IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT

IN AND FOR MIAMI- DADE COUNTY, FLORIDA FALL TERM, 2008

F09007246 DIV.# F015

THE STATE OF FLORIDA v.

BELKIS GONZALEZ

Defendant(s)

INFORMATION FOR

1. HEALTH CARE PROFESSION/UNLICENSED/ SERIOUS INJURY
   456.065(2)(D)2 FEL 2D
2. TAMPERING WITH OR FABRICATING PHYSICAL EVIDENCE 918.13(1)(a) Fel. 3D

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

KATHERINE FERNANDEZ RUNDLE, State Attorney of the Eleventh Judicial Circuit, prosecuting for the State of Florida, in the County of Miami-Dade, by and through her undersigned Assistant State Attorney, under oath, Information makes that:

WAKSMAN,DAVID :md 03/09/2009

DIRECT FILE - WARRANT ALREADY FILED

Jail No. 090018448 ,Bkd: , CIN: 1005205, W/F, DOB: 11/19/1965, SS#:

F09007246

Thornton Jr (F015)

(CC#: F09007246)

COUNT 1

BELKIS GONZALEZ, on or about July 20, 2006, in the County and State aforesaid, did unlawfully and feloniously practice a health care profession, to wit: the practice of medicine, without an active Florida license, when such practice resulted in serious bodily injury to S.D.O., A FEMALE INFANT LATER EXAMINED BY THE MIAMI-DADE COUNTY MEDICAL EXAMINER UNDER CASE NUMBER 2006-01925, to wit: brain or spinal damage and/or limitation of neurological, physical, or sensory function, in violation of s. 456.065(2)(d)2, Fla. Stat., contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida.

COUNT 2

And the aforesaid Assistant State Attorney, under oath, further information makes BELKIS GONZALEZ, on or between July 20, 2006 and July 28 2006, in the County and State aforesaid, inclusive, did unlawfully and feloniously, knowing that a criminal trial or proceeding or an investigation by a duly constituted prosecuting authority and/or law enforcement agency was pending or was about to be instituted, alter, destroy, conceal, or remove evidence, to wit: BIOHAZARD BAGS and/or THEIR CONTENTS, INCLUDING THE BODY OF S.D.O., A FEMALE INFANT and/or FETAL REMAINS and/or PLACENTA and/or UMBILICAL CORD REMNANTS, LATER EXAMINED IN MIAMI-DADE MEDICAL EXAMINER, CASE NUMBER 2006-01925, with the purpose to impair the verity or availability of said evidence in said proceeding or investigation, in violation of s. 918.13(1)(a), Fla. Stat., contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida.

(CC#: F09007246)

STATE OF FLORIDA, COUNTY OF MIAMI-DADE:

Personally known to me and appeared before me, the Assistant State Attorney of the Eleventh Judicial Circuit of Florida whose signature appears below, being first duly sworn, says that the allegations set forth in this Information are based upon facts which have been sworn to as true by a material witness or witnesses, and which if true, would constitute the offenses therein charged, and that this prosecution is instituted in good faith.

Assistant State Attorney/Bar #: 176710
1350 NW 12th Ave., Miami, FL (305) 547-0100

Sworn to and subscribed before me this 6 day of March, 2009.

CIRCUIT & COUNTY COURTS CLERK IN GOD WE TRUST Dade County, Florida

By _____
Deputy Clerk for Clerk of the Courts, or
Notary Public

NOTARY PUBLIC-STATE OF FLORIDA
C. M. Miranda
Commission #DD693661
Expires: JULY 17, 2011
BONDED THRU ATLANTIC BONDING CO., INC.

