IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

ERNESTO BEHRENS,
Appellant/Petitioner,

Case No.: 4D21-1039
L.T. No.: 98-5739CF10A

v.

STATE OF FLORIDA,
Appellee/Respondent. /

PETITIONER'S RESPONSE TO THE COURT'S JULY 22, 2021 SHOW CAUSE ORDER

COMES NOW, the Appellant, ERNESTO BEHRENS, in propria persona, and respectfully files the instant Response. In furtherance thereof, the Appellant states as follows:

1. On July 22, 2021, this Court issued an Order to Show Cause to the Appellant, which states:

> "ORDERED that the Appellant has filed multiple frivolous challenges to his convictions and sentences in Broward County case number 98-5739CF10A and has been warned against frivolous filing in case number 4D17-273. Within twenty (20) days of service of this order, Appellant shall file a response and show cause why this court should not impose the sanctions of no longer accepting his *pro se* filings and why Appellant should not be referred to prison officials for disciplinary proceedings. *State v. Spencer*, 751 So.2d 47 (Fla. 1999); Section 944.279(1), Fla. Stat. (2020)."

See Court's Order issued on July 22, 2021.

2. The Order above is the direct result of the Assistant Attorney General Mr. Paul Patti's encouragement for this Court to consider barring Appellant from further *pro se* filings under § 944.279, Fla. Stat. (2020). Mr. Patti did encourage – via his Response to the Court filed on April 23, 2021, to sanction the Appellant, in the most severely and damaging way this Court could possibly sanction him.

However, it appears to the Appellant that Mr. Patti's encouragement to the Court has been requested without taking into consideration the fact that the Appellant is an indigent *pro se* litigant, ignorant to the law and who does not have any previous schooling or training in the law. But more importantly of all, is the undeniable fact that the laws of Florida permitted the Appellant to exercise remedial filing rights. Therefore, the sanctions of barring him and referring him to prison officials for disciplinary proceedings, because he abused the process and filed a limited number of *pro se* postconviction relief motions over a 21-year period, is too extreme and severe.

It should also be noted, that this severe sanction, requested by the Assistant Attorney General Mr. Patti, is apparently based on his own professional opinion of what "abusing the process" is, not on what it has been defined by law. In other words, the reason articulated by Mr. Patti in

support of his request to this Court was that: "Appellant is no stranger to abusing this Court via relentless legal filings ... Appellant continues to file appeals and original proceedings in this Court without regard to the merits of his claims or the immense stress it puts on the judicial proceedings in this Court." (See Attorney General's Response filed on April 23, 2021, case no. 4D21-1039.) Nevertheless, Mr. Patti's explicit accusation about the Appellant's multiple challenges having been an abuse of the process and/or frivolously filed is misleading, as will be explained below:

3. Because the Court's Order is a three (3) part order, the Appellant's Response will be addressed in the same chronological order.

Part I – Reason for the Sanctions

The Court's Order states as its reasons to impose sanctions upon the Appellant as follows:

> "... the Appellant has filed multiple frivolous challenges to his convictions and sentences in Broward County case number 98-5739CF10A and has been warned against frivolous filing in case number 4D17-273..."

Although it is true that the Appellant has filed multiple challenges to his convictions and sentences in Broward County case number 98-5739CF10A in the last 21 years – while claiming actual innocence and manifest injustice – and that he was warned against frivolous filing in case

number 4D17-273, the Appellant respectfully avers that as a matter of law and legal definitions his previous challenges should not be taken as abuse of process and/or counted as frivolous.

However, it is necessary for the Appellant to familiarize himself with the following definitions below. And furthermore, to rely on them in order to better understand the Court's Order, and of course, to place the Appellant in a better position to respond more adequately and effectively on what appears to be two simple questions formulated by this Court.

Hence, the following pertinent words and its definitions are as follows:

SANCTION – meaning: 1) to penalize by imposing a sanction < the court sanctioned the attorney for violating the gag order > (Black's Law Dictionary, Abridged 7th Edition, page 1077).

