

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

CASE NO: 98-5739 CF10A
JUDGE: ALFRED HOROWITZ

STATE OF FLORIDA,]
]
 Plaintiff,]
]
 vs.]
]
 ERNESTO BEHRENS,]
]
 Defendant.]
-----]

BROWARD COUNTY COURTHOUSE
ROOM 519
201 SOUTHEAST 6TH STREET
FORT LAUDERDALE, FLORIDA
SEPTEMBER 14, 2000

APPEARANCES: MICHAEL J. SATZ, STATE ATTORNEY
BY: Dennis Segal, Esq.
Assistant State Attorney
Appearing on behalf of the Plaintiff

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PROCEEDINGS AT TRIAL
VOLUME VII

1 Whereupon, the following proceedings were had:

2 THE COURT: Let the record show
3 Mr. Behrens is present, Mr. Segal, Ms. Shelowitz,
4 Mr. Terrell are present.

5 Mr. Terrell, did you hear from the
6 doctor?

7 MR. TERRELL: Judge, we've been playing
8 phone tag back and forth, back and forth, back and
9 forth. Yes, he did call me back. And I know
10 Mr. Segal heard me on the phone when I called him
11 yesterday: Please at least leave the information
12 on my voicemail if you don't talk to me
13 personally. He called me back. He left his
14 number again. He said: I'm available. And
15 that's all he said to me. But we've been going
16 back and forth so I have not talked to him about
17 that.

18 THE COURT: Well, we can still continue
19 that pursuit and then we'll readdress it when --
20 when and if he decides to testify.

21 MR. TERRELL: Okay.

22 THE COURT: Other than motions the
23 defense would -- might want to present, were there
24 any other loose ends we needed to address?

25 MS. SHELOWITZ: Judge, we've got one

1 thing we'd like to address. We talked about it in
2 the beginning of the case, that there was a lady
3 that was watching the trial, [REDACTED] and she was
4 involved in a prior trial of Mr. Behrens that he
5 was acquitted on.

6 We did ask for a cautionary instruction
7 to her about discussing things with witnesses and,
8 you know, her emotions and that she's just -- you
9 know, it's an open court. She can watch. We knew
10 that she was talking to people in the courtroom
11 about Mr. Behrens, saying that he's a rapist and
12 on and on but that's out of our control.

13 But we are finding out now that she
14 actually did talk to Marchaese after court
15 yesterday who's a witness who has not been excuse
16 in this case and could very well be called in
17 rebuttal. And I don't know what that conversation
18 was. I wasn't privy to it. I do know it
19 occurred.

20 And I'm concerned now. I'm concerned
21 that if that happened, then I don't know what else
22 happened that I'm not aware of that nobody made me
23 aware of. And I'm voicing those concerns. And I
24 think at one point that she needs to be seriously
25 asked what her conversation was and what other

1 conversations she's had and with whom during this
2 trial. She's been taking notes the entire trial,
3 which she's allowed to, but I want to know when
4 she leaves who's she's sharing those notes with.

5 MR. SEGAL: Judge, she can take notes and
6 there's no way or any reason Ms. Shelowitz has a
7 right to know what notes she's taking, what she's
8 doing with the notes as long as it's not
9 interfering with this trial in some fashion
10 subject to any -- any violation of her right to
11 privacy by intruding on what she's doing with the
12 notes or who she's talking about them with as long
13 as it doesn't interfere with this trial.

14 THE COURT: Well, I think the only -- the
15 only point that Ms. Shelowitz raises that would be
16 of any concern is whether or not this individual,
17 like any other individual that would be in here,
18 would be having any inappropriate conversation or
19 contact with either members of the jury or
20 witnesses in the case.

21 I don't know whether or not the state
22 would intend to be recalling Ms. Marchaese in a
23 rebuttal circumstance and certainly I'm not asking
24 you to make that decision now. I think what we'll
25 do is -- and this individual, I don't see in the

1 courtroom now. You say her name was [REDACTED] Is
2 that her last name, do you know? I don't know
3 what her name is.

4 But should she come, I will remind her
5 again. In the event there's any rebuttal that
6 either of you feel that this individual may have
7 spoken or anybody else may have spoken
8 inappropriately to a witness, you'll bring it to
9 my attention and I'll address it with the
10 prospective witness before they testify, whether
11 anybody's, you know, inappropriately contacted
12 them or communicated with them about this case.

13 MS. SHELOWITZ: And again, judge, I mean
14 I have not said anything about the fact that I
15 know that she talked to other people and I know
16 she has that right. I'm not trying to --

17 THE COURT: She has the right -- she has
18 the right to take notes.

19 MS. SHELOWITZ: Absolutely.

20 THE COURT: That's --

21 MS. SHELOWITZ: My concern is, when I
22 find out she talked to witnesses, then at that
23 point, I don't know what else she's done. That's
24 the position --

25 THE COURT: I don't -- and I understand

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

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

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

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

15 MS. SHELOWITZ: Okay.

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

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

20 THE COURT: Okay. That would be
21 helpful.

22 MS. SHELOWITZ: And this is State versus
23 Law.

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

1 Cridlen and Dodd. Let me hear any further
2 argument.

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

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

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

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

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

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

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

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

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

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

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

15 THE COURT: Go ahead.

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

1 The state asked:

2 "Now, on the property receipt, it
3 says one swab specimen; correct?

4 A. That's correct.

5 "Q. How many swabs are in a swab
6 specimen?

7 A. Two, one for the left and one for
8 the right."

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

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

MS. SHELOWITZ: Judge, the reason --

1 THE COURT: -- in terms of --

2 MS. SHELOWITZ: First of all --

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

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

12 THE COURT: Sure.

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

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

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

19 THE COURT: I mean, where is the break?

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

1 been no evidence that --

2 THE COURT: Well, you see the way --

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

7 THE COURT: When that issue came with
8 the -- with the generating of the item number and
9 the writing of Ernest and the handwritten
10 numerical listing of name from those 3,000 swabs,
11 the way I viewed that at the time was that if Hinz
12 testified -- and I think she did to my
13 satisfaction -- that she was otherwise familiar
14 with the internal workings of her office from her
15 11 years there, whatever it may have been, and
16 that she knew that there was a person whose
17 mission in life was to generate that number, she
18 testified as to the familiarity with the
19 handwriting of this woman who generated the list,
20 I think the -- the -- the hearsay rule provides
21 that it's not only a custodian of records, which I
22 don't think she was, but it's not only a custodian
23 of records but it's a person who a court would
24 find otherwise trustworthy, I think can testify
25 those things from which they can be admitted.

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

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

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

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

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

9 THE COURT: Mr. Segal.

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

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

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

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

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

10 MR. SEGAL: Sargeant Moore's property
11 receipt.

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

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

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

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

22 THE COURT: Okay.

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

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

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

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

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

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

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

6 MR. SEGAL: No.

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

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

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

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

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

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

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

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

1 fact that this evidence came in to begin with.

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

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

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

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

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

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

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

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

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

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

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

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

16 THE COURT: Mr. Segal.

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

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

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

5 Secondly, Ms. ██████ testified there no
6 ejaculation in her mouth. No semen is expected to
7 be found in somebody's mouth if there's no
8 ejaculation. She clearly testified that the
9 penetration occurred. That's all that's
10 necessary.

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

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

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

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

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

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

1 be consistent with that.

2 MS. SHELOWITZ: Judge, I don't think that
3 they did give us competent evidence as to rebutt
4 the number. They want to assert that having
5 Butchko's testimony, which I wouldn't give too
6 much weight to -- I mean, I think that he was in a
7 desperate attempt at a last minute witness to come
8 in and testify that he -- that he remembered 5,000
9 names. I think that's contrary to logic, that he
10 would remember that.

11 It's interesting how he even knew to look
12 for an Ernest Behrens because before this trial
13 started and as the state admitted to the court,
14 they didn't even know that's where we were going.
15 Okay. So I find it interesting that he even
16 testified to that fact alone from reviewing it
17 eight months ago. He didn't testify to anybody
18 else's names he knew on the list.

19 In addition to that, he had nothing to
20 say about the number of swabs. That has not been
21 rebutted. And through the state's own case,
22 through their own witness, they brought out the
23 fact there was only two swabs taken by Sargeant
24 Moore. That was their evidence. I don't
25 understand what they're trying to do now, say that

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

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

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

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

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

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

5 MR. SEGAL: No.

6 MS. SHELOWITZ: We have nothing further.

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

13 Is the defense ready to proceed?

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

16 THE COURT: I'm sorry?

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

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

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

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

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

1 here yet -- Dr. Doran, we did a pre-trial motion
2 in limine as to a 1985 medical malpractice action
3 against him, in 1997 or 1998, suspension of his
4 medical license.

5 It's my understanding from the court's
6 ruling which did grant our motion in limine, is
7 that if I don't go into today's time as far as any
8 of the doctor's opinions of today's date, the
9 state then can't go into the suspension itself.
10 Because the only way they can impeach his
11 credibility, it has to go to truthfulness.

12 The only thing Dr. Doran is going to
13 testify to are the dates of May 8th, 10th, 12th
14 and 15th of 1995. It has nothing to do with
15 today's date. And I just wanted to make sure
16 that's the ruling I understood from the court.

17 THE COURT: Mr. Segal.

18 MR. SEGAL: Judge, I'm not going to go
19 into the malpractice. That, I'm not going to do.
20 But if he's going to offer an opinion as to any
21 aspect of this, which he did in his deposition, if
22 he's going to offer any opinions whatsoever, then
23 if he's -- if his license is suspended, if he's a
24 suspended doctor, then I can inquire into that.

25 MR. TERRELL: It wasn't suspended at the

1 time that he's going to testify to. That's three
2 years later, that the suspension took place. And
3 it's questionable. I got provided to me a -- I
4 guess from the medical rules and it basically
5 says, when a license is suspended for a definite
6 period of time and upon completion of that
7 definite period of time, it's automatically -- it
8 says the license shall be automatically
9 re-instated upon expiration of the period of
10 constention in full compliance with the final
11 order, which has been shown.

12 THE COURT: Well, what is -- can you just
13 proffer to me, what is the opinion that he's going
14 to give? What does it relate to?

15 MR. TERRELL: The only opinion he's going
16 to give, that in his experience as a -- from doing
17 surgery, the way the stitches he made, that if
18 somebody were to be climbing through a window and
19 exert all the effort that this person exerted
20 going into Ms. [REDACTED] house, it would have tore
21 the stitches. It would have showed some type of
22 trauma, some pus, some bleeding or tearing of the
23 stitches and he saw none of that. That's it.

24 THE COURT: He's not going to be able to
25 get -- you're not going to ask him an opinion as

1 to whether Mr. Behrens could have done this, are
2 you?

3 MR. TERRELL: I'm going to ask, in his
4 opinion, by looking at the stitches, did they
5 encounter any kind of trauma.

6 THE COURT: Well, you can do that. I can
7 understand that question. That's -- that's
8 looking and telling what he observes on the
9 stitches. But it doesn't seem like he's able to
10 give an -- he can testify, I guess, to what he --
11 what surgery he may have done to Mr. Behrens. And
12 he can testify that he sewed him up, wrapped him
13 up, whatever he may have done to him. And he can
14 testify to, you know, the range of recovery
15 period, you know, whatever may be in that regard.
16 But he can't testify -- he can't give an opinion
17 as to whether or not Mr. Behrens did or did not go
18 through a window.

19 MR. TERRELL: Oh, of course.

20 THE COURT: He's not going to be able
21 to -- he's not -- he's not going there, is he?

22 MR. TERRELL: No, no, no.

23 THE COURT: When was the suspension?

24 MR. TERRELL: '99, September 7th, 1999 to
25 September 7th, 2000. It ended a week ago today.

1 THE COURT: And what would be the purpose
2 of you're going into the suspension, Mr. Segal?

3 MR. SEGAL: Judge, I wouldn't if he's
4 just an historical witness: I did this surgery
5 and this is what I saw. If he starts offering
6 opinions as to if the defendant had done this,
7 then I would have expected to see this, then
8 you're talking about his qualifications to give
9 expert testimony. I think the fact that's he's a
10 suspended -- not a real physician at that point,
11 at the point he's testifying, is relevant.

