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Pablo Ibar 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 HUH SHALL BE HEARD. GOD SAVE THESE UNITED STATES, THE GREAT STATE OF FLORIDA AND THIS HONORABLE COURT. LADIES AND GENTLEMEN, THE FLORIDA SUPREME COURT. PLEASE BE SEATED.

CHIEF JUSTICE: GOOD MORNING EVERYONE. WELCOME TO THE FLORIDA SUPREME COURT. WE WANT TO MAKE A SPECIAL WELCOME TO DR. MYERS'S CLASS, FROM FLORIDA A&M UNIVERSITY, ON THE AMERICAN COURT SYSTEM. WE APPRECIATE YOUR ATTENDANCE AT THIS SESSION TODAY AND ALSO APPRECIATE COUNSEL BEING READY TO GO ON THE FIRST CASE ON THE DOCKET THIS MORNING, SO WITHOUT ANY FURTHER ADO, WE WILL CALL THAT CASE OF IBAR VERSUS STATE OF FLORIDA. YOU MAY PROCEED, IF COUNSEL IS READY.

MAY IT PLEASE THE COURT. I AM PETER RABEN, THE ATTORNEY FOR PABLO IBAR IN THE CAUSE. THIS COURT IS SOMEWHAT FAMILIAR WITH THIS CASE. A CODEFENDANT IN THIS CASE WAS NOT TRIED SEPARATELY. THEY WERE SEVERED AND THE CODEFENDANT WAS TRIED SEPARATELY.

CAN YOU, IN GIVING A SHORT SKETCH OF THE FACTS, TELL US WHAT ISSUES YOU ARE GOING TO ADDRESS WITH THE ORAL ARGUMENTS THIS MORNING.

I WOULD LIKE TO ADDRESS THE COURT'S CONSTRUCTION OF THE EVIDENCE RULE 801-2-C. AS THIS COURT IS AWARE, THE CRIME OCCURRED IN EARLY MORNING OF LATE JUNE 1994. TWO MEN ENTERED THE HOME OF A LOCAL LOUNGE OWNER IN MIRAMAR, FLORIDA, CASEY SUCHARSKI. HE WAS ENTERTAINING WOMEN FROM HIS NIGHTCLUB. THE TWO MEN ENTERED THE HOME AND RANSACKED IT AND THE VICTIMS WERE SUBSEQUENTLY SHOT. A GIRLFRIEND WAS THROWN OUT, AND SHE HAD MADE THREATENING PHONE CALLS, AND IT WAS FEARED THAT SHE WOULD RETURN AND RANSACK THE PROPERTY, SO MR. SUCHARSKI HAD HIDDEN IN A BOOKCASE ON THE PROPERTY, A SURVEILLANCE FILM SO THESE CRIMES ARE CAUGHT ON TAPE. IDENTITY IS THE SOLE ISSUE IN THIS CASE. BOTH ATTORNEYS ARGUED TO THE JURY THAT IDENT WAS THE SOLE ARGUMENT IN THE CASE. THAT IS IMPORTANT BECAUSE, ALTHOUGH THERE WAS A TAPE, IT WAS ALTERNATELY DESCRIBED BY THE WITNESSES AS GRAINY, UNCLEAR AND FUZZY AND THERE WAS DISTORTION PROBLEMS IN REDUCING IT FROM A TAPE TO STILL PICTURES.

WHEN THEY SAID BLURRY, WERE THEY DESCRIBING THE STILL PICTURES AS OPPOSED TO THE TAPE. THE TAPE, ITSELF, IS PRETTY CLEAR, ISN'T IT?

I AM NOT SO SURE ABOUT THAT, BECAUSE THE FIRST JURY THAT HEARD THIS CASE BACK IN 1997, SAW THE TAPE. IT WAS A NINE-MONTH TRIAL, AND ALTHOUGH MR. IBAR WAS BEING PROSECUTED BY THE STATE AND HIS CODEFENDANT, HIS DEFENSE WAS THAT HE WAS NOT GUILTY BUT HIS CODEFENDANT WAS, AND THEY WERE HUNG ON WHETHER IT WAS CLEAR ENOUGH TO MAKE THE IDENT AND IT WAS CONCEDED IN CLOSING ARGUMENT THAT NOT ONLY NO PHYSICAL EVIDENCE TIED MR. IBAR TO THE CRIME BUT THE DNA ON HEAD COVER OF ONE OF THE INDIVIDUALS EXCLUDED MR. IBAR AS THE OWNER OF THAT DNA.

CAN YOU GO INTO THE TWO ISSUES THAT YOU ARE GOING TO ADDRESS.

DO YOU MEAN THE HEAD COVERING, THE SHIRT?

YES.

AND THAT WAS SUPPOSEDLY THE SHIRT THAT ONE OF THE DEFENDANTS HAD TAKEN OFF OR ONE OF THE PERPETRATORS HAD TAKEN OFF?

RIGHT. UNDER THE STATE'S THEORY, PABLO IBAR PABLO IBAR WORE A HEAD COVER, A SHIRT, AND AT THE CONCLUSION OF THE CRIME, THAT WAS TAKEN OFF.

WHAT EVIDENCE WAS ON IT?

HAIR AND CELLULAR MICHONDRIAL ANALYSIS. ACCORDING TO THE STATE, WHAT THEY SAID WAS THAT THE DNA NOT ONLY DIDN'T MATCH BUT EXCLUDED MR. IBAR AS THE DONOR OF THAT DNA.

OF WHICH, THE HAIR OR ALL OF IT?

YES. WHATEVER THEY WERE ABLE TO RECOVER. MOVING ON, THE REASON WHY I WOULD LIKE TO DISCUSS THE LIVE LINEUP ISSUE IS BECAUSE THE STATE'S BRIEF REALLY CRYSTALIZES THAT ISSUE. THE LIVE LINEUP WAS IMPORTANT BECAUSE THERE WERE NO EYEWITNESSES TO THIS CASE. AS THE TWO MEN LEFT THE HOUSE, A MAN DROVE BY AND SEES THE COMMOTION AND TELLS THE POLICE THAT HE SEES TWO MEN DRIVING BY AND HE SAID THAT HE WOULD TRY TO MAKE AN IDENTIFICATION. TWO WEEKS LATER, PABLO IBAR IS IN THE DADE COUNTY JAIL ON AN UNRELATED MATTER AND A BOLO WENT OUT WITH A STILL AND SAID COME DOWN AND LOOK AT THIS FELLOW, AND THE POLICE WENT DOWN AND GOT A POLAROID OF MR. IBAR AND TOOK IT AND PUT IT IN A PHOTO ARRAY FOR THE WITNESS, ON JULY 19. HE SAID, I WOULD LIKE TO SEE CLOSE-UP TO MAKE AN IDENTIFICATION. HE IS ONLY LOOKING AT THESE MEN FOR SECONDS AT A TIME AT AN ANGLE, THROUGH HIS CAR WITH TINTED WINDOWS AND THE MERCEDES THAT THE TWO WERE DRIVING, WHICH HAD TINTED WINDOWS, SO HE SAID HE WOULD LIKE TO SEE A LIVE LINEUP. MIRAMAR POLICE DIDN'T WANT TO ARREST PABLO IBAR. THEY GOT INSTEAD A SEARCH WARRANT COMPELLING HIM TO STAND IN A LIVE LINEUP. THE STATE SUMMARIZES IN ITS BRIEF, THERE IS NO RIGHT TO COUNSEL ON THE LINE-UP OF THE HOMICIDE. AS HE IS TAKEN TO THE LINEUP HE SAYS WHERE IS MY ATTORNEY? DO YOU WANT US TO CALL YOUR ATTORNEY? YES, I DO. THEY CALL HIS ATTORNEY --

YOU SAY HE WAS IN CUSTODY IN MIAMI ON ANOTHER MATTER, HE WAS IN CUSTODY.

ON ANOTHER MATTER.

ON A SEPARATE CHARGE, NOTHING TO DO WITH THIS.

CORRECT.

AND HIS COUNSEL THAT HE HAD BEEN APPOINTED TO HAVE, WAS COUNSEL THAT WAS IN THAT MATTER, IS THAT CORRECT?

CORRECT. UNTIL SUCH TIME AS THE POLICE SERVE A SEARCH WARRANT ON HIM, COMPELLING HIM TO GO FROM HIS CELL TO STANDING IN A LINEUP, AND HE CALLS HIS FT. LAUDERDALE LAWYER AND SAYS, CAN YOU REPRESENT ME ON THIS LINEUP, AND HE SAYS YES, AND THE POLICE SPEAK TO THE LAWYER AND HE AGREES TO APPEAR. HOWEVER, THERE IS A TIME FRAME. THE POLICE WANT TO DO IT RIGHT AWAY, AND THE LAWYER SAYS, I WILL BE THERE SOON, SO THE POLICE CONDUCT THE LINEUP WITHOUT THE LAWYER PRESENT. WHICH IS WHY THE STATE CONCEDES THERE IS NO DISPUTE THAT HE SOUGHT TO INVOKE HIS RIGHT TO COUNSEL ON THE MIRAMAR TRIPLE HOMICIDE, THIS IS AT PAGE 63 OF THEIR BRIEF. THE CRUCIAL ISSUE WAS

WHETHER HE HAD A RIGHT TO COUNSEL ON THOSE CRIMES, WHETHER IT ATTACHED. THE STATE CONCEDES THAT HE ASKED FOR AN ATTORNEY, HE HAD AN ATTORNEY AND AN ATTORNEY AGREED TO BE THERE.

IF AN ATTORNEY IS AT A LIVE LINEUP, WHAT, IT IS NOT JUST RIGHT TO REMAIN SILENT. HE HAD TO BE IN THAT LINEUP.

RIGHT.

ARE YOU CLAIMING THAT THE LINE-UP WAS UNDULY SUGGESTIVE? WHERE IS THE CONNECTION, IN TERMS OF ASSUMING THERE IS A RIGHT BETWEEN WHAT COUNSEL COULD DO AT A LINEUP AND WHAT HAPPENED HERE?

THAT IS WHAT JUSTICE BRENNAN TALKS ABOUT IN WADE, HOW A LINEUP IS A CRITICAL STAGE BECAUSE THE PRESENCE OF AN ATTORNEY IS IMPORTANT IN ADVISING, THE POLICE ARE OFFERING SUGGESTIONS AS TO WHO IS PLACED IN THE LINEUP. FOR EXAMPLE --

WHEN IS THE LINEUP CRUCIAL? ISN'T THE LINEUP A CRUCIAL STAGE OF A PROCEEDING, ONCE A DEFENDANT IS, YOU KNOW THAT THE STATE IS ABOUT TO PROCEED AGAINST A DEFENDANT, A LINEUP, THEN, BECOMES A CRUCIAL STAGE OF THE PROCEEDING.

