

SWORN AFFIDAVIT

**Mr. Ernesto Behrens-732564 [G-1110U]
Calhoun Correctional Institution
19562 S.E. Institution Drive
Blountstown, Florida 32424**

TO: The Seventeenth Judicial Circuit Court In And For Broward County, Florida

REF.: STATE OF FLORIDA v. ERNESTO BEHRENS CASE NO.: 98-5739 CF10A

To The Honorable Court,

This sworn affidavit is being submitted in conjunction with the instant DNA Post Conviction Motion in support of and to notify this Honorable Court of such material witnesses are willing to corroborate via testimonial statement [s] as to the specific facts therein the instant (DNA) motion.

1. On December 17, 1999 an "Arthur" hearing was held where the Honorable Judge: Ronald J. Rostchild presided over, this specific hearing.
2. During this "Arthur" hearing there were several key individual [s] present, and they are listed as follows: State Attorney- Mr. Dennis Siegel, State's Expert Witness- Serologist- Ms. Donna Marchese, Honorable Court's Bailiff- (Male), Defense Attorney-Mr. Ty Terrel and Ms. Andrea Shelowitz, and the defendant- Mr. Ernesto Behrens.
3. During such review of the specific evidence that the State of Florida intended to present at trial. There was a conversation that ensued between the State's Expert Witness Ms. Donna Marchese and the defense concerning a specific exhibit, a spot cut from the" victim's fitted sheet."
4. Ms. Donna Marchese, Serologist, made the following statement:

"While using my microscope I was able to find one (1) spermatozoa cell, that was entwined into the fiber of the fitted sheet". She further stated the she pulled the cell from the fabric, and performed a (RFLP) DNA testing. That resulted into a match of this defendant's DNA make-up.
5. In preparation of my post-trial DNA motion I have been able to obtained sworn statement [s] from the DNA/ Forensic Community. That has stated it is scientifically impossible to conduct a (RFLP) DNA testing with a single spermatozoa cell. Indicating apparent variance to the State's Expert witness testimony' resulting into "questionable" evidence in this instant case.

6. Hereafter, I contacted Mr. Ty Terrel, my trial attorney on September 5, 2003 round about [1:40 p.m.] by phone, inquiring as to his recollection of the 12-17-99 "Arthur" hearing. Upon him affirming that he recall such proceeding, I further inquired as to his specific recollection of the State of Florida's Expert Witness specific testimony pertaining to the spermatozoa cell that was allegedly a "match" to my (DNA) make-up?

7. Mr. Ty Terrel, quoted back to me via this phone call essentially verbatim as to Ms. Donna Marchese previous testimony, however, Mr. Terrel used words and phrases during our call such as i.e.:

"I clearly remember talking about testing one (1) single spermatozoa cell, and how it the (cell) was intertwined within the fabric of the sheet and her using a microscope to pull the cell from... But, as to Ms. Marchese exact words that she used during the latter portion of her statement then...I (Mr. Terrel) cannot remember."

8. Also, see attached correspondence dated October 6, 2003, where Mr. Terrel has stated the following:

"Ernesto, I clearly remember talking about testing one (1) single spermatozoa cell, and how it the (cell) was intertwined within the fabric of the sheet..."

9. The defendant now states to this Honorable Court that based upon such holding and whereas the defendant continuously asserts his innocent to this specific crime. Not to exclude that the (DNA) community as a whole does not agree with the particularities proffered by the State of Florida's Expert Witness pertaining to the facts of such procedural tested. See attached sworn affidavit.

9. Also, whereas Mr. Ty Terrel and Ms. Andrea Shelowitz, Attorneys-at-Law, located at 1801 S. Perimeter Road Suite 180, Fort Lauderdale, Florida 33309. Will proffer their individual and professional recollection ... of the State of Florida's Expert testimony if this court requires it.

10. This sworn affidavit is being submitted to this Honorable Court in good faith and to provide the court such opportunity to subpoena the defendant's witnesses if so required.

Respectfully Submitted


Ernesto Behrens, #732564

NOTARY

Before, me the undersigned authority, this day personally appeared, Ernesto Behren
Who first being duly sworn, stated that he is the individual that has provided the information
herein, and such facts are true. Thereby, certifying that the forgoing has been thoroughly read and
having personal knowledge of the facts herein are true and correct.