12 THE COURT: Anything else you have to
13 present?

14 MR. TERRELL: No. Judge, I'd like to go
15 to the bathroom real quick.

16 THE COURT: Go ahead.

17 Okay. Again, Mr. Behrens, Mr. Terrell,
18 Ms. Shelowitz, Mr. Segal are present.

19 MR. TERRELL: May I caution the doctor
20 right now as far as the doctor giving any kind of
21 medical opinions?

22 THE COURT: Well, let me address the
23 issue that you both raised on that. You know, my
24 thinking on the malpractice case really was, you
25 know, a combination of being perhaps collateral

1 and certainly remote in time.

2 If the doctor gets up as a historian and
3 talks about, you know, this is what I did, this is
4 what my notes reflect, et cetera, then -- then
5 nothing else is really relevant because he's an
6 historian of a past event.

7 When he gets up and he says today, you
8 know, as a doctor, I'm telling you this is the
9 effect or impact of those surgeries and recovery
10 period and things of that nature, he's testifying
11 in a present day capacity as a doctor albeit to a
12 procedure done I guess in '95.

13 MR. TERRELL: Right.

14 THE COURT: I don't see the suspension
15 being within this five year period of the alleged
16 event and today as being that collateral or that
17 remote in time. I don't view it in the same
18 timeframe that I do the malpractice case. So if
19 he goes into his opinion on, you know, as a result
20 of that surgery, it's my opinion today as a doctor
21 that this is the effect, this would be the effect,
22 this would be the recovery period, then -- then
23 I'm going to permit Mr. Segal to ask a question
24 about his suspension.

25 As I said yesterday, I don't know what

1 this guy's answer will be and absent some
2 documentation to support impeachment, Mr. Segal's
3 going to be held to whatever the answer is.

4 MR. TERRELL: If Mr. Segal were to go
5 into the suspension, judge, it's my understanding
6 that there was just that, whether your license is
7 suspended but not what for your license and the
8 facts of the case and why his license was
9 suspended because that's totally irrelevant.

10 THE COURT: Mr. Segal, do you want to be
11 heard on that?

12 MR. SEGAL: No. I have no problem with
13 that.

14 THE COURT: Okay. If you need to talk to
15 your witness, this would be the time to do it.
16 You know, before you do that, let me address the
17 question that Ms. Shelowitz first raised earlier
18 this morning.

19 Mr. Segal, if you'll go to your left
20 perhaps. We'll wait for the doors to shut.

21 Ma'am, in the second to back row, I'm
22 sorry, I don't know your name.

23 MS. [REDACTED]: [REDACTED].

24 THE COURT: Okay. Your last name?

25 MS. [REDACTED]: [REDACTED].

1 THE COURT: [REDACTED]. Ms. [REDACTED], it had
2 been suggested to me that perhaps you may have
3 spoken to one of the witnesses in the case and
4 that's why I'm saying -- I'm certainly not saying
5 that's true or not true but I'm just letting you
6 know it had been suggested to me.

7 As I indicated at the beginning of the
8 trial, we're happy to have you here but please
9 make sure that we don't say anything to any
10 witnesses, certainly not any jurors. You know, we
11 want to maintain the integrity of the trial and
12 have it continue forward. I'm not suggesting
13 anything was inappropriately done but because it
14 had been suggested to me, I feel it important just
15 to, you know, mention back at your end, okay.

16 Okay. Go talk to your witness.

17 Thank you, ma'am.

18 Okay. Mr. Behrens, Mr. Terrell,
19 Ms. Shelowitz, Mr. Segal are all present.

20 Bring in the jury, please.

21 THE SHERIFF: Jurors coming in, judge.

22 [WHEREUPON, the jury panel entered the
23 courtroom]

24 THE COURT: Welcome back, ladies and
25 gentlemen. I hope you had a nice evening.

1 Apparently, that's the rough seat there by the air
2 conditioner. I know that people don't like that
3 seat. I've been told that. You'll recall
4 yesterday, ladies and gentlemen -- in fact, if --
5 if one of you want to sit in one of these front
6 seats, then certainly feel free to, if that
7 will -- if you want to sit in the front seat
8 towards the end, you know, you're welcome to.

9 You'll recall from yesterday, the state
10 has rested its case. At this time, the defense
11 has the opportunity now to proceed with a case if
12 that's their decision.

13 Mr. Terrell.

14 MR. TERRELL: Judge, the defense would
15 call Mr. Duran.

16 THE COURT: Okay. Good afternoon, sir.

17 THE WITNESS: Good afternoon, sir.

18 THE COURT: Good morning, I should say.
19 It shows you where I am. If you'll please have
20 a -- come up to the witness stand and raise your
21 right hand for us.

22 THE WITNESS: Yes, sir.

23 THE COURT: Raise your right hand, sir.

24 THE WITNESS: Yes, sir.

25 Thereupon,

1 DR. GUY DURAN, called as a witness
2 herein, and having been first duly sworn by the
3 court clerk and cautioned to tell the truth of HIS
4 knowledge as to the within matters, was thereupon
5 examined and testified upon HIS oath as follows:

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

8 THE WITNESS: My name is Dr. Guy Duran.
9 D-u-r-a-n, the last name.

10 DIRECT EXAMINATION

11 BY MR. TERRELL:

12 Q. How are you, doctor?

13 A. Good morning.

14 MR. TERRELL: Judge, at this time, the
15 defense would be moving in Defense Exhibits K, D
16 and E into evidence?

17 THE COURT: I'm sorry. What were those
18 letters?

19 MR. TERRELL: D as in dog, K and E.

20 THE COURT: What -- Mr. Segal?

21 MR. SEGAL: No objection.

22 THE COURT: All right. So Defense
23 Exhibits D, K and E will be admitted as defense
24 exhibits into evidence. D will be 10, K will be
25 11 and E will be 12.

1 [DEFENSE EXHIBIT NOS. 10, 11 and 12 were
2 admitted into evidence]

3 BY MR. TERRELL:

4 Q. Good morning, doctor. How are you doing?

5 A. I'm doing very well. Thank you.

6 Q. Doctor, could you please tell the jury
7 your educational background, please?

8 A. I'm a graduate from Madrid Central
9 University, a school that was founded in 1499. I
10 trained in general surgery at the University of
11 Massachusetts Hospital in Westershire and I
12 finished my training at the graduate hospital of
13 the University of Pennsylvania in Philadelphia.

14 Q. What year did you graduate medical
15 school?

16 A. In 1970.

17 Q. After you graduated medical school, did
18 you participate in any post graduation education
19 seminars?

20 A. Shortly after graduation, I practiced
21 general medicine in Spain. I did practice until I
22 came to train in general surgery here.

23 Q. So you started practice in Spain?

24 A. Yes, I started practice in Spain.

25 Q. What year did you open up or did you open

1 up a private practice here in United States?

2 A. The last practice that I opened was in
3 1986; '85, '86. Yes.

4 Q. And what kind of medicine did you
5 practice at that time?

6 A. I practiced general medicine. And since
7 I had a background in surgery, I took upon myself
8 to do quite a few things that a physician might
9 not have done.

10 Q. What type of surgeries have you
11 performed?

12 A. In the office, I have done minor surgery.
13 But in -- here in New Jersey, in Ghana, I did
14 general surgery.

15 Q. Okay. Can you give us approximately how
16 many surgeries, whether minor or major surgeries,
17 you have performed?

18 A. Two fifty, 300 of any kind.

19 Q. Do you know a person by the name of
20 Ernesto Behrens?

21 A. Yes. Mr. Behrens had been my patient --
22 I had been his family physician from 1988.
23 Mr. Behrens came to me in July of 1988 for a
24 physical examination for his adjustment of status.
25 I was a --

1 Q. One second. Do you see Ernesto Behrens
2 in the courtroom today?

3 A. Yes, Mr. Behrens is right here.

4 Q. You said Mr. Behrens was a patient of
5 yours?

6 A. Yes, sir.

7 Q. Okay. Was he -- were any other family
8 members of Mr. Behrens a patient of yours?

9 A. Yes. His ex-wife, Michelle. And I saw
10 his brother-in-law on one occasion.

11 Q. Okay. Do you know whether or not
12 Mr. Behrens has a child?

13 A. Yes.

14 Q. But you're not a pediatrician?

15 A. No, I'm not a pediatrician.

16 Q. And I believe you said he became a
17 patient in '89?

18 A. 1988.

19 Q. 1988?

20 A. Yes.

21 Q. Okay. Have you ever performed physicals
22 on Mr. Behrens?

23 A. Yes. I have done physical examinations
24 on Mr. Behrens.

25 Q. Have you ever had the opportunity to

1 examine his penis or his urinary tract?

2 A. Yes, I have. As a matter of fact, in
3 December of '91, he had a urinary tract infection.

4 Q. Okay. Can you tell us whether
5 Mr. Behrens is circumcised or not?

6 A. No, he is not.

7 Q. What does that mean when you're not
8 circumcised?

9 A. Well, he still has that foreskin that we
10 are all born with. That stays with us until --
11 unless and until we are circumcised.

12 Q. Okay. And that's surgically removed?

13 A. That's surgically removed.

14 Q. Have you ever had the opportunity to
15 perform any type of surgery on Mr. Behrens?

16 A. Yes. I did surgery on two occasions on
17 Mr. Behrens, in 1994 and 1995.

18 Q. Okay. Focus in on the 1995 surgery.

19 A. Yes.

20 Q. Do you remember the date to that surgery?

21 A. Yes. The surgery was done the 8th of May
22 of 1995.

23 Q. What was the surgery for?

24 A. We removed two lumps, one from the front
25 and one from the back of his torso. Mr. Behrens

1 was worried about cancer. And I felt that I
2 should take them out because there are other
3 diseases that could have caused that so even when
4 I was convinced they were benign, but I still had
5 to do it.

6 Q. I'm going to show you what's been marked
7 Defense Exhibit P for identification.

8 Do you recognize that?

9 A. Yes. Those are my office notes
10 pertaining to the surgery and the post-surgical
11 care.

12 Q. Did you personally write those notes?

13 A. I did personally write them.

14 Q. Have you had a chance to review those
15 notes?

16 A. Yes. I have reviewed them when I had to
17 make a copy for the court and the attorneys.

18 Q. And since 1995, have those notes been
19 altered or -- altered in any way?

20 A. No, sir.

21 MR. TERRELL: Judge, at this time, I'd
22 like to move Defense Exhibit P into evidence?

23 MR. SEGAL: No objection.

24 THE COURT: All right. Defense Exhibit P
25 will be admitted without objection as Defense

1 No. 13.

2 [DEFENSE EXHIBIT NO. 13 entered into
3 evidence]

4 BY MR. TERRELL:

5 Q. Doctor, I'm showing you what's been
6 marked as Defendant's Q for identification.

7 Do you recognize that document?

8 MR. SEGAL: I'm not sure I've seen
9 Exhibit Q.

10 BY MR. TERRELL:

11 Q. Do you recognize Defense Exhibit Q for
12 identification?

13 A. Yes, I do.

14 Q. Okay. What is that document?

15 A. This is a transcript, a typewritten
16 transcript, of what my notes were. Seeing that we
17 don't have the best handwriting and it facilitated
18 the attorneys and the court, I have taken the -- I
19 felt that I should transcribe those for legibility.

20 Q. Does that document accurately reflect --
21 accurately reflect your handwritten notes?

22 A. Yes, sir. Except the explanation where I
23 would give some explanation as to the meaning of
24 some symbols.

25 Q. So in your notes --

1 A. Otherwise -- otherwise, it is the
2 accurate transcript of what is in my notes.

3 Q. So in your notes, basically you have
4 acronyms or --

5 A. Acronyms of symbols like Latin symbols
6 that we use in medicine so I facilitated the task,
7 by -- some variation like CHR which stands for
8 chronic. So for the sake of clarity, I have
9 retranscribed it.

