plantation

The offense(s) set forth in the foregoing Affidavit is/are contrary to the statute(s) in such case made and provided, and against the peace and dignity of the State of Florida.

Sworn to and subscribed before me this ____ day of _____, A.D. 19____.

_____ (Seal)
JUDGE, CIRCUIT COURT

_____
Affiant

Docket No. Draft Page

IN THE CIRCUIT/COUNTY COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY, FLORIDA.

STATE OF FLORIDA

vs.

ERNESTO JOSE BEHRENS
H/M DOB 11/10/64

97-00883-MF

WARRANT
[redacted]

BROWARD COUNTY, FLORIDA
I certify this document to be a t
and correct copy of the original.
WITNESS MY COMMAND
on 5/13/97
ROBERT E. LOCKWOOD, Cle
BY D.

IN THE NAME OF THE STATE OF FLORIDA, TO ALL AND SINGULAR THE SHERIFF'S AND CONSTABLES OF THE STATE OF FLORIDA:

WHEREAS, Detective Steven Geller has this day made oath before me that on the 12th day of May, A.D. 19 95, in the County aforesaid, one Ernesto Jose Behrens did then and there unlawfully

Enter or remain in a structure, to-wit: a dwelling or curtilage thereof, located at 750 N.W. 91 Terrace, City of Plantation, Broward County, Florida, property of [redacted], with intent to commit the offense of Sexual Battery therein, and in the course therein did commit a battery upon Denise Wood by actually and intentionally touching or striking [redacted] against her will, contrary to Florida State Statute 810.02(2).

Said Defendant did commit Sexual Battery upon [redacted], a person twelve (12) years of age or older, without her consent by causing his penis to unite with and penetrate the mouth of [redacted] and in the process thereof Ernesto Behrens used or threatened to use a deadly weapon, to wit: Knife or screwdriver contrary to Florida State Statue 794.011(3).

The offense(s) set forth in the foregoing Warrant is/are contrary to the statute(s) in such case made and provided, and against the peace and dignity of the State of Florida. Attached hereto and made a part hereof by incorporation is the Affidavit executed by Detective Steven Geller, Affiant herein.

THESE ARE, THEREFORE, to command you forthwith to arrest the said Ernesto Jose Behrens, H/M, DOB 11/10/64, and bring him/her before me to be dealt with according to law.

Given under my hand and seal this 13 day of May, A.D. 19 97.

Behrens, Ernesto

A TRUE CO
Circuit Court Seal

HONORABLE RICHARD D. EADE
Judge of the Circuit/County Court

97-00883-MF

Rev 5/90

OBTS. NO.

FILING AGENT	OFFENSE REPORT	LOCAL I.D. NO.	FT	FBI	SS NO.
Plantation	1619 -05			197560HA4	[redacted]

DEFENDANT'S LAST NAME	FIRST	MIDDLE	SUF	ALIAS/STREET NAME	CITIZENSHIP
Behrens	Ernesto				

RC.	SEX	HGT.	EYES	HAIR	WGT.	COMP.	AGE	D.O.B.	BIRTHPLACE	SCARS, MARKS, TT
W	M	5'10"	brn	brn	170	med	33	111064	Venezuela	

PERMANENT ADDRESS	LOCAL ADDRESS
Unknown	

PLACE OF EMPLOYMENT	LENGTH
Unemployed	

RESIDENCE TYPE: (1) CITY (2) COUNTY (3) FLORIDA (4) OUT-OF-STATE

HOW LONG DEFENDANT IN BROWARD COUNTY	BREATHALYZER BY/CCN	READING	PLACE OF ARREST	DATE/TIME ARRESTED	ARRESTING OFFICER(S) CCN

OFFICER INJURED	UNIT	ZONE	BEAT	SHIFT	UNIT TRANSPORTING PRISONER	TRANSPORTING OFFICER/CCN	PICK-UP TIME / TIME ARRIVED AT BSO	DRUG TYPE
Y ☒ N ☐								

TYPE: N-N/A, A-AMPHETAMINE, B-BARBITURATE, C-COCAINE, E-HEROIN, H-HALLUCINOGEN, M-MARIJUANA, O-OPIUM, P-PARAPHERNALIA/EQUIPMENT, S-SYNTHETIC, U-UNKNOWN, Z-OTHER

ACTIVITY: N-N/A, P-POSSESS, S-SELL, B-BUY, T-TRAFFIC, A-SMUGGLE, D-DELIVER, E-USE, M-MANUFACTURE/PRODUCE/CULTIVATE, K-DISPENSE/DISTRIBUTE, Z-OTHER

INDICATION OF ALCOHOL INFLUENCE / DRUG INFLUENCE: Y N UNK

ATTACH DEFENDANT'S PHOTO

DEFENDANT'S VEHICLE-MAKE _____ TYPE _____ YEAR _____ COLOR _____ VIN. NO. _____

VEHICLE TOWED TO _____ TAG NO. _____ OTHER IDENTIFIERS OR REMARKS _____

NAME OF VICTIM (IF CORPORATION, EXACT LEGAL NAME AND STATE OF INCORP.)	ADDRESS	PHONE #
[redacted]	[redacted]	[redacted]

COUNT NO.	OFFENSES CHARGED	CITATION #, IF APPLICABLE	F.S.# OR CAPIAS/WARRANT #
1-2	Sexual Battery -Armed		794.005(3)
3	Armed Burglary		810.02(b)
4	Battery		784.03(1)

PROBABLE CAUSE AFFIDAVIT

Before me this date personally appeared Detective Steve Geller who being first duly sworn deposes and says that on 12 day May, 19 95 at 750 NW 91 Terr. (crime location) the above named defendant committed the above offenses charged and the facts showing probable cause to believe same are as follows:

On 05/12/95 victim [redacted] resident of [redacted], was n her home sleeping when an unknown suspect committed the crime of burglary by rying the rear sliding glass door open. The suspect gained entry into the esidence and awoke Miss [redacted] by shining a flashlight in her face. The suspect limbed on top of Miss [redacted] and at that time placed a sharp pointed object

swear the above statement is correct and true to the best of my knowledge and belief.

Steve Geller — OFFICER/AFFIANT'S SIGNATURE

Detective Geller, 9038 — OFFICER'S NAME/CCN

C.I.D. — OFFICER'S DIVISION

STATE OF Florida COUNTY OF Broward

The foregoing instrument was acknowledged before me this 25 day of Feb, 19 98, who is personally known to me or who has produced (ID Type) _____ as identification and who _____ (DID OR DID NOT) take an oath.

(SEAL OR STAMP)

DEPUTY CLERK OF THE COURT, NOTARY PUBLIC, OR ASSISTANT STATE ATTORNEY

935 — TITLE OR RANK/CCN

SEVENTEENTH JUDICIAL CIRCUIT
BROWARD COUNTY
STATE OF FLORIDA

FIRST APPEARANCE / ARREST FORM

SHOULD ADDITIONAL SPACE BE NEEDED, USE PROBABLE CAUSE AFFIDAVIT CONTINUATION.