3/17/11
F015

IN THE CIRCUIT COURT OF
THE ELEVENTH JUDICIAL
CIRCUIT IN AND FOR MIAMI-
DADE COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

BELKIS GONZALEZ,

Defendant.
_____/

CRIMINAL DIVISION

CASE NO. F09007246

DEFENDANT'S SWORN MOTION TO DISMISS COUNTS 1 AND 2 OF THE INFORMATION WITH AN INTEGRATED MEMORANDUM OF LAW

COMES NOW, the Defendant, Belkis Gonzalez, by and through undersigned counsel, pursuant to Rule 3.190(c)(4) of the Florida Rules of Criminal Procedure, and hereby requests this Court to dismiss Counts 1 and 2 of the Information on the grounds that there are no material disputed facts and the undisputed facts do not establish a prima facie case of guilt against her for either of the Counts. As grounds, Ms. Gonzalez states the following undisputed facts and submits a memorandum of law both integrated herein and sworn to support the dismissal of the charges against her:

THE CHARGES

1. On July 20, 2006 the Hialeah Police Department began an investigation based upon an anonymous female caller alleging "that an infant had been born alive and killed by the staff at a clinic located at 3671 West 16th Avenue, Hialeah, Miami-Dade County, Florida." The investigation of the alleged killing thereafter

focused on one of the clinic's co-owner, Belkis Gonzalez, the defendant in this case.

2. Unequivocally, "[o]n 31 October 2006, the medical examiner concluded the cause of death was extreme prematurity and the manner of death to be natural." (Exhibit A, Death Certificate.)

3. Three years later, on February 27, 2009, a warrant was issued for the arrest of Ms. Gonzalez for the offenses with which she was eventually charged on March 24, 2009 by Information consisting of two counts. The first count charged her with unlawfully practicing a health profession which resulted in serious bodily injury "to S.D.O., A FEMALE INFANT LATER EXAMINED BY THE MIAMI-DADE COUNTY MEDICAL EXAMINER....to wit: brain or spinal damage and/or limitation of neurological, physical, or sensory function" in violation of Fla. Stat. §456.065(2)(D)2, a second degree felony. (See information.)

4. The second count charged her with unlawfully tampering with physical evidence on or between July 20, 2006 and July 28, 2006 in violation of Fla. Stat. §918.13(1)(a), a third degree felony, in that she unlawfully knew "that a criminal trial or proceeding or investigation by a duly constituted prosecuting authority and/or law enforcement agency was pending or was to be instituted , alter, destroy, conceal, or remove evidence, to wit: BIOHAZARD BAGS and /or FETAL REMAINS and/or PLACENTA and/or UMBILICAL CORD REMNANTS, LATER EXAMINED IN MIAMI-DADE EXAMINER....with the purpose to impair the verity or availability of said evidence in said proceeding or investigation.....". Id.

THE UNDISPUTED MATERIAL FACTS OF THE CASE

5. As to Count 1 of the Information, Ms. Gonzalez was not practicing a health care profession on July 20, 2006 because the State experts, Dr. William Smalling, M.D. and Dr. Glenn L. Skalding, have attested that (1) the Defendant was not practicing as a healthcare professional (2) the fetus was not viable at time of the termination of the pregnancy and (3) the cutting of an umbilical cord is not a medical procedure. (Composite Exhibit B.)

6. As to Count 2 of the Information, Ms. Gonzalez did not tamper, that is, alter, destroy, conceal, or remove the physical evidence (biohazard bags and /or fetal remains and/or placenta and/or umbilical cord remnants) while an investigation was being conducted because the Hialeah Police Department found the biohazard bag inside the premises and not on the roof as it was alleged by an anonymous caller. There are no witnesses that can testify that Ms. Gonzales removed a bag from inside the premises, placed it on the roof, and then brought it back into the premises with the purpose of impairing the investigation. Nor can the detectives testify that they in fact searched the same boxes during both searches of the premises as they made no reference to boxes searched nor did they memorialize the first search in any way.

ARGUMENT IN SUPPORT OF DISMISSAL OF COUNTS 1 AND 2

MEMORANDUM OF LAW

THIS COURT SHOULD DISMISS COUNTS 1 AND 2 OF THE INFORMATION, PURSUANT TO RULE 3.190(c)(4), BECAUSE MS. GONZALEZ DID NOT PRACTICE A HEALTH CARE PROFFESION WITHOUT AN ACTIVE LICENSE, AS CUTTING THE UMBILICAL CORD IS NOT A MEDICAL PROCEDURE AND WOULD NOT HAVE CAUSED A NOT-VIABLE FETUS SERIOUS INJURY, AND THERE IS NO EVIDENCE THAT SHE CONCEALED A BIOHAZARDOUS

BAG DURING AN INVESTIGATION CONDUCTED BY THE HIALEAH POLICE DEPARTMENT IN ORDER TO CONCEAL IT FROM THE POLICE.