10 MR. TERRELL: At this time, I ask to move
11 Defense Exhibit Q into evidence.

12 THE COURT: Mr. Segal?

13 MR. SEGAL: No objection.

14 THE COURT: All right. It'll be admitted
15 without objection as Defense No. 14.

16 [DEFENSE EXHIBIT NO. 14 entered into
17 evidence]

18 BY MR. TERRELL:

19 Q. Doctor, regarding May 8th of 1995, can
20 you tell us the procedure of the surgery that you
21 did on Mr. Behrens?

22 A. I did remove -- no. I have my notes
23 here. I can check on that. I can check on that
24 right now. I removed -- he was in supine
25 position, meaning he was lying down. I removed

1 the one on his back. And then I turned him over
2 and I removed the one on his abdomen.

3 Q. Okay.

4 A. My wife assisted me in that.

5 Q. Excuse me a second. Using me as an
6 example on the back, could you show the jury where
7 on the back of Mr. Behrens --

8 A. Left side right here.

9 Q. And using me as an example, can you show
10 the jury --

11 A. Slightly around here.

12 Q. And would that be right in the abdomen?

13 A. Yes.

14 Q. The procedure of extracting the cysts?

15 A. Excision of a cyst. It involved
16 dissection -- well, you cut the skin and you have
17 to dissect the subcutaneous tissue and then
18 isolate the cyst. It's -- it's -- it's a good
19 policy to try to isolate the cyst that's there,
20 behind. So it's an extensive -- it's a pretty
21 good dissection, I would say.

22 Q. Okay. Was he under any kind of local
23 anesthesia.

24 A. Yes. I did use localized anesthesia.
25 And he was very hyperalgetic so I had to give him

1 quite a bit of anesthesia.

2 Q. Okay.

3 A. Yeah.

4 Q. Did there come a point in time when you
5 extracted both the cysts?

6 A. Yes. Yes, sir.

7 Q. And how did you close the wounds?

8 A. The wounds, I did the closure in two
9 layers. I -- I closed the lower part with chromic
10 cuts, three -- four chromic cuts, which is a
11 suture, an absorbable suture that dissolves during
12 the course of time. And then I closed the skin
13 with a nylon suture, with nylon.

14 Q. Nylon?

15 A. Yeah. A nylon filament suture; yes.

16 Q. And the nylon is actually the stitches?

17 A. The stitches. Well, what the public
18 sees, what the person sees. But it's closed in
19 two layers.

20 Q. About how wide was the wound in the back
21 and how wide was the wound in the front?

22 A. Okay. I'd say a five centimeter incision
23 which is about an inch and a half incision,
24 roughly.

25 Q. In the abdomen or the back or front?

1 A. In the back. And in the abdomen, let me
2 see. Let me see what that was. And the incision
3 in the gastrium -- I don't see -- but it had to be
4 about the same size, if I'm not -- if I'm not --
5 it's been so long.

6 Q. Once you sewed up Mr. Behrens, what
7 did -- did he go home at that time?

8 A. Yes. I put pressure dressing on it to
9 absorb whatever exudant there might be and I
10 prescribed pain medication for him.

11 Q. What type of medication?

12 A. Darvocet.

13 Q. What does Darvocet do?

14 A. Darvocet is a potent painkiller.

15 Q. So you stitched him up?

16 A. Yes.

17 Q. And then you bandaged him?

18 A. Yes. I put pressure dressings. We don't
19 leave the pressure dressing for too long time, but
20 the pressure dressing's just in case the wound
21 wants to ooze.

22 Q. You prescribed him medication and then
23 you sent him home?

24 A. Yes, sir.

25 Q. When, after May 8th of 1995, did you next

1 see Mr. Behrens regarding those wounds?

2 A. Well, I seen Mr. Behrens on the 10th. I
3 usually see my patient every other day. That's a
4 safe precaution in order to make sure that the
5 wound doesn't get infected. On the second day,
6 the 10th, I removed the pressure dressing and
7 changed it to something else.

8 Q. And did you reflect that in your notes?

9 A. Oh, yes.

10 Q. Did you at that time see any
11 abnormalities in the stitches?

12 A. No. The wound was --

13 Q. So you redressed the wound at that time?

14 A. Yes.

15 Q. Was there any complaints from Mr. Behrens?

16 A. No. Except the tenderness, nothing --
17 no.

18 Q. Was the wound at that time healing
19 correctly or as expected?

20 A. It was -- it was a normal process.
21 Nothing abnormal.

22 Q. After May 10th of 1995, when was the next
23 time you saw Mr. Behrens?

24 A. I saw Mr. Behrens on Friday, the 12th.

25 Q. Do you have a time that you saw

1 Mr. Behrens?

2 A. A time. Not really. I don't usually put
3 the time.

4 Q. Okay.

5 A. But if my --n it should have been in the
6 afternoon.

7 Q. Was this a scheduled appointment?

8 A. Yes. It's normal for --

9 Q. What was the purpose of the May 12th,
10 1995 appointment with you?

11 A. It's a wound check.

12 Q. And reflecting off your notes --

13 A. Yes.

14 Q. -- or from knowledge, if you remember,
15 what was the status of his wounds at that time?

16 A. The wound was clean -- dry and clean, no
17 drainage, normal.

18 Q. Did you actually take the bandage off the
19 wound?

20 A. Yes, I do my own dressing.

21 Q. Okay. Did you clean the wounds at that
22 time?

23 A. I just cleaned it with a swab and then
24 put -- re-applied the bandage.

25 Q. Were the wounds and stitches dry at the

1 time?

2 A. They were healing normally.

3 Q. Did you see any type of trauma to the
4 wounds?

5 A. No, sir.

6 Q. Did you see any oozing of any bodily
7 fluids?

8 A. No, sir.

9 Q. Did you see any infection of any type?

10 A. No, sir.

11 Q. Did you see any abnormalities in the
12 stitches on the front and the back of any kind?

13 A. No, sir.

14 Q. How did he leave the office that day?
15 Did you rebandage it?

16 A. I rebandaged him. I don't remember any
17 part of it. It was a normal -- I don't remember
18 anything abnormal. It might have been with a joke
19 and left.

20 Q. Nothing else?

21 A. As far as the wound was concerned or
22 concerned; no.

23 Q. As far as on the 12th, when you bandaged
24 him to leave, you didn't do the wraparound
25 bandage?

1 A. No, no, no, no, no. Just a terry strip.
2 After the first bulky dressing, you don't use
3 anything voluminous. You just put something
4 light.

5 Q. After May 12th, 1995, when's the next
6 time you saw Mr. Behrens regarding those wounds?

7 A. I removed his stitches on Monday, the
8 15th.

9 Q. You actually took the stitches out?

10 A. Ten days after the surgery.

11 Q. At that time, was there any infection,
12 trauma or oozing of any type that you saw?

13 A. No, sir.

14 Q. Would you have removed the stitches if
15 there was?

16 A. Well, I would have had to do a revision
17 of the -- of the wound if there was any
18 abnormality. I would put him on antibiotics,
19 something -- do something extraordinary.

20 Q. Since 1995, doctor, have you in any
21 way -- excuse the pun -- doctored these notes?

22 A. No.

23 Q. Have you changed or altered them in any
24 way?

25 A. No, sir.

1 Q. No further questions. Actually, one.
2 I'm sorry. I'm showing you what's been marked
3 Defense Exhibit O for identification.

4 Do you recognize that?

5 MR. SEGAL: Can I see that?

6 THE WITNESS: Yes.

7 BY MR. TERRELL:

8 Q. Okay. What is this?

9 A. This is a prescription for the pain
10 medication.

11 Q. Did you fill out that prescription or did
12 you write out that prescription?

13 A. Yes, this is my signature.

14 MR. TERRELL: At this time, judge, the
15 defense would move Defense Exhibit O for
16 identification into evidence.

17 THE COURT: Mr. Segal?

18 MR. SEGAL: No objection.

19 THE COURT: All right. O will be
20 admitted without objection as Defense No. 15.

21 [DEFENSE EXHIBIT NO. 15 entered into
22 evidence]

23 MR. TERRELL: No further questions.

24 CROSS-EXAMINATION

25 BY MR. SEGAL:

1 Q. Good morning, doctor.

2 A. Good morning, sir.

3 Q. You became a personal friend of the
4 defendant in addition to being his doctor, did you
5 not?

6 A. Yes. I did, as well of his wife.

7 Q. And you socialized with them?

8 A. No, I didn't.

9 Q. But you were a friend of his?

10 A. I had a friendly relationship, harmonious
11 relationship. Nothing of going out or having
12 dinner or a late lunch with him.

13 Q. And the defendant, in fact, would go out
14 and try to recruit patients for you; correct?

15 A. No, sir.

16 Q. He never tried to recruit patients?

17 A. No, sir. That's an implication that I
18 resent, Mr. Segal. You have brought it up
19 already.

20 Q. When you said yes, could you clarify,
21 doctor?

22 A. I'm sorry?

23 Q. You said yes when I brought it up before,
24 did you not?

25 A. He has not recruited patients. He has

1 recommended, like every other patient who
2 recruits. It's not recruits. Excuse me, sir.
3 The term -- the term recruit implies that Mr. --
4 either Mr. Behrens or I, we were -- we had some
5 sort of arrangement. No. Every patient
6 recommends patients because of the quality of care
7 they have received.

8 Q. Did you ever say that you all had any
9 type of financial arrangement?

10 A. No. You said recruit which is --

11 Q. And you're pretty thorough in the notes
12 that you keep about these types of surgeries and
13 treatments; correct?

14 A. Yes, sir.

15 Q. And in your notes --

16 A. Yes.

17 Q. -- from your May 8th, '95 surgery --

18 A. Yes.

19 Q. -- you wrote that the only advice that
20 you gave to him as far as his activities was to
21 keep the wound dry and clean; correct?

22 A. Yes, sir.

23 Q. You didn't write on there that he was to
24 avoid going up and down stairs, did you?

25 A. No, sir.

1 Q. You didn't write on there that he was to
2 avoid --

3 MR. TERRELL: Your honor, I'm going to
4 object and ask for a sidebar.

5 THE COURT: You may come up.

6 [WHEREUPON, the following sidebar
7 discussion was commenced]

8 MR. TERRELL: I was told not to say
9 anything about him going through a window. I was
10 told not to say anything about him going down
11 stairs or committing a crime or any of these
12 activities, which I refrained from doing. The
13 state is going right there with these questions
14 and I ask to move to strike those questions.

15 MR. SEGAL: If I'm wrong -- like you
16 said, if he did that, then I would be able to do
17 something else.

18 THE COURT: Well, I --

19 MR. SEGAL: I can ask him, did he
20 instruct him not to do that. I don't think
21 that --

22 THE COURT: My discussion really before
23 related to the issue of how and under what
24 circumstance Mr. Segal would be able to go into
25 the suspension question. And that related to

1 whether he was giving present opinions about a
2 person having gone through the procedure. If a
3 person went through that, if he's testifying today
4 as a doctor, you know, that a person could or
5 couldn't do certain things, then I was going to
6 permit him to go into the suspension.

7 MR. TERRELL: Okay. So now, after his
8 direct, if that's coming, then on redirect, I can
9 get into the fact and ask the question: If he
10 would have done that, would you have seen trauma.
11 I mean, if they're going to get into that --

12 MR. SEGAL: I'm not getting at what he
13 would have seen. I'm going on the instructions
14 that were given.

15 THE COURT: Okay. I'm going to permit
16 you to go into what he did relating to that
17 timeframe in '95 as to the surgery. And I don't
18 think that opens the door to going into his
19 opinions on what the guy could or couldn't do as a
20 result of surgery today but you need to limit
21 yourself though to what he told him in '95.

22 MR. SEGAL: Right.

23 THE COURT: I'll overrule the objection.

24 [WHEREUPON, the sidebar discussion was
25 concluded]

1 BY MR. SEGAL:

2 Q. You did not instruct him to refrain from
3 engaging in any strenuous activities or physical
4 activities, did you?

5 A. I haven't specified that in my notes but
6 it's more likely that I might have discussed the
7 wound trauma with him. It may not be reflected
8 there but as a general common sense, you make
9 recommendations to the patient that don't
10 necessarily come into your notes.