THE FLORIDA CONSTITUTION IN 3.11 DEFINES WHEN A CRITICAL STAGE OF THE PROCEEDING BEGINS IN FLORIDA, AND IT IS WHEN A PERSON IS FORMALLY CHARGED AT HIS FIRST APPEARANCE OR AS SOON AS FEASIBLE AS, AS SOON AS FEASIBLE AFTER CUSTODIAL RESTRAINT.

WHERE WAS THE CUSTODIAL RESTRAINT FOR THIS OFFENSE?

THE ISSUANCE OF A SEARCH WARRANT, COMPELLING HIM TO APPEAR IN A LINEUP. THERE IS NOT A LOT OF CASES ON CUSTODIAL RESTRAINT IN THIS, AND THE RIGHT TO COUNSEL PROVISION, BECAUSE USUALLY A PERSON AGREES TO APPEAR OR THE PERSON HAS BEEN ARRESTED, SO YOU HAVE TO LOOK AT THE DEFINITION OF CUSTODIAL RESTRAINT. WHAT THIS COURT SAID IS THAT WHEN A PERSON IS THERE IN VOLUNTARILY, WHEN A PERSON IS DENIED HIS RIGHTS LIKE THE RIGHT TO COUNSEL.

WHEN DID THE RIGHT OF COUNSEL ATTACH TO THIS OFFENSE, NOT THE ONE HE WAS IN CUSTODY FOR IN MIAMI?

WHEN A SEARCH WARRANT COMPELLING HIM TO LEAVE HIS CELL AND STAND IN A LINEUP, WAS SERVED UPON HIM. AT THAT POINT IN TIME, MR. IBAR DIDN'T HAVE THE RIGHT TO SAY, NO, I DON'T WANT TO GO. I WOULD LIKE TO STAY IN MY CELL. SO THE ISSUE BECOMES DID HE VOLUNTARILY APPEAR IN THIS LINEUP AND THE ANSWER IS NO. HE HAD NO RIGHT TO REFUSE TO APPEAR IN THAT LINEUP. HE WAS COMPELLED TO STAND IN THE LINEUP, AND IS THERE A DIFFERENCE BETWEEN COMPELLING A PERSON TO GO FROM ONE PLACE TO THE OTHER, WITH THE PAIN OF CONTEMPT, GIVEN CUSTODIAL RESTRAINT, AND YOU LOOK AT THE CRITERIA, HAS THE PERSON BEEN, IS IT VOLUNTARY, HAS HE BEEN DENIED HIS RIGHTS, HAS HE BECOME THE FOCUS OF AN INVESTIGATION AND HAS HE BEEN CONFRONTED WITH THE EVIDENCE AGAINST HIM? ALL OF THE ANSWERS ARE YES, BECAUSE ON JULY 19, WHEN HE WAS INTERVIEWED, THE POLICE TOLD HIM HE WAS A SUSPECT IN THE EVIDENCE ON THE MIRAMAR HOMICIDE, AND HE KNEW FROM THE EVIDENCE AGAINST HIM AND THE LINEUP, THAT HE WAS THE FOCUS OF THE INVESTIGATION.

ASSUMING THAT HE SHOULD HAVE BEEN ALLOWED TO HAVE HIS ATTORNEY AT THE LINEUP, THEN WHAT? WHAT ARE YOU ASKING US TO EXCLUDE AND HOW DOES THAT IMPACT ON MR. FOY'S IN-COURT TESTIMONY?

I WOULD LIKE TO ANSWER, ONE, THE PRESENCE OF AN ATTORNEY WAS IMPORTANT IN THIS CASE

BECAUSE THERE WAS A DISPUTED HEARSAY STATEMENT THAT WAS ATTRIBUTED IN THIS CASE WHICH BECAME A POWERFUL PART OF THIS CASE. MR. FOY TOOK THE STAND AND SAID, I MADE AN IDENTIFICATION AND DIDN'T RECALL ANYTHING SPONTANEOUS, YET MR. MANDELA WAS ABLE TO GET ON THE STAND AND SAY THIS WAS A POWERFUL IDENTIFICATION. BECAUSE AS THEY WERE FILING INTO THE ROOM, FOY TAPPED ME ON THE SHOULDER AND SAID, IT IS NUMBER FOUR. OBVIOUSLY HE DOESN'T RECALL THAT, AND THERE WAS NO OTHER POLICE OFFICERS THERE TO CONFIRM OR DENY THAT. ONE OF THE IMPORTANCES OF COUNSEL IS TO OBJECT TO THE WAY THE PROCEEDINGS OCCUR, AND THE RIGHT TO COUNSEL HAS A VERY SLIM HARMLESS ERROR TEST TO IT, AND I AM NOT SURE THAT THIS COURT HAS EVER APPROVED A HARMLESS ERROR TEST TO A DENIAL OF A RIGHT TO COUNSEL, BUT IT WAS NOT HARMLESS IN THIS SITUATION, BECAUSE THE STATE POWERFULLY ARGUED TO THE JURY THE IMPORTANCE OF THE LIVE LINEUP. IT WAS IMPORTANT BECAUSE, REMEMBER MR. FOY WAS SEVERELY IMPEACHED REGARDING HIS ABILITY TO SEE, AND SECOND WHEN SHOWN THE PHOTO ARRAY, HE WAS UNABLE TO MAKE AN IDENTIFICATION.

DID HE IDENTIFY MR. IBAR AT TRIAL?

YES, HE DID.

SO GOING BACK TO JUSTICE QUINCE'S QUESTION, YOU WOULDN'T, IF THERE WAS, WERE A RIGHT TO COUNSEL, THE WHOLE CASE WOULDN'T BE THROWN OUT. YOU WOULD SAY THAT IT WAS MR. FOY'S IDENTIFICATION DURING THE LINEUP AND THEN THE STATEMENT THAT HE SUPPOSEDLY MADE TO THE DETECTIVE.

IF THE COURT IS LOOKING TO THE REMEDY, I WOULD SUBMIT THAT, IF THIS COURT FOUND THE INTRODUCTION TESTIMONY REGARDING THE LIVE LINEUP WAS ERROR, THEN IT COULD NOT BE HARMLESS ERROR IN THIS CASE, BECAUSE OF THE IDENTITY IN THE CASE. MR. FOY WAS THE ONLY TRADITIONAL EYEWITNESS IN THIS CASE. THE ONLY OTHER IDENTIFICATION WITNESSES WERE THE SIX PEOPLE, IF I COULD SLIP INTO MY 801 ARGUMENT HERE, WERE THE SIX PEOPLE WHO STOOD UP AND SAID, I NEVER MADE AN IDENTIFICATION.

WERE YOU ARGUING THE LIVE LINEUP AND THE USE OF THE PHOTO ARRAY AND HAVING MR. IBAR THE ONLY PHOTOGRAPH IN THE PHOTO ARRAY AND AT THE LINEUP, WAS UNDULY SUGGESTIVE?

NO. THAT IS NOT RAISED IN OUR BRIEF. HOWEVER, THAT GOES TO THE IMPORTANCE OF THE LINE-UP. BECAUSE THE LINEUP CLEARLY, YOU KNOW, SINGLED OUT MR. IBAR, HE WAS THE ONLY ONE REPRESENTED --

SO THERE WAS NO MOTION TO SUPPRESS OR THE LINEUP OR THE IDENTIFICATION, BASED ON SUGGESTION IVENESS.

YES, THERE WAS, AND THAT WAS DENIED.

OKAY, AND THAT IS NOT SOMETHING --

CORRECT. IF I COULD MOVE TO THE 801 ISSUE, 801-2-C ALLOWS AS NONHEARSAY, OUT OF COURT DECLARATIONS, WHEN THE PERSON IS AVAILABLE TO TESTIFY AND WHEN IT IS CONCERNING IDENTIFICATION. WHAT HAPPENED IN THIS CASE IS THAT THE POLICE OFFICERS TOOK THE STILL AND WENT AROUND TO SIX DIFFERENT PEOPLE AND SAID VARIOUSLY AND THIS IS NOT RECORDED, DO YOU RECOGNIZE THIS PERSON? CAN YOU IDENTIFY THIS PERSON? THESE SIX PEOPLE ALL MADE STATEMENTS CONCERNING IDENTIFICATION. HOWEVER, NONE OF THESE PEOPLE MADE THESE STATEMENTS AFTER HAVING FIRST PERCEIVED THE PERSON. WHAT I HAVE DONE HERE, AND I HAVE SHOWN THIS TO THE STATE, IS 801-2, TALKS ABOUT A STATEMENT IS NOT HEARSAY IF THE DECLARANT TESTIFIES AT THE TRIAL OR HEARING AND IS SUBJECT TO CROSS-

EXAMINE CONCERNING THE STATEMENT, AND THE STATEMENT IS ONE OF IDENTIFICATION OF A PERSON MADE AFTER PERCEIVING A PERSON. THE ISSUE HERE --

LET'S BACKTRACK SLIGHTLY. IS THIS THE ARGUMENT THAT YOU MADE BELOW, OR WAS THE ARGUMENT THAT THIS WASN'T REALLY IMPEACHMENT, BECAUSE THE WITNESS HAD NOT TESTIFIED CONTRADICTORY TO THE OUT OF COURT STATEMENT.

THAT IS THE NEXT ISSUE. THAT HAS TO DO WITH THE MOTHER. OKAY. THIS HAS TO DO WITH THE SIX PEOPLE AND WHETHER THEY QUALIFIED UNDER 2-C, BECAUSE THEY MADE AN IDENTIFICATION AFTER PERCEIVING THE PERSON, AND I WOULD LIKE TO GET TO THAT ONE IN A SECOND, IF I COULD.

BUT THE QUESTION, REALLY, IS THAT, IT IS THE SAME ARGUMENT THAT YOU ARE MAKING NOW. WAS IT MADE BELOW?

THE ARGUMENT THAT WAS MADE BELOW WAS THAT THE SUBSTANTIVE EVIDENCE INSTRUCTION, WHICH IS ALLOWED BECAUSE OF 2-C, WAS OBJECTED TO AND THE STATE DOESN'T CONTEND OTHERWISE. THE STATE AGREES THAT THE DEFENSE VEHEMENTLY OBJECTED THAT THE OUT OF COURT DECLARATIONS ARE SUBSTANTIVE, IF IT GIVES AN IDENTITY.

WHAT WAS THE BASIS THAT THEY OBJECTED? I THOUGHT THAT THE BASIS FOR ALL OF IT WAS THAT THEY HADN'T TESTIFIED CONSISTENTLY, NOT THAT 801-C-2 DIDN'T APPLY BECAUSE THEY DIDN'T PERCEIVE THE WITNESS AT THE TIME.

