

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  
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Assistant State Attorney  
Appearing on behalf of the Plaintiff

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PROCEEDINGS AT TRIAL  
VOLUME VIII

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Paula Turgeon

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1 A. He was down.

2 Q. Which is part of the reason you didn't go  
3 out and he didn't go to work?

4 A. It's not really his personality.  
5 Ernesto's very upbeat and happy and let's go  
6 gambling and let me take you here and lovey and  
7 affectionate and he's -- you know, he wasn't like  
8 that that week. He was down and we just watched  
9 TV, I mean.

10 Q. And he was also on Darvocet which could  
11 have effected how he felt; correct?

12 A. Right. He wasn't used to taking  
13 medicine.

14 Q. The state kept saying about the  
15 excruciating pain and using that adjective but  
16 you've never used that terminology in this room,  
17 did you?

18 A. I don't remember it if I did; no.

19 Q. Would you characterize it as excruciating  
20 or that he was just uncomfortable and in pain?

21 A. He was uncomfortable and he was in pain;  
22 right. Correct.

23 Q. And whether you talked to him at night on  
24 May 12th, was that something that you looked into?  
25 Was that as significant as to whether he committed

1 a crime on the morning of May 12th?

2 A. Oh, I personally don't remember that.  
3 But when all this started three years ago,  
4 whenever it was, I pulled my phone records and I  
5 had actually sent them to Ernesto at that time.  
6 He may have the exact time that we spoke that day.  
7 I don't really remember it.

8 Q. But were you concentrating on what you  
9 did that night of May 12th?

10 A. The important date is, you know, the  
11 night of May 11th, morning of May 12th, when he  
12 supposedly this occurred to this girl. I knew  
13 that he wasn't there.

14 MS. SHELOWITZ: I have nothing further.

15 THE COURT: Mr. Segal?

16 MR. SEGAL: Yes, your honor.

17 RE-CROSS-EXAMINATION

18 BY MR. SEGAL:

19 Q. Ms. Turgeon, he was not in excruciating  
20 pain?

21 A. It depends. Like, for example, if I  
22 accidentally -- one time, I accidentally bonked  
23 him and I would say that he was in excruciating  
24 pain at that moment. Yeah. Like, if he bonked  
25 himself or if he, you know, laid exactly on it, he

1           could be in excruciating pain. But, in general,  
2           he was uncomfortable; yeah.

3           Q.     Okay. Do you remember giving a  
4           deposition in this case back on June 28th of 2000?

5           A.     Yes.

6           Q.     Okay. Page 33, lines 12 through 16.

7           A.     I said that he was in excruciating pain  
8           and he didn't want to go anywhere but lie in bed  
9           and take his medicine.

10          Q.     You were characterizing his general --  
11          his general situation; correct, ma'am?

12          A.     Yeah. He was hurt.

13          Q.     Right. And the general characterization  
14          of his situation was excruciating pain; correct,  
15          ma'am?

16          A.     That's what that says; yes.

17                 MR. SEGAL: Okay. Nothing further, your  
18          honor.

19                         RE-DIRECT EXAMINATION

20          BY MS. SHELOWITZ:

21          Q.     Do you know whether, in fact, he was  
22          actually in excruciating pain or if he just liked  
23          to get a lot of sympathy from you, for instance?

24          A.     I think he just wanted a little extra  
25          attention, a little love.

1 MS. SHELOWITZ: Nothing further.

2 RE-CROSS-EXAMINATION

3 BY MR. SEGAL:

4 Q. Did you say that in your deposition or  
5 did you say he was in excruciating pain?

6 A. I said whatever -- whatever you have  
7 there.

8 Q. Okay. You said he was in excruciating  
9 pain; right?

10 A. Yes, I did.

11 Q. Okay. Go through here and show me where  
12 you said he just did that for attention.

13 A. I don't --

14 MS. SHELOWITZ: She already -- she  
15 already said that she did.

16 BY MR. SEGAL:

17 Q. Okay. Go ahead. If you just find it in  
18 there where you said he did it for attention.

19 A. I don't know what page that would be on.

20 Q. It's not in there, ma'am.

21 MS. SHELOWITZ: I think that the question  
22 was misunderstood.

23 THE WITNESS: Could you repeat the  
24 question for me?

25 BY MR. SEGAL:

1 Q. Sure. Where in the deposition that you  
2 gave did you say that he was just dealing with --  
3 complaining of the pain to get attention?

4 MS. SHELOWITZ: Judge, I'm talking about  
5 the question before that.

6 THE COURT: Overruled. He can ask this  
7 question.

8 BY MR. SEGAL:

9 Q. Okay. Go through that deposition and  
10 find where you told me during the course of that  
11 deposition that he was doing this for attention.

12 A. I believe you if you say it's not in  
13 there but I know that he was trying to get  
14 attention too and that he was in pain.

15 Q. You didn't bother saying that at the  
16 deposition; correct?

17 A. There's probably a lot of things I didn't  
18 say at the deposition.

19 Q. I'm only talking about the pain. We  
20 talked a lot about the pain; right?

21 A. Absolutely.

22 MR. SEGAL: Nothing further, your honor.

23 THE COURT: Thank you very much, ma'am.  
24 You may step down.

25 [WHEREUPON, the witness was excused]

1 THE COURT: Counsel, can I see you very  
2 briefly.

3 [WHEREUPON, the following sidebar  
4 discussion was commenced]

5 MR. TERRELL: We would request that the  
6 jury be dismissed.

7 THE COURT: Okay. I'll do that. Do you  
8 anticipate additional witnesses beyond possibly  
9 the defendant?

10 MS. SHELOWITZ: Possibly not.

11 THE COURT: All right. I'll excuse them.

12 [WHEREUPON, the sidebar discussion was  
13 concluded]

14 THE COURT: Okay. Ladies and gentlemen,  
15 there are matters that I'm going to want to  
16 address with the attorneys which is going to take  
17 a few -- it's going to take a little while, to be  
18 very candid with you, so I don't want you just to  
19 sit there and just watch us over here. And I  
20 assure you, there's not a little refrigerator here  
21 and we're not -- it's not -- it's a true sidebar,  
22 as Mr. Harmon suggests. That having been said,  
23 let me give you this opportunity to break for  
24 lunch.

25 A couple of comments. First of all,



1 don't leave any personal items in the courtroom.  
2 Don't discuss this case among yourselves. Don't  
3 discuss it with anybody else. And certainly don't  
4 form any definite or fixed opinion on the merits  
5 of this case.

6 Schedule-wise, I want you to be outside  
7 the jury assembly on the third floor no later than  
8 1:15. Please try to have your lunch break  
9 consistent with that time period. With that in  
10 mind, we'll see you outside the jury assembly room  
11 on the third floor no later than 1:15.

12 Thank you all very much.

13 [WHEREUPON, the jury panel left the  
14 courtroom]

15 THE COURT: All right. Let the record  
16 show the jury's left the courtroom. Mr. Behrens,  
17 Mr. Segal, Ms. Shelowitz, Mr. Terrell are present.

18 Mr. Behrens -- let me wait -- Al, have  
19 them shut the door please. I'll wait for these  
20 people to go out.

21 You can -- you can have a seat, sir. I  
22 appreciate that courtesy. Mr. Behrens, do you  
23 understand that you have the right to testify in  
24 this case?

25 MR. BEHRENS: Yes, I do, sir.

1 THE COURT: And do you understand that if  
2 you elected to testify -- and this is a decision  
3 that you privately make in consultation with your  
4 lawyers -- that if you elected to testify, among  
5 other things, I would instruct the jury that they  
6 cannot draw any inference -- excuse me. If you  
7 elected not to testify, that among others things,  
8 I would instruct the jury that they cannot draw  
9 any inference of guilt from your not testifying.

10 Do you understand that?

11 MR. BEHRENS: Yes, sir.

12 THE COURT: In other words, there's no  
13 burden on you to prove your innocence. There's no  
14 burden on you to disprove anything.

15 Do you understand that?

16 MR. BEHRENS: Yes, sir.

17 THE COURT: The state has the burden to  
18 prove your guilt by competent evidence.

19 Do you understand that?

20 MR. BEHRENS: Yes, sir.

21 THE COURT: Beyond and to the exclusion  
22 of every reasonable doubt.

23 Do you understand that?

24 MR. BEHRENS: Yes.

25 THE COURT: Now, if you elected to

1       testify, you understand that I would instruct the  
2       jury, among other things, that your testimony  
3       should be -- would be viewed and should be viewed  
4       by them with the same standard that they would  
5       view any other witness's testimony.

6               Do you understand that?

7               MR. BEHRENS:  Yes.

8               THE COURT:  In other words, they have --  
9       they would have the right to scrutinize your  
10      testimony and evaluate your credibility just like  
11      every other witness.

12              Do you understand that?

13              MR. BEHRENS:  Yes, sir.

14              THE COURT:  And do you understand,  
15      Mr. Segal would have the opportunity to  
16      cross-examine you just like your attorneys have  
17      cross-examined the state's witnesses and he's  
18      cross-examined your two witnesses.

19              Do you understand that?

20              MR. BEHRENS:  Yes, sir.

21              THE COURT:  Let me ask this.  If  
22      Mr. Behrens should elect to testify, have you  
23      discussed among yourselves the issue of any  
24      impreachable felonies or misdemeanors?

25              MR. SEGAL:  We haven't discussed it but

1 he's got five prior felony convictions.

2 THE COURT: Is that a number that the  
3 defense is in agreement with?

4 MR. TERRELL: Yes.

5 THE COURT: Okay. Do you understand,  
6 Mr. Behrens, that among other things, should the  
7 state -- are there any impeachable misdemeanors,  
8 according to the state?

9 MR. SEGAL: I don't know if this counts  
10 or not. There's a conspiracy to possess stolen  
11 property. I know petty theft is a impeachable  
12 misdemeanor. I don't know if a conspiracy to  
13 possess stolen property would qualify the same way  
14 as petty theft would.

15 THE COURT: Okay. At this point, I would  
16 just limit it to the five felonies.

17 Do you understand that if you elected to  
18 testify, Mr. Behrens, the state would be able to  
19 ask you if you've ever previously been convicted  
20 of a felony and presumably your answer would be  
21 yes and they would be able to ask you how many  
22 times and presumably your answer would be five  
23 times.

24 Do you understand that?

25 MR. BEHRENS: Yes, sir.

1 THE COURT: They would not be able to go  
2 into those cases based on that question and  
3 answer.

4 Do you understand that?

5 MR. BEHRENS: Yes, sir.

6 THE COURT: Now, have you discussed with  
7 your lawyers about -- about this issue as to  
8 whether or not you want to testify in this case?

9 MR. BEHRENS: Yes, sir. At this time,  
10 for the best of my interest, I am not going to  
11 take the stand.

12 THE COURT: Okay. Have you discussed  
13 that with your lawyers?

14 MR. BEHRENS: Yes.

15 THE COURT: Have they answered all your  
16 questions?

17 MR. BEHRENS: Yes, they have.

18 THE COURT: And you've discussed  
19 specifically the question of whether or not it's  
20 to your advantage to testify or not testify?

21 MR. BEHRENS: Yes, we have.

22 THE COURT: Do you want more time to  
23 discuss with your lawyers the issue of testifying  
24 and not testifying? And, of course, I mean  
25 privately.

1 MR. BEHRENS: No. I'm comfortable with  
2 the decision.

3 THE COURT: Okay. And it's your decision  
4 not to testify?

5 MR. BEHRENS: Yes, it is.

6 THE COURT: Okay. Mr. Terrell,  
7 Ms. Shelowitz, do you have any other question you  
8 want to ask Mr. Terrell for the record on this  
9 question?

10 MR. TERRELL: Do you mean Mr. Behrens?

11 THE COURT: Mr. Behrens.

12 MR. TERRELL: No, judge.

13 THE COURT: Okay. Based on Mr. Behrens'  
14 decision not to testify and the court having  
15 colloquayed him on that issue, will the defense be  
16 presenting any additional testimony or evidence?

17 MS. SHELOWITZ: No.

18 THE COURT: Okay. You rest at this time?

19 MS. SHELOWITZ: Judge, we would rest at  
20 this time.

21 THE COURT: Okay. And, of course, I'll  
22 ask you to do that in front of the jury when they  
23 come back.

24 Will the state be presenting any  
25 rebuttal?

1 MR. SEGAL: Judge, just give me one  
2 second because they -- this is a whole different  
3 situation.

4 MS. SHELOWITZ: We always catch him off  
5 guard.

6 THE COURT: It happens.

7 MR. SEGAL: No, your honor.

8 THE COURT: Okay. At this time then,  
9 what I'd like to do is, I'd like you to take the  
10 remaining time this morning -- actually, let me  
11 address any additional motions the defense wishes  
12 to present at this time.

13 MS. SHELOWITZ: Judge, we'd like to renew  
14 our motion for judgement of acquittal. At this  
15 time, the standard is different, that reasonable  
16 minds could differ.

17 In addition, I would adopt all of my  
18 argument from the beginning from my first initial  
19 motion and apply it to the new standard now.

20 In addition, I would say that this alibi  
21 is uncontroverted. It was -- although there may  
22 have been some type of impeachment on or attempt  
23 at impeachment on whether she ate in or out or not  
24 and the type of pain he was in, there has been no  
25 evidence to controvert the fact that she says

1       that's where he is. She can identify him. She's  
2       the only person who has personal knowledge as to  
3       where Ernesto Behrens was at the time this crime  
4       was discussed.

5               Everything else, as we discussed, was  
6       circumstantial. You know, in addition to the  
7       problems with the chain of custody and nobody can  
8       personally testify that they ever took a swab from  
9       Ernesto Behrens. This witness personally knows  
10      where he was and that's uncontroverted.

11             In addition, to what our conversation  
12      before as far as oral penetration, now there's yet  
13      another witness that is unrebutted that  
14      Mr. Behrens does not normally engage in that type  
15      of sexual behavior because of the fact of the  
16      discomfort and his issue of being not circumcized.

17             Therefore -- and, you know, my arguments  
18      go to both Counts 1 and Count 2 as to completing  
19      the elements of proving Mr. Behrens is guilty of  
20      those two crimes.

21             THE COURT: Okay. I thank you.

22             I've had an opportunity to listen to the  
23      argument to evaluate it. And again, the court  
24      recognizes a different standard of review and I'm  
25      still familiar with the case law you've previously



1 presented. I am going to respectfully deny your  
2 motion at this time.

3 I would like to suggest that you take  
4 collectively the benefit of this time among  
5 yourselves to review proposed jury instructions  
6 and verdict forms, in particular, lesser  
7 includeds. Let's just take a minute and look at  
8 this.

9 MR. SEGAL: Judge, the issue of lesser  
10 includeds. There's a statute of limitation. You  
11 have to have a colloquay with the defendant if he  
12 wants to go for lessers. He's got to  
13 affirmatively waive them. There's a colloquay  
14 that the Florida Supreme Court set forth in a  
15 case -- I could get ahold of it but I don't have  
16 it with me, so --

17 THE COURT: You mean, if he wants to  
18 waive them?

19 MR. SEGAL: Essentially; yeah. He has to  
20 waive the Statute of Limitations -- the Statute of  
21 Limitations that applies to this for any lessers.  
22 So again, there's a colloquay that's required.

23 THE COURT: Well, let me -- before we get  
24 there, has the defense made any decision on the  
25 issue of lessers? So what you're saying is,

1 Mr. Segal, that the Statute of Limitations would  
2 normally preclude any lessers?

3 MR. SEGAL: Yes, your honor.

4 MR. TERRELL: Judge, at this time, the  
5 defense would request no lesser included offences.

6 THE COURT: Okay. So they're not  
7 requesting any waiver of any Statute of  
8 Limitation.

9 MR. TERRELL: Correct.

10 THE COURT: Does the defense agree with  
11 Mr. Segal's presentment to the court that the  
12 Statute of Limitations would otherwise bar any  
13 lessers?

14 MS. SHELOWITZ: I haven't -- to be  
15 honest, I haven't seen any case law that says that  
16 if the lessers were given and the jury found  
17 guilty of that, that that guilty verdict would be  
18 void because of the Statute of Limitations. I  
19 don't know if that exists.

20 MR. SEGAL: It does, judge. I can  
21 provide it, if Ms. Shelowitz wants to see it.

22 MS. SHELOWITZ: I just ask that we are  
23 provided it.

24 THE COURT: Okay. So perhaps during the  
25 lunch break, you can pull that case, if that's --

1       if that's the circumstance, show it to  
2       Ms. Shelowitz afterwards and we'll readdress that  
3       issue.

4               But right now, I gather it's Mr. Behrens'  
5       intention not to have any lessers?

6               MS. SHELOWITZ: Correct.

7               THE COURT: And, of course, the state's  
8       position is they're -- they're gone by the Statute  
9       of Limitations anyway. So we have just -- the  
10      verdict forms then would be pretty  
11      straightforward: Two verdict forms, Count 1 and  
12      Count 2, guilty as charged in the information and  
13      not guilty.

14              Just very briefly and let's -- let's just  
15      go through the West Book because now I think we're  
16      going to be somewhat streamlined. I'm starting on  
17      page 1337.

18              Again, the record will show Mr. Behrens  
19      remains present, has been continuously present.

20              I anticipate I'll read 1.02, 2.01, 2.02.

21              MS. SHELOWITZ: Judge, I'm sorry. I  
22      didn't get to the page.

23              THE COURT: I apologize. 1337.

24              MS. SHELOWITZ: In which book?

25              MR. SEGAL: West Book.

1 THE COURT: The West, 2000 Rules.

2 MR. TERRELL: We have '99.

3 MR. SEGAL: Judge, I can show them mine.

4 THE COURT: You here or there, it doesn't  
5 matter. Is that the idea, Mr. Terrell?

6 MS. SHELOWITZ: We'll flip to the  
7 standard.

8 THE COURT: Okay. I would read 1.02,  
9 2.01, 2.02. With the understanding there will not  
10 be any lessers, obviously I will not read 2.02(a).  
11 I'll read 2.03, 2.04, one through five and number  
12 eight.

13 MS. SHELOWITZ: Judge, I'm sorry. I just  
14 want to ask whether we're really supposed to be  
15 going on '95 because of the --

16 THE COURT: On '95. I don't understand  
17 what you mean.

18 MS. SHELOWITZ: '95 jury instructions.

19 THE COURT: Well, first of all -- and I  
20 appreciate your question.

21 MS. SHELOWITZ: I want to make sure --

22 THE COURT: What we've done at this point  
23 is, these haven't changed, what I've gone over.

24 MR. SEGAL: Judge, one of them has very  
25 slightly changed, 2.03. I know that.

1 THE COURT: What portion of 2.03 has  
2 changed?

3 MR. SEGAL: Again, I can't remember the  
4 exact wording but it is -- the definition reads --  
5 where it says: Reasonable doubt is not a mere  
6 possible doubt, a speculative, imaginary or forced  
7 doubt. There was a very minor change in the  
8 wording in that sentence.

9 THE COURT: I think the word mere.

10 MR. SEGAL: I think the word mere or  
11 something like that.

12 THE COURT: Right. Does the defense have  
13 any objection to the word mere being in the  
14 reasonable doubt instruction?

15 MS. SHELOWITZ: Well, it's in our favor  
16 not to have it so yeah.

17 THE COURT: Do you have any objection to  
18 the word mere being deleted?

19 MR. SEGAL: If that's their affirmative  
20 request to do, your honor.

21 THE COURT: Okay. Then I'll read the  
22 reasonable doubt supplement without the word mere.  
23 Then I'll read 2.04, one through five and number  
24 eight, 2.04(a).

25 With respect to the defendant not

1       testifying, under 2.04(d), do you want the first,  
2       second or both paragraphs read?

3               MS. SHELOWITZ: We want both paragraphs.

4               THE COURT: Okay. I'll read 2.05, one  
5       through eight, 2.07. 2.08, we've talked about the  
6       verdict forms but we'll look at them when they're  
7       presented. I'll read 2.08(a) and 2.09.

8               Now, let's look at the substantive  
9       instruction. Let me look at 794.11. Okay. In my  
10      book, it's on page 1382. I don't know where it  
11      would be in the '99 book.

12              MR. TERRELL: What's that, judge?

13              THE COURT: The instruction on sexual  
14      battery. The statute is 794.11.

15              MR. SEGAL: Sub three.

16              THE COURT: Got it?

17              MR. TERRELL: Yes.

18              THE COURT: Okay. The -- the heading or  
19      title is: Sexual Battery, Victim 12 Years of Age  
20      or Older, Great force. And then it has 794.11(3).

21              MR. TERRELL: Yes.

22              MR. SEGAL: Your honor, I don't know if  
23      the court wants to change the -- I don't know how  
24      the court is going to read the heading, great  
25      force.

1 THE COURT: I'm not going to read the  
2 heading. I'm just trying to reference it so they  
3 get to the right page.

4 MR. SEGAL: Or physical force in there,  
5 too.

6 THE COURT: Right. It obviously with the  
7 use of a deadly weapon. I would not be reading  
8 the words physical force. I'm in the introductory  
9 paragraph. Then we're looking at the elements.  
10 We've got [REDACTED] as the listed victim, was 12  
11 years of age or older. Then let me look at two.

12 It would be subparagraph A: Ernesto --  
13 Ernesto Behrens committed an act upon [REDACTED] [REDACTED]  
14 in which the sexual organ of Ernesto Behrens  
15 penetrated or had union with the mouth of [REDACTED]  
16 [REDACTED]

17 Is defense with me on that?

18 MS. SHELOWITZ: Yes.

19 THE COURT: Okay. Then element three:  
20 Ernesto Behrens, in the process, used or  
21 threatened to use a deadly weapon.

