Seth Penalver v. State of Florida

MARSHAL: PLEASE RISE. HEAR YE. HEAR YE. HEAR YE. THE SUPREME COURT OF THE GREAT STATE OF FLORIDA IS NOW IN SESSION. ALL WHO HAVE CAUSE TO PLEA, DRAW NEAR, GIVE ATTENTION AND YOU SHALL BE HEARD. GOD SAVE THESE UNITED STATES, THE GREAT STATE OF FLORIDA AND THIS HONORABLE COURT.

CHIEF JUSTICE: GOOD MORNING.

MARSHAL: LADIES AND GENTLEMEN, THE FLORIDA SUPREME COURT. PLEASE BE SEATED.

CHIEF JUSTICE: GOOD MORNING, EVERYONE. WELCOME TO THE FLORIDA SUPREME COURT. WE ARE PLEASED THIS MORNING, TO HAVE MANY STUDENTS FROM FLORIDA A&M UNIVERSITY. SO WITH THAT, WELCOME. LET'S CALL THE FIRST CASE. PENALVER VERSUS STATE. IF COUNSEL IS READY TO PROCEED, YOU MAY PROCEED.

THANK YOU. MAY IT PLEASE THE COURT. MY NAME IS JEFFREY ANDERSON, AND I REPRESENT THE APPELLANT, JEFF PENALVER. THIS IS A CASE WHERE WE HAVE VIDEOTAPE OF THE KILLINGS, AND WHAT BASICALLY HAPPENED WAS THE VICTIM, IN WHICH CASE HE IS ALSO KNOWN AS CASMIR SUCHARSKI, HAD BROKEN UP WITH HIS GIRLFRIEND AND BECAME IN FEAR FOR HIS SAFETY. WITNESSES SAY HE ESSENTIALLY PREDICTED HIS DEATH, AND EIGHT DAYS PRIOR TO HIS DEATH, HE INSTALLED A VIDEO CAMERA, AND AS I SAID, THAT PICKED UP THE KILLINGS AND IT CLARIFIED THE ISSUE ON WE KNOW IT IS NOT SELF-DEFENSE OR ACCIDENTAL KILLING. THESE ARE MURDERS. THE PROBLEM AND THE ISSUE DOWN BELOW, PRIMARILY FOCUSED IN ON WAS, WHO ARE THE INTRUDERS OF THE VIDEO, AND THAT IS BECAUSE THE QUALITY OF THE VIDEO ISN'T VERY GOOD AND THE INTRUDERS, ONE OF THEM WORRY SUNGLASSES AND A HAT ON, IT SAID, AND ANOTHER ONE WORRY BASICALLY A T-SHIRT OVER -- AND ANOTHER ONE WORE BASICALLY A T-SHIRT OVER HIS HEAD.

WHAT WAS THE NATURE OF THE CRIME? THERE WERE DRUGS AND THERE WAS THE ASSERTION THAT THERE WERE ITEMS THAT WERE VALUABLE THAT WERE, REMAINED. IS THERE ANYTHING THAT DEVELOPED IN THAT, IN EITHER CASE, THE DEFENSE?

THE EVIDENCE SHOWS THERE WERE A LOT OF JEWELRY LEFT BEHIND. THERE WAS SOME MONEY LEFT BEHIND. I THINK $5,000 WAS LEFT BEHIND. I DON'T KNOW IF THAT WAS SEEN BY THE INTRUDERS, BUT CERTAINLY A LOT OF JEWELRY WAS LEFT BEHIND THAT THEY COULD HAVE EITHER, SOME OF IT WAS IDENTIFIABLE TO THE VICTIM AND SOME OF IT WASN'T.

WHAT WAS TAKEN?

WE DON'T KNOW IF ANYTHING WAS TAKEN. THAT IS ONE OF THE KEY ISSUES THAT THE DEFENSE RAISED. WHAT IS THE MOTIVE FOR THIS? IS IT A HOME INVASION ROBBERY OR IS IT SOMETHING ELSE? DOES IT RELATE TO KACY'S FEAR OF -- TO CASEY'S FEAR OF CRYSTAL AND A LOT OF FEAR.

YOU HAVE GOT A LOT OF THINGS, AND THIS IS EVIDENCE, AND I THINK IT MIGHT BEHOOVE YOU TO GET TO THOSE, SINCE THE MOTIVE FOR THE MURDER ISN'T REALLY AS PERTINENT AS WHETHER OR NOT THE EVIDENCE SHOULD HAVE BEEN ADMITTED.

WHAT ARE YOU GOING TO FOCUS ON THIS MORNING?

I AM GOING TO START WITH ISSUE NUMBER ONE, AND THAT HELPS DEAL WITH THE DEFENSE IN THIS CASE WAS REASONABLE DOUBT THAT SETH PENALVER WAS THE PERSON IDENTIFIED IN THE VIDEO AND THE THEORY WAS IT WAS SETH PENALVER AND THE PERSON WITH THE T-SHIRT OVER THE HEAD WAS PABLO MALL DO VARIETIES. -- PABLO MALDOVAR. THE THEORY WAS THAT HE WAS THE OWNER OF THE HAT AND SUNGLASSES THAT THE MURDERER WORE IN THE VIDEO, AND ALSO, ACCORDING TO ONE STATE WITNESS, ALEX HERNANDEZ, WHO IS ALSO KNOWN AS ALEX SALAZAR, KEPT THIS UNDER LOCK AND KEY IN HIS BEDROOM, AND IT ALSO HAPPENED THAT ALEX HERNANDEZ WAS CAUGHT THREE WEEKS AFTER THIS INCIDENT, WITH SETH PENALVER. SO THE DEFENSE SET UP THAT IT MIGHT POSSIBLY BE SOMEONE ELSE THAN ALEX HERNANDEZ. THE STATE ATTACKED THAT AND SAID ALEX HERNANDEZ HAS ANAL GUY BUY. HE WAS -- AN AND BY. HE WAS IN -- AND ALIBI. HE WAS IN NORTH CAROLINA AT THE TIME OF THE MURDERS.

OTHER THAN THE EVIDENCE THAT YOU ARE FOCUSING ON NOW, WHAT OTHER EVIDENCE WAS ADMITTED DURING THE COURSE OF THE TRIAL THAT HERNANDEZ WAS IN NORTH CAROLINA, AT THE TIME OF THE OFFENSE? IF ANY.

THERE WAS NO OTHER EVIDENCE AT ALL. IT WAS SOLELY BASED ON THE OUT OF COURT STATEMENT, THAT THE STATE WAS PROVING IT, AND THEIR POSITION DOWN BELOW WAS WE DON'T NEED ANYTHING ELSE. THIS COMES UNDER --

THERE WAS ABSOLUTELY NO OTHER EVIDENCE THAT HE WAS ACTUALLY IN NORTH CAROLINA AT THE TIME OF THE OFFENSE?

NO RETURN PLANE TICKET OR ANYTHING, AND THAT, THE STATE SAID IT COMES IN AS A STATE OF INTENTION THAT GOES TO PROVE SUBSEQUENT CONDUCT. UNDER 98.03 SUBSECTION C OF THE EVIDENCE CODE.

DID THEY ARGUE IN CLOSING, THAT HE COULDN'T HAVE BEEN IN A SUSPECT BECAUSE HE WAS IN NORTH CAROLINA? IN OTHER WORDS, LET'S ASSUME THAT IT WAS ERROR TO ADMIT IT. WHAT, YOU KNOW, WHAT, HOW --

HE ARGUED TO THE JURY, THE THEORY ABOUT ALEX HERNANDEZ DOESN'T HOLD WATER, BECAUSE HE WAS IN NORTH CAROLINA, AS SHOWN BY THE STATEMENT.

THERE IS NOTHING ELSE ABOUT NORTH CAROLINA IN THE RECORD, OTHER THAN THIS HEARSAY STATEMENT?

THAT IS IT.

AND HE ACTUALLY MADE THE ARGUMENT TO THE JURY, AND HIS CLOSING ARGUMENT, THAT ALEX HERNANDEZ WAS IN NORTH CAROLINA?

RIGHT. HE COULDN'T HAVE DONE IT BECAUSE HE IS IN NORTH CAROLINA, BECAUSE OF THIS STATEMENT MADE THAT HE INTEND TO GO TO NORTH CAROLINA.

SO THE PRECISE STATEMENT MADE WAS THAT HERNANDEZ INTENDED TO GO TO NORTH CAROLINA, CORRECT?

HE HAD PLANS TO GO TO NORTH CAROLINA.

RIGHT. SO WHY IS THAT NOT ADMISSIBLE AS A STATEMENT OF INTENT OR PLAN?

WELL, IT IS NOT, THEY ARE NOT USING IT, THEY ARE NOT REALLY CONCERNED ABOUT HIS INTENT, BECAUSE HERNANDEZ'S INTENT WAS NOT AN ISSUE. BUT THEY WERE RELYING ON THIS, YOU

KNOW, INTENT OF SUBSEQUENT CONDUCT, TO PROVE THE SUBSEQUENT CONDUCT THAT HE ACTUALLY WENT TO NORTH CAROLINA, AND THE DEFENSE OBJECTED TO THAT, NOTING THAT THE HEARSAY EXCEPTION THAT WAS BEING USED HAS A TRUSTWORTHINESS EXCEPTION IN IT, AND THAT IT CAN'T BE USED, YOU KNOW, TO ADMIT A SELF-SERVING STATEMENT. IF THIS GUY, ALEX HERNANDEZ WAS ONE OF THE FIRST SUSPECTS THAT THE POLICE HAD IN THIS CASE, AND THEY WERE TRYING TO PROVE, INITIALLY, THAT HE WAS ONE OF THE CULPRITS, AND --

WASN'T THERE SOME TESTIMONY, HOWEVER, IN THIS RECORD, THAT MR. HERNANDEZ WAS TALLER THAN MR. EBAR AND THAT THE PERSON IN THE VIDEO WAS ACTUALLY SHORTER THAN HIM? YOU MAKE IT SOUND LIKE THERE WAS NOTHING ELSE IN THIS RECORD ABOUT THAT.