NO. THAT WAS NOT SPECIFICALLY MADE. THE DEFENSE ATTORNEY WAS CONCERNED ABOUT THE INSTRUCTION. HE CONTINUOUSLY OBJECTED TO THE INSTRUCTION, AND WHAT HE SAID THERE, AND I QUOTE IT IN MY BRIEF, I OBJECT TO ANYTHING HAVING TO DO WITH THIS INSTRUCTION. THE SUBSTANTIVE EVIDENCE SHOULDN'T APPLY.

NOW WE ARE SHIFTING YOU SEE, FROM AN ISSUE ABOUT THE PROPRIETY OR ACCURACY OF THE INSTRUCTION, SO HOW ABOUT COMING BACK TO SQUARE ONE AND RESPOND TO JUSTICE CANTERO'S QUESTION AS TO WHETHER OR NOT THE ISSUE YOU ARE RAISING NOW AND ARGUMENT YOU ARE MAKING NOW, WAS THAT ISSUE RAISED BELOW, WAS THIS ARGUMENT MADE TO THE TRIAL COURT BELOW, IN OTHER WORDS WAS THE ARGUMENT THAT YOU ARE MAKING NOW, PRESERVED IN THE TRIAL COURT?

IF THE COURT CONSIDERS A GENERAL OBJECTION TO THE INSTRUCTION SUFFICIENT TO PRESERVE THE OBJECTION, THE ANSWER IS YES. IF THE COURT REQUIRED THAT THE DEFENSE COUNSEL SAY I OBJECT TO THE INSTRUCTION, BECAUSE THESE IDENTIFICATIONS WERE NOT MADE AFTER PERCEIVING A PERSON, THEY WERE MADE AFTER PERCEIVING AN IMAGE OF THE PERSON, THAT WAS NOT ARTICULATED, OTHER THAN IN A 19, IN THE 1997 MOTION TO SUPPRESS.

THIS RELATES AS MUCH TO THE ADMISSION OF THIS EVIDENCE, DOES IT NOT, AS IT DOES TO THE INSTRUCTION? THAT --

NO.

NO?

NO, SIR, I WOULD DISAGREE. UNDER 701, THIS COURT ALLOWS PEOPLE WHO WERE NEVER WITNESSES TO A CRIME, TO LOOK AT A SURVEILLANCE PHOTO AND OFFER AN OPINION IN A PREDICATE IS MADE, A FAMILIARITY. UNDER 701, THIS TESTIMONY IS ADMISSIBLE AS AN OPINION NOT A DECLARATION OF IDENT, SO THAT WHEN THAT IS DONE, IMPEACHMENT IS PERMITTED UNDER 608. A PRIOR ADMISSION MAY BE ADMITTED TO AFFECT THE WEIGHT OR CREDIBILITY OF THE WITNESS BUT THE QUESTION IS WHETHER THE IMAGE OF THE PERSONS, RATHER THAN AFTER

PERCEIVING THE PERSON, WAS ALLOWED TO BE READ TO THE JURY AS AN IMPEACHMENT INSTRUCTION UNDER 608 OR A SUBSTANTIVE EVIDENCE INSTRUCTION, WHICH IS WHAT THE COURT READ TWO TIMES AND THE PROSECUTOR WAS ABLE TO TELL THE JURY YOU CAN CONSIDER THIS AS SUBSTANTIVE EVIDENCE OF IDENTIFICATION.

BUT YOU CONCEDE THAT THAT COUNSEL BELOW --

WHEN THE PROSECUTOR SAID I AM GOING TO IMPEACH THIS WITNESS FOR CORRECTION, AND THE DEFENSE ATTORNEY JUMPED UP AND SAID HOW CAN WE DO THAT WITHOUT THE MOTHER TESTIFYING? WE CAN'T DO THAT WITHOUT THE MOTHER TESTIFYING, AND THE COURT RULED, WHICH IS WHY I MENTION ADD NUMBER OF TIMES IN MY BRIEF THAT THIS IS FUNDAMENTAL ERROR, BECAUSE THAT IS THE ERROR THAT EVISCERATES THE ENTIRE PROCEEDING. WHAT YOU LOOK AT IS SIX PEOPLE MADE THE IDENTIFICATION. WELL, THEY DIDN'T, AND SAID THEY DIDN'T. AND WHAT I HAVE OFTEN SAID IT WAS A FRUITLESS OR UNNECESSARY GESTURE TO MAKE THESE IDENTIFICATIONS BECAUSE IT WAS UNNECESSARY RESEARCH AND THE COURT RULED OFTEN THAT THE STATEMENTS WERE GOING TO BE ADMISSIBLE, THEY WERE SUBSTANTIVE EVIDENCE AND HE HAD DONE HIS OWN RESEARCH, SO, YES, JUSTICE ANSTEAD, THE DEFENSE COUNSEL DID NOT ARTICULATE AS I DID, WHY 801-2-C DID NOT APPLY HERE, BUT HE DID MAKE GENERAL OBJECTIONS TO THE SUBSTANTIVE EVIDENCE INSTRUCTION, WHICH IS WHY WE RAISED POINTS 1 AND 3, NOT AS TO WHETHER THE TESTIMONY WAS ADMISSIBLE. IT WAS BUT UNDER WHAT THEORY? OUR THEORY WAS AS TO POINT ONE, THE SIX WITNESSES, IT WAS ADMISSIBLE UNDER 701 AND IMPEACHABLE UNDER 608, NOT 201-C, AS THE PROSECUTOR ARGUED.

TWO, AT LEAST TWO WITNESSES GAVE PRIOR IDENTIFICATIONS IN THE GRAND JURY PROCEEDINGS UNDER OATH, AND THAT, THEN, CALLS INTO QUESTION THAT IF THEY TESTIFY AND THEIR PRIOR TESTIMONY IS IN A PROCEEDING SUCH AS A GRAND JURY PROCEEDING, THAT THAT CAN BE ADMISSIBLE AS SUBSTANTIVE EVIDENCE.

WHEN DEFENSE, WHEN THE DEFENDANT IS AVAILABLE TO CROSS-EXAMINE. WHAT I POINT OUT TO THE COURT IS, ONE, IT WAS A GRAND JURY WHERE THERE WAS NO DEFENSE ATTORNEYS, AND WHAT THIS COURT IS REFERRING TO IS THE AUGUST 31 ADVERSARY PRELIMINARY HEARING. MR. IBAR WAS BROUGHT TO THAT HEARING, BUT HE WAS NOT REPRESENTED BY COUNSEL AND DID NOT PARTICIPATE IN THAT HEARING AND THE PARTIES AGO GEE THAT HE DID NOT CROSS EXAMINE THOSE WITNESSES. THOSE WITNESSES WERE CROSS-EXAMINED BY CODEFENDANT PANALVER, SO THOSE STATEMENTS WERE NOT ADMITTED AS SUBSTANTIVE EVIDENCE AGAINST MR. IBAR.

WHAT ABOUT MR. MILLMAN, I BELIEVE, AND MS.^MONROE, DIDN'T THEY BOTH TESTIFY IN GRAND JURY PROCEEDINGS, SO WOULDN'T GRAND JURY PROCEEDINGS FLOW UNDER THE TESTIMONY BEING ADMISSIBLE AS SUBSTANTIVE EVIDENCE, BECAUSE THEY ARE PRIOR PROCEEDINGS?

YES. IT WAS ADMISSIBLE, BUT, AGAIN, WE ARE NOT TALKING ABOUT THE ADMISSIBILITY OF IT. WE ARE TALKING ABOUT HOW THE JURY IS TOLD THAT THEY CAN LOOK AT THAT.

ADMISSIBLE AS SUBSTANTIVE EVIDENCE, UNDER 90.801-2-A.

YES. HOWEVER, MS. MONROE DID NOT MAKE AN IDENTIFICATION AND SAID TO THE GRAND JURY THAT IF SHE HAD TO CHOOSE BETWEEN THE TWO, MR. IBAR OR MR. PANALVAR, SHE SAID THAT IS THE SELECTION THAT I WOULD MAKE.

SO IT WAS NOT INCONSISTENT WITH 90.801.

IT WAS UP TO THE COURT AS TO WHETHER THE JURY COULD HEAR IT AS SUBSTANTIVE EVIDENCE.

DIDN'T YOU JUST SAY THAT YOU WOULDN'T AGREE THAT GRAND JURY TESTIMONY WOULD

QUALIFY AS A PRIOR PROCEEDING?

YES.

IS THERE --

YES, I DID.

WHAT CASE DO YOU HAVE FOR THAT PROPOSITION?

I AM SORRY?

WHAT CASE DO YOU HAVE FOR THAT PROPOSITION?

I HAVE TO LOOK AT IT IN MY REPLY OR I WILL FILE NOTICE WITH THE COURT.

AS I READ THE RULE, IT DOES NOT REQUIRE THAT THE WITNESS WAS SUBJECT TO CROSS-EXAMINE IN THE PRIOR PROCEEDING, ONLY THAT THE WITNESS BE SUBJECT TO CROSS-EXAMINE AT THIS TRIAL.

AS TO THE GRAND JURY AND THE PRIOR SWORN TESTIMONY? THEN I WOULD ACCEPT THAT, BUT I WOULD LIKE THE COURT TO LOOK AT THE CLOSING ARGUMENT, AS TO HOW THE PROSECUTOR PRESSED UPON THE STATEMENTS MADE BY MS.^VANCARA AND MS.^VAN DEL AND, OF COURSE, THE MOTHER. WE ARGUE THAT THE TESTIMONY OF THE MOTHER WAS COMPLETELY DAMAGING AND THE PROSECUTOR USED THAT IN A DAMAGING FASHION. WE ARGUE THAT THAT WAS PRESERVED BECAUSE THE DEFENSE ATTORNEY SAID HOW CAN THE MOTHER TESTIFY?

THE MOTHER DID NOT TESTIFY.

CORRECT. CORRECT. THE MOTHER TESTIFIED AT THE FIRST TRIAL. SHE TESTIFIED THAT SHE LOOKED AT STILL PHOTOGRAPHS AND SAID THAT IS NOT MY SON. THE POLICE OFFICER TESTIFIED IN THE FIRST TRIAL AND SHE SAID, YES, THAT WAS MY SON, AND THIS IS THE TRIAL WHERE THE JURY HUNG AND WAS UNABLE TO REACH A VERDICT AND THIS IS THE TRIAL WHERE THE DEFENSE ATTORNEY SAID IN THE SECOND TRIAL, HOW CAN THEY DO THAT WITHOUT THE MOTHER TESTIFYING? HE SAID THAT THE MOTHER WAS A BEAUTIFUL AND CREDIBLE WITNESS AND HE BELIEVED THEY HUNG ON HER TESTIMONY AS OPPOSED TO THAT OF THE POLICE OFFICER.