22 Element four is, you know, just as it's  
23 written. I'll read the consent.

24 MR. TERRELL: Judge, excuse me. At this  
25 time, the defense is going to make a motion to

1       exclude that a deadly weapon was used. There was  
2       no testimony of which object was used. We can't  
3       characterize what it is because she didn't know  
4       what it was. She didn't see it. All she said is,  
5       she felt a metal on her stomach and it had a sharp  
6       point to it. It doesn't mean it's a knife. If  
7       you characterize it as a knife, that would be a  
8       mischaracterization of the evidence. Therefore,  
9       because there was no evidence, we ask that that  
10      part be excluded from the jury instruction.

11               THE COURT: Well, I think that -- I think  
12      the testimony is sufficient to leave that question  
13      to the jury as to whether or not that's a deadly  
14      weapon. I'm going to respectfully deny your  
15      motion.

16               I don't think I need to read the next  
17      sentence about the victim's mental incapacity or  
18      defect. I don't believe that's applicable. I  
19      don't believe I need to read mentally  
20      incapacitated or mentally defective.

21               I will read union means contact. I'll  
22      read a weapon is a deadly weapon if it is used or  
23      threatened to be used in any way like to produce  
24      death or great bodily harm.

25               MR. TERRELL: Judge, in using that



1 instruction, there was no testimony that it was  
2 used or likely to be used in any way to cause  
3 great bodily harm.

4 THE COURT: There again, I think based on  
5 the testimony of [REDACTED] [REDACTED] I think there's  
6 sufficient testimony for that issue to go to the  
7 jury.

8 And I believe that's the instruction on  
9 Count 1. Now, let's look at Count 2.

10 MR. SEGAL: You're going to read that  
11 thing about the access and bonafide measure,  
12 unless they agree to its exclusion.

13 THE COURT: I don't see it as applicable.  
14 What's the defense position?

15 MS. SHELOWITZ: No. I don't think it's  
16 applicable.

17 THE COURT: Okay. All right. Let's look  
18 at the instructions under 810.02. By the way, I'd  
19 like your input. In this kind of case, based on  
20 these instructions, particularly if we have no  
21 lessers, it would not be my intention to send the  
22 instructions back. I just would anticipate  
23 reading them.

24 MS. SHELOWITZ: That's fine.

25 THE COURT: So if there's anything either

1 of you would want to say in that regard, this  
2 would be the time to let me know and I would  
3 consider it.

4 Okay. 810.02, let me just get there.  
5 All right. I'm on page 1390 of the 2000 edition.  
6 I don't know if --

7 Have you gotten there, Ms. Shelowitz?

8 MS. SHELOWITZ: Yes.

9 MR. TERRELL: We're there.

10 THE COURT: Okay. Let me just take care  
11 of one thing here.

12 MR. SEGAL: Judge, prior to going into  
13 it -- and, again, I don't know how this applies.  
14 They were asking for the '95 instructions. The  
15 court, if it looks at the burglary instruction, it  
16 says amended but I don't know when that amended  
17 took place

18 THE COURT: Well, what I'm going to  
19 ask -- I was going to do this later but we'll just  
20 do it now. I'm going to ask both of you, whether  
21 it's in your office or wherever, both of you  
22 please compare all of these instructions to '95.  
23 I do recall the word mere being an addition. But  
24 if there's any addition to the other instructions  
25 and particularly the substantive charges, then

1           you'll bring those back to me when we reconvene.

2                   Okay. Let's look at the burglary  
3 instruction. It would be element one: Ernesto  
4 Behrens entered a structure owned by or in the  
5 possession of [REDACTED] [REDACTED]

6                   MR. SEGAL: Your honor, can I ask the  
7 court to read that as entered or remained as  
8 charged in the information.

9                   THE COURT: Let me look at the  
10 information. I will read it in the alternative  
11 because that's how it's charged: Entered or  
12 remained in a structure owned by or in the  
13 possession of [REDACTED] [REDACTED]

14                   Element two: Ernesto Behrens did not  
15 have the permission or consent of [REDACTED] [REDACTED] or  
16 anyone authorized to act for him to enter and/or  
17 remain in the structure.

18                   Element three: At the time of entering  
19 and/or remaining in the structure, Ernesto Behrens  
20 had a fully formed conscious intent to commit the  
21 offense of battery in that structure.

22                   MR. SEGAL: Your honor, I think it ought  
23 to be sexual battery. That's the way it's charged  
24 in the information.

25                   THE COURT: Correct. All right. Now,

1       where it says in the notes, to define the offence  
2       that was the object of the burglary, in my mind, I  
3       have already read them the instruction on sexual  
4       battery. I would not intend to reread it.

5               Do either of you have any problem with  
6       that?

7               MR. SEGAL: No, your honor. It makes  
8       sense to me.

9               MS. SHELOWITZ: No.

10              THE COURT: Okay. I don't think the next  
11       sentence is applicable where you have -- you know,  
12       dealing with premises that originally were open to  
13       the public and then later closed so I would not  
14       anticipate reading that sentence.

15              MR. SEGAL: I agree.

16              THE COURT: Okay. How about the  
17       stealthfully sentence?

18              MR. SEGAL: I think that should be given.

19              MS. SHELOWITZ: Judge, we would object.  
20       I don't think there's any evidence of a stealthy  
21       entry.

22              MR. SEGAL: that's all the evidence, your  
23       honor, because she was asleep when it occurred.  
24       There was obviously a stealthy -- stealthy entry.

25              THE COURT: I'm going to -- I'm sorry.

1 MS. SHELOWITZ: I don't think what the  
2 person in the house is doing has any bearing on  
3 how the person gets in.

4 THE COURT: I'm going to read the  
5 stealthfully paragraph. I'll read the next  
6 sentence about, need not be the whole body of the  
7 defendant. I'll read the proof of intent  
8 paragraph. I'll read the next paragraph. I hope  
9 you all are with me. I am not going to read the  
10 paragraph about stolen property because I don't  
11 think that's applicable here. I'll read the  
12 definition of structure.

13 Now, let's talk -- now, this is where it  
14 always gets a little tricky -- about the  
15 enhancement paragraphs. What I think would be  
16 appropriate is, I read the first, what I call the  
17 introductory, paragraph about the enhancements,  
18 beginning: The punishment provided by law for the  
19 crime of burglary is greater if the burglary was  
20 committed under certain aggravating circumstances.

21 But you know what? Let's think about  
22 that because the essence of this provision is that  
23 if you don't find the aggravators, then it's just  
24 simple burglary. Here -- here, that's not the  
25 case.

1 MR. TERRELL: Was that paragraph in the  
2 '95 guidelines?

3 MR. SEGAL: It probably -- it probably  
4 was, I would imagine, because those enhancements  
5 have always been with the burglary statutes so I  
6 imagine --

7 THE COURT: Do you understand what my  
8 thinking is?

9 MS. SHELOWITZ: There are no lessers,  
10 though. It just seems like --

11 THE COURT: I'm just wondering outloud.  
12 I don't -- as I'm thinking outloud -- and I invite  
13 your input -- I don't think I would actually read  
14 this. My initial reaction was, I was going to  
15 change this paragraph written about assault and  
16 insert battery and, you know, conform it to our  
17 case. But in thinking about it, the whole idea of  
18 the enhancements is that if you don't find any of  
19 these enhancements, it's then burglary. We don't  
20 have that situation here.

21 MR. SEGAL: I would agree.

22 THE COURT: All right. So based on that,  
23 I will not read anything about enhancements. I'll  
24 read -- the next paragraph I will read is about:  
25 In the course of committing. And then I will

1 read: A dangerous weapon.

2 MR. SEGAL: Judge, I don't think a  
3 dangerous weapon applies.

4 THE COURT: Oh, I'm sorry. You're right.  
5 I'm sorry. I will not read dangerous weapon.  
6 Actually, let me back up. I will not read the --  
7 in the course of committing, I will not even read  
8 that paragraph. I believe the last thing I read  
9 is the definition of structure.

10 MR. SEGAL: Judge, I think you have to  
11 define battery because charged burglary with a  
12 battery. I think you in some fashion have to  
13 say -- define in the course of committing the  
14 burglary, the defendant made a battery, committed  
15 a battery, whatever the wording, then you should  
16 find him guilty of burglary during which a battery  
17 has been committed. And then define what battery  
18 is and then go down to the course of committing  
19 battery.

20 MS. SHELOWITZ: I thought that's what --  
21 we weren't going to read -- I mean, to wit is  
22 sexual battery, not battery.

23 MR. SEGAL: No. But if you look in  
24 the -- I think it's Count 2, Ms. Shelowitz,  
25 Count 2. It says, you know, in the course of

1 committing the burglary, he committed a battery  
2 upon [REDACTED] [REDACTED] So the element -- one of the  
3 elements or one of the things that need to be done  
4 here is that a battery is committed during the  
5 course of it

6 THE COURT: Okay. I understand what  
7 Mr. Segal's saying. After I read structure, I  
8 would then suggest that I read: An act is  
9 committed in the course of committing --

10 MS. SHELOWITZ: Judge, he doesn't have --  
11 has has to prove a battery occurred. He has to  
12 prove a sexual battery occurred. The definition  
13 of battery is irrelevant. He's charging --

14 THE COURT: Well, Count 2 is that he  
15 intended to commit a sexual battery but, in fact,  
16 committed a battery.

17 MR. SEGAL: But all Count 2 charges is  
18 the unlawful entry with an intent. That's the  
19 intent to commit sexual battery. And then in the  
20 course thereof, committed battery. So Count 2,  
21 there's no need to prove a sexual battery.

22 MR. TERRELL: But the only battery  
23 committed was a sexual battery. That's what he's  
24 charged with.

25 MR. SEGAL: Well, actualy, any time he



1 touched her, there was a battery so --

2 THE COURT: Well, I think what -- I think  
3 what -- perhaps we're ahead of ourselves. I think  
4 the argument you're going towards, Mr. Terrell, if  
5 this jury should find Mr. Behrens guilty on both  
6 counts, there may be some issues there in terms of  
7 sentencing on how these counts interplay. I mean,  
8 what -- you know, some double jeopardy questions  
9 that may arise as a sentencing issue.

10 But I think for purposes of the  
11 instruction, they could find him guilty on Count 2  
12 and not Count 1. They could find him guilty of  
13 just the battery, commit burglary with a battery,  
14 and not the sexual battery.

15 So that having been said, I think there  
16 needs to be read -- let's see. What I'm going  
17 to -- and I guess I'm going to put this burden  
18 perhaps on your back, Mr. Segal. There has to  
19 be --

20 MR. SEGAL: Thank you.

21 THE COURT: Your office tends to have the  
22 wheels to do this. There has to be a paragraph  
23 created that says: If, in the course of  
24 committing the burglary, there occurred a battery  
25 upon [REDACTED] [REDACTED] then the defendant has committed

1 burglary with a battery.

2 And then I can always then read the  
3 misdemeanor definition of battery, the intentional  
4 touching or striking of another person without  
5 their consent. I can always -- that would then  
6 follow that. But I think there has to be -- and I  
7 may not have said it the best way, but there has  
8 to be an introductory sentence or line dealing  
9 with that.

10 MS. SHELOWITZ: Judge, the only thing I  
11 would add is, it should be consistent with their  
12 information, which say that it was with the intent  
13 to commit the offense of sexual battery but in the  
14 course did commit a battery.

15 THE COURT: That's fine.

16 MR. SEGAL: Judge, that goes back to the  
17 elements. It already says in the very first part  
18 of the burglary instruction: At the time of  
19 entering, he had a fully formed conscious intent  
20 to commit. So that's already in there.

21 MS. SHELOWITZ: That's right. I just  
22 want to keep it consistent.

23 MR. SEGAL: Now, I'll agree, the way this  
24 instruction is written is problematic but, I mean.

25 THE COURT: I think you need to add

1 another sentence in there and it's got to key off  
2 of: In the course, if he entered the structure --  
3 entered and/or remained in the structure and had a  
4 fully formed conscious intent to commit the  
5 offense of sexual battery and in fact committed a  
6 battery upon [REDACTED]

7 MR. SEGAL: Or, judge, how about this.  
8 How about just make it a number four under the  
9 elements, the three that we've already discussed  
10 and the fourth: In the course of committing the  
11 burglary, the defendant committed battery upon  
12 [REDACTED] [REDACTED] A burglary -- a battery is defined  
13 as so and so. Therefore, it's given as an equal  
14 element to the other three. I don't know.

15 THE COURT: I think it's going to be  
16 easier just -- I think element three pretty  
17 closely says what we want with a little change.  
18 At the time of entering and/or remaining in the  
19 structure, Ernesto Behrens had a fully formed  
20 conscious intent to commit the offense of sexual  
21 battery in that structure and in the course  
22 thereof did commit a battery upon [REDACTED]  
23 which is exactly consistent with the information.

24 And then I would define battery which is  
25 I think what is contemplated after element three.

1 MR. SEGAL: See, my -- my problem with  
2 that, your honor, I think you're expanding element  
3 three. Element three in and of itself is, he had  
4 the intent when he -- when he entered. That's  
5 what element three is supposed to cover. That's  
6 why I think it should just be a fourth element.

7 MR. TERRELL: I'm not following that.

8 MR. SEGAL: Because basically, it expands  
9 element three to not only the intent part but it's  
10 a battery therein so it's really like putting two  
11 elements in one.

12 THE COURT: But they're not going to be  
13 able to find him guilty on Count 2 unless they  
14 find the battery.

15 MR. SEGAL: Right. Which is why I think  
16 you should put it as element four. It's a  
17 co-equal element with the other three.

18 THE COURT: If we read element three  
19 exactly as you said and then put in, and in the  
20 course thereof committed a battery upon [REDACTED]  
21 [REDACTED] I think that's going to be the simplest way  
22 to state it. All right. Let me read it again.

23 Element three: At the time of entering  
24 and/or remaining in the structure, Ernesto Behrens  
25 had a fully formed conscious intent to commit the

1 offense of sexual battery in that structure and in  
2 the course thereof committed a battery upon [REDACTED]

3 [REDACTED]

4 I think that is exactly consistent with  
5 the information. And I understand your point but  
6 that's how I'm going to read it. And then I will  
7 define battery, misdemeanor battery, at that  
8 point.

9 Okay. At this point, you'll each have an  
10 opportunity over the lunch break to sort of digest  
11 all these instructions that we went over. Review  
12 them please in the context of the '95  
13 instructions, particularly the substantive  
14 charges.

15 If there's -- let me ask. Are there any  
16 special instructions or additional instructions  
17 that either side wants me to consider?

18 MR. TERRELL: Yes, judge.

19 THE COURT: How about at your end,  
20 Mr. Segal?

21 MR. SEGAL: Not for the state.

22 THE COURT: What do you have at your end,  
23 Mr. Terrell, Ms. Shelowitz?

24 MS. SHELOWITZ: Judge, the alibi.

25 THE COURT: That's back in the early

1 pages.

2 MS. SHELOWITZ: Yeah. 3.04(a).

3 THE COURT: I'm sorry?

4 MR. TERRELL: 3.04(a).

5 THE COURT: Okay. Give me just one  
6 second.

7 MR. SEGAL: It's on page 1343.

8 THE COURT: Got you. All right. I think  
9 that's appropriate to read. And I would read  
10 that, those two sentences, after reading the  
11 substantive charges. And what I'd do is, I'll  
12 read the substantive charges, so you'll know,  
13 right after 2.02.

14 MS. SHELOWITZ: Judge, 2.02(a), about a  
15 multiple count information.

16 THE COURT: Yeah. I'm going to read  
17 that. I said that.

18 Again, if there's any other instructions  
19 either of you want me to consider, you'll bring  
20 that to my attention.

21 MS. SHELOWITZ: The expert.

22 THE COURT: I'm going to read that. I've  
23 said that.

24 Let me ask you this -- and it's certainly  
25 not, in this kind of case, my intention to limit

1 anybody -- who's doing your -- you're doing the  
2 closing? Ms. Shelowitz, you're doing the closing?

3 MR. SEGAL: I'm doing it for the state.

4 THE COURT: How about at your end? Okay.  
5 How much time do you think you're looking at?

6 MR. SEGAL: Judge, can I make a request  
7 to the court? Given all the circumstances, the  
8 situations and anticipated witness preparation and  
9 all like that, is there any possible way to do  
10 this tomorrow -- the closing tomorrow morning to  
11 give us a chance to prepare them?

12 MR. TERRELL: Judge, not only do we have  
13 cases -- I have lots of cases tomorrow morning.  
14 We have a whole afternoon here. I request that we  
15 go forward. You know, if he wants extra time to  
16 start the --

17 THE COURT: Well, let me ask this.  
18 Again, it's not my intention to limit anybody. I  
19 think there's too much involved with this case. I  
20 think we're going to go forward and do the  
21 closings today. Now, when you say you need a  
22 little extra time to collect yourself, I'm  
23 amenable to that.

24 MR. SEGAL: Judge, if we have to find the  
25 '95 instructions and do that kind of stuff, I

1 mean, this case has enough in it and it's  
2 important enough that I just want the proper time  
3 to prepare. And to use up that time to, you know,  
4 to try and find old jury instructions and figure  
5 out and compare them to the current jury  
6 instructions, on top of which our belief was that  
7 the case was going to be over with -- it would go  
8 through Friday anyhow.

9 So their complaint now that they have  
10 cases tomorrow doesn't seem to make a lot of  
11 sense because the planning should have been that  
12 we were going to be in trial tomorrow. So I'm  
13 just saying to the court, if we could, if there's  
14 any way we could, to just do this tomorrow  
15 morning. That would give the jury the entire day  
16 to deliberate if they need to.

17 MS. SHELOWITZ: Judge, we knew that we  
18 were going to finish today. We knew. And it's  
19 not our job to inform the state. Everyone has to  
20 be prepared. If I'm not prepared for my closing,  
21 normally we go forward.

22 I mean, I don't mind if we take a two and  
23 a half hour break if the state needs time. I  
24 mean, I don't know how much time he needs to write  
25 a closing. We'll go look up the '95 guidelines.



1 I don't think -- I think there was only one other  
2 instruction that might have been different. That  
3 was burglary. That was it.

4 MR. SEGAL: Your honor, this is just  
5 gamesmanship. You know, there's no obligation to  
6 tell the state. We knew we were going to be done.  
7 And this whole thing with Dr. Shea. They could  
8 have said that Dr. Shea was not going to testify.  
9 They could have done that. But the whole game was  
10 being run that, we'll talk to Dr. Shea, we'll talk  
11 to Dr. Shea, the whole thing.

12 THE COURT: What I'm going to do is this.  
13 The jury's going to be back at 1:30 downstairs.  
14 What I will do is, I'm going to instruct Henry or  
15 Terry -- Terry won't be here. I'm going to  
16 instruct Henry or Karen perhaps to go down there  
17 and tell the jury that we're going to convene at  
18 2:30. I'm going to go forward with this case  
19 today though and get this case to the jury today.

20 Then we'll -- yes?

21 MR. TERRELL: As far as deliberations,  
22 how long do you project letting them go tonight?

23 THE COURT: Well, my feeling is, you  
24 know, I'm going to let them deliberate until they  
25 tell me they're hungry or they're tired. I

1 don't -- I don't think it's up to me to inject  
2 myself in that.

3 MR. TERRELL: Well, at some point, by  
4 like 7:00 or eight o'clock at night, you'll --

5 MR. SEGAL: Judge, again, I hate to keep  
6 throwing this out. My diabetes --

7 THE COURT: No, no. I mean, We'll see  
8 where we are at that point. Let's not -- let's  
9 jump off that bridge when we have to. But you can  
10 assume that we're going to go into closing  
11 arguments at 2:30.

12 Thank you.

13 [WHEREUPON, a lunch recess was taken]

14 THE COURT: All right. The record will  
15 show Mr. Behrens is present. Mr. Segal,  
16 Ms. Shelowitz, Mr. Terrell are present.

17 Let me ask whether there's any further  
18 comments or requests that either of you would have  
19 relative to the jury instructions that we  
20 previously discussed.

21 Mr. Segal?

22 MR. SEGAL: No, judge.

23 THE COURT: How about at the defense end,  
24 anything with regard to the instructions that you  
25 want to bring up?

1 MR. TERRELL: Judge, I didn't catch  
2 anything; no.

3 THE COURT: Okay. These are verdict  
4 forms?

5 MR. SEGAL: Yes, your honor.

6 THE COURT: Okay. Thank you.

7 MS. SHELOWITZ: Judge, I just want to  
8 make sure that I say that as far of our motion for  
9 judgement of acquittal, I know it was denied but I  
10 just didn't recall any testimony by anybody that  
11 this occurred in Broward County, Florida. And I  
12 do want to just note that the state has to show to  
13 get pass --

14 THE COURT: Again, I am going to stand by  
15 the ruling previously made. Thank you.

16 It's not my intention, as I said, to put  
17 any time restriction on anybody but I would like  
18 to get a feel for time.

19 Mr. Segal, how do you anticipate your  
20 time running and how would you want to divide it?

21 MR. SEGAL: Without limitations, it's  
22 really hard to say but I'll just make my opening  
23 and closing to be somewhere about 30, 35 minutes.

24 THE COURT: In total?

25 MR. SEGAL: The opening and closing,

1           roughly, judge.

