

>> ALL RISE.  
HEAR YE, HEAR YE, HEAR YE.  
THE SUPREME COURT OF FLORIDA IS  
NOW IN SESSION.  
ALL WHO HAVE CAUSE TO PLEAD,  
DRAW NEAR, GIVE ATTENTION,  
AND YOU SHALL BE HEARD.  
GOD SAVE THESE UNITED STATES,  
THE GREAT STATE OF FLORIDA, AND  
THIS HONORABLE COURT.  
LADIES AND GENTLEMEN, THE  
SUPREME COURT OF FLORIDA.  
PLEASE BE SEATED.  
>> WELCOME TO THE FLORIDA  
SUPREME COURT.  
FIRST CASE FOR THE DAY IS IBAR  
VERSUS STATE OF FLORIDA.  
YOU MAY PROCEED.  
>> GOOD MORNING YOUR HONORS.  
MAY IT PLEASE THE COURT.  
BENJAMIN WAXMAN OF MIAMI LAW  
FIRM OF ROBBINS, TUNKEY, ROSS  
AMSEL, RABEN AND WAXMAN ON  
PABLO IBAR.  
I RESERVE FOUR MINUTES FOR  
REBUTTAL.  
MR. IBAR WAS CONVICTED BASED ON  
HIS RESEMBLANCE TO A BLURRY  
IMAGE TO THE, BLURRY IMAGE  
OF ONE THE MURDERERS IN A  
20-YEAR-OLD, GRAINY, SOUNDLESS,  
BLACK AND WHITE VIDEOTAPE.  
THIS COURT ACKNOWLEDGED THAT  
THIS WAS THE PRIMARY EVIDENCE  
AGAINST THEM IN IBAR AND PENALVER  
DECISIONS.  
BUT THE MOST SIGNIFICANT  
EVIDENCE IN THIS CASE WAS THE  
EXCULPATORY BLUE T-SHIRT THAT  
THE MURDERER HAD WRAPPED AROUND  
HIS FACE AND THRASHED AROUND THE  
MURDER SCENE FOR 20 MINUTES,  
COMING INTO CONTACT WITH ALL OF  
THE VICTIMS AND VARIOUS PARTS OF  
THE SCENE BEFORE HE WIPED HIS  
FACE IN HIS HEAD, IN THE SHIRT,  
THREW IT OVER HIS SHOULDER AND  
DEPOSITED IT IN FRONT OF THE  
HOUSE.  
THAT T-SHIRT WAS EXAMINED FOR

ALL OF THE BIOLOGIC MATERIAL  
COMING FROM THE UNDOUBTEDLY  
COVERED IN THE ENTIRE SHIRT.  
ALL THE EVIDENCE, THE SWEAT, THE  
BLOOD, THE DNA, THE HAIR, ALL OF  
IT EXCLUDED MR. IBAR.

THAT WAS JUST LIKE THE  
EXCULPATORY FINGERPRINTS THAT  
THE MURDERER HAD LEFT ALL OVER  
THE CRIME SCENE --

>> LOOKS LIKE YOU'RE GIVING A  
CLOSING ARGUMENT IN THE CASE.

>> WHAT I'M TRYING TO DO IS  
EXPLAIN TO THIS COURT THERE WAS  
JUST A RAFT OF EXCULPATORY  
EVIDENCE AND THAT THE EVIDENCE  
OTHERWISE WAS VERY THIN.

>> DID THE JURY HEAR THAT  
EVIDENCE?

>> JURY DID HEAR THAT EVIDENCE  
BUT THE EVIDENCE THAT THE JURY  
DIDN'T HEAR WAS THE VITAL  
TESTIMONY OF AN EXPERT TO  
ANALYZE THE KEY PIECE OF  
EVIDENCE IN THIS CASE, THE  
VIDEOTAPE AND TO DEMONSTRATE  
THAT IT WAS OF SUCH DEFICIENT  
QUALITY, THAT IT COULD NOT BE  
THE BASIS OF ANY REASONABLE,  
RELIABLE IDENTIFICATION OF  
MR. IBAR.

>> WOULD YOU GO INTO THAT, INTO  
THE SPECIFICS OF IT.  
GOING THROUGH READING THE  
MATERIAL IN CONNECTION WITH THIS  
CASE AND I DON'T KNOW THAT I'VE  
SEEN A LAWYER BEHAVE AS THIS  
LAWYER HAS.

MORGAN IN THIS CASE, SEEMS, OFF  
THE WALL.

I MEAN TO MY MIND THIS IS NOT  
PROFESSIONAL BEHAVIOR BUT WHAT  
IS, WHAT WAS ESTABLISHED AT THE  
POST-CONVICTION EVIDENTIARY  
HEARING IN THE NATURE OF THE  
SUBSTANCE OF THAT TESTIMONY?  
I UNDERSTAND THE, YOU KNOW, HOW  
POORLY THIS THING WAS ADDRESSED.  
IF YOU ACCEPT THAT EXPERT, THE  
FACIAL EXPERT AND THE, I GUESS

ANTHROPOLOGIST HE HIRED OR DIDN'T HIRE AND THAT KIND OF THING BUT WHAT DID YOU, WHAT DID YOU PROVE WITH REGARD TO THE PREJUDICE PRONG OF THIS ANALYSIS?

