

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

ERNESTO BEHRENS,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

Case No. 4D21-1039

**RESPONSE TO MOTION TO RELINQUISH JURISDICTION; AND
NOTICE OF ABUSE OF THIS COURT'S PROCESS**

Appellant appeals an order denying his Fla. R. Crim. P. 3.850 motion alleging various collateral attacks on his conviction and sentence. See (R¹ 1-128).

Appellant moves this Court to relinquish jurisdiction for the circuit court to enter an order on his "Motion for a Court Order Compelling The BSO Crime Lab To Release All DNA Testing Conducted In This Case (RFLP/PCR) To Be Reviewed And Inspected By Defendant's DNA Consultant, Tiffany Roy." (M 3-5).

¹ R = Record on Appeal filed on March 11, 2021; M = Appellant's motion to supplement the record. Ex. = Attached exhibits to this Response. **Emboldened** emphasis is added unless otherwise stated.

The State **staunchly objects** to relinquishment of jurisdiction for this purpose.

First, this Court lacks jurisdiction to review any order on such motion because such order would be void. Appellant moved the circuit court, in his pre-existing criminal case, to compel the Broward Sherriff's Office to release DNA tests conducted in this case after Appellant attempted a public records request under § 119.07, Fla. Stat. See (Ex. 1).² Such a motion³ cannot be entertained in a pre-existing criminal case.

Florida has made it a public right to inspect public records and proclaims its official policy as: "[A]ll state, county, and municipal records are open for personal inspection and copying by any person. Providing access to public records is a duty of each agency." § 119.01, Fla. Stat.

² The motion was not included in the record on appeal but is included as an appendix to this response for this Court's reference.

³ Fla. R. Crim. P. 3.853 and §§ 925.11, 925.12, Fla. Stat. do **not** apply to Appellant's motion to compel the Broward Sheriff's Office to release all DNA testing because it was **not** seeking to test the physical evidence in this case for DNA but was instead seeking documents related to the Broward Sheriff's Office's testing. Nor would Appellant's motion be facially sufficient to seek such relief. Compare id. with (Ex. 1).

However, the procedures enacted under Ch. 119 contemplate an **original cause of action** in which to assert deprivation of such rights. See § 119.11, Fla. Stat. (accelerated hearings after filing of “an action” and prohibition on transfer, destruction or alteration of documents “[u]pon service of a complaint, counterclaim, or cross-claim in **a civil action** brought to enforce the provisions of” Ch. 119).

The Fifth District Court of Appeal (‘5th DCA’) dealt with a comparable case where Claudio filed a criminal mandamus petition “to compel the Clerk of Court of Volusia County to accept for filing a ‘petition for accelerated hearing’ of a public records request that he claim[ed] to have delivered to the clerk.” Claudio v. Clerk of Circuit Court, Volusia Cty., 128 So. 3d 830, 831 (Fla. 5th DCA 2013); see also Claudio v. Clerk of Circuit Court, Volusia Cty., Case Docket, 5D13-1801 (docket indicating the case was a “Criminal Mandamus Petition from Volusia County”).

The 5th DCA found:

[T]he filing of a “petition for accelerated hearing” is **not sufficient to commence a civil action** under section 119.11. **The statute contemplates a complaint, counterclaim or cross-claim.** Although the

filing of a motion for accelerated hearing is not precluded, and may even be prudent, it is not a substitute for the filing of a complaint for enforcement of the public records law.

Claudio, 128 So. 3d at 832 (internal citation omitted). The petition was granted to the extent that the clerk was directed to treat the filed petition as a complaint to initiate the appropriate proceedings and the court withheld the writ. Id.

This holding is extremely logical because criminal defendants who fail to avail themselves of proper procedures to litigate a right in the trial court should not expect to benefit from consideration on appeal. C.f., e.g., Ferguson v. State, 417 So. 2d 639, 641 (Fla. 1982) (finding issue unpreserved stating: “[e]ven if the comment is objectionable on some obvious ground, the proper procedure is to request an instruction from the court that the jury disregard the remarks.”).