YOU WANT US TO SAY THAT THE JURY DIDN'T HEAR HER TESTIMONY?

NO. I AM SAYING THAT THE JURY HEARD HER TESTIMONY. WHAT HAPPENED WAS THE POLICE OFFICER IMPEACHED HER. UNDER 801-2-C, THE POLICE OFFICER'S TESTIMONY OF HER IDENTIFICATION, COULD HAVE BEEN CONSISTENT AS IF SHE MADE THE IDENTIFICATION AND HE ASKED THE JURY TO BELIEVE THE POLICE OFFICER OVER THE MOTHER AND ASKED THE JURY TO SAY EVEN HIS MOTHER THINKS HE IS GUILTY IN THIS CASE AND 801-2-C ALLOWS HIM TO DO THAT. 801-2-C SAYS WHEN THE DECLARANT TESTIFIES, IT IS SUBSTANTIVE EVIDENCE, AND WHAT WE ARE DOING HERE IS THAT THIS COURT WOULD HAVE TO CHANGE 801-2-C TO SAY IF THE PRIOR TESTIMONY IS INTRODUCED.

YOU ARE IN YOUR REBUTTAL.

READING TESTIMONY WHERE THE CREDIBILITY OF A WITNESS CANNOT BE DETERMINED BY THE JURY, OR ALLOW THE JURY TO SEE THE WITNESS BE THERE AND THE PERSON CAN FAINT, HAVE MEMORY LOSS, RENEGING, AND BECAUSE SHE WAS NOT THERE TO TESTIFY, IT WAS NOT ADMISSIBLE SUBSTANTIVELY, AND IT WAS NOT ADMISSIBLE IN THE INSTRUCTION.

GOOD MORNING.

GOOD MORNING. MAY IT PLEASE THE COURT. LESLIE CAMPBELL WITH THE ATTORNEY GENERAL'S OFFICE ON BEHALF THE STATE OF FLORIDA. I WILL START WITH MARIA CASAS, THEN, AND SAY WHERE THERE WAS OBJECTION AND COMMENTS AND DISCUSSION DURING THE OPENING STATEMENT, ONCE MARIA CASAS'S TESTIMONY FROM THE FIRST TRIAL WAS BEING OFFERED, THE DEFENSE COUNSEL MADE IT CLEAR THAT HE WAS OBJECTING TO THE PRIOR TESTIMONY OF MARIA CASAS, ON THE BASIS THAT THE PHOTO ID HADN'T BEEN IDENTIFIED AS THE ONE THAT WAS SHOWN TO HER, SO THAT IS A DIFFERENT ARGUMENT THAN WHAT IS BEING MADE HERE. WHAT IS BEING MADE HERE IS THAT HER TESTIMONY, MARIA CASAS'S TESTIMONY, COULD NOT BE USED IN ORDER TO HAVE THE OFFICER TESTIFY ABOUT THE PRIOR IDENTIFICATION.

AS SUBSTANTIVE EVIDENCE.

AS SUBSTANTIVE EVIDENCE.

WOULD YOU JUST, SINCE, LET'S SET ASIDE THE PRESERVATION ISSUE, BECAUSE I THINK THERE IS A STRONG ARGUMENT THAT SOME OF THESE ARGUMENTS WERE NOT PRESERVED, BUT I AM CONCERNED ABOUT THE STATE'S INTERPRETATION AS HEARSAY OBJECTION OR EXCEPTION AS SUBSTANTIVE EVIDENCE. NORMALLY, AND YOU WOULD AGREE THAT EVERY PRIOR INCONSISTENT STATEMENT WHICH MAY BE GIVEN EARLY, IS ALWAYS GIVEN EARLIER IN TIME, COMES IN AS IMPEACHMENT, BUT IT DOESN'T COME IN AS SUBSTANTIVE EVIDENCE. CORRECT?

NOT ALL THE TIME.

CAN YOU THINK OF ANY PRIOR -- OTHER THAN, UNLESS IT IS AN EXCITED UTTERANCE, THAT THERE IS SOME OTHER TRADITIONAL TYPE OF RELIABILITY SUCH AS EXCITED UTTERANCE OR --

BUT WE ARE TALKING IDENTIFICATION HERE, YOUR HONOR.

I UNDERSTAND THAT BUT WHAT I AM ASKING YOU IS ARE YOU SAYING IT IS CORRECT THAT PRIOR STATEMENTS GENERALLY COME IN AS IMPEACHMENT TO SUBSTANTIVE EVIDENCE.

GENERALLY.

EXPLAIN WHY ALL OF THE KINDS OF THING THAT IS COULD BE DONE EARLY ON, SUCH AS WHENEVER THE STATEMENT IS MADE BITE WITNESS TO THE POLICE OFFICER, WHY WOULD IT BE THAT THE, THIS EXCEPTION WOULD BE SO BROAD TO SAY THAT ANY TIME SOMEBODY LOOKED AT A PHOTOGRAPH, NO MATTER WHETHER THEY HAD PERCEIVED THAT PERSON OR NOT, THAT THAT WOULD BE, THAT, THE INTENT OF THAT EXCEPTION WAS TO ALLOW ALL OF THOSE TYPES OF IDENTIFICATIONS IN, AS SUBSTANTIVE EVIDENCE. I GUESS WHERE IS THE RELIABILITY IN THIS THERE?

BECAUSE THE RELIABILITY COMES ON THE TIME FRAME. WHEN YOU PERCEIVE A PERSON OR LOOK AT A PHOTO, EARLY ON, YOU HAVE RECENTLY SEEN THAT PERSON, CLOSE IN TIME TO THAT PHOTOGRAPH, SO YOUR PERCEPTION OF THAT PERSON IS CLOSER TO THE PHOTOGRAPH.

IS THAT SAME ARGUMENT MADE ABOUT EVERY STATEMENT THAT SOMEONE MAKES, AN EYEWITNESS TO A CRIME, THEY TELL THE POLICE, YOU KNOW, THAT IT WAS 7:30 IN THE MORNING THAT THIS OCCURRED, AND THEN THEY TESTIFY AT TRIAL THAT I THINK IT WAS SIX IN THE MORNING, AND THE ARGUMENT IS MADE, AS FAR AS IMPEACHMENT, THEY SAY, WELL, IT, YOU ALWAYS ARGUE IT IS MORE RELIABLE WHAT THEY SAID BACK THEN, BUT THAT DOESN'T PREVENT THE FACT, I MEAN IT NEVER COMES IN AS SUBSTANTIVE EVIDENCE, BUT WHY ISN'T IT, AND I AM CONCERNED ABOUT THIS BROAD CONSTRUCTION THAT THE STATE IS ARGUING, THAT YOU COULD ALLOW PEOPLE THAT KNOW THE PERSON TO MAKE STATEMENTS AND THEN IT ALL COMES IN AS

SUBSTANTIVE EVIDENCE.

BECAUSE, AGAIN, THE IDENTIFICATION IS MADE EARLY. IT IS SUBJECT TO CROSS-EXAMINE AT TRIAL, AND THEN WHEN THEY INITIALLY LOOK, WHEN A WITNESS INITIALLY LOOKS AT A PERSON, BY THE TIME HE GETS TO TRIAL, HIS FEATURES MAY CHANGE HOW HE LOOKS --

CROSS-EXAMINING, IT IS THE POLICE OFFICER THAT SAYS THAT IS WHAT SHE SAID. HOW DO YOU SAY, WELL, I MEAN, WHAT KIND OF CROSS-EXAMINATION WOULD YOU GIVE TO THE POLICE OFFICER?

YOU HAVE THE DECLARANT AND THE WITNESS, WHO HAS INITIALLY MADE THE STATEMENT, AND THAT TESTIMONY CAN BE USED TO WEIGH AGAINST WHATEVER THE POLICE OFFICER SAID, BUT THE RULES REQUIRE THREE THINGS TO BE SHOWN BY THE STATE, IN ORDER TO GET THIS IDENTIFICATION EVIDENCE IN, AND THAT IS THAT THE WITNESS WHO HAD MADE THE INITIAL IDENTIFICATION, TESTIFY, THAT WITNESS BE SUBJECT TO CROSS-EXAMINE, AND ALSO THAT THE WITNESS BE TALKING ABOUT IDENTIFICATION. THAT HAS BEEN EXEMPTED OUT UNDER THE RULES, FROM HEARSAY. THAT IS NOT A HEARSAY STATEMENT.

SO PERCEIVES THE PERSON. HOW WOULD YOU INTERPRET THAT TERM, IN THE RULE, THAT IS THAT IT IS MADE AFTER THEY HAVE PERCEIVED THE PERSON.

THAT'S CORRECT. AFTER THEY HAVE PERCEIVED A PERSON. IT DOESN'T HAVE TO BE THAT THEY PERCEIVED THE PERSON DOING THE CRIME. IT COULD BE THAT THIS IS THE PERSON THAT I SEE ON A VIDEOTAPE. IT COULD BE THAT THIS IS THE PERSON THAT I SEE IN A PHOTO LINEUP. ALL OF THIS EVIDENCE COMES IN UNDER 801-2-C, BECAUSE IT IS AFTER THE WITNESS HAS LOOKED AT THE PERSON AND HAS MADE AN IDENTIFICATION THAT THAT IS THE PERSON WHO HAS EITHER DONE A PARTICULAR CRIME OR THEY HAVE SEEN THEM, THEY HAVE MADE AN IDENTIFICATION OF THAT PERSON FROM WHATEVER PHOTOGRAPH OR VIDEO OR HOWEVER THAT PERSON IS, THE DEFENDANT IS SHOWN TO THEM.

BUT ISN'T THE CASE LAW FROM THE DISTRICT COURTS OF APPEAL CONTRARY TO THAT, THAT THERE IS SOME REAL MEANING TO THAT PHRASE "AFTER PERCEIVING THEM", THAN IS AFTER PERCEIVING THEM IN THE CIRCUMSTANCES OF THE CRIME, BASICALLY?