>> WE PRESENTED ONE OF THE PREEMINENT EXPERTS IN THE WORLD, DR. EVANS, OR MR. EVANS, I'M SORRY, FROM THE U.K., A PLACE THAT HAD USED, HAS 2/3 OF THE CCTV CAMERAS IN THE ENTIRE WORLD AND --

>> IS THAT THE ONLY EVIDENCE? YOU RELY ENTIRELY ON THE EVIDENCE?

>> WELL THAT WAS EXPERT --

>> I'M ASKING, IS THAT WHAT YOU RELY ON?

>> WELL, THERE WAS ALSO TESTIMONY FROM DR. FALSETTIE OF THE ACCEPTANCE OF THIS TYPE OF TESTIMONY.

>> DIDN'T TESTIFY ABOUT THIS CASE?

>> NO, HE DID NOT.

>> THAT WHAT I'M TALKING ABOUT THIS CASE, THE EVIDENCE.

>> IT IS BASED ON MR. EVANS AND HE HAS BEEN DOING THIS FOR DECADES.

HE IS THE LEADER OF THE MANCHESTER UNIT OF IDENTIFICATION IN THE U.K. HE IS ONE OF THREE REGISTERED EXPERTS ON THEIR COUNCIL OF REGISTERED EXPERTS.

>> WAS THAT, WAS HE AT THE TIME OF THESE EVENTS?

>> HE DIDN'T, HE DIDN'T ACHIEVE ALL OF THOSE THINGS AT THIS TIME BUT WHAT HE DID TESTIFY ABOUT --

>> WHAT ABOUT THE SCIENCE YOU'RE PRESENTING TO THAT LEVEL?

>> IT WASN'T ACCEPTED SCIENCE IN 2000.

HE TESTIFIED ABOUT THAT HE TESTIFIED THAT HE AND HIS MENTOR, RICHARD NEED --

>> WHAT WAS HIS ANALYSIS BASED

ON?

WASN'T IT BASED ON A COMPARISON OF THE VIDEO WITH PHOTOGRAPHS OF THE DEFENDANT THAT WERE MADE YEARS AFTER THE CRIME WAS COMMITTED AND THE TRIAL TOOK PLACE?

>> WELL HE DID A NUMBER OF DIFFERENT ANALYSES BUT CERTAINLY ONE OF THEM AND THE PREDOMINANT ONES THAT'S IN THE RECORD WAS BASED ON A PICTURE THAT WAS TAKEN OF MR. IBAR AROUND THE TIME THAT HE DID HIS ANALYSIS AND HIS TESTIMONY WAS --

>> DID HE ALSO USE HE PHOTOS THAT WERE CONTEMPORANEOUS WITH THE CRIME, LIKE A BOOKING PHOTO OR -- I'M SURE THERE WERE PHOTOGRAPHS OF MR. IBAR THAT WOULD HAVE BEEN CLOSER IN TIME TO THE CRIME.

DID HE ANALYZE THOSE?

>> HE DID EXAMINE THOSE BUT THE PROBLEM WAS THAT THEY DIDN'T HAVE THE CORRECT ANGLE THAT HE NEEDED TO DO IN ORDER TO DO THE FACIAL MAPPING AND THE OTHER BIOMETRICS THAT WERE VITAL TO HIS PRESENTATION OF HIS CASE AND WHAT HE DID --

>> SO HIS CONCLUSIONS ARE BASED ON THESE LATER PHOTOGRAPHS, NOT THE EARLIER PHOTOGRAPHS?

>> CORRECT.

AND WHAT HE TESTIFIED TO IS THAT THE FEATURES THAT HE FOCUSED ON WERE ONES THAT WOULD NOT HAVE CHANGED OVER AGE AND IN FACT, WHAT HE DETERMINED IS THAT THE JAW LINE OF MR. IBAR, SOMETHING THAT DIDN'T CHANGE, DID NOT MATCH THAT OF THE MURDERER AND THE CHIN SHAPE DID NOT MATCH THAT OF THE MURDERER.

AND THE LIP AND SHAPE OF THE MOUTH DID NOT MATCH THAT OF THE MURDERER.

THIS IS PRECISELY THE TYPE OF TESTIMONY THAT PENALVER'S EXPERT

BACK IN 1997 GAVE IN THE FIRST JOINT TRIAL THAT RESULTED IN A HUNG JURY.

>> WHEN WE LOOKED AT WHAT MR. EVANS EVENTUALLY SAID, I MEAN, IT'S DISTURBING TO ME WHAT THIS ATTORNEY MAY NOT HAVE DONE BUT I'M STILL STRUGGLING HERE WITH THE PREJUDICE PRONG OF INEFFECTIVE ASSISTANCE OF COUNSEL AND I LOOK AT THE TESTIMONY FROM MR. EVANS AND EXPLAIN TO ME WHY WE ACCEPT, THAT HE IS AN EXPERT IN THIS PARTICULAR FIELD, BUT IT SEEMS TO ME IN THE FINAL ANALYSIS, IN ONE SENTENCE HE SAYS THIS PERSON IS NOT MR. IBAR YET IN ANOTHER PORTION OF HIS TESTIMONY WHEN WE GET TO THE CROSS-EXAMINATION HE SAYS, THIS PERSON COULD BE MR. IBAR.