This Court, much like in Claudio, is asked to accept Appellant’s motion filed in his pre-existing criminal case, 98-5739 CF10A, as tantamount to independent “action[s] for mandamus or other appropriate relief” as envisioned by Chapter 119.

Accordingly, even if the circuit court entered an order on Appellant's motion, this Court would still lack jurisdiction to review the motion on appeal as Appellant failed to follow proper procedures for receiving relief and his motion is void. The State therefore **objects** to relinquishing jurisdiction for entry of an order on Appellant's improperly filed motion.

Second, the asserted motion bears no relevance to this appeal. The Broward Sheriff's Office compliance with Florida's public records law is wholly irrelevant to the propriety of Appellant's conviction and sentence. While Appellant futilely attempts to intertwine the issues by interjecting matters outside the record of either this Court and the circuit court by noting "concerns" about the DNA of his allegedly retained analyst Ms. Tiffany Roy.

The Broward Sheriff's Office compliance with public records laws neither proves nor disproves any of Appellant's claims presented in his Rule 3.850 motion filed below or on appeal in this Court. Appellants various unsupported assertions to move this Court to relinquish jurisdiction are based on nothing more than conjecture and should be disregarded. Spencer v. State, 842 So. 2d 52, 63 (Fla. 2003) ("Reversible error cannot be predicated on such

conjecture.”). The State therefore **objects** to relinquishing jurisdiction for entry of an order on Appellant’s improperly filed motion.

Third, the Broward Sheriff’s Office was neither a party below nor has been given the opportunity to be represented on its position regarding Appellant’s improperly filed motion. Appellant cannot pursue claims in this Court that directly impact a party that was neither represented nor made a party below. See Naghtin v. Jones By & Through Jones, 680 So. 2d 573, 575 (Fla. 1st DCA 1996) (“He was not a party below; he cannot be a party to this appeal.”) (quoting Diehl v. United States, 438 F.2d 705, 711 (5th Cir. 1971)).

The State is mindful of other cases that have led to confusion on this issue and offers some clarification. In Matos v. Office of State Attorney for Seventeenth Judicial Circuit, 80 So. 3d 1149 (Fla. 4th DCA 2012), undersigned’s office represented the State Attorney’s Office in a Ch. 119 mandamus case to set an “immediate” hearing as set out in § 119.11, Fla. Stat. Id. at 1149. That case is distinguishable because the case originated--properly--from an underlying civil case “11CA16613” and was directly against

the State Attorney's Office, which undersigned's office does represent on appeal. See id.

Further, this Court's Minasin appears to have misinterpreted the right to seek mandamus for public records in a preexisting criminal case. See Minasian v. State, 967 So. 2d 454, 455 (Fla. 4th DCA 2007) (relying heavily on Radford v. Brock, 914 So. 2d 1066, 1068 (Fla. 2d DCA 2005), and Mathis v. State, 722 So. 2d 235, 236 (Fla. 2d DCA 1998)). Both Radford and Mathis originated from civil proceedings and were **not** filed in a preexisting criminal case. See Mathis v. State, 2D97-327 Docket ("**Civil** Mandamus Petition from Hillsborough County"); Radford v. Brock, 2D04-3515 Docket ("Final **Civil** Other Notice from Collier County"). Put simply, these cases did **not** grant license for criminal defendants to seek public records from various state agencies--many of whom are **not** parties to the proceeding at all--in their preexisting criminal cases.

Defendants must institute new civil proceedings to obtain public records from any state agencies. Adjudicating such claims without proper service of process on the proper parties, without the rights of being made a party to a case, and without the opportunity to obtain counsel to adjudicate such claims are patently

inconsistent with the basic rights of due process for these agencies. See Vill. of Key Biscayne v. Dep't of Env'tl. Prot., 206 So. 3d 788, 792 (Fla. 3d DCA 2016) ("It is a fundamental precept in our jurisprudence that due process must be afforded **all litigants** in judicial and quasi-judicial proceedings.") (citing Dept. of Law Enforcement v. Real Property, 588 So. 2d 957, 960 (Fla.1991)). The State therefore **objects** to relinquishing jurisdiction for entry of an order on Appellant's improperly filed motion.