THAT WAS, THE STATE TRIED TO ARGUE, IN ADDITION TO THE NORTH CAROLINA ALIBI THING, THAT IT PROBABLY ISN'T HERNANDEZ BECAUSE OF THE HEIGHT DIFFERENTIAL. AND THEY ARGUED, THE POLICE HAD BASICALLY CONSIDERED THAT TO ELIMINATE HERNANDEZ AS A SUSPECT, BUT THAT IS KIND OF A DISINGENIOUS ARGUMENT, WHEN YOU CONSIDER THAT THE POLICE HAD REVIEWED THE TAPE MANY TIMES AND HAD TAKEN PHOTOS FROM THE TAPE AND BLOWN THEM UP, AND THEY HAD MET WITH HERNANDEZ IN THE COUNTY JAIL AND WITH EBAR, AND KNOWING ABOUT THE SUPPOSED HEIGHT PROBLEMS AND ALL OF THAT, THEY STILL HAD HIM AS THE LEAD SUSPECT AS THE PERSON IN THE HAT AND SUNGLASSES.

WHAT IS THE TRUTH OF THE MATTER ASSERTED, WITHIN A STATEMENT THAT SAYS THAT HE TOLD ME HE INTENDED TO GO TO NORTH CAROLINA? WHAT IS THE, THAT HE, THAT HE INTENDED TO GO TO NORTH CAROLINA, OR THAT HE WENT TO NORTH CAROLINA, OR WHAT IS THE TRUTH OF THE MATTER WHICH IS ASSERTED IN THAT STATEMENT?

THE STATE WAS USING THIS HEARSAY EXCEPTION TO ASSERT THAT THAT SHOWS HE ACTUALLY WENT.

I WANT TO FOCUS, FIRST, ON WHY IT MEETS THE DEFINITION OF HEARSAY. WHY IS IT A PROOF, AN OUT-OF-COURT STATEMENT, WHICH IS PROOF OF A MATTER ASSERTED? WHAT IS THE MATTER ASSERTED?

WELL, IF YOU JUST BREAK IT DOWN IN THE COLD WORDS AND LOOK AT IT, I SUPPOSE YOU COULD SAY IT IS THAT HE INTENDED TO GO TO NORTH CAROLINA. WHICH BECOMES THE PROBLEM THERE, THOUGH. THAT IS NOT AN ISSUE IN THE CASE.

WELL, THEN, BUT THAT --

INTENT IS AS TO WHETHER OR NOT HE WAS IN NORTH CAROLINA.

WHAT I AM TRYING TO UNDER IS WHETHER IT IS HEARSAY WITHIN THAT DEFINITION, OR WHETHER IT REALLY FOCUSES UPON WHETHER IT IS RELEVANT OR NOT. I MEAN, IF IT IS JUST AN OFF THE WALL STATEMENT, PERHAPS IT IS NOT RELEVANT, BUT WHAT IS THE MATTER ASSERTED? THAT THAT STATEMENT PROVES?

WELL, LIKE I WAS SAYING, IF YOU LOOK AT THE COLD WORDS, IT MAY APPEAR TO BE THE INTENTION, BUT THE ASSERTION THE STATE WAS MAKING THROUGH THAT WAS THAT THE GUY WAS IN NORTH CAROLINA, AND THAT IS WHAT THEY TOTALLY ARGUED IN THE ARGUMENT. THERE WERE LONG ARGUMENTS CONCERNING THIS ISSUE, AND DEFENSE COUNSEL COMPLAINED ON TWO THINGS. THEY SAID THIS IS HEARSAY, AND IT IS NOT ACTUALLY RELEVANT, BECAUSE OF THE TENUOUSNESS OF IT.

THE STATE, DURING THE ARGUMENT ON THE ADMISSIBILITY OF THE STATEMENT, ARGUED THAT THEY WERE USING THAT TO PROVE THAT HE WAS IN NORTH CAROLINA AT THE TIME OF THE OFFENSE?

EXACTLY. THAT IS WHAT THEY WERE MAINTAINING. THAT IS THE WAY THEY USED IT IN CLOSING ARGUMENT. AND THERE WAS A SECOND FACTOR. I ARGUED THE FIRST FACTOR, THE TRUSTWORTHINESS, BUT DEFENSE COUNSEL ALSO COMPLAINED THAT THIS WHOLE HEARSAY EXCEPTION IS BASED ON THE U.S. SUPREME COURT CASE OF MUTUAL INSURANCE VERSUS HILLMAN, AND THEY POINTED TOWARD THAT CASE AND SAID IT HAS LANGUAGE IN THERE, INDICATING YOU NEED MORE THAN JUST THAT BARE OUT OF COURT STATEMENT, TO PROVE THE FACT THAT YOU ARE TRYING TO PROVE. IE THAT THE DWI GUY IS IN ANOTHER -- THAT THE GUY IS IN ANOTHER STATE, AND THERE IS LANGUAGE IN HILLMAN THAT TALKS ABOUT THE STATEMENT OF INTENTION IS ADMISSIBLE, AS PART OF THE CHAIN OF CIRCUMSTANCES, TO SHOW THAT THE ACT IS DONE. THERE IS OTHER EVIDENCE.

YOU HAVE A NUMBER OF OTHER ISSUES, AND I AM AFRAID DWRIRM IS PASSING RATHER QUICKLY.

OKAY -- I AM AFRAID YOUR TIME IS PASSING RATHER QUICKLY.

OKAY. THERE IS OTHER LANGUAGE IN HILLMAN, IF YOU READ IT, THAT TALKS ABOUT OTHER EVENTS BEING NEEDED. UNLESS THERE ARE OTHER QUESTIONS ON THIS ISSUE, I WOULD LIKE TO GO TO POINT THREE IN MY BRIEF. POINT THREE AND POINT TWO ARE RELATED. THEY DEAL WITH INNUENDO AND SPECULATION ABOUT DEFENSE COUNSEL AND/OR THE DEFENDANT TAMPERING THE WITNESSES.

AS FAR AS THREE IS CONCERNED, ISN'T THE JAIL RECORDS OF THE ATTORNEY'S VISITS WITH MR. PENALVER, CORRECT?

CORRECT.

THESE RECORDS WERE INTRODUCED AND THEN WHAT WAS SAID ABOUT THEM, IF ANYTHING?

WELL, THE PROSECUTOR IN CLOSING ARGUMENT AFTER THAT, SAID YOU LOOK AT, WE SHOWED YOU THE JAIL RECORDS, THEY SHOW THE MEETINGS BETWEEN THE DEFENDANT AND HIS ATTORNEY, AND THEN WE KNOW THAT THE DEFENDANT IS IN CONTACT WITH MELISSA MONROE, AND SHE CHANGES HER TESTIMONY RIGHT AFTER THAT. SO --

RIGHT AFTER WHAT?

RIGHT AFTER MEETING WITH, THE MEETING BETWEEN THE DEFENDANT AND HIS ATTORNEY AND THEN THEY SAY THERE MUST HAVE BEEN A MEETING THERE BETWEEN MELISSA MONROE AND THE DEFENDANT. AND THEN SHE CHANGES HER TESTIMONY.

WHAT WAS THE GAG ORDER? THAT, I, WAS THERE A GAG ORDER NOT, THAT THE ATTORNEY COULDN'T SPEAK WITH WITNESS OR WHAT WAS THE INFERENCE WAS THERE WAS SOME SECRET INFORMATION THAT THE ATTORNEY KNEW THAT HE PASSED ONTO THIS WITES?

OKAY. THAT, I THINK THAT IS PRIMARILY THE RELATED ISSUE, TOO, BUT THE GAG ORDER WAS IT HADN'T BEEN, ALLEGEDLY IT HADN'T BEEN RELEASED THAT THERE WAS A VIDEOTAPE. THAT IS WHAT WAS ALLEGED, BUT PABLO IBAR KNEW ABOUT THAT. THE INFORMUATION WAS RELEASEED TO PABLO IBAR, SO WHO KNOWS IF IT SPREAD OR NOT, BUT THE THEORY WAS THERE WAS A GAG ORDER THAT THE ATTORNEYS FOR THE DEFENSE NOT DISCUSS WHAT WAS IN THE PROBABLE CAUSE AFFIDAVIT. IT WAS SEALED, AND IT TAKES ABOUT THE TAPE. INTERESTINGLY ENOUGH, IN POINT THREE, THE ATTORNEY THAT THE DEFENDANT MET WITH, THIS NEVER GETS BEFORE THE JURY BUT THERE IS A HEARING INVOLVING CERTAIN EVIDENCE AT THE PRELIMINARY HEARING, AND AT THE PRELIMINARY HEARING, THE DEFENSE ATTORNEY MAKES A REPRESENTATION THAT HE HAS NEVER KNOWN ABOUT THE TAPE, VIDEOTAPE, UNTIL THE DAY BEFORE, AUGUST 30, WHICH IS AFTER THE STATE ALLEGING THE WITNESS HAD CHANGED HER TESTIMONY. THIS IS --

THE INFERENCE, THEY USE BOTH, WHATEVER WAS JAIL RECORDS, TO ARGUE, DID THEY ACTUALLY ARGUE TO THE JURY THAT THE DEFENSE ATTORNEY IMPROPERLY SUGGESTED THAT THE WITNESS CHANGE HER TESTIMONY?

THEY, THEY ARGUED, HERE, YOU CAN LOOK AT THIS EVIDENCE AND DRAW INFERENCES THAT THE DEFENSE, SOMEHOW, CHANGED THE WITNESS, GOT THE WITNESS TO CHANGE THEIR TESTIMONY.

HOW WOULD THAT BE, BECAUSE WEREN'T THE JAIL RECORDS OF THE VISITS BETWEEN THE DEFENDANT AND THE ATTORNEY?

THE DEFENDANT AND THE ATTORNEY, BUT WHAT THEY ARE DOING IS A SERIES OF INFERENCES, AS DEFENSE COUNSEL POINTED OUT. THEY ARE INFERRING, FIRST OF ALL, THAT THE DEFENSE ATTORNEY GOT AHOLD OF THE INFORMATION ABOUT THE TAPE AND THEN HE PASSED IT ON TO THE DEFENDANT, AND THEN THE DEFENDANT PASSED IT ON TO MELISSA MONROE. NOW, THE STATE IS NOT ARGUING THAT EXPLICITLY, BUT THEY ARE SAYING HERE ARE THESE MEETINGS AND THEN SHE CHANGES HER TESTIMONY.

