

MAY 13 2008

PROVIDED TO
CENTURY CION

MAY 13 2008

FOR MAILING EB

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

STATE OF FLORIDA

CASE NO: 98-5739CF10A

VS.

JUDGE: STEBEL

ERNESTO BEHRENS

RECEIVED COURT
CLERK, CIRCUIT COURT
BROWARD COUNTY, FL
2009 MAY 19 PM 4:26
FELONY

MOTION FOR REHEARING

THE DEFENDANT, ERNESTO BEHRENS, PRO SE,
TIMELY FILES THIS MOTION FOR REHEARING
IN CONJUNCTION WITH HIS MOTION FILED
PURSUANT TO FLORIDA RULE OF CRIMINAL
PROCEDURE, RULE 3.850 WHICH WAS DENIED
ON APRIL 29, 2008 AND IN SUPPORT
THEREOF, THE DEFENDANT STATES THE
FOLLOWING:

1) AN EVIDENTIARY HEARING IS REQUIRED WHERE A FULL EXPLORATION OF THE TRIAL ATTORNEY'S STRATEGY DECISIONS AND HIS COMMUNICATIONS WITH HIS CLIENT CAN BE AILED. RUTLEDGE V. STATE, 786 SO2d 1199 (FLA. 4TH DCA 2002). SPECIALLY IN THIS CASE, WHERE THE TRIAL COURT IS CALLED UPON TO MAKE A DETERMINATION AS TO WHETHER THE COUNSEL MADE STRATEGIC CHOICES, AND SUCH CHOICES WOULD NOT CONSTITUTE DEFICIENT CONDUCT "IF ALTERNATIVE COURSES OF ACTION WOULD HAVE BEEN CONSIDERATED AND REJECTED." LAWRENCE V. STATE, 831 SO2d 121, 129 (FLA. 2002). THIS COURT IS REMINDED THAT HAS BEEN ALMOST UNANIMOUSLY HELD THAT IT IS INAPPROPRIATE FOR A TRIAL COURT TO FIND THAT AN ATTORNEY'S DECISION WAS A "TACTICAL DECISION" WITHOUT AN EVIDENTIARY HEARING BEING HELD. WILLIS V. STATE, 840 SO2d 1135 (FLA. 4TH DCA 2003), AND THAT WITHOUT AN EVIDENTIARY HEARING BEING CONDUCTED, THIS COURT (AND A REVIEWING COURT OF APPEALS) MUST ACCEPT ALL FACTS AND ALLEGATIONS BY THE DEFENDANT AS TRUE, TO THE EXTENT THAT THEY ARE NOT CONCLUSIVELY REBUTED BY THE RECORD. FORD V. STATE, 825 SO2d 358 (FLA. 2002).

THE DEFENDANT RESPECTFULLY SUBMITS THAT THIS HONORABLE COURT MUST HAVE OVERLOOKED, MISAPPREHENDED OR MISUNDERSTOOD THAT:

1) GROUNDS 1 THRU 20 OF DEFENDANT'S MOTION ARE A COMBINATION OF FULLY COGNIZABLE GROUNDS WHICH SHOULD NOT HAVE BEEN SUMMARILY DENIED.

2) THIS COURT, AS WELL AS A REVIEWING COURT MUST REVIEW AND CONSIDER THE CUMULATIVE EFFECT OF ALL ERRORS RAISED BY THE DEFENDANT WHICH ARE NEITHER MERITLESS NOR PROCEDURALLY BARRED. COLE V. STATE, 841 SO2d 409 (FLA. 2003).

3) THE INEFFECTIVE ASSISTANCE OF TRIAL AND SENTENCING COUNSELORS AFFECTED THE FAIRNESS AND RELIABILITY OF THE PROCEEDINGS, AND, CONSIDERATED CUMULATIVELY, UNDERMINED CONFIDENCE IN THE OUTCOME OF THIS CASE. STATE V. RIEZHMANN, 777 SO2d 342 (FLA. 2000).

4) THE DEFENDANT ARGUES IN HIS MOTION THAT: WHEN FACTORS ARE ALREADY TAKEN INTO ACCOUNT IN CALCULATING A GUIDELINES SCORE, THOSE SAME FACTORS MAY NOT ALSO BE USED AS AGGRAVATING CIRCUMSTANCES FOR A DEPARTURE SENTENCE. THE DEFENDANT BASES HIS ARGUMENT ON THE DECISION REACHED BY JUDGE POLEN IN DAMIANO V. STATE, 944 SO2d 516 (FLA. 4TH DCA 2006) HOLDING THAT [PRIOR CONVICTION FOR ROBBERY WITH A FIREARM THAT WAS USED TO CALCULATE DEFENDANT'S PRESUMPTIVE SENTENCING SCORE

COULD NOT ALSO BE USED TO JUSTIFY UPWARD DEPARTURE SENTENCE].

5) THE STATE ARGUES IN ITS RESPONSE THAT: THERE WAS NO ERROR IN THE USE OF FIA. STAT. 921.0016(3)(b) TO DEPART FROM THE SENTENCING GUIDELINES BASED UPON BEHRENS' UNDISPUTED PRIOR CONVICTIONS. THE STATE BASES ITS ARGUMENT ON THE DECISION REACHED BY JUDGE LAWSON IN POOLE V. STATE, 968 S.2d 82 (FLA. 5TH DCA 2007) HOLDING THAT [DEFENDANT WAS NOT ENTITLED TO JURY TRIAL ON EXISTENCE OF PRIOR CONVICTIONS RELIED UPON IN IMPOSING UPWARD DEPARTURE SENTENCE].