2           THE COURT: I understand. I'm going to  
3           have Karen -- how about at the defense end? And  
4           you're giving it, Ms. Shelowitz?

5           MS. SHELOWITZ: Yes. I think it's going  
6           to be a lot longer than that.

7           THE COURT: Okay. What I'm going to do  
8           is -- and again, it's not my intention to, you  
9           know, put a clock on anybody but that you have  
10          some idea of where time is. Actually, some  
11          lawyers have wanted me to let them know what time  
12          because they don't want to go too long because  
13          they feel that that can also have a negative  
14          effect.

15          At your end, Mr. Segal, Karen's going to  
16          give a tap when you've gone 20 to 25 minutes and  
17          then you'll gauge whatever you want at that point.

18          MR. SEGAL: Okay. That's fine.

19          THE COURT: And then at your end,  
20          Ms. Shelowitz, you're going to get a tap when  
21          you've gone 45 minutes and then you'll gauge  
22          whatever you want at that point.

23          MS. SHELOWITZ: Okay. I can say that I  
24          probably will go an hour or more, depending on how  
25          fast I talk, if I slow down, if I skip things.

1           THE COURT: It's not my intention to  
2           limit you but I just want you -- you'll know when  
3           you've gone 45 minutes. And then you can decide  
4           at that point, you can continue on for however  
5           long you feel appropriate.

6           MS. SHELOWITZ: You can bring out the  
7           cane, if I get --

8           THE COURT: We'll prop you up if we have  
9           to, stand you up like Hannibal Lecter.

10          Okay. I do notice that there are some  
11          people out here that are -- some of you have been  
12          here for the whole trial. Some of you have been  
13          here intermittently. As I've said throughout,  
14          everybody is welcome to stay here and, you know,  
15          it's a public trial.

16          I am going to caution though that I am  
17          not going to tolerate any expression of emotion,  
18          any facial expressions during closing arguments.  
19          If something somebody says is not to your liking,  
20          you can keep that to yourself. But if I do sense  
21          any kind of expressions or sighs of relief or  
22          sighs of despair, however you want to term it, I  
23          am going to respond to that. So I appreciate  
24          everybody's cooperation in that regard.

25          Okay. And the jury should be up here

1 momentarily.

2 MR. TERRELL: Judge, we'd like to just  
3 examine one thing on this piece of evidence, if we  
4 could.

5 THE COURT: Sure. You may want to take  
6 this moment and sort of filter out things where  
7 you're going to want to grab onto them.

8 Are they all there, Karen?

9 THE CLERK: Yes, they are.

10 THE COURT: Okay. Mr. Behrens,  
11 Mr. Segal, Ms. Shelowitz, Mr. Terrell are present.  
12 Bring them in, Henry.

13 Ms. Shelowitz, I'm going to ask you if  
14 you want to proceed and you'll rest on the record.

15 THE SHERIFF: Jury coming in, your honor.

16 [WHEREUPON, the jury panel entered the  
17 courtroom]

18 THE COURT: Welcome back, ladies and  
19 gentlemen. I appreciate your patience. The delay  
20 in getting you back in here enabled us to continue  
21 working on this case, all with the view towards  
22 getting it concluded.

23 The defense may proceed.

24 MS. SHELOWITZ: At this time, the defense  
25 would rest.

1 THE COURT: Any rebuttal at your end,  
2 Mr. Segal?

3 MR. SEGAL: No, your honor.

4 THE COURT: Okay. Ladies and gentlemen,  
5 at this time, both the state and defense have  
6 rested their case. The attorneys will now present  
7 to you their final arguments.

8 Please remember that what the attorneys  
9 say is not evidence. However, do listen closely  
10 to their arguments. They're intended to aid you  
11 in understanding the case. Each side will have  
12 equal time. However, the state is entitled to  
13 divide its time between an opening argument and a  
14 rebuttal argument after the defense has spoken.

15 Mr. Segal.

16 MR. SEGAL: Thank you, your honor.

17 MR. SEGAL: Good afternoon, folks. I  
18 want to thank you all very much for your attention  
19 during the course of this case even though at  
20 times it was boring, it dragged on, whatever the  
21 deal is. Sometimes, you were all freezing,  
22 listening to the evidence. So we do appreciate  
23 your attention throughout all of that.

24 Now, as the court indicated about the  
25 closing argument, again, what the attorneys say in

1 the course of closing argument is not evidence.  
2 It is your memories of the evidence that controls.  
3 Hopefully, we'll tell you accurately what the  
4 evidence was. But again, if your memory of what  
5 the evidence differs from what we say, it's your  
6 memories that control. What we say is not  
7 evidence.

8 Also, in a similar way, what we say  
9 during the course of each closing argument is not  
10 the law. Hopefully, the state will correctly  
11 state the law to you but it's Judge Horowitz who  
12 will tell you what the law is applied to this  
13 case. That's what you have to go by.

14 Okay. The court's going to read you a  
15 bunch of instructions when we get done arguing to  
16 you all. I want to read one instruction and take  
17 it off from there. The court's going to instruct  
18 you all that to overcome the defendant's  
19 presumption of innocence, the state has the burden  
20 of proving the crime with which the defendant is  
21 charged was committed and the defendant is the  
22 person who committed the crime.

23 So there's only two things the state has  
24 to prove, one that the crime was committed and,  
25 two, the person is who committed the crime. There



1 really is or shouldn't be any issue that the crime  
2 was committed.

3 [REDACTED] [REDACTED] uncontradicted testimony is  
4 that she worked a long, exhausting day on  
5 September -- on May 11th into May 12th. Got to  
6 work at about 7:00 a.m. Got home about 2:30 a.m.  
7 the following day. She comes home. She sets her  
8 alarm to wake up in a few hours because she has to  
9 be back at work early again and she goes to sleep  
10 alone in her home. The home's locked up. The  
11 kitchen window is closed. The screen's in it.

12 She's awakened by a man standing in the  
13 doorway of her bedroom. The man is a stranger to  
14 her, nobody she invited or gave permission to come  
15 into her house. It is uncontradicted, the man  
16 broke into the house through the kitchen window.  
17 You saw the photos and you heard the testimony  
18 about the window being open and the screen laying  
19 outside on the ground, which is not the way it was  
20 when she went to sleep.

21 [REDACTED] and the police found the dirt  
22 tracks through the house, through the home, that  
23 you all saw in the photographs and, again, the  
24 kitchen window open and the screen on the ground.  
25 All indicated there was an unlawful entry into the

1 house, a break-in.

2 Why did the person break in? Well, I'm  
3 going over it, the elements of burglary that the  
4 court will instruct you about. Why did the person  
5 break in? What was the intent of the person who  
6 broke into her house, this home invader. It was  
7 obvious that he intended to commit a sexual  
8 battery on [REDACTED]

9 There was no evidence at all in this case  
10 that anything was taken from [REDACTED] home.  
11 Therefore, there was no intent to steal from her.  
12 The intent was what the person did: Went up to  
13 her room and committed sexual battery against her.

14 Now, in the course of committing that  
15 burglary, the break-in, the person who broke in  
16 committed a battery upon [REDACTED] by unlawfully  
17 touching her, and the court will tell you about.  
18 It's uncontradicted again that the home invader  
19 pushed this knife or this sharp object against her  
20 stomach, her uncovered stomach, molested her by  
21 rubbing her buttocks area and back, in that area  
22 of her that she described and by putting his penis  
23 in her mouth.

24 All unlawful touching. All a battery  
25 committed against her during the course of this

1 break-in. That's the burglary charge in Count 2  
2 and all the elements of that. It's uncontradicted  
3 that that occurred.

4 Similarly, it's uncontradicted that the  
5 sexual battery charged -- the armed sexual battery  
6 charged in Count 1 occurred. Again, [REDACTED]  
7 testified uncontradicted that the home invader  
8 sexually terrorized her while she's laying in her  
9 bed, alone, in the early morning hours, in the  
10 dark, by sticking his penis in her mouth without  
11 her permission. In the dead of night, when she's  
12 frightened and lying alone there.

13 It's uncontradicted that when he did it,  
14 he was armed with a deadly weapon. [REDACTED] felt  
15 that sharp, metallic blade against her stomach.  
16 And she knew the handle was non-metallic and wider  
17 than a blade, all of which indicates that it was a  
18 knife. That's a deadly weapon.

19 He pushed it against her stomach and told  
20 her to feel this immediately before he started the  
21 sexual assault against her. Therefore, he used  
22 that deadly weapon in the course of the sexual  
23 assault against her. That's the armed sexual  
24 battery charge in Count 1 of the information. The  
25 evidence that that crime occurred is

1           uncontradicted.

2                   The issue in this case becomes, is the  
3           defendant the person who committed the crime. The  
4           answer is, he most certainly is. The primary  
5           ediface in this case that tells us that that  
6           defendant is the person who committed this crime  
7           against [REDACTED] [REDACTED] the person who terrorized  
8           [REDACTED] [REDACTED] is the DNA evidence.

9                   You heard uncontradicted from Donna  
10          Marchaese who's worked in the Sheriff's Office  
11          Crime Laboratory for about 18 years total, about  
12          nine years doing DNA testing. She's tested  
13          thousands and thousands of evidence samples. And  
14          you heard from Dr. Martin Tracey, Professor of  
15          Florida International University, he was going  
16          around the country testifying about DNA and DNA  
17          analysis, who's written papers, who's reviewed  
18          papers, goes to conferences, all of that.

19                  They all testified uncontradicted that  
20          this RFLP DNA testing technique that was used back  
21          in 1995, in 1997, by the Crime Lab, is generally  
22          accepted, well-recognized, legitimate scientific  
23          testing of evidence.

24                  And it was also uncontradicted from  
25          Ms. Marchaese and Professor Tracey that the DNA

1       that was extracted from the fitted sheet, that  
2       hole in the fitted sheet, matched the DNA profile  
3       of the defendant's swabs. They both testified on  
4       the autoradiogram of the two different samples.  
5       And they matched. They're in the same location, a  
6       visual match. They matched. That is  
7       uncontradicted.

8               Then Dr. Tracey testified, again  
9       uncontradicted, without even a challenge when  
10      Mr. Terrell cross-examined him. Remember, I think  
11      Mr. Terrell asked him two questions. He didn't  
12      ask at all about the population statistics that he  
13      came up with. He testified, again uncontradicted,  
14      with his expertise, that the odds of anyone else  
15      having the same DNA profile that was found on the  
16      sheet and in the defendant's swab ranges from one  
17      in 14 billion for a Caucasian population, one in  
18      40 billion for the Minnesota population, one in 45  
19      billion for the Southeast Hispanic population, one  
20      in 80 billion for the Southwest Hispanic  
21      population and one in 152 billion for an African  
22      American population.

23             So the most conservative you could be, to  
24      look at it in the light most favorable to the  
25      defendant, the chance that somebody else, pulled

1 at random from the population, who would have the  
2 same DNA profile as was found in the DNA testing,  
3 is one in 14 billion. One in 14 billion that  
4 anybody else pulled from the population would have  
5 the same genetic profile.

6 What's the population of the earth?  
7 Five, six billion people, something like that. It  
8 is virtually impossible, in fact, totally  
9 impossible to find any other person on this earth,  
10 on this planet who on May 12th, 1995, who had the  
11 same DNA profile as the defendant and the DNA  
12 profile found on the sheet, much less another male  
13 with an Hispanic accent of described age in  
14 Broward County.

15 Furthermore, the DNA evidence doesn't  
16 lie. It's a scientific test. It doesn't have  
17 biases in there. It doesn't have motives. It  
18 doesn't have reasons to fabricate. It's just a  
19 scientific test. It is a well recognized and  
20 accepted scientific test which was reviewed and  
21 analyzed by knowledgeable, experienced people:  
22 Donna Marchaese and Professor Martin Tracey.  
23 Ms. Marchaese and Professor Tracey have no motive  
24 whatsoever to fabricate anything they said.

25 What else supports the DNA evidence?

1       What other evidence is there that supports that?  
2       That in and of itself would be enough. One in, at  
3       best, 14 billion people have that DNA profile.

4       ██████████ said the man terrorized her had a  
5       Hispanic accent. The defendant's girlfriend  
6       testified the defendant has a Hispanic accent.

7       ██████████ said the man who sexually assaulted and  
8       terrorized her appeared to be in his 20s, from his  
9       voice. The defendant: 30 years old. She said  
10      20. She thought 20s. He's 30. How close can you  
11      get?

12               By the way, bear in mind that ██████████  
13      never said he was in his early 20s, as Mr. Terrell  
14      asserted in his opening statement. He asserted  
15      that. The evidence did not say that. The only  
16      evidence in this case is that she said she  
17      believed him to be in his 20s. What did Ms. ██████████  
18      ██████████ say about the height of the person that  
19      did it? Five, seven to five, nine.

20               And again remember, when she's looking at  
21      him, the brief time she has to look at him, she's  
22      laying on her side, in bed, having just woken  
23      after being exhausted, with a light shining in her  
24      face in the dark and she sees a silhouette of this  
25      man. And she makes a rough approximation based on

1       that situation. And then she said five, seven to  
2       five, nine. You folks have walked in here and  
3       seen the defendant standing: Five, ten, five, 11.  
4       Not exact but given the circumstances, it's pretty  
5       close.

6               Where did the defendant live at the time?  
7       He lived in Lauderhill. That's where Sargeant  
8       Moore testified that he went to get the oral swabs  
9       from the defendant two months earlier. And  
10      Ms. Turgeon testified that he lived in Lauderhill.  
11      Where's Lauderhill in relation to Plantation? Two  
12      towns away. Lauderhill, Sunrise, Plantation.

13             That all indicates, the DNA supported by  
14      the -- by the -- by that other evidence, that this  
15      defendant here, he's the one that sexually  
16      terrorized her, invaded her home during those  
17      early morning hours while she's alone, in bed.

18             Let's examine the alibi defenses or  
19      defense that they've tried to present, they wanted  
20      to sell to you. They want you to believe that he  
21      wasn't there, that he was off with his girlfriend  
22      in Lighthouse Point. Well, let's go through all  
23      that.

24             First of all, Ms. Turgeon had every  
25      motive in the world to fabricate her testimony.



1       There was nothing in evidence to support what she  
2       said, just her words. What's the motive to  
3       fabricate? She has a romantic relationship with  
4       the defendant. She has a business relationship  
5       with the defendant.

6               Did you all observe the way she was  
7       smiling at him when she was testifying up here and  
8       he was seated over there? Did you all see that?  
9       She provided money for his defense. She still  
10      cares about him. In fact, she cares enough about  
11      him to be here now while this closing argument's  
12      going on. She still cares about him. She wants  
13      him to be found not guilty.

14             Now, what did she say. She says that she  
15      clearly recalls this night, specifically this  
16      night, among the hundreds and hundreds and  
17      hundreds and hundreds of nights that she spent  
18      with him. That several years later, when she  
19      learned about the defendant's arrest, she was able  
20      to reconstruct exactly that night among these  
21      hundreds and hundreds and hundreds of nights,  
22      dating from September of 1989, I think it was,  
23      until February of 1997.

24             Yet, she's unable to recall whether she  
25      even spoke to the defendant the next day.

1 Remember, she was talking about how special and  
2 significant May 12th was to her and May 11th  
3 because the job and the operation and all that  
4 stuff. That was special and significant to her.  
5 That's why she was able to remember May 11th,  
6 May 12.

7 Yet, she also said that the evening of  
8 May 12th was significant to her too because her  
9 love, the defendant, was going to go away to  
10 Stewart that weekend for Mother's Day with the  
11 family and not be around her. That was  
12 significant to her too. Yet, curiously, she's  
13 unable to recall if she even spoke to him that  
14 night. She can't recall that.

15 She can recall the details of May 11th  
16 into May 12th but can't recall the details of the  
17 evening of May 12th, both equally significant to  
18 her. And it's curious that the time she alleges  
19 that she can remember happens to be the time  
20 connected with the crime, May 11th into May 12th.  
21 But the May 12th has nothing to do with the crime  
22 and, for whatever reason, she can't remember that.  
23 She can remember when it involves the crime but  
24 can't remember times that had nothing to do with  
25 the crime.

1                   Another contradictions between her and  
2           Dr. Duran -- contradiction might the wrong word,  
3           but the inconsistentencies between her and  
4           Dr. Duran.

5                   Ms. Turgeon said that the defendant has a  
6           very low tolerance for pain and was in  
7           excruciating pain and was prociferously  
8           complaining about the pain he was in for those, I  
9           guess, Tuesday, Wednesday and Thursday nights that  
10          she was with him and that he was taking medication  
11          and the medication didn't get rid of the pain. He  
12          was still in pain. He was depressed and he was  
13          not sleeping well. And he liked to complain. He  
14          liked to complain for attention.

15                  Well, the defendant visited Dr. Duran on  
16          May 12th, in the afternoon, for one follow-up  
17          visit after the removal of the cysts. And you can  
18          take those back and look at them. Here's his  
19          notes which the doctor said are unreadable but he  
20          has this translation here. You can look at the  
21          translation that on May 10th, the Wednesday, he  
22          goes in and his complaint, he complains of not  
23          being able to shower. That's his only complaint.

24                  How trivial is that, not being able to  
25          shower? His only complaint Dr. Duran noted. And

1 as Dr. Duran stated, he's a thorough notetaker and  
2 he would record the complaints. The only  
3 complaint was, not able to shower.

4 May 12th, the day of the crime, when he  
5 goes to see Dr. Duran that afternoon. This man,  
6 who complains for attention, who has a low  
7 tolerance for pain, who wasn't sleeping well, who  
8 was in excruciating pain the entire week,  
9 depressed, the pain medication wasn't doing its  
10 job. He was still in excruciating pain. 5/12/95:  
11 No complaints. No complaints.

12 If what Ms. Turgeon had to say was the  
13 truth, you know, using your common sense -- and  
14 I'll get to that in a second. You're allowed to  
15 use your common sense. You know, using your  
16 common sense, that this defendant would have  
17 complained to his friend, Dr. Duran, about the  
18 pain, not sleeping well, needing more medication,  
19 being depressed because he complained about not  
20 taking a shower -- not being able to shower. He  
21 was -- he was able to complain about that. But  
22 not one word mentioned in that medical reports  
23 about complaints about the pain, being depressed  
24 or anything of these other things that Ms. Turgeon  
25 said.

1           The fact the complaining that the  
2       defendant did about pain -- even Dr. Duran  
3       testified to that. I forget the medical term  
4       used, hyperalgie or something, but it stands for  
5       low tolerance to pain. Dr. Duran and Ms. Turgeon  
6       both said that.

7           Drs. Duran -- Dr. Duran's notes, he  
8       testified did not change, which were accurate,  
9       tell you, using your common sense, that  
10      Ms. Turgeon's story, the alibi she's trying to  
11      sell to you, is false. None of that happened. He  
12      didn't spend the night with her. Or if he did  
13      spend the night with her, he got back like six  
14      o'clock or whatever, after he committed this  
15      crime.

16           Because it didn't happen the way she  
17      said. There was no severe pain. He was not there  
18      the entire night. Remember, you can only rely on  
19      what she says. There's nothing to support what  
20      she said. And, in fact, what exists contradicts  
21      what she said, what Dr. Duran's notes say.

22           Her inability to recall the significant  
23      evening of May 12th and whether she spoke to him  
24      but can't recall everything else also shows that  
25      she's fabricating this alibi she's trying to sell

1 to you all. People can fabricate to cover up for  
2 somebody they care about. Scientific evidence  
3 does not fabricate. Scientific evidence doesn't  
4 care. Scientific evidence is just science.  
5 That's what that DNA evidence proved, the  
6 scientific evidence.

7 Now, let's go over some of the things  
8 that the defense attorney is probably going to  
9 talk to you about. They're probably going to try  
10 to tell you all that the swabs --

11 MS. SHELOWITZ: Judge, I'm going to  
12 object. This is improper argument.

13 THE COURT: Overruled.

14 MR. SEGAL: They're probably going to  
15 tell you that the swabs that Ms. Marchaese used  
16 for the testing are not the defendant's swabs.

17 Another instruction the court's going to  
18 give is as follows, about the common sense. You  
19 should use your common sense in deciding which is  
20 the best evidence and which evidence should not be  
21 relied upon in considering your verdict. Let's  
22 use our common sense in looking at this evidence.

23 It's again uncontradicted, Sargeant  
24 Moore, as part of that serial homicide  
25 investigation down in Dade County, goes to the

1       defendant and I think it was March of 1995 and  
2       obtains a swab from him at his Lauderhill home.  
3       Then he takes them down to the Metro Dade Police  
4       Department where they are logged into the lab.

5               And when they're logged into the lab, on  
6       the property receipt that Sargeant Moore filled  
7       out for those swabs, the number 232 was put on  
8       there, the item number. Is on here, that item  
9       number 232, that you can see on this piece of  
10      evidence.

11             Again, number 232 is assigned to the  
12      proper receipt for Ernesto Behrens' swabs. That  
13      number 232 appears on the paperwork throughout the  
14      processing of the swabs. It appears in that  
15      running list that Ms. Hinz testified about, Sharon  
16      Hinz from the Crime Lab down there testified  
17      about: 232, Ernesto Behrens down here.

18             There was something referred to but not  
19      admitted into evidence, the DNA transmittal sheet,  
20      where Ms. Hinz turned over about 15 batches of  
21      swabs to Dr. Khan for testing. She -- it was not  
22      admitted into evidence but it was discussed. And  
23      on that was: 232, Ernesto Behrens. The number  
24      232 stuck with the defendant's swabs all the way  
25      through the processing at the Metro Dade Police

1 Department Crime Laboratory.

2 Then Detective Geller contacts Ms. Hinz  
3 in June of 1997, after they get a lead that the  
4 defendant may be the person who did this and he  
5 learns about the swabs being down there, contacts  
6 Ms. Hinz and goes down there to collect the swabs.