Accordingly, Appellant's motion to relinquish is clearly an attempt to obfuscate the true issues regarding his Rule 3.850 motion and should **not** be entertained.

ABUSE OF PROCESS

Appellant is no stranger to abusing this Court via relentless legal filings. Since he was convicted and sentenced, Appellant has instituted an immense amount of appeals to this Court regarding his felony offenses. See Behrens v. State, 4D00-4484; Behrens v. State, 4D04-1055; Behrens v. State, 4D04-2277; Behrens v. State, 4D04-4153; Behrens v. State, 4D04-4156; Behrens v. State, 4D05-1373; Behrens v. State, 4D05-4404; Behrens v. State, 4D07-836; Behrens v. State, 4D08-958; Behrens v. State, 4D08-3291; Behrens

v. State, 4D09-4736; Behrens v. State, 4D10-1041; Behrens v. State, 4D10-2462; Behrens v. State, 4D11-3044; Behrens v. State, 4D14-1958; Behrens v. State, 4D16-219; Behrens v. State, 4D16-2586; Behrens v. State, 4D17-273; Behrens v. State, 4D17-1848; Behrens v. State, 4D17-2938; Behrens v. State, 4D20-1851.

Despite being first warned by this Court against frivolous filings in 2017, see 4D17-273, 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.

Now, in this case, he follows an increasing trend of pro se filings utilizing Florida's public records law to abuse the judicial process of this Court and disguise or confuse the true issues in their pleadings. See Jackson v. State, 4D16-2491; Jackson v. State, 4D19-2692; Jackson v. State, 4D20-2802; Jackson v. State, 4D20-2366; Jackson v. State, 4D21-709; Da Silva v. State, 4D19-784; Da Silva v. State, 4D20-927. This Court must end this puzzling trend.

Appellant's complete disregard for the procedures of Ch. 119 and inundating this Court with filings:

[I]s irrefutable evidence before us that appellant has no understanding of the appellate process and, further, that he is unwilling or unable to acquire such knowledge. Instead, he is content to place a substantial burden on the resources of this court by his persistent filing of notices of appeal, petitions for extraordinary writ, and pleadings, all of which produce no meaningful result.

Peterson v. State, 817 So. 2d 838, 840-41 (Fla. 2002); see also Nilio v. State, 172 So. 3d 557, 558 (Fla. 1st DCA 2015) ("Petitioner's continued practice of inundating the court with redundant and excessive petitions, appeals, and motions has wasted judicial resources and unnecessarily delayed the ultimate resolution of his case.").

In light of Peterson and Nilio, the State notifies this court that Appellant has proven an undeniable burden on this Court and should be barred from further filings **in all cases**; if not signed by a licensed member of the Florida Bar. See Nilio, 172 So. 3d at 558 ("if petitioner continues to engage in abusive filings, the Court may

prohibit him from appearing as a litigant in this court unless represented by counsel.”).

Accordingly, this Court should consider barring Appellant from further pro se filings under § 944.279, Fla. Stat. See State v. Spencer, 751 So. 2d 47 (Fla. 1999); Marc v. State, 46 So. 3d 1045, 1046 (Fla. 4th DCA 2010) (“given the possibility of sanctions, prisoners should ‘stop and think’ before filing frivolous collateral criminal challenges or appeals.”); Wimberly v. State, 50 So. 3d 785, 788 (Fla. 4th DCA 2010) (same).

CONCLUSION

Based on the foregoing arguments and authorities, Appellee requests that this Court DENY Appellant’s motion to relinquish and consider prohibiting Appellant from filing further pro se filings.

ASHLEY MOODY
ATTORNEY GENERAL
Tallahassee, Florida

/s/ Paul Patti, III
PAUL PATTI, III
Assistant Attorney General
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Counsel for Appellee

CERTIFICATE OF SERVICE

I CERTIFY that on April 23, 2021, I electronically filed the foregoing document with the Clerk of the Court using the Florida Courts e-filing Portal and it is being served on all counsel of record or *pro se* parties identified in the attached Service List either via the Florida Courts e-filing Portal or in another authorized manner for counsel or parties not authorized to receive electronic filing.