COURT COPY

Orig. - Court
2nd - State Atty.
3rd - Filing Agency
4th - Arresting Agency

ARREST NO. _____ PROBABLE CAUSE AFFIDAVIT CONTINUATION NO. _____

DEFENDANT'S LAST NAME	FIRST	MIDDL	SUF.	HGT.	WGT.	RC	SEX	D.O.B.	OF	E REPORT	ARRESTING OFFICER (S)/CCN
Behrens	Ernesto			5'10"	170	W	M	111064		1619-95-05	

NAME OF VICTIM (IF CORPORATION, EXACT LEGAL NAME AND STATE OF INCORP.) [redacted] ADDRESS [redacted] PHONE # [redacted]

COUNT NO.	OFFENSES CHARGED	CITATION #, IF APPLICABLE	F.S. # OR CAPIAS/WARRANT #

Before me this date personally appeared Detective Steve Geller who being first duly sworn deposes and says that on 12 day May, 19 95 at 750 NW 91 Terr. (crime location) the above named defendant committed the above offenses charged and the facts showing probable cause to believe same are as follows:

against Miss [redacted] stomach and advised her not to move. Miss [redacted] believed that the object was a knife. Next, the suspect committed the act of sexual battery by physically forcing his penis into Miss [redacted] mouth. Once the suspect gained an erection, he forced Miss [redacted] to stroke his penis with her hand. During this portion of the incident, the suspect fondled the victim's breasts and buttocks against her will. The suspect eventually ejaculated on Miss [redacted] thigh and wiped the fluid off of her using Miss [redacted] slip dress. The suspect fled the residence and was not apprehended at the time of the incident. Victim [redacted] provided a description of the perpetrator as being a white male with a slight Hispanic accent.

During an ongoing investigation of this case, along with other sexual batteries with similar M.O.'s to that of the unknown suspect, it was learned that Coral Springs PD had an attempted sexual battery in which a suspect fingerprint was obtained (See Coral Springs case number 94-6152). The suspect in that case was identified as Ernesto Behrens. Subsequently, this Detective was able to obtain a DNA sample taken from Behrens when he was investigated by Metro-Dade PD

I swear the above statement is correct and true to the best of my knowledge and belief

Steve Geller — OFFICER/AFFIANT'S SIGNATURE

Detective Geller, 9038 — OFFICER'S NAME/CCN

C.I.D. — OFFICER'S DIVISION

STATE OF Florida COUNTY OF Broward

The foregoing instrument was acknowledged before me this 25 day of Feb, 19 98, who is personally known to me or who has produced (Type) _____ as identification and who _____ (DID OR DID NOT) take an oath.

(SEAL OR STAMP)

DEPUTY CLERK OF THE COURT, NOTARY PUBLIC OR ASSISTANT STATE ATTORNEY

9308 — TITLE OR RANK/CCN

FIRST APPEARANCE/ARREST FORM

SEVENTEENTH JUDICAL CIRCUIT
BROWARD COUNTY
STATE OF FLORIDA

Orig - Court
2nd - State Atty
3rd - Filing Agency
4th - Arresting Agency

COURT COPY

ARREST NO. _____ PROBABLE CAUSE AFFIDAVIT CONTINUATION _____ NO. _____

DEFENDANT'S LAST NAME	FIRST	MIDDI	SUF.	HGT.	WGT.	RC	SEX	D.O.B.	OF	REPORT	ARRESTING OFFICER (S)/CCN
Behrens	Ernesto			5'10"	170	W	M	111064	1619-95-05		

NAME OF VICTIM (IF CORPORATION, EXACT LEGAL NAME AND STATE OF INCORP.)	ADDRESS	PHONE #
Denise Wood	1521B NW 14 PL, Margate, FL	969-5148

COUNT NO.	OFFENSES CHARGED	CITATION #, IF APPLICABLE	F.S. # OR CAPIAS/WARRANT #

Before me this date personally appeared Detective Steve Geller who being first duly sworn deposes and says that on 12 day May, 19 95 at 750 NW 91 Terr. (crime location) the above named defendant committed the above offenses charged and the facts showing probable cause to believe same are as follows:

on an unrelated incident. The DNA sample was forwarded to the BSO crime lab for comparison with the suspect DNA of Miss [redacted] perpetrator.

On 091697, Donna Marchese of the BSO crime laboratory released the results of the DNA comparison testing. Her report indicated an exact DNA match between the semen obtained from the slip dress to that of Ernesto Behrens.

Based on the results of the DNA testing, there is reason to believe that Ernesto Behrens committed the criminal acts against [redacted] on 05/12/95. Victim [redacted] advised that she does wish to pursue charges against Behrens.

ewer the above statement is correct and true to the best of my knowledge and belief.

Detective Geller, 9038 — OFFICER/AFFIANT'S SIGNATURE / OFFICER'S NAME/CCN

C.I.D. — OFFICER'S DIVISION

ATE OF Florida COUNTY OF Broward

foregoing instrument was acknowledged before me this 25 day of Feb, 19 97, who is personally wn to me or who has produced (ID Type) _____ as identification and who _____ (DID OR DID NOT) take an oath.

PUTY CLERK OF THE COURT, NOTARY PUBLIC OR ASSISTANT STATE ATTORNEY

9308 — TITLE OR RANK/CCN

(SEAL OR STAMP)

FIRST APPEARANCE/ARREST FORM

Orig - Court
2nd - State Atty
3rd - Filing Agency
4th - Arresting Agency

ENTEENTH JUDICAL CIRCUIT
ARD COUNTY
ORIDA

COURT COPY

98-5739CFD

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

STATE OF FLORIDA

vs.

ERNESTO BEHRENS

INFORMATION FOR

I-II. - SEXUAL BATTERY-ARMED
III. - BURGLARY OF A DWELLING WITH A BATTERY
IV. - BATTERY

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

MICHAEL J. SATZ, State Attorney of the Seventeenth Judicial Circuit of Florida, as Prosecuting Attorney for the State of Florida in the County of Broward, by and through the undersigned Assistant State Attorney, charges that ERNESTO BEHRENS

on the 12th day of May, A.D. 1995, in the County and State aforesaid, did commit Sexual Battery upon [redacted] a person twelve (12) years of age or older, without her consent by causing his sexual organ to penetrate or unite with the mouth and/or tongue of [redacted] and in the process thereof ERNESTO BEHRENS used or threatened to use a deadly weapon, to-wit: a knife or other sharp object, contrary to F.S. 794.011(3).