In Florida, a court may entertain a motion to dismiss a criminal case at any time before trial if "[t]here are no material disputed facts and the undisputed facts do not establish a prima facie case of guilt against the defendant." Fla. R. Cr. P. 3.190(c)(4). A motion under Rule 3.190(c)(4) is like a summary judgment in a civil case. Fla. R. Cr. P. 3.190, Committee Notes, 1968 Adoption. "The purpose of this procedure is to avoid a trial when there are no material facts genuinely in issue." *State v. Kalogeropolous*, 758 So. 2d 110, 111 (Fla. 2000). "The facts on which such motion is based should be specifically alleged and the motion sworn to." *Id.* The court "may receive evidence on any issue of fact necessary to the decision of the motion." Fla. R. Cr. P. 3.190(d).

When filing a motion to dismiss an Information under this rule, the initial burden is on the defendant, who must demonstrate that the undisputed facts fail to establish a prima facie case or that they establish a valid defense. *Ellis v. State*, 346 So. 2d 1044, 1045-46 (Fla. 1st DCA 1977). The facts must be considered in the light most favorable to the prosecution. *State v. Bruner*, 526 So. 2d 1076 (Fla. 5th DCA 1988). Moreover, the court may not try or determine factual issues nor consider the weight of conflicting evidence or the credibility of witnesses in determining whether there exists a genuine issue of material fact. *State v. Fort*, 380 So. 2d 534 (Fla. 5th DCA 1980).

A motion to dismiss shall be denied upon the filing of a traverse specifically denying the allegations of the motion only if the traverse creates a dispute as to material evidentiary facts. Fla. R. Cr. P. 3.190(d). However, a

motion to dismiss shall be granted "if the traverse only disputes the legal effect of undisputed facts." *State v. Snyder*, 635 So. 2d 1057, 1059 (Fla. 2nd DCA 1994) (citation omitted). Moreover, the Florida Supreme Court has recently held that:

> If the facts in the motion that the State does not specifically deny support the defendant's position but additional facts exist that would create a material issue preventing the granting of the motion, the State should set forth those additional facts in the traverse just as a non-movant would have to do in a counter-affidavit in order to defeat a motion for a summary judgment.

Kalogeropolous, 758 So. 2d at 112. "Where the undisputed facts do not establish a prima facie case, the trial court does not err in dismissing the information." *Id.*

A. The Undisputed Material Facts Do Not Establish a Prima Facie Case of Unlawfully Practicing a Health Profession Causing Serious Injury.

Ms. Gonzalez is charged in Count 1 of the Information with having committed the offense of unlawfully practicing a health profession causing serious injury to an infant on or about July 20, 2006. In order for the state to prove a prima facie case of in this case, it must then prove the following:

(1) that Ms. Gonzalez practiced a health care profession without an active Florida license *in cutting an umbilical cord*;

(2) that "such practice *result(ed)* in serious bodily injury which means death; brain or spinal damage; disfigurement; fracture or dislocation of bones or joints; limitation of neurological, physical, or sensory function; or any condition that required subsequent surgical repair." (emphasis added).

The state cannot prove any of the above elements for two reasons. First, as to the first element, it is undisputed that cutting an umbilical cord is not a

medical procedure nor is it necessary to have a healthcare license for the cutting of the cord. (See Composite Exhibit B). As such, Ms. Gonzalez was not acting as a health care professional who needed an active license to cut an umbilical cord. Most importantly, as it relates to the second element, no serious injury could have occurred to the fetus as a result of cutting the umbilical cord because unequivocally the fetus was non-viable and could not have survived outside of the uterus because of its gestational age. *Id.* (See Composite Exhibit B).