SO WHAT ARE WE SUPPOSED TO DO WITH THE TESTIMONY FROM SOMEONE WHO SORT OF VACILLATING AS TO WHETHER OR NOT THIS IS OR COULD BE MR. IBAR?

>> I DON'T BELIEVE HE EVER TESTIFIED THIS WAS NOT MR. IBAR. HE TESTIFIED IT COULD BE MR. IBAR BECAUSE THAT WAS NOT HIS TESTIMONY TO GIVE.

>> HE SAYS IT COULD BE MR. IBAR, OKAY?

>> NO DIFFERENT, NO DIFFERENT THAN WHAT IS ISCAN TESTIFIED TO IN PENALVER'S TRIAL THAT THIS COURT RECOGNIZED IN THE PENALVER OPINION.

>> WE TAKE THE EVIDENCE THAT IT COULD BE MR. IBAR, WE LOOK AT EVIDENCE OF OTHER PEOPLE WHO TESTIFIED AT THE TRIAL THAT THEY BELIEVE THIS PHOTOGRAPH WAS MR. IBAR.

WE LOOK AT THE TESTIMONY FROM THE NEIGHBOR OF THE MALE VICTIM WHO SAYS THAT THE PERSON WHO CAME OUT OF THE VICTIM'S DRIVEWAY IN THE CAR WAS

MR. IBAR.

WHAT ARE WE SUPPOSED TO DO WITH ALL OF THAT TESTIMONY?

>> I THINK WHAT YOU NEED TO LOOK A LITTLE MORE CLOSELY AT THAT TESTIMONY BECAUSE FRANKLY THE TESTIMONY OF WHAT I'VE CALLED THE THIRD PARTY IDENTIFYING WITNESSES, THE FAMILY MEMBERS, AND THE ACQUAINTANCES, MOST OF THOSE PEOPLE IN COURT AND DENIED --

>> I'M NOT EVEN TALKING ABOUT THOSE THAT WE SAID ON DIRECT APPEAL COULD NOT COME IN AS SUBSTANTIVE EVIDENCE BECAUSE SOME OF THOSE, WE DID SAY THAT, CORRECT?

>> CORRECT.

>> THOSE COULD NOT COME IN AS SUBSTANTIVE EVIDENCE BUT THERE ARE A COUPLE OF THESE WITNESSES WE SAID THEIR TESTIMONY COULD COME IN AND I'M REALLY MORE INTERESTED IN THE PERSON THE NEIGHBOR OF THE MALE VICTIM WHO DEFINITELY SAYS THAT MR. IBAR WAS THE PASSENGER IN THE CAR THAT LEFT THE NEIGHBORHOOD AND THAT HE WAS FOLLOWING HIM AND THEY WERE CLOSE AND HE SAW HIM FOR SOME PERIOD OF TIME.

>> I THINK THE COURT HAS TO NOTE A COUPLE OF THINGS ABOUT THAT TESTIMONY.

NUMBER ONE, MR. FOY NEVER IDENTIFIED MR. IBAR IN THE COURTROOM.

HE NEVER SAID, THERE'S THE GUY THAT I SAW AT THE PLACE, AT THE TIME.

HE NEVER EVEN SAID THAT THE PERSON, THAT THE PERSON IN THE, IN THE PHOTOGRAPH THAT HE SAW WAS MR. IBAR.

IN THE COURTROOM HE SAID THAT THE GUY IN THE PHOTO RESEMBLED HIS BOWLING PARTNER, JUSTIN, AND THAT'S WHAT HE TESTIFIED BUT ASIDE FROM THAT, HIS TESTIMONY

AS AN EYEWITNESS, AS AN EYEWITNESS WAS THE MOST CHALLENGEABLE KIND OF TESTIMONY THERE COULD BE.

BOTH INSTITUTIONALLY BECAUSE WE KNOW OF THE FALLIBILITY OF EYEWITNESS IDENTIFICATION, AND WITH REGARD

TO THE CIRCUMSTANCES HIS VERY LIMITED OBSERVATION OF MR. IBAR HE TESTIFIED --

>> HE BELIEVED, IF I REMEMBER CORRECTLY HE SAID HE SAW HIM FOR A PERIOD OF ABOUT SIX MINUTES IN VARIOUS STAGES, THEY WERE NEXT TO EACH OTHER AT ONE, IN THESE TWO CARS AND THAT HE, MR. IBAR ACTUALLY, YOU KNOW, WAS STARING HIM DOWN, ALL OF THIS KIND OF INFORMATION.

SO ARE YOU TRYING TO TELL ME THAT MR. FOY NEVER ACTUALLY SAID, THAT WAS MR. IBAR WHO WAS THE PASSENGER IN THAT CAR?

>> THE CIRCUMSTANCES OF HIS IDENTIFICATION --

>> DID HE OR DID HE NOT SAY THAT THAT WAS MR. IBAR?