NO. RICHARDS WAS A RECENT CASE, AND WHAT THAT SAID IS THE PERSON WHO WAS MAKING, THE DECLARANT WHO WAS MAKING THE STATEMENT, WAS A GIRLFRIEND. THE DEFENDANT CALLED IN AND TOLD THE GIRLFRIEND "I HAVE DONE THIS CRIME." THAT TESTIMONY WAS PERMITTED, AS FAR AS HER IDENTIFICATION OF THE DEFENDANT UNDER 801-2-C, 801-2-C DID NOT ALLOW HER TO TESTIFY THAT HE SAID HE HAD DONE THE CRIME. THAT WOULD HAVE COME IN UNDER A DIFFERENT SECTION, BUT THE IDENTIFICATION OF THE DEFENDANT AS THE ONE WHO MADE THE TELEPHONE CALL. THAT IS A VOICE IDENTIFICATION. THE GIRLFRIEND WAS NOT AT THE CRIME SCENE. SHE WAS MERELY SAYING, BASED ON HEARING MY BOYFRIEND'S VOICE, THIS IS THE PERSON WHO CALLED ME, AND THAT WAS ADMISSIBLE UNDER 801-2-C.

TO A CERTAIN EXTENT, THAT IS DISTINGUISHABLE FROM THIS SITUATION, BECAUSE YOU HAVE GOT AT LEAST ALIVE SITUATION THERE, AND HERE WE ARE TALKING ABOUT PEOPLE WHO REALLY WERE LOOKING AT PHOTOGRAPHS.

THEY WERE LOOKING AT PHOTOGRAPHS. BUT A PHOTOGRAPH IS WORTH 1 THOUSAND WORDS. THE PERSON CAN LOOK AT A PHOTOGRAPH, AND THAT IS ADMISSIBLE TESTIMONY. I HAVE LOOKED AT THIS PHOTOGRAPH, AND IT IS THE PERSON THAT I PERCEIVE. ZOO SO YOU BELIEVE THAT --

SO YOU BELIEVE THAT, IF THEY DO A CONTRARY STATEMENT AT TRIAL, YOU CAN BRING THAT IN, UNDER 90.801-2-C.

2-C. YOU CAN BRING IT IN, IF THEY MAKE A STATEMENT THAT SAYS, YES, THAT IS THE PERSON I IDENTIFIED. YOU CAN STILL BRING THE OFFICER IN AND HE CAN TESTIFY, YES, THAT IS THE, THAT IS WHAT WAS IDENTIFIED.

A CONSISTENT STATEMENT.

A CONSISTENT STATEMENT, AN INCONSISTENT STATEMENT, A STATEMENT "I DON'T REMEMBER." ALL OF THAT EVIDENCE COMES IN UNDER 801-2-C.

THAT IS NOT ONE OF THE TRADITIONAL HEARSAY EXCEPTIONS, RIGHT?

THAT IS NOT HEARSAY.

THIS IS NOT ONE OF THE TRADITIONAL HEARSAY EXCEPTIONS.

THAT'S CORRECT.

I STILL HIM HAVING A GREAT DEAL OF TROUBLE, ESPECIALLY BECAUSE WE KNOW THAT EYEWITNESS IDENTIFICATION IS REALLY INHERENTLY CAN BE MISLEADING, A PERSON PERCEIVING SOMEBODY, EVEN THOSE CASES, BUT WHERE, BUT IS THERE ANY HISTORY ABOUT WHY, AGAIN, OTHER THAN WHAT YOU SAY, WHICH IS THAT SOMEBODY SEEING SOMEONE BACK WHEN THEY LOOK AT THEM, IT IS GOING TO BE MORE RELIABLE, THAT EXPLAINS WHY THAT WOULD BE GIVEN MORE WEIGHT THAN ANY OTHER INCONSISTENT STATEMENT THAT SOMEONE HAS MADE TO, SAY, POLICE EARLY ON IN AN INVESTIGATION?

THE LEGISLATURE HAS TAKEN THIS, HAS SAID THAT IDENTIFICATION MADE AFTER PERCEIVING THE PERSON IS NOT HEARSAY. THEY HAVE TAKEN IT OUT OF THE HEARSAY RULE. THEY HAVE FOUND THAT THAT IS MORE RELIABLE AND THAT IS WHY IT IS NOT HEARSAY.

IS THIS ONE OF THE RULES THAT IS PATTERNED AFTER THE FEDERAL RULES OF EVIDENCE?

YES, IT IS.

WHAT ARE THE FEDERAL COURT INTERPRETATIONS, IF YOU KNOW, ABOUT WHETHER PERCEIVING A PHOTOGRAPH IS THE SAME AS PERCEIVING THE PERSON?

THEY ALSO ALLOW TESTIMONY WITH REGARD TO PHOTO LINEUPS AND VIDEOTAPES AND OTHER EVIDENCE SUCH AS THAT. AND THAT IS ACCEPTABLE.

IS THERE ANY EXPLANATION IN THOSE FEDERAL CASES, AS TO WHY, THEY USE THE WORD PERCEIVING, IN THE FEDERAL RULE.

I BELIEVE THEY DO.

I MEAN IT DOES SEEM TO ME THAT, AS JUSTICE PARIENTE SAYS, THAT PERCEIVING IS SORT OF AN UNUSUAL WORD HERE. AND I WOULD LIKE TO KNOW WHY THAT WAS CHOSEN.

WELL, PERCEIVING DOESN'T NECESSARILY MEAN THAT YOU HAVE TO SEE THE PERSON COMMIT THE CRIME. YOU HAVE SEEN THIS PERSON BEFORE. IT COULD BE A FRIEND. IT COULD BE A CLASSMATE. IT COULD BE ANYONE THAT YOU HAVE CONTACT WITH AND KNOW THEIR FEATURES, SO I DON'T THINK PERCEIVING SHOULD BE THE MAKE-OR-BREAK POINT.

HAVE WE HAD A CASE WITHIN THE PAST COUPLE OF YEARS, UNDER THIS PROVISION, HEARSAY RULE? I DON'T THINK ANYBODY CITED IT, BUT THE BACK OF MY MIND, WE HAD A CASE HAVING TO DO WITH A DRAG DEALER IN AN AUTOMOBILE, THAT THIS EXCEPTION CAME INTO PLAY. WHATEVER YOU CALL THIS. NOT BEING HEARSAY. IS THAT NOT --

I DON'T RECALL IT, YOUR HONOR. THE ONE THAT I FOUND THAT WAS CLOSEST WAS RICHARDS. AND THAT ALLOWED A NONEYEWITNESS TO A CRIME TESTIFY AS TO THE IDENTITY OF THE DEFENDANT.

YOU HAVEN'T FOUND ANY RECENT CASES FROM THIS COURT, ON THIS SECTION OF THE EVIDENCE CODE?

NO.

OKAY.

WELL, THE CASE THAT I THINK JUSTICE WELLS IS REFERRING TO IS PER YEAR.

PER YEAR. CORRECT.

AND THAT HAD TO DO WITH THE ISSUE OF WHAT IDENTIFICATION MEANT. I THINK THAT WAS CITED IN THE REPLY BRIEF.

WITH REGARD TO THE OTHER WITNESSES, NOT THE MOTHER, BUT ALL OF THE OTHER WITNESSES, THEIR TESTIMONY ALSO WOULD BE ADMISSIBLE UNDER 801-2-C, AND IF I COULD GIVE THE COURT A LITTLE BACKGROUND OF HOW THIS CAME ABOUT, THE WITNESSES BACKING OFF FROM THEIR IDENTIFICATION. THE WITNESSES DID NOT KNOW THAT THE PICTURE THAT THEY WERE PERCEIVING IN THE FLIER CAME FROM A VIDEOTAPE OF THE CRIME. THESE WERE FRIENDS AND FAMILY MEMBERS OF THE DEFENDANT. THEY LOOKED AT THESE PHOTOGRAPHS, AND THEY MADE IDENTIFICATIONS. AS TIME WENT ON AND IT BECAME KNOWN THAT THESE WITNESSES WERE, OR THAT THE PHOTOGRAPHS WERE FROM THE CRIME SCENE, THE IDENTIFICATIONS BECAME LESS AND LESS FORTUNATE RIGHT. THEY, THE WITNESSES WOULD HEDGE. NO. IT MAYBE LOOKS LIKE, THE POLICE, ACCORDING TO THE VIDEOTAPE, SAY THAT IS NOT CORRECT, RIGHT?

IF YOU LOOK --

BASICALLY HOW IT ALL OCCURRED IS THAT THE WITNESSES SAID, SUCH AS THE MOTHER AND THE 14-YEAR-OLD GIRL AT THE TIME THAT I SHOWED IT TO THEM, AND THEN ANY TIME THEY ARE UNDER OATH, THEY SAID, NO, I NEVER SAID THAT. I SAID IT LOOKS LIKE HIM OR SOMETHING AFTER THAT NATURE. ISN'T THAT BASICALLY HOW, I KNOW THE STATE SAYS, THAT IS THE STATE'S THERE THAT I SINCE THEY WANTED TO PROTECT THEM THAT IS WHY THEY ARE NOT IDENTIFYING HIM NOW, BUT THAT IS WHY IT WOULD CERTAINLY BE PROPER AS IMPEACHMENT EVIDENCE.

FOR IBAR'S MOTHER, FOR HER FRIEND AND THE FRIEND'S DAUGHTER, YES, THEY DIDN'T TESTIFY AT THE GRAND JURY OR THE BOND HEARING, SO THEIR TESTIMONY WAS, WASN'T ETCHED IN STONE BEFORE THE VIDEOTAPE FROM THE CRIME SCENE WAS LOOKED AT. HOWEVER, IF YOU LOOK AT OTHER WITNESSES WHO DID TESTIFY AT THE GRAND JURY AND THE BOND HEARING, THEIR TESTIMONY WAS A FIRMER IDENTIFICATION.

WHICH BRINGS UP IN MY MIND THE QUESTION OF, ONE OF THE REASONS THE APPELLANT DID NOT ARGUE HERE, IS BASICALLY THE ISSUE OF WHETHER OR NOT THE STATE CALLED THESE WITNESSES, KNOWING THAT ALL THEY WERE GOING TO DO WAS IMPEACH THEM. THEY HAD NO OTHER EVIDENCE TO OFFER, OTHER THAN THIS VAGUE IDENTIFICATION, AND THEN THE STATE WAS GOING TO IMPEACH THEM. WAS THAT A PROPER CALLING OF THESE WITNESSES BY THE STATE?

I WOULD SAY THAT THE STATE DIDN'T CALL THEM FOR MERE IMPEACHMENT PURPOSES. THEY, EACH WITNESS DID OFFER ADDITIONAL EVIDENCE.

WHAT DID, LIKE, FOR EXAMPLE, WHAT DID THE YOUNG GIRL, THE 14-YEAR-OLD, HAVE TO OFFER, OTHER THAN HER IDENTIFICATION OR LACK OF IDENTIFICATION OF MR. IBAR?