The state's medical expert, Dr. William Smalling, M.D., a Board Certified Neonatologist, who has practiced the specialty since 1999, was asked at a deposition held February 7, 2011, whether he arrived at an opinion about cutting an umbilical cord and the viability of the fetus who allegedly sustained serious injury in this case. Dr. Smalling plainly responded:

> After reviewing the charts [presented by law enforcement], it was deemed that the fetus was about twenty-one and a half weeks. And based on estimation by the pathology report and the ultrasound, a fetus of that age would not be—would be considered non-viable, which means it wasn't mature enough to survive outside of the uterus regardless of whatever intervention was done. So I felt that cutting the umbilical cord played no role on the survival of the infant, because the baby was deemed to be not able to survive.
>
> ******
>
> Q. Do you feel cutting an umbilical cord is a medical procedure?
> A. I do not feel cutting an umbilical cord it's a medical procedure.
> Q. Doctor, you just stated that in your opinion the cutting of the umbilical cord is not a medical procedure. Did you come to an opinion as if, in this case, cutting of the umbilical cord would not result in brain, spinal, sensory, or any kind of physiological damage to an infant of that age?

A. No, it would not.

(See Composite Exhibit B).

Further, the second state's medical expert, Dr. Glenn L. Salkind, M.D., FACOG, an obstetrician and gynecologist, attested in an affidavit on January 28, 2011 regarding the events of July 20, 2006 that "1. [t]he fetus was not viable at the time of the termination of pregnancy" and that "2. [c]utting of the umbilical cord, in and of itself, is not a medical procedure." (See Composite Exhibit B).

Because the state cannot prove in this case that cutting an umbilical cord is a medical procedure that required a health care license which *caused* serious consequences or injury to a not viable fetus given its gestational age, MS. Gonzalez has not violated § 456.065(2)(d) 2., Fla.Stat. *See, e.g., Hawkins v. State*, 933 So.2d 1186, (4th DCA 2006)("One of the elements that the state had to prove for the charges of both third degree murder and the unlicensed practice of medicine causing the victim's death was a causative link between the *act* of the defendant and the death of the victim.'") (citations omitted). Therefore, this Court should dismiss Count one of the Information.

B. The Undisputed Material Facts Do Not Establish a Prima Facie Case of Tampering with Physical Evidence.

Ms. Gonzalez is charged in Count 2 of the Information with having committed the offense of tampering with the physical evidence on or between July 20, 2006 and July 28, 2006 in violation of section 918.13(1)(a), Florida Statutes (2006), which states, in pertinent part:

> (1) No person, knowing that a criminal ... investigation by a ... law enforcement agency, ... is pending or is about to be instituted, shall:

> (a) Alter, destroy, conceal, or remove any record, document, or thing with the purpose to impair its verity or availability in such ... investigation;

"To prove this offense, the state must show that the defendant had knowledge of the impending investigation and destroyed or concealed evidence, impairing its availability for the investigation." A.F. v. State, 850 So.2d 667, 668 (4th DCA 2003) (citations omitted). Further, the court underscored that

> "[a]s the statute makes clear, 'tampering with evidence' is a specific intent crime. *See Rader v. State,* 420 So.2d 110 (Fla. 4th DCA 1982); *State v. News-Press Publishing Company,* 338 So.2d 1313 (Fla. 2d DCA 1976). The Florida statute was adopted verbatim from the American Law Institute's MODEL PENAL CODE AND COMMENTARIES, section 241.7 (1980), which explains:
>
> > The limiting factor in Paragraph (a) is the requirement of specific intent. The statute punishes any kind of tampering with any document or thing but only if the defendant acts "with purpose to impair its verity or availability" in an official proceeding or investigation. This designation of specific purpose identifies the ultimate evil as obstruction of justice rather than destruction of property and restricts the scope of the offense to persons who consciously intend to commit the forbidden harm.

Id.