>> NOW IN THE PHOTO ARRAY --

>> I'M TALKING ABOUT IN THE CAR THAT CAME OUT OF THE VICTIM'S DRIVEWAY IN THE NEIGHBORHOOD?

>> NO, HE NEVER SAID --

>> WHAT HE ACTUALLY TESTIFIED IS THAT HE SELECTED TWO PHOTOGRAPHS, NOT ONE, OUT OF THE PHOTO ARRAY AND THAT HE SELECTED MR. IBAR OUT OF THE LIVE LINEUP. THAT'S WHAT HE TESTIFIED.

HE NEVER TESTIFIED IN THE COURTROOM THAT MR. IBAR --

>> I DIDN'T ASK YOU IF HE SAID IN THE COURTROOM, THIS IS MR.-- DID HE SAY THAT THAT WAS THE PERSON WHO WAS IN THE CAR?

>> HE TESTIFIED THAT WAS THE PERSON THAT HE SELECTED FROM THE LIVE LINEUP.

THAT WAS THE FOCUS OF THE TESTIMONY.

BUT THERE WERE SO MANY PROBLEMS WITH HIS IDENTIFICATION.

HE HAD AN EXTREMELY, IT WASN'T SIX MINUTES.

HE TESTIFIED THERE WERE ABOUT 10 TO 15 SECONDS AT THE STOPLIGHT, WHEN HE WAS LOOKING THROUGH TWO SETS OF TINTED WINDOWS, BETWEEN HEADREST, INTO THE RISING SUN AND THAT'S WHEN HE MADE HIS IDENTIFICATION.

BUT WERE THE PROBLEMS WERE MANY PROBLEMS.

HE USED A STRATEGY OF ELIMINATION AND A STRATEGY OF RELATIVE SIMILARITY IN HIS IDENTIFICATION FROM THE PHOTOGRAPHS.

OUR EXPERT THAT WE PRESENTED IN THE POST-CONVICTION PROCEEDING SAY SAID THOSE ARE THE STRATEGIES THAT ARE ASSOCIATED WITH UNRELIABLE IDENTIFICATIONS. MR. IBAR WAS THE ONLY ONE WHOSE PICTURE HE WAS EXPOSED TO BEFORE THE LIVE LINE UP.

HE HAD A LIMITED OPPORTUNITY TO OBSERVE.

HE WAS NOT, HE WAS PRESENTED A SIMULTANEOUS PHOTO ARRAY, INSTEAD OF SEQUENTIAL ONES, THE ONES POLICE DEPARTMENTS RELY ON TODAY BECAUSE THEY'RE MORE RELIABLE THAN THE ONES PRESENTED.

THIS WAS NOT A DOUBLE BLIND PRESENTATION.

IN OTHER WORDS --

>> ISN'T THERE EVIDENCE IN THE RECORD THAT WOULD SUPPORT THE CONCLUSION HIS IDENTIFICATION OF MR. IBAR IN THE LINEUP REALLY TOOK PLACE INDEPENDENTLY OF THAT AND WAS NOT TAINTED BY THAT? ISN'T THAT TESTIMONY WHERE HE SAID, WHEN HE, WHEN, CORRECT ME IF I'M WRONG, WHEN HE WAS AT THE LINEUP HE SAW MR. IBAR AND, THAT'S THE GUY, THAT'S THE GUY? IS THERE TESTIMONY TO THAT



EFFECT?

>> HIS TESTIMONY WAS EQUIVOCAL TO THE EXTENT THAT HE DID ACKNOWLEDGE HIS SELECTION AT THE LINEUP COULD HAVE BEEN INFLUENCED BY THE PHOTO ARRAY. AND IN FACT THAT IS A SCIENTIFIC PRINCIPLE THAT OUR EXPERT THAT WE PRESENTED BY AFFIDAVIT, BECAUSE WE WERE NEVER PERMITTED TO PRESENT TESTIMONY ON THAT ISSUE, WOULD HAVE TESTIFIED ALONG WITH EVERY OTHER VAGUERY OF EYEWITNESS

IDENTIFICATION THAT ADHERED TO THIS PARTICULAR IDENTIFICATION. THIS WAS THE WORST POSSIBLE IDENTIFICATION THAT WAS POSSIBLE SOME THE EVIDENCE IN ITSELF WAS VERY DIMINISHED BUT BEYOND THAT, MR. IBAR NEVER HAD THE EXPERT TO SHARE WITH THE JURY THESE SPECIFIC ISSUES THAT ARE, THAT ALL DEALT WITH THIS VERY LIMITED OPPORTUNITY AND VERY SUGGESTIVE AND UNRELIABLE IDENTIFICATION.

>> WAS THIS LINEUP CHALLENGED DURING THE INITIAL PROCEEDINGS?

>> THERE WAS A MOTION TO SUPPRESS FILED BUT THE MOTION TO SUPPRESS VERY QUICKLY CAME TO FOCUS ON THE ISSUE OF THE RIGHT TO COUNSEL WHICH THIS COURT ADDRESSED IN ITS DIRECT APPEAL OPINION AND REALLY THE ISSUES OF SUGGESTIVENESS AND UNRELIABILITY WERE LEFT BEHIND AND THAT IS ONE OF THE ISSUES WE RAISED IN OUR POST-CONVICTION MOTION THAT IT WAS NOT ADEQUATELY BROUGHT TO THE ATTENTION OF THE COURT.