ABUSE OF PROCESS – meaning: the improper and tortious use of a legitimately issued court process to obtain a result that is either unlawful or beyond the process' scope. (Black's Law Dictionary, Abridged 7th Edition, page 8).

FRIVOLOUS – meaning: lacking a legal basis or legal merit; not serious; not responsibly purposeful < a frivolous claim >. (Black's Law Dictionary, Abridged 7th Edition, page 534).

On the other hand, a frivolous petition, motion or application has been described as one being without arguable merit in law or fact. See *Neitzke v. Williams*, 490 U.S. 319 (1989).

Thus, by having the above pertinent words already defined and by applying the above-mentioned existing case law to the facts of this case. It is easier to adequately address the Court's above-stated reasons to sanction the Appellant.

In fact, taking into consideration the definitions contained in the Black's Law Dictionary together with the case law describing "frivolous" in the context of petitions, motions and applications – even though the Appellant is a *pro se* litigant ignorant to the law and without any previous training in the art/science of law – it becomes easy to understand and safe to conclude now that the Appellant's multiple challenges made in Broward County case number 98-5739CF10A were not frivolous and/or an abuse of process, contrary to Mr. Patti's professional opinion while suggesting for sanctions.

More to the point, even though all of the Appellant's *pro se* postconviction motions were unsuccessful and denied, none of the trial court's denial orders explicitly found Appellant's claims to be frivolous. Instead, according to the Fla.R.Crim.P. applicable to this case, the trial

court timely issued show cause orders to the State to respond to each single one of the Appellant's sufficient claims. Additionally, the trial court seemingly incorporated the reasons stated in the State's responses to each of the Appellant's Rule 3.800(a), 3.853, 3.850(a), and 3.850(b)(1) motions, respectively. Yet, the State argued the merits of the claims for relief raised in each of the Appellant's multiple motions. Therefore, the finding and accusation made by the Assistant Attorney General Mr. Patti, in reference to abuse of process is unsupported by the Appellant's filing history in the record. The accusation and finding made by Mr. Patti is, in fact, misleading.

Part II – Timeliness of the Response

In compliance with the Court's Order, this Response is timely filed because it is being submitted on or before August 11, 2021.

Part III – Types of Sanctions

The Court's two questions formulated to the Appellant in its order to show cause together with the Appellant's answers follows:

1.) WHY THIS COURT SHOULD NOT IMPOSE THE SANCTION OF NO LONGER ACCEPTING HIS *PRO SE* FILINGS?

Because under the circumstances of this case, Mr. Patti's explicit complaint in support of his requested sanctions uncharacteristically takes

into account many filings made by previous attorneys in the case, as well as multiple *pro se* postconviction relief filings authorized by law. Stated differently, Appellant cannot and should not be penalized to such extreme for exercising his constitutional access-to-court right or doing what the law afforded him the right to do.

Article I, § 21 of the Florida Constitution guarantees as follows:

> "The courts shall be open to every person for redress of any injury."

This constitutional guarantee does not expressly or implicitly exclude incarcerated *pro se* litigants from the meaning of "every person." The Florida Supreme Court has recognized the importance of this constitutional guarantee of citizen access to the courts, with or without an attorney. See *Rivera v. State*, 728 So.2d 1165 (Fla. 1998). "Denying a *pro se* litigant the opportunity to file future petitions is a serious sanction, especially where the litigant is a criminal defendant who has been prevented from further attacking his or her conviction, sentence, or conditions of confinement..." See *Spencer v. State*, 751 So.2d 47, 48 (Fla. 1998).

Consequently, the power of courts in the State of Florida to impose filing sanctions against a *pro se* litigant is limited in part by the litigant's constitutional right of access to the courts. See Article I, § 21, Fla. Const.; *Spencer*, 751 So.2d at 48. Therefore, it is inappropriate and impermissible,

as a matter of law, for a Florida court to penalize an incarcerated *pro se* litigant for availing himself, in good faith, of the panoply of criminal postconviction relief procedural remedies available to such litigants under Florida's laws to challenge the lawfulness of his or her conviction and sentence.