SO THE JAIL RECORDS SHOW ALL THE VISITS BETWEEN THE ATTORNEY AND THE CLIENT?

HE WAS SHOWING VISITS, THE SPECIFIC JAIL RECORDS THAT HE INTRODUCED IN EVIDENCE WERE THE MEETINGS BETWEEN THE DEFENSE ATTORNEY AND THE CLIENT ON AUGUST 22, 23 RAN 24, AND THE GRAND JURY HEARING, WHICH THEY CLAIM THERE IS A CHANGE IN TESTIMONY, WAS ON THE 25th.

> WHAT WAS THE BASIS OF THE JAIL RECORDS TO BEGIN WITH?

I THINK IT WAS TO CREATE THIS INFERENCE OR SPECULATION.

WAS IT FOR THIS SPECIFIC PURPOSE?

THERE WAS NO OTHER PURPOSE.

WAS THERE AN OBJECTION TO THE JAIL RECORDS?

YES, THERE WAS. HE OBJECTED, BASED ON, YOU KNOW, THE PREJUDICIAL VALUE THAT HE WAS GOING TO TRY TO CREATE ALL OF THESE INFERENCES WHERE THEY DON'T REALLY STAND, AND HE WAS JUST ATTACKING THE DEFENSE AND ATTORNEY, AND HE, ALSO, ARGUED SPECIFICALLY, AT 11.740, THAT ANY PROBATIVE VALUE THAT THE RECORDS OF THE MEETINGS BETWEEN THE TWO WAS SUBSTANTIALLY OUTWEIGHED BY POTENTIAL PREJUDICE OR MISUSE.

JUST TO FINISH, THE STATE WAS OPENLY ARGUING AT THAT TIME, THOUGH, THAT WE WANT TO ADMIT THE JAIL RECORDS, TO SHOW THAT THE ATTORNEY VISITED AT A CERTAIN TIME AND CONVEYED INFORMATION TO THE DEFENDANT, AND THEN THE DEFENDANT CONTACTED THIS WITES? -- THIS WITNESS, TO HAVE HER CHANGE HER TESTIMONY. I AM USING PARTICULAR WORDS, BUT TELL ME WHAT, I AM INTERESTED IN KNOWING IF THAT WAS THE THE SPECIFIC ARGUMENT OF THE STATE, AS TO THE ADMISSIBILITY OF THESE RECORDS.

THE ONLY THING THEY TALKED ABOUT WAS, HERE YOU HAVE THESE MEETINGS, AND THEN THE TESTIMONY CHANGES. IT IS NOT LIKE THEY WERE OFFERING ANY OTHER REASON FOR ADMISSION OF THESE JAIL RECORDS.

NOW, THIS ALL RELATES TO, THIS IS THE WITNESS THAT ALLEGEDLY HAD BEEN FORCED TO MAKE THE IDENTIFICATION INITIALLY. THAT WAS THE REASON GIVEN FOR THE CHANGE, WITH REGARD TO THE IDENTIFICATION? THAT IS WHAT WE ARE SPEAKING OF, CORRECT? MONROE HAD SUGGESTED THAT SHE HAD BEEN FORCED TO MAKE THE IDENTIFICATION.

CORRECT.

AND WAS THERE ANY OTHER EVIDENCE? WAS THERE ANY OTHER ATTEMPT TO DISCREDIT THIS CHANGE, OR WAS THIS THE SOLE THRUST OF THE STATE'S POSITION WITH THESE RECORDS, WITH REGARD TO THE ATTORNEY?

WELL, OKAY. LET ME, FIRST, MAKE A RECORD CORRECTION, BECAUSE I HAVE A LONG RECORD CITE IN MY BRIEF. IF YOU WANT TO SEE WHERE HE ARGUES THE JAIL RECORDS TO THE JURY, IT IS AT 14513. I HAVE A TYPO IN THERE. BUT HE ARGUES, POINTS TO DEALS WITH THE CIRCUMSTANCE WHERE THERE IS ANOTHER ATTORNEY INVOLVED WHO IS UNDER THE GAG ORDER, WHO THE PROSECUTOR IN HIS ARGUMENT, TO ADMIT THE EVIDENCE OF THE CONVERSATIONS BETWEEN THE TWO, OR THE MEETINGS BETWEEN THE TWO, BETWEEN THE WITNESS AND THE DEFENSE ATTORNEY, HE ARGUED SPECIFICALLY, I AM TRYING TO SHOW, TO CREATE THE INFERENCE THAT THERE WAS TAMPERING WITH THE WITNESS, AND THAT THE DEFENSE ATTORNEY VIOLATED THE GAG ORDER.

I GUESS I AM HAVING A HARD TIME HERE, SEPARATING WHAT THE ARGUMENT, WHAT YOU ARE SAYING IS THE ARGUMENT MADE FOR ADMISSIBILITY BEFORE THE JUDGE, AND WHAT THE ARGUMENT WAS MADE ABOUT THESE RECORDS, ONCE THEY WERE INTRODUCED, THAT THE JURY ACTUALLY HEARD.

> I DON'T THINK THERE IS ANY DIFFERENT. I THINK THEY ARE BASICALLY THE SAME.

SO HE ARGUES TO THE JUDGE FOR ADMISSIBILITY, THAT THIS DEMONSTRATES THAT THERE WERE THESE MEETINGS AND THEREFORE YOU CAN INFER THAT HE GOT INFORMATION, HE PASSED ON INFORMATION TO HIS CLIENT, TO THE CLIENT, WHO THEN PASSED IT ON TO MS. MONROE, AND THAT SAME ARGUMENT WAS MADE TO THE JURY IN CLOSING ARGUMENT. THAT IS WHAT YOU ARE TELLING US.

I THINK BASICALLY YES, AND DEFENSE COUNSEL LAID OUT ALL THESE INFERENCES THAT WERE BEING MADE, AND THE PROSECUTOR DIDN'T DISAGREE THAT THAT IS WHAT THE PURPOSE OF THIS WAS. AND HE GAVE NO SEPARATE PURPOSE. HE MAY NOT HAVE LAID IT OUT AS SUCCINCTLY, I AM TALKING ABOUT THE ADMISSIBLE PORTION, AS WE HAVE DONE HERE, BUT BASICALLY CONVEYED THE MESSAGE, I AM GETTING THIS IN AND THEN WE ARE GOING TO TELL A JURY THAT THERE WAS A CHANGE IN TESTIMONY AFTER THESE MEETINGS.

HOW ELSE WAS SHE IMPEACHED? SHE WAS IMPEACHED BY, THAT SHE HAD, SHE IS THE ONE THAT TESTIFIED BEFORE THE GRAND JURY, CONSISTENT WITH HER TRIAL TESTIMONY OR INCONSISTENTLY?

I THINK IT IS PRETTY CONSISTENT, BECAUSE EVEN BEFORE THE GRAND JURY, SHE SAID, THE PROSECUTOR TRIED TO BRING IT OUT WHERE SHE SAID, AT FIRST SHE ADMITS THAT SHE HAD SIGNED PHOTOS A CERTAIN WAY AND NOTICED A RESEMBLANCE, BUT EVEN AT THAT TIME, SHE SAID, AND SHE WAS UNEQUIVOCAL, I AM NOT TRYING TO MAKE AN IDENTIFICATION, BECAUSE THIS COULD BE A NUMBER OF DIFFERENT PEOPLE THAT I SEE IN THE PHOTOGRAPH. MAYBE, THE ONLY THING THAT REALLY CHANGES THROUGHOUT TIME IS THE DEGREE OF CERTAINTY. AT TRIAL SHE WAS WAVERING, AT TIMES, EVEN IF THERE WAS A RESEMBLANCE. SHE WAS UNCERTAIN ABOUT THAT. WHEREAS BEFORE, SHE SAID THERE MIGHT BE SOME RESEMBLANCE, BUT I AM NOT MEANING TO GIVE AN IDENTIFICATION.

I AM SURE, I AM SORRY, I THOUGHT THAT YOU WERE SAYING THAT THE REASON THAT THE STATE WAS TRYING TO BRING IN THE JAIL RECORDS, WAS TO SHOW THE REASON OR WHEN SHE HAD CHANGED HER TESTIMONY FROM ONE TO THE OTHER.

THAT IS WHAT THEY ARE PURPORTING TO DO. THEY ARE TRYING, IT IS UNFORTUNATE, BECAUSE THEY ARE TRYING TO CREATE AN INFERENCE THAT SHE HAS REALLY CHANGED HER TESTIMONY, AND I THINK IT IS NOT REALLY CHANGING HER TESTIMONY OVER TIME. IT MAY HAVE GOTTEN A LITTLE LESS SET -- A LITTLE LESS CERTAIN, BUT I THINK THEIR MAIN POINTS IN TWO AND THREE WERE TO TRY AND TELL THE JURY THAT THE DEFENSE WAS DOING SOMETHING WRONG.

SO THAT WOULD ALSO GO TO YOUR ARGUMENT THAT THEY DID BRING IN PART OF HER GRAND JURY TESTIMONY AS A PRIOR INCONSISTENT STATEMENT, AND THAT WAS WHY IT WAS ALLOWED, IS THAT CORRECT?

NO. I THINK IT WAS BROUGHT IN AS, UNDER IDENTIFICATION. STATEMENT OF IDENTIFICATION. THAT SHE --

PRIOR IDENTIFICATION.

RIGHT. AND THAT IS POINT 11 IN THE BRIEF.

BUTTER SAYING THEY WERE REALLY ASSERTING THAT, EARLIER IDENTIFICATION, EVEN THOUGH IT WAS QUALIFIED IN THE WAY THAT YOU DESCRIBED IT, WAS REALLY STRONGER. THAT SHE ACTUALLY WAS CHANGING HER TESTIMONY AT TRIAL, TO MAKE IT WEAKER, BASED ON A VISIT WITH THE DEFENDANT. IS THAT IT?