7 Ms. Hinz testifies, she pulls out the  
8 swabs under 232 and transfers to the swabs to a  
9 card and on that card writes 232, the same number  
10 that's been assigned to the defendant's swabs  
11 throughout this, 232. And she writes Ernest  
12 Behrens, leaves out the O. We'll get to that in a  
13 minute. Ernest Behrens, 232. She made a mistake.  
14 She left the O off. Everything else is the same.  
15 Every other letter in the first name is the same,  
16 in the same order. The last name is exactly the  
17 same and the item number is the same.

18 Then you further heard from Detective  
19 John Butchko, who was one of the key lead  
20 investigators in the Tamiami serial murders down  
21 there, that he reviewed all the leads in the case.  
22 He saw who submitted swabs in the course of that  
23 investigation. And he testified without  
24 contradiction that there was never a swab obtained  
25 from anybody named Ernest Behrens. There was no



1 Ernest Behrens involved in the Tamiami  
2 investigation. It was Ernesto Behrens. An O was  
3 left off. It was a simple mistake. Now, I'll get  
4 to this in a second.

5 And they're probably going to get you to  
6 believe that these swabs were not Ernesto Behrens'  
7 swabs. They were somebody else's swabs: Ernest  
8 Behrens who doesn't exist. That's what they going  
9 to try to get you to believe.

10 So the court's going to instruct you as  
11 follows and I ask you to listen to this  
12 instruction. A reasonable doubt is not a possible  
13 doubt, a speculative, imaginary or forced doubt.  
14 Such a doubt must not influence you to return a  
15 verdict of not guilty if you have an abiding  
16 conviction of guilt.

17 Their effort to have you believe that  
18 those swabs were submitted by somebody else is  
19 nothing but their effort to try to raise the  
20 possibility. Possibility or possible doubts are  
21 not reasonable doubts. Have you speculate or  
22 imagine. Speculative or imaginary doubts are not  
23 reasonable doubts. Or force you to conjecture.  
24 Forced doubts are not reasonable doubts, that  
25 somebody else provided these swabs. There's no

1 evidence that anybody else provided those swabs.  
2 232, the defendant, Ernesto Behrens. 232, Ernest,  
3 O left off, Behrens went to the Broward Sheriff's  
4 Office Crime Laboratory for testing.

5 There is not one scintilla or bit of  
6 evidence that anybody else provided those swabs  
7 that Ms. Marchaese utilized in her testing. And  
8 to accept their efforts to force you to have a  
9 reasonable doubt, which is contrary to the jury  
10 instruction, you must also accept the coincidence  
11 the person who actually gave the swabs that were  
12 tested by Ms. Marchaese from some contact around  
13 Southwest 8th Street in South Miami area was in  
14 his 20s or early 30s, spoke with a Hispanic accent,  
15 was five, seven to five, 11, somewhere in that  
16 height range and happened to be in Broward County  
17 on May 12th of 1995.

18 There is no coincidence that the person  
19 who actually gave those swabs fit those criteria  
20 because the person that gave the swabs that  
21 Ms. Marchaese tested was him. Please use your  
22 common sense. They're trying to use a writing  
23 error, a simple writing error, where an O is left  
24 off, to force a reasonable doubt. They're should  
25 be no reasonable doubt.

1                   Another thing they may raise is the  
2                   number of swabs that were collected from the  
3                   defendant. Now, Ms. Hinz testified without  
4                   contradiction, without contradiction, that in her  
5                   long experience with the Metro Dade Police  
6                   Department Crime Laboratory, that police officers  
7                   she deals with routinely misnumber the amount of  
8                   swabs they deal with, that they handle during an  
9                   investigation, that that is routine, common, an  
10                  everyday thing.

11                  Clearly, and using your common sense,  
12                  that's what Sargeant Moore did. If you look at  
13                  the property receipt for the swabs, he wrote: The  
14                  quantity, one. Brown evidence bag containing oral  
15                  swab. Then he testified that, in his memory, he  
16                  thought there were two swabs. Ms. Hinz testified  
17                  there were three or four swabs.

18                  Sargeant Moore did nothing other than  
19                  what the police officers routinely do, is  
20                  mischaracterize the number of swabs. As Ms. Hinz  
21                  said, swabs came either one or two to a packet.  
22                  What Sargeant Moore had was two packets which he  
23                  called two swabs. Two swabs to a packet. Some  
24                  had one swab. That's why Ms. Hinz says there were  
25                  three or four swabs associated with item 232.

1                   And it's really interesting too how the  
2           defense is willing to attack Sargeant Moore for  
3           mischaracterizing the number of swabs when  
4           Dr. Duran, their witness, who they want you to  
5           believe, believe what he said, he mischaracter --  
6           they mischaracterized something too.

7                   As you recall Dr. Duran's testimony, when  
8           they sent the cysts that were removed from the  
9           defendant to the pathologist to be examined, that  
10          Dr. Duran's wife wrote on there, they were  
11          swabs -- I mean, they were cysts from the back.  
12          Didn't put the front, just put cysts from the  
13          back. And when the pathology report came back,  
14          which just referred to the cysts on the back were  
15          examined, he had to correct it because it was  
16          front and the back.

17                   So what they want you to do is to believe  
18          it's okay for Dr. Duran to do that. Believe  
19          Dr. Duran but don't believe Sargeant Moore. Don't  
20          believe that. It's either one way or the other.  
21          Either people make mistakes about things which are  
22          explainable or it's a big conspiracy where  
23          everybody's making stuff up just to get this  
24          defendant for no known reason.

25                   Again, they may try to again focus on the

1 difference in the descriptions of the defendant  
2 and what Ms. [REDACTED] described as the person who did  
3 this to her. Remember that the height, as I  
4 discussed before, she's only guesstimating. She's  
5 terrorized. She's lying down on her side of the  
6 bed. The home invader, the guy that sexually  
7 terrorized her, is several feet away. He could  
8 have been crouching while -- while he's doing this  
9 and she's just guesstimating height and she's not  
10 too far off to this defendant. The defendant's 30  
11 years old. She's said in his 20s. How close can  
12 you get?

13 Another thing they may raise to you all  
14 is their testimony that the defendant is  
15 uncircum sized and [REDACTED] thought that the person  
16 taht attacked her was circum sized. Well, first of  
17 all, [REDACTED] never saw his penis. Her face was  
18 covered with a pillow the entire time his penis  
19 was exposed so she never had a chance to see the  
20 penis.

21 Secondly, she testified, without  
22 contradiction, that her fiance, who is also  
23 uncircum sized, that there are times -- usually,  
24 when he's aroused, she can't tell whether he's  
25 circum sized or uncircum sized. So that's who is

1 offering this opinion. Her belief.

2 And look at the circumstances that [REDACTED]  
3 [REDACTED] was in when this occurred. This poor woman  
4 is exhausted after working a long, stressful day.  
5 She had just gotten to sleep and has only been  
6 asleep for a short time. She's awoken in the dead  
7 of night, in her dark room, terrorized by this  
8 person.

9 Do you think that under those  
10 circumstances, that a woman's going to sit there  
11 and say: Okay. Let me just ignore everything  
12 else and figure out whether the person who's  
13 sexually assaulting me is circumcised or not  
14 because that's clearly the most important thing  
15 and I'm going to find that out while all this is  
16 happening to me.

17 It is easy -- easy for [REDACTED] [REDACTED] to  
18 make a mistake as to circumcised or uncircumcised.  
19 Her boyfriend or fiancé, who she lives voluntarily  
20 with, she can't tell the difference when he's  
21 aroused. How is she going to tell the difference  
22 in the conditions that she was in?

23 Well, another thing. Ms. Turgeon says  
24 that the defendant didn't like oral sex because  
25 his penis is tender because he's uncircumcised.

1 Yet, he frequently -- frequently engages in  
2 vaginal intercourse with her. Well, how much  
3 friction takes place between a man's penis and the  
4 lips and the walls of a woman's vagina when  
5 intercourse takes place?

6 I hate to be graphic about this but  
7 unfortunately that's the kind of case this is.  
8 It's back and forth, back and forth, back and  
9 forth. That's okay. That's not too sensitive.  
10 He's not too sensitive for that. He can do that.  
11 But he hates oral sex. He would never do that.  
12 Another indication that what Ms. Turgeon told you  
13 is fabrication.

14 Folks, this defendant is guilty, guilty  
15 of breaking into the privacy of [REDACTED] [REDACTED] home  
16 when she was alone, exhausted and asleep. And he  
17 then woke her and sexually terrorized her,  
18 threatened her with that knife. He stuck his  
19 penis into her mouth against her will while she  
20 was there, terrorized in her bed, in the early  
21 morning hours, home alone.

22 The DNA, the other supporting evidence in  
23 this case, has clearly proven that this defendant  
24 is guilty of the armed sexual battery and the  
25 burglary with the battery that he's charged with

1 in the information.

2 Thank you very much.

3 THE COURT: Thank you.

4 Ms. Shelowitz.

5 MS. SHELOWITZ: Ladies and gentlemen,  
6 thank you so much for your attention throughout  
7 this trial. And as the state said, some of this  
8 evidence was very difficult to sit through,  
9 whether it would be difficult to hear or through  
10 just being plain -- sometimes a little bit above  
11 our heads to understand, it's hard to sit through  
12 but you did a good job and we appreciate that.

13 The state started out with something so  
14 important. They told you, they have to prove  
15 beyond a reasonable doubt that Ernesto Behrens  
16 committed this crime.

17 Mr. Terrell told you in the beginning of  
18 this case two things. Number one, no one in this  
19 trial could stand here and say Ernesto Behrens was  
20 in that house. We know that. He did it. No one  
21 testified to it. In fact, almost every witness  
22 would give testimony and present evidence that in  
23 fact shows that he is innocence, that he is not  
24 guilty of that -- these charges.

25 And as his honor will instruct you,



1 looking for reasonable doubt, we look at the  
2 evidence itself. We look at lack of evidence or  
3 we look at conflict in the evidence. That's how  
4 we find reasonable doubt. And you keep that in  
5 mind throughout what we're going to discuss.

6 I want to start with Marjorie Hanlon, the  
7 first witness. But actually before I get to  
8 Marjorie Hanlon, I think it's interesting that  
9 this was a crime scene. Okay. The police are  
10 called. 911. I was just assaulted. Come.  
11 Hurry. I mean, we saw [REDACTED] [REDACTED] You can  
12 imagine what it was like.

13 The next step we know is, who arrives.  
14 The police, many police, detectives, sergeants,  
15 all kinds of police coming, setting up a  
16 parameter. I mean, there was a whole thing going  
17 on here. There were cops in the house, looking  
18 around. There was even canine there.

19 Ladies and gentlemen, who are they? Who  
20 are they? You're sitting in an armed sexual  
21 battery trial and not one officer, not one --  
22 Hanlon's not an officer. She's a crime tech. She  
23 collects evidence. Not one police officer was  
24 called to testify. If that's not a lack of  
25 evidence, then I don't know what is.

1                   It's unheard of. It makes no sense. And  
2                   there has to be a reason why. There has to be a  
3                   reason why. Was he worried that the trial was  
4                   going to take too long? What did those people  
5                   have to say? We know they did reports. Why  
6                   didn't those people testify?

7                   They did bring in one detective. We'll  
8                   give you that. Detective Geller, an officer who  
9                   wasn't at the scene, never talked to the victim,  
10                  didn't see anything, basically. But he did write  
11                  a probable cause affidavit, which we got to, which  
12                  we all heard about all the mistakes and the  
13                  controveries over that. And we'll get to that a  
14                  little bit later. One thing that we do know about  
15                  Detective Geller is the way he wrote his police  
16                  report. The way he wrote it was from what? From  
17                  reading these other unknown officer's reports.

18                  Okay. Now, the state says in direct:  
19                  You made this mistake. You made that mistake.  
20                  You made a mistake with the slip dress, that the  
21                  slip dress had semen on it. It was your mistake.  
22                  He wrote that the sliding glass door was the point  
23                  of entry. That was a mistake. You didn't put  
24                  anything in your report, including your  
25                  supplemental, about semen being on a sheet. That

1 was a mistake.

2 Well, ladies and gentlemen, that's what  
3 the state says. We don't know that was a mistake  
4 because not one of the officers testified that it  
5 was a mistake. What evidence was really at the  
6 scene? We don't know because the state did not  
7 bring in anybody. And this is their case. They  
8 have to prove this case beyond a reasonable doubt.  
9 And if they don't have the evidence and they don't  
10 bring it, then they have a lack of evidence. And  
11 that means that they did so because there's a  
12 reasonable doubt in this case.

13 Marjorie Hanlon. There was a talk of  
14 talk about the prints. And there was a lot of  
15 talk about: Sometimes, there's problems with  
16 prints and why some of the prints she had no value  
17 of. Okay. No value meaning that either they were  
18 smeared and she gave a bunch of things like  
19 humidity and different ideas like that.

20 And she also testified that prints can be  
21 forever and once you touch something, that's it.  
22 If the print is there, it'll always be there. It  
23 may not always be something that they can read in  
24 the future but it'll always be there. And there  
25 were prints that could not be read.

1                   So let's use logic. Four prints were  
2                   readable. Logic says those were the freshest  
3                   prints. That's why she could read them. And  
4                   those fresh prints were negative. They were  
5                   negative to Ernesto Behrens. And prints don't  
6                   lie. They're a hundred percent. They're one for  
7                   one. No probability. They don't have to come in  
8                   and bring in experts on probability. That's how  
9                   much of an exact science. Either it is or it  
10                  isn't.

11                  As she testified, we use the point of  
12                  reference: Everybody's is different. There's no,  
13                  one in 500 are the same. None of that. Either it  
14                  is or it isn't. And they can give identity to it  
15                  and say: Yeah. This print belongs to X. They  
16                  said it didn't belong to Ernesto Behrens.

17                  Mr. Behrens did not touch that window.  
18                  There's no evidence at all in this trial that  
19                  there were gloves, anything on the hands. In  
20                  fact, there was evidence to the contrary, that  
21                  there was nothing on the perpetrator's hands. So  
22                  there should be the perpetrator's prints.

23                  Shoe impressions, we saw these molds.  
24                  One thing that, while they were passing the  
25                  pictures, was brought up in -- could it have even

1       been an officer's boot? They didn't know. Is the  
2       state going to assert that this was such a sloppy  
3       investigation that they're making molds of their  
4       own officer's boots? Come on. I hope that's not  
5       why they brought him in, because these cops were  
6       that bad. Okay. That's ridiculous.

7               This crime scene should have been  
8       preserved. We don't know if it was because nobody  
9       testified whether it was preserved. And Hanlon  
10      doesn't know when she got there, whether anything  
11      had been moved. This is a crime technician. She  
12      doesn't know. She thinks might have been but  
13      doesn't know. And nobody came to testify as to  
14      whether they moved anything.

15             They don't take these molds -- and right  
16      there, she testified, there's workers there right  
17      outside [REDACTED] window. It's open. That they've  
18      been working there. There's tire tracks right  
19      behind her window. And no one interviews one  
20      worker. Nobody compares. They didn't even  
21      compare this. There's the boot. Nobody compares  
22      the boots. Why not? This is the investigation.  
23      This is the big investigation that they did.  
24      Nothing.

25             Hanlon testified she collected the

1       comforter, which you have over there, a green  
2       pillow case, sheets and a slip dress. And the  
3       reason is because -- get all the evidence. Hair,  
4       fibers, possible blood or semen. All of that  
5       evidence was submitted on May 18th, 1995, as you  
6       see in the lab -- in the property receipts, except  
7       for one piece of evidence, one piece.

8               What was the one piece of evidence that  
9       wasn't submitted along with all of the other  
10      evidence collected? The fitted sheet. The fitted  
11      sheet doesn't come into the lab until June of '95.  
12      It was very obvious that the state didn't like  
13      that fact. Okay. We saw the state trying to  
14      impeach their own expert to say: Oh, wait a  
15      minute. June, we saw that. Marchaese had the  
16      sheet in front of her and it's marked June of '95,  
17      30 days later. This piece of evidence was  
18      delivered by and -- someone with a -- I don't know  
19      what the name was. Nobody to testify. Okay. The  
20      the sheet's delivered by that person.

21             [REDACTED] [REDACTED] she's a victim. We all  
22      felt -- feel for her. Okay. And maybe some  
23      people may even feel Mr. Terrell was a little hard  
24      on her. Attorneys aren't on trial. Attorneys  
25      make mistakes. Maybe shouldn't have, shouldn't

1 have. But the reality is that it's really an  
2 emotional difficult thing also that Mr. Behrens is  
3 sitting here being accused of this crime and being  
4 not guilty, to hear that this happened. But also  
5 to hear that somebody is saying he did it when he  
6 didn't. Emotions run high that way as well.

7 But there is no excuse as far as [REDACTED]  
8 [REDACTED] goes when it comes to being just untruthful  
9 about things. And I'm not talking about whether  
10 this happened to her. There is no excuse to get  
11 on the stand and say: Well, I never said anything  
12 about the slip dress being what I wiped myself  
13 with. You made me say that at that statement,  
14 that statement that was taken a few months before  
15 the trial.

16 Ladies and gentlemen, the reason -- the  
17 reason, the whole reason -- and you saw pictures.  
18 Marjorie Hanlon took these pictures. Okay. We  
19 blew them up. But Marjorie Hanlon took these  
20 pictures. That's the slip dress. You can see it  
21 for yourself. There's no mistake about that.

22 They didn't collect any other clothes on  
23 that floor. And as you saw, the closet, if you  
24 want to go back and look at the pictures, there's  
25 a whole bunch of clothes in there. They didn't

1 take anything. They picked that dress for a  
2 reason. That's number one.

3 Number two, she goes to the Sexual  
4 Assault Treatment Center. You heard from Jean  
5 Swaby. She says: Well, there was a slip dress  
6 and -- according to her notes -- it was used to  
7 wipe semen. Okay. That's how she knew also to  
8 swab her thigh. Again, she said: No, no.  
9 Nobody's putting these words in her mouth.

10 And there were also statements that she  
11 gave to the police. I mean, even if she comes up  
12 here and she says: All the transcripts are wrong.  
13 Well, what about the people that heard and what  
14 about the evidence they collected? I mean, that  
15 doesn't make any sense. Okay. That doesn't make  
16 any sense at all, why a person would come in here  
17 and say something like that.

18 And just one more point to show that this  
19 is the first time she's ever done that, is the  
20 state said in their opening that she wiped the leg  
21 with the slip dress.

22 The height, she's always said five,  
23 seven. She said she might have used the word  
24 approximately. She never said guesstimate in any  
25 of her statements. That's the state's words.



1       Okay. She never said five, seven; five, eight.  
2       She said five, seven; five, eight. He's not five,  
3       seven; five, eight. But why come in and say: I  
4       don't know now. I'm just guesstimating. You  
5       always knew. Nobody put these words in her mouth.  
6       Nobody created this description for her. Okay.  
7       This is way before the name Ernesto Behrens even  
8       came up. Why is she doing that?

9               Young voice. It's in her statement to  
10       the police one hour after this happens. Young  
11       voice. We didn't put it there. It's what she  
12       said.

13               She gave statements that he was  
14       circumsized. The state now wants to say that she  
15       lied about it. That makes no sense. That makes  
16       no sense. She said it and she said it on the  
17       stand. That, she's never ever retracted. But the  
18       state doesn't like that so now they're saying:  
19       Well, she never saw it.

20               In their own direct of her in their  
21       opening, they talked about how she saw it. She  
22       testified pretty graphically about it, actually.  
23       She was sure that this person was in fact  
24       circumsized. And back when she gave these  
25       original statements, she wasn't engaged to this

1       fiance.

2               Another curious thing about [REDACTED] and  
3       how she tried -- she really just -- you know, you  
4       want to take a lot of what she says at face value  
5       but then some of what she says is just not  
6       credible in that, she testifies to the state the  
7       time, to get the time down. Well, ladies and  
8       gentlemen, here's a picture of her room. There's  
9       a picture of her clock. It's not lit. These  
10      are -- these are Marjorie Hanlon's photos.

11              This isn't a statement that was typed  
12      wrong. We heard the testimony in court. And  
13      again, it's not saying this didn't happen to her.  
14      It's just about why her testimony is so skewed the  
15      day of trial.

16              The state says: Well, DNA is one of our  
17      evidence but it's not all of it. We had a lot of  
18      other things. I mean, we're talking about five,  
19      seven Latin male that happened to be in the area.

20              A lot of people that would be offended by  
21      that comment actually, to say a Latin male in  
22      Broward in their 20s. I mean, what about hundreds  
23      of people? I mean, that's just incredible. Let's  
24      just throw them altogether. So whatever the  
25      description was, if she thinks it was Hispanic,

1       around the 20s: Well, then it must have been  
2       Ernesto Behrens. Well, it couldn't have been  
3       anybody else, I mean; right?

4               That makes no sense. And that's there  
5       other evidence. Close enough, the state says.  
6       Close enough to take someone's liberty away?