Neither detective involved in the search of the premises testified in deposition nor can testify at trial that they in fact searched the same box or boxes during both searches of the premises on different dates. The detectives cannot make reference to specific boxes or bags that were searched and, indeed neither detective memorized the first or second search of said premises. Both detectives involved, Elosegui and Rodriguez, searched the premises on different dates independent of each other.

The state cannot prove any of the above elements because there is no evidence to support the allegations of an anonymous caller who falsely alleged to the Hialeah Police Department that the biohazard bag was on the roof of the premises. The police found the bag inside the premises. Indeed, Detective Joseph Elosegui, attests in the deposition that there were no eyewitnesses who saw Ms. Gonzalez remove a biohazard bag from inside the premises or returned it to the premises:

> Q. Was there ever a single witness to your knowledge, who ever saw our client, Belkis Gonzalez, remove a fetus?
> A. No, I already said, no.
> Q. And to your knowledge, was there ever a single witness that saw her put the fetus back in the facility?
> A. No, my answer was no.

(Composite Exhibit C, Deposition of Det. Elosegui at 38, 39).

Indeed, the lead investigator, Detective Anthony Rodriguez, unequivocally attested the same, as Det. Elosegui did, at his deposition: that there were no eyewitnesses that could testify that Ms. Gonzalez removed the biohazard bag from inside the premises and then returned it inside to impair the investigation. Id. (Composite Exhibit D, Deposition of Det. Rodriguez at 59-61). Because there is no evidence to show that Ms. Gonzalez had the specific intent to alter, destroy, conceal, or remove bags with the purpose to impair its verity or availability in an investigation, the State cannot prove an essential element of the offense. Nor can the detectives testify that in fact the boxes searched during the second search were searched during the first search since the first search was not memorialized. Therefore, this Court should also dismiss Count two of the Information.

CONCLUSION

In this case, Belkis Gonzalez is charged with one count of unlawfully practicing a health profession causing serious injury and one count of tampering with physical evidence in violation of Fla. Stat. §§ 456.065(2)(D)2, a second degree felony, and 918.13(1)(a), a third degree felony, respectively. "Where the undisputed facts do not establish a prima facie case, the trial court does not err in dismissing the information" pursuant to Rule 3.190(c)(4) of the Florida Rules of Criminal Procedure. *Snyder*, 635 So. 2d at 1059.

Here, the undisputed material facts show that the fetus was not viable given its gestational age, that cutting an umbilical cord is not a medical procedure which requires a health care license, and that there is no evidence to show that Ms. Gonzalez removed a bag from inside the premises to the roof and then back into the premises with the specific intent to impair an investigation. There exists no other evidence that could lead to other undisputed facts supporting all the elements of both counts. Thus, this Court should dismiss Counts 1 and 2 of Information as the undisputed material facts do not establish a prima facie case of either unlawfully practicing a health profession causing serious injury or of tampering with physical evidence during the course of an investigation

WHEREFORE, the Defendant, Belkis Gonzalez, respectfully requests this Court to dismiss Counts 1 and 2 of the Information pursuant to Rule 3.190(c)(4) of the Florida Rules of Criminal Procedure on the grounds that there are no material disputed facts and the undisputed facts do not establish a prima facie case of guilt against Belkis Gonzalez for having violated Fla. Stat. §§

456.065(2)(D)2, a second degree felony, and 918.13(1)(a), a third degree felony, respectively.

Respectfully submitted:

By: _____
Roberto Pertierra, Esq.
Florida Bar No. 616370
2655 LeJeune Road Suite 1105
Coral Gables, Florida
Tel.: 305.444.0011
Fax: 305.441.2122

By: _____
Alberto Milian, Esq.
Florida Bar No. 651168
4000 PonceDeLeon Blvd. Suite 470
Coral Gables, Florida
Tel.: 305.777.0337
Fax.: 305.777.0449

By: _____
Jose Rodriguez-Dod, Esq.
Florida Bar No. 52353
1801 Ponce de Leon Blvd
Coral Gables, Florida 33134
Tel.: 305.444.2141
Fax.: 305.444.2575

STATE OF FLORIDA)
) SS:
COUNTY OF DADE)

Before me, the undersigned authority, this day personally appeared Belkys Gonzalez, who first being duly sworn, says that he is the defendant in the above styled cause, that he has read the foregoing motion to dismiss with an integrated memorandum of law, and has personal knowledge of the facts and matters therein set forth and alleged and that each and all of these facts and matters are true and correct.