Florida laws enforce the constitutional right of access to the courts through the implementation of different postconviction relief procedures which can be invoked by incarcerated *pro se* litigants desiring to challenge the legality of their criminal convictions and sentences. See Rule 3.800(a), Rule 3.801, Rule 3.850(a), Rule 3.850(b)(1), Rule 3.853, Fla.R.Crim.P. See also Rule 9.141(d)(5), Fla.R.App.P.

Florida's courthouse doors remain continuously open to the incarcerated *pro se* litigants for correction of illegal sentences. Rule 3.800(a), Fla.R.Crim.P. provides: "A court may at any time correct an illegal sentence imposed by it or an incorrect calculation made by it..." Once widely misunderstood by Florida trial courts, Rule 3.800(a) has been clearly interpreted to afford criminal defendants the right to petition trial courts more than one time to the correction of illegally imposed sentences. This is because Florida appellate courts, including this District Court, have determined that the phrase "at any time" permits the filing of multiple Rule

3.800(a) motions as long as the claims for relief being raised or re-raised were not previously adjudicated on the merits. See *State v. McBride*, 848 So.2d 287, 289-91 (Fla. 2003); *Bynes v. State*, 289 So.2d 938, 939 (Fla. 4th DCA 2020) (court concluded that Bynes' four Rule 3.800(a) motions were not impermissibly successive and had been filed in good faith); *Jordan v. State*, 36 So.3d 796 (Fla. 4th DCA 2010) (held: Rule 3.800(a) allows for filing of multiple motions); *Mims v. State*, 994 So.2d 1233, 1237 (Fla. 3d DCA 2008) (relying on *McBride*, the Third District Court of Appeal concluded that Florida allows motions under Rule 3.800(a) to be filed "successively" so that a defendant or an attorney has more than one chance to persuade the court that a sentence is illegal).

Florida's courthouse doors also are open to incarcerated *pro se* litigants to collaterally attack their criminal convictions and sentences pursuant to Rule 3.850 (formerly Rule 1.850). This Rule was afforded to prisoners as a matter of procedural right. *In re: Criminal Procedure, Rule No. 1*, So.2d 634 (Fla. 1963). The Supreme Court stated in its 2004 *Baker* decision that Rule 1 was intended to provide circuit courts an effective postconviction remedy to adjudicate rights and to "correct convictions on any grounds which subject them to collateral attack." See *Baker v. State*, 878 So.2d 1236, 1240 (Fla. 2004). Effective on January 1, 1985, a two-

year filing limitation period was added to Rule 3.850 to require prisoners to file motions for postconviction relief with the trial court within two years of their convictions and sentences becoming final by the conclusion of direct appeal proceedings. See *Amendments to Rules of Criminal Procedure*, 460 So.2d 907 (Fla. 1984). Equally afforded to prisoners as a matter of procedural right has been the implementation of Fla.R.Crim.P. 3.853 (petitions for DNA testing) in 2001.

In the present case, this Court stated that Appellant has filed multiple frivolous challenges to his convictions and sentences in Broward County case number 98-5739CF10A and has been warned against frivolous filing in case number 4D17-273. Appellant reply contends that the Court's factual premise for its intentions to impose sanctions is flawed because the Court counted and relied, when it should not have, on Mr. Patti's suggested list of combined postconviction motions which Florida authorized the Appellant to file and motions filed by previous attorneys.

More to the point, below the Appellant will address each one of the chronological filings relied on by Mr. Patti, n support of his accusation brought to this Court against the Appellant. Specifically, that the Appellant has abused the process, meaning "improperly and tortuously using the legitimately issued court process to obtain a result that is either unlawful or

beyond the process' scope," via relentless legal filings, as a *pro se* litigant. The Appellant will show to this Court that, contrary to Mr. Patti's assumptions, the majority of Appellant's *pro se* legal filings were lawful and not beyond the process' scope.

Behrens v. State, 4D00-4484 refers to his direct appeal proceedings. He was represented by counsel (James W. McIntire, Esq.). this was not a *pro se* filing. Nevertheless, this was a legally authorized proceeding by law and could not be counted in determining whether he was abusing his rights to *pro se* access to the court, as incorrectly suggested to this Court by Mr. Patti. (The Court affirmed with a written opinion.)