7               Ladies and gentlemen, take that sheet  
8       back with you. This sheet says a lot. You can  
9       tell when you have the right side by the lining.  
10      It's not a marked top or bottom. We know Hanlon  
11      said that. But let's use some common sense to  
12      figure that out. At the top of this sheet --  
13      Okay. And it might not be clear. I don't know  
14      how close I can get -- there is a big yellow  
15      stain. Okay. It's a big yellow stain.

16              None of the other evidence has that big  
17      yellow stain. Okay. That big yellow stain looks  
18      like a sweat stain. It's either that or urine.  
19      And I don't think -- I don't want to go so far as  
20      to say that much wet stain is urine. Okay. It  
21      most likely common sense would be sweat. When you  
22      lie in bed, most of the sweat, upper back, around  
23      this area. Okay. So that's where I submit to you  
24      is the top of the sheet. Okay. That is most  
25      likely the top of the sheet. There's also a tag

1           on the bottom so that might also indicate that  
2           that was the bottom.

3                   Okay. Besides that, you're going to see  
4           a lot of other stains. The one thing the state  
5           didn't show you is how the sheet was lying on the  
6           bed. And when you lay it out -- and this is a  
7           fitted sheet so the ends are tight around and it  
8           looks like about like a Queen size. It may be a  
9           full. I don't know. But it's definitely not a  
10          single and it's not a King bed.

11                   If you pull this out tight -- and you may  
12          want to do this in the jury room -- you can see  
13          that the center of the sheet is right here where  
14          that big hole is, okay, that big hole is. And if  
15          you go down from the center, right to this side,  
16          that's spot one. Okay. Spot two, going  
17          clockwise -- well, from one -- from where the  
18          jury's sitting, where you're sitting, it's  
19          clockwise the other way. Spot one, spot two, spot  
20          three, spot four. Okay.

21                   Now, and you can remember that the  
22          smallest one is -- it was like a pin hole and  
23          that's the one she said there was no value. Spot  
24          three tested positive for semen. Spot four tested  
25          positive for semen. Spot one, that's the spot.

1       Okay. That's -- and you can see, it's the next  
2       smallest. That's the spot, that there is any type  
3       of semen that they're claiming was Ernesto  
4       Behrens'. Okay.

5               That is in the center of the sheet, just  
6       to the left of the center of the sheet. This is  
7       the left side of the bed, if you pull it out,  
8       okay, because I can't stretch it all the way out.  
9       Okay. At the time the perpetrator ejaculated, she  
10      testified that she was at the edge of the bed.  
11      Part of the reason that she knows that is because  
12      all his weight wasn't on her. She doesn't know  
13      exactly what the position was. And went through  
14      that. She could say definitely. But one foot  
15      might have even been on the floor, she testified.  
16      But she knows that the weight switched and he was  
17      masterbating. Okay.

18             That stain is not where it should be.  
19      And that's why I want you to pull out this sheet  
20      and look at it. It's not where it should be,  
21      according to the testimony.

22             Okay. Another thing to look at with this  
23      sheet. Look at all the stains and remember:  
24      Stain one, the first stain that Marchaese tests,  
25      she says that's it. I got my stain. Out of all

1 the investigation that we saw in this case,  
2 Marchaese hits it on the knows. She hit the magic  
3 stain out of all those stains. Look at that  
4 sheet.

5 Swaby testified. There's a critical  
6 witness, Swaby. This is the person who does the  
7 Sexual Assault Treatment Center, who goes down  
8 there and accompanies the victim right after this  
9 happens. No shower. I mean, you have to go right  
10 down there and they have to examine you. Yet  
11 another witness that only could testify that  
12 Ernesto Behrens was not there, can't point her  
13 finger at him in anyway. She finds no physical  
14 trauma. And is there a possibility? The state's  
15 going to say there's all these reasons why there's  
16 no possibility. Of course, there's always  
17 possibilities.

18 But look at the case as a whole. I mean,  
19 we've got to get to some kind of possibility  
20 somewhere. Something's got to happen, you know.  
21 So far, nothing's where it's supposed to be. We  
22 haven't found anything. No physical trauma. No  
23 evidence at all of oral penetration. No evidence  
24 of ejaculation. No evidence of sperm. No  
25 evidence of Ernesto Behrens' pubic hair, which

1       they collected hair. No evidence of any bodily  
2       fluids that belonged to Ernesto Behrens.

3               She testified that [REDACTED] -- again,  
4       we're going to stick to this Latin -- she goes to  
5       the center and when they ask her about the person  
6       that did this to her, there's a section for white,  
7       for black, for Latin, for unknown. They circle  
8       unknown. And no evidence of any sperm. They wet  
9       it and they said: Common sense. They wet the  
10      swab because that helps pick up any kind of dry  
11      particles, things that got into the skin. It  
12      helps them to pick it up. They did that.  
13      Nothing. She didn't say anything to point to  
14      Ernesto Behrens as being the person who committed  
15      this crime.

16             Now, as to no cops again. We go into day  
17      two. Are we going to see cops regarding this  
18      case? No. Who do we go into? Sargeant Moore, a  
19      Miami sargeant. Nothing to do with this case.  
20      Has no personal knowledge of this case. And he  
21      gets called in. I mean, they solved their crime.  
22      They have somebody convicted in Miami. Okay.  
23      This isn't that trial. We're not here -- we heard  
24      from more witnesses from that trial than we saw  
25      from this.

1           Anybody on the street, they went up to,  
2           they made contact with, they're looking: Will you  
3           give a sample? Will you give a sample? Ernesto  
4           says: I don't care. Come on. Brings them into  
5           his home, with his kids and his wife. Go ahead.  
6           Take a swab.

7           What did Sargeant Moore testify to and  
8           what is so important? Everybody kept testifying  
9           as to what's generally done. Why these officers  
10          sometimes make mistakes. Okay. Why they  
11          sometimes make mistakes with the number of swabs.  
12          We have Sargeant Moore's testimony. I'm not going  
13          to tell you what I think he said. I'm going to  
14          tell you what he said.

15          This is by Mr. Terrell.

16          "Q. I'm showing you what has been  
17               marked Defense M for identification.  
              Do you recognize that?

18          A. Sure do.

19          "Q. Could you explain to the jury what  
              that is?

20          A. That is a Metro Dade Police  
21               Department property receipt listing  
              the oral swab specimen that was  
              taken from Mr. Behrens.

22          "Q. You just mentioned that it had --  
23               that it said oral swab specimen.  
              Is that singular or in the plural?

24          A. Oral swab specimen, meaning one  
              swab, one specimen."

25          Now, on cross, the state attorney wanted



1 to correct what he said. This was it. This was  
2 the moment the state attorney had the opportunity  
3 to correct it, as the state knew it to be true at  
4 that part of the trial. Okay. The state could  
5 have gotten up and said: Well, isn't it true,  
6 really there were four. We didn't hear that  
7 testimony.

8 Let's see what Mr. Segal said.

9 "Now, on the property receipt, it  
10 says one swab specimen; correct?  
A. That is correct.

11 "Q. How many swabs are in a swab  
specimen?  
12 A. Two. One for the left side and one  
for the right side of the mouth.

13 "MR. TERRELL: Nothing further."  
14

15 I'm not telling you what I think the  
16 evidence is. I'm reading it to you.

17 That property receipt that the state says  
18 says 232, there is no testimony, none -- as a  
19 matter of fact, the opposite -- that sargeant  
20 Moore wrote 232. He did not assign that number.  
21 Sharon Hinz did. And you can review that  
22 testimony and you can review Sargeant Moore's and  
23 see for yourself. You don't have to believe me.

24 Two swabs in one specimen property  
25 receipt, one specimen. So now there may be  
confusion, was there one or two but we've never

1           gotten to four.

2                   Hinz, Sharon Hinz, another person who has  
3           nothing to do with the Ernesto Behrens case.  
4           Another witness who never saw anything, can't  
5           testify to anything. The only thing the state  
6           brought her in to do was to talk about generally  
7           what's done.

8                   This case is not in a vacuum. We're not  
9           here to talk about how cases are generally tried,  
10          how cases are generally won or how police  
11          investigations generally go. Generally, we go out  
12          and if somebody's standing with a gun, we arrest  
13          him. Generally; no.

14                   What happened here? Who handled these  
15          swabs? She has no personal knowledge of the  
16          processing of this swab. I didn't make it up.  
17          I'm not creating anything. This is the state's  
18          case. That's what we're talking about. This is  
19          the state's witness, who came down here, who could  
20          only testify to normally what's done.

21                   She never saw these swabs come into the  
22          department. She didn't assign them the number  
23          232. It was the person who processed it. It came  
24          out of a computer number and somebody assigned it.  
25          Remember, somebody else did this. Who? I don't

1 know because there wasn't one witness brought by  
2 the state that actually worked there.

3 And why didn't this person want to  
4 testify? She didn't see these swabs taken out of  
5 the package. She doesn't have any personal  
6 knowledge at the time that the swabs are separated  
7 from the property receipt. She didn't see anybody  
8 put a name on the index card. She didn't write  
9 the name on the index card. She never transported  
10 these anywhere.

11 She testifies to protocol and the state,  
12 after saying: Accept her protocol, accept her  
13 protocol and accept her protocol, gets up and  
14 said: But sometimes there's screw-ups. And those  
15 screw-ups are whatever's in their favor.  
16 Screw-ups are now the number of swabs. That's a  
17 guess. They never proved that that was a  
18 screw-up. They said somebody wrote somewhere the  
19 number of swabs.

20 You know why? Because that's the  
21 actual -- actually, the only witness that they did  
22 bring in, Sargeant Moore. Out of all the  
23 witnesses who could personally testify the number  
24 that were taken, they brought that one person in.  
25 And that one person testified that there were two.

1           So to now have somebody say: We do this  
2           as protocol and this is what's generally done and  
3           things are done and the number stays with it and  
4           the name is never wrong and if there's a mistake,  
5           it's got to be just a spelling error.

6           This person is willing to then say: But  
7           a mistake that we sometimes make is how many swabs  
8           we have. Unbelievable. Unbelievable. That's  
9           totally neglecting the fact that they brought that  
10          actual witness in to testify how many swabs there  
11          were.

12          She wasn't there when two became four.  
13          Two don't become four. She wasn't there to see  
14          why the name Ernest Behrens was put on that card.  
15          And, ladies and gentlemen, Andrea is not Andrew  
16          and Andrew is not Andre. Dennis is not Denise.  
17          Joe is not Joel. Fran is not Frank. And Bow is  
18          not Bob. And Ernest is not Ernesto.

19          That is an assumption. And you can't  
20          make assumptions. It's in the jury instructions  
21          just like the state read it. You either bring in  
22          the witness that can explain it or it's a lack of  
23          evidence. It's a conflict of evidence. And it's  
24          a problem with the evidence itself, which again,  
25          reasonable doubt.

1           The state wants to say that it was a  
2       mistake but they have not provided one scintilla  
3       of evidence that proves that it was a mistake.  
4       And, ladies and gentlemen, there is way too much,  
5       way too much, at risk to speculate or guess if it  
6       was a mistake and how it was made.

7           The state has the duty, has the  
8       obligation under the law -- that's why -- how this  
9       system runs, is they have to bring in those  
10      witnesses to show you how that happened. You  
11      can't just say: It just seems silly to me or  
12      maybe it seems like a mistake. We're not here to  
13      guess that. They're there to prove it.

14           And if there was a person who did that,  
15      if it was a person that made an honest mistake,  
16      they should have been on the stand. And if  
17      they're not on the stand, then we have question  
18      why not. And the state -- no matter how many  
19      times the state -- how many theories they come up  
20      with, they're theories. It's the state theory.  
21      It is not fact. It is not evidence. It is not  
22      the law.

23           And there's only three ways to see this:  
24      These are someone else's swabs or this lab does  
25      make mistakes with evidence and switches evidence

1 or puts other people's swabs in evidence or  
2 somebody was messing with those swabs and isn't  
3 willing to come on the stand and say it or even  
4 get on the stand and deny doing it.

5 And we know that that's a fact because  
6 two were taken. It's in the transcript. It's in  
7 the testimony. It was cross-examined by the  
8 state. And the state accepted that answer.  
9 That's the answer they were going for: Two swabs  
10 in one specimen. The property receipt says there  
11 was one specimen. That's what they were looking  
12 for.

13 And during their case, things got screwed  
14 up. That's what happened. All of a sudden,  
15 Sharon Hinz is saying four. And what are they  
16 going to do about it? What are they going to do?  
17 They're going to go back and say: Oh, no, no, no.  
18 That was Sargeant Moore who made the mistake. It  
19 don't work that way. You can't change your case  
20 in the middle and decide that you didn't like what  
21 one of the witnesses said. And that's why the  
22 evidence has to be disregarded.

23 My favourite part: Captain Butchko to  
24 the rescue. Another Miami cop who has nothing to  
25 do with this case comes in next. And this guy

1 gets on the stand from a case five years ago, with  
2 5,000 people that they were looking at, with over  
3 3,000 swabs, and: I looked at the list eight  
4 months ago and I didn't see Ernesto Behrens. Do  
5 you believe that? That was a last minute attempt  
6 by the state to bring a witness in and and it was  
7 nothing more than that. It was obvious by the  
8 order that they called him in.

9 And if that was the case, go look at the  
10 list. Where are the other names? Look at the --  
11 the list is in evidence. Where's the other names?  
12 There were 3,000. Why is there only about 25 on  
13 that list? If it exists and there's no Ernest  
14 Behrens on it, then why didn't they bring it in?  
15 Why bring in half the evidence, like everything  
16 else in this case?

17 And then we go to the cop who actually  
18 had something to do with this case, if you want to  
19 say that. School Resource Officer Geller, who  
20 doesn't even realize he's a School Resource  
21 Officer at the time or forgets it. Doesn't know  
22 when he becomes a detective, who -- in late '97.  
23 Remembers that in a deposition but gets on the  
24 stand and can't remember when he became a  
25 detective.

1                   He doesn't testify to having any  
2           experience at all in armed sexual battery cases.  
3           I mean, it's beautiful. Never -- no armed sexual  
4           battery cases whatsoever. He's the detective on  
5           this case that comes in to testify for the state,  
6           their best witness.

7                   What does he do? He does an  
8           investigation -- an investigation. Goes down to  
9           Miami with a Detective Tye. Who's Tye? I don't  
10          know. Didn't testify. Doesn't know how many  
11          swabs he brought. Just got some swabs. Do you  
12          think he knew he was carrying swabs from Ernesto  
13          Behrens? Doesn't look. Writes the big probable  
14          cause affidavit, the sworn police report of the  
15          case.

16                   And what does he say? Here's a slip  
17          dress and it has semen on it and there's no sheet  
18          with semen on it and the point of entry was a  
19          sliding glass door. My investigation. My big  
20          armed sexual battery case. I got my man. That's  
21          what he did. That's the state's best witness  
22          because that's who they brought in.

23                   Marchaese. When we talked about this in  
24          voir dire, scientific results from testing are  
25          only as accurate and as good as the evidence that



1 is submitted for testing. It doesn't matter what  
2 those numbers are. It doesn't matter because if  
3 you have the wrong evidence, they're wrong. The  
4 numbers might be accurate but they're wrong as to  
5 who they're comparing it to, who they think  
6 they're comparing it to.

7 The state made a whole big point about  
8 whether Marchaese works for the county. Ladies  
9 and gentlemen, Marchaese works for Broward  
10 Sheriff's Office. It's on the first floor.  
11 Broward Sheriff's Office. Okay. Broward  
12 Sheriff's Office is not the same as the judge.  
13 Okay. Bad comparison. Maybe the paychecks --  
14 I've never seen them -- could be from the county.  
15 But make no mistake, she works for the police.  
16 She testifies for the state.

17 And this person who testified for the  
18 state says that this slip dress has no semen on  
19 it. She says that the leg has no semen on it.  
20 Common sense: Wipe yourself. Semen's got to be  
21 somewhere. It's not. Can't explain it. That's  
22 her answer.

23 She used the best technology she had at  
24 the time in 1995. We're in the year 2000.  
25 Incredible things are happening. They're getting

1 DNA off door knobs. I mean, is it -- is it that  
2 once you do it, you can't do it again. She  
3 testified she could test it again. She just  
4 didn't. So now we just don't know. And the state  
5 accepts that and they ask the jury to also.

6 Oral swab: Negative. Thigh swab:  
7 Negative. We still haven't gotten to the other  
8 evidence that the state has. And [REDACTED] never  
9 washed her leg, she testified. And they did use a  
10 Q tip where they moistened it. So they did what  
11 they could, is what they testified, scientifically  
12 to lift any sperm.

13 Now, she's got hairs and fibers. They're  
14 sitting here. They're in evidence. Take a look  
15 at them. And what does she do with them?  
16 Nothing. She does nothing with them. We're in  
17 the year 2000. She's done nothing with them. A  
18 transmittal that she testified came with those  
19 hairs and fibers. She does nothing. That's sick.

20 Explain that, state. Explain how  
21 evidence sits for five years. Who cares? If you  
22 think you have a match, you check twice, you check  
23 three times, before you take a man's liberty away,  
24 especially if you see that there's a problem in  
25 the chain of custody because the state can only

1       guess. They don't have evidence that they was no  
2       problem so they have a duty, they have an  
3       obligation, to come here and do the right thing to  
4       test. They had it. It's in BSO property. It's  
5       in the state's property.

6               She even testified there's two tests they  
7       can do with these hairs, PCR and the mitachondria  
8       DNA testing. Wonderful advanced testing she  
9       talked about. She may not personally do it and  
10      maybe they don't always do all those tests at the  
11      lab but it's available to her. That's why they  
12      collected it and that's why they asked for it to  
13      be tested back in 1995.

14             Again, that fitted sheet, 30 days later  
15      comes into the lab. Thirty days. I wasn't there.  
16      I'm not going to sit here and tell you. I don't  
17      know. But 30 days is unaccounted for for that  
18      sheet. The evidence. Why is it that the only  
19      evidence that they're claiming is a match are two  
20      things that are just grossly messed up. Why is  
21      that?

22             Why are the only two things that  
23      supposedly match these swabs and the sheet, the  
24      only evidence in the entire case, unless you want  
25      to buy a Latin male in his 20s, the only two

1 things have problems. Why? And why all of a  
2 sudden, did she test it 30 days later? She never  
3 testified as to why that was done. And they never  
4 brought the witness in that told her to do it.  
5 That makes no sense. That's the state's case.

6 Stains three and four, they're big  
7 stains. They're big stains. I showed you that  
8 sheet. That big circle, that was three and four,  
9 positive for seminal fluid. So back in 1995 --  
10 and no fault of Marchaese's. RFLP couldn't do a  
11 profile. But she testified, with the new  
12 technology of PCR and STR, they could do a  
13 profile. Okay.

14 If you're a scientist and this new thing  
15 came out, even if she can't do it on her own,  
16 where's the officers, where's detectives, where's  
17 the state? This is their case. This is their  
18 investigation that they're doing. Why weren't  
19 those tested? Whose are they? Whose are they?  
20 Why neglect all this retesting, a retest, a check,  
21 that Marchaese said: Oh, it would only take me  
22 about 30 seconds to check my work. Then why  
23 didn't you? Why?

24 Imagine five years later, after a crime,  
25 after a man's accused of a crime, prosecuted for

1 three years. Imagine if they retested it and they  
2 were wrong. How would they say that they were  
3 wrong? Imagine they had to say that there was  
4 somebody, either in Broward or in Dade, who did  
5 something to this evidence.

6 This isn't a crazy idea. And it doesn't  
7 matter what the state gets back up here and says  
8 about it. Reality is better than fiction in some  
9 of the movies that you see. This is reality and  
10 it's even better. The reality is, they didn't do  
11 it.

12 And the reality is that even if you think  
13 that you're right, even if you're adding one plus  
14 five to check your work before you give anything  
15 in to your boss, before you do anything in life.  
16 If you're a doctor and you're doing something and  
17 you check your work. You get a second opinion.  
18 You do these things. You do these things because  
19 you want to be right.

20 Well, ladies and gentlemen, when should  
21 you be more right than when a man's liberty is at  
22 stake? When should you be more right? What would  
23 it take, if it was five cents, to use another  
24 swab? Why not? Why not do that? Unless you're  
25 afraid you're wrong.

1                   Ladies and gentlemen, there's no need to  
2                   cross Dr. Tracey and have you sit any longer  
3                   through that kind of testimony. The tie was nice.  
4                   The testimony had nothing to do with the case.  
5                   Why? Because it was obvious that the point is, it  
6                   wasn't his. Whatever they were testing wasn't his  
7                   so the numbers can be whatever the heck they want  
8                   to be. It doesn't make a difference.

9                   What's important that Dr. Tracey said,  
10                  the only thing he said that was important is: I  
11                  don't know the facts of the case. I don't know  
12                  Ernesto Behrens. I didn't do any of my own  
13                  testing. And I have no idea how swabs multiply.  
14                  He has no personal knowledge as to anything. No  
15                  personal knowledge. He knows about numbers.  
16                  We'll give him that. I wouldn't even go near that  
17                  degree. But he knows nothing about this case.

18                 Dr. Duran. Uncontroverted that this man  
19                 was operated during that time. That's it. He  
20                 just was. There's nothing that the state said to  
21                 say that's not true. Uncontroverted. He had pain  
22                 medications. We saw the prescription.  
23                 Uncontroverted.

24                 You want to argue about how much pain he  
25                 was in. Who cares how much pain he was in? The

1 bottom line is, he was in some kind of pain.  
2 That's why you have Darvocet. And even if you  
3 don't want to believe that, they cut him and took  
4 something out of him and they put stitches in him.  
5 Common sense says that hurts.