YEAH. THE THING THE STATE HAD THAT IT WAS CLAIMING WAS THE STRONGEST IDENTIFICATION BY THE WITNESS, DIDN'T COME OUT BY REVIEWING THINGS WITH THE WITNESS. IT CAME OUT THROUGH, THEY CALLED A POLICE OFFICER, WHO SAID THE INITIAL STATEMENT THEY TOOK OFF THE TAPE, SHE MADE A POSITIVE IDENTIFICATION OF SETH PENALVER OF BEING THAT PERSON, AND SHE HAD AN EXPLANATION FOR THAT. THAT IS WHERE YOU HAVE CONTROVERSY, WHERE SHE SAID SHE WAS FORCED INTO MAKING THIS DECISION, AND THAT SHE REALLY DIDN'T WANT, YOU KNOW, SHE HAD A CHOICE, WHICH ONE IS IBAR AND WHICH ONE IS PENALVER, ACCORDING TO HER, AND THERE YOU HAVE A CONFLICT WITH POLICE.

THAT WAS THE FOCUS OF THE STATEMENT SAYING THAT SHE HAD CHANGED HER TESTIMONY, IN COMPARISON TO WHAT SHE HAD TOLD THE POLICE OFFICER.

WELL, I THINK THEY ARE SAY NO, I THINK THEY ARE FOCUSING ON, THEY ARE SAYING SHE CHANGED AT THE GRAND JURY AND AT THE AUGUST 31 HEARING, BUT IT DOESN'T MAKE SENSE, BECAUSE SHE REALLY DOESN'T CHANGE. LIKE I SAID, I THINK THEY HAD ANOTHER MOTIVE.

CHIEF JUSTICE: THE MARSHAL HAS REMINDED US THAT YOU SHOULD WATCH YOUR TIME. IF YOU WANT TO SAVE THE REST OF YOUR TIME.

ILL SAVE THE REST OF MY TIME FOR REBUTTAL. THANK.

CHIEF JUSTICE: GOOD MORNING.

GOOD MORNING. MELANIE DALE ON BEHALF OF THE STATE. MAY IT PLEASE THE COURT. I WOULD LIKE TO START WITH ONE AND ASK THE COURT TO LOOK AT THE RULE CLEARLY AND LOOK AT THE CASE LAW CITED BY THE DEFENSE. EVERYTHING IN THIS CASE DEALS WITH THE STATEMENT MADE BY IAN MELMAN THAT ALEX HERNANDEZ TOLD HIM I INTEND TO GO TO NORTH CAROLINA OR SOUTH CAROLINA. THAT WAS THE TESTIMONY.

THAT WAS THE RELEVANCY?

THE STATE WAS ARGUES -- ARGUING THAT ALEX HERNANDEZ WAS AT THE SCENE OF THE CRIME.

THE STATEMENT "I INTEND TO GO TO SOUTH CAROLINA", HOW DOES THAT REBUT?

THIS IS IN REDIRECT BY THE STATE. I THINK THAT IS IMPORTANT TO KNOW. ON CROSS-EXAMINATION OF IAN MELLMAN, THE DEFENSE COUNSEL ATTACKED THAT ALEX HERNANDEZ COULD HAVE BEEN THE PERSON WHO COMMITTED THIS CRIME, AND ON REDIRECT BY THE STATE, THE STATE ASKED IAN MELLMAN, HE ASKED DID ALEX HERNANDEZ TELL YOU ANYTHING? HE TOLD ME THAT HE INTENDED TO GO TO NORTH OR SOUTH CAROLINA THAT WEEKEND FOR A BAPTISM, BUT THAT IS COUPLED WITH 7412 TO 7414, WHERE HE EXPLAINS WHY ALEX HERNANDEZ IS RULED OUT.

BEFORE YOU GET TO THAT, YOU ARE ACTUALLY, THEN, SAYING THAT THIS STATEMENT WAS, IN FACT, ELICITED, TO SHOW THE TRUTH OF THE MATTER THAT HE WENT TO NORTH CAROLINA.

I THINK THAT IT REALLY GOES TO THE ULTIMATE ISSUE, AND I THINK IF YOU READ THE RULE IN THE CASES --

COULD YOU ANSWER JUSTICE --

YES. THAT IS EXACTLY HOW I AM ANSWERING. IT GOES TO THE ISSUE OF WHETHER OR NOT HE WAS AT THE CRIME, SO OFFERING PROOF THAT HE MAY HAVE NOT BEEN HERE IS, I THINK, WHAT IS ANTICIPATED BY THE RULE, THAT YOU ARE PROVING OR EXPLAINING ACTS OF SUBSEQUENT CONDUCT. CASES CITED GENERALLY --

WHAT WAS THE ACT OF SUBSTANTIVE -- ADOPT YOU HAVE TO DEMONSTRATE THAT THERE WAS SOME ACT SUBSEQUENTLY? SO WHERE WAS THE PROOF THAT THERE WAS SOME SUBSEQUENT ACT.

THE PROOF IS HE MADE THE STATEMENT THAT HE WAS LEAVING, AND THEN THAT GOES TO THE ULTIMATE ISSUE IN THE CASE, IS WHAT IS ARGUABLE --

ISN'T THERE SUPPOSED TO BE ACTUAL PROOF THAT HE DID GO TO NORTH CAROLINA IN THIS PARTICULAR INSTANCE? IS YOUR OPPONENT CORRECT THAT THERE WAS NO OTHER PROOF OFFERED, THAT HE WAS IN NORTH CAROLINA AT THE TIME. IS THAT A CORRECT STATEMENT?

THAT IS A CORRECT STATEMENT.

ALL RIGHT. WELL, WHERE IS, THEN, ASSUMING THAT THE PROOF, THAT THE ACT SUBSEQUENT, THAT HE ACTUALLY DID GO TO NORTH CAROLINA, IN ORDER TO GET THIS ADMITTED?

WELL, THERE IS NO INDEPENDENT ACT, BUT IT IS THE STATE'S POSITION THAT THERE DOESN'T MEAD TO BE A SHOWING OF AN INDEPENDENT ACT. THE RULE ON ITS FACE, IS PROVING OR EXPLAINING. HOWEVER, IT DOESN'T SAY THAT YOU ARE PROVING THAT THE ACT MIGHT HAVE OCCURRED, AND THAT IS WHAT THE STATE WAS ATTEMPTING TO DO IN THIS INSTANCE, BUT IT ALSO GOES TO THE ULTIMATE ISSUE IN THE CASE, AND I THINK LOOKING AT THE CASE LAW SURROUNDING THIS RULE REALLY DOES EXPLAIN. THAT I AM LOOKING AT MORRIS V STATE, WHICH IS A THIRD DCA CASE BUT CITES TO THE MUTUAL LIFE INSURANCE CASE AND VARIOUS OTHER CASES THAT DEAL WITH THIS RULE, AND IT IS THE OCCURRENCE OR PERFORMANCE OF THE ACT IS AN ISSUE. I THINK IT GOES TO THE ESSENCE OF WHAT THEY ARE ALLEGING THE DEFENDANT DID. THE DEFENSE IS ALLEGING THAT ALEX HERNANDEZ IS THE PERSON WHO KBHITED THE CRIME.

WHAT I AM DEALING WITH IS HOW, WHEN SOMEBODY MAKES A STATEMENT "I AM GOING TO THE MOON THIS SUNDAY." HOW DOES THAT BECOME RELEVANT AS TO WHAT THE PERSON ACTUALLY DID? HOW, IF I AM CONFRONTED WITH THE FACT THAT HE SAID HE WAS GOING TO THE MOON, AND I HAVE GOT THE WITNESS ON THE STAND, I CAN CROSS-EXAMINATION THE WITNESS AS TO

WHETHER HE DID OR DIDN'T MAKE THAT ASSERTION, BUT I DON'T KNOW WHAT THAT HAS TO DO WITH WHERE THE PERSON WAS THAT FOLLOWING SUNDAY.

WELL, I THINK IN THIS CASE, THE RELEVANT COMES FROM THE ASSERTION THAT ALEX HERNANDEZ IS THE, THE PERSON WHO COMMITTED THIS CRIME. I THINK THAT IS WHERE WE NEED TO LOOK AT THE ADDITIONAL EVIDENCE WE PRESENTED. DETECTIVE MANDELA ALSO TESTIFIED IT COULDN'T HAVE BEEN HIM IN THE VIDEO, AND I THINK --

HOW DID THE STATE ARGUE THIS? WHAT DID THE STATE ARGUE IN THE CLOSING ARGUMENT IN THIS CASE?

IN THE CLOSING ARGUMENT? IT WAS PRETTY MUCH THERE IS SOME EVIDENCE THAT HE MAY NOT HAVE BEEN IN TOWN. HOWEVER, WE ALSO HAVE DETECTIVE MANDELA WHO TESTIFIED THAT ALEX HERNANDEZ WAS RULED OUT AS A SUSPECT, BECAUSE OF THE HEIGHT DIFFERENTIATION, WHICH WAS DISCOVERED FROM REVIEWING THE VIDEO.

BUT IT WAS ARGUED BY THE STATE THAT HE COULDN'T HAVE BEEN THE ONE BECAUSE HE WAS IN NORTH CAROLINA.

YES. THAT WAS PART OF THE ARGUMENT.

SO THE STATE WAS USING IT TO PROVE.

YES.

THE TRUTH OF WHETHER HE WAS IN NORTH CAROLINA OR NOT, IS THAT CORRECT?

YES. TO REBUT WHETHER OR NOT ALEX HERNANDEZ COMMITED THIS CRIME.

THAT IS WHAT I NEED TO CLARIFY. IN THE CROSS-EXAMINATION BY THE DEFENSE COUNSEL, WHAT SPECIFICALLY, WAS ASKED AND ANSWERED BY THE WITNESS, TO WHICH THIS MAY, THERE IS A DIFFERENCE WHETHER IT IS REBUTTAL AS OPPOSED TO DIRECT PROOF BY THE STATE. I NEED HELP TO CLARIFY THAT DISTINCTION.