SHE ALSO TESTIFIED THAT THE POLICE OFFICERS WERE THERE FOR THE SEARCH WARRANT. THEY WERE THERE THAT NIGHT. SHE ADDED --

WHAT DOES THAT ADD? WHAT ISSUE OR WHAT DOES THAT ADD TO THE TRIAL HERE?

IT GIVES FURTHER SUPPORT TO THE OFFICER'S TESTIMONY -- THE OFFICERS' TESTIMONY THAT THEY DID CONDUCT A SEARCH OF THAT HOUSE AND THAT THEY DID TALK TO THESE WITNESSES, SO EACH WITNESS WAS INTERLINKED WITH ANOTHER WITNESS, WHETHER IT BE FOR IDENTIFICATION OR WHETHER IT BE FOR THE ACTIONS OF THE OFFICERS, SO I WOULDN'T SAY THAT THEY WERE CALLED MERELY FOR IMPEACHMENT PURPOSES. TURNING TO THE THIRD ARGUMENT, UNLESS THERE ARE OTHER QUESTIONS ON THE -- LET ME SAY ONE MORE THING ON THE IDENTIFICATION. WHETHER OR NOT THESE WITNESSES WERE, THE TESTIMONY SHOULD HAVE COME IN AS IT DID, EVERYTHING IS GOING TO BE HARMLESS. WE HAVE A VIDEOTAPE OF THE CRIME. THE --

THAT WAS PLAYED TO THE JURY.

THAT WAS PLAYED TO THE JURY MANY, MANY TIMES. THEY HAD PHOTOGRAPHS, STILL PHOTOGRAPHS FROM THAT VIDEOTAPE. THE JURY COULD LOOK AT THE VIDEOTAPE, LOOK AT THE DEFENDANT, AND THEY SPENT MANY HOURS WITH THE DEFENDANT IN THE COURTROOM, AND THEY COULD COME TO THEIR OWN CONCLUSION. IN ADDITION TO THAT, THERE IS GARY FOY'S TESTIMONY, AND HE SAID THAT HE SAW TWO MEN IN K Cs CAR, THE BLACK MERCEDES DRIVING AWAY FROM THE SCENE SHORTLY AFTER THE CRIME, WAS THE TIME FRAME, AND HE GOT A LOOK AT THEM, WHETHER IT BE FOR A FEW MINUTES, A FEW SECONDS AT A TIME OR FOR A LONG ENOUGH PERIOD OF TIME, HE WAS ABLE TO IDENTIFY THOSE DEFENDANTS. EXCUSE ME. HE WAS ABLE TO IDENTIFY MR. IBAR. HE WAS UNABLE TO IDENTIFY MR. PANALVAR. HOWEVER, HE DID GIVE AN IDENTIFICATION AS TO WHAT MR. PINALVAR WAS WEARING, SO IT LINKED THOSE TWO DEFENDANTS TOGETHER. IN ADDITION TO THAT, THERE ARE OTHER WITNESSES WHO PLAYSED THE DEFENDANT WITH THE CAR AT ANOTHER LOCATION, WITH THE GUN AT ANOTHER LOCATION, THAT WAS SIMILAR TO THE GUN THAT WAS SEEN ON THE VIDEOTAPE, SO THERE IS PLENTY OF EVIDENCE --

WHO ARE THOSE WITNESSES?

MR. CLEMESCO, KIM SANDS, AND MR. DAVE PHILLIPS.

WHO WAS DAVE FILL SNIPS.

HE WAS A FRIEND OF KIM SANDS'S BROTHER.

JUST ASSUMING THAT WE WOULD FIND IT IS PRESERVED BECAUSE THE HARMLESS ANALYSIS ONLY COMES IN AT THAT POINT, DO WE LOOK AT THE POTENTIAL EFFECT ON THE JURY AND HOW DO YOU, THE FACT THAT A PRIOR JURY HUNG, IS THAT SOMETHING THAT IS AT ALL, YOU KNOW, IF IT IS SO CLEAR ON THE, THAT THE VIDEO IS HIM AND THAT THE JURY JUST NEEDS TO LOOK AT THE VIDEO AND THEY KNOW IT IS HIM, WHAT EXPLAINS THE PRIOR JURY HANGING ON THIS CASE WITH NO PHYSICAL EVIDENCE, WITH THE DNA EXCLUDING MR. IBAR ON THE SHIRT THAT HE SUPPOSEDLY WORRY AND NO FINGERPRINTS WHATSOEVER. WHAT, NO MOTIVE, NO --

THERE SEEMS TO BE PLENTY OF MOTIVE BUT NOT THAT THE STATE HAS TO PROVE THAT BUT THE VIDEOTAPE ITSELF, SHOWS THAT THE MOTIVE WAS SOME SORT OF ROBBERY IN AN ATTEMPT TO GET SOME PROPERTY.

IN TERMS OF DO WE LOOK AT THE FACT THAT THERE IS A PRIOR HUNG JURY ON SOMETHING WHERE THE EVIDENCE IS SO OVERWHELMING?

I DON'T BELIEVE SO, BECAUSE THE CIRCUMSTANCES WERE MUCH DIFFERENT. YOU HAD TWO DEFENDANTS BEING TRIED TOGETHER. THEY ARE POINTING FINGERS IN DIFFERENT DIRECTIONS, AS TO WHO WAS ON THE VIDEOTAPE. SO THAT JURY HAD A DIFFERENT MIX OF INFORMATION TO DELIBERATE, AND WHETHER OR NOT COUNSEL FOR MR. IBAR, TRIAL COUNSEL FOR MR. IBAR BELIEVES THAT MRS.^CASAS'S TESTIMONY WAS THE DECIDING FACTOR FOR A HUNG JURY, THAT IS SOMETHING THAT YOU KNOW, WE SHOULDN'T SPECULATE ON THAT.

DID ALL OF THAT, IN THE PRIOR TRIAL, DID ALL OF THE TESTIMONY COME IN AS SUBSTANTIVE EVIDENCE LIKE IT CAME IN IN THIS CASE?

THE SAME ARGUMENTS WERE MADE, YES.

WOULD YOU ADDRESS, BOTH SUBSTANTIVELY AND FROM A PROCEDURAL PRESERVATION STANDPOINT, THE LINE OF TESTIMONY THAT WAS DIRECTED TO THE SEQUENCE OF THE INVESTIGATION, AND THE MENTION OF POSSIBLE COLLATERAL INVOLVEMENT IN OTHER CRIMES, WITH A CALL FROM HOMICIDE BEING INVOLVED, BECAUSE WE HAVE HAD OTHER CASES FROM THE FT. LAUDERDALE AREA, WHERE THE SEQUENCE OF THE INVESTIGATION HAS BROUGHT FORTH INFORMATION CONCERNING COLLATERAL CRIMES, AND THIS COURT HAS HELD THAT THAT IS NOT ADMISSIBLE EVIDENCE AND IT IS REVERSIBLE ERROR. COULD YOU ADDRESS THAT ASPECT? IT ISN'T DISCUSSED IN ORAL ARGUMENT BUT YOU SEEMED TO HAVE ADDRESSED ALL OF THE OTHER --

COLLATERAL CRIMES AS FAR AS MR. IBAR?

YES.

WITH THE TIP COMING IN FROM MIAMI-DADE?

NOT COMING FROM DADE BUT COMING FROM HOMICIDE.

YES. THE OFFICER WAS ASKED THE QUESTION, HOW DID HE ARRIVE AT SELECTING MR. IBAR? TO SET THIS UP, THE JURY HAD BEEN INFORMED THAT THERE WAS A STILL PHOTO TAKEN FROM THE VIDEOTAPE, AND IT WAS TRANSMITTED TO ALL AREA HOMICIDE OR POLICE DEPARTMENTS. THE CONNECTION WAS MADE THAT A HOMICIDE DETECTIVE SAW MR. IBAR AND SAW THE PHOTO AND MADE THE CALL. HIS NAME AND HIS EMPLOYMENT WAS MENTIONED.

WHICH THE DEFENDANT SUGGESTS IS INAPPROPRIATE.

RIGHT. IT WAS NEVER MENTIONED AGAIN. IT WAS MERELY, NOT THAT MR. IBAR WAS IN CUSTODY, NO THAT MR. IBAR WAS IN CUSTODY, WAS IN CUSTODY FOR A PARTICULAR CRIME OR WAS A SUSPECT ON A PARTICULAR CRIME. SPECIFICALLY NOT IN CUSTODY OR A SUSPECT IN ANY HOMICIDE OR VIOLENT CRIME. IT WAS JUST HIS NAME AND RANK, HIS EMPLOYMENT, AND WHERE IT CAME FROM. IT WAS NOT USED IN CLOSING.

HOW IS THAT ADDRESSED PROCEDURALLY? WAS THAT BY THE DEFENDANT? DID THE DEFENDANT OBJECT TO THAT? WHAT WAS DONE WITH REGARD TO THAT?

HE DID NOT OBJECT TO THAT RIGHT AWAY. IF I COULD JUST, IT WAS ABOUT 30 MINUTES LATER, AFTER THAT COMMENT THAT, THAT STATEMENT WAS MADE, THAT THE STATE ATTORNEY WENT TO SIDE BAR ON A DIFFERENT MATTER, AT WHICH POINT, THEN, THE DEFENSE COUNSEL SAID, OH, AND BY THE WAY, I OBJECT TO THAT OTHER COMMENT.

WAS THAT A REQUEST FOR CORRECTIVE ACTION?

THERE WAS DISCUSSION ABOUT IT, AND IT WAS FOUND THAT IT WAS NOT A TIMELY OBJECTION. AND THAT IS WHERE IT ENDED. TURNING TO THE FIFTH AMENDMENT AND SIXTH AMENDMENT ISSUE, UNLESS THERE ARE OTHER QUESTIONS ON THAT ISSUE, THE DEFENDANT DOES NOT HAVE A FIFTH AMENDMENT RIGHT, WITH REGARD TO STANDING IN A LINEUP. IT IS NOT TESTIMONIAL IN NATURE, AND THEREFORE THE FIFTH AMENDMENT DOES NOT APPLY AND DOESN'T ATTACH. NOW, WITH REGARD TO THE SIXTH AMENDMENT, HE WAS NOT IN CUSTODY AT THE TIME, SO, THEN AGAIN, THE SIXTH AMENDMENT DOESN'T APPLY. IT IS A CASE-SPECIFIC, OFFENSE-SPECIFIC, AND MR. IBAR --

YOUR DEFENSE COUNSEL SAYS THAT CUSTODIAL, REGARDING THIS, THE SIXTH AMENDMENT RIGHT, REFERS TO IF THE PERSON IS NOT FREE TO GO, AND HE WAS NOT FREE TO REFUSE TO ATTEND THE LINE-UP AND THEREFORE HE WAS IN CUSTODY.