6 No signs of injury, trauma or tear to the  
7 stitches. He went to all his doctor appointments  
8 that week every other day. He was there. Okay.  
9 On the 10th, on the 12th, even after. And why is  
10 that surgery so important? He's on meds. He's in  
11 pain. He's got stitches.

12 Here's the window, the window that the  
13 state's theory is Ernesto Behrens went through,  
14 even with no proof or no fingerprints. Okay.  
15 Some people aren't good at estimating feet. Okay.  
16 Forget what [REDACTED] [REDACTED] thinks a two foot chair  
17 looks like. Let's talk about reality and take a  
18 look at the chair and think about common sense  
19 about a chair.

20 Chairs are usually of the average height.  
21 These don't seem very different than normal  
22 average chairs. Okay. Pick up an average chair  
23 and see for yourself. [REDACTED] [REDACTED] is five, two --  
24 five, three. I'm five, two. Okay. We're talking  
25 four feet up. This chair is at least three feet

1 off the ground. A two foot chair would come up to  
2 here, the top back. It's just not that low.  
3 Common sense. Measure a chair. Okay. This  
4 window is higher than that. And why is that  
5 important?

6 Okay. Nothing was used to hoist anybody  
7 up into this window. Somebody had to literally  
8 get into this window, climb into this window.  
9 Think about the exertion. Get into this window  
10 without touching a stitch, without any pus coming  
11 out, without breaking or tearing fresh surgery.  
12 It defies common sense.

13 Goes down the stairs, even skipping  
14 stairs, flying into a wall and out the window  
15 after just having surgery with no injuries to the  
16 stitches, stitches that the doctor testified and  
17 did put in his notes can't get wet. A person  
18 running out of this place would sweat. Sweat  
19 would effect the stitches. You heard no  
20 testimony, uncontroverted, that there were a  
21 problem with these stitches.

22 And here comes the big impeachment. Why  
23 shouldn't you believe him? Why? Because they  
24 sent out to the lab the wrong number of mistakes.  
25 That's really funny. Dr. Duran did not make that



1 mistake and he corrected it. Uncontroverted.  
2 Admitted it and corrected it. Not leaving you to  
3 guess, conjecture or anything of that matter. In  
4 fact, that doesn't make him guilty or not guilty  
5 either. It's not the same thing as their key  
6 piece of evidence in this case.

7 Paula Turgeon is no expert witness.  
8 She's not going to get up here and testify like  
9 she's an expert. She's not a cop. She doesn't  
10 come to trial regularly and testify. She's not  
11 going to have the perfect mannerisms, whatever  
12 you're looking for. She's not going to be the  
13 perfect testifier. She may laugh at inopportune  
14 times. She may make certain faces. I mean, that  
15 is what it is when you're a lay witness. Same  
16 thing with [REDACTED] [REDACTED] Same thing.

17 Why is she here? She knows beyond a  
18 reasonable doubt 100 percent that he's not guilty.  
19 Does she care enough to sit here and watch?  
20 Absolutely. Is she willing to put up some money  
21 for someone she's not with anymore from years ago?  
22 Why is she willing to do that? Because she knows  
23 he's not guilty. And she has no reason to lie.  
24 And the state did not give one bit of evidence  
25 showing that she was lying.

1                   She has nothing to gain. There is no  
2                   prize at the end of this trial or no reward. And  
3                   she is the only witness in this case because the  
4                   state didn't bring in anybody who said: I saw and  
5                   I have personal knowledge of where Ernesto Behrens  
6                   was on that morning. I saw. Uncontroverted.

7                   She may not remember whether they got the  
8                   food and brought it in or whether they ate it and  
9                   then went back or whether she called him late on  
10                  the 12th but what she does know is the basics.  
11                  She wasn't -- if she wanted to lie, she would come  
12                  in here: Oh, yes. And he was wearing blue jeans.  
13                  And come up with all these little facts. Well,  
14                  that's not what she did. She told you what she  
15                  did know. And it made sense.

16                  She remembered the bigger things, okay,  
17                  the bigger things. I know that that is the week  
18                  that I got my new job. Uncontroverted. They  
19                  didn't produce any evidence that that was untrue.

20                  She testified that this was the week of  
21                  the surgery. Consistent. Nothing controverting  
22                  that. The weekend after was Mother's Day. Okay.  
23                  That was another thing I used. Common sense. And  
24                  that's when we thought that he might have had  
25                  cancer. My father died of cancer and Ernesto's

1 family had problem with cancer as well. That's  
2 how I remember. She didn't take the stand here  
3 and say whether she had chicken or hamburger for  
4 dinner. She's not going to give you any kind of  
5 specifics that are ridiculous. That is  
6 ridiculous. There's no reason to remember that.

7 And out of all those thousands of days  
8 that she spent with him, if you said: What did  
9 you do on this certain day? And she had to sit  
10 down. Maybe she could figure out the other days.  
11 Okay. She admitted: The first time I was asked,  
12 I didn't know. I didn't know. I had to go back  
13 and figure it out. I didn't know.

14 She's not -- she's not claiming to be  
15 wonder memory and immediately say: Oh, but I know  
16 you're not guilty of that crime and I'm going to  
17 go testify. That's not what happened. Okay. She  
18 had to think about it. Okay. This is out of  
19 nowhere. She gets this phone call. She's not  
20 with him anymore. And he says: Look, was I  
21 working? I don't know. Look in the records and  
22 see what you can find. Okay.

23 If they really wanted, they could have  
24 doctored up some records and said he was working  
25 that night. But that's not what they did. They

1 did what was fruitful, what really happened that  
2 week.

3 And do you really want to get graphic?  
4 Oral sex is a lot different than regular sex.  
5 Okay. And I'm not going to have to get into that  
6 but there's a lot of differences. And if somebody  
7 is not circumcized, they may know that difference.  
8 She was uncontroverted. It's as simple as that.  
9 And there's no one to testify to say that she was  
10 wrong or lying.

11 This is a sexual battery case. This is a  
12 rape case. This is a case that the State  
13 Attorney's Office brought charges on. This is a  
14 case that they had is to prove beyond and to the  
15 exclusion of every reasonable doubt, with  
16 competent evidence, evidence that says that, once  
17 the jury instructions are read and the elements  
18 are met, we can can convict because we did our  
19 job. We called the witnesses. We did the  
20 investigation. We have a duty to do. We did all  
21 that. And because of that, we bring this case to  
22 you and we ask for a guilty verdict. That's what  
23 they were supposed to do.

24 And they did not do that, not even close,  
25 not even close. You should have been presented

1 all of the evidence because the reality is, the  
2 State Attorney's Office doesn't make the decision  
3 in this case. The jury makes the decision in this  
4 case. That's why it's here because, thank God, we  
5 don't have to rely on the fact that they don't  
6 want to do a full enough investigation or spend  
7 five cents on a swab. We don't have to rely on  
8 that. That's why we have the jury that can make  
9 that decision for the State Attorney's Office and  
10 for society.

11 We said it in the beginning. There is  
12 one thing, one thing worse than being accused of  
13 armed sexual battery of a woman and a burglary  
14 battery of a woman. There is one thing. And that  
15 is being innocent, innocent of that charge and  
16 having to sit there through this, this trial.

17 He didn't do this. He is not guilty of  
18 this crime. They didn't prove it. They can't  
19 prove it. They will never be able to prove it  
20 because he didn't do it. And we are asking for a  
21 not guilty verdict on all counts in this case.

22 Thank you.

23 THE COURT: Mr. Segal.

24 MR. SEGAL: Let's go over some of the  
25 things Ms. Shelowitz said.

1                   She started out complaining that none of  
2                   the officers that arrived there that morning were  
3                   called to testify. Testify to what? What are  
4                   they going to testify to? The person that was  
5                   committing the crime wasn't there so they couldn't  
6                   testify to arresting anybody. What are they going  
7                   to testify to? They showed up and witnessed the  
8                   way the place was.

9                   Marjorie Hanlon came in to testified.  
10                  The only thing that was relevant about that is the  
11                  way the scene looked that morning, the way things  
12                  looked in the house, where the window was, the  
13                  prints, the lack of prints, the sheet upstairs  
14                  with the stain. And Marjorie Hanlon testified to  
15                  that.

16                  There was no reason to call the officer.  
17                  What? To say: I showed up and I hung around. I  
18                  showed up and I stayed and watched Marjorie Hanlon  
19                  do her job.

20                  Okay. She talks about Detective Geller's  
21                  probable cause affidavit. Well, first of all,  
22                  Detective Geller didn't do anything in the case  
23                  that's significant except go get the swabs down in  
24                  Miami and bring them back up to the Sheriff's  
25                  Office up here. Yes. He had two mistakes in the

1       probable cause affidavit. Sure enough. I mean,  
2       there's no disputing that.

3               He said that the entry was made through a  
4       sliding glass door. Well, entry was made  
5       unlawfully clearly through the window. It was a  
6       mistake. It doesn't change that there was an  
7       unlawful entry to the place. It's just -- he put  
8       the wrong place down there. It was a dumb  
9       mistake. He made it.

10              He said that DNA was on the slip dress.  
11       Well, he was wrong. Another dumb mistake. Again,  
12       he didn't do anything in the case except take  
13       swabs from one location to another. And there was  
14       DNA in the case. As Marchaese testified to and as  
15       Dr. Tracey supported and backed up, there was DNA  
16       except it was on a fitted sheet, not the slip  
17       dress.

18              Then Ms. Shelowitz talked about: Well,  
19       we didn't bring in the reports that -- or the  
20       author of the reports that Detective Geller relied  
21       upon for the errors. Well, why bring in the  
22       reports? Why bring in the people who wrote  
23       reports? Instead, we brought in the people who  
24       did the work. Ms. Marchaese who created the --  
25       I'm sorry -- not created but who did the DNA

1 analysis came in and testified. She's the one  
2 that had created -- who came up with the DNA  
3 results. What's a report going to do?

4 Then as far as the point of entry being  
5 the window as opposed to the sliding door. We  
6 brought in Marjorie Hanlon. She came in. She  
7 took the pictures. You saw the pictures. That's  
8 the person that said the point of entry was the  
9 window. [REDACTED] [REDACTED] said the point of entry was  
10 the window. The people that testified in that  
11 came in. I don't know what she wants the police  
12 officers to come in with their reports to say.

13 Then Ms. Shelowitz starts making stuff  
14 up. There were four fingerprints of value. Logic  
15 says that the freshest fingerprints belong to the  
16 perpetrator. The four fingerprints that were  
17 compared today were the freshest fingerprints.

18 Well, the person that testified to that  
19 was Marjorie Hanlon, the person that said: I'm  
20 trained in fingerprint comparison through the FBI  
21 and all, through her experience. She said very  
22 clearly: You can't date fingerprints. You can't  
23 say how old fingerprints are.

24 Ms. Shelowitz was saying they were the  
25 freshest fingerprints. I don't know where she got



1       that from. That's not the evidence. Folks, rely  
2       on your recollection of the evidence, not what  
3       Ms. Shelowitz tells you it is because she tells  
4       you wrong. Those four fingerprints could be years  
5       old.

6               She talked about: Well, the person that  
7       did this clearly wasn't wearing gloves and the  
8       fingerprints had to be that person's. Well, first  
9       of all, we have no evidence at all as to whether  
10      the person who broke in had -- wore gloves or  
11      socks covering their hands or anything else  
12      because Ms. [REDACTED] saw that person in a silhouette,  
13      in the dark, for a few seconds.               That  
14      person very easily could have taken the gloves or  
15      the socks or whatever he had on and put them in a  
16      pocket while he was doing this.

17             The only time she ever had any visions --  
18      observations of or perception of this man's hands  
19      is when he's fondling her. And if a man's going  
20      to sexually assault somebody, he's not going to be  
21      wearing gloves when he's doing that. He's getting  
22      his sexual thrills by the touching. He's not  
23      going to be wearing gloves or socks or whatever he  
24      had on his hands.

25             Furthermore, you had I think it was

1       either seven or nine more other prints that were  
2       not of comparison value. They could have been of  
3       the person that did it. They could have been the  
4       defendant's. But you just couldn't compare them.  
5       Those four fingerprints that were of value could  
6       have been anybody's: Previous tenants, anybody  
7       that ever, you know, went through that residence,  
8       work people touched the window, whatever.

9               Then she was complaining about the police  
10       not going down and getting the boots of every  
11       worker around there because the tracks looked like  
12       boots. Well, what evidence was there that any  
13       worker committed this crime?

14              The defense attorney would be the first  
15       person to come in here screaming if the police  
16       said: Uh-uh. Those look like boots. There are  
17       workers outside. Therefore, let's round them all  
18       up and bring them in and look at their shoes. And  
19       while we're at it, let's round up anybody in the  
20       apartment complex because anybody in there could  
21       have boots. Let's round them all up and get all  
22       their shoes. This is America. You don't do that  
23       to people. People have rights. You don't just go  
24       and round up everybody in sight to look at their  
25       shoes.

1                   She talks about: Well, the fitted sheet  
2                   came in in June of '95, whereas the other evidence  
3                   came in in May of '95. So what's the point?  
4                   What's she trying to say? Is she trying to say  
5                   that because it came in a month later, that  
6                   somebody somehow in the intervening time put the  
7                   defendant's semen all over the sheet? Who had a  
8                   vial of the defendant's semen to put on the sheet?  
9                   Where did that come from? Do the police just keep  
10                  a locker of everybody's semen and just pour it on  
11                  there when they feel like it? There were semen on  
12                  the sheet. Nobody poured it on there except the  
13                  man that sexually assaulted her by ejaculating  
14                  onto the sheet.

15                  Then interestingly enough, Ms. Shelowitz  
16                  has answered everybody's mistakes, jumping down  
17                  everybody's throats about mistakes, says that  
18                  Mr. Terrell made a mistake in cross-examining  
19                  ██████ by being a little aggressive with her.  
20                  That was a mistake. That's okay. Mr. Terrell's  
21                  mistakes are okay. That's okay.

22                  MR. TERRELL: Judge, I object. I don't  
23                  think I'm the one on trial here.

24                  MR. SEGAL: Not --

25                  THE COURT: Sustained. Let's move on.

1 MR. SEGAL: Okay. One mistake's okay.  
2 Every other mistake is a horrendous, horrible  
3 thing. When you leave out an O, it's a  
4 condemnable mistake.

5 She talked about [REDACTED] [REDACTED] never used  
6 the term guesstimate. She used the terminology  
7 approximately. Well, don't they mean about the  
8 same thing? Aren't they both terminology used to  
9 say you're not sure of what you're saying? You're  
10 just approximating roughly. What was the point of  
11 that?

12 Ms. Shelowitz said that [REDACTED] said  
13 the person had a young voice. Well, we went over  
14 this when Ms. [REDACTED] testified, what she told the  
15 police in her statement. And as you'll recall,  
16 this is what was -- the question that was asked  
17 and the answer that was given.

18 "Okay. And you said from his  
19 voice, you could tell he was kind of  
20 young -- kind of young?

A. Yes.

21 "Q. Around in his 20s, you say?

A. Probably; yes."

22 She never said a young voice. She said  
23 he was young, around in his 20s, approximately.

24 Then she tells you -- she's not saying  
25 that the crime didn't happen, yet she continues to

1        attack what [REDACTED] says. [REDACTED] is not  
2        lying about the crime happening but I'm going to  
3        start picking at little things she says which  
4        really have no -- nothing to do with the decision  
5        you have to make, kind of force a reasonable  
6        doubt. That's all they're trying to do, is force  
7        a reasonable doubt which, as the jury instruction  
8        says, is not a reasonable doubt.

9                Then she brings up something about:  
10       Well, if the person that did this is Hispanic, in  
11       his 20s, then it must be the defendant. That's  
12       real wrong. Well, I don't know where that came  
13       from. She -- she told the police: Hispanic,  
14       roughly in the 20s.

15               Did the police go out right then and  
16       there and arrest the defendant? Did the police  
17       have any reason at all to go after this defendant?  
18       No. They didn't go after Willy Nilly anybody that  
19       fit that and not this defendant.

20               They waited until there was a DNA match  
21       two years later. And that's when they went after  
22       the defendant. Then. Not just because he's a  
23       Hispanic male in his 20s. They just picked him  
24       out of anybody.

25               Then Ms. Shelowitz laid out the sheet and

1       said: The yellow stain on there is sweat or  
2       urine. Therefore, this has to be the top sheet.  
3       Well, first of all, Ms. Shelowitz is not a  
4       serologist. She's not a witness. She's didn't  
5       testify in this case. She was not placed under  
6       oath.

7               The serologist was Donna Marchaese. What  
8       Ms. Shelowitz about what that yellow stain was is  
9       not evidence and you're not to consider it as  
10      such. You are to ignore it. She is not a  
11      serologist. She's not an expert.

12             Somehow the stain meant that's the top of  
13      the sheet? What? Because that stain's there,  
14      that makes it the top of the sheet. Where's  
15      that -- where's that coming from?

16             Then Ms. Shelowitz talked about what  
17      Ms. [REDACTED] said was her location when the  
18      ejaculation occurred. And recall, she said she'd  
19      been moving around. She was constantly being told  
20      to roll over, roll over, roll over and the  
21      pillow's covering her face the entire time.

22             All she could say for sure as to her  
23      location when the ejaculation occurred was that  
24      she was anywhere from center to the left side of  
25      the bed. That's all she could say. And when men

1 ejaculate -- I hate to get graphic but,  
2 unfortunately, it's a case like that. Ejaculate  
3 doesn't drip down. Ejaculate, as you all know --

4 MR. TERRELL: I don't think there's any  
5 evidence about how men ejaculate in this trial.

6 THE COURT: I'm going to sustain the  
7 objection. There was no testimony as to that.  
8 You can argue that people use their common sense  
9 but there was no testimony as to that.

10 MR. SEGAL: Okay. Use your common sense  
11 about how people ejaculate, what ejaculate does.

12 Then Ms. Shelowitz says: Well, [REDACTED]  
13 must be lying because she had no physical trauma  
14 on her. Although, earlier she had said that  
15 they're not challenging that the crime occurred.

16 Well, you wouldn't expect to find  
17 physical trauma. What did [REDACTED] do? [REDACTED]  
18 immediately submitted, while she's alone and  
19 terrorized in her bed, a pillow over her head, to  
20 this man with a knife. She didn't fight him. She  
21 didn't struggle. She didn't resist. All the man  
22 did was fondle her and stick his penis in her  
23 mouth.

24 Where's the physical trauma going to be?  
25 Where is the physical trauma going to be? There

1       isn't going to be any because those acts don't  
2       require any stress, any trauma, anything of that  
3       nature. I don't know what the point of bringing  
4       that up was.

5               She attacked the processing of the swab  
6       by the Metro Dade Police Department. Of course,  
7       the processing of the swab was okay when it  
8       eliminated the defendant as being involved in the  
9       Tamiami murder. But for our purposes, it's a  
10      horrible thing. Attack the whole thing about one  
11      swab, two swabs, the whole thing.

12             And again, yeah, I mean, there's no two  
13      ways about it. There was some confusion about  
14      that. But what the truth is, is what Ms. Hinz  
15      said, that police officers routinely, constantly  
16      confuse the swabs, the number of swabs.

17             And that was nowhere more clear than in  
18      Sargeant Moore's testimony. He said he took a  
19      swab and he wrote down one on the property  
20      receipt. Then later on in his testimony, he said  
21      two swabs, one from one side and one from the  
22      other side.

23             There's nothing clearer about how the  
24      police routinely mischaracterize or misnumber the  
25      amount of swabs in a DNA situation than what



1 Sargeant Moore did. He's not making stuff up,  
2 lying, trying to -- trying to fabricate stuff.  
3 He's a police officer with the normal confusion  
4 that Ms. Hinz testified to.

5 Then Ms. Shelowitz says: Ernesto is not  
6 Ernest. And she does the whole bunch of other  
7 names, the name game. Well, Detective Butchko  
8 testified uncontradicted, uncontradicted. He's  
9 the lead investigator in that investigation that  
10 as part of his job, he reviewed all the leads,  
11 everybody who provided the swabs.

12 And you know, if two people virtually the  
13 same name separated by one o, he would have  
14 remembered that. He said that he reviewed all  
15 that stuff and there was nobody named Ernest  
16 Behrens that provided a swab. And there was no  
17 evidence whatsoever that contradicts that. Trying  
18 to force a doubt which the jury instruction says  
19 is not a reasonable doubt.

20 Then she says somebody's messing with the  
21 swabs. No evidence of that. That's speculative,  
22 imaginary, possible, forced doubts which, as the  
23 jury instruction says, are not reasonable doubts.  
24 There's no evidence anybody messed with those  
25 swabs.

1                   Somehow Sargeant Moore, Ms. Hinz,  
2           Detective Butchko were all coming in here, lying  
3           about stuff because I guess they're all part of  
4           this grand conspiracy to get the defendant. This  
5           two count conspiracy to get the defendant that  
6           involves the Plantation Police Department, the  
7           Metro Dade Police Department, the Broward  
8           Sheriff's Office Crime Laboratory, all out to get  
9           this defendant for no known reason. There's no  
10          reason. There is no conspiracy. They testified  
11          to the truth. Detective Butchko is not wrong.  
12          There is no Ernest Behrens.

13                   She goes after Ms. Marchaese because she  
14          works for the Broward Sheriff's Office in their  
15          Crime Laboratory. Well, first of all, the Broward  
16          Sheriff's Office is not the Plantation Police  
17          Department. They're entirely different agencies.