Belkys Gonzalez

SWORN TO SUBSCRIBED TO BEFORE THIS 23RD DAY OF FEBRUARY, 2011.

MARIA MAGUINA
MY COMMISSION # DD 833326
EXPIRES: October 23, 2012
Bonded Thru Notary Public Underwriters

NOTARY PUBLIC
STATE OF FLORIDA

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA

CRIMINAL DIVISION
CASE NO.: F09-7246

STATE OF FLORIDA,
Plaintiff

JUDGE THORNTON
SECTION 15

FILED
MAR 15 2011
CLERK

Vs.

BELKIS GONZALEZ,
Defendant

ORDER ON DEFENDANT'S UNOPPOSED SWORN MOTION TO DISMISS

The Defendant filed a Sworn Motion to Dismiss the charges in this case on February 24, 2011. The State has agreed the facts set forth in the Defendant's motion are accurate. The State was requested by this Court to file a response to the Defendant's motion. The State has filed no opposition to the Defendant's motion, knowing that this Court is required by law to grant the motion based upon the facts of this case.

Wherefore, because the State has agreed it cannot prove the charges it has filed against the defendant, this Court has no choice under the law but to grant the Defendant's Sworn Motion to Dismiss. It is therefore,

ORDERED and ADJUDGED that the Defendant's Sworn Motion to Dismiss, with the agreement by the State that it cannot prove the charges it had filed, is hereby granted.

Done and Ordered at Miami, Miami-Dade County, Florida, this 15th day of March, 2011.

JOHN W.THORNTON, JR
CIRCUIT COURT JUDGE

CC:

ASA Gail Levine, Esq.
Roberto Pertierra, Esq.
Alberto Milian, Esq.
Jose Rodriguez-Dod, Esq.

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

vs.

BELKIS GONZALEZ,
Defendant.

Case No. F09-7246

Judge Thornton

RESPONSE TO DEFENDANT'S SWORN MOTION TO DISMISS

KATHERINE FERNANDEZ RUNDLE, State Attorney of the Eleventh Judicial Circuit of Florida, by and through the undersigned Assistant State Attorney, hereby Responds to Defendant's Sworn Motion to Dismiss, and advises the Court that based upon the evidence, the State of Florida can neither Traverse nor Demur the Defendant's Sworn Motion to Dismiss.

Respectfully submitted,

KATHERINE FERNANDEZ RUNDLE
STATE ATTORNEY

By: _____
Gail Levine
Assistant State Attorney
Florida Bar # 466591
E.R. Graham Building
1350 N.W. 12th Avenue
Miami, Florida 33136-2111
(305) 547-0100

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the above was furnished to Robert Pertierra, 2655 S. Le Jeune Road, Suite 1105, Coral Gables, Florida 33134-5802, and Alberto Milian, 4000 Ponce de Leon Blvd., Suite 470, Coral Gables, Florida 33146-1432, on this 11th day of March, 2011.

_____
Gail Levine
Assistant State Attorney

**** DUPLICATE ****

Official Receipt

Please keep this receipt for your records

Miami-Dade County Clerk's Office
Office: Felony Inform- Clerk's Offi-FELI
1351 NW 12th Street (9th Ph:305-275-1155

Miami FL
Date:9/27/2019 4:05 PM Cashier: EALVARE
Batch# 385815 PC# RG09IU05 Trans# 13

- -

Receipt# *2840022* Felony Miscellaneous

Acct# F09007246
Name: GONZALEZ, BELKIS

3630 Copy
17.0 X $1.0000 = $17.00

==========

Transaction Total: $17.00

Tender: Master Card $17.00
Order#25746677 Name:
CC# **********5310 Merch#11085

Thank you for your payment.
Have a nice day!

Worthless payments are
subject to s. 68.065 F.S. charges

**** DUPLICATE ****