11 Q. Okay. Well, it's common sense to keep
12 the wound dry and clean; right?

13 A. Yes. Because he could be in a position
14 where he might be tempted to take a shower and
15 what have you.

16 Q. And you wrote that down, didn't you,
17 doctor?

18 A. Yes.

19 Q. Okay. But you're saying, the other
20 common sense thing, you didn't write that?

21 A. Not necessarily. We don't write every --
22 every aspect of a conversation with the patient.
23 We write what is essential.

24 Q. Okay. You said you were thorough in your
25 notekeeping?

1 A. I am thorough in that, in the reflected
2 procedure that I have done and in the course of
3 the treatment and progress of the situation,
4 whatever it is.

5 Q. Okay. And you thought it was important,
6 so you wrote it down, to keep the wound dry and
7 clean?

8 A. Because they were trunk wounds.
9 Everybody would be tempted to take a shower,
10 forgetting that.

11 Q. Okay.

12 A. And this is a general recommendation that
13 we make.

14 Q. His job at the time was cleaning offic
15 ducts s; correct?

16 A. Yes.

17 Q. Which is kind of a strenuous work,
18 getting up to clean; right?

19 MR. TERRELL: Objection, judge, unless
20 he's cleaned ducts before.

21 THE COURT: Sustained. I mean, if he
22 knows from his personal knowledge, that -- if you
23 know from your personal knowledge, you can answer
24 but don't speculate if you don't -- if you don't
25 know.

1 THE WITNESS: Yes, yes. I would say. I
2 knew that he was working in the -- in the duct
3 business. I don't know if at that time or before,
4 if he was the one doing it or if -- I knew he had
5 a business of that sort but I had no knowledge
6 that he personally cleaned the ducts.

7 Q. Okay. You didn't write down that he was
8 not to do any kind of that work, did you, doctor?

9 A. No. Because he was in such a pain, that
10 I knew that he wouldn't do anything anyway. By
11 the way, that procedure required much more
12 anesthesia than I would give under normal
13 circumstances.

14 Q. I'll get to that in a second.

15 A. Okay.

16 Q. I think you used the terminology --
17 again, I couldn't understand the term you were
18 using or the word you were using in direct.

19 You said he was hyperallergic?

20 A. Algic, algic

21 Q. Hyperalgic?

22 A. He's very sensitive to pain.

23 Q. He has like a low pain tolerance?

24 A. I would say that; yes.

25 Q. And, in fact, he complains a lot about

1 pain; correct?

2 A. Yes, as far as surgery was concerned.

3 Q. Now, on Wednesday, May 12th -- I'm
4 sorry -- Wednesday, May 10th --

5 A. Yes, sir.

6 Q. -- when he came into you, you wrote that
7 he had no complaint. Then you wrote: Complained
8 of not being able to shower; correct?

9 A. Which is not a medical complaint.

10 Q. Okay. But you wrote: Not being able to
11 shower?

12 A. Yes.

13 Q. That's the kind of thing you would note,
14 that he complained of not being able to take a
15 shower?

16 A. That's what he said; yes.

17 Q. That's because of how thorough you make
18 notes of complaints the patient gives you;
19 correct?

20 A. No. That was something that struck me
21 because nobody complains of -- the wound is the
22 first -- you know, the wound is their first
23 concern. And in this case, he was worried about
24 showering. He was a very thorough and clean
25 person.

1 Q. And you thought that was worthy of noting
2 down?

3 A. Yes. I wrote it; yes.

4 Q. Because that was his only complaint at
5 the time; correct?

6 A. That was the only thing that I could
7 remember.

8 Q. He didn't ask for a stronger painkiller
9 or anything?

10 A. No.

11 Q. Okay. Then on May 12th, '95, he came in;
12 correct.

13 A. Yes, sir.

14 Q. That would be a Friday?

15 A. Yes, sir.

16 Q. And you wrote: No complaint; correct?

17 A. Yes.

18 Q. Okay. He didn't complain about anything
19 at the time when he came in, did he?

20 A. No.

21 Q. And he has low pain tolerance.

22 He wasn't even complaining about pain;
23 correct?

24 A. No. He wasn't complaining about pain
25 because he was well-medicated, Mr. Segal.

1 Q. He didn't ask for a stronger painkiller?

2 A. No, he didn't.

3 Q. Now, you attempted to follow-up to
4 determine whether that pain prescription, the
5 Darvocet prescription, had been filled; correct?

6 A. I have tried last year to confirm but
7 unfortunately, neither Eckert or Walgreens keep
8 track of any prescription that are too old.

9 Q. Okay. So the drug stores don't keep
10 track of that?

11 A. They were not able to locate them. I
12 called even headquarters, regional headquarters,
13 in -- in Tampa or somewhere.

14 Q. Okay. And you were told there was no
15 record that he ever filled those for pain --

16 A. They do not keep record of prescription
17 after a certain time, sir.

18 Q. Okay. So drug stores don't keep records
19 of prescriptions?

20 A. Not that long. At least, that's what
21 both Eckert's and Walgreen told me.

22 Q. Okay. The cyst that you removed, you had
23 to sent out?

24 A. Yes.

25 Q. -- for patholo -- to the pathologist?

1 And who was responsible for sending the
2 cysts out?

3 A. My wife is the one who sent them out.
4 She was right there. By the way, there were noted
5 as one specimen when, in fact, there were two
6 cysts, a cyst of the back but there were two
7 cysts.

8 Q. Okay. So your wife wrote down, there was
9 one and there was really two?

10 A. No, no, no, no. There were two. The
11 path report confirms that there were two cysts.
12 But my wife wrote it as cyst of the back whereas
13 it was from the front and the back.

14 Q. Okay. So your wife made a mistake in the
15 notation as to where the cysts were?

16 A. The origin of the cysts. She lumped them
17 in as one. It was a routine thing.

18 Q. Okay. So she mischaracterized or
19 mislabeled the cysts?

20 A. As to the origin. But I corrected that
21 in the path report, as you may have seen.

22 Q. Right. And what she did was, she sent
23 them off as -- she just said they were from the
24 back; correct?

25 A. Yes.

1 Q. Okay. When, in fact, they were from the
2 back and the front?

3 A. And the front. One from the back and one
4 from the front. And upon receiving the report, I
5 did correct it.

6 Q. Okay. Because you knew somebody made a
7 mistake in characterizing the location or the
8 number of cysts?

9 MR. TERRELL: Judge, judge, judge,
10 objection. Asked and answered.

11 THE COURT: Sustained.

12 BY MR. SEGAL:

13 Q. When the defendant came in on May 12th of
14 1995 to see you --

15 A. Yes.

16 Q. -- did he have any complaints about not
17 being able to sleep?

18 A. No, sir.

19 Q. Did he complain about not being able to
20 work?

21 A. Well, I -- I don't remember him
22 mentioning work but I assume that he had not
23 worked. Judge, this is an assumption on my part.
24 I have no recollection of discussing work with
25 him.

1 Q. Okay. What I'm asking you is, did he
2 complain about not being able to work?

3 A. No.

4 MR. SEGAL: Nothing further, your honor.

5 THE COURT: Mr. Terrell, any redirect?

6 RE-DIRECT EXAMINATION

7 BY MR. TERRELL:

8 Q. On May 12th, 1995, was the wound on his
9 back dry?

10 A. Both wounds were dry.

11 Q. Was the wound on his abdomen dry?

12 A. Absolutely.

13 MR. TERRELL: I have no further
14 questions.

15 THE COURT: Mr. Segal?

16 MR. SEGAL: Nothing further.

17 THE COURT: Thank you very much, doctor.
18 You may step down.

19 THE WITNESS: Thank you.

20 [WHEREUPON, the witness was excused].

21 THE COURT: Mr. Terrell, call your next
22 witness, if any --

23 MS. SHELOWITZ: Judge, I'd like to call
24 Ms. Sturgeon.

25 THE COURT: -- or Ms. Shelowitz. I'm

1 sorry. The name again?

2 MS. SHELOWITZ: Judge, actually, can I
3 have one moment before she testifies?

4 MR. SEGAL: Can we come sidebar with you?

5 THE COURT: Okay.

6 [WHEREUPON, the following sidebar
7 discussion was commenced]

8 MR. SEGAL: Judge, there was a motion in
9 limine to prevent Ms. Sturgeon from testifying,
10 because it's hearsay, to anybody telling her --
11 the defendant or anybody else telling her that the
12 defendant's family descends from an enclave.

13 MS. SHELOWITZ: If she has knowledge of
14 something that may not have only been through
15 hearsay, she should be able to testify about it.

16 THE COURT: Well, I think all I can say
17 at this point is, she's not going to be able to
18 testify to something somebody else told her.

19 MR. TERRELL: Not even the defendant
20 himself?

21 MS. SHELOWITZ: Which is an admission.

22 THE COURT: Well, there's case law and I
23 can dig it out but there's case law to the effect
24 suggesting that if the defendant's not going to
25 testify -- and I don't know whether he is or

1 isn't. I'm not asking you to make that decision.
2 But if he's not going to testify, a witness called
3 by the defense can't bootstrap in his testimony
4 through another witness.

5 So in answering your question, even if he
6 told her, it would still be inadmissible hearsay
7 at that point.

8 MS. SHELOWITZ: Judge, I think then that
9 would be a question that she can answer, having
10 spent time with him. Well, how -- I mean,
11 sometimes, you build things -- sometimes, you know
12 things through pictures, from experience from
13 being with somebody. I mean, they had a
14 relationship for a couple of years. There's
15 things she just knows from knowing him.

16 THE COURT: I think if a question is
17 asked, do you know where the defendant is from --
18 and I assume she says yes -- you can then ask,
19 where's he from. I think she can answer that
20 question. But she's not going to get into, you
21 know, his --- you know, just what he may have told
22 her.

23 I think it's perhaps a thin line but if
24 you feel like you need to raise an objection,
25 you'll raise it and we'll deal with it then.

1 MR. SEGAL: I'm raising it now but I have
2 no problem with them asking her: Where's he from?
3 Venezuela. I have no problem with that. It is
4 going onto the enclave that allegedly is the
5 father's -- the father is descendent from,
6 according to their people, descendent from this
7 enclave. That would be hearsay as to
8 Ms. Sturgeon.

9 MR. TERRELL: Judge, if you rule that,
10 that's fine. That means no hearsay comes in on
11 the part -- you --

12 THE COURT: Well --

13 MS. SHELOWITZ: Some things just don't go
14 to the truth of the matter asserted. Sometimes,
15 the fact that something was said, you rely on and
16 you believe to be true.

17 THE COURT: Can you proffer to me -- I
18 gather this is something you would want to go
19 into. Can you proffer to me, what is the
20 relevance or significance of this enclave?

21 MS. SHELOWITZ: This issue in this case
22 as to the different databases that were used. And
23 everybody has assumed thus far that Mr. Behrens is
24 Hispanic when, in fact, his relatives are German.
25 The only reason he has a Spanish accent is because

1 he lived in Venezuela.

2 MR. SEGAL: It's more than that. Unless
3 her experts are going to testify differently, her
4 experts -- I don't know for sure what they're
5 going to ask her but their experts have come up
6 with this opinion that says in calculating the
7 frequencies, they should have used Colonial
8 databases rather than the database that they used,
9 which is entirely against science.

10 THE COURT: Let's send the jury out.

11 [WHEREUPON, the sidebar discussion was
12 concluded]

13 THE COURT: Ladies and gentlemen, I need
14 to continue addressing a matter with the
15 attorneys. It's going to take a few more minutes
16 so I think rather than just let you sit there like
17 that, I'll give you this time as a stretch break.

18 Don't discuss this case among yourselves.
19 Don't discuss it with anybody else. And certainly
20 don't form any definite or fixed opinion about the
21 merits of the case.

22 Please be outside these doors no later
23 than quarter after 10:00. Thank you.

24 [WHEREUPON, the jury panel left the
25 courtroom]

1 THE COURT: Okay. The jury's left the
2 room. Mr. Behrens, all counsel remain present.

3 Let me hear any further argument.

4 Ms. Shelowitz, anything further at your
5 end, at least as it relates to the issue of
6 hearsay?

7 MS. SHELOWITZ: Judge, I would just say
8 that if she has knowledge through her experience
9 with being with Mr. Behrens, that he is in fact
10 from a Colonial or that his ancestry is -- I would
11 ask that she be able to testify to it. She -- she
12 doesn't have to say: He told me.