Behrens v. State, 4D04-1055 refers to a Petition for Writ of Habeas Corpus proceeding, alleging ineffective assistance of appellate counsel. Although a *pro se* filing, it was a legally authorized proceeding by law pursuant to Rule 9.141, Fla.R.App.P., and could not be counted in determining whether he was abusing his right to *pro se* access to the court, as incorrectly suggested to this Court by Mr. Patti. (The Court denied the petition without opinion.)

Behrens v. State, 4D04-2277, 4D05-4404, 4D09-958, 4D09-4736, and 4D10-1041 refers to five (5) Petition for Writ of Mandamus proceedings requesting timely rulings by the lower court. Although *pro se* filings, they

were legally authorized proceedings by law pursuant to Rule 9.141, Fla.R.App.P., and could not be counted in determining whether he was abusing his right to *pro se* access to the court, as incorrectly suggested to this Court by Mr. Patti. (The Court issued show cause orders but the Clerk dismissed them as moot.)

Behrens v. State, 4D04-4152 refers to a Rule 3.800 motion alleging an illegal sentence. Although a *pro se* filing, it was a legally authorized proceeding by law, and could not be counted in determining whether he was abusing his right to *pro se* access to the court, as incorrectly suggested to this Court by Mr. Patti. (The Court *per curiam* affirmed.)

Behrens v. State, 4D04-4156 refers to a Rule 3.853 motion requesting DNA testing. Although a *pro se* filing, it was a legally authorized proceeding by law, and could not be counted in determining whether he was abusing his right to *pro se* access to the court, as incorrectly suggested to this Court by Mr. Patti. (The Court issued a show cause order but ultimately *per curiam* affirmed.)

Behrens v. State, 4D05-1373 refers to a Petition for Belated Appeal proceeding, requesting leave from the Court to file an appeal outside the timeframe allowed by the rules. Although a *pro se* filing, it was a legally authorized proceeding by law pursuant to Rule 9.141, Fla.R.App.P., and

could not be counted in determining whether he was abusing his right to *pro se* access to the Court, as incorrectly suggested to this Court by Mr. Patti. (This Petition was denied by the Clerk.)

Behrens v. State, 4D07-836 refers to a Rule 3.850(a) motion filed by an attorney (Donald Goodrich, Esq.), not a *pro se* filing. It was a legally authorized proceeding by law, and could not be counted in determining whether he was abusing his right to *pro se* access to the court, as incorrectly suggested to this Court by Mr. Patti. (The Court *per curiam* affirmed.)

Behrens v. State, 4D08-3291 refers to a Rule 3.850(a) motion alleging ineffective assistance of counsel and a sentencing error. Although a *pro se* filing, it was a legally authorized proceeding by law by law, and could not be counted in determining whether he was abusing his right to *pro se* access to the court, as incorrectly suggested to this Court by Mr. Patti. (The Court issued a show cause order on ground 20 but ultimately *per curiam* affirmed.)

Behrens v. State, 4D10-2462 refers to a Rule 3.800(a) motion alleging an illegal sentence. Although a *pro se* filing, it was a legally authorized proceeding by law, and could not be counted in determining whether he was abusing his right to *pro se* access to the court, as

incorrectly suggested to this Court by Mr. Patti. (The Court *per curiam* affirmed.)

Behrens v. State, 4D11-3044 and 4D16-2586 refers to two (2) criminal habeas corpus proceedings challenging the unlawfulness of his detention. Although *pro se* filings, they were legally authorized proceedings by law, and could not be counted in determining whether he was abusing his right to *pro se* access to the court, as incorrectly suggested to this Court by Mr. Patti. (The Court denied relief.)

Behrens v. State, 4D14-1958 refers to a Rule 3.800(a) motion alleging an illegal sentence. He was represented by counsel (Bernard Daley, Esq.). This was not a *pro se* filing. Nevertheless, it was a legally authorized proceeding by law, and could not be counted in determining whether he was abusing his right to *pro se* access to the court, as incorrectly suggested to this Court by Mr. Patti. (The Court *per curiam* affirmed.)