/S/ Ernesto Behren

Sworn to and subscribed before me this 22nd day of October 2003.

/S/ Thomas M. Woodham

My Commission Expires: 9-9-07

Notary No.: DD248679

Notary Public, State of FLORIDA

Type of identification used? Personally known _____, or produced identification ✓

Department of Correction
Inmate In



Thomas M. Woodham
Commission #DD248679
Expires: Sep 09, 2007
Bonded Thru
Atlantic Bonding Co., Inc.



SHELOWITZ, SHELOWITZ & TERRELL, P.A.

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MARC A. SHELOWITZ*
ANDREA SHELOWITZ
TY TERRELL
DONALD GEUN
ANDREW M. COFFEY
*Admitted to New York Bar

October 6, 2003

Ernesto J. Behrens
D.C. # 732564
Mailing No.: G110U
Calhoun Correctional Institution
19562 S.E. Institution Drive
Blountstown, Florida 32424

Dear Ernesto:

I am in receipt of your letter wherein you are requesting an affidavit from me regarding statements from Donna Marchese regarding spermatozoa and DNA testing. First of all, I have reviewed the statute you speak of (3.853) and feel you do have a viable claim for relief under that statute. Although I intend to help you where I can, I don't see where you need an affidavit from me in order to proceed forward with the post conviction relief.

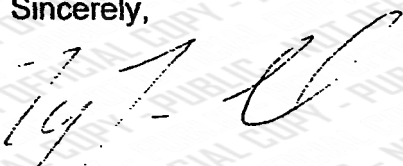
As for the affidavit, I am very uncomfortable signing an affidavit that could end up in the Supreme Court which details a conversation that I may have had with Donna Machese in 1999 when I simply don't remember the "verbatim" words she used during one of our many conversations. Ernesto, I clearly remember her talking about testing one single Spermatozoa and how it was intertwined within the fabric of the sheet, but I do not remember exactly what words she used and the rest of our conversation on the issue. I spoke with Donna Marchese several times and we spoke about DNA testing several times while viewing the sheet, both in and out of court. I can not positively remember if I first saw the sheets in court the day of the Arthur Hearing or if it was in the jail while they were being shown to you. I spent a lot of time on your case including meetings with experts, viewing the physical evidence, taking many trips to the jail, and a

week of trial and I just can not remember the specific time and place and words used when Donna Marchese was talking about the single spermatozoa.

I don't mean to be an obstacle in your quest for freedom, and I will help where I can, but the exact content of an affidavit that you want me to produce, I just can't do. On the other hand, if you want an affidavit with the information contained in this letter, I will be happy to provide you with that. Think it over and let me know if you still want an affidavit or some alternative assistance.

I am sorry this correspondence does not meet with your expectations.

Sincerely,

A handwritten signature in black ink, appearing to read 'Tyrone A. Terrell', with a stylized flourish at the end.

Tyrone A. Terrell, Esquire

September 11, 2003

EBN, INC.
MRS. HOLDER, CEO
P.O. BOX 1562
POMPANO BEACH, FLORIDA 33061
PHONE NO.: (954) 786-8619

LAB CORP, LABORATORY CORPORATION OF AMERICA
MRS. EISENBERG, PH.D
P. O. BOX 13973
1912 ALEXANDER DRIVE
RESEARCH TRIANGLE PARK, NORTH CAROLINA 27709

REF.: ON BEHALF OF MR. ERNESTO BEHRENS # 0-732564
CASE NO.: 98-5739 CF10A

SUBJ.: SWORN AFFIDAVIT / UNIVERSAL INQUIRY AS TO THE DNA PROCEDURES
/ CLARIFICATION AS TO THE DIFFERENCE IN (RFLP) DNA TESTING, AND (PCR)
DNA TESTING.

MRS. Eisenberg,

As per our recent phone conference, whereby you spoke with Mr. Behrens and myself; this correspondence is forwarded to you by EBN, INC. EBN, will be the mediator and responsible for all current and future financial requirements between Lab Corp and Mr. Behrens, holding Mr. Behrens's interest in this matter.