THAT IS NOT THE DEFINITION OF CUSTODY, AND THAT IS NOT THE DEFINITION UNDER RULE 3.111 WITH REGARD TO THIS ISSUE. THE DEFENDANT CAN GET AN ATTORNEY AT THE TIME OF INDICTMENT, AT THE TIME OF ARREST, OR YOU KNOW, AT THE EARLIEST VENT TIME WHEN THERE ARE CHARGES PENDING. THERE WAS NOTHING PENDING IN THIS CASE.

WHAT WAS THE EFFECT OF THE -- WHAT WAS THE EFFECT OF THE WARRANT? WHAT LEGAL EFFECT?

IT WAS TO MOVE HIM FROM HIS JAIL CELL TO THE PLACE WHERE THEY COULD CONDUCT THE LINEUP.

WASN'T THAT PHYSICAL CUSTODY, IF THEY MOVED HIM FROM ONE PLACE TO THE OTHER? IN OTHER WORDS, HE REALLY HAD NO CHOICE IN THAT MATTER, DID HE NOT? WASN'T HE EFFECTIVELY IN CUSTODY FOR PURPOSES OF ATTENDING THIS LINEUP?

NO, BECAUSE HE WAS FREE TO GO UNDER, I WILL CALL IT THE BROWARD CHARGE OR BROWARD CRIME, AS SOON AS AFTER THE LINEUP WAS COMPLETED. IF HE WERE JUST OUT IN THE COMMUNITY AND HE WAS NOT IN CUSTODY FOR THE DADE CHARGE, HE WOULD NOT HAVE BEEN ABLE TO REFUSE, EITHER, AND HIS FIFTH AMENDMENT RIGHT STILL WOULDN'T HAVE APPLIED, BECAUSE HE IS GIVING NO TESTIMONIAL EVIDENCE.

WE ARE TALKING ABOUT SIXTH AMENDMENT.

HIS SIXTH AMENDMENT, AGAIN, IS NOT BEING IMPLICATED, BECAUSE HE IS NOT IN CUSTODY AT ALL.

ARE YOU SAYING THE WARRANT WASN'T NECESSARY?

I DON'T BELIEVE THE WARRANT WAS NECESSARY. HOWEVER, THE OFFICERS WENT THROUGH THE STEPS AND THEY GOT THE SEARCH WARRANT THROUGH THE DADE CIRCUIT COURT, AND THEY BROUGHT HIM TO THE LINEUP.

BUT IT DID RESULT IN HIM BEING TAKEN INTO PHYSICAL CUSTODY, DID IT NOT?

HE WAS NOT IN CUSTODY ON THAT PARTICULAR CHARGE. HE WAS MERELY MOVED FROM ONE PLACE TO THE OTHER.

THAT IS NOT REALLY MY, THE WARRANT AND THE ENFORCEMENT OF THE WARRANT, RESULTED IN HIM BEING TAKEN INTO PHYSICAL CUSTODY BY THE AUTHORITIES, DID IT NOT?

I WOULD SAY IT WAS NOT CUSTODY, AS DEFINED.

WHAT WERE THEY DOING, WHEN THEY PHYSICALLY TOOK HIM TO THE LINEUP? IN OTHER WORDS HE HAD NO CHOICE AT THAT TIME, AND HE WAS IN AN ACTUAL, THEIR CUSTODY, WAS HE NOT? AND HAVING THIS LINEUP CONDUCTED, I AM HAVING, IT SEEMS TO ME THAT WE ARE SORT OF CIRCLING AROUND ON A SEMANTICS DISCUSSION. I DON'T THINK WHAT THE EFFECT OF IT WAS, BUT IN TERMS OF HIM BEING RESTRAINED AND HAVING ANY CHOICE ABOUT WHERE HE WAS WHILE THAT WARRANT WAS BEING ENFORCED, HE WAS IN THE CUSTODY OF THE AUTHORITIES FOR THE PURPOSE OF HAVING THAT LINEUP CONDUCTED BECAUSE OF THE WARRANT, RIGHT?

HIS CUSTODY NEVER CHANGED, BECAUSE HE WAS IN CUSTODY ON A DADE CHARGE. WHETHER HE WAS ASKED TO PRESENT HIMSELF FOR A LINEUP PRE-INDICTMENT, PRE-ARREST, PRE-FIRST APPEARANCE ON A DIFFERENT MATTER, MERELY AS AN INVESTIGATIVE TOOL, DOESN'T MEAN CUSTODY. HE WAS IN CUSTODY FOR THE DADE CHARGE ALONE.

WHAT DID THEY KNOW AT THAT TIME, WHEN THEY APPLIED FOR THE SEARCH WARRANT? DO WE HAVE THE APPLICATION FOR THE SEARCH WARRANT IN THE FILE? IN OTHER WORDS, WHAT EVIDENCE --

I DON'T BELIEVE THAT IS IN THE FILE, BUT IF IT IS YOUR HONOR, I COULD GIVE YOU THE CITE.

WHAT DO WE KNOW ABOUT WHETHER HE WAS A LIKELY DEFENDANT IN THIS CASE?

WE HAVE GARY FOY'S IDENTIFICATION FROM A PHOTO LINEUP, WHERE HE SAID THAT HE WAS 95 PERCENT SURE THAT IT WAS MR. IBAR THAT WAS THE PERPETRATOR. HE WAS 5 PERCENT SURE ON ANOTHER PERSON. MR. FOY'S TESTIMONY AT TRIAL EXPLAINED --

NO, THEY HAD MR. FOY --

THEY HAD MR. FOY, WHO WANTED TO SEE.

THAT IS ALL THE EVIDENCE THAT THEY THIS THAT THIS DEFENDANT MIGHT BE -- THAT THIS DEFENDANT MIGHT BE THE LIKELY SUSPECT?

THAT IS WHERE IT STARTED. HE WANTED A LINEUP. MR. FOY SAID, I FEEL MORE COMFORTABLE IF I SEE THESE PEOPLE --

HAVE WE HAD ENOUGH EVIDENCE TO ISSUE AN ARREST WARRANT?

BASED ON MR. FOY'S TESTIMONY ALONE, MAYBE THEY WOULD HAVE. THEY MIGHT HAVE HAD PROBABLE CAUSE, BUT IT STILL WAS EARLY IN THE INVESTIGATION. AS FAR AS YOU KNOW, MR. FOY HAD SEEN THESE PEOPLE DRIVE AWAY.

I MEAN, I GUESS WHAT I AM CONCERNED WITH IS THAT, IF THEY HAD USED THIS WHATEVER THEY HAD TO GET A SEARCH WARRANT, ANOTHER WARRANT, AND PLAYED A GAME THAT WE WILL CALL IT FOR AT LINEUP A SEARCH WARRANT RATHER THAN AN ARREST WARRANT, WE DON'T WANT TO HAVE THOSE KINDS OF THINGS HAPPEN, DO WE?

THERE WAS NO ARREST UNTIL THE END OF AUGUST, WITH THE INDICTMENT. THAT IS ONCE THEY HAD THE INFORMATION ON MR. PANALVAR ON THE FULL --

HE WAS IN CUSTODY, AS YOU SAY, IN DADE COUNTY.

BUT THE FACT REMAINS THAT THERE WASN'T AN ARREST UNTIL MUCH LATER IN TIME.

SO I GUESS THE REAL QUESTION IS THESE OTHER PEOPLE WHO IDENTIFIED, THESE SIX PEOPLE

THAT WE TALKED ABOUT ALL MORNING, HAD THOSE IDENTIFICATIONS BEEN MADE, AT THE TIME THAT THIS ARREST WARRANT, I MEAN, SEARCH WARRANT WAS ISSUED?

THEY MAY HAVE TALKED TO THE MOTHER, BECAUSE THERE WAS A SHORT TIME BETWEEN TALKING TO HIM AND DOING THE, THEY MAY HAVE TALKED TO THE MOTHER AND THE MAID, THE MOTHER'S FRIEND AND HER DAUGHTER AT THAT TIME, SO THEY WOULD HAVE HAD ADDITIONAL INFORMATION FROM THERE.

THAT WOULD, I MEAN, THAT, ACCORDING TO WHAT YOU, WHAT THE OFFICER SAID, HE SAID THAT'S HIM! THERE WASN'T ANY, I MEAN, ACCORDING TO, SO THAT IS, THAT IS, IN TERMS OF WHAT THERE WAS, YOU HAVE GOT FOY AND THE MOTHER SUPPOSEDLY IDENTIFYING HIM OFF THE VIDEOTAPE.

OKAY. BUT THAT DOESN'T MEAN THAT THEY HAVE TO ARREST HIM AT THAT POINT. THEY COULD HAVE, AND AS THEY DID IN THIS CASE, THEY GOT ADDITIONAL INFORMATION. THEY GOT INFORMATION FROM MR. CLEMESKO AS TO THE GUN. WHO WAS SEEN WITH THE GUN. WAS THERE A GUN AVAILABLE, SO THERE WAS ADDITIONAL POLICE INVESTIGATORY ACTION TAKEN, POST THE LINEUP. IN ANY CASE, WITH, EVEN IF THE LINEUP IS FOUND TO BE IMPROPER, IT IS GOING TO BE HARMLESS ERROR IN THIS CASE. MR. FOY TESTIFIED AT TRIAL, AND THE PHOTO LINEUP WAS CONDUCTED BEFORE THAT, AND THE PHOTO LINEUP WAS OF A PHOTO OF MR. IBAR, TAKEN ON THE 14th AND MR. FOY IDENTIFIED THAT ON THE 15th, AS BEING 95 PERCENT SURE, AND AS I SAY, HE TESTIFIED AT TRIAL THAT HE WAS SURE THAT IT WAS MR. IBAR. UNLESS THERE ARE ANY OTHER QUESTIONS OF THE COURT, I WOULD RELY ON MY BRIEF AND ASK THIS COURT TO AFFIRM.

CHIEF JUSTICE: THANK YOU. MR. MARSHAL, HOW MUCH TIME ON REBUTTAL?

SEVEN.

THANK YOU, YOUR HONORFUL I WOULD LIKE TO CLARIFY ONE THING. IT IS NOT A SIXTH AMENDMENT ISSUE. I DIDN'T RAISE IT AS A SIXTH AMENDMENT ISSUE, BECAUSE THE FLORIDA CONSTITUTION IN 3.111 BEGINS THE RIGHT TO COUNSEL AT AN EARLIER STAGE THAN THE FEDERAL COURTS DO. THERE IS IT IS A CRITICAL STAGE AND HERE IT IS AS SOON AS FEASIBLE AFTER CUSTODIAL RESTRAINT AND THEY DON'T USE THE WORD ARREST. THEY USE CUSTODIAL RESTRAINT, AND THAT IS THE REASON I RAISED THAT ISSUE AND HERE TODAY IS FIRST OF ALL, WE MOST AGREE, THAT IS AN OBJECTION, AND SECOND OF ALL I THINK IT IS POWERFUL PIECE OF EVIDENCE AND THE PROSECUTOR USED IT AS A POWERFUL PIECE OF EVIDENCE BECAUSE THE PHOTO ARRAY IDENTIFICATION WAS NOT MADE BY MR. FOY AND THE OFFICER SAID THAT FOY'S IDENTIFICATION AT THE PHOTO ARRAY WAS POSSIBLE.