COUNT II

MICHAEL J. SATZ, State Attorney of the Seventeenth Judicial Circuit of Florida, as Prosecuting Attorney for the State of Florida in the County of Broward, by and through the undersigned Assistant State Attorney, charges that ERNESTO BEHRENS

on the 12th day of May, A.D. 1995, in the County and State aforesaid, did commit Sexual Battery upon [redacted] a person twelve (12) years of age or older, without her consent by causing his finger to penetrate the anus of [redacted] and in the process thereof ERNESTO BEHRENS used or threatened to use a deadly weapon, to-wit: a knife or other sharp object, contrary to F.S. 794.011(3).

COUNT III

MICHAEL J. SATZ, State Attorney of the Seventeenth Judicial Circuit of Florida, as Prosecuting Attorney for the State of Florida in the County of Broward, by and through the undersigned Assistant State Attorney, charges that ERNESTO BEHRENS

on the 12th day of May, A.D. 1995, in the County and State aforesaid, did unlawfully, enter or remain in a structure, to-wit: a dwelling, or the curtilage thereof, located at [redacted] property of [redacted] with the intent to commit the offense of Sexual Battery therein, and in the course thereof did commit a Battery upon [redacted] by actually and intentionally touching or striking [redacted] against the will of [redacted] contrary to F.S. 810.02(2)

COUNT IV

MICHAEL J. SATZ, State Attorney of the Seventeenth Judicial Circuit of Florida, as Prosecuting Attorney for the State of Florida in the County of Broward, by and through the undersigned Assistant State Attorney, charges that ERNESTO BEHRENS

on the 12th day of May, A.D. 1995, in the County and State aforesaid, did then and there commit a battery upon [redacted] by actually and intentionally touching or striking [redacted] against the will of said [redacted] contrary to F.S. 784.03(1).

'98 FEB 6:10

COUNTY OF BROWARD
STATE OF FLORIDA

Personally appeared before me ***DENNIS SIEGEL,*** duly appointed as an Assistant State Attorney of the 17th Judicial Circuit of Florida by MICHAEL J. SATZ, State Attorney of said Circuit and Prosecuting Attorney for the State of Florida in the County of Broward, who being first duly sworn, certifies and says that testimony has been received under oath from the material witness or witnesses for the offense(s), and the allegations as set forth in the foregoing Information would constitute the offense(s) charged, and that this prosecution is instituted in good faith.

Dennis Siegel
Assistant State Attorney, 17th Judicial Circuit of Florida

SWORN TO AND SUBSCRIBED before me this 17th day of March, A.D. 1998.

ROBERT E. LOCKWOOD

Clerk of the Circuit Court, 17th Judicial Circuit,
Broward County, Florida

By Martha N. Haase
Deputy Clerk

APR 03 1998

To the within Information, Defendant pleaded Not guilty.

ROBERT E. LOCKWOOD

Clerk ~~of the Circuit Court~~, 17th Judicial Circuit,
Broward County, Florida

By
~~Deputy Clerk~~

DS:emb 2-13-5.ds

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

STATE OF FLORIDA

vs.

ERNESTO BEHRENS

AMENDED
INFORMATION FOR

I. - SEXUAL BATTERY-ARMED
II. - BURGLARY OF A DWELLING WITH A BATTERY

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

MICHAEL J. SATZ, State Attorney of the Seventeenth Judicial Circuit of Florida, as Prosecuting Attorney for the State of Florida in the County of Broward, by and through the undersigned Assistant State Attorney, charges that ERNESTO BEHRENS

on the 12th day of May, A.D. 1995, in the County and State aforesaid, did commit Sexual Battery upon [redacted] a person twelve (12) years of age or older, without her consent by causing his sexual organ to penetrate or unite with the mouth and/or tongue of [redacted] and in the process thereof ERNESTO BEHRENS used or threatened to use a deadly weapon, to-wit: a knife or other sharp object, contrary to F.S. 794.011(3).

COUNT II

MICHAEL J. SATZ, State Attorney of the Seventeenth Judicial Circuit of Florida, as Prosecuting Attorney for the State of Florida in the County of Broward, by and through the undersigned Assistant State Attorney, charges that ERNESTO BEHRENS

on the 12th day of May, A.D. 1995, in the County and State aforesaid, did unlawfully, enter or remain in a structure, to-wit: a dwelling, or the curtilage thereof, located at [redacted], property of [redacted] with the intent to commit the offense of Sexual Battery therein, and in the course thereof did commit a Battery upon [redacted] by actually and intentionally touching or striking [redacted] against the will of [redacted] contrary to F.S. 810.02(2)

COUNTY OF BROWARD
STATE OF FLORIDA

Personally appeared before me ***DENNIS SIEGEL,*** duly appointed as an Assistant State Attorney of the 17th Judicial Circuit of Florida by MICHAEL J. SATZ, State Attorney of said Circuit and Prosecuting Attorney for the State of Florida in the County of Broward, who being first duly sworn, certifies and says that testimony has been received under oath from the material witness or witnesses for the offense(s), and the allegations as set forth in the foregoing Information would constitute the offense(s) charged, and that this prosecution is instituted in good faith.

Dennis Siegel
Assistant State Attorney, 17th Judicial Circuit of Florida

SWORN TO AND SUBSCRIBED before me this 15th day of June, A.D. 1999

ROBERT E. LOCKWOOD

Clerk of the Circuit Court, 17th Judicial Circuit,
Broward County, Florida

By Denise D. Clark
Deputy Clerk

To the within Information, Defendant pleaded not guilty 4/3/98

ROBERT E. LOCKWOOD

Clerk of the Circuit Court, 17th Judicial Circuit,
Broward County, Florida

By Karen Hayes
Deputy Clerk

DS:emb 06-15-05 ds

Filed In Clerk Court
ROBERT E. LOCKWOOD
Clerk
ON 6/16/99
BY

CIRCUIT PRINTED: 05/01/98

IN THE COUNTY/CIRC[illegible] COURT OF THE SEVENTEENT[illegible] UDICIAL CIRCUIT,
IN [illegible] FOR BROWARD COUNTY, FLO[illegible] DA

CASE NO. 98005739CF10A

JUDGE: RICHARD EADE

STATE OF FLORIDA, :

ASA: MR. D. SIEGEL

Plaintiff, :

STATE'S DISCOVERY SUBMISSION

vs. :

BEHRENS, ERNESTO

: ALL CORRESPONDENCE SHOULD BE DIRECTED TO:
STATE ATTORNEY'S OFFICE
: SEXUAL BATTERY UNIT
201 S.E. 6TH ST. ROOM 568
Defendant(s). : FT. LAUDERDALE FL 33301

. . . . . .:

COMES NOW the State of Florida, by and through the undersigned Assistant State Attorney, in compliance with Rule 3.220, Florida Rules of Criminal Procedure and in recognition of the Defendant's election to participate in discovery, submits the following information:

1. The names and addresses of all persons presently known to the prosecutor to have information which may be relevant to the offense charged, or to any defense with respect thereto are:

A	[redacted]	[redacted]	[redacted]	[redacted]
A	ANDELIN, SIRU	3835 S. CAMBRIDGE ST APT347	LASVEGAS	NV 89009
A	SWABY, JEAN	400 NE 4TH STREET	FT LAUD	FL 33301
A	TRACEY, DR MARTIN	FIU, UNIVERSITY PARK BIOLOGY DEPT	MIAMI	FL 33199
A	GELLER, DET STEVE	451 N.W. 70 TERRACE	PLANTATION	FL 33317
A	TIGHE, WILLIAM	451 N.W. 70 TERRACE	PLANTATION	FL 33317
A	HAGER, DET BRIAN	451 N.W. 70 TERRACE	PLANTATION	FL 33317
A	FARRON, OFF. D.	451 N.W. 70 TERRACE	PLANTATION	FL 33317
A	STANCO, OFC. AL	451 N.W. 70 TERRACE	PLANTATION	FL 33317
A	HUSKISSON, OFC	451 N.W. 70 TERRACE	PLANTATION	FL 33317
A	HANLON, MARJORIE	451 N.W. 70 TERRACE	PLANTATION	FL 33317

Copies of all "statements" within the meaning of the aforesaid Rule are provided to the defense with this submission.

IN THE COUNTY/CIRC COURT OF THE SEVENTEENT JUDICIAL CIRCUIT,
IN D FOR BROWARD COUNTY, FLO DA

CASE NO. 98005739CF10A

JUDGE: RICHARD EADE

STATE OF FLORIDA, :

ASA: MR. D. SIEGEL

Plaintiff, :

STATE'S DISCOVERY SUBMISSION

vs. :

BEHRENS, ERNESTO

: ALL CORRESPONDENCE SHOULD BE DIRECTED TO:
STATE ATTORNEY'S OFFICE
: SEXUAL BATTERY UNIT
201 S.E. 6TH ST. ROOM 568
Defendant(s). : FT. LAUDERDALE FL 33301

. . . . . .:

RECEIVED
CLERK OF CIRCUIT COURT
BROWARD COUNTY, FLA.

COMES NOW the State of Florida, by and through the undersigned Assistant State Attorney, in compliance with Rule 3.220, Florida Rules of Criminal Procedure and in recognition of the Defendant's election to participate in discovery, submits the following information:

1. The names and addresses of all persons presently known to the prosecutor to have information which may be relevant to the offense charged, or to any defense with respect thereto are:

A	MARCHESE, DONNA	2601 WEST BROWARD BLVD	FORT LAUDE	FL 33312
A	BUTCHKO, DET JOHN	1351 NW 12TH ST.,RM. #310	MIAMI	FL 33125
A	MOORE, DET ARCHIE	1351 NW 12TH ST.,RM. #310	MIAMI	FL 33125
A	HINES, SHARON	1351 NW 12TH ST.,RM. #310	MIAMI	FL 33125
A	EVANS, KEITH	FBI, 16320 NW 2ND AVE	N. MIAMI	FL 33169
A	CLEMENTS, DET JACK	LAS VEGAS METRO POLICE DEPT 400 EAST STEWART AVE.	LAS VEGAS	NV 89101
A	BELANGER, DET	451 N.W. 70 TERRACE	PLANTATION	FL 33317
A	MAZER, DET	451 N.W. 70 TERRACE	PLANTATION	FL 33317
A	LARSEN, LT.	451 N.W. 70 TERRACE	PLANTATION	FL 33317
A	BERGSTROM, SGT	451 N.W. 70 TERRACE	PLANTATION	FL 33317
A	LEE, OFF	451 N.W. 70 TERRACE	PLANTATION	FL 33317

Copies of all "statements" within the meaning of the aforesaid Rule are provided to the defense with this submission. 11

2. The items described below are within the prosecutor's possession, control, or knowledge, and [excepting information concerning subparagraph (d)] are available for inspection, copying and/or photographing at this office upon timely and reasonable notice.

(a) Statements of Defendant.

[ ]Written [X]Recorded [X]Oral [ ]Grand Jury [ ]None.
Made to: ORAL TO DET. BARBARA HAYDU
ORAL AND TAPED TO DET. WILLIAM TIGHE AND DET. JACK CLEMENTS

(b) Statements of Co-defendant(s) [provided if a joint trial].
[ ]Written [ ]Recorded [ ]Oral [X]None.
Made to:

(c) Tangible papers or objects obtained from or belonging to Defendant (see paragraph 3. on page 3 of this Submission.) YES, RIGHTS WAIVER, SEE OBJECTS AND PAPERS LISTED BELOW

(d) Material or information provided by confidential informant(s). [If "yes", same will only be disclosed pursuant to Court order]
[ ]YES [X]NONE

(e) Electronic surveillance, including wiretapping, of the premises of the Defendant or of conversations to which the Defendant was a party.
[X]No electronic surveillance.
[ ]Electronic surveillance conducted as indicated:
[ ]*Documents:

(f) Search or seizure.

[ ]No search and/or seizure conducted in reference to this case
[X]Search and/or seizure conducted as indicated:
[X]*Documents: CONSENT FORMS

(g) *Reports or statements of experts: YES

[ ]Chemist,Lab#_____ [ ]Ballistics [ ]Fingerprint
[X]Medical/Psychiatric

Other(s)____DNA_____

* [Copies of documents relating to electronic surveillance, search and/or seizure and expert reports are provided with defense counsel's copy of this Submission and/or are available for inspection, copying and/or photographing upon timely and reasonable notice to the prosecution.]

(h) Tangible papers not obtained from or belonging to Defendant which the State intends to use at hearing or trial:

POLICE REPORTS, WITNESS STATEMENTS, MEDICAL REPORTS FROM SATD AND DNA REPORTS

3. The tangible objects listed below, whether or not taken from or belonging to Defendant, which the State intends to use at hearing or trial, may be inspected, photographed and/or tested, upon reasonable and timely notice to the agency shown:

Object	Agency & Locale
TAPES	PLANTATION POLICE DEPARTMENT
LATENTS	
RIGHTS WAIVER	
PHOTOS	
DRESS	
PROPERTY RECEIPT ITEMS	
VIDEOTAPE	
SHEETS, PILLOWCASE, AND COMFORTER	
SHOE IMPRESSION CASTS AND SHOEPRINT IMPRESSIONS	
RAPE KIT	PLANTATION POLICE DEPT. AND BSO

4. [ ] The State Attorney's Office has the following material information within its possession or control which may tend to negate the guilt of the Defendant as to the offense(s) charged:

[X] At this time the State is unaware of any evidence which falls within the purview of Brady v. Maryland and/or FRCrP 3.220(b)(2).

5. Having made this Discovery Submission under Rule 3.220, FRCrP, and in light of Defendant's notice of intent to participate in discovery, the State hereby reminds the Defendant of his/her reciprocal disclosure obligations, and the time limits for same, under section(d) of said Rule.