> WELL, IN THIS CASE, IT WAS CLEAR FROM THE VERY BEGINNING OF THE TRIAL, THAT THE DEFENSE WAS GOING TO ALLEGE THAT ALEX HERNANDEZ WAS POSSIBLY THE PERSON WHO COMMITTED THIS CRIME. DURING THE EXAMINATION OF I AND MILL MAN, THERE WAS QUESTIONS -- OF IAN MILL MAN, THERE WAS QUESTIONS ABOUT LIVE TOGETHER AT THIS TIME. QUESTIONS CAME OUT ABOUT THE -- BY THE DEFENSE THAT THEY WERE STARTING TO BUILD UP THE THERE THAT I ALEX HERNANDEZ COMMITTED THE CRIME, SO ON REDIRECT, THE STATE SAID, WELL, LET'S TALK ABOUT ALEX HERNANDEZ. WE ALREADY KNOW THAT THERE IS AN ALLEGATION FROM OPENING ARGUMENTS AT THE BEGINNING OF THE CASE THAT THIS WAS AN IDENTIFICATION CASE, AND THAT THIS COULD BE ALEX HERNANDEZ, BECAUSE HE WAS CAUGHT WITH PABLO IBAR IN MIAMI-DADE COMMITTING ANOTHER CRIME. AND THE STATE WANTED TO DIRECT THAT THEORY AND FIND OUT AS MUCH AS THEY COULD, TO FIGURE OUT WHY ALEX HERNANDEZ WAS RULED OUT. THIS WAS ONE OF THE REASONS, BECAUSE THERE WAS EVIDENCE THAT HE WASN'T IN TOWN, PLUS THE REASON -- AGAIN, LET'S MAKE SURE THAT THE EVIDENCE THAT HE WASN'T IN TOWN WAS THAT ANOTHER WITNESS SAYS THAT ALEX HERNANDEZ SAID THAT HE WAS PLANING TO GO TO NORTH CAROLINA.

YES.

NOTHING ABOUT THAT THE WITNESS KNEW THAT HE, IN FACT, WENT TO NORTH CAROLINA.

EXACTLY.

AND PUT HIM ON THE BUS TO NORTH CAROLINA.

NO, HE DIDN'T.

LET ME, I AM HAVING DIFFICULTY, IN TERMS OF THE APPLICATION OF THIS EXCEPTION TO THE HEARSAY RULE. BECAUSE YOU ARE TALKING ABOUT ADMITTING THIS EVIDENCE TO ESTABLISH THAT HERNANDEZ WAS IN NORTH CAROLINA AT THE TIME OF THE OFFENSE AND THEREFORE HE COULD NOT HAVE BEEN THE ASSAILANT. IT IS CLEAR THAT THAT IS WHAT THE STATE, AM I CORRECT, AND YET IN ARGUING THIS RULE OF EVIDENCE, THE EXCEPTION TO THE HEARSAY RULE HERE, IN ESSENCE YOU ARE SAYING TO THE COURT, JUDGE, WE ARE NOT OFFERING THIS FOR THE TRUTH OF THE MATTER ASSERTED IN THAT STATEMENT. WE ARE ONLY OFFERING IT TO SHOW HIS INTENT, AS JUSTICE WELLS SAYS, A QUESTION HERE. NOW, HOW, IF YOU ARE USING IT, TO ESTABLISH THE TRUTH OF WHAT HE SAID, THAT IS THAT HE SAID HE DID ACTUALLY GO, NOT ONLY THAT HE INTENDED TO BUT THAT HE DID GO TO NORTH CAROLINA, HOW CAN YOU USE THIS RULE OF EVIDENCE TO GET THIS MATTER IN ? AND THEN QUICKLY SORT OF ABANDON ANY LIMITATION ABOUT JUST DEMONSTRATING AN INTENT AND GO DIRECTLY TO THIS IS PROOF THAT WE HAVE THAT HE WAS IN NORTH CAROLINA. I AM REALLY HAVING DIFFICULTY IN SEEING HOW THE STATE CAN BE CONSISTENT IN USING IN RULE TO GET THE EVIDENCE IN AND THEN QUICKLY ABANDON ANY PRETENSE OF LIMITING ITS USE TO JUST INTENT, GOING RYE TO USING IT TO -- GOING RIGHT TO USING IT TO INDEED PROVE THAT HE WAS IN NORTH CAROLINA.

I THINK IN LOOKING AT THE RULE ITSELF, IT SAYS IT IS IMPORTANT TO PROVE OR EXPLAIN AND WE ARE ATTEMPTING TO PROVE. THAT SHOWING THE INDEPENDENT EVIDENCE THAT HE ACTUALLY WENT TO NORTH CAROLINA DOESN'T SEEM TO BE CONTEMPLATED BY THE RULE. IT IS TO PROVE THAT HE WASN'T IN TOWN OR WE WERE ALSO PROVING THAT HE WASN'T AT THE CRIME SCENE. THINGS THAT THE RULE ALLOWS US TO DO BOTH.

WHAT, LET'S LOOK AT WHY YOU HAVE ANY HEARSAY EXCEPTION, BECAUSE YOU CAN'T CROSS-EXAMINATION HERNANDEZ, TO FIND OUT WHETHER HE WENT OR NOT, SO WE ARE CROSS-EXAMINING OR TO CROSS-EXAMINATION A WITNESS THAT REALLY IS ONLY TESTIFYING TO WHAT SOMEONE TOLD HIM. WHAT IS, IF IT IS NOT BEING OFFERED IN CONJUNCTION WITH PROOF THAT THE PERSON DID WHAT THE PERSON SAID HE INTENDED OR SHE INTENDED TO DO, WHAT IS THE SAFEGUARD OF TRUSTWORTHINESS THAT THE SIXTH AMENDMENT REQUIRES IN A CRIMINAL TRIAL, TO MAKE SURE THAT THIS IS AN ACCURATE STATEMENT? I MEAN, WHAT, WHY WOULD YOU, WHY WOULD THIS EXCEPTION EXIST, IF IT WASN'T TO BE ABLE TO BE USED IN CONJUNCTION WITH THE FACT THAT SOMEONE IN FACT, DID WHAT THEY SAID THEY WERE GOING TO DO?

I THINK IN THIS CASE, THE TRUTH WORTHY -- THE TRUSTWORTHINESS, I THINK THE QUESTION WAS WHETHER OR NOT IAN MELLMAN WAS TRUSTWORTHY TO TESTIFY AS TO WHAT ALEX HERNANDEZ SAID, AND IAN MELLMAN'S TRUSTWORTHINESS HASN'T BEEN ATTACKED IN THIS CASE.

COULD THE STATE PUT SOMEONE ON TO TELL ME THAT ALEX -- PUT SOMEONE ON TO SAY THAT ALEX HERNANDEZ TOLD ME THAT HE DIDN'T INTEND TO KILL THE VICTIM?

I THINK UNDER THE CIRCUMSTANCES, TO --

IF YOU EXPLAIN ACTS OR CONDUCT, YOU WOULDN'T HAVE TO HAVE SEPARATE CONDUCT. YOU COULD JUST HAVE SOMEONE GET ON AND SAY HE TOLD ME HE INTENDED TO KILL HIM!

I THINK THAT IS THE ARGUMENT HERE, THAT WE NOT ONLY HAVE THE STATEMENT THAT ALEX HERNANDEZ TOLD SOMEONE HE WAS GOING OUT OF TOWN. WE HAVE OTHER EVIDENCE TO COUPLE WITH THAT, BECAUSE THE ISSUE IS WHETHER OR NOT ALEX HERNANDEZ WAS AT THE SCENE OF THE CRIME, SO EVEN IF WE FIND THAT THIS TESTIMONY SHOULDN'T HAVE COME IN, IT

WOULD BE HARMLESS, BASED ON THE FACT THAT DETECTIVE MANDELA, STATING WE RULED HIM OUT FOR A SPECIFIC REASON. IT IS NOT ALEX HERNANDEZ ON THE VIDEOTAPE, SO THE ARGUMENT --

HOW COULD IT BE HARMLESS, IF ACTUALLY, THE JURY BELIEVED THAT HE WAS IN NORTH CAROLINA? THEN IT WOULD BE PHYSICALLY IMPOSSIBLE FOR HIM TO HAVE COMMITTED THE CRIME. THAT WOULD BE DEVASTATING EVIDENCE, WOULD IT NOT, ELIMINATING HERNANDEZ AS AN ASSAILANT HERE. SO WHY WOULD THE JURY AGO NOR -- THE JURY IGNORE SUCH POWERFUL EVIDENCE IN A CASE SUCH AS THIS, WHICH IS WHAT THE HARMLESS ERROR CALLS FOR, IS IT NOT -- DOES IT NOT, THAT THE JURY WOULD NOT HAVE PAID ANY ATTENTION TO THAT, EVEN THOUGH THE PROSECUTION ARGUED THAT IN THEIR FINAL ARGUMENT?

IN THIS CASE THAT IS NOT THE ONLY EVIDENCE WE HAVE. WE HAVE, WE HAVE RULED ALEX HERNANDEZ-EAT TEST ON HARMLESSNESS IS NOT WHETHER OR NOT THAT IS THE ONLY EVIDENCE THAT YOU HAVE OR, WHETHER EXCLUDING THAT, THAT YOU HAVE PLENTY OF OTHER EVIDENCE. THE TEST IS WHETHER OR NOT THE JURY WOULD HAVE CONSIDERED THAT AS PART OF THE EVIDENCE TO RENDER A VERDICT OF GUILTY.

I THINK, BASED ON THE ADDITIONAL EVIDENCE THAT IT WOULD NOT HAVE AFFECTED THE JURY'S VERDICT, BASED ON THE FACT THAT ALEX HERNANDEZ, THERE IS, VERY SPECIFICALLY WAS RULED OUT, PLUS WE HAVE IDENTIFICATION TESTIMONY IN THIS CASE. WE HAVE --

LET'S GO BACK TO ALEX HERNANDEZ. THE REASON HE WAS, WAS TALKING ABOUT WHETHER THERE WAS GOING TO BE REASONABLE DOUBT IN THIS CASE, AND THERE IS NO PHYSICAL EVIDENCE. WE HAVE GOT A VIDEO THAT, IF ANY OTHER PERSON LOOKED AT THE VIDEO, CAN'T TELL WHO IT IS. ALEX HERNANDEZ WAS ACTUALLY ARRESTED FOR A HOME INVASION ROBBERY, HOW LONG AFTER THIS PARTICULAR ROBBERY?