6) THE WHOLE ISSUE COMPLAINED BY DAMIANO, SUPRA, WAS THAT HIS ROBBERY CONVICTION WAS COUNTED AGAINST HIM IN DETERMINING HIS PRESUMPTIVE GUIDELINES SCORE AND THEN AGAIN FOR THE PURPOSES OF HIS UPWARD DEPARTURE WHICH DID RESULT IN COUNTING HIS PRIOR CONVICTIONS TWICE. - THIS IDENTICAL LOGIC AND ARGUMENT WAS RAISED IN GROUND 20TH OF DEFENDANT'S MOTION!

7) THE WHOLE ISSUE COMPLAINED BY POOLE, SUPRA, WAS THAT HIS UPWARD DEPARTURE SENTENCE WAS IMPROPER UNDER BLAKELY V. WASHINGTON, 542 U.S. 296 (2004). - AN ARGUMENT THAT DEFENDANT

NEVER RAISED IN ANY WAY, SHAPE OR FORM!

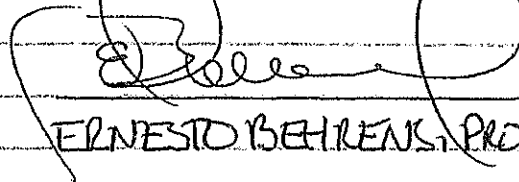
8) THE TRIAL COURT ERRONEOUSLY RELIED AND ADOPTED THE STATE'S IMPROPER, MISLEADING, OUT OF CONTEXT, WITHOUT MERIT AND LEGALLY INSUFFICIENT ARGUMENT AND SUPPORTING CASE LAW. POOLE, SUPRA, SUBMITTED IN ITS RESPONSE, IN ORDER TO DENY GROUND 20TH OF DEFENDANT'S MOTION, SEEKING AS RELIEF, DEFENDANT'S RESENTENCING WITHIN THE 1994 SENTENCING GUIDELINES WHICH IS THE IDENTICAL RELIEF OBTAINED IN DAMIANO, SUPRA, BY THE FOURTH DISTRICT COURT OF APPEALS.

9) THE DEFENDANT IS ENTITLED TO A RESENTENCING WITHIN THE 1994 SENTENCING GUIDELINES BECAUSE WHEN THE REASON STATED BY THE TRIAL COURT IN SUPPORT OF DEPARTURE IS FOUND TO BE INVALID, — LIKE IN THE SUBJUDICE AND DAMIANO'S, SUPRA, CASE — RESENTENCING WITHIN THE PRESUMPTIVE GUIDELINES MUST BE IMPOSED. SCHULL V. DUGGER, 515 SO2D 748, 749 (FLA. 1987).

WHEREFORE, THE DEFENDANT RESPECTFULLY MOVES THIS HONORABLE COURT GRANT REHEARING TO CONSIDER THAT THIS COURT MAY HAVE OVERLOOKED, MISAPPREHENDED, OR MISUNDERSTOOD THE ABOVE AFOREMENTIONED FACTS AND APPLICABLE RULES

OF COURT RELIED UPON IN RENDERING A
SUMMARY DENIAL ON THE DEFENDANT. FURTHER,
THIS COURT MUST CONSIDER SPECIFICALLY THE
FACT THAT THE STATE'S SUBMITTED ARGUMENT
AND SUPPORTING CASE LAW, PODES SUPRA, IN
REFERENCE TO GROUND 20TH OF DEFENDANT'S
MOTION IS IMPROPER, MISLEADING, OUT OF CONTEXT,
WITHOUT MERIT AND LEGALLY INSUFFICIENT TO
DENY DEFENDANT'S REQUESTED RELIEF OF BEING
SENTENCED WITHIN THE PRESUMPTIVE GUIDELINES.

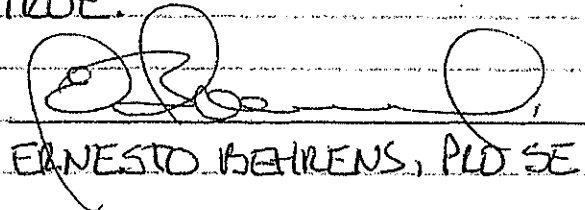
RESPECTFULLY SUBMITTED,



ERNESTO BEHRENS, PRO SE.

UNNOTARIZED OATH

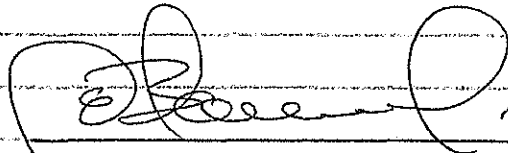
UNDER PENALTY OF PERJURY, I, ERNESTO
BEHRENS, DECLARE THAT I HAVE READ THE
FORGOING PLEADING AND THAT THE FACTS
STATED IN IT ARE TRUE.



ERNESTO BEHRENS, PRO SE.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT A TRUE AND CORRECT COPY OF THE FORGOING REHEARING HAS BEEN FURNISHED BY U.S. MAIL TO: OFFICE OF THE STATE ATTORNEY, MICHAEL J. SATZ, BROWARD COUNTY MAIN COURTHOUSE, 201 SE 6TH ST, FORT LAUDERDALE, FLORIDA. 33301 - ON THIS 13TH DAY OF MAY 2008.



ERNEST BEHRENS, PRO SE
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CENTURY CORRECTIONAL INSTITUTION
4100 TEDDER RD.
CENTURY, FLORIDA. 32535