SO THAT THAT'S OTHER PLACE WHERE MR. MORGAN, WHO IS BELEAGUERED BY ILLNESS AND PERSONAL TRAGEDY IN HIS LIFE AT THIS TIME, THAT IS ANOTHER PLACE THAT HE FELL DOWN.

HE FELL DOWN IN FAILING TO PRESENT THE TESTIMONY OF AN ENGINEER WHO HAD LOOKED AT THE

CRIME SCENE AND HAD TAKEN MEASUREMENTS AND HAD DETERMINED THAT THE PERPETRATOR WAS 2 1/2 TO THREE 1 1/2 INCHES SHORTER THAN MR. IBAR.

>> NOW WHERE WAS THAT, WHERE WAS THAT, WHEN YOU SAY HE DIDN'T USE THE ENGINEER, DID HE OBTAIN THE SERVICES OF THE ENGINEER?

>> HE DID AND HIS AFFIDAVIT IS IN OUR POST-CONVICTION MATERIALS BUT HE NEVER CALLED THIS EXTREMELY, EXCULPATORY WITNESS AND ONLY ISSUE WAS IDENTIFICATION. THERE IS ALL OF THIS EVIDENCE. THERE IS NO WAY THAT THE MURDERER --

>> ON THE ENGINEER, DIDN'T, WASN'T THEIR SOME TESTIMONY ABOUT A MARGIN OF ERROR IN HIS ANALYSIS, IF YOU TAKE INTO THE ACCOUNT THE MARGIN OF ERROR THEN HIS TESTIMONY WOULD NOT THAT BE THAT SIGNIFICANT?

>> THERE WAS TESTIMONY THERE WAS A MARGIN OF ERROR BUT THAT THIS 2 1/2 INCHES TO 3 1/2 INCHES WAS ARGUABLY OUTSIDE OF THAT MARGIN OF ERROR.

BUT IT WAS EXCULPATORY EVIDENCE IN A DEATH PENALTY CASE WHERE THE ONLY ISSUE WAS IDENTIFICATION AND THE OTHER EVIDENCE EXCULPATED AND IN FACT EXONERATED IBAR. HIS DNA, HIS HAIR, WAS NOWHERE ON THAT SHIRT. THAT THE MURDERER, WIPED HIS SWEATY FACE WITH AND THEY HAD AND THEY ANALYZED IT.

THE STICK THAT THIS GUY CAME INTO THE HOUSE WITH HAD TWO UNIDENTIFIED FINGERPRINTS ON IT, NEITHER OF WHICH MATCHED MR. IBAR, WHO WAS CONVICTED OF BEING THE PERSON WHO BROUGHT THAT STICK INTO THE HOUSE. THERE WAS SO MUCH EXONERATING EVIDENCE THAT HE HAD TO BRING IN THIS OTHER TESTIMONY THAT

EXCULPATED AND SHOWED THAT THIS  
SIMPLY WAS NOT THE MURDERER.

>> JUST, IN YOUR REBUTTAL NOW, I  
JUST WANT TO MAKE SURE, IN YOUR  
POST-CONVICTION MOTION AND YOUR  
ALLEGED BRADY HAS ANYBODY EVER  
POINTED TO THE TWO OTHER POTENTIAL  
DEFENDANTS THAT COULD HAVE BEEN  
THE PERPETRATORS OF THIS, THESE  
CRIMES?

>> THERE WERE LOTS OF POTENTIAL  
ALTERNATIVE --

>> I'M SAYING IN YOUR  
POST-CONVICTION PROCEEDING?

WE NOW KNOW MR. PENALVER --

>> HAS BEEN ACQUITTED.

>> HAS BEEN ACQUITTED.

AND THERE IS NOTHING THAT YOU  
RAISED AS FAR AS ANYTHING THAT  
COMES OUT OF MR. PENALVER'S  
TRIAL, IS THERE ANY OTHER  
EVIDENCE ABOUT ANOTHER SUSPECT?

>> THERE IS SIMPLY INFORMATION  
THAT WAS PRESENT FROM THE  
BEGINNING.

MR. SUCHARSKI HAD NUMEROUS  
ENEMIES, NUMEROUS PEOPLE THAT HE  
HAD CONFLICT WITH.

THERE WAS POSSIBILITY THAT IT  
WAS ONE OF THE OTHER PEOPLE IN  
THE LEE STREET HOUSE,  
MR. HERNANDEZ.

THERE WERE CERTAINLY OTHER  
SUGGESTIONS THAT WERE MADE.

>> BUT THOSE WERE KNOWN AT THE  
TIME OF TRIAL?

NOTHING NEW THAT HAS COME TO  
LIGHT?

NOTHING NEW HAS COME TO LIGHT?

>> NOTHING NEW IN TERMS OF A  
DIFFERENT SUSPECT BUT AGAIN THE  
POINT HERE IS THAT THE EVIDENCE  
THAT WAS INTRODUCED SIMPLY  
EXONERATED HIM AND THERE WAS  
OTHER EVIDENCE THAT NEEDED TO BE  
ADDRESSED BY THE EVIDENCE.