WITHIN A FEW WEEKS, I BELIEVE.

WITH IBAR, THE CODEFENDANT.

YES.

SO IN TERMS OF, NOW, IS HE, MUCH, WHEN YOU SAY THIS IS POWERFUL EVIDENCE, IT COULDN'T HAVE BEEN HIM BECAUSE A POLICE OFFICER SAYS HE IS LOOKING AT THE VIDEO AND HERNANDEZ LOOSE SHORTER? WHAT IS --

I THINK THE ADDITIONAL EVIDENCE THAT WE HAVE IS KIM SAND.

I THOUGHT YOU SAID THAT THE POLICE OFFICER RULED HIM OUT AND THAT IS WHY THIS WAS HARMLESS. THE POLICE OFFICER, WHAT, LOOKED AT THE VIDEO, LOOKED AT HERNANDEZ AND SAID IT COULDN'T BE HIM?

THE POLICE OFFICERS TESTIFIED THAT THE OTHER ASSAILANT, NOT IBAR, THE OTHER ASSAILANT WAS SHORTER THAN IBAR AND THAT ALEX HERNANDEZ IS A FEW INCHES TALLER THAN PABLO IBAR, BUT THAT IS NOT WHAT THE STATE IS ARGUING. WHAT THE STATE IS ARGUE IS WE HAVE THAT EVIDENCE WITH RESPECT TO HERNANDEZ, BUT WE ALSO HAVE SOLID EVIDENCE FROM KIM SAND, WHO HAS NEVER WAVERED THAT IT IS SETH PENALVER IN THIS CASE. I THINK WE HAVE TO LOOK AT THIS CASE AS A WHOLE. WE HAVE KIM SAND TESTIFYING THAT IT IS PABLO IBAR, WHO HAD THE VICTIM'S BLACK MERCEDES THE NEXT DAY AT HOME. IT IS NOT LOOKING AT THE TESTIMONY TO RULE HIM OUT BUT WITH RESPECT TO THE TESTIMONY FROM THE POLICE OFFICER WITH REGARD TO ALEX HERNANDEZ AND FROM OTHER WITNESSES AS TO SETH PENALVER'S GUILT, AND THAT IS HOW IT WOULD BE HARMLESS IN THIS CASE. IT IS NOT SIMPLY DETECTIVE MANDELA'S TESTIMONY. THAT IS ONE LINK TO ADDRESS SETH PENALVER.

COULD YOU LINK JAIL RECORDS AND CONFERENCE OR VISITS BETWEEN THE WITNESS AND HIS ATTORNEY, PUTTING IT INTO EVIDENCE AND WHAT THE PURPOSE OF THOSE JAIL RECORDS WERE?

OUTSIDE THE PRESENCE OF THE JURY, THE STATE ATTORNEY AND DEFENSE COUNSEL HAD ARGUMENT WITH RESPECT TO THE JAIL RECORDS BEING ADMITTED INTO EVIDENCE. THE STATE ARGUED THAT THEY WERE TRYING TO SHOW A PATTERN AS TO HOW TESTIMONY WAS CHANGED. HOWEVER, THAT WAS OUTSIDE THE PRESENCE OF THE JURY. THE JAIL RECORDS WERE ADMITTED INTO EVIDENCE.

THEY WERE ADMITTED. THE JUDGE MADE A DECISION. THEY WERE RELEVANT, TO ALLOW THE STATE TO ASSERT WITNESS TAMPERING. IS THAT --

I DON'T THINK THE JUDGE SAID, WELL, POSSIBLY. THE JUDGE JUST FOUND THAT THEY WOULD BE RELEVANT TO SHOW, POSSIBLY RELEVANT AS TO HOW TESTIMONY WAS CHANGED, BECAUSE THE STATE HAD TO ESTABLISH THAT THIS HAPPENED, IN ORDER TO MAKE THE ARGUMENT, AND I WOULD LIKE TO CORRECT, I THINK ON CLOSING ARGUMENT, I REVIEWED, I DON'T THINK THE STATE EVER SAID, I AM PRETTY SURE THE STATE NEVER SAID THAT WE HAVE ADMITTED JAIL VISITATION RECORDS. SETH PENALVER TALKED TO HIS ATTORNEY, AND IN TURN HIS ATTORNEYS TOLD HIM THAT MELISSA MONROE CHANGED, FOUND OUT, SHE ID APPEARED HIM AT THE CRIME -- SHE IDED HIM AT THE -- SHE ID'ED HIM AT THE CRIME SCENE.

YOU ARE SAYING RELEVANCY? YOU ARE NOT SAYING THE POSSIBLE BEING, IN OTHER WORDS THE JUDGE SAID I WILL LET THIS IN AND I WILL SEE HOW YOU USE IT LATER IS?

AS IS KNOWN, THIS WAS A VOLUMINOUS RECORD. I THINK THIS WAS QUITE AN ISSUE, TWO VOLUMES DEDICATED.

APPARENTLY THE STATE MUST HAVE HAD THE REASON FOR ASSERTING THE RELEVANCY AND USE OF THESE RECORDS. WHAT WAS THAT REASON?

WELL, THE REASON WAS WE ARE GOING TO PRESENT TESTIMONY FROM A WITNESS THAT, YOU KNOW, THE STATE, I THINK, ANTICIPATED THAT THERE WAS SOME TYPE OF VIOLATION OF A GAG ORDER THAT SOME OR THAT --

WELL, LET'S NOT BE RESTRAINED, IF THIS IS THE ARGUMENT THAT IS BEING ASSERTED, SO THE STATE WAS SAYING THAT WE SUBMIT THAT THIS IS PART OF EVIDENCE THAT THERE WAS WITNESS TAMPERING.

THAT WAS WHAT THE STATE ADMITTED BELOW.

THAT IS WHY THESE RECORDS WERE ADMITTED.

THAT IS WHY THEY WERE ADMITTED. HOWEVER, IN LOOKING AT WHAT HAPPENED IN THIS CASE, THINGS DIDN'T TURN OUT THAT WAY. MELISSA MONROE, AND THIS IS THE STATE'S ARGUMENT, IS THAT BECAUSE WE COULDN'T ESTABLISH IT, IT IS A HARMLESS ERROR HERE, BECAUSE MELISSA MONROE, WHEN ASKED, DID YOU HAVE ANY CONVERSATIONS WITH SETH PENALVER'S ATTORNEY? THIS IS IN VOLUME 63 OF THE RECORD. SHE TESTIFIED SHE COULDN'T RECALL THE CONTENT OF ANY OF THE CONVERSATIONS. THEN, IN VOLUME 91, MR. RODERMAN, THE PRIOR ATTORNEY, THE FIRST ATTORNEY ON THIS CASE IS PUT ON THE STAND. HE TESTIFIES I DIDN'T VIOLATE THE GAG ORDER.

SO DID YOU ASK THE, DID THE STATE ASK MS. MONROE OUTRIGHT, WERE YOU TOLD ABOUT XYZ?

NO.

SO THE JURY IS LEFT TO INFER ALL OF THIS INFORMATION?

YES.

WE HAVE RECORDS THAT CAME IN, JUST RECORDS OF --

-- JAIL VISITATION BETWEEN --

-- VISITING HIS CLIENT, AND THE JURY IS LEFT TO INFER THAT SECRET INFORMATION WAS GIVEN AND THEN PASSED ON.

BUT I DON'T THINK THAT INFERENCE CAN BE MADE IN THIS CASE. FIRST OF ALL, THOSE RECORDS ARE RECORDS OF VISITATION BETWEEN THE SECOND, THE PUBLIC DEFENDER, TIM DAY, WHO WAS ON THE CASE, NOT RECORDS OF MR. RODERMAN VISITING SETH PENALVER, WHICH WAS --

SO WE HAVE A GAG ORDER THAT WAS ONLY APPLICABLE TO ONE ATTORNEY?

YES, BECAUSE WHEN THE PUBLIC DEFENDER CAME ON THE CASE, THE GAG ORDER WAS LISTED, AND THERE WAS CONVERSATIONS, THERE WAS, WE KNOW FROM THE JAIL RECORDS THAT HIS ATTORNEY WENT TO VISIT HIM. WE DON'T KNOW WHAT WAS SAID IN THOSE CONVERSATIONS. THERE IS NOTHING IN THE RECORD TO SHOW THAT, AND I THINK TO MAKE THE ASSERTION THAT THESE JAIL RECORDS --

SO IF WE HAVE, WE HAVE NO, THAT MAKES IT, IT SEEMS TO ME, EVEN WORSE. WE HAVE NO IDEA WHAT WAS SAID IN THESE CONVERSATIONS, AND WE SHOULDN'T HAVE, YET WE PUT THEM IN FOR THE JURY TO DO WHAT WITH THEM?

WELL, INITIALLY, I BELIEVE IT WAS TO MAKE, I THINK THE STATE'S POSITION WAS TO MAKE THIS ARGUMENT THAT MELISSA MONROE SUBSEQUENTLY FOUND OUT THAT SHE IDENTIFIED SETH PENALVER AT THE CRIME SCENE. HOWEVER, I THINK WE NEED TO REALLY LOOK AT MELISSA MONROE'S TESTIMONY. SHE DID TESTIFY THAT SHE SUBSEQUENTLY FOUND THAT OUT, BUT SHE DIDN'T KNOW HOW, AND THE STATE WAS UNABLE TO ESTABLISH THIS INFERENCE THAT IT IS ARGUED THAT WE ESTABLISH. I THINK IT IS CLEAR FROM THIS RECORD THAT, EVEN IF IT WAS ERROR TO PUT THE JAIL RECORDS IN, THERE WAS NO WAY ON THIS RECORD TO MAKE THAT INFERENCE THAT THERE WAS WITNESS TAMPERING.