I HEREBY CERTIFY that a true copy hereof has been furnished by U.S.Mail/Hand-delivery this 4th day of May, A.D. 1998, to

RENEE T. DADOWSKI
Assistant Public Defender

MICHAEL J. SATZ
State Attorney

By: Dennis Siegel
DENNIS SIEGEL Fla. Bar #258131
Assistant State Attorney
201 SE Sixth Street
Fort Lauderdale, Florida 33301
Telephone: (954) 831-6933
Fax: (954) 831-6936

S-19

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

CASE NO. 98-5739CF10A

STATE OF FLORIDA, : JUDGE: EADE

Plaintiff, :

vs. : DEMAND FOR NOTICE OF ALIBI

ERNESTO J. BEHRENS, :

Defendant. :

RECEIVED
CIRCUIT COURT
BROWARD COUNTY
98 MAY -4 PM 12:

COMES NOW the State of Florida, by and through the undersigned Assistant State Attorney, pursuant to Rule 3.200, Florida Rules of Criminal Procedure, and hereby makes demand upon the above-named Defendant to file and serve upon the aforesaid prosecuting attorney a notice in writing if it is his/her intention to offer evidence of an alibi in his/her defense; to state in such notice specific information as to the place at which the Defendant claims to have been at the time of the alleged offense(s); and to state as particularly as is known to the Defendant or his/her attorney the names and address of the witnesses by whom the Defendant proposes to establish such alibi.

As particularly as is known to the aforesaid prosecuting attorney, the place, date and time of the commission of the crime(s) charged are as follows:

Place: At or near [redacted]
PLANTATION
BROWARD COUNTY, FLORIDA.

Date/time: Within TWO (2) hours either side of 4:30 A. M.,
on MAY 12, 1995

Such evidence of alibi shall be served upon the prosecuting attorney not less than ten (10) days prior to trial, unless directed otherwise by the court.

I HEREBY CERTIFY that a true copy hereof has been furnished by U.S. Mail/hand - delivery this 1ST day of MAY A.D. 1998, to: RENEE DADOWSKI, ASSISTANT PUBLIC DEFENDER

MICHAEL J. SATZ
State Attorney

BY: Dennis Siegel
DENNIS SIEGEL
Assistant State Attorney FL Bar #258131
Sex Crimes/Child Abuse Unit
201 S.E. Sixth Street, Rm. 568
Fort Lauderdale, Florida 33301
Telephone: (954) 831-6933
FAX: (954) 831-6936

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

CASE NO. 98-5739CF10A

JUDGE: Dimitrouleas

STATE OF FLORIDA,

Plaintiff,

vs.

ERNESTO BEHRENS

Defendant.

NOTICE OF THE STATE'S INTENT TO SEEK THAT THE COURT DECLARE THE DEFENDANT AN HABITUAL FELONY OFFENDER, AN HABITUAL VIOLENT FELONY OFFENDER, AND/OR A VIOLENT CAREER CRIMINAL

Filed In Open Court
ROBERT E. LOCKWOOD
MAY 26 1998
Clerk

COMES NOW the State of Florida, by and through its undersigned Assistant State Attorney, and hereby requests this Honorable Court to declare the above-named Defendant to be an "Habitual Felony Offender", an "Habitual Violent Felony Offender", and/or a "Violent Career Criminal", pursuant to Section 775.084, Florida Statutes.

In support of its request, the State relies on the following:

A. (1) The Defendant has been previously convicted of any combination of two (2) or more felonies or other qualified offenses; and

(2) The felony for which the Defendant is to be sentenced was committed within five (5) years of the date of the conviction of the defendant's last prior felony or other qualified offense, or within five (5) years of the defendant's release, on parole or otherwise, from a prison sentence or other commitment imposed as a result of a prior conviction for a felony or other qualified offense, whichever is later;

AND/OR

B. (1) The Defendant has previously been convicted of a felony or an attempt or conspiracy to commit a felony and one or more of the convictions was for arson; sexual battery; robbery; kidnapping; aggravated child abuse; aggravated assault; murder; manslaughter; the unlawful throwing, placing or discharging of a destructive device or bomb; armed burglary; aggravated battery; or aggravated stalking, and

(2) The felony for which the Defendant is to be sentenced was committed within five (5) years of the date of the conviction of the last prior enumerated felony or within five (5) years of the date of the Defendant's release, on parole or otherwise, from a prison sentence or other commitment imposed as a result of a prior conviction for an enumerated felony, whichever is later.

AND/OR

C. (1) The Defendant has previously been convicted as an adult three or more times for an offense in this state or other qualified offense that is any forcible felony (F.S. 776.08); aggravated stalking; aggravated child abuse; lewd, lascivous, or indecent conduct; escape; or a felony violation of chapter 790 involving the use or possession of a firearm, and

(2) The primary felony offense for which the Defendant is to be sentenced is a felony enumerated in subparagraph (1) and was committed within 5 years after the conviction for the last prior enumerated felony or within five (5) years after the defendant's release, on parole or otherwise, from a prison sentence or other commitment imposed as a result of a prior conviction for an enumerated felony, whichever is later.

I HEREBY CERTIFY that a true copy hereof was served on the Defendant and the Attorney for the Defendant, in the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida, this 26th day of May, A.D. 1998.

MICHAEL J. SATZ
State Attorney

By: Dennis Siegel

FLBar# 258131
Assistant State Attorney
201 Southeast Sixth Street
Fort Lauderdale, FL 33301-3306

19

IN THE COUNTY RCUIT COURT OF THE SEVENTEE H JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO. 98-5739CF10
JUDGE EADE

ON MAY 26 1998

STATE OF FLORIDA,
Plaintiff,
vs.
ERNESTO BEHRENS,
Defendant

ORDER TRANSFERRING CASE

IT IS HEREBY ORDERED that the above-styled case be transferred, upon the proper execution of this Order by the "Accepting Judge" named hereinbelow, in the manner and for the reason(s) set forth hereinbelow:

Relinquishing Division FK Presided over by the Honorable RICHARD EADE
Judge of the County/Circuit Court

Accepting Division ____ Presided over by the Honorable WILLIAM DIMITROULEAS
Judge of the County/Circuit Court

Reason(s):

☐ 1. Defendant, _____, ☐ has an open case pending in ☐ is on probation in
Division _____ [Case No.].

☐ 2. Co-Defendant, _____, ☐ has an open case pending in ☐ is on probation in
Division _____ [Case No.].

☒ X 3. Other DEFENDANT QUALIFIES AS HABITUAL VIOLENT OFFENDER

DATED this 20 day of May, A.D. 1998.

HONORABLE RICHARD EADE
Relinquishing Judge

THE ABOVE-STYLED CASE is accepted into Division FK in accordance with and for the reason(s) and/or limited purpose(s) specified hereinabove.