18                   Furthermore, Dr. Khan, who eliminated the  
19          defendant as a suspect in the Tamiami serial  
20          murders --

21                   MR. TERRELL: Judge, there's never --  
22          there's no testimony from a Dr. Khan in this  
23          trial.

24                   THE COURT: Sustained.

25                   MR. SEGAL: Your honor, can we come

1 sidebar?

2 THE COURT: Certainly.

3 [WHEREUPON, the following sidebar  
4 discussion was commenced]

5 MR. SEGAL: Your honor, their Dr. Khan  
6 processed the swab and there was testimony that  
7 the defendant was eliminated as a suspect in this  
8 case. Therefore, I can certainly argue that my  
9 opinion --

10 MS. SHELOWITZ: Judge, this was a motion  
11 in limine that was brought up and that it was  
12 stipulated to before this case started, that his  
13 name wouldn't even come up in closing.

14 THE COURT: There was no testimony, that  
15 I can recall, as to what agency Dr. Khan worked  
16 for. And I think --

17 MR. SEGAL: Your honor, it was brought up  
18 very clearly in the transmittal form to Ms. Hinz  
19 talking about, these were the DNA samples that  
20 were submitted to Dr. Khan for testing. It was  
21 clearly discussed.

22 THE COURT: I think it was discussed that  
23 they were submitted to him for testing and then he  
24 was exonerated from the Tamiami murders. There  
25 was no testimony as to where he worked and the

1 transmittal form is not in evidence. I'm going to  
2 sustain the objection.

3 MS. SHELOWITZ: We ask the court that you  
4 instruct the jury to disregard the last comment.

5 [WHEREUPON, the sidebar discussion was  
6 concluded]

7 THE COURT: You may proceed, Mr. Segal.

8 MR. SEGAL: Thank you, your honor.

9 Ms. Shelowitz suggested that somehow in  
10 that 30 day period that it -- or approximately 30  
11 day period that it took to get the Queen fitted  
12 sheet into the Sheriff's Office Crime Laboratory,  
13 that the defendant's semen was deposited on it.

14 Well, if somebody's working to frame him  
15 for no known reason, then why didn't they just get  
16 him right off? Why didn't they get a swab from  
17 him right in the beginning and arrest him in 1995  
18 because they're out to get him? Just do it right  
19 then and there. Why wait two years later?  
20 Because nobody's out to frame him. Nobody's  
21 dripping his semen all over the sheets. Nobody's  
22 doing that. That's absurd.

23 Ms. Marchaese -- Ms. Shelowitz said it  
24 takes 30 seconds to recheck your work. I don't  
25 remember any evidence that it takes 30 seconds to

1 do a DNA test.

2 Then she said Dr. Tracey, Professor  
3 Tracey, his testimony had nothing to do with this  
4 case. Okay. So what -- so what Dr. Tracey says,  
5 in the light most favorable to the defendant,  
6 there's a one in 14 billion odds that somebody  
7 else has the same genetic profile as him. And the  
8 evidence on the fitted sheet has nothing to do  
9 with this case. That's what she said, that that  
10 has nothing to do with this case. Of course, that  
11 has everything to do with this case.

12 Then there was some mention about that  
13 Dr. Duran prescribing the Darvocet. Of course  
14 Dr. Duran testified he called the drug stores and  
15 couldn't find any evidence that the prescription  
16 was ever filled.

17 MS. SHELOWITZ: Objection. That's a  
18 mischaracterization of the testimony.

19 THE COURT: Ladies and gentlemen, you're  
20 going to rely on your recollection of what the  
21 evidence and testimony is.

22 Go ahead, Mr. Segal.

23 MR. SEGAL: Ms. Shelowitz talks about the  
24 exertion of getting in the window but getting out  
25 of the window is a simple matter of being on a

1 chair and going through the window. But recall,  
2 that somehow she was implying that any testimony  
3 to this effect, that certainly there would be pus  
4 or whatever Dr. Shelowitz said would happen by  
5 climbing --

6 MR. TERRELL: Judge, I'm going to object  
7 to these personal attacks now. We've got to stop  
8 this and keep it to the evidence in this trial.

9 THE COURT: I'm going to sustain that one.

10 MR. SEGAL: Okay.

11 THE COURT: Continue on.

12 MR. SEGAL: Ms. Shelowitz is not a  
13 doctor. Ms. Shelowitz is not a witness. Her  
14 saying that pus would form when somebody climbs  
15 into a window has no basis in the evidence.  
16 Also -- and you can look at Dr. Duran's notes on  
17 the translation part, wherever that got to. It's  
18 here somewhere. Oh, I'm sorry.

19 The only instruction that he wrote in his  
20 notes, the thorough notetaker, that he gave to the  
21 defendant on May 8th, when he did the operation,  
22 was: Advised to keep wound dry and clean. He  
23 didn't write on there: Avoid strenuous activity.  
24 Avoid working. Avoid climbing, anything of that  
25 nature. It was not written on there. Only to

1       avoid -- keep it clean and dry.

2               Then Ms. Shelowitz gets up there and says  
3       sweat is going to effect the stitches. Again,  
4       she's not a doctor. She didn't testify. You have  
5       to look at the evidence in this case. Nobody,  
6       nobody testified that sweat, any sweat, would  
7       effect the stitches. There was no evidence to  
8       that whatsoever. None.

9               Interestingly, Ms. Shelowitz did not  
10       address the situation about the defendant being in  
11       excruciating pain, depressed, unable to sleep  
12       well, about the medication not working adequately  
13       yet and the fact that he complains a lot, has a  
14       low pain tolerance, yet those are not reflected at  
15       all anywhere in Dr. Duran's notes where you would  
16       certainly expect that to be there if he did make  
17       those complaints.

18              The defendant complained about not being  
19       able to take a shower, something as small as that,  
20       and Dr. Duran noted that. But this entire week of  
21       excruciating pain and prociferous complaints that  
22       Ms. Turgeon testified to, not one mention of that  
23       in Dr. Duran's report.

24              Folks, using your common sense again, the  
25       evidence in this case, the DNA evidence and the

1 other supporting evidence, evidence which doesn't  
2 lie. People can fabricate. People can say things  
3 when there's no support for it.

4 But the DNA evidence again which doesn't  
5 lie, is not mistaken, and the other evidence  
6 supporting it has shown clearly beyond a  
7 reasonable doubt that that defendant is guilty as  
8 sin of breaking into Ms. [REDACTED] house, terrorizing  
9 her, sexually assaulting her, in the dead of  
10 night, when she's home alone, with a knife. He is  
11 guilty as charged.

12 Thank you very much.

13 THE COURT: Thank you, Mr. Segal.

14 Members of the jury, thank you for the  
15 attention which you've given during this trial.  
16 Please now pay attention to the instructions on  
17 the law that I'm about to give you.

18 Ernesto Behrens, the defendant in this  
19 case, has been accused of the crimes of sexual  
20 battery while armed and burglary of a dwelling  
21 with a battery. As I did earlier in this case,  
22 let me read to you again from the information  
23 filed in this case.

24 It reads: The State of Florida versus  
25 Ernesto Behrens. In the name and by the authority



1 of the State of Florida, Michael J. Satz, State  
2 Attorney, of the 17th Judicial Circuit of Florida,  
3 as prosecuting attorney for the State of Florida,  
4 in the County of Broward, by and through his  
5 Undersigned Assistant State Attorney, charges that  
6 Ernesto Behrens on the 12th of May, 1995, in the  
7 county and state aforesaid, did commit sexual  
8 battery upon [REDACTED] a person 12 years of age  
9 or older, without her consent, by causing his  
10 sexual organ to penetrate or unite with the mouth  
11 and/or tongue of [REDACTED] [REDACTED] and in the process  
12 thereof, Ernesto Behrens used or threatened to use  
13 a deadly weapon, to wit a knife or other sharp  
14 object, contrary to Florida Statute 794.0.

15 And Count 2 reads: Michael J. Satz,  
16 State Attorney of the 17th Judicial Circuit of  
17 Florida, as prosecuting attorney for the State of  
18 Florida, in the County of Broward, by and through  
19 his undersigned Assistant State Attorney, charges  
20 that Ernesto Behrens on the 12th day of May, 1995,  
21 in the county and state aforesaid, did unlawfully  
22 enter or remain in a structure, to wit a dwelling  
23 or the cartilage thereof, located at [REDACTED]  
24 [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED],  
25 property of [REDACTED] [REDACTED] with the intent to commit

1 the offense of sexual battery therein and in the  
2 course thereof, did commit a battery upon [REDACTED]  
3 [REDACTED] by actually and intentionally touching or  
4 striking [REDACTED] [REDACTED] against the will of [REDACTED]  
5 [REDACTED] contrary to Florida Statute 810.02(2).

6 Before you can find the defendant guilty  
7 of sexual battery upon a person 12 years of age or  
8 older with the use of a deadly weapon, the state  
9 must prove the following four elements beyond a  
10 reasonable doubt: One, that [REDACTED] [REDACTED] was 12  
11 years of age or older. Two, Ernesto Behrens  
12 committed an act upon [REDACTED] in which the  
13 sexual organ of Ernesto Behrens penetrated or had  
14 union with the mouth of [REDACTED] [REDACTED] Three,  
15 Ernesto Behrens in the process used or threatened  
16 to use a deadly weapon. And four, the act was  
17 done without the consent of [REDACTED]

18 Consent means intelligent knowing and  
19 voluntary consent and does not include coerced  
20 submission. Union means contact. A weapon is a  
21 deadly weapon if it is used or threatened to be  
22 used in a way likely to produce death or great  
23 bodily harm.

24 Before you can find the defendant guilty  
25 of burglary with a battery, the state must prove

1 the following three elements beyond a reasonable  
2 doubt: One, that Ernesto Behrens entered and/or  
3 remained in a structure owned by or in the  
4 possession of [REDACTED] [REDACTED] Two, that Ernesto  
5 Behrens did not have the permission or consent of  
6 [REDACTED] [REDACTED] or anyone authorized to act for her to  
7 enter and/or remain in the structure at the time.  
8 And three, at the time of entering and/or  
9 remaining in the structure, Ernesto Behrens had a  
10 fully formed conscious intent to commit the  
11 offense of sexual battery in that structure and in  
12 the course thereof committed a battery upon [REDACTED]

13 [REDACTED]  
14 A battery is defined as the intentional  
15 touching or striking of another person against  
16 their will. Proof of the entering of a structure  
17 stealthfully and without the consent of the owner  
18 or or occupant may justify a finding that the  
19 entering was with the intent to commit a crime if  
20 from all the surrounding facts and circumstances,  
21 you are convinced beyond a reasonable doubt that  
22 the intent existed.

23 The entry need not be the whole body of  
24 the defendant. It is sufficient if the defendant  
25 extends any part of the body far enough into the

1 structure to commit the crime of sexual battery.

2 The intent with which an act is done is  
3 an operation of the mind and therefore is not  
4 always capable of direct and positive proof. It  
5 may be established by circumstantial evidence like  
6 any other fact in the case.

7 Even though when unlawful entering and/or  
8 remaining into a structure is proved, if the  
9 evidence does not establish that it was done with  
10 the intent to commit the crime of sexual battery,  
11 the evidence must be found not guilty.

12 Structure means any building of any kind,  
13 either temporary or permanent, that has a roof  
14 over it and the enclosed space of ground and  
15 outbuildings immediately surrounding that  
16 structure.

17 An issue in this case is whether the  
18 defendant was present when the crime allegedly was  
19 committed. If you have a reasonable doubt that  
20 the defendant was present at the scene of the  
21 alleged crime, it is your duty to find the  
22 defendant not guilty.

23 The defendant has entered a plea of not  
24 guilty. This means you must presume or believe  
25 the defendant is innocent. The presumption stays

1 with the defendant as to each material allegation  
2 in the information through each stage of the trial  
3 unless it has been overcome by the evidence to the  
4 exclusion of and beyond a reasonable doubt.

5 To overcome the defendant's presumption  
6 of innocence, the state has the burden of proving  
7 the crime with which the defendant is charged was  
8 committed and the defendant is the person who  
9 committed the crime. The defendant is not  
10 required to present evidence or prove anything.

11 Whenever the words reasonable doubt are  
12 used, you must consider the following. A  
13 reasonable doubt is not a possible doubt, a  
14 speculative, imaginary or forced doubt. Such a  
15 doubt must not influence you to return a verdict  
16 of not guilty if you have an abiding conviction of  
17 guilt.

18 On the other hand, if, after carefully  
19 considering, comparing and weighing all the  
20 evidence, there is not an abiding conviction of  
21 guilt or, if having a conviction, it is one which  
22 is not stable but one which waivers and  
23 vacillates, then the charge is not proved beyond  
24 every reasonable doubt and you must find the  
25 defendant not guilty because the doubt is

1 reasonable.

2 It is to the evidence introduced in this  
3 trial and to it alone that you are to look for  
4 that proof. A reasonable doubt as to the guilt of  
5 the defendant may arise from the evidence,  
6 conflict in the evidence or the lack of evidence.  
7 If you have a reasonable doubt, you should find  
8 the defendant not guilty. If you have no  
9 reasonable doubt, you should find the defendant  
10 guilty.

11 It is up to you to decide what evidence  
12 is reliable. You should use your common sense in  
13 deciding which is the best evidence and which  
14 evidence should not be relied upon in considering  
15 your verdict. You may find some of the evidence  
16 not reliable or less reliable than other evidence.

17 You should consider how the witnesses  
18 acted, as well as what they said. Some things you  
19 should consider are: Did the witness seem to have  
20 an opportunity to see and know the things about  
21 which the witness testified? Did the witness seem  
22 to have an accurate memory? Was the witness  
23 honest and straightforward in answering the  
24 attorney's questions? Did the witness have some  
25 interest in how the case should be decided? Does

1 the witness's testimony agree with the other  
2 testimony and other evidence in the case? Did the  
3 witness at some other time make a statement that  
4 is inconsistent with the testimony he or she gave  
5 in court?

6 You may rely upon your own conclusion  
7 about the witness. A juror may believe or  
8 disbelief all or any part of the evidence or the  
9 testimony of any witness.

10 Expert witnesses are like other witnesses  
11 with one exception. The law permits an expert  
12 witness to give his or her opinion. However, an  
13 expert's opinion is only reliable when given on a  
14 subject about which you believe he or she to be an  
15 expert. Like other witnesses, you may believe or  
16 disbelief all or any part of an expert's  
17 testimony.

18 The constitution requires the state to  
19 prove its accusations against the defendant. It  
20 is not necessary for the defendant to disprove  
21 anything nor is the defendant required to prove  
22 his innocence. It is up to the state to prove the  
23 defendant's guilt by evidence.

24 The defendant exercised a fundamental  
25 right by choosing not to be a witness in this

1 case. You must not view this as an admission of  
2 guilt or be influenced in any way by his decision.  
3 No juror should ever be concerned that the  
4 defendant did or did not take the witness stand to  
5 give testimony in the case.

6 These are some general rules that apply  
7 to your discussion. You must follow these rules  
8 in order to return a lawful verdict. You must  
9 follow the laws that are set out in these  
10 instructions. If you fail to follow the law, your  
11 verdict will be a miscarriage of justice.

12 There is no reason for failing to follow  
13 the law in this case. All of us are depending  
14 upon you to make a wise and legal decision in this  
15 matter. This case must be decided only upon the  
16 evidence that you have heard from the testimony of  
17 the witnesses and may have seen in the form of the  
18 exhibits in evidence and these instructions.

19 This case must not be decided for or  
20 against anyone because you feel sorry for anyone  
21 or are angry at anyone. Remember, the lawyers are  
22 not on trial. Your feelings about them should not  
23 influence your decision in this case.

24 Your duty is to determine if the  
25 defendant has been proven guilty or not in accord



1 with the law. It is my job to determine a proper  
2 sentence if the defendant is found guilty.

3 Whatever verdict you render must be  
4 unanimous; that is, each juror must agree to the  
5 same verdict.

6 It is entirely proper for a lawyer to  
7 talk to a witness about what testimony the witness  
8 would give if called to the courtroom. The  
9 witness should not be discredited by talking to a  
10 lawyer about his or her testimony.

11 Your verdicts should not be influenced by  
12 feelings of prejudice, bias or sympathy. Your  
13 verdict must be based on the evidence and on the  
14 law contained in these instructions.

15 Deciding a verdict is exclusively your  
16 job. I cannot participate in that decision in any  
17 way. Please disregard anything that you feel I  
18 may have said or done which in any way makes you  
19 think I prefer one form of verdict over another.

20 Only one verdict may be returned as to  
21 each crime charged. The verdicts must be  
22 unanimous. That is, all of you must agree to the  
23 same verdicts. The verdicts must be in writing.  
24 And for your convenience, we've prepared  
25 appropriate verdict forms for you. And I'll go

1 over them with you at this time. And you'll take  
2 these into the jury room. You'll see that there's  
3 going to be two verdict forms: One for Count 1  
4 and one for Count 2.

5 The first one reads as follows: The  
6 State of Florida versus Ernesto Behrens. And it  
7 says: Count 1, verdict, we the jury find as  
8 follows as to the defendant in this case. And  
9 then you'll see, it'll say: Check only one.  
10 There's a line that says A, the defendant is  
11 guilty of sexual battery armed as charged in the  
12 information. Underneath that is a line that says  
13 B, the defendant is not guilty. So say we all,  
14 this blank day of September, in the year 2000, at  
15 Fort Lauderdale, Broward County, Florida. And  
16 there's a line for signature for the foreperson of  
17 the jury.

18 Similarly, you'll have a second verdict  
19 form which reads: The State of Florida versus  
20 Ernesto Behrens. This one is for Count 2. Then  
21 it reads as follows: We, the jury, find as  
22 follows as to the defendant in this case. And  
23 again, it'll say: Check only one. There's a  
24 line. It says: A, the defendant is guilty of  
25 burglary of a dwelling with a battery as charged

1 in the information. Underneath that is a line.  
2 It says: B, the defendant is not guilty. So say  
3 we all, this blank day of September, in the year  
4 2000, at Fort Lauderdale, Broward County, Florida.  
5 And there's a line for signature for the  
6 foreperson of the jury.

7 A separate crime is charged in each count  
8 of the information and while they have been tried  
9 together, each crime and the evidence applicable  
10 to it must be considered separately and a separate  
11 verdict returned as to each. A finding of guilty  
12 or not guilty as to one crime must not effect your  
13 verdict as to the other crime charged.

14 In just a few moments, you'll be taken to  
15 the jury room by our court deputy. The first  
16 thing you should do is elect a foreperson. The  
17 foreperson presides over your deliberations like  
18 the chairperson of a meeting. It is the  
19 foreperson's job to sign and date the verdict  
20 forms when all of you have agreed to a verdict in  
21 this case.

22 The foreperson will bring the verdicts  
23 back to the courtroom when you return. Either a  
24 man or a woman may be the foreperson of the jury.  
25 Your verdicts, finding the defendant either guilty

1 or not guilty, must be unanimous. The verdicts  
2 must be the verdicts of each juror, as well as the  
3 jury as a whole.

4 In closing, let me remind you that it is  
5 important that you follow the laws spelled out in  
6 these instructions in deciding your verdicts.  
7 There are no other laws that apply to this case.  
8 Even if you do not like the laws that must be  
9 applied, you must use them. For two centuries, we  
10 have agreed to a constitution and to live by the  
11 law. No one of us has the right to violate rules  
12 we all share.

13 Counsel, can I see you briefly please?

14 [WHEREUPON, the following sidebar  
15 discussion was commenced]

16 THE COURT: Do either of you have any  
17 objection to the instructions as read?

18 MR. TERRELL: No.

19 MS. SHELOWITZ: No.

20 MR. SEGAL: No.

21 THE COURT: Okay. Thank you.

22 [WHEREUPON, the sidebar discussion was  
23 concluded]

24 THE COURT: All right. Ladies and  
25 gentlemen, gather together your personal items.

1           At this time, I'm going to ask Ms. Kettle  
2           and Ms. Daye, you're going to stay with me. And  
3           you are our alternate jurors and I'll address you  
4           momentarily.

5           Everyone else, what's going to happen is,  
6           our court deputy is going to escort you into the  
7           jury room. On the way in, if anybody has any cell  
8           phones, you're going to leave them with our court  
9           deputy. They will not be permitted in the jury  
10          room. After you're in the jury room, you'll be  
11          provided with, you know, paper, pencils to work  
12          with. All of the exhibits in evidence, the  
13          information, the verdict forms, they will come to  
14          you after you're in there. They'll be provided to  
15          you, as I said they would.

16          You'll be shown how to get in touch with  
17          me, whether you have verdicts, whether you have  
18          questions. And if you have questions, you put the  
19          questions in writing. Or just for any other  
20          reason, if you need to get in touch with me, you  
21          will be shown how to do that.

22          Make sure you have your personal things  
23          with you. Don't leave anything in the jury box.  
24          At this time then, you may retire to the jury  
25          room. And we'll also send a box of gloves back

1 too, if anybody wants to look at some of the  
2 evidence.

3 [WHEREUPON, the jury panel left the  
4 courtroom to deliberate]

5 THE COURT: Okay. The record will show  
6 that the jury's gone into the jury room.

7 Counsel, let me ask you to just review  
8 the information, the two verdict forms, the items  
9 in evidence. And if you can -- once you've gone  
10 over them, if you can somehow package them perhaps  
11 in that big box, then we can have it sent back to  
12 the jury room.