YOU ARE TELLING US THAT THE STATE NEVER MADE THE ARGUMENT TO THE JURY, THAT THAT IS AN INFERENCE THEY COULD DRAW?

NO. I THINK, LOOKING AT THE CLOSING ARGUMENT, RELATIVE TO WHAT WAS PRESENTED, MELISSA MONROE TESTIFIED, HERSELF, THAT SHE SUBSEQUENTLY FOUND OUT THAT SHE IDENTIFIED SETH PENALVER AT THE CRIME SCENE.

SO THE STATE DID ARGUE THAT.

YES. BASED ON HER TESTIMONY. SHE TESTIFIED THAT SHE KNEW THAT THEY WOULD PUT IT ON TELEVISION AND IT WAS IN THE NEWS, BUT SHE COULDN'T WALL RAUL HOW SHE FOUND OUT -- SHE COULDN'T RECALL HOW SHE FOUND OUT, AND SHE DIDN'T SAY THE ATTORNEY TOLD HER OR THE ATTORNEY TOLD TIM DAY OR TO TELL HER THIS.

WHAT WAS ESTABLISHED WITH THE JAIL RECORDS AND ALL OF THAT?

I REVIEWED MY NOTES. I DON'T BELIEVE THE JURY WAS TOLD ANYTHING ABOUT THE RELEVANCY OF THE JAIL VISITATION RECORD. COUNSEL DIDN'T CITE TO THE PAGE UNTIL TODAY, BECAUSE I COULD NOT FIND IT IN THE CLOSING ARGUMENT, BASED ON WHAT I HAVE IN MY RECORD. I DID

NOT SEE ANY ARGUMENT THAT --

SO JAIL RECORDS WERE NEVER REFERRED TO, THEN, AFTER THEY WERE PUT IN EVIDENCE?

THEY MAY HAVE BEEN REFERRED TO THAT THEY WERE PUT IN EVIDENCE, BUT I DON'T THINK THERE WAS EVER AN ARGUMENT MADE THAT, WELL, I PUT THESE JAIL RECORDS IN TO SHOW YOU THAT ATTORNEY TIM DAY TALKED TO SETH PENALVER, AND HE TOLD MELISSA MONROE THAT THAT ARGUMENT WAS NEVER MADE.

BUT THEY WERE NEVER REFERRED TO IN ANY PREJUDICIAL WAY TO THE DEFENDANT.

NO. AND --

ARE YOU GOING TO ADDRESS, I AM CONCERNED ABOUT ISSUE SIX, WHICH HAS TO DO WITH THEIR, SHOES THAT MR. PENALVER DIDN'T WANT TO GIVE UP, AND ALL OF THIS EVIDENCE ABOUT WHAT HE DID AFTER, WHEN THEY WERE TRYING TO GET HIS SHOES, AND HOW THAT IS EVIDENCE OF CONSCIOUSNESS OF GUILT OR WHAT THAT WAS ADMITTED FOR, AS WELL AS THE STATEMENT AFTER PUBLICITY CAME OUT THAT HE WISHED HE WAS DEAD OR SOMETHING. WHAT, I GUESS THE SHOES --

SIX AND SEVEN. YEAH. WELL, SPECIFICALLY I WOULD LIKE TO GO RIGHT TO THE CASE LAW AND TO WHAT EVIDENCE OF CONSCIOUSNESS OF GUILT, HOW IT BECOMES ADMITTED. IN ORDER TO ADMIT THE EVIDENCE, THERE NEEDS TO BE A NEXUS BETWEEN THE CONCEALMENT OR THE RESISTANCE AND THE CRIME. IN THIS CASE, PRIMARILY WITH THE SNEAKERS, THE DEFENDANT, SETH PENALVER HAD TURNED HIMSELF IN FOR THE CRIME. AND WHEN THE POLICE CAME WITH A SEARCH WARRANT FOR THE SNEAK,, AT THAT TIME NOBODY KNEW WHOSE SHOE PRINT WAS AT THE SCENE OF THE CRIME BUT WE KNOW THAT SETH PENALVER KNEW HE WAS A SUSPECT OF THE CRIME, SO HE RECESSED FOR THE POLICE TO TAKE HIS -- SO HE RESISTED FOR THE POLICE TO TAKE HIS SNEAKERS.

WAS IT PROVED THAT HE -- DID THE SEARCH WARRANT INCLUDE THE SNEAKERS?

I BELIEVE HE SAID, AT THE TRIAL, THAT HE KNEW THAT THE --

DID THE SEARCH WARRANT INCLUDE THE SNEAKERSA?

I BELIEVE THAT SETH PENALVER TOLD HIS ATTORNEY THIS AT THE JAIL. AND THAT WAS AS PART OF THE TESTIMONY, YOU HAVE TO GET THIS IN, SHOW US THAT DETECTIVE HAD THE SEARCH WARRANT AND WAS USING THE SEARCH WARRANT TO OBTAIN THE SNEAKERS FROM SETH PENALVER.

WHAT WAS THE PLAUSIBLE EXPLANATION? WAS IT THAT HE DIDN'T WANT TO BE IN JAIL WITHOUT HIS SHOES?

NOW, YES. THAT IS WHAT SEEMS TO BE HIS SUGGESTION IN THE APPEAL BRIEF. I DON'T KNOW IF IT IS CLEAR BELOW WHAT THAT EXPLANATION IS. HOWEVER --

THE PROBLEM IS THAT THE DEFENDANT HAS THE RIGHT TO REMAIN SILENT AND DOESN'T HAVE TO TESTIFY, SO WE DON'T WANT TO BE IN A SITUATION THAT, IF THERE ARE OTHER PLAUSIBLE EXPLANATIONS FOR CONDUCT, THAT THE DEFENDANT WOULD BE FORCED TO GET ON THE STAND AND TESTIFY, IN ORDER TO DENY OR TO EXPLAIN WHY HE DIDN'T WANT TO GIVE UP HIS SHOES, SO ISN'T THE LAW, CASE LAW DEVELOPS THAT, IF THERE ARE OTHER PLAUSIBLE EXPLANATIONS THAT ARE NOT NECESSARILY CONSISTENT WITH CONSCIOUSNESS OF GUILT, THAT THE DANGER OF ADMITTING THIS IS THAT IT IS, YOU KNOW, AGAIN, IT IS NOT THAT, THEY SAID HE DIDN'T WANT TO GIVE IT UP BUT THEY TALKED ABOUT HOW UPSET HE WAS AND THEY WENT INTO ALL OF

THESE THINGS THAT HE DID IN THE JAIL AND IT TURNED OUT THIS WASN'T, DIDN'T MATCH.

WELL, THE POINT IS I DON'T THINK WHETHER OR NOT IT MATCHED, REALLY, IS WHAT THE CONSCIOUSNESS OF GUILT STANDARD SURFACES ON. IT IS THE NEXUS LINKING THE POSSIBILITY THAT THIS DEFENDANT THOUGHT HE MAY, I MEAN, WE DON'T KNOW THE IDEA BEHIND THE CONSCIOUSNESS OF GUILT IS A CRIME OCCURRED. THIS DEFENDANT KNEW HE WAS A SUSPECT IN THAT CRIME, AND I THINK YOU NEED TO LOOK AT BOTH OF THE ISSUES, WITH RESPECT TO THE SUICIDE, THE COMMENT WITH RESPECT TO SUICIDE AND THE SNEAKERS, RESISTANCE. I THINK IF WE LOOK --

THAT COMMENT WAS SPECIFICALLY WHAT?

MADE WHILE HE WAS READING THE NEWSPAPER. HE AND MELISSA MONROE WERE READING THE NEWSPAPER. HE SPECIFICALLY SAID THAT HIS LIFE WAS OVER AND HE WAS THINKING OF COMMITTING SUICIDE IN THAT ASPECT, AND HE KNEW HE HAD TO TURN HIMSELF IN, BECAUSE HE KNEW THAT THE POLICE HAD, WERE LOOKING FOR HIM WITH RESPECT TO THIS CRIME, AND I THINK BASED ON THE ARGUMENTS MADE, THERE IS A NEXUS BETWEEN THE FACT THAT, I MEAN, DEBATING THE PROSECUTION OR UPSET BECAUSE HE KNOWS HE IS A SUSPECT IN THIS CRIME, AND I THINK THAT IS THE NEXUS. HE KNOWS HE IS THE SUSPECT, AND HE IS RESISTING OR COMMENTING THAT HE DOESN'T WANT TO BE RESPONSIBLE. I THINK THE COMMENTS ON SUICIDE AND THE SNEAKERS,, BOTH, LINKED TO THIS CRIME.

AND THE STATE ARGUED IT THAT WAY.

YES.

WHAT ABOUT THE ARGUMENT THAT, WHAT WAS THE PURPOSE OF THE DETECTIVE GOING INTO THE SPECIFICS OF THE DIFFERENCES BETWEEN MR. MELLMAN AND MR. POMETSO'S TESTIMONY?

DETECTIVE MANDELA, I THINK, THAT IS POINT FIVE OF THE BRIEF. SPECIFICALLY I WOULD POINT THIS COURT TO THE CROSS-EXAMINATION OF DETECTIVE MANDELA, WHERE DEFENSE COUNSEL WAS ESTABLISHING THAT, IAN MELLMAN AND JOHN CONETCO WERE GIVING SPECIFIC STATEMENTS AND THAT DETECTIVE MELLMAN WAS CONDUCTING HIS INVESTIGATION. ON REDIRECT, DETECTIVE MANDELA, SAID TO EXPLAIN HIS CONDUCT AND TO EXPLAIN POLICE MISCONDUCT, WHY DID YOU GO IN THE DIRECTION YOU WENT, MR. MELLMAN, AND MR. MELLMAN GAVE ME THESE SPECIFIC STATEMENTS AND THIS IS WHY I CONDUCTED MY INVESTIGATION THIS WAY, AND I THINK BECAUSE POLICE MISCONDUCT WAS SUCH A HEAVILY-ARGUED ISSUE IN THIS CASE AND IN LOOKING AT THE CLOSING ARGUMENTS BY DEFENSE COUNSEL, THAT THIS IS DEFINITELY PROPER IN THIS CASE, BECAUSE DETECTIVE MANDELA WAS CONSISTENTLY ATTACKED AS TO THE WAY HE CONDUCTED HIS INVESTIGATION.