/s/ Paul Patti, III
PAUL PATTI, III
Assistant Attorney General

SERVICE LIST

Ernesto Behrens, DC# 732564
Martin CI
1150 S. W. Allapattah Road
Indiantown, Florida 3495

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

ERNESTO BEHRENS,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

Case No. 4D21-1039

INDEX TO APPENDIX

Exhibit 1: Motion for a Court Order Compelling the Bso Crime Lab to Release All DNA Testing Conducted in This Case (RFLP and PCR) to Be Reviewed and Inspected by Defendant's DNA Consultant, Tiffany Roy; 3/5/19

CERTIFICATE OF SERVICE

I CERTIFY that on April 23, 2021, I electronically filed the foregoing document with the Clerk of the Court using the Florida Courts e-filing Portal and it is being served on all counsel of record or *pro se* parties identified in the attached Service List either via the Florida Courts e-filing Portal or in another authorized manner for counsel or parties not authorized to receive Notices of Electronic Filing.

/s/ Paul Patti, III
PAUL PATTI, III
Assistant Attorney General

SERVICE LIST

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Respectfully Submitted,

ASHLEY MOODY
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Tallahassee, Florida

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Counsel for Appellee

PROVIDED TO MARTIN
CORRECTIONAL INSTITUTION
ON 2/14/19
FOR MAILING

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

STATE OF FLORIDA,
Plaintiff,

v.

Case No.: 98-5739CF10A

ERNESTO BEHRENS,
Defendant. /

**MOTION FOR A COURT ORDER COMPELLING THE BSO CRIME LAB
TO RELEASE ALL DNA TESTINGS CONDUCTED IN THIS CASE
(RFLP AND PCR) TO BE REVIEWED AND INSPECTED BY
DEFENDANT'S DNA CONSULTANT, TIFFANY ROY**

COMES NOW, the Defendant, Ernesto Behrens, *pro se*, and respectfully moves this Honorable Court for a Court Order Compelling the BSO Crime Lab to Release All DNA Testings Conducted in this Case (RFLP And PCR) to be Reviewed and Inspected by Defendant's DNA Consultant, Tiffany Roy, pursuant to applicable Fla.R.Crim.P. and Section 943.325(14), Fla. Stat. (2018). In support thereof, the Defendant states as follows:

1. On January 7, 2019, the BSO Crime Lab refused to provide the Defendant with the following requested and necessary information related to DNA analysis conducted in this case. The Defendant's Public Request pursuant to Section 119.07, Fla. Stat. (2018), requested in part:
 - a. The Analyst Case File;
 - b. The Electropherograms (or equivalent) from the testing;

- c. All printouts and worksheets from the serology testing (findings of body fluids);
 - d. All DNA testing process;
 - e. Any calculations made by Broward Sheriff's Office Analyst to convey a frequency of the DNA profile obtained from the evidence;
 - f. Inclusion of language regarding sample consumption or documentation of the presence and availability of sample remaining for testing in every report made;
 - g. Recording and reporting (in writing) of all inquiries, efforts and contacts made by law enforcement personnel regarding this case;
 - h. How many cases did Ms. Marchese actually test utilizing the RFLP methodology between October 1993 and October 1997;
 - i. How many of those cases Mr. Marchese tested, resulted in a "local match" hit obtained by the DNA Computer Database.
2. The Defendant's DNA consultant, Tiffany Roy, needs to review and inspect the above requested information before she can render a professional opinion in this case.

3. The BSO Crime Lab denied the request citing Section 934.325(14), Fla. Stat.

(2018). This section of the statute states, in pertinent part:

(14) Results – The results of a DNA analysis and the comparison of analytic results shall be released only to criminal justice agencies as defined in s.943.045 at the request of the agency. Otherwise, such information is confidential and exempt from s.119.07(1) and s.24(a), Art. I of the State Constitution.