13 THE COURT: Well, let me ask you this. I
14 guess I would start with the analysis as -- as
15 to -- forget whether or not you feel it's
16 admissible hearsay or hearsay at all. Do you
17 think it's hearsay for her to answer that he's
18 from whatever this enclave or village is?

19 MS. SHELOWITZ: I would say if she
20 testified she believes that where he's from, then
21 that's not going to the truth of the matter
22 asserted, whether he actually is. She's not
23 offering any proof of that but that that's her
24 opinion, based on her relationship and the
25 conversations she's had with his family and with

1 him. It's through her relationship.

2 I mean, I think it's actually limiting so
3 much that -- I mean, just like the state brought
4 up, asking somebody: Well, how old is
5 Mr. Behrens? It's hearsay. Well, how -- you
6 know, I mean, there's no -- unless she, you know,
7 went through records, you learn about people from
8 being with them.

9 THE COURT: Mr. Segal?

10 MR. SEGAL: Judge, it's clearly hearsay.
11 It's a matter that Ms. Sturgeon learned through
12 being told by somebody else that's being admitted
13 for the truth of the matter asserted for there --
14 for whatever argument they're going to make about
15 the databases. So it's being admitted for the
16 truth of the matter asserted.

17 Ms. Turgeon only learned about because
18 somebody told her. She's not part of the
19 defendant's family. She didn't grow up with him.
20 She learned about this or she made this up,
21 whatever the deal is, based on her relationship
22 with the defendant.

23 MS. SHELOWITZ: I'll say this. We'll
24 stipulate that I won't ask that question if the
25 state is then going to concede that they can't ask

1 any questions about anything Paula Turgeon talked
2 to Mr. Behrens, as they did in their deposition,
3 about in the last three years. So if that's
4 hearsay, then it's the same thing that's going to
5 go the other way. Anything that Mr. Behrens told
6 Paula in the last whatever years about this case,
7 about anything, forever in time, is also hearsay
8 and that they can't go into any hearsay either.

9 MR. SEGAL: That doesn't make any sense.
10 There's admissible hearsay. There is inadmissible
11 hearsay. There is things that are not hearsay and
12 just not being admitted for the truth of the
13 matter asserted so I don't know what Ms. Shelowitz
14 is saying.

15 MS. SHELOWITZ: Well, short of him
16 saying: Yes, I committed or I did it, Ms.
17 Shelowitz, I would make maybe an admission of some
18 sort. But anything short of any conversations
19 they might have had about, you know, anything that
20 Paula might have done, you know, as being
21 somebody, you know, out of this -- out of jail,
22 that could actually help him and assist him in
23 time, you know, making phone calls and things like
24 that, if he's going to ask those type of questions
25 about their conversations, then that's going to

1 call for hearsay answers and those should be
2 excluded as well. And then we'll have no problem
3 and I won't ask that question.

4 MR. SEGAL: If I ask her if she made
5 phone calls, I -- I don't see how that's hearsay.
6 Correct me if I'm wrong but I don't see how that's
7 hearsay.

8 THE COURT: Give me a couple of minutes.

9 Okay. Anything else any of you wish to
10 present on the issue?

11 MS. SHELOWITZ: Judge, just in response
12 to what I -- what I now know for sure, that the
13 state's going to go into probable in cross, is
14 whether Paula Turgeon did any things for
15 Mr. Behrens while he was in custody, such as
16 calling experts, any notes or anything she might
17 have done, conversations she had with Mr. Behrens.
18 For two reasons, that should be kept out.

19 Number one --

20 MR. SEGAL: I apologize for interrupting
21 but I think we ought to take the issue --

22 THE COURT: Let's go back to the question
23 of the village. Anything else on that issue that
24 either of you want to present?

25 MS. SHELOWITZ: Judge, if that's going to

1 be considered hearsay by the court, I would say
2 all hearsay, anything that he might have said to
3 her, should be considered hearsay, should all be
4 kept out.

5 THE COURT: Can you just tell me how you
6 anticipate that question and answer to go, that --
7 that -- with her? I mean, how are you going to go
8 into that?

9 MS. SHELOWITZ: If I ask that question, I
10 would simply ask her: Do you know anything about
11 Ernesto Behrens' family history? What do you
12 know?

13 THE COURT: Well, that's a little
14 open-ended question. I mean, you're going to have
15 to be a little more specific.

16 MS. SHELOWITZ: His heritage, what his
17 heritage is. What his race is.

18 THE COURT: Is her answer as to his --
19 and I guess the key issue is this village in
20 Venezuela. Is her answer as to that based on her
21 being with him and his family and -- or is it
22 based on just, you know, what he told her where
23 I'm from.

24 MS. SHELOWITZ: She has met family
25 members. She's never gone there with him. His

1 wife did and she knows about that through him and
2 through family. I don't know whether she's seen
3 pictures. I know that there are pictures but I
4 don't know if she's ever walked by a mantle and
5 seen a picture.

6 THE COURT: Well, pictures aren't really
7 going to --

8 MS. SHELOWITZ: Right.

9 THE COURT: -- address the issue we're
10 dealing with. It seems -- and I've really tried
11 to, you know, get in my mind whether or not this
12 is a statement and it's not a -- it's not a
13 situation where your proffering her to testify as
14 to a specific statement. And I'm trying to
15 understand whether it's some kind of, you know,
16 assertive conduct or, you know, I'm really trying
17 to figure out what it is she's going to say.

18 And if -- if her answer regarding where
19 he's from is solely based on what he told her,
20 then I don't see how that's not hearsay. The
21 question is, is it admissible hearsay. And I've
22 got to sort throw back into your court, asking you
23 to tell me, is there any exception that would
24 otherwise make that hearsay admissible hearsay?

25 MS. SHELOWITZ: Judge, I would just say

1 it doesn't go to the truth of the matter asserted
2 regarding this crime. If I ask her where he's
3 from and she says Colonial Tavare and I -- let's
4 say I ask her: Well, do you know anything about
5 Colonial Tavare? You know, she could say: I know
6 it's a German enclave. I mean, whatever her
7 answer is, I mean, I don't know that she's studied
8 Colonial Tavare. I mean, she ultimately did find
9 out from --

10 THE COURT: Well, theoretically, she can
11 answer and provide detailed knowledge of this
12 village --

13 MS. SHELOWITZ: Right.

14 THE COURT: -- independent of talking to
15 him or anyone else.

16 MS. SHELOWITZ: Right.

17 THE COURT: I think where I'm running
18 into the stumbling block is as to her testifying
19 where he's from. I don't see how, in my -- in my
20 looking at the issue, I don't see how it's not
21 hearsay. And I'm just not aware of where it then
22 becomes admissible hearsay. So unless there's
23 something else to present, I'm going to grant the
24 motion in limine --

25 MS. SHELOWITZ: How about --

1 THE COURT: -- on that question.

2 MS. SHELOWITZ: How about the fact
3 that -- it doesn't go to the truth of the matter
4 but the fact that it was said by Mr. Behrens?

5 THE COURT: Well, you see, then you --
6 and I think you then have to go to the next
7 analysis which is, you know, it's perhaps said for
8 the effect on one's state of mind. Okay. Her
9 state of mind is not relevant so that's where I --
10 and I went down that road in my own thinking.

11 MS. SHELOWITZ: Well, it was said before
12 this incident.

13 THE COURT: Sorry?

14 MS. SHELOWITZ: I mean, she knew this
15 before May of '95.

16 THE COURT: I understand. But whatever
17 she knew before or after, her state of mind is not
18 relevant. And I went down that road in trying to
19 see where I am. I'm going to grant the motion in
20 limine on that question.

21 Anything else we have to address? Are
22 there any other issues on this cross-examination
23 you wanted to discuss?

24 MS. SHELOWITZ: No, judge. I think that
25 should extend then to any hearsay that she might

1 have heard from Mr. Behrens. Any conversations
2 that they had is also going to be hearsay unless
3 they have an exception. You know, I'd rather not
4 see that come out on a cross question.

5 THE COURT: Well, we're not going to get
6 into the question of him being in custody, are we?

7 MR. SEGAL: No.

8 MS. SHELOWITZ: But there was a great
9 period of time here where Ernesto Behrens was in
10 custody and did not have a lawyer. He was his
11 lawyer. And the key person that he had, so to
12 speak, as his paralegal secretary, the only person
13 that could call experts or even get anything done,
14 was Paula Turgeon. Okay. She helped him.

15 THE COURT: Well, let me ask you this
16 and -- well, let me -- let me -- let me ask
17 Mr. Segal this.

18 Can you just proffer to me, do you intend
19 on getting into these areas?

20 MR. SEGAL: I don't think after the
21 direct. Yes, that's a possibility. And if the
22 court -- just to advise the court. Mr. Behrens
23 wasn't always his own lawyer. He had -- not in
24 this case. He wasn't always his own lawyer. Kayo
25 Morgan was his lawyer on two separate occasions

1 during the course of this case. Ms. Turgeon was
2 continuing to do things for the defendant when
3 Mr. Morgan was his lawyer.

4 THE COURT: What would be -- just, what
5 would be the relevance -- let's assume Ms. Turgeon
6 went out and made phone calls and acted as his
7 paralegal/runner, whatever you want to
8 characterize it as, what's the relevance of what
9 she may have done?

10 MR. SEGAL: Bias and motive. What -- the
11 fact that she is so much tied to him, that her
12 credibility is effected by that or impacted by
13 that.

14 THE COURT: Well, let me ask you this. I
15 assume it's going to be established in either
16 direct or cross that -- and I don't know whether
17 they're just presently or formerly
18 boyfriend/girlfriend or married. I don't know.
19 But they had some relationship. I gather that's
20 going to come out. So, you know, the issues of
21 motive I think are going to be on the table.

22 MR. SEGAL: Judge, it's also going to
23 come out that they broke up -- not broke up. But
24 they terminated their relationship in February of
25 '97, which is before this case occurred. And

1 according to her, they're just friends. Although,
2 she said in a previous deposition, it could be
3 more. So it's unclear -- I'm unclear as to what
4 she's going to say about it. But the fact that
5 she has paid money -- put up money for his lawyer,
6 the fact --

7 MS. SHELOWITZ: Judge, he does not know
8 that. And it's never been admitted or in any
9 deposition. When we had a motion in limine in
10 this case, judge. We objected to it in this case.
11 I don't care about the other cases.

12 THE COURT: Well, let me ask you this.

13 MR. SEGAL: Judge, I'll show you the
14 deposition in this case where she said she
15 provided money for a lawyer.

16 MR. TERRELL: What lawyers?

17 MS. SHELOWITZ: I don't know what lawyers
18 he's talking about. I don't see how that's
19 relevant anyway.

20 THE COURT: Well, first of all, if she's
21 provided financial assistance for him in this
22 case, I can understand the relevancy of that as it
23 would relate to an issue of bias or motive. Now,
24 in fact, whether she did or not, I certainly have
25 no idea but I would not restrict that line of

1 questioning.

2 The concern I have is, I don't know --
3 I'm more concerned about her inadvertently
4 referencing him being in custody. I think -- I
5 think that candidly my fear of that outweighs
6 whether she might testify that she made
7 photocopies of papers for him or, you know.

8 MR. SEGAL: My concern -- I'm not going
9 to get to photo -- I don't know -- I don't know if
10 she ever did photocopy anything.

11 THE COURT: I'm using that as an example.

12 MR. SEGAL: Okay. It's phone calls. One
13 of the experts testified they had a dozen or more
14 phone conversations with her.

15 THE COURT: Well, I mean, you can --

16 MS. SHELOWITZ: He can't make calls from
17 jail.

18 THE COURT: You know, I think it's
19 appropriate for you -- and obviously, you're going
20 to have to tread a little carefully. You have the
21 benefit of leading questions. I think you can ask
22 questions, if you're inclined to, as to, you know,
23 did you assist -- have you assisted Mr. Behrens on
24 this case. I mean, I think, you know, those go
25 directly to issues of bias or motive.

