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IN THE DISTRICT COURT OF APPEALS
FOR THE FOURTH DISTRICT
STATE OF FLORIDA

ERNESTO BEHRENS,
APPELLANT,

Vs.

CASE NO.: 4D08-3291

STATE OF FLORIDA,
APPELLEE.

APPELLANT'S REPLY BRIEF

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

ERNESTO BEHRENS
DO# 732564
CENTURY CORR. INST
400 TEDDER ROAD
CENTURY, FLORIDA 33503

TABLE OF CONTENTS

PAGES

TABLE OF CONTENTS

i

TABLE OF AUTHORITIES

ii

ARGUMENT

1-3

TRIAL COURT ERRED IN DENYING APPELLANT'S
CLAIM THAT COUNSEL WAS INEFFECTIVE FOR
FAILING TO OBJECT TO IMPROPER UPWARD
DEPARTURE SENTENCE.

CONCLUSION

3

CERTIFICATE OF SERVICE

4

TABLE OF AUTHORITIES

PAGES

<u>BUDIN V. STATE, 464 SO2d 596 (Fla. 4th DCA 1985)</u>	<u>1</u>
<u>BROWN V. STATE, 763 SO2d 1190 (Fla. 4th DCA 2000)</u>	<u>1</u>
<u>CALLAGHAN V. STATE, 462 SO2d 832 (Fla. 4th DCA 1994)</u>	<u>2</u>
<u>DAMIANO V. STATE, 944 SO2d 576 (Fla. 4th DCA 2006)</u>	<u>1</u>
<u>HENDRIX V. STATE, 473 SO2d 1113 (Fla. 1985)</u>	<u>2</u>
<u>LEMA V. STATE, 497 SO2d 736 (Fla. 1986)</u>	<u>2</u>
<u>MANDEL V. STATE, 629 SO2d 1052 (Fla. 2nd DCA 1993)</u>	<u>3</u>
<u>RICHE V. STATE, 777 SO2d 977 (Fla. 2nd DCA 2001)</u>	<u>3</u>
<u>STATE V. MICHEL, 488 SO2d 313 (Fla. 1982)</u>	<u>2</u>
<u>TURFACE V. STATE, 776 SO2d 992 (Fla. 4th DCA 2001)</u>	<u>3</u>

ARGUMENT

TRIAL COURT ERRED IN DENYING APPELLANT'S CLAIM THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO IMPROPER UPWARD DEPARTURE SENTENCE.

IN THIS CASE, THE APPELLEE WAS ORDERED TO REVERT TO GROUND TWENTY OF APPELLANT'S MOTION FOR POST CONVICTION RELIEF, CONTENDING THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO APPELLANT'S UPWARD DEPARTURE LIFE SENTENCE DEPARTURE, BECAUSE THE GROUND GIVEN FOR THE DEPARTURE WAS ALREADY FACTORED INTO APPELLANT'S GUIDELINES SCORESHEET. APPELLANT'S RELIANCE IS FOUND IN THE COURT'S HOLDING AS DECIDED IN DAMIANO V. STATE, 944 S02D 576 (FLA. 4TH DCA 2006); CITING TO BROWN V. STATE, 763 S02D 1190 (FLA. 4TH DCA 2000). THE APPELLEE, IN RESPONDING, RATHER THAN TO CONCEDE ERROR, SUGGESTS THAT THIS COURT SHOULD RECEED FROM BOTH DAMIANO AND BROWN, BECAUSE DAMIANO IS AN INCOHERENT CHAOTIC MIX OF LAW, RESPONSE AT 2 AND BROWN IS PURE DICTA, RESPONSE AT 3. CERTAINLY, THE APPELLEE'S ARGUMENT MUST FAIL, BECAUSE THERE IS ABSOLUTELY NO VALID ARGUMENT STATED WITHIN APPELLEE'S RESPONSE THAT WOULD JUSTIFY THE COURT TO DECEED FROM THE FOR THE CASE AUTHORITIES AS DECIDED BY THIS COURT IN DAMIANO AND BROWN. ESPECIALLY SO, AFTER A CHRONOLOGICAL READING OF OUR RECENT YEARS OF CASE PRECEDENT CONCERNING THIS SUBJECT MATTER. SEE: BOURIN V. STATE, 464 S02D 576 (FLA. 4TH DCA 1985)