SUMMARY

Mr. Behrens is currently incarcerated in the State of Florida on a crime of which he is claiming his complete innocence. The State of Florida proffered in support of Mr. Behrens's conviction alleged positive DNA results derived from partial tangible evidence collected from the crime scene. Mr. Behrens did not object to the DNA evidence presented by the State of Florida, including their DNA expert's testimony. Due to defense counsel insufficiency during trial

Mr. Behrens only option now is to file a DNA Post Conviction Motion (3.853), requesting the court to grant a new DNA testing per the new (PCR) test, on the actual evidence submitted at trial; as well as the evidence collected by the State of Florida but not tested for DNA.

FACTS

In the case **STATE of Florida v. Ernesto Behrens**, case no.: 98-5739 CF10A, the defendant was formally charged with Armed Sexual Battery and Burglary of a Dwelling with a Battery on March 27, 1998. The defendant did proceed to trial and was found guilty by a jury in 2000. The State of Florida proffered to the court as evidence positive DNA results from partial evidence collected from the crime scene.

However, in Mr. Behrens's DNA Post Conviction Motion that he intends to present to the Florida 's Court as support for granting a new DNA testing on all of the evidence, with the sophisticated (PCR) test. Mr. Behrens's strategy is to illuminate the gross conflict and inconsistency as to the State's Expert Witness' Testimony and the DNA community, which transpired during a pre-trial hearing on the evidence that the State plans to proffer at trial and the evidence actually presented at trial.

The State's Expert Witness, (Broward County Crime Lab Tech), asserted that she received the victim's fitted sheets in the crime lab. During her examination for seminal fluid, she located four spots, which were assigned numeric numbers (i.e., spot-1, spot-2, spot-3 and spot-4). The State's expert witness asserted that (spot -1, spot-3 and spot-4) tested positive for seminal fluid, whereas, (spot-2) had a negative result. This witness additionally asserted that during such examination she discovered "hairs" on the victim's sheet and "dry-spots" on the victim's comforter, but did not perform any type of DNA testing on these specific items.

The expert further testified that upon a thorough examination of (spot-3 and spot-4), that she was unable to discover any DNA material on those pieces of evidence.¹ Concerning (spot-1) she stated (verbatim):

"While using my microscope I was able to find one (1) spermatozoa cell that was entwined into the fiber of the fitted sheet". She further asserted that she pulled the cell from the fabric, and performed a (RFLP) DNA testing that resulted into a match of Mr. Behrens's DNA make-up. During this testimony she explains to the jury that, **"if you were to take a single piece of DNA from a single cell and stretch it out, it would be approximately (6) feet long. Which is really kind of hard to imagine, but the body has a wonderful way of twisting and compacting it to make it fit into each and every one of our cells."**

Mrs. Eisenberg in accordance to our (9-11-03) phone conference and such clear-cut information shared during this call. Defining, spermatozoa cells and the difference in (RFLP) DNA testing as opposed to (PCR) DNA testing, also articulating the required weight and amount of cells that are needed to perform a reliable DNA test, ect...it is now imperative that I acquire the riches of your knowledge per our phone conference in a sworn written affidavit format. It has

¹ It is note worthy to point out that the State's (DNA) experts stated that spot-1 is approximately a "dime" in dimensional size, spot-3 is approximately "five" times bigger than spot-1, and spot-4 is approximately "ten" times bigger than spot-1. In spite of the exceeding dimensional size of spot-3 and spot-4, she was unable to find any (DNA) material thereon these specific spots.

become apparent that your expert statements; being highly recognizable in the DNA community, and the State of Florida's expert's testimony, have some sharp inconsistencies. Thus, resounding a prior statement quoted herein, Mr. Behrens's strategy is to illuminate the gross conflict and inconsistency as to the State's expert witness testimony in opposed to the overall DNA community.