1 I'm not going to -- I don't want to get
2 into, you know, what he did or didn't tell her. I
3 don't think that really lends itself to anything.
4 I mean, the fact is, she did what she did.
5 Whether it's assisting him or not assisting him or
6 paying money on his behalf to hire experts or
7 lawyers, I have no idea. But I think that those
8 are fair areas for bias or motive.

9 And I don't know whether I've clarified
10 or confused.

11 MS. SHELOWITZ: Judge, the only thing I
12 do want to lead as part of the rule is that a
13 communication between a lawyer and a client, which
14 in this case Ernesto Behrens was his lawyer and
15 client, is confidential if it is not intended to
16 be disclosed to third persons other than going to
17 disclose in furtherance of the rendition of legal
18 services to the client and those reasonably
19 necessary for the transmission of the
20 communication.

21 In this case, clearly what was necessary
22 was somebody out of custody. If he didn't have an
23 attorney to do it, somebody had to do it. And
24 Paula Turgeon made these phone calls. It doesn't
25 matter if there's one or a hundred. If you have

1 no one else to do it, you have to have somebody.
2 If he --

3 THE COURT: Were these calls made at a
4 time when he was representing himself?

5 MS. SHELOWITZ: I think almost all of
6 them because if I'm on the case, I'm making the
7 calls. Okay. And I think she did testify in
8 deposition that once -- you know, things have
9 changed a little bit once he had lawyers. But
10 for -- there was a great period of time where she
11 did the legwork. I mean, she wasn't doing any
12 legal work but she did legwork, a lot of legwork
13 for him.

14 MR. SEGAL: Judge, those experts
15 testified the officers received calls from the
16 defendant and they spoke to the defendant so to
17 say that he was unable to make the calls is
18 incorrect.

19 MS. SHELOWITZ: Well, those calls were
20 assisted, judge.

21 THE COURT: Well, I believe Ms. Shelowitz
22 correctly says that while he's his own lawyer,
23 that I think there is a protection afforded for
24 those people facilitating his effort at that time.
25 And I just have to rely on the two of you because

1 I don't know when he got counsel, when he was his
2 own counsel but you folks know it. And if these
3 occurred at the time he was his own lawyer, then I
4 think Ms. Shelowitz' motion or objection, I don't
5 know what she's making but I think it's well
6 founded. So I would say that you would not go
7 into that.

8 That -- again, I don't know how time-wise
9 that relates to whether she paid money to assist
10 him, boyfriend/girlfriend, child in common. I
11 don't know what their story is. But I think
12 that's --

13 MR. TERRELL: Can I suggest we just keep
14 it a general. If the state wants to go in: Did
15 you assist him in his defense as far as
16 financially or whatever and just keep it general
17 instead of going through specifics because, I
18 mean, being specific, we're going to have to
19 figure out what calls were made on what date,
20 whether or not he was represented by Kayo, whether
21 he --

22 THE COURT: Well, I think -- did Kayo
23 represent him on this case?

24 MR. SEGAL: Twice.

25 MS. SHELOWITZ: Twice.

1 THE COURT: On this case?

2 MS. SHELOWITZ: Yes.

3 THE COURT: Then I would say that unless
4 you know the time periods and are clear on the
5 time periods when he was unrepresented --

6 MR. SEGAL: Judge, I can do what
7 Mr. Terrell suggested: Did you provide financial
8 assistance and other assistance with him with this
9 case or something to that effect and leave it at
10 that.

11 THE COURT: It sounds like perhaps
12 something generic like that is well said because I
13 do know that what Ms. Shelowitz cites is the law
14 on that issue while he's unrepresented is correct.
15 And whatever her ultimate motivations may have
16 been, if she acted as his runner/paralegal, then
17 those are going to be privileged conversations.

18 MR. SEGAL: Okay. I'll keep it in that
19 generic vein then.

20 MS. SHELOWITZ: And, judge, I just want a
21 chance to instruct her so that she knows she
22 doesn't have to say those things or --

23 THE COURT: And make sure you instruct
24 her she's not to reference him being in custody.

25 MS. SHELOWITZ: In custody and --

1 THE COURT: And other cases. I mean, I
2 don't want to know about other cases.

3 MS. SHELOWITZ: Yeah. I know. Okay.
4 I'm going to --

5 THE COURT: Okay. Take a minute to do
6 that. Make sure you say --

7 MR. SEGAL: Could you instruct her as
8 well not to mention that he's from -- that his
9 father's family is from Colonial Tavare.

10 MS. SHELOWITZ: Well, I know not to ask a
11 question that calls for hearsay.

12 THE COURT: Well, let her know that.

13 MS. SHELOWITZ: But I will tell her not
14 to mention it.

15 THE COURT: Okay. Mr. Behrens,
16 Mr. Terrell, Ms. Shelowitz, Mr. Segal are present.
17 Your next witness.

18 Bring in the jury, please.

19 Ma'am, second row, I ask that you stand.
20 Thank you.

21 THE SHERIFF: Jurors coming in, your
22 honor.

23 [WHEREUPON, the jury panel entered the
24 courtroom]

25 THE COURT: Welcome back, ladies and

1 gentlemen. Thank you for your patience.

2 Mr. Terrell, you may call your next
3 witness, or Ms. Shelowitz. I'm sorry.

4 MS. SHELOWITZ: I'll call Paula Turgeon.

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

8 Whereupon,

9 PAULA TURGEON, called as a witness
10 herein, and having been first duly sworn by the
11 court clerk and cautioned to tell the truth of HER
12 knowledge as to the within matters, was thereupon
13 examined and testified upon HER oath as follows:

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

16 THE WITNESS: My name is Paula Turgeon,
17 T-u-r-g-e-o-n.

18 THE COURT: Ms. Turgeon, you can adjust
19 that microphone in front of you however you want.

20 DIRECT EXAMINATION

21 BY MS. SHELOWITZ:

22 Q. Good morning, Ms. Turgeon. How are you?

23 A. I'm fine.

24 Q. Okay. Where do you live?

25 A. I live in Lighthouse Point.

1 Q. Okay. What's your address?

2 A. 2080 Northeast 26th Street.

3 Q. Were you living at that address back in
4 May 12th of 1995?

5 A. No. I had an apartment at that time.

6 Q. And where was your apartment at that
7 time?

8 A. It was one street over on 1910 Northeast
9 27th Court, apartment one.

10 Q. And are you currently employed?

11 A. I have my own company.

12 Q. Okay. And what kind of company do you
13 have?

14 A. An industrial exhaust cleaning company.

15 Q. Okay. And what's your educational
16 background?

17 A. I have a four year college education.

18 Q. And how old are you?

19 A. Thirty-six.

20 Q. Okay. Do you know somebody by the name
21 of Ernesto Behrens?

22 A. Yes, I do.

23 Q. Do you see him in the courtroom today?

24 A. Yes, I do.

25 Q. Can you please point to him and describe

1 an article of clothing he's wearing?

2 A. He's right here in the cream jacket.

3 MS. SHELOWITZ: Let the record reflect
4 that the witness has identified Mr. Behrens.

5 THE COURT: Yes. The defendant's been
6 identified for the record.

7 BY MS. SHELOWITZ:

8 Q. How do you know Mr. Behrens?

9 A. I met him in 1989. I was on a gambling
10 cruise ship. I was alone and he was alone and we
11 met there.

12 Q. Okay. And did you guys become friends?

13 A. Yes, right away.

14 Q. Okay. And did that at some point evolve
15 into something more?

16 A. Yes. We came to be boyfriend/girlfriend
17 for many years, all the way from '89 to '97.

18 Q. Okay. At the time that you guys were
19 dating, was Ernesto married?

20 A. Yes, he was.

21 Q. Okay. Did he have a family?

22 A. He had a daughter.

23 Q. Okay. And you were aware of that?

24 A. Yes.

25 Q. And you're aware that you're here today

1 to testify that Mr. Behrens is accused of armed
2 sexual battery and burglary with a battery that
3 allegedly occurred on May 12th of '95?

4 A. Yes. That's ridiculous.

5 Q. Where were you on May 12th, '95, between
6 the hours of 3:00 and 5:00 a.m.

7 A. I was home in my bed.

8 Q. Okay. Have you had time to reflect so
9 that you could testify accurately today through
10 the years --

11 A. Absolutely.

12 Q. -- on what happened?

13 A. Absolutely.

14 Q. What are some of the things that were
15 going on at the time that helped you remember what
16 happened around this date?

17 A. All right. I received a call from him,
18 saying he had been arrested for these terrible
19 charges. And at this point, I now owned the
20 company that he used to own, that we used to run
21 together. And he said: Can I go back and check
22 through his old records and see, maybe he was
23 doing a job that night or something.

24 And, in fact, to tell you the truth, he
25 asked me if I was the one who had come forward and

1 pressed these charges against him because
2 apparently the police would not reveal the name to
3 him or anything like that so he didn't know who
4 was doing this.

5 Q. Okay. And you guys weren't together at
6 the time?

7 A. No, we were not.

8 Q. And you had to go back and figure out
9 what happened?

10 A. I went through the records. And it was
11 strange because his men used to go clean the
12 grease ducts in the middle of the night. And from
13 the 8th all the way through May 22nd, there's no
14 jobs in the business records, that he was not
15 performing any jobs.

16 And then I had checked through some
17 paperwork and I realized that that was the time
18 that he had gotten his operation. He had an
19 operation on his chest. They cut a big cyst out
20 and also on the back.

21 Q. Okay.

22 A. It was also on May the 8th, the day he
23 had his operation was the day I had started -- I
24 also had full time work as a manager of the Dollar
25 Store in the Coral Springs Mall. And that was my

1 very first day going to work, the day he was
2 operated on.

3 Q. And what was important about you starting
4 this new job?

5 A. Well, he and I had just come from
6 Atlantic City. I think we had returned May 3rd.
7 I had to go there for a ten day training program
8 in Monticello, New York. And -- is that -- what
9 was your question? What was important about it to
10 me?

11 Q. Yes.

12 A. I wanted to make a very good impression.
13 It was my first week on my new job, you know.

14 Q. It sounds like, from your testimony, you
15 got to spend a lot of time with Ernesto Behrens
16 even though he was married.

17 Do you know if he was having trouble with
18 his marriage at the time?

19 A. Actually, yes. When we got back from
20 Atlantic City, a friend of his -- actually, a
21 friend of her family in New York had told her that
22 he was with another woman in New York so they were
23 doing very badly; yes.

24 Q. And another reason that you guys spent
25 some time together is, what kind of occupation

1 does she have?

2 A. She's a flight attendant. And she used
3 to fly international so she was basically almost
4 never home. She'd sometimes fly for three, four,
5 five, six days at a time.

6 Q. Okay. And sometimes, she was home but
7 you'd still see him; right?

8 A. Oh, yes. I saw him pretty much every
9 day. Not always -- you know, certain days like
10 that weekend was Mother's Day weekend. He went
11 away to Stewart with her for the weekend to visit
12 his brother.

13 Q. You're talking about the May 14th
14 weekend?

15 A. May 14th; yes. At the end of the time
16 period you were talking about.

17 Q. And how many nights a week would he, on a
18 normal week, sleep over?

19 A. It changed because it could be two,
20 three, four, five. It could be any amount.

21 Q. Okay.

22 A. It wasn't a set number.

23 Q. Into this week and going back to your
24 recollection, what were you able to piece together
25 the night that you believe he was at your house or

1 day during this -- that week of the 8th through,
2 say, the 12th?

3 A. I know exactly. On the 8th, it was my
4 first day at work and that was -- he had been
5 operated on, I believe it was, early afternoon.
6 He had gone home after the afternoon, after his
7 operation. And I know he was in a lot of pain and
8 he probably didn't really want to come over and I
9 was exhausted my first day mentally from work so I
10 didn't see him on the 8th.