I WILL RESERVE THE REST OF MY  
TIME FOR REBUTTAL, THANK YOU.

>> MAY IT PLEASE THE COURT.

LESLIE CAMPBELL WITH THE

ATTORNEY GENERAL'S OFFICE,  
ON BEHALF OF THE STATE.  
THIS IS NOT A CASE WHERE  
INEFFECTIVE ASSISTANCE OF  
COUNSEL HAS BEEN PROVEN.  
WHETHER IT BE BECAUSE MR. MORGAN  
DID NOT HIRE A FACIAL  
IDENTIFICATION EXPERT OR HE  
DIDN'T CROSS-EXAMINE WITNESSES.  
>> WOULDN'T YOU HAVE TO AGREE,  
HOWEVER, THAT BASED ON THIS  
RECORD, WITH MR. MORGAN'S  
ILLNESS AND MR. MORGAN'S  
PERSONAL ISSUES, AND THE FACT  
THAT EVEN MR. MORGAN  
ACKNOWLEDGED IN THE EVIDENTIARY  
HEARING THAT THERE WERE THINGS  
THAT HE COULD HAVE DONE, HE  
COULD HAVE FOLLOWED THROUGH,  
BECAUSE HE KNEW ABOUT FACIAL  
IDENTIFICATION EXPERTS, DIDN'T  
HE?

>> HE KNEW OF THE FORENSIC  
ANTHROPOLOGIST FROM THE FIRST  
TRIAL, WHEN THERE WAS A JOINT  
TRIAL BETWEEN MR. IBAR AND  
MR. PENALVER.

HOWEVER --

>> DIDN'T HE ALSO KNOW ABOUT  
MR. FALSETTI AT THE TIME--

>> YES.

>> AT THE TIME OF THIS NEW TRIAL  
ALSO?

>> YES AND MR. FALSETTI, THE  
FORENSIC ANTHROPOLOGIST WHO  
CO-COUNSEL CONTACTED, SPOKE WITH  
AND OBTAINED FUNDS FOR AND  
OBTAINED EVIDENCE, PHOTOGRAPHIC  
EVIDENCE FOR.

>> NOW DID MR. FALSETTI, DID I  
UNDERSTAND IT AT THIS  
EVIDENTIARY HEARING AND REALLY  
LOOKED BACK AT HIS RECORDS AND  
COULD NOT FIND NOTHING REALLY  
MORE THAN A TELEPHONE  
CONVERSATION ABOUT THIS CASE.  
REALLY, WE HAVE NO EVIDENCE, I  
MEAN THE CO-COUNSEL NEVER  
TESTIFIED AT THE EVIDENTIARY  
HEARING, DID SHE?

>> NO, SHE DID NOT AND IT'S MR. IBAR'S BURDEN TO PROVE THAT THERE WASN'T EVIDENCE THAT WAS COLLECTED OR INVESTIGATED FROM MR. FALSETTI'S OR SOME OTHER EXPERT.

>> WE HAVE DR. FALSETTI'S TESTIMONY.

>> WE HAVE DR. FALSETTI'S TESTIMONY HE HAD NO RECORD OF RECEIVING ANYTHING. WE HAD WHAT HE CONSTRUED AS CONSULTATION, WHICH IN HIS DEFINITION IS RECEIVING MATERIALS, REVIEWING MATERIALS AND MAKE MAKING A DECISION ON THOSE MATERIALS.

>> IN THE JOINT TRIAL WAS THERE A FACIAL IDENTIFICATION EXPERT?

>> THERE WAS DOCTOR, A FORENSIC ANTHROPOLOGIST, NOT A FACIAL IDENTIFICATION EXPERT.

THERE WERE TWO.

AND THEY --

>> AND THEY TESTIFIED?

>> THEY TESTIFIED IN THE FIRST TRIAL.

>> THEY TESTIFIED FOR MR. PENALVER?

>> YES.

>> AND WAS, ONE OF THESE EXPERTS THE ONE THAT THE CO-COUNSEL TALKED TO AND SAID, YOU KNOW, IT'S NOT, IT DOESN'T LOOK LIKE MR. PENALVER BUT IT EVEN LOOKS LESS LIKE MR. IBAR?

>> YES, THAT IS DR. ISCAN.

>> HERE IS WHAT I'M TRYING TO UNDERSTAND.

AND JUST, APPELLANT'S COUNSEL HAS DONE, I THINK YOU WOULD AGREE VERY GOOD JOB IN DOING A CLOSING ARGUMENT IN THE FIRST TRIAL BUT I'M VERY DISTURBED ABOUT HOW KNOWING THAT THIS EVIDENCE, THE TESTIMONY REALLY IS CRITICAL AS TO WHO THIS IS IN THE PHOTOGRAPH, AND KNOWING THAT THERE WAS A FACIAL IDENTIFICATION EXPERT THAT AT

LEAST SAID TO CO-COUNSEL, THIS DOESN'T LOOK LIKE MR. IBAR, WHY YOU WOULDN'T BE DOING THAT AS THE VERY FIRST THING ON THE NEW TRIAL?