13 Ms. Kettle, Ms. Daye, if you'll just hang  
14 with me one minute, let me just take care of this  
15 and then we'll be happy to address you.

16 Okay. Just for the record,  
17 Ms. Shelowitz, Mr. Segal, you've reviewed all the  
18 exhibits and they're acceptable for you to go  
19 back?

20 MR. SEGAL: Yes, your honor.

21 MS. SHELOWITZ: Yes.

22 THE COURT: Okay. Thank you.

23 Okay. Ms. Daye, Ms. Kettle, we never  
24 know in these cases, particularly a case of this  
25 duration, when we're going to need the services of

1 an alternate juror to participate in  
2 deliberations. It's important for us to have an  
3 alternate, as you can appreciate, in fact, in your  
4 case, Ms. Daye. I mean, Ms. Kettle. Excuse me.  
5 Things come up as did with your mother.  
6 Sometimes, you know, we need to have the alternate  
7 actually deliberate. At this point though, your  
8 services are no longer necessary as a juror so at  
9 this time, you are discharged, free to go.

10 I do need you to leave those jury buttons  
11 on the railing in the front of you as we'll be  
12 using them again. On behalf of everyone  
13 associated with the criminal justice system here  
14 in Broward County, I want to thank you very much  
15 for your service as jurors. This was a long  
16 trial.

17 You're free to discuss the case with  
18 anybody that you'd like. I can tell you that  
19 sometimes people like talking to the alternate  
20 juror about the case, sometimes just for feedback,  
21 sometimes for constructive criticism. But again,  
22 whether or not you want to talk about this case or  
23 not is a decision you can privately make and I'm  
24 sure your wishes will be honored in that regard.

25 I hope that when the opportunity next

1 presents itself for you to come with jury duty,  
2 that you'll bring with you the same enthusiasm  
3 that you brought with you earlier in this week and  
4 also through jury selection several weeks ago.  
5 We're happy to have you stay with us and hang out  
6 and see what the results is. I'll leave that up  
7 to you.

8 I just want to thank you all very much  
9 for your service though. I appreciate it. Again,  
10 you are free to stay with us. If you'd like to  
11 say, just have a seat and wait with everyone else.  
12 Make sure you have your personal items.

13 Henry, let me see you just one second.

14 Let the record show Mr. Behrens is  
15 present. Mr. Segal, Mr. Terrell, Ms. Shelowitz  
16 are present.

17 The jurors sent out the following  
18 question: Can we take a 15 minute break? Of  
19 course, you're both welcome to look at this but  
20 that's -- that's the question.

21 Mr. Segal?

22 MR. TERRELL: How can you say no?

23 MR. SEGAL: No problem.

24 MS. SHELOWITZ: Do they want to go  
25 somewhere or --



1 THE COURT: Well, I don't know if  
2 maybe -- I don't know. Maybe one is a smoker. I  
3 have no idea. I don't know what the deal is. Do  
4 either of you have any objection to my giving them  
5 a 15 minute break? And, of course, I would  
6 admonish them accordingly. They're not to discuss  
7 the case with anybody. And certainly all the  
8 evidence remains in the jury room.

9 MR. SEGAL: I have no comment.

10 THE COURT: Any objection?

11 MR. TERRELL: That's fine.

12 MS. SHELOWITZ: No, not at all.

13 THE COURT: Okay. Mr. Behrens has been  
14 continuously present and is present now.

15 Are his handcuffs off?

16 THE SHERIFF: Yes, judge.

17 THE COURT: He's present now. All  
18 counsel are present.

19 Bring in the jurors, please.

20 That's the first question like that I've  
21 received.

22 THE SHERIFF: Jury coming in, your honor.

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

25 THE COURT: Welcome back, ladies and

1 gentlemen. Any seat will be fine.

2 I received your question and have had an  
3 opportunity to review it with counsel. Certainly,  
4 we're happy to give you a 15 minute break but with  
5 a counsel of admonitions.

6 First of all, all of the evidence is  
7 going to stay in the jury room. No item of  
8 evidence can be removed.

9 Secondly, you are in the middle of your  
10 deliberative process. You are not to discuss this  
11 case with anybody during this 15 minute break.  
12 You're not to discuss it with another juror during  
13 this break. You deliberate collectively as a  
14 jury.

15 All right. So you're certainly free to  
16 take a 15 minute break. You're not to discuss  
17 this case with anybody in a literal sense. You're  
18 not to let anybody approach you in any way. And  
19 certainly, if that should occur during this break,  
20 I would anticipate that any of you would bring  
21 that to my attention, if you feel anybody tries to  
22 approach you in any way to discuss this case.

23 Anybody have any question about the  
24 ground rules of this break? Okay. Seeing none --  
25 make sure you have your personal items with you.

1 I want you to be outside these doors, not on the  
2 third floorbut outside these doors, no later than  
3 five minutes to 6:00, which is approximately a 15  
4 minute break.

5 Thank you very much.

6 [WHEREUPON, the jury panel left the  
7 courtroom]

8 [WHEREUPON, a short recess was taken]

9 THE COURT: Let the record show  
10 Mr. Behrens is present. Mr. Segal, Ms. Shelowitz,  
11 Mr. Terrell is present.

12 Bring them in, Henry.

13 [WHEREUPON, the jury panel entered the  
14 courtroom]

15 THE COURT: Welcome back, ladies and  
16 gentlemen. Please just have a seat just briefly.

17 I just want to ask the jury as a whole:  
18 During this 15 minute break, did anybody approach  
19 any of you in any way, shape or form to discuss  
20 this case?

21 THE JURY PANEL: No.

22 THE COURT: Okay. Seeing nobody  
23 responding in the positive sense, let me now  
24 excuse you back into the jury room to continue  
25 your deliberations.

1 Thank you very much.

2 [WHEREUPON, the jury panel left the  
3 courtroom to continue deliberating]

4 MR. SEGAL: I'll be on beeper standby.

5 THE COURT: All right. Let the record  
6 show Mr. Behrens, Ms. Shelowitz, Mr. Terrell,  
7 Mr. Segal are present.

8 Apparently, when they beeped the first  
9 time and we checked, they had a question. But  
10 now, they indicated they have a second question  
11 which they're supposedly writing down. So we'll  
12 wait and see.

13 Thank you. Again, Mr. Behrens, all  
14 counsel are present.

15 "Can we have the written," then it says,  
16 "(manual) testimony of Detective Moore and  
17 previous depositions? Is the list of all 3,000 or  
18 5,000 DNA samples (suspects) available and can we  
19 see it?" You're each, of course, welcome to take  
20 a look at that.

21 MR. TERRELL: It's the defense's position  
22 that the detective -- Sargeant Moore's  
23 statement --

24 MS. SHELOWITZ: I think if they're  
25 requesting the transcript, that they're entitled

1 to it. It is typed up so thankfully, you know,  
2 the court reporter doesn't have to whip it up  
3 right now.

4 MR. TERRELL: His -- yeah. His trial  
5 testimony, his evidence, and it's ready to go.  
6 It's already been transcribed. The depositions  
7 obviously weren't testimony. And I don't think  
8 that should go back. And the list, we've never  
9 even seen so it's not here to give to them.

10 MR. SEGAL: And I agree. They can't get  
11 the list of 3,000. They have that partial list,  
12 that they already have. But the 3,000, they can't  
13 have because it's not evidence. The prior  
14 depositions, obviously they can't get either.

15 MS. SHELOWITZ: We would just ask for the  
16 instruction -- I don't know the name for it but --  
17 that they have to rely on the evidence that was  
18 presented to them.

19 THE COURT: Well, let me hear --  
20 certainly, you know, you're both right with regard  
21 to the other list and depositions, I mean, and  
22 I'll address that with them in the context that  
23 you've received all the evidence that's been  
24 presented in this case.

25 But I want to hear your respective input

1 on the written, what they call, manual, in perens,  
2 testimony of Detective Moore.

3 MR. SEGAL: Judge, my -- I would have no  
4 problem with them being read in some fashion the  
5 testimony. I just have a problem with them being  
6 given selective testimony to take back with them  
7 as opposed to the entire trial. That's my  
8 concern.

9 And again, I hate to put the burden on a  
10 court reporter. Somebody needs to read the  
11 transcript that she has. But I just have a  
12 problem sending back a transcript with all the  
13 testimony. I think it gives it undue weight, to  
14 have it in their hands and not the rest of the  
15 stuff.

16 MS. SHELOWITZ: Judge, I would just argue  
17 that the transcript is evidence. They can require  
18 the entire transcript if they want. They can  
19 request one witness if they wanted. It's the  
20 state's own witness. And they should be able  
21 to -- it is in its entirety. It wasn't sliced in  
22 any way so there is an original of the complete  
23 testimony that he gave.

24 MR. SEGAL: Judge, they're not entitled  
25 to it. It's a discretionary thing in the rules.

1                   THE COURT: I understand. First of all,  
2                   let me ask you this. Do either of you have any  
3                   reason to question that the transcript you were  
4                   each provided this morning is an accurate  
5                   transcript, complete transcript, of detective or  
6                   Sargeant Moore? Can we -- do we agree that it's  
7                   the complete transcript of his testimony?

8                   MR. SEGAL: Judge, I mean, I didn't read  
9                   it. I assume it's an accurate and complete thing.  
10                  And even if it was read, it would say the same  
11                  thing --

12                 THE COURT: Right.

13                 MR. SEGAL: -- as the court reporter has  
14                  transcribed from her notes.

15                 THE COURT: Ms. Shelowitz, would you  
16                  agree that that's the complete testimony of the  
17                  sargeant?

18                 MS. SHELOWITZ: Yes, I would. And in  
19                  looking at it, it goes from the beginning to the  
20                  end.

21                 THE COURT: All right.

22                 MR. SEGAL: Judge, let me look at it real  
23                  fast because I didn't look at it. There's nothing  
24                  that occurred, were there, in this regard, while  
25                  he was testifying?

1 MS. SHELOWITZ: Was there any sidebars in  
2 there? I -- I didn't -- I didn't notice any but I  
3 don't think so.

4 MR. SEGAL: Yeah. It appears to be, you  
5 know, a basic, complete transcription of what he  
6 testified to.

7 THE COURT: Well, in my going through  
8 this transcript right now, I don't see anything in  
9 terms of any speaking objections or anything that,  
10 you know, discloses any sidebar conversation that  
11 we may have had. It seems to be, you know,  
12 whatever objections were made were just either  
13 sustained or overruled and then the lawyer just  
14 moved on.

15 MS. SHELOWITZ: Judge, the only thing  
16 that I would ask is, the first -- the front page  
17 says the Office of the Public Defender, Andrea  
18 Shelowitz and Tyrone Terrell. We're not from the  
19 Public Defender's Office and I just wouldn't want  
20 any -- even if we had been, I don't think the jury  
21 is entitled to hear -- maybe we could just rip off  
22 the cover sheet? I don't think the --

23 MR. TERRELL: we've had that stigmatism  
24 for four or five years.

25 MS. SHELOWITZ: We're past that.



1                   THE COURT: Well, what I'm going to do --  
2                   and I've received your respective input. You  
3                   know, as long as I have this complete transcript,  
4                   I will send back the transcript of Moore. And I  
5                   will tell them with regard to the remaining  
6                   portions of their questions, that they have  
7                   already received all the evidence in the case. I  
8                   am going to remove from the transcript that I'll  
9                   send back the front page with the style of the  
10                  case that references public defender. And  
11                  otherwise, we'll get this sent back.

12                 Okay. Are his cuffs off?

13                 THE SHERIFF: Yes.

14                 THE COURT: Okay. Again, the defendant  
15                 remains present. He's been continuously present.  
16                 All counsel are present.

17                 Bring them in, please, the jury.

18                 THE SHERIFF: Jury coming in, your honor.

19                 [WHEREUPON, the jury panel entered the  
20                 courtroom]

21                 THE COURT: Welcome back, ladies and  
22                 gentlemen. Any seat will be fine.

23                 I've received your recent questions.  
24                 I've had an opportunity to review it with counsel.  
25                 I'm going to send back for your review a copy of

1 the trial transcript portion dealing with Sargeant  
2 Moore so you'll have that available to you in the  
3 jury room.

4 With respect to the remainder of your  
5 questions regarding depositions and other lists,  
6 you have already received all the evidence that's  
7 been presented in this trial. Okay. And that's  
8 available to you in terms of physical evidence in  
9 the jury room.

10 Okay. You may now retire back to the  
11 jury room and continue deliberating.

12 [WHEREUPON, the jury panel left the  
13 courtroom to continue deliberating]

14 THE COURT: Let the record show  
15 Mr. Behrens, Ms. Shelowitz, Mr. Segal, Mr. Terrell  
16 are present.

17 I just wanted to ask, because I see  
18 Karen's going to order some pizza and some food  
19 for I guess some people here and before that's  
20 done, perhaps I should bring the jurors back in  
21 here and if they want something to eat, I'd like  
22 to just send out one order and sort of conquer it  
23 at one time. If they say that they don't want  
24 anything to eat, then that's fine. But I don't  
25 want her to order something and two minutes later,

1           they beep and say we want something.

2                   So do either of you have any problem or  
3           objection to that?

4                   MR. SEGAL:  No, judge.  I would like to  
5           ask though, what is the court's intention as far  
6           as the --

7                   THE COURT:  My intention -- and for the  
8           record, it's 6:35.  My intention is to let them  
9           just run their course.  My experience is, they'll  
10          tell me when they've had enough.

11                  MR. SEGAL:  Okay.

12                  THE COURT:  But I'll bring them in and  
13          inquire of them.

14                  All right.  Again, are his cuffs off,  
15          Henry.

16                  THE SHERIFF:  Yeah, judge.

17                  THE COURT:  Okay.  Mr. Behrens, all  
18          counsel are present.

19                  Bring in the jury, please.

20                  THE SHERIFF:  Judge, for the record, when  
21          I knocked on the door of the jury room, they said  
22          they're almost there.  And then they opened the  
23          door and said:  We're only going to be a few more  
24          minutes.

25                  THE COURT:  All right.  Let's wait then

1 and see where we are.

2 THE SHERIFF: We have a verdict, your  
3 honor.

4 THE COURT: All right. Let the record  
5 show Mr. Behrens is present. Mr. Segal,  
6 Mr. Terrell, Ms. Shelowitz are present.

7 Bring in the jury, please.

8 THE SHERIFF: Jury coming in, your honor.

9 [WHEREUPON, the jury panel entered the  
10 courtroom]

11 THE COURT: Welcome back, ladies and  
12 gentlemen. Please have a seat.

13 Have you arrived at verdicts in this  
14 case?

15 MS. DORCAS RIVERA: Yes.

16 THE COURT: Okay. Just hand them to our  
17 court deputy. Thank you.

18 Okay. I find the verdicts to be correct  
19 as to form. You may publish the verdicts.

20 THE CLERK: In the Circuit Court of the  
21 17th Judicial Circuit, in and for Broward County,  
22 Florida, Case Number 98-5739 CF10A, Judge Alfred  
23 Horowitz, State of Florida, Plaintiff, versus  
24 Ernesto Behrens, Defendant.

25 Verdict. Count 1: We, the jury, find as

1, follows as to the defendant in this case. The  
2 defendant is guilty of sexual battery armed as  
3 charged in the information. So say we all, this  
4 14th day of September, AD 2000, at Fort  
5 Lauderdale, Broward County, Florida. Dorcas  
6 Rivera, foreperson.

7 Count 2: We, the jury, find as follows  
8 as to the defendant in this case. The defendant  
9 is guilty of burglary of a dwelling with a battery  
10 as charged in the information. So say we all,  
11 this 14th day of September, AD 2000, in Fort  
12 Lauderdale, Broward County, Florida. Dorcas  
13 Rivera, foreperson.

14 THE COURT: Will you poll the jury,  
15 please?

16 THE CLERK: Manuel Torres, are these your  
17 verdicts?

18 MR. MANUEL TORRES: Yes.

19 THE CLERK: Jeffrey Harmon, are these  
20 your verdicts?

21 MR. JEFFREY HARMON: Yes, ma'am.

22 THE CLERK: William Walker, are these  
23 your verdicts?

24 MR. WILLIAM WALKER: Yes.

25 THE CLERK: Seth Sigal, are these are

1           your verdicts?

2                   MR. SETH SIGAL:   Yes, ma'am.

3                   THE CLERK:   Joel Hartnik, are these are  
4           your verdicts?

5                   MR. JOEL HARTNIK:   Yes.

6                   THE CLERK:   And Dorcas Rivera, are these  
7           your verdicts?

8                   MS. DORCAS RIVERA:   Yes.

9                   THE COURT:   Thank you.   Okay.   Ladies and  
10          gentlemen, a couple of very brief comments and  
11          we'll have you on your way.   First of all, before  
12          I forget, I need you to leave your juror buttons  
13          on the railing in front of you as they'll be used  
14          again.   Excuse me.

15                   At this time, ladies and gentlemen, your  
16          service as jurors is completed and you are  
17          discharged.   You're free to discuss the case with  
18          anybody that you'd like.   You needn't feel  
19          compelled to discuss the case.   Sometimes people  
20          like talking to jurors about the case, sometimes  
21          out of idle curiosity, sometimes to find fault  
22          with what you do.

23                   Whether or not you want to talk about  
24          this case is a decision you'll privately make and  
25          I'm sure your wishes in that regard will be

1 honored. I can tell you that without a court  
2 order, nobody can require you to disclose what  
3 went on in the context of your deliberations.

4 I hope that when the opportunity next  
5 presents itself for you to come forward for jury  
6 service, that you'll bring with you the same  
7 enthusiasm that you brought with you in this case.  
8 It may sound very simple for me to say but the  
9 fact is, for our system to work and move forward,  
10 it requires people such as yourselves, taking time  
11 away from employment or other personal matters  
12 every day in this building.

13 So again, on behalf of everyone  
14 associated with the criminal justice system here  
15 in Broward County, I want to thank you very much  
16 for your services as jurors and your services are  
17 complete at this time.

18 For purposes of this case, we're going to  
19 move to a sentencing phase at this time. You're  
20 certainly, as a member of the public, welcome to  
21 observe in the rear of the room. Again, that's a  
22 choice you can make.

23 Thank you all very much for your service.  
24 Make sure you have your personal items. Phones  
25 will be returned to you.

1 [WHEREUPON, the jury panel was excused]

2 THE COURT: All right. The record will  
3 reflect Mr. Behrens remains present. Mr. Segal,  
4 Ms. Shelowitz, Mr. Terrell are present.

5 Let me hear from the state with regard to  
6 the issue of sentencing.

7 MR. SEGAL: Judge, what I would ask the  
8 court to do, I think -- I'm not sure if it's by  
9 constitution or by statute. I think I should  
10 contact the victim and give her --

11 THE COURT: She certainly has the right  
12 to input on the issue.

13 MR. SEGAL: Right. So if the court could  
14 possibly just reset the sentencing. And I can get  
15 the guidelines as far as reviewing it with  
16 Ms. Shelowitz and Mr. Terrell

17 THE COURT: Can you -- for the court's  
18 edification at this time, can you tell me anything  
19 about Mr. Behrens prior background, if any?

20 MR. SEGAL: Judge, as far as his criminal  
21 history, he had one case in Broward County which  
22 has the five convictions. I didn't bring the file  
23 with me. It's back in the office. I think it was  
24 a burglary or armed burglary or something like  
25 that. He's got a conviction in Las Vegas for



1 conspiracy -- we talked about that before -- the  
2 conspiracy to possess stolen property or something  
3 to that effect, which is a misdemeanor in Las  
4 Vegas. I'll have to check. He may have had a  
5 misdemeanor in Palm Beach. I'm not a hundred  
6 percent sure on that.

7 THE COURT: Okay. So the five felonies  
8 we spoke of before arose out of one case here in  
9 Broward?

10 MR. SEGAL: Yes, sir.

11 THE COURT: Okay. How long ago was that,  
12 if you recall?

13 MR. SEGAL: It was like 1990 or '91,  
14 somewhere in that timeframe.

15 THE COURT: Anything from the defense on  
16 the issue of sentencing at this point?

17 MR. TERRELL: We agree with the state to  
18 put it off.

19 MS. SHELOWITZ: And just so the state --  
20 the judge knows, I think he received probation for  
21 that case.

22 THE COURT: Well, at this time, what I'm  
23 going to do is -- first of all, Mr. Behrens is  
24 going to be remanded to the custody of Broward  
25 Sheriff's Office. In that this is a potentially

1 life felony, he'll be held without bond.

2 I will order a pre-sentence  
3 investigation. I expect that the Department of  
4 Corrections can accomplish that in 30 days so I  
5 will set sentencing for -- let me just see where I  
6 am. The 14th. I will set sentencing for Friday,  
7 October 13th, at 10:00 a.m.

8 And what I'll ask -- actually, will we  
9 have somebody from the Department of Corrections  
10 here tomorrow morning?

11 THE CLERK: Yeah. They'll be here.

12 THE COURT: Okay. So I'll go ahead and  
13 make sure that the PSI is underway at that point.

14 Anything else either of you wish to  
15 address at this time?

16 MR. SEGAL: No, your honor.

17 MS. SHELOWITZ: No, your honor.

18 THE COURT: Okay. He'll need to be  
19 printed now.

20 [WHEREUPON, the proceeding was adjourned  
21 at 6:55 p.m.]

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REPORTER'S DEPOSITION CERTIFICATE

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 Jasik  
CARMEN E. JASIK, BCSRA  
Certified Shorthand Reporter

CARMEN E. JASIK, BCSRA

Certified Shorthand Reporter