11 But the 9th, 10th and 11th, I'm positive
12 he was sleeping at my house because normally, on
13 Tuesdays, Thursdays and Saturdays, we went
14 gambling on the gambling boats. We were almost
15 religiously -- always, we were on the boats. So
16 for me, I remember it too because for me, even
17 though I cared very much for Ernesto at that time,
18 on Tuesday and the Thursday, I had not to go on
19 the boat those nights. So it was a sacrifice for
20 me because I was a very addicted gambler at the
21 time.

22 Q. And what are some of the reasons that you
23 remember -- besides the fact that he just had
24 surgery, what other things about that surgery were
25 important for you?

1 A. Well --

2 MR. SEGAL: Your honor, I'm going to
3 object to the form of the question, what about the
4 surgery was important.

5 BY MS. SHELOWITZ:

6 Q. To her.

7 A. To me and to Ernesto, it was important.
8 My father had just recently died of cancer and his
9 father had also died of cancer. And when they --
10 when he told me, like, about the size of the meat
11 that they had taken out of him and the doctor had
12 sent it to an independent laboratory to be tested
13 and he was very worried that it might be cancer
14 too.

15 Q. And that also assisted you in remembering
16 that time period?

17 A. Yeah. He was -- he was very, very
18 depressed at that time, very down. He didn't have
19 any work going on. It was -- it was a bad time.
20 He was worried. He was worried. Anybody would
21 be.

22 Q. And on the 11th, you're saying that he
23 slept over that night?

24 A. Oh, absolutely.

25 Q. Okay. And in the morning, when you woke

1 on the 12th, about what time was it?

2 A. I woke up at 4:30.

3 Q. Why would you say that?

4 A. Well, I had to be at work every day 8:00
5 to 5:00. But I -- I remember that Friday, I had
6 to be there at 6:00. Not that that makes a
7 difference but I'm not a morning person so I don't
8 like getting up early. And if the job was going
9 to require that I had to be there at 6:00 all the
10 time, I wasn't going to stay at that job. So I
11 remember that; yes.

12 Q. And when you awoke, who was with you?

13 A. Ernesto.

14 Q. Okay. Any reason to believe he left in
15 the middle of the night?

16 A. Oh, no, no.

17 Q. Okay. When you awoke, was he sleeping or
18 awake?

19 A. He was sleeping but he heard me, you
20 know, get up and get out of bed.

21 Q. Okay.

22 A. I went to take my -- my bath and get
23 ready for work. And I think he asked me to bring
24 him one of his pills or the medicine or something.

25 Q. Do you know what he was taking?

1 A. It was a pain medication like Darvocet or
2 something.

3 Q. And did you sometimes even get that
4 medication for him that week?

5 A. Yeah. I got it for him out of his
6 prescription bottle. He had gotten the
7 prescription apparently after he left or
8 something.

9 Q. Okay. Were you intimate with him that
10 week?

11 A. You're asking me that question. As I
12 recall, we were not. We were not because he was
13 in a lot of pain and -- I may have convinced him
14 one time or something but he pretty much was not
15 in that kind of a mood, the fact that he was very
16 down and we didn't have the results from the
17 biopsy yet so he wasn't in like a party mood.

18 Q. Okay. You've known -- you've put this
19 together for some time; correct?

20 A. Oh, yes. He called me over three --
21 three years ago, whatever it was. I don't
22 remember.

23 Q. And because of your knowledge and the
24 severity of these charges, have you agreed to
25 assist Ernesto Behrens financially in this case?

1 A. Oh, definitely. Absolutely. I know 100
2 percent that he didn't do this. And his family's
3 in Venezuela and I know there's monetary problems
4 there so I helped him in any way that I could.
5 Absolutely.

6 Q. Have you had -- and you've made reference
7 to it before but you had a sexual relationship
8 with Ernesto; correct?

9 A. Yes.

10 Q. Okay. And do you know if he's
11 circumcised?

12 A. Yeah. He's not circumcised.

13 Q. Okay. Is it obvious to you that he's not
14 circumcised?

15 A. Well, the first time I ever -- I had
16 never been with a person who was not circumcised
17 before. And the first time I ever -- like, I
18 didn't know what the heck that was really, to tell
19 you the truth. It was very embarrassing because I
20 didn't understand that at all.

21 Q. What made it different?

22 A. Well, he has like a very -- a big piece
23 of skin over top of it. You can't miss it. It's
24 not like an American guy or something like that.

25 Q. How did that play a role in your sexual

1 relationship with him?

2 A. Well, it was -- for one thing, I -- it's
3 something that you kind of have to get used to.
4 He has a piece of skin so, like, the skin has to
5 come down and he's very, very, very sensitive
6 there so -- and I know he was charged with oral
7 sex in this crime which is totally a joke because
8 he hates oral sex. Because that's -- he's so
9 sensitive from not being circumcised, that it
10 would irritate him for someone to like -- if
11 someone were to perform oral sex on him. He's not
12 into that whatsoever.

13 Q. You've had many conversations with
14 Mr. Behrens; correct?

15 A. Yes, we talk.

16 Q. Okay. And would you characterize his
17 accent as a heavy Latin accent?

18 A. In 1995, that --

19 Q. Or today?

20 A. When I met him, yeah, he had a very heavy
21 accent; yeah. And, you know, it's become a little
22 bit less and less as he's been here longer. But
23 in 1995, yeah, it was still pretty heavy; yeah.

24 Q. And is it still pretty heavy today?

25 A. I would say it's medium; yeah.

1 Q. But it was heavier back in '95, you say?

2 A. Oh, definitely.

3 Q. Knowing what you know -- what you know --

4 A. Yes.

5 Q. -- is there any doubt in your mind that
6 Ernesto Behrens could have been at [REDACTED] [REDACTED]
7 home on May 12th, 1995, between the hours of 2:00
8 to 5:00?

9 A. I know 100 percent, absolutely no, he was
10 not there.

11 MS. SHELOWITZ: I have nothing further.

12 THE COURT: Mr. Segal?

13 CROSS-EXAMINATION

14 BY MR. SEGAL:

15 Q. Good morning, Ms. Turgeon.

16 A. Hi.

17 MR. SEGAL: Your honor, can I use this
18 for one second.

19 THE COURT: Sure.

20 BY MR. SEGAL:

21 Q. Ms. Turgeon, you met him when, in October
22 of '89, I think it was?

23 A. September 9th, 1989.

24 Q. Okay. And then you basically got
25 romantic with him about two weeks later?

1 A. Yes.

2 Q. So September of '89?

3 A. Yes.

4 Q. And your relationship --

5 MS. SHELOWITZ: I'm going to object to
6 the prosecutor writing and testifying through
7 written diagrams. If he wants to ask a witness to
8 do written testimony, that's fine. But this is
9 testimony from -- written testimony of the state.

10 MR. SEGAL: Judge, I'm not going to write
11 anything that was not said.

12 THE COURT: Well, I can't see what you
13 wrote down.

14 MR. SEGAL: So far I've written down that
15 I'm testifying to myself.

16 MS. SHELOWITZ: I think the proper way is
17 that the witness write the testimony, not the
18 prosecutor.

19 THE COURT: I think you can write down
20 what her testimony is. Overruled.

21 BY MR. SEGAL:

22 Q. Okay. And your romantic relationship
23 continued with him until February of '97?

24 A. Yes.

25 Q. Okay. And you said during that time

1 period, you would spend the night with him
2 anywhere from three to five times a week?

3 A. Two, three, four, different times.

4 Q. Or up to five times?

5 A. Could be; yeah.

6 Q. Okay. So you've got the amount of weeks
7 during that timeframe, say mid-September so we'll
8 say two weeks; is that right, or is it towards the
9 end of September?

10 A. I'm sorry?

11 Q. Was it the middle of September, the end
12 of September of '89, when you first got
13 romantically involved with him?

14 A. Yeah. It would be about two weeks after
15 the 9th.

16 Q. Okay. So one week left in September?
17 That's September; right?

18 A. Okay.

19 Q. Okay. Then that's one week. Then you
20 got October 4, November, December.

21 Twelve weeks there; right? Right?

22 A. If you say so.

23 Q. There's four weeks to a month; right?

24 A. Yeah; four and one third.

25 Q. Okay. Then you've got from 1990 to

1 through 1996 -- 1990 through 1996: 1991, '92,
2 '93, '94, '95, '96.

3 Seven years; right?

4 A. Yes.

5 Q. Fifty-two weeks in a year?

6 A. There sure are.

7 Q. Three hundred and sixty-four weeks
8 approximately? I'm sorry. Three hundred and
9 sixty-four weeks; right?

10 A. Yes.

11 Q. Okay. So you got 13 plus 364.

12 Then you got into February so you got
13 four weeks in January and how long in February?

14 A. I don't remember exactly. I think none.
15 Maybe the first week.

16 Q. Okay. So maybe five weeks in '97?

17 A. Okay.

18 Q. Three hundred and eighty-two weeks;
19 correct?

20 A. Yes.

21 Q. Okay. At the bear minimum, 764 nights
22 with the defendant; right?

23 A. Oh, yes.

24 Q. At the maximum, 1910 nights with the
25 defendant?

1 A. Yes.

2 Q. Okay. When did you get a call from the
3 defendant that he had been arrested?

4 A. I can't recall the date exactly.

5 Q. Do you remember the month, the year?

6 A. No.

7 Q. Okay. Two or three years after May of
8 '95?

9 A. Oh, yes.

10 Q. So two to three years before -- two,
11 three years later, you can remember what you did
12 in one night among the 764 to 1910 nights that you
13 were with him; right?

14 A. Yes. I remember those nights.

15 Q. Okay. Can you tell us about the other
16 1,000 nights you with were him, what you did?

17 A. Some of them, if there was a memorable
18 event, you know, anniversaries, birthdays, things
19 like that. Sure.

20 Q. Okay. And was it an anniversary or
21 birthday that day?

22 A. No. We had started -- I had started my
23 new job that week and he had his operation.
24 That's why I remember.

25 Q. Okay. You started your job on Monday

1 though; right?

2 A. The 8th.

3 Q. The business that you had, you got from
4 the defendant; correct?

5 A. Right. Well, we had actually closed down
6 his corporation. He dissolved it. And then I
7 started my own but I used the same doing business
8 name.

9 Q. It's a duct cleaning business, correct,
10 where you clean ducts like in restaurants and
11 stuff?

12 A. Yes, we do.

13 Q. Okay. And when the defendant had the
14 business, you worked with him in the business;
15 correct?

16 A. I helped him with the paperwork and the
17 billing. Like I said, I always had a full-time
18 job and I helped him to start the company and help
19 it to grow.

20 Q. Part of what he did, as part of the
21 companies, you helped clean the ducts, get up
22 there and clean the ducts, correct, as part as --

23 A. Yeah, it evolved. I mean, eventually, he
24 had men doing most of the work.

25 Q. But he did a lot of the work himself too;

1 correct?

2 A. In '95. Very occasionally. Just maybe
3 train new people or make sure certain jobs got
4 done properly.

5 Q. Okay. Now, you say you spent --
6 according to you, you spent Tuesday, Wednesday and
7 Thursday night of that week with him; correct?

8 A. Yes.

9 Q. Okay. And during the entirety of that
10 week, he was complaining proficferously about the
11 amount of pain that he was in; correct?

12 MS. SHELOWITZ: Objection.
13 Mischaracterization of the testimony.

14 THE COURT: Overruled. She can answer
15 the question.

16 THE WITNESS: Yeah, he was uncomfortable.
17 He had -- they had sliced him open and took a
18 piece of meat out of him and then stitched him
19 and, yeah, he was kind of a baby about it.

20 Q. He has kind of a low pain threshold, low
21 pain tolerance?

22 A. He -- he complained about it; yeah. He
23 was uncomfortable. He couldn't sleep properly and
24 he didn't really want to do anything or go out
25 or -- I mean, he didn't even want to go gambling

1 so, you know, that it hurt.

2 Q. Okay. He couldn't sleep well that entire
3 week? He was having problems sleeping?

4 A. Yeah. He was just -- he slept more on
5 his side than he would normally sleep on.

6 Q. At the time, he lived at 5300 Northwest
7 74th Terrace in Lauderhill; correct?

8 A. In Lauderhill; right.

9 Q. Now, the night or the evening of May
10 11th, did you work May 11th?

11 A. Yes, I did.

12 Q. Okay. And what happened? Did you meet
13 with the defendant afterwards or how did he get to
14 your house? How did that happen?