YOU SAY THERE IS NO DEFICIENCY. I CAN'T, I DON'T GET IT.

I DON'T GET HOW YOU CAN SAY THAT THAT FAILURE IS NOT UNREASONABLE UNDER THESE CIRCUMSTANCES?

>> FIRST OF ALL IN THE FIRST TRIAL THERE WAS NO, FOR MR. IBAR, THERE WAS NO ALIBI DEFENSE.

SO THAT IS SOMETHING NEW IN THE SECOND TRIAL.

IN THE FIRST TRIAL DR. ISCAN WAS SAYING THAT --

>> NO.

PLEASE STAY ON THE ISSUE OF THE FACIAL IDENTIFICATION EXPERT ABOUT HOW THAT, WHY THAT'S REASONABLE.

BECAUSE HOW DOES, IF HE HAS AN ALIBI DEFENSE, SAYING, AND THAT IS NOT HIM, THOSE AREN'T INCONSISTENT DEFENSES.

>> NO THEY ARE NOT, HOWEVER, WE, LIMITING THIS TO JUST MR. EVANS -- OR IS THIS IN GENERAL?

>> YOU SAY THERE IS NO DEFICIENCY AND I JUST WANT TO FOCUS IN HOW A REASONABLE LAWYER WOULD NOT SAY, LISTEN, I AM GOING TO, GOT THESE LAY WITNESSES SAYING THIS, I NEED TO USE THE SAME KIND OF EXPERT THAT MR. PENALVER USED AND NOT FOLLOW THROUGH WITH THAT?

>> I UNDERSTAND YOUR QUESTION, YOUR HONOR.

I NEED TO JUST SET THE STAGE. THE EXPERTS IN MR. PENALVER AND MR. IBAR'S JOINT TRIAL DID NOT SAY SPECIFICALLY THAT THOSE WERE NOT MR. PENALVER AND MR. IBAR. WHAT THEY SAID WAS THEY COULD NOT DETERMINE THAT THEY WERE OR WERE NOT.

BECAUSE OF THE, THE LEVEL A  
SCIENTIST HAS TO BE HELD TO.

>> THAT IS PRETTY IMPORTANT  
TESTIMONY.

YOU GOT OTHER PEOPLE I CAN LOOK  
AT THIS PHOTOGRAPH AND LOOKS  
LIKE HIM AND PEOPLE THAT ARE  
EXPERTS SAY, YOU CAN NOT TELL  
FROM THESE PHOTOGRAPHS, THAT  
CREATES, AT LEAST IN MY MIND,  
FIRST OF ALL, IT CREATES A  
CHANCE FOR REASONABLE DOUBT  
WHICH IS WHAT WE WOULD BE  
LOOKING FOR AND AS FAR AS NOT  
THINKING THEY TESTIFIED, IT  
CERTAINLY HAS THE POTENTIAL FOR  
UNDERMINING CONFIDENCE IN THE  
OUTCOME OF THIS CASE, THAT IS,  
THAT WHETHER MR. IBAR IS ONE OF  
THE COPERPETRATORS OF THIS  
TERRIBLE CRIME.

AND --

>> AND IF YOU MR. EVANS AND  
EXPERTS, THE EXPERTS IN THE  
JOINT TRIAL AND IN THE  
POST-CONVICTION ALL SAY THAT  
THOSE THAT KNOW A DEFENDANT, OR  
KNOW A PERSON COULD MAKE A  
DETERMINATION THAT THE PERSON  
THAT IS IN THE PHOTOGRAPH IS THE  
PERSON THAT THEY KNOW.

MORE SO THAN AN EXPERT WHO WAS  
HELD TO A MUCH HIGHER LEVEL OF,  
OF HAVING TO SAY TO A SCIENTIFIC  
LEVEL, TO A SCIENTIFIC DEGREE  
THAT IS OR IS NOT THE --

>> IS THAT WHAT THEY SAID?

I GUESS I'M HAVING, I'M HAVING A  
PROBLEM WHAT THEY ACTUALLY SAID  
ABOUT WHAT A PERSON WHO KNOWS,  
EVEN A LAYPERSON WHO KNOWS THE  
DEFENDANT, FOR EXAMPLE, WHETHER  
OR NOT THEY WOULD HAVE A BETTER  
CHANCE OF IDENTIFYING SOMEONE  
FROM THAT PHOTOGRAPH?

>> THEY COULD MAKE THAT  
DETERMINATION WHEREAS AN EXPERT,  
WHO IS HELD TO A SCIENTIFIC  
DEGREE OF EXPERTISE WOULD NOT BE  
ABLE TO MAKE THAT SAME FINDING

BECAUSE OF BECAUSE OF THE REQUIREMENTS OF THE PROFESSION. WHEREAS JUST A LAYPERSON WHO KNOWS THE DEFENDANT COULD SAY, YES, THAT'S MR. IBAR OR THAT LOOKS LIKE MR. IBAR, THEY CAN MAKE THAT, A LAYPERSON CAN MAKE THAT STATEMENT AND THAT FINDING.