Behrens v. State, 4D16-219 refers to a criminal habeas corpus proceeding challenging the correctness of the Court's decision. He was represented by counsel (Luke Newman). This was not a *pro se* filing. Nevertheless, it was a legally authorized proceeding by law, and could not be counted in determining whether he was abusing his right to *pro se*

access to the court, as incorrectly suggested to this Court by Mr. Patti. (The Court issued a show cause order but ultimately denied relief.)

Behrens v. State, 4D17-273 refers to a Rule 3.800(a) motion alleging an illegal sentence. Although a *pro se* filing, it was NOT a legally authorized proceeding by law, and CAN be counted in determining whether he was abusing his right to *pro se* access to the court, as correctly suggested to this Court by Mr. Patti. (The Court *per curiam* affirmed and issued an order warning against frivolous filing.)

Behrens v. State, 4D17-1848 refers to a Rule 3.850(b)(1) motion, alleging newly discovered evidence. Although a *pro se* filing, it was a legally authorized proceeding by law and could not be counted in determining whether he was abusing his right to *pro se* access to the court, as incorrectly suggested to this Court by Mr. Patti. (The Court issued a show cause order but based on the motion's facial insufficiency, it was voluntarily dismissed by Appellant/Petitioner.)

Behrens v. State, 4D17-1938 refers to a Petition for Writ of Mandamus proceeding requesting timely rulings by the lower court and/or State's response. Although a *pro se* filing, it was NOT a legally authorized proceeding by law, and CAN be counted in determining whether he was abusing his right to *pro se* access to the court, as correctly suggested to

this Court by Mr. Patti. (The Petition was stricken by this Court and transferred to the lower court.)

Behrens v. State, 4D20-1851 refers to a Petition for Writ of Mandamus proceeding, requesting the removal of the presiding judge. Although a *pro se* filing, it was a legally authorized proceeding by law pursuant to Rule 9.141, Fla.R.App.P., and could not be counted in determining whether he was abusing his right to *pro se* access to the Court, as incorrectly suggested to this Court by Mr. Patti. (This Court granted the petition and the judge was removed.)

In sum, these twenty-one (21) challenges that Mr. Patti has referred to in his Response, four (4) of the involved representations made by prior attorneys, in reference to one (1) direct appeal, one (1) Rule 3.850(a) motion, one (1) Rule 3.800(a) motion and one (1) criminal habeas corpus proceeding. None of these were *pro se* filings. They were all legally authorized by law and could not be counted in determining whether the Appellant was abusing his right to *pro se* access to the courts.

Seven (7) of these filings involved *pro se* representation, in reference to the lower court and/or the State not performing their ministerial duties, via petitions for writ of mandamus. In four (4) of them, the Court issued show cause orders to the parties in question, although eventually

dismissing the as moot after the parties complied with what was requested of them. One (1) of these filings was dismissed by the Clerk, as unauthorized. See case number 4D17-2938. One (1) was stricken by the Court and transferred to the lower court, and the last one (1) was granted by the Court. Thus, six (6) of them were legally authorized by law and could not be counted in determining whether the Appellant was abusing his right to *pro se* access to the courts.

Ten (10) of these filings involved *pro se* representation, in reference to postconviction relief proceedings. On e(1) of them is a petition for ineffective assistance of appellate counsel pursuant to Rule 9.141, Fla.R.App.P. The Court issued a show cause order but ultimately denied relief. One (1) of them is a motion requesting DNA testing pursuant to Rule 3.853, Fla.R.Crim.P. The Court issued a show cause order but ultimately *per curiam* affirmed. One (1) of them is a petition for a belated appeal pursuant to Rule 3.850(a), Fla.R.Crim.P. The Court issued a show cause order but ultimately *per curiam* affirmed. One (1) of them is a motion alleging newly discovered evidence pursuant to Rule 3.850(b)(1), Fla.R.Crim.P. The Court issued a show cause order but the Appellant voluntarily dismissed it before any ruling was made. Two (2) of them are criminal habeas corpus petitions pursuant to Rule 9.141, Fla.R.App.P.,

which were denied by the Court. Three (3) of them are motions alleging illegal sentences pursuant to Rule 3.800(a), Fla.R.Crim.P. All of them were *per curiam* affirmed by the Court, but on the last one, case number 4D17-273, the Court issued a warning about frivolous filings. Thus, nine (9) of them were legally authorized by law and could not be counted in determining whether the Appellant was abusing his right to *pro se* access to the courts.