DATED this 21 day of May, A.D. 1998

HONORABLE WILLIAM DIMITROULEAS
Accepting Judge

Copies furnished:
State Attorney's Office, Relinquishing Div. ___
State Attorney's Office, Accepting Div. ___
Defense Counsel RENEE DANOWSKI, Esq.
Address: PUBLIC DEFENDER'S OFFICE

2 0

Original - Clerk/Accepting Div. Copy - Relinquishing Judge
Copy - SAO Relinquishing Div. Copy - SAO Accepting Div. Copy - Defense Counsel

Rev 11/95 #042

BROWARD COUNTY SHERIFF'S OFFICE
P.O. Box 9507
Ft. Lauderdale, FL 33310

Lab Number: ~~I-21-68H~~

CRIME LABORATORY ANALYSIS REPORT

To: Detective S. Geller
Plantation Police Department
451 NW 70 Terr.
Plantation, FL 33317

Date: 07/16/97
Agency Case# 1932-97-04

Defendant(s): ERNEST O. BEHRENS
Victim(s): MATHENA ROCHE

The evidence listed below was submitted to this laboratory:

50) Standard - Ernest Behrens

High molecular weight DNA was obtained from item 50. Hae III was used as a restriction enzyme.

CONCLUSIONS:

The DNA profile from item 50 matched the DNA profile from the following case(s):

Victim: [redacted]
Lab Number: 1089-D
Agency: Coral Springs
Agency Case #: 93-10-4618

Victim: [redacted]
Lab Number: 9186E
Agency: Plantation
Agency Case #: 1619-95-05

The foregoing instrument was acknowledged before me this 21st day of July, 1997 by Donna J. Marchese who is personally known to me and who did take an oath.

Diana M. Edwards
CC641792
STATE OF FLORIDA, COUNTY OF BROWARD

Respectfully submitted,

Donna J. Marchese
DNA Specialist
Crime Laboratory

EXHIBIT MM

F2

SHERIFF'S OFFICE
PALM BEACH COUNTY
PROPERTY RECEIPT

Case Number: 97-1115

Date: 10/14/97 Time: 1415 Zone: Type Case: Sexual Battery Bin Number: 997-3...

☐ Property of Deceased ☒ Trial ☐ Found Property ☒ Laboratory ☐ ... ☐ Destroy

Release After Processing? ☒ Yes ☐ No To Whom: B.S.O. LAB

Address Where Property Impounded

NAME	ADDRESS	PHONE
Discovered by: BSO Crime Lab	451 NW 70 Terr Plantation	957-2112
Owner: N/A		
Victim: Renee Ahladis	—	
Suspect(s) include DOB: Ernesto Behrens 11/10/64	W/M In Custody	—

ITEM #	QUANTITY	VALUE	DESCRIPTION
X2-1	1	Ø	DNA Swab from Metro-Dade Lab from
			Suspect Ernesto Behrens
			CHAIN OF Custody:
			From BSO LAB to
			Detective Steven Geller to
			P.B.S.O LAB
ISWE			

I hereby acknowledge that the above list represents all property taken from my possession and that I have received a copy of this receipt.

Signature: Steven Geller 00/5088

I hereby acknowledge that the above list represents property ... me in the official performance of duty as a Deputy Sheriff

Signature: Steven Geller ID 5075 Division PAD

RECEIVED BY	REASON	DATE & TIME
Maritza	Lab	10-17-97-1...
Debra Glidewell	Sero/DNA	...
Debra Glidewell	Return to BSO by UPS	...

Final Disposition | Authority | Date & Time

☐WEST PALM BEACH ☐DELRAY BEACH ☐PALM BEACH GARDENS

PBSO # 0145

CONTRIBUTOR'S COPY

FILE COPY

LAB NUMBER: 97-11[illegible]

DATE: 12/22/97 *** PALM BEACH COUNTY SHERIFF'S OFFICE *** PAGE: 1

3228 GUN CLUB ROAD
WEST PALM BEACH, FLORIDA 33406
PHONE (407) 688-4200
RICHARD L. TANTON
LABORATORY DIRECTOR

*** CRIME LABORATORY REPORT ***

SECTION: SEROLOGY

INVEST. AGENCY: BSO	CASE NUM: 108920	AGENT:	DET. GELLER
INVEST. AGENCY:	CASE NUM:	AGENT:	
INVEST. AGENCY:	CASE NUM:	AGENT:	
INVEST. AGENCY:	CASE NUM:	AGENT:	
INVEST. AGENCY:	CASE NUM:	AGENT:	
DATE SUBMITTED: 10/14/97		ANALYSIS COMPLETE: 12/22/97	

*** PRINCIPALS ***

SUSPECT/VICTIM	LAST NAME	FIRST NAME	MI	SX	DOB	RACE	SSN
VICTIM	AHLADIS	RENEE					
SUSPECT	BEHRENS	ERNESTO			11/10/64		

*** EVIDENCE ***

ITEM NO.	QTY	DESCRIPTION
*****		*** SEROLOGY/DNA EVIDENCE ***
PR #1	1	SEALED PAPER BAG CONTAINING:
1-1	2	VAGINAL SWABS IN A SEALED ENVELOPE
1-2	1	BLOOD STANDARD FROM "RENEE AHLADIS" IN A SEALED ENVELOPE
PR #2		
2-1	2	DNA SWABS FROM ERNESTO BEHRENS IN A SEALED ENVELOPE

*** RESULTS ***

SEROLOGY/DNA RESULTS

1. DNA FROM ERNESTO BEHREN'S STANDARD (2-1) WAS ANALYZED FOR 10 GENETIC MARKERS INCLUDING: AMELOGENIN, DQA1, LDLR, G/PA, HBGG, D7S8, GC, CSF1PO, TPOX, AND THO1 (SEE ATTACHED DATA SHEET).

2. NO DNA RESULTS WERE OBTAINED FROM THE SPERM ON THE VAGINAL SWAB (1-1 SP). DNA WAS RECOVERED FROM RENEE AHLADIS' BLOOD STANDARD (1-2) AND THE NONSPERM FRACTION ON THE VAGINAL SWAB (1-1 NS).

Debra E. Gilewell 97

DEBRA E. GILEWELL
SENIOR FORENSIC SCIENTIST

DATE 12/22/97

EXHIBIT NN

DNA DATA SHEET

PBSO LAB NUMBER:	97-11152
PAGE:	2
ANALYST:	Debra E. Glidewell

		DNA PROFILE									
EXHIBIT #	SOURCE	DQA1	DQ1	GYPA	HBGG	D7S8	GC1	CSF1PO	TPOX	THO1	SEX
X2-1	ERNESTO BEHRENS	2, 4.1	BB	AB	AB	AA	AC	10, 12	10, 11	NR	MALE

NOTES:

NR = No Result(negative/inconclusive)

EXHIBIT OO

Laboratory Corporation of America

Laboratory Corporation of America® Holdings
1912 Alexander Drive
Research Triangle Park, North Carolina 27709
Telephone: 800-533-0567
Fax: 919-361-7797

CERTIFICATE OF ANALYSIS

October 8, 2001

Dr. Guy Durand, M.D.
1670 NW 93rd Avenue
Plantation, FL 33322

FS Lab #: F01-3385

Dear Dr. Durand,

Pursuant to your request to consult on the above referenced case please find the following conclusions.