LET ME ASK YOU THIS. IT SEEMS THE DEFENSE IS REALLY TAKING ISSUE TO THAT PART OF THIS TESTIMONY THAT CONCERNS THE GUNS THAT WERE IN THIS HOUSE THAT THEY ALL SEEMED TO LIVE IN. WAS THERE ANY OTHER TESTIMONY PRESENTED AT TRIAL, CONCERNING THESE GUNS, THEIR LOCATION, WHO HAD THEM?

WELL, I THINK, THE RECORD REALLY REFLECTS THAT THE GUNS WERE IN ALEX HERNANDEZ'S ROOM. HOWEVER, JOHN COMETCO TESTIFIED ABOUT THE GUNS BEING GRABBED. THAT IS WHEN THE DETECTIVE DECIDED I NEED TO TURN MY INVESTIGATION TO LOOK INTO THESE GUNS, AND I DON'T THINK IT IS CLEAR EXACTLY WHERE ALL OF THE GUNS WERE IN THIS CASE. I THINK THAT IT DOESN'T FLUSH OUT IN THIS.

WE HAVE MR. CLEMETCO TESTIFYING ABOUT THESE GUNS AND WHO ELSE TESTIFIED ABOUT THEM?

I THINK IT WAS ONLY MR. CLEMETCO WHO TESTIFIED ABOUT THE GUNS AND I DON'T THINK ANYBODY ELSE TESTIFIED AS TO THE GUNS IN THE HOUSE. I AM PRETTY SURE IT WAS JUST MR. CLEMETCO.

THE STATE, DR. BIRD BEAK, TESTIFIED THAT SOMEONE WHO IS FAMILIAR WITH A PERSON MAY BE ABLE TO IDENTIFY A PERSON IN A PHOTOGRAPH, EVEN THOUGH SOMEONE WHO IS NOT FAMILIAR WITH THE PERSON CAN'T, AND MY CONCERN WITH THIS IS THERE HAS BEEN CASE AFTER CASE, WHERE DEFENDANTS HAVE TRIED TO PUT ON EXPERT TESTIMONY, TO SHOW THAT, EYEWITNESS TESTIMONY IS NOT RELIABLE. YOU KNOW, THAT, BECAUSE, AND THEY HAVE HAD EXPERTISE IN THAT AREA AND THE COURTS HAVE UNIFORMLY REFUSED TO ALLOW TESTIMONY,ES -- EXPERT TESTIMONY THAT BASICALLY CALLS INTO QUESTION EYEWITNESS TESTIMONY, SO I GUESS THE QUESTION IS WHY WOULD THE STATE BE ABLE TO PUT INTO EVIDENCE, SOMETHING THAT, REALLY, BUTT RESIST EYEWITNESS -- BUTTRESSES EYEWITNESS TESTIMONY OR IDENTIFICATION TESTIMONY, BY SAYING SOMEONE WHO IS FAMILIAR WITH SOMEONE IS GOING TO BE ABLE TO IDENTIFY THAT PERSON T SEEMS THAT THE FLIP SIDE, EITHER -- THAT PERSON. IT SEEMS THAT THE FLIP SIDE, EITHER WE OUGHT TO BE SAYING THAT THIS TESTIMONY IS ALL HELPFUL AND ELIMINATE THE BAN ON THE RELIABILITY OF EYEWITNESS TESTIMONY AS EXPERTISE, OR SAY THIS IS THE SAME KIND OF THING, AND IT IS NOT, IT IS NOT FAIR TO BE ABLE TO, ESPECIALLY WITH THIS EXPERT NOT BEING QUALIFIED IN THAT AREA.

NUMBER ONE, I THINK THAT IT IS IMPORTANT TO LOOK EXACTLY WHAT WAS SAID IN THE TESTIMONY, AND I WOULD POINT THE COURT TO PAGE 13210, AND DR. BURKBE NEVER SAID ALLAY WITNESS CAN'T IDENTIFY HIM IN THE PHOTO. THE DOCTOR SAID IT IS POSSIBLE IF SOMEONE KNOWS SOMEONE, IN A PHOTO TO IDENTIFY THEM.

THAT WAS THE QUESTION THAT THE STATE ASKED THEIR EXPERT.

ALTHOUGH IT IS NOT ARTFUL QUESTION IN REVIEWING THE RECORD, THAT SEEMS TO BE THE SUBSTANCE, BECAUSE THE DOCTOR SAID I THINK WHAT YOU ARE ASKING IS THIS, AND IT IS POSSIBLE.

WHY, WAS THERE AN OBJECTION TO THAT OR WAS THERE NO OBJECTION?

THERE WAS AN OBJECTION BELOW AT THAT POINT. HOWEVER, I BELIEVE --

WHAT WAS THE OBJECTION BASED ON?

THAT HE WAS NOT REQUESTED AS AN EXPERT IN THE AREA OF WITNESS PERCEPTION. HOWEVER, I WOULD THEN REFER THE COURT TO THE QUALIFICATIONS OF THE DOCTOR. IT IS STILL THE STATE'S POSITION THAT THE DOCTOR DID NOT TESTIFY THAT ALLAY WITNESS COULD DEFINITELY DO IT. THE TESTIMONY WAS IT IS POSSIBLE, BUT LOOKING AT HIS QUALIFICATIONS, HE IS QUALIFIED IN THE AREAS OF HUMAN IDENTIFICATION AND HOW PEOPLE ARE IDENTIFIED IN PHOTOS. I DON'T THINK IT IS OUTSIDE HIS REALM OF EXPERTISE TO SAY IT IS POSSIBLE FOR SOMEONE TO IDENTIFY HIM. I SEE MY TIME IS UP AND I WOULD ASK THIS COURT TO CONFIRM THE CONVICTION AND THE SENTENCE.

CHIEF JUSTICE: MR. MARSHAL, HOW MUCH TIME IS LEFT? EIGHT MINUTES.

I WOULD FIRST LIKE TO APOLOGIZE, BECAUSE I MADE A CORRECTION THAT WAS INCORRECT BEFORE, WHEN I GAVE YOU THE PAGE NUMBER FOR THE PROSECUTOR'S ARGUMENT REGARDING THE JAIL RECORDS. I SHOULD HAVE, IT SHOULD BE 14468. THE CORRECTION I GAVE YOU BEFORE WAS FOR A MISQUOTE IN THE BRIEF FOR POINT SIX.

WHEN YOU SAY THAT THAT IS THE PAGE FOR ARGUMENT, ARE YOU TALKING ABOUT THE ARGUMENT BEFORE THE JUDGE?

ARGUMENT TO THE JURY BY THE PROSECUTOR.

AND THAT WAS 14 WHAT?

468.

AND THAT WAS IN CLOSING ARGUMENT?

YES.

WHAT WAS IN CLOSING ARGUMENT?

BASICALLY I HAVE IT BEFORE ME AND HE BASICALLY STARTED OFF BY SAYING WHEN HE TESTIFIED ABOUT, MELISSA MONROE, SHE SAID THAT "I GUESS THAT IS PABLO". AND THEN SHE SAID "IT LOOKS LIKE THEM", AND THEN A PHOTOGRAPH AND I WILL SKIP DOWN TO WHAT HE PERCEIVES AS HER CHANGE IN TESTIMONY, BUT HE COMES A BACK AND SAYS I SUBMIT TO YOU, WITH RESPECT TO THE AUGUST 25 HEARING, TAKE A LOOK AT WHAT I INTRODUCED. THE LAST THINGS I INTRODUCED, STATE'S EXHIBITS 263, VISITATION RECORDS OF THE LAWYERS ON AUGUST 226789 MR. TIM -- ON AUGUST 22. MR. TIM DAY TOOK OVER AS THE ATTORNEY FOR MR. PENALVER. HE WAS THE ATTORNEY TO FOLLOW RODERMAN. AND 9-15, VISIT, AUGUST 20, 8:30. AUGUST 24, TIM DAY VISITED PENALVER TWO TIMES. HE SIGNED THERE. MELISSA MONROE TOLD YOU THAT SHE WAS IN TOUCH WITH SETH PENALVER. SPOKE TO HIM. HE HAS GOT CONSTANT DAILY COMMUNICATION WITH THE LAWYER WHO, IS UNDER NO ORDER, VISITING HIM EVERYDAY, EVEN BEFORE THAT GRAND JURY PROCEEDING, AND THEN SUDDENLY, IN THE GRAND JURY PROCEEDING, SHE IS SAYING IT LOOKS LIKE HIM. SO HE IS CERTAINLY TRYING TO INFER THAT SHE WAS BEING INFLUENCED, AND HE IS USING HER --

CONTRARY TO THE STATE'S REPRESENTATION THAT THERE WAS NO REFERENCE OR USE OF THOSE RECORDS.

CORRECT.

IT WAS EXPRESS USE OF THE RECORDS IN CLOSING ARGUMENT.

CORRECT. AND THEN ONE THING ABOUT POINT SIX, THERE WAS A QUESTION ABOUT THE SEARCH WARRANT, WHETHER IT WAS READ TO MR. PENALVER. THE SEARCH WARRANT WAS READ TO MR. PENALVER AT THE JAIL. THE SEARCH WARRANT DIDN'T MAKE REFERENCE TO MR. PENALVER'S SHOES.

IT DID NOT?

IT DID NOT. IT IS THE AFFIDAVIT TO THE SEARCH WARRANT THAT MADE MENTION OF THAT, AND THE POLICE OFFICER WHO TALKED TO PENALVER ADMITTED THAT HE NEVER READ PENALVER THE AFFIDAVIT TO THE SEARCH WARRANT. UNLESS THERE ARE ANY QUESTIONS ON ANYTHING, I WOULD ASK THAT THIS COURT REVERSE. THANK YOU. THANK YOU,

CHIEF JUSTICE: THANK YOU, BOTH.