HOW DOES THIS DIFFER FROM --

THIS IS AN ARTICLE ONE CASE, AND THIS COURT SAID IN TRAYNOR, THAT THE RIGHT TO COUNSEL DOESN'T BEGIN EARLIER, AND WE DISAGREE.

DO YOU MAKE THE CLAIM?

NO. WE MAKE IT UNDER ARTICLE I, SECTION 912. I FORGOT. BECAUSE FLORIDA SAYS EARLIER. I I DON'T MAKE A FIFTH AMENDMENT CLAIM. I DRAW ANALOGY TO FIFTH AMENDMENT BECAUSE THERE ARE NO SIXTH AMENDMENT RIGHT TO COUNSEL CASES AS REGARDS WHAT CUSTODIAL RESTRAINT IS. I REFER TO FEDERAL CASES BECAUSE IN UNITED STATES VERSUS BYNUM, THEY TALK ABOUT THE DEFENDANT IN CUSTODY ON AN UNRELATED MATTER INTERVIEWED BY POLICE IS ENTITLED TO HIS FIFTH AMENDMENT RIGHTS BECAUSE IS HE CUSTODY AND I DIRECT THE COURT TO A MAN BEING TOLD TO STAND IN ONE SPOT WHILE THE SEARCH WARRANT IS EXECUTED.

YOU ARE SAYING IT IS NOT CONSTITUTIONAL.

YES.

YOU ARE, ASSUMING YOU ARE CORRECT AND IT VIOLATED A RULE, IS THE REMEDY FOR A RULE VIOLATION ANY DIFFERENT THAN A REMEDY FOR A CONSTITUTIONAL VIOLATION?

WITH ALL ALL DUE RESPECT, THE RULE, THE FLORIDA CONSTITUTION IS INTERPRETED BY THE RULE. THIS COURT SAID IN Traynor THAT THE DEFENDANT'S RIGHT TO COUNSEL IS SAID FORT IN 3.111, SO YOU HAVE RAISED IT AS A CONSTITUTIONAL VIOLATION, AND IF THE COURT WERE TO STRIKE ALL TESTIMONY REGARDING THE LIVE LINEUP, I BELIEVE IT IS HARMFUL ERROR, BECAUSE IT WHAT IS LEFT IS DISPUTED IDENTIFICATIONS FROM THE PHOTOGRAPH AND FOY'S PHOTO ARRAY.

LET'S BACK UP TO JUST FOR A MOMENT AND AGREE AND ASSUME THAT IT IS A RULE VIOLATION, NOT A CONSTITUTIONAL VIOLATION. IS IT THE SAME REMEDY, THEN, THAT HAS TO BE APPLIED THAN IF IT WERE A CONSTITUTIONAL VIOLATION?

I WOULD SAY YES. I WOULD SAY YES, BUT I BELIEVE THE RULE PARROTS, AS, THIS COURT IN TRAINOR, SAID THE RULE IS THE CONSTITUTIONAL PROVISION. ANOTHER THING REGARDING THE FEDERAL CASES, YES, THERE ARE FEDERAL CASES THAT ALL CONSTRUE HOW THIS TESTIMONY IS ADMISSIBLE, AND THE FEDERAL CASES ALL TALK ABOUT 701. I HAVE NOT FOUND AND THE STATE DID NOT STATE ANY CASES SAYING WHEN AN INDIVIDUAL MAKES AN OBSERVATION OR OFFERS AN OPINION REGARDING WHO IS DEPICTED IN THE STILL PHOTOGRAPH, AND THAT PERSON TESTIFIES, THAT IS ADMISSIBLE, BUT THE QUESTION BECOMES WHEN THE THIRD PARTY HEARS THAT ON THE STREET AND WANTS TO TESTIFY, WHETHER THAT IS ADMISSIBLE UNDER IMPEACHMENT OF 608 OR SUBSTANTIVE EVIDENCE UNDER 801-2-C. I HAVE NOT FOUND ANY CASES THAT SAY THAT THE DECLARANT ON THE STILL PHOTOGRAPH IS THE SAME AND THE REASON I SET FORTH THIS MATTER OF HORRIBLES, IS BECAUSE YOU CAN TAKE A WITNESS AND THERE IS GOING TO BE MORE AND MORE OF THIS BECAUSE SURVEILLANCE CAMERAS ARE MORE AND MORE POPULAR, YOU CAN TAKE THE DEFENSE OR PROSECUTION AND MAKE WITNESSES, AND WHEN THE WITNESSES TAKE THE STAND AND RENEGE OR RECANT OR ARE AFRAID THAT THEY HAVE STEPPED ON THE WRONG FOOT, YOU BRING IN A PRIVATE INVESTIGATE OR OR POLICE OFFICER AND THESE PEOPLE SUDDENLY HAVE THEIR OBSERVATIONS, WHETHER IN THE MALL OR A STREET CORNER BAR, AND IT IS SET IN STONEANT JURY IS TOLD THAT THE OFFICER'S TESTIMONY OR PRIVATE INVESTIGATOR'S TESTIMONY IS AS IF THESE PEOPLE MADE AN IDENTIFICATION. THE REASON THAT I PUT PURIER IN THE BRIEF IS BECAUSE THIS COURT SEEMED DISINCLINED TO STAND WHERE 801-2-C IS AND THAT IS WHERE THE PERSON MADE A DESCRIPTION BUT NOT AN IDENTIFICATION AND I AM ASKING THIS COURT TO NARROWLY CONSTRUE 801-2-C. WHAT I POINT TO, THE MORTON OR STOHL ISSUE, THERE IS NO DOUBT THE STATE CALLED WITNESSES FOR THE SOLE PURPOSE OF IMPEACHMENT AND THE PROSECUTOR SAID I AM GOING TO PUT WITNESSES ON AND PUT ON THE INVESTIGATOR TO IMPEACH THEM. THE MORTON STATEMENT, THIS IS REBUTTAL IN THE MORTON/STOHL ISSUE AND THERE WAS NO OBJECTION TO THAT, THE STATE CALLED THE DEFENDANT'S SISTER-IN-LAW FOR THE SOLE PURPOSE OF IMPEACHING HER AND HE SAID IT WAS JUST TO THE PURPOSE OF IMPEACHING HER. HE CALLED HER TO THE WITNESS STAND TO SAY THAT SHE RECALLED BUYING A TELEPHONE CALLING CARD IN IRELAND, AND HE SAID THANK YOU VERY MUCH, SO THE WITNESS THEN WAS CALLED TO SAY THAT WE DON'T SELL THEM IN IRELAND, AND THE WITNESS WAS CALLED SOLELY TO DISPROVE THEM, AND THERE IS A MOTION MADE AS TO MORTON STOHL, AS TO IMPEACHMENT BEING POSSIBLE.

THE STATE, THE DEFENSE ORIGINALLY CALLED TANIA, THE ALLEGED GIRLFRIEND, AND THE GIRLFRIEND TESTIFIED THAT SHE RECEIVED A CALL FROM HER MOTHER THAT THEY FOUND IBAR IN HER ROOM, HER MOTHER AND HER, HER AUNT AND HER SISTER FOUND IBAR IN HER ROOM, AND THEY TALKED TO THE MOTHER. THE MOTHER HAD CALLED THEM. IS THAT WHAT THE --

THE MOTHER AND HER DAUGHTER MIMI WERE IN IRELAND. THEY CALLED HOME. THEY HEARD ON THE TELEPHONE, THAT PABLO HAD SNUCK INTO TANYA'S ROOM THAT WEEKEND, AND WHEN THE MOTHER AND MIMI GOT HOME, THERE WAS HELL TO PAY. WHAT HAPPENED IS THE MOTHER GOT ON THE WITNESS STAND. TANYA AND THE BABY-SITTER, ALL TESTIFIED THAT THIS PHONE CALL CAME IN. IT WAS THE LAST WEEKEND IN JUNE, AND THAT IS HOW THEY WERE ABLE TO PINPOINT THE ALIBI. WELL, THE PROSECUTOR HAD DEPOSED MIMI AND IN THE DEPOSITION MIMI SAYS, YEAH, WE CALLED HOME. I REMEMBER WE USED A CALLING CARD AND BOUGHT IT IN AN IRISH HOTEL, BLAH BLAH BLAH. IN REBUTTAL, THE PROSECUTOR CALLS MIMI AND SAID YOU CALLED HOME? YES, I DID. WHAT DID YOU USE? A CALLING CARD. WHERE DID YOU GET IT? AT AN IRISH HOTEL, THANK YOU VERY MUCH. THEN CALLED MR. McELROY IN CHARGE OF VENDING MACHINES AND SAID MR. McELROY, DID YOU SELL CALLING CARDS IN IRISH HOTELS BACK IN 1994? NO, WE DID NOT. SO THE PROSECUTOR WAS ABLE TO ARGUE THAT HE CALLED MIMI TO SAY ONE THING. HE PROVED THAT IT WAS NOT TRUE, AND THE WHOLE ALIBI FELL, AND HIS QUOTE WAS "LIKE A CASTLE OF SAND AT THE SEA." THAT IS HOW THAT SCENARIO WENT.

THAT WAS USED AS JUST, THAT WAS, THAT WASN'T INTRODUCED AS SUBSTANTIVE EVIDENCE. THAT WAS TRUE IMPEACHMENT, CORRECT?

WELL, I GUESS BY CALLING MIMI, THAT IS SUBSTANTIVE EVIDENCE, AND THEN IMPEACHING HER, THAT IS IMPEACHMENT. WHAT, THE REASON WE OBJECTED WAS THE ONLY REASON HE CALLED MIMI AND THE ONLY REASON HE CALLED MS.^VACARA AND VENDELL WAS TO IMPEACH THEM.

CHIEF JUSTICE: WITH THE COURT'S ASSISTANCE, WE HAVE CONCLUDED THE TIME FOR THIS CASE. THANK YOU VERY MUCH. THE COURT WILL STAND IN RECESS FOR FIVE MINUTES BEFORE CALLING THE NEXT CASE.

MARSHAL: PLEASE RISE.