Based on the DNA profile provided via fax, The probability of randomly selecting an unrelated individual with a DNA profile that matches the profile provided at the genetic systems analyzed is approximately:

1 in 2,220,000 for the African American population.
1 in 469,000 for the Caucasian population.
1 in 454,000 for the Southeastern Hispanic population.
1 in 829,000 for the Southwestern Hispanic population.

If you have any additional questions, feel free to call me at the number listed above, ext. 3393.

Sincerely,

Marcia Eisenberg

Marcia Eisenberg, Ph.D.
AVP and Senior Director, Forensic Identity Testing

Shawn M. Weiss

Shawn M. Weiss, B.S.
Associate Technical Director, Forensic Identity Testing

EXHIBIT PP

IN THE CIRC COURT OF THE SEVENTEENTH JICIAL CIRCUIT
BROWARD COUNTY, STATE OF FLORIDA

6.13

STATE OF FLORIDA,

Plaintiff,

vs.

ERNESTO BEHRENS,

Defendant.

_____/

CASE NO:98-5739CF10A

JUDGE: ROTHSCHOLD

DEFENDANT'S AMENDED WITNESS LIST

Defendant in the above cause, through undersigned counsel, pursuant to Fla. R.Cr.P. 3.220(d)(1)(A), furnishes to the State of Florida this written list of witnesses whom the Defendant expects to call at the trial or hearing in this cause:

Dr. Guy Durand
P.O. Box 17927
Plantation, Fl 33318

Dr. Leslie Sue Liberman
P.O. Box 17305
University of Florida
Gainsville, Florida 32611

Maria Rosales
1042 NW 53rd Street
Pompano Beach, Florida 33064

Ivette Hernandez
3259 Coral Lakes Drive
Coral Springs, Florida 33065

Paula Turgeon
2080 NE 26th Street
Lighthouse Point, Florida 33064

Officer Huskisson
451 NW 70th Terrace
Plantation, Florida 33317

Marjorie Hanlon
451 NW 70th Terrace
Plantation, Florida 33317

Sharon Hinz
1351 NW 12th Street
Miami, Florida 33123

Det. Archie Moore
1351 Nw 12th Street
Miami, Florida 33125

Det. John Butchko
1351 NW 12th Street
Miami, Florida 33125

Det. Steve Geller
451 NW 70th Terrace
Plantation, Florida 33317

Det. Brian Hager
451 NW 70th Terrace
Plantation, Florida 33317

Officer D. Farron
451 NW 70th Terrace
Plantation, Florida 33317

Dr. Jin-Xong She
P.O. Box 100275
Gainsville, Florida 32610-0275

Det. Mazer 451 NW 70th Terrace
Plantation, Florida 33317

Jean Swaby
400 NE 4th Street
Ft.Lauderdale, Florida 33317

COURT

EXHIBIT QQ

[X] 17th Judicial Circuit in and for Broward County
[ ] In the County Court in and for Broward County

DIVISION:
[X] Criminal
[ ] Traffic
[ ] Other

ORDER

CLOCK IN
Filed in Open Court,
ROBERT E. LOCKWOOD, CLERK
ON NOV 10 1998
BY

THE STATE OF FLORIDA VS.
ERNESTO BEHRENS
DEFENDANT

CASE NUMBER
98-5739 CF
97-22091 CF

CHARGE SEX BATTERY

COSTS FOR DEFENSE DNA EXPERT IS GRANTED — CAP: $2000 ~

DONE AND ORDERED THIS 10 DAY OF NOVEMBER, 1998, IN BROWARD COUNTY, FLORIDA.

James I. Cohn
JUDGE

COPIES: BSO - SAO

23

FORM 1CC18

[X] 17th Judicial Circuit in and for Broward County
[ ] In the County Court in and for Broward County

CLOCK IN
Filed in Open Court,
ROBERT E. LOCKWOOD, CLERK
SEP 30 1999
ON
BY

DIVISION:
[X] Criminal
[ ] Traffic
[ ] Other

ORDER

THE STATE OF FLORIDA VS.

Ernesto Behrens
DEFENDANT

CASE NUMBER
98-5739 CF10

CHARGE I Armed Sexual Battery
II Burg. Dwelling w/ Battery

DEFENSE MOTION TO COMPEL ADDITIONAL DISCOVERY IS HEREBY GRANTED. FOR REASONS AS STATED ON THE RECORD IN OPEN COURT. MAKE PHOTO OF SLIP DRESS AND SLIP DRESS AVAILABLE; if they exist.

DEFENSE MOTION FOR ADDITIONAL D.N.A. FUNDS UP TO $800.00 IS HEREBY: GRANTED FOR REASONS AS STATED ON THE RECORD IN OPEN COURT.

DEFENSE MOTION TO DISQUALIFY A.S.A. DENNIS SEIGEL is HEREBY DENIED.

DONE AND ORDERED THIS 30th DAY OF September, 1999, IN BROWARD COUNTY, FLORIDA.

JUDGE Rothschild

COPIES: BSO - SAO

90

FORM ICC13

EXHIBIT RR

whether it's somebody discovering somebody in their house and having a heart attack, you know, those things can occur and you elected to disregard that apparently in your conduct.

Okay. Accordingly as I said, I'm going to upperly depart from the guidelines. I'm going to adjudicate you guilty on both counts of the armed sexual battery and burglary with a battery. I'm concerned about separate sentencing on those counts as it relates to the issue of double jeopardy which really haven't be addressed, but I've got them in mind. Any sentence that I do now is going to be concurrent sentences on both counts.

I'm going to sentence you to life in prison to run concurrent on both counts. You have thirty days from today's date within which to appeal the legal perimeters to this sentence. If you cannot afford a lawyer, one will be appointed for you. I don't know, Mr. Lewis, whether you are being retained privately for any appellate issues that Mr. Behrens may have.

MR. LEWIS: I'm not, Judge.

THE COURT: I will certainly inquire as

THE CIRCUIT/COUNTY COURT, IN AND FOR BROWARD COUNTY, FLORIDA

EST _____

VAC _____

FAILURE TO PAY FINE BY THE BELOW DATE MAY RESULT IN A WARRANT FOR YOUR ARREST AND/OR THE SUSPENSION OF YOUR DRIVER'S LICENSE AND DELINQUENCY FEES IMPOSED.