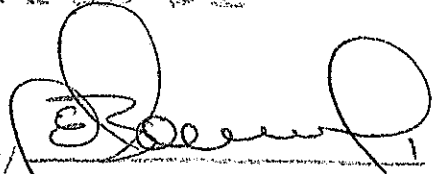
(NONE OF THE ENUMERATED FACTORS RELIED UPON IN THIS CASE JUSTIFIED THE DEVIATION FROM THE GUIDELINES AND, THUS THE DEVIATION CONSTITUTES AN ABUSE OF DISCRETION. THE USE OF THE FIREARM WAS ALREADY FACTORED INTO THE PRESUMPTIVE SENTENCE, CITING BALLAGHAN V. STATE, 462 SO2D 832 (FLA. 4TH DCA 1984) (SEE ALSO STATE V. MISCHE, 488 SO2D 523 (FLA. 1986) AND LEWIS V. STATE, 497 SO2D 736 (FLA. 1986) REASONS PROHIBITED BY THE GUIDELINES THEMSELVES, FACTS ALREADY CONSIDERED IN THE GUIDELINES SCORING, AND INHERENT COMPONENTS OF THE CRIME CAN NEVER SUPPORT A DEVIATION SENTENCE.). FURTHER, IN HENDRIX V. STATE, 475 SO2D 1220, THE SUPREME COURT HELD THAT BECAUSE THE TRIAL JUDGE DEVIATED FROM THE GUIDELINES BASED ON THE DEFENDANT'S PRIOR CRIMINAL CONVICTIONS, WAS NOT A PROPER REASON FOR DEVIATION WHERE THE GUIDELINES HAD FACTORED IN PRIOR CRIMINAL RECORD IN ORDER TO ARRIVE TO A PRESUMPTIVE SENTENCE. AS SUCH, APPELLANT CONTENDS THAT BROWN AND DANIEL ARE CONSISTENT WITH THE LEGISLATOR'S INTENT. THEREFORE, THIS COURT MUST NOT RECEED FROM BROWN AND DANIEL AS APROPRIATE SENTENCES.

THE ALTERNATIVE ARGUMENT PRESENTED BY APPELLATE THAT APPELLANT'S COUNSEL SHOULD NOT BE FOUND TO BE INEFFECTIVE MUST ALSO FAIL. WHERE A FLORIDA COURT HAS FOUND COUNSEL'S FAILURE TO OBJECT TO THE RETURN GIVEN TO SUPPORT AN OVERRULED DEVIATION SENTENCE CONSTITUTE INEFFECTIVE ALSO FAILURE OF COUNSEL. AND ENTITLES A DEFENDANT TO A POST-CONVICTION REVIEW IF COUNSEL KNEW OR SHOULD HAVE KNOWN THAT THE INCLUSION OF THE INADVERTENT FACTOR OR ERRONEOUS POINTS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing REPLY BRIEF has been furnished via U.S. Mail to:

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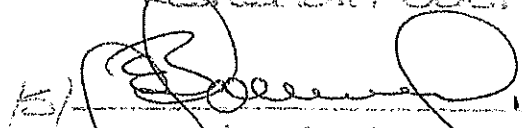
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AFFECTED THE SENTENCE. SEE: TURNAGE V. STATE,
776 SO2d 992 (FLA. 4TH DCA 2001); RACHE V.
STATE, 777 SO2d 977 (FLA. 2ND DCA 2001) AND
MANUEL V. STATE, 629 SO2d 1052 (FLA. 2ND DCA 1993).

WHEREFORE, RELIEF SHOULD BE GRANTED TO THE
APPELLANT.

CONCLUSION

THIS COURT MUST REVERSE THE TRIAL COURT'S ORDER
SUMMARILY DENYING GROUND TWENTY OF APPELLANT'S
MOTION FOR POST CONVICTION RELIEF, AND CERTAIN
FOR FURTHER PROCEEDINGS DULY LEAVE THE TRIAL
COURT TO RE-SENTENCE APPELLANT UNDER THE 1994
SENTENCING GUIDELINES IN THIS CASE.

RESPECTFULLY SUBMITTED

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