15 A. Well, he knew I'd be home, arriving home,
16 after 5:00 sometime, 5:00 to 6:00, in that
17 vicinity and, you know, we just met -- he came
18 over to my house, my apartment. It was an
19 apartment.

20 Q. He met you at your apartment?

21 A. Yes.

22 Q. Before you went to your apartment, did
23 you meet him and have dinner with him?

24 A. As I recall, I think we ate in mostly
25 that week. We ordered in Italian, Chinese.

1 Q. So the night of -- the evening of May
2 11th, you ate in your apartment?

3 A. Yes.

4 Q. Okay.

5 A. We might even have stopped for sandwiches
6 on the way home or something.

7 Q. So you had sandwich on the way home and
8 then you had dinner when you got home?

9 A. No. You're asking me about Tuesday,
10 Wednesday and Thursday. I don't remember which
11 night --

12 Q. I'm asking you about Thursday, May 11th?

13 A. To the best of my recollection, we had
14 dinner in the house that night.

15 Q. Ever given a deposition in this case on
16 June 24th, 2000?

17 A. Yes.

18 Q. Okay. Do you remember you were sworn to
19 tell the truth in that deposition?

20 A. Yes.

21 Q. And there was a court reporter like this
22 woman taking down what you said?

23 A. There sure was.

24 Q. Okay. Do you remember being asked --

25 MS. SHELOWITZ: Judge, I would ask that

1 he refresh her recollection first.

2 BY MR. SEGAL:

3 Q. Okay. Refer you to page 24. Refer you
4 to lines 18 through 20.

5 A. Yes.

6 Q. Remember those questions and those
7 answers?

8 A. Yes.

9 Q. Does that accurately reflect the
10 questions and answer -- that question and answer?

11 A. May I look at it?

12 Q. You said you did look at it.

13 A. I'm looking at it now.

14 Q. I'm sorry. Just take a look at it.

15 A. Yes. It says: "I met with Ernesto and
16 had dinner and then we went to my apartment." And
17 then on the next page, it says: "Yes. I think we
18 ordered in."

19 Q. Okay. So within one page, you change
20 your story about that; correct?

21 A. Yeah. Well, I remember we didn't eat
22 out. We didn't eat in a restaurant. We ate in
23 the house. He didn't want to go out to dinner.

24 Q. Okay. On page 24, lines 18 through 20, I
25 asked the question: "What did you do after work?"

1 Your answer was: "I met with Ernesto and had
2 dinner and then we went to my apartment."

3 Correct?

4 A. Yeah. But we didn't. We had -- we
5 ordered in.

6 MS. SHELOWITZ: Judge, I would object and
7 ask him to go to the next page where she also --

8 THE WITNESS: I corrected it on the next
9 page; right.

10 THE COURT: Ms. Turgeon, just wait one
11 second.

12 I'm sorry, Ms. Shelowitz?

13 MS. SHELOWITZ: I would ask that the
14 state attorney be complete and go on to page 25
15 where she goes into that answer.

16 THE COURT: Why don't you read that
17 complete answer if it extends onto the next page.

18 MR. SEGAL: Judge, there's a break and
19 then she said that, but --

20 BY MR. SEGAL:

21 Q. Okay. I mean, you said before that you
22 corrected it on the next page; correct? You said
23 that a minute ago.

24 A. I was telling you to the best of my
25 recollection when you asked me that question.

1 Q. So your memory was flopping around in the
2 course of that deposition as to that part --

3 A. No. I think I had --

4 Q. -- of the evening that you remembered so
5 well; correct?

6 A. I think I had just misspoken.

7 Q. Okay. And one of the reasons you all
8 ordered in so much was because he was in so much
9 pain that he couldn't go out; correct?

10 A. Yeah. We just stayed home and watched
11 TV.

12 Q. And, in fact, you spent the rest of the
13 evening of May 11th trying to make him comfortable
14 because he was in so much pain; is that correct?

15 MS. SHELOWITZ: Judge, I'm going to
16 object to the mischaracterization of the
17 testimony. That's never been said.

18 THE COURT: Overruled. I mean, this is
19 the question and she can answer the question.

20 BY MR. SEGAL:

21 Q. You spent the rest of the night dealing
22 with him because he was in so much pain; correct?

23 A. Right. He took his medicine and we took
24 it easy. We just stayed in bed.

25 Q. Did the medicine help the pain? I mean,

1 he was still proficiferously complaining about the
2 pain even after taking the medicine; right?

3 A. Well, I think he was just uncomfortable.
4 Yeah, he had a cut.

5 Q. Okay. It was bad pain even after taking
6 the medication; correct?

7 A. He could still feel it; yes. I just had
8 a back operation. I take medicine every day and
9 it's still killing me.

10 Q. Okay. And again, as you said, he has a
11 very low threshold or low tolerance for pain;
12 correct?

13 A. Yeah. I think, you know, he just wanted
14 a lot of attention.

15 Q. And Friday morning, May 12th, when you
16 woke up, was he in excruciating pain still?

17 A. He was sleeping when I woke up. And then
18 when I got out of bed, I went to start to get
19 ready for work and he said: Would I mind to bring
20 him his pain tablets.

21 Q. Because he was --

22 A. I'm sure he was feeling uncomfortable. I
23 remember him asking for one.

24 Q. Okay. So he was in pain?

25 A. Yes, I would say so.

1 Q. And, in fact, when he is in pain, he
2 complained a lot; correct?

3 A. I don't know if he complains a lot. You
4 know, a little. He lets me know.

5 Q. Okay. Let's go to May 12th, the evening
6 after work.

7 Did you go home directly or did you do
8 something else after work?

9 A. I most likely went home. I mean, I could
10 have stopped to pick something up at the store. I
11 don't remember but I normally generally go home.

12 Q. Do you know what time you got home?

13 A. Exactly; no. 5:00, 6:00. I mean, I left
14 my work at 5:00. I don't know exactly.

15 Q. Okay. The evening of May 12th, did you
16 speak to the defendant?

17 A. Offhand, I can't recall. He may have
18 called me. I knew he was -- I don't remember -- I
19 know he was going to be going away that weekend so
20 I don't remember if I did or not.

21 Q. Okay. That was a significant thing, that
22 he was going to be away from you that weekend;
23 correct?

24 A. That was very significant; yes.

25 Q. But you can't remember whether you spoke

1 to him the evening before he went away?

2 A. He may have called me at work. I'm not
3 sure. You know, I don't know exactly when was the
4 last time I spoke to him. I can't give you an
5 exact time.

6 Q. I'm asking --

7 A. I'm sure he said goodbye before he left.

8 Q. I'm asking if you spoke to him on the
9 phone in the evening of May 12th?

10 A. In the evening. I can't recall if I did
11 in the evening. I don't -- I don't know when he
12 and his wife left for Stewart.

13 Q. Okay. But that was a significant time
14 for you; correct?

15 A. It was.

16 Q. Okay. On May 12th, the defendant was 30
17 years old?

18 A. Thirty or 31. I'm not sure.

19 Q. What's his date of birth?

20 A. Eleven --

21 MS. SHELOWITZ: Objection. Calls for
22 hearsay.

23 THE COURT: Sustained.

24 BY MR. SEGAL:

25 Q. Okay. How old was he on May -- on that

1 day?

2 MS. SHELOWITZ: Objection. Calls for
3 hearsay.

4 THE COURT: If she knows, can answer the
5 question.

6 THE WITNESS: Well, let me think for a
7 moment. '95. And he was born in '64. So 31, I
8 would say.

9 BY MR. SEGAL:

10 Q. Well, this is May, '95; correct?

11 A. So he was about to turn 31.

12 Q. He was 30?

13 A. Okay. Yeah.

14 Q. I'm asking you, was he 30?

15 A. Yes. If it was in May; right.

16 Q. Okay. Now, when Ms. Shelowitz was asking
17 you questions, you told her that he has a very
18 tender or sensitive, I guess, the head of the
19 penis?

20 A. Yes.

21 Q. Now, when you have intercourse, the head
22 of your penis is like going in and out and rubbing
23 against a woman's vagina; correct?

24 A. Yes.

25 Q. Okay. But that tenderness didn't bother

1 him, did it?

2 A. No.

3 Q. Okay.

4 A. It depends. Sometimes; yeah. His skin
5 rips sometimes. Yeah. He has pain in there.

6 Q. Okay. So one second, it was no and the
7 next second, it was yes, he has pain in there?

8 A. I mean, when you're enjoying it; no.
9 Then you're -- you're enjoying it. But I'm saying
10 that sometimes, like if we were to have sex too
11 often, yeah, it ripped. He'd get pain in his
12 skin; yes.

13 Q. And you frequently had sex with him so
14 that he was doing that a lot; correct?

15 A. Well, we would have sex as often as we
16 could; yeah.

17 Q. Okay. And sex involved his penis in your
18 vagina, rubbing in there; right?

19 A. Yes.

20 Q. Okay. But he -- he -- he had no problem
21 doing that though, did he?

22 A. Oh, no.

23 MR. SEGAL: I have nothing further, your
24 honor.

25 THE COURT: Ms. Shelowitz?

RE-DIRECT EXAMINATION

1
2 BY MS. SHELOWITZ:

3 Q. Where's Plantation in relation to
4 Lighthouse Point?

5 A. It's -- I live east of Federal Highway
6 and north of Copeland and -- oh, I'd say that's
7 all the way up by University so 30, 40 minutes
8 away.

9 Q. And did you know offhand right away --
10 when Mr. Behrens asked you what happened on that
11 day, did you know right away: Oh, this is what
12 happened or did you have to figure it out?

13 A. Oh, no. I went through all the business
14 records and how did we not do a job from the 8th
15 to the 22nd. I -- actually, later on, I looked at
16 a calendar and some other things later on that
17 refreshed my memory, that I had written down:
18 When I started my job. I tried to find my
19 checkbook. I tried to look through anything.

20 Q. Okay. So of the 764, 1910 days, if
21 somebody asks you right offhand, what did you do
22 on the 356th day, you might not know but if you
23 had to look back, you may be able to recall;
24 correct?

25 MR. SEGAL: Objection, your honor. It's

1 a leading question?

2 THE COURT: Overruled.

3 THE WITNESS: Yes. I spent a good time
4 trying to figure out where he was on the day, you
5 know. Yeah. It took me time to investigate it.

6 BY MS. SHELOWITZ:

7 Q. And if you didn't find that you were him
8 for any reason, for him -- you wouldn't have any
9 personal knowledge as to where he was, would you
10 be here testifying?

11 A. No, no, no.

12 Q. Where you ate or whether you ate in or
13 out, was that as important to you as the surgery?

14 A. No, no. I just wanted him to be happy,
15 you know.

16 Q. Okay. And where you ate, was that as
17 important as starting a new job?

18 A. No.

19 Q. Okay. And was -- where you ate have --
20 was that as important as the cancer that he
21 believed he might have had during that time?

22 A. No.

23 Q. Isn't it true, you're not just saying he
24 was in pain but you're also testifying that he was
25 just in a bad mood?

REPORTER'S DEPOSITION CERTIFICATE

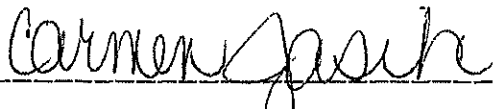
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STATE OF FLORIDA)
COUNTY OF MIAMI-DADE)

I, CARMEN JASIK, Shorthand Reporter,
certify that I was authorized to and did
stenographically report the hearing of STATE OF
FLORIDA versus ERNESTO BEHRENS; that a review of
the transcript was requested; and that the
transcript is a true and complete record of my
stenographic notes.

I further certify that I am not a
relative, employee, attorney or counsel of any of
the parties, nor am I a relative or employee of
any of the parties' attorney or counsel connected
with the action, nor am I financially interested in
the action.

Dated this 30th day of March, 2001.



CARMEN E. JASIK, RCSR
Certified Shorthand Reporter