CONCLUSION

Considering the facts of this case at hand, the State of Florida by way of their expert witness presented to the trial court to support their theory, the results from a (RFLP) test using a single spermatozoa cell to produce an alleged positive DNA match of Mr. Behrens's DNA. We now inform you that Mr. Behrens is serving a life sentence in the Florida State Prison based solely from the (RFLP) test results and the State's Expert testimony, which by the way was not corroborated by any other DNA testing or expert testimony. We must mention herein that the investigation resulted into absolutely no independent evidence, i.e. (fingerprints, palm prints, foot casting nor victim' or witnesses identification). But most importantly there is an unrefuted alibi witness for Mr. Behrens, not to exclude that there were no DNA tests performed on the remaining evidence within the State of Florida possession i.e. ("hairs and dry-spots") found on the victim's sheets and comforter.

In holding Mr. Behrens interests, he has authorized us to voice on his behalf that he only seeks justice in this matter. He has continued to claim such innocence and will not relinquish in this fight to regain his freedom. Please, if you hold any additional comments or suggestions surrounding the DNA community that meet the facts of this case; that have not been covered herein, and you are of the opinion that such information would be fruitful to Mr. Behrens in his endeavor, we ask that you would freely share this such information.

Please place your answers and complete responses on a separate sheet, labeling this sheet answers and respond in numerical order, and then place these documents in the following order.

- Our cover letter detailing the facts and summary of this case should be first.
- Our questions should be second.
- This corporation's answers and detail responses to the requested questions should be third.
- Finally the signed certificate of service and the signed sworn oath making this document authentic should be fourth and the last sheet herein.

Sincerely



Mrs. Holder, CEO

EBN, INC.

P.O. Box 1562

Pompano Beach, Florida 33061

(954) 786-8619

SWORN AFFIDAVIT

**FROM: LAB CORP, LABORATORY CORPORATION OF AMERICA
MRS. EISENBERG, PH.D
P. O. BOX 13973
1912 ALEXANDER DRIVE
RESEARCH TRIANGLE PARK, NORTH CAROLINA 27709**

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

REF.: STATE OF FLORIDA v. ERNESTO BEHRENS CASE NO.: 98-5739 CF10A

To Whom It May Concerns:

The following questions have been presented to us for explicit answers by Mr. Ernesto Behrens, therefore, based on Lab Corp's exclusive pride and mission statement, we answer the following questions in their entirety.

1. Would it be scientifically possible and reliable to conduct a (RFLP) DNA testing and a (PCR) DNA testing using one single spermatozoa cell? Yes or No, Please explain your answer.

2. What is the size of one spermatozoa cell?

3. What is the nanogram or picogram weight of one spermatozoa cell?

4. What is the minimum amount of spermatozoa cell [s] required to perform a reliable scientific test using (RFLP) and (PCR)? Please explain your answer.

5. Is there a minimum required size of DNA sample[s] needed to perform a (RFLP) DNA test versus a (PCR) DNA test? Yes or No, Please explain your answer.

6. Upon a normal, healthy male ejaculation, approximately how many spermatozoa cells are released?

7. Based upon the DNA protocol community is it possible to recheck/retest evidence that has been (RFLP) tested, with the new (PCR) test? Please explain your answer.

8. When viewing (RFLP) or (PCR) DNA forms of tests individually, the National Resource Council recommends the use of which test when the forensic evidence is old, small, and partially degraded? Please explain your answer.

9. Is it possible to extract DNA from human hair? Yes or No

10. What is the specific type of DNA test that must be used when the evidence is human hair? Please explain your answer.

11. Is the (PCR) test a more sophisticated test in opposed to the (RFLP) test? Yes or No, Please explain your answer.

12. Would it be safe to say that this company recommends that all evidence collected from the crime scene be DNA tested, and not just partial evidence? Please explain your answer.

Based on the articulate facts therein the cover letter attached to this questionnaire it would be wise and parallel to this corporation recommendation to perform a (PCR) DNA test on the remaining untested evidence, to corroborate the reliability of the previous?