Even though Appellant's current *pro se* Rule 3.850(b)(1) motion was not included in the above-mentioned list of all the filings made by the Appellant, it is important to clarify to this Court that this motion met the exception to the limitation rule, as it was predicated on the claim of newly discovered evidence. On the other hand, contrary to the State's allegations made at the lower court's level, that this motion was procedurally barred as successive and untimely. Postconviction relief is available to prisoners filing within the exceptions of the rule governing newly discovered evidence claims. For this reason, Mr. Patti, in good faith, could not have suggested to this Court nor should this Court consider or use the Appellant's current *pro se* Rule 3.850(b)(1) motion in prohibiting him from filing further motions, simply because the current 3.850(b)(1) motion raised a claim for relief which is permissive to be filed outside the two-year statute of limitation

period, as long as it is filed within two years from the time the newly discovered evidence was found to be in existence.

More to the point, in considering when the newly discovered evidence was found to be in existence in this particular case, it would be wise pointing out to the Court that it was the State of Florida who on October 27, 2016 submitted its "NOTICE PURSUANT TO RULE 3.220(b)(4)" alerting the Appellant that on April 12, 2016 the Broward Sheriff's Office (BSO) DNA Crime Law was advised by the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD) that there was in appropriate use of DNA calculations made by the Broward County's DNA Crime Laboratory.

On a later day, the Appellant was informed that the actual ASCLD report additionally revealed, that multiple BSO Crime Lab analysis practices were incorrect and that the Crime Lab mishandled, misinterpreted, and miscalculated samples that contain DNA from more than one person. Then, as the Appellant was in the middle of investigating the BSO Crime Lab's allegations, it was also discovered that on December 24, 2016, BSO Crime Lab DNA consultant, Dr. Martin Tracey, was terminated form his 33-year job as a teacher at the Florida International University (FIU) amid

accusations of bias, racism, sexism and particularly because his regular comments about drones and planting DNA evidence.

However, since the sole inculpatory evidence in this case involves a single stain of seminal fluid allegedly found on a bed sheet containing DNA that was handled exclusively by BSO Crime Lab (DNA technician Donna Marchese) and DNA consultant Dr. Martin Tracery. The Appellant immediately made contact with the DNA forensic expert, Ms. Tiffany Roy. After she reviewed the pertinent DNA documents in this case, Ms. Roy offered the Appellant her professional pro bono assistance. Thus, it was the above-stated October 27, 2016 State's notification – about BSO Crime Lab mishandling DNA evidence and Dr. Tracey's December 24, 2016 accusations of misconduct, what prompted the Appellant to file the current claim under newly discovered evidence.

Nevertheless, the State of Florida took almost three years to respond to the Appellant's allegations. And when the State finally responded and provided the relevant and necessary DNA documentation, Ms. Roy immediately wrote her own independent report unambiguously requesting DNA testing in this particular case. The lower court summarily denied the Appellant's "actual innocence" claim and totally ignored the DNA expert's repot explicitly requesting for DNA testing. The Appellant timely appealed

to this Court and on July 22, 2021, the Court *per curiam* affirmed without reaching the merits of the Appellant's five (5) years pending claim of actual innocence / manifest injustice. This Court's silent opinion, of course, leaves the Appellant again without the opportunity of testing the DNA evidence requested and with the seriously high probability of having him severely sanctioned by not being allowed to file another *pro se* motion in the courts ever again.

However, back on track, assuming the one petition for writ of mandamus that the Appellant filed under case number 4D17-2938 was to be counted also by the Court as another unlawful filing because it was in fact stricken and dismissed by the Clerk as unauthorized, it still places the Appellant as having just two (2) unlawful challenges – out of twenty-one (21) filings in over two decades time period.