>> BUT NOW I THOUGHT THESE EXPERTS ALSO WENT A LITTLE FURTHER AND TALKED ABOUT, AS YOUR, AS MR. IBAR'S COUNSEL JUST INDICATED, THAT THEY WENT THROUGH VARIOUS ASPECTS OF THE FACIAL FEATURES TO ACTUALLY SAY THEY DID NOT MATCH THE FACIAL FEATURES OF MR. IBAR?

>> AND IF WE'RE LOOKING AT MR. EVANS'S TESTIMONY, WHAT MR. EVANS'S BOTTOM LINE WAS THAT HE WOULDN'T ELIMINATE, HE COULDN'T EXCLUDE MR. IBAR FROM BEING THE PERPETRATOR ON THAT VIDEO.

AND THERE WERE CERTAIN FEATURES THAT HE MEASURED THAT LOOKED LIKE THEY MATCHED MR. IBAR AND OTHERS THAT DID NOT, BUT THERE'S DISTORTION AND GRAININESS AND OTHER FACTORS IN THERE.

>> SO YOUR BOTTOM LINE WHAT HE BELIEVED THE EXPERT TESTIMONY IS IS THAT, WHAT?

THAT THIS PROBABLY IS NOT MR. IBAR BUT IT COULD BE? OR WHAT IS YOUR, WHAT DO YOU SAY IS WHAT THE EXPERTS BOTTOM LINE IS?

>> IT IS INCONCLUSIVE AND MR. IBAR CAN NOT BE ELIMINATED. SO AS YOUR HONOR POINTED OUT BEFORE, THAT LEAVES US WITH MR. FOY, THE FAMILY AND OTHER, AND FRIENDS, AS WELL AS THE FRIEND THAT PUT MR. IBAR IN THE VICTIM'S MERCEDES RIGHT AFTER THE MURDER.

HE DROVE TO HIS HOME AND MULTIPLE WITNESSES SAW HIM IN THAT CAR.



>> WOULD YOU ADDRESS THE LACK OF DNA ON THE SHIRT?

>> YOUR HONOR, MERELY BECAUSE THERE WAS LACK OF EVIDENCE, WE DON'T KNOW THAT MR. IBAR WAS ACTUALLY SWEATING.

WE DON'T KNOW HE LEFT EPITHELIAL CELLS OR ANY TYPE OF DNA ON THERE.

THAT DOESN'T MEAN THAT WASN'T THE SHIRT HE WAS USING DURING THAT CRIME.

THAT WAS THE STATE'S THEORY THAT IT WAS BUT THE FACT, EXCUSE ME, THAT THE FACT THAT DNA ISN'T FOUND ON IT DOESN'T NECESSARILY MEAN THAT MR. IBAR WASN'T THE PERSON THAT SHOT THOSE THREE VICTIMS, WASN'T THE PERSON THAT WAS IN THE VICTIM'S CAR AFTERWARDS.

>> NOW THERE WAS SOME TESTING WITH REGARD TO A POSSIBLE THIRD PARTY, NOT PART OF THIS TRIAL, CORRECT?

>> YES.

>> DNA TESTING AND FINGERPRINTING AND NONE OF THAT MATCHED.

WHAT IS, IS THAT OF ANY SIGNIFICANCE WHAT WE'RE DEALING WITH?

>> NOT IN THIS CASE, YOUR HONOR. A CONFIDENTIAL INFORMANT CAME FORWARD WITH SOME ALLEGED INFORMATION ABOUT A THIRD PERSON.

THE STATE AND DEFENSE HAD THE, THE, THAT PERSON TESTED AND --

>> BUT TO MATCH SOMETHING FOUND AT THE SCENE OF THIS CRIME, WASN'T IT?

>> JUST, WHATEVER WAS FOUND THEY TESTED HIM AGAINST IT.

AND I BELIEVE --

>> AND WAS THAT SAME MATERIAL TESTED AGAINST THE TWO PERPETRATORS THAT WERE CHARGED OR THE TWO PEOPLE THAT WERE CHARGED?

>> YES.  
>> AND WHAT DID THAT SHOW?  
>> AND IT, MR. IBAR WAS NOT ON THAT MATERIAL.  
>> THAT'S WHY I'M SITTING HERE AND YOUR ANSWER TO CHIEF JUSTICE POLSTON, YOU SAID MAYBE, WASN'T HIS SHIRT BUT IT WAS THE STATE'S THEORY IT WAS HIS SHIRT.  
YOU SAID, WELL MAYBE HE DIDN'T SWEAT BUT SOMEONE LEFT DNA SOMEBODY WHO HAD THAT SHIRT ON WAS SOMEONE'S DNA.  
LIKE THEY DIDN'T COLLECT DNA FROM THE SHIRT.  
>> THEY COLLECTED SOME MATERIALS.  
SOME WERE INCONCLUSIVE AND SOME, DIDN'T MATCH THE --  
>> SO I UNDERSTAND YOUR ANSWER WHY WASN'T HIS DNA ON IT, IF IT WAS HIS SHIRT, YOU'RE SAYING WELL MAYBE IT WASN'T THE SHIRT HE ACTUALLY HAD OR MAYBE HE DIDN'T LEAVE DNA BUT THERE WAS DNA LEFT.  
>> THERE WAS EVIDENCE IN THIS