Also, Section 943.045, Fla. Stat. (2018) defines in pertinent part:

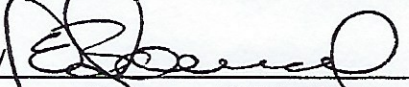
(11) “Criminal Justice Agency” means:

- a. A court
- b. ...
- c. ...
- d. ...
- e. ...

4. Since Section 943.045 defines the court as one of the “Criminal Justice Agencies” authorized to request the results of the DNA analyses and the comparison of analytic results obtained in DNA case, the Defendant does respectfully move this Honorable Court to request the BSO Crime Lab to release the requested information to be provided to the Defendant’s DNA consultant, Tiffany Roy, for the sole purpose of reviewing and inspecting all DNA testings that were conducted in this case. Without the requested information stated in this pleading, the DNA consultant cannot render her professional opinion about the DNA testings conducted herein.

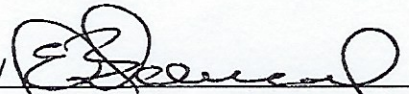
WHEREFORE, the Defendant prays this Honorable Court grants the relief sought and orders the BSO Crime Lab to release the requested information to the Defendant's DNA consultant, Tiffany Roy, for the sole purpose of reviewing and inspecting the results of the DNA analysis and the comparison of analytical results obtained by BSO Crime Lab in this case.

Respectfully Submitted,

/s/ 
Ernesto Behrens, DC# 732564

OATH


Under penalties of perjury and administrative sanctions from the Department of Corrections, including forfeiture of gain time if this Motion is found to be frivolous or made in bad faith, I certify that I understand the contents of the foregoing Motion, that the facts contained in the Motion are true and correct, and that I have a reasonable belief that the Motion is timely filed. I certify that this Motion does not duplicate previous motions that have been disposed of by the court. I further certify that I understand English and have read the foregoing Motion or had the Motion read to me.

/s/ 
Ernesto Behrens, DC# 732564

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion was placed into a prison official's hands for mailing via U.S. first class mail to: State Attorney's Office, Michael J. Zats, Postconviction Unit, 201 S.E. Sixth Street, Fort Lauderdale, Florida 33301, on this 12th day of February, 2019.

Respectfully Submitted,

/s/ 

Ernesto Behrens, DC# 732564
Martin Correctional Institution
1150 SW Allapattah Rd.
Indiantown, FL 34956

MARCH 1, 2019

ATTN: CLERK OF COURT DEPUTY

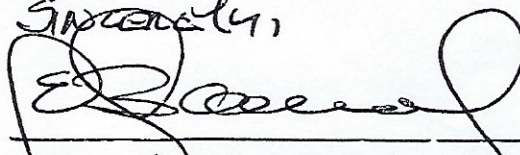
RE: ERNESTO BETHLENS CASE NO: 98-5739 CF 10 A.

DEAR DEPUTY CLERK,

ON FEBRUARY 12, 2019, I SUBMITTED THIS ATTACHED MOTION TO BE FILED IT WITH THE COURT. IT APPEARS TO ME THAT IT NEVER MADE IT THERE BECAUSE AS TO FEBRUARY 28, 2019 THE DOCKET DOES NOT DEPICT IT AS FILED. SO HERE I AM SUBMITTING A COPY OF THAT MOTION TO BE PROPERLY FILED.

THANK YOU FOR YOUR ASSISTANCE IN THIS MATTER.

Sincerely,



ERNESTO BETHLENS, DCA #73284

ERNESTO BERRANS, DLT# 732564 (A-11040)
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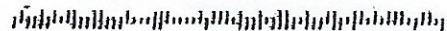
ATTN: CLERK OF COURT
BROWARD COUNTY MAIN COURTHOUSE
201 SE. 6TH STREET
FORT LAUDERDALE, FLORIDA. 33301

PROVIDED TO MARTIN
CORRECTIONAL INSTITUTION
ON 03/01/2019
FOR MAILING

EM.

LEGAL MAIL

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