DATE 11/13/00 CASE NO. 98 5739 CF 10A ARREST NO. B598 6793 ROP/C/SURETY SUMMONS/CASH BOND JC AGENCY _____

DEFENDANT Ernesto Behrens AKA _____

COURT STATUS

- ☐ MAGISTRATE
- ☐ ARRAIGNMENT
- ☒ SENTENCING
- ☐ PSI
- ☐ PDR

- ☒ TRIAL
- ☒ JURY
- ☐ COURT
- ☐ 1ST.V.O. _____
- ☐ FINAL V.O. _____

- ☐ CHANGE OF PLEA
- ☐ PLED GUILTY
- ☐ PLED NOLO

☒ 200 TRUST FUND / HOURS COMM. SERVICE

☒ ADJ. GUILTY 50.00 I, II VC 5.00 ASSESSMENT ~~EACH COUNT~~

☐ WITHHELD _____ VC EACH COUNT 50.00 SN 1

☐ NOLLE PROSEQUI ☐ DISMISSED ☐ ACQUITTED

☐ PUBLIC DEFENDER FEE ☐ PUBLIC DEFENDER ASSESSMENT

CHARGE(S) I Sexual Battery/Armed

~~II~~ Burg Dwelling w/Battery

COUNT _____ DUI USE ONLY

PROBATION WITH SPECIAL CONDITIONS

FINE _____ CC _____ 5% _____ VC _____

CJC _____ EMTF _____ CDC _____ SN1 _____

DUI SCHOOL _____ EVALUATION _____

LICENSE SUSP. _____ DAYS IMMOBILIZATION _____ WORK PERMIT _____

COMMUNITY SERVICE HOURS _____

SENTENCE: I-II Life in Prison both counts concurrent with no Parole/ w/ with credit 957 day Time Served NO contact w. victim in this case!

Defendant Declared a Sexual Predator.

P.D. appointed for appeals Purposes

COUNT(S)		TIME SERVED			DAYS	
$	FINE	COURT COST	5%	V.C.	CJC	SN1
$	FINE	COURT COST	5%	V.C.	CJC	SN1
$	FINE	COURT COST	5%	V.C.	CJC	SN1
$	FINE	COURT COST	5%	V.C.	CJC	SN1

PLUS $ _____ DEFERRAL FEE TO: _____

S/ Alfred Horowitz JUDGE BY Karen Kayne (DEPUTY CLERK)

CRISP 4 5/97

FILE COPY

EXHIBIT SS

FELONY

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

2000 SEP 19 PM 2:40

RECEIVED
CLERK, CIRCUIT COUNTY COURT
BROWARD COUNTY, FL.

CASE NO: 98-5739CF10A

JUDGE: Alfred Horowitz

STATE OF FLORIDA,

Plaintiff,

vs.

ERNESTO BEHRENS,

Defendant.

MOTION TO IMPOSE SENTENCE WHICH IS UPWARD DEPARTURE FROM RECOMMENDED GUIDELINE SENTENCE

COMES NOW the State of Florida, by and through the undersigned Assistant State Attorney, and respectfully moves this Honorable Court, pursuant to F.S. 921.0016(3) (1995), to impose a sentence upon the Defendant which would constitute an upward departure from the recommended guidelines sentence in this case, and as grounds states the following:

1. On September 14, 2000, the Defendant was found guilty by a jury of Sexual Battery - Armed and Burglary Of A Dwelling With A Battery.

2. The recommended guideline sentencing range appears to be 115.8 months to 190 months state prison.

3. Pursuant to F.S. 921.0016(3)(r)(1995), the aggravating circumstance exists, which reasonably justifies an upward departure sentence, that the primary offense of which the Defendant was convicted is a level ten offense, and the Defendant has previously been convicted of two counts of Armed Burglary, level eight offenses.

4. The Defendant was convicted of two counts of Conspiracy To Possess Stolen Property in the District Court of Clark County, Nevada, in case number 97-C-146497 on or about March 3, 1998, which offenses do not constitute prior convictions and are thus unscoreable. Unscoreable convictions constitute a valid aggravating circumstance to upwardly depart from the recommended sentencing guideline range. **Smith v. State**, 515 So. 2d 182 (Fla.1987), ***cert. denied***, 485 U.S. 971, 108 S.Ct. 1249, 99 L.Ed. 2d 447(1988): **Freeman v. State**, 663 So. 2d 675 (Fla. 4th DCA 1995).

5. The Defendant entered a plea of guilty to an information charging him with Grand Theft in the Circuit Court of the 15th Judicial Circuit of Florida in case number 95-9832CF A02 on May 29, 1996, which offense does not constitute a prior conviction and is thus unscoreable. Unscoreable convictions constitute a valid aggravating circumstance to upwardly depart from the recommended sentencing guidelines range. **Smith**, *supra:* **Freeman**, *supra.*

6. The sexual battery for which the Defendant was convicted clearly evidenced heightened premeditation or calculation which justifies an upward departure sentence. **Marcott v. State**, 650 So. 2d 977 (Fla.1995).

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail\hand delivery this 19 day September of, 2000, to: Tyrone A. Terrell, ESQ., 1895 W. Commercial Blvd., Suite 135, Fort Lauderdale, Fl 33309

MICHAEL J. SATZ
State Attorney

By: Dennis Siegel

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DSL:jt 09-18-03

Mr. Behrens has done in his life and consider all that and access an appreciate sentence.

THE COURT: Thank you, Mr. lewis. Okay. I had an opportunity to listen to your respective arguments and to previously read the case law applicable to the issue of sentencing. First let me address the Motion for Upward Departure. The record is clear and has been admitted into evidence that Mr. Behrens was previously convicted of two counts of armed burglary. Looks like the convictions were back in May of '92. As well as a possession of burglary tools but in particular the two counts of armed burglary which were level eight offenses.

In the charges that he was found guilty of in this case, being the burglary with a battery and the armed sexual battery, certainly the armed sexual battery is a level ten offense. What is the level of the burglary battery? Is that a ten also? I think, it's a life felony.

MR. SEGAL: It's a level eight, Your Honor.

THE COURT: Okay. In any event, the

armed sexual battery is a level ten. I do, based on this, feel there is a lawful basis for upward departure consistent with 921.0016(3)(R) a accordingly I'm going to grant the State's motion relative to an upward departure based solely on the '92 conviction for armed burglary being a level eight offense.

I think, as I consistently said regarding the issue of sentencing as it relates to this case, and I want the record to be again clear, the Court gives absolutely no weight to what's referenced as the [redacted] case or the [redacted] case if that is the correct pronunciation. I remember the facts of the case. I remember the trial and I understand Mr. Behrens's position as to why in his mind he shows no remorse because he believes his innocent of the crime charged.

Nonetheless the jury, the system, if you will, found him to be guilty beyond a reasonable doubt. Without a doubt, Mr. Behrens, the Court does believe that you did terrorized Ms. [redacted] I think there's probably a lasting scar that's been left. I

EXHIBIT TT