Appellant also argues, with faith and confidence, to this Court that Mr. Patti also incorrectly counted and relied on the Appellant's three (3) *pro se* Rule 3.800(a) motions in concluding that Appellant had abused his right to *pro se* access to the court by repeatedly attacking his sentences. Nevertheless, Florida Rules of Criminal Procedure Rule 3.800(a) allows for the filing of multiple motions. See *Casey v. State*, 276 So.3d 343, 344 (Fla. 1st DCA 2019). Such motions cannot be classified as successive or

repetitive unless they raise claims for relief that were previously raises and addressed on the merits. See *State v. McBride*, supra.

Under the facts and circumstances of the instant case, only one (1) of the Appellant's three (3) *pro se* Rule 3.800(a) motions filed in the last 21 years did in fact raise successive or identical claims for relief. However, this Court timely warned him about filing frivolous pleadings. See case number 4D17-273. The record then unambiguously shows that Appellant's additional two (2) *pro se* Rule 3.800(a) motions filed in this case did claim totally different sets of sentencing illegalities. And the trial court, for each one of the individual reasons stated in each one of the different State's responses – opposing the Appellant's arguments, denied these motions to correct illegal sentence on the merits of each individual motions' claim for relief.

Inasmuch that Rule 3.800(a), correctly interpreted, afforded Appellant the right to file multiple motions raising different illegal sentence claims for relief, Appellant's multiple motions to correct illegal sentences were all authorized by law – with the exception of the one he was warned against frivolous pleading, and should not have been the reason for Mr. Patti's suggesting this Court for sanctions nor should be counted by this Court to

reach its determination that Appellant's repetitious filings abused his right to *pro se* access to the court.

This is equally true as to Appellant's Rule 3.850(a), 3.850(b)(1), and 3.583 motions pursuant to Fla.R.Crim.P., and his Rule 9.141(d)(5) petitions pursuant to Fla.R.App.P. – which Florida laws afforded the Appellant a right to file. Although each one of Appellant's claims for relief raised in the multiple combined litigations he has brought to the courts were unsuccessful on their merits, he had exercised his legal right afforded him under Florida laws to petition the courts of redress and should not now be penalized from filing future *pro se* motions by doing so.

The Appellant respectfully asserts that the Court's *pro se* sanction order would be unfair under the facts and circumstances of this case. In his *pro se* plight for just constantly arguing actual innocence and trying to correct a Manifest injustice, the Appellant should not be penalized and sanctioned by this Court for filing legally authorized Rule 3.800(a) non-successive motions to correct illegal sentences and Rule 3.850(a), 3.850(b)(1) and 3.853 motions collaterally attacking his convictions. The laws of Florida permitted Appellant to exercise remedial filing rights. Hence, the Appellant prays this Court does not impose such extreme sanctions upon him.

2.) WHY APPELLANT SHOULD NOT BE REFERRED TO PRISON OFFICIALS FOR DISCIPLINARY PROCEEDINGS?

Because Appellant's limited number of *pro se* Rule 3.800(a), 3.850(a), 3.850(b)(1), and 3.853 motions, filed in good faith over a period of over 21 years, does not rise to the level of abuse of his right to *pro se* access to the courts, either independently or collectively, and does not warrant the extreme sanction this Court is planning to impose.

Florida courts have long ago recognized the need for judicial economy and the importance of curtailing the egregious abuse of judicial process. See *Spencer v. State*, 751 So.2d 47 (Fla. 1999); *Gaston v. State*, 141 So.3d 627 (Fla. 4th DCA 2014); *Bivens v. State*, 35 So.3d 67 (Fla. 1st DCA 2010); *Mims v. State*, 994 So.2d 1233, 1239 (Fla. 3d DCA 2008) (noted that trial and appellate courts need(s) [sic] to concentrate on serious legal claims, not matters already adjudicated).