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Telephone: 800-533-0567
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September 30, 2003

ENB, INC.
2740 NE 47 Street
Lighthouse Point, FL 33064
Attn: Mrs. Holder

RE: Mr. Ernesto Behrens #0-732564
Case No.: 98-5739 CF10A
FS Lab #F03-4525

Dear Mrs. Holder:

Pursuant to your request for answers to the questions that you provided, I am providing the following responses:

1. Based on the DNA quantity requirements for RFLP and PCR analysis it is my opinion that it is not scientifically possible to obtain reliable results from one single spermatozoa cell using traditional published methodologies.
2. The human sperm cell consists of a head 0.005 by .003 mm and a tail .05 mm long.
3. The weight of a spermatozoa cell is not a determining fact in RFLP or PCR analysis.
4. The minimum amount of spermatozoa required for RFLP and PCR analysis would depend on the quantity of DNA in each sperm cell. The average amount of DNA in a single sperm cell is approximately 3.5 pg.
5. The average minimum amount of DNA required for RFLP is approximately 50 ng and the average minimum amount of DNA required for PCR is approximately .1 ng. It is possible to get results from samples with less DNA than the suggested amounts of DNA depending on the quality of the DNA.
6. The average amount of seminal fluid in a normal healthy male ejaculation is 2.5 to 3.5 ml containing 200 to 300 million sperm cells.

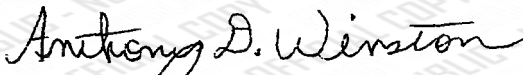
7. If there is enough evidence remaining, you can retest the evidence with PCR using excepted protocols.
8. Do to the lower DNA quantity and quality requirements associated with PCR analysis PCR would be the best method of analysis for old, small and partially degraded samples. Few labs if any are still using RFLP methods.
9. Yes it is possible to extract DNA from human hair.
10. There are two types of PCR methodologies that can be used for hair analysis. If the hair has an intact root it can be tested using **nuclear** DNA methods, if there is not a root present on the hair **mitochondrial** DNA method must be used.
11. No I would not say that PCR testing is more sophisticated than RFLP. They are simply two different types of methodologies used in forensic identity testing. RFLP is an older method of analysis requiring higher quality and quantity of DNA than the PCR method. PCR produces results in days vs. RFLP, which takes months.
12. LabCorp can not suggest to a client that all evidence collected from a crime scene be tested. The type and number samples tested would depend on the particular circumstances involved with that particular case.

Advancements in DNA testing technology have made it possible to obtain results from evidence that in the pass yielded none. Due to the lower DNA quantity and quality requirements for PCR analysis evidence previously analyzed using RFLP yielding no results may now yield results using PCR technology.

Once a case has been accepted for testing the details of that particular case will be reviewed at that time. It is not the policy of LabCorp to suggest to clients what samples they should submit for testing.

Should you need additional information or have any questions, please give me a call at 1-800-533-0567 ext. 3209.

Sincerely,



Anthony D. Winston
Associate Technical Director
Forensic Identity Testing

CERTIFICATE OF SERVICE

I, Anthony D. Winston, the preparer of the answers herein, certify that a copy of this entire document has been placed in Lab Corp's file and the original signed and sworn copy has been placed in the United States Postal Service possession to be delivered to the following individuals:

Mrs. Holder, in the interest State of Florida v. Ernesto Behrens, Case No.: 98-5739CF10A
EBN, INC.
P.O. Box 1592
Pompano Beach, Florida 33061
(954) 786-8619

on this, 1 day of October 2003.

/s/ Anthony D. Winston
Anthony D. Winston
Print Name

LAB CORP, I. D. No.: NA
P. O. BOX 13973
1912 ALEXANDER DRIVE
RESEARCH TRIANGLE PARK,
NORTH CAROLINA 27709

NOTARY

Before, me the undersigned authority, this day personally appeared,
Anthony D. Winston, Associate Technical Director
NAME Title I.D. No.,

Who first being duly sworn, states that he or she is the individual that provided the answers and responses outlined on the answers sheet[s]. Based on the facts and summary provided in the cover letter from EBN INC, in the interest of Mr. Ernesto Behrens, case no.: 98-5739-CF10A. Thereby, certifying that the answers and responses have been thoroughly read and having personal/professional knowledge of the forgoing herein are true and correct.

/s/ Anthony D. Winston

Sworn to and subscribed before me this 1st day of October 2003.

/s/ Julie A. Hnat
Julie A. Hnat
Notary Public, State of North Carolina

My Commission Expires: Oct 31, 2004
Notary No.: _____

Type of identification used? Personally known X, or produced identification _____