While this Court does not condone the filing of numerous frivolous petitions and motions by a *pro se* serial filer, see e.g., *McCutcheon v. State*, 44 So.3d 156 (Fla. 4th DCA 2010), the Court has already observed that barring a criminal *pro se* litigant form filing future petitions has been described as an "extreme remedy" which should be reserved for those litigants how have repeatedly filed successive, frivolous and meritless

claims where were not advanced in good faith. For example, the prisoner in *Atwood* was found to have abused the judicial system by relentlessly filing 100-plus petitions and appeals. See *Attwood v. Singletary*, 661 So.2d 1216 (Fla. 1995). See also *McCutcheon*, supra ("initiated at least 50 cases" in the District Court of Appeal alone).

In *Gaston* this Court carved out of the *pro se* sanction rule an equity principle that "there is not bright line rule on the maximum number of filings a *pro se* litigant can make before he is barred." *Id.* 141 So.3d at 629. The defendant in *Gaston* had filed only three *pro se* postconviction relief motions attacking his convictions and sentences imposed pursuant to a plea agreement made with the State. This Court reversed the *pro se* sanction order, finding that the three *pro se* filings did not justify such a serious sanction. *Id.*

The equity principle seemingly established in *Gaston* was later applied by the Third District Court in *Garcia v. State*, 212 So.3d 479 (Fla. 3d DCA 2017). Over a 16-year period, the defendant in *Garcia* had filed a total of three postconviction motions, one of which was filed by an attorney. The Third District reversed the *pro se* sanction order entered by the trial court after finding that three *pro se* filings over a 16-year period did not amount to an egregious abuse of process by Garcia. *Id.*

Turning to the facts of this particular case, the reason articulated by Mr. Patti and adopted by this Court in support of the intended sanctions is "that the Appellant has filed multiple frivolous challenges to his convictions and sentences in Broward County case number 98-5739CF10A and has been warned against frivolous filing in case number 4D17-273." However, as previously discussed in the first question of this Response, all the challenges with the exception of two (2) of them were permissibly successive, had been filed in good faith and not meriting sanctions.

Thus, discounting the four (4) legally authorized litigations made by attorneys, including his direct appeal proceeding; the six (6) out of seven 7) petitions for writ of mandamus, and the nine (9) out of ten (10) combined Rule 3.800(a), 3.850(a), 3.850(b)(1), and 3.853 motions, and Rule 9.141 petitions which were properly filed in accordance with Florida's laws. Appellant submits to this Court that his remaining one (1) Rule 3.800(a) motion and, in particular his one (1) petition for writ of mandamus which was stricken and transferred by the Clerk as unauthorized, filed over a 21-year period, are too limited in numbers to support the intended finding of this Court that Appellant had abused his right to *pro se* access to the courts.

The Court seemed to have weighed on the fact that all of Appellant's *pro se* challenges have been denied and affirmed on appeal. However, a *pro se* litigant's guessing wrong in litigation and being unsuccessful is not the type of filing misconduct envisioned in *Spencer*, supra. See also *Goldman v. Campbell*, 920 So.2d 1264, 1273 (Fla. 4th DCA 2006). Therefore, sanctioning the Appellant with disciplinary proceedings because he filed a limited number of *pro se* relief motions over a 21-year period would be too extreme.

CONCLUSION

WHEREFORE, based upon the facts and circumstances of this case and the legal arguments presented in this Response, Appellant prays that this Court reconsiders its extremely severe order of sanctions barring this indigent Appellant form filing further *pro se* pleadings in circuit court case number 98-5739CF10A.

Respectfully Submitted,

/s/

Ernesto Behrens, DC# 732564
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1150 SW Allapattah Road
Indiantown, FL 34956

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was placed into a prison official's hands for mailing via USPS First-Class Mail to: Clerk of Court, 110 South Tamarind Ave., West Palm Beach, FL 33401; and Attorney General's Office, 1515 N. Flagler Drive, Ste. 900, West Palm Beach, FL 33401 on this 9th day of August, 2021.

/s/
Ernesto Behrens, DC# 732564
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Indiantown, FL 34956

CERTIFICATE OF COMPLIANCE

I CERTIFY that this document complies with the font and word count limit requirements of Fla.R.App.P. Rule 9.045.

/s/
Ernesto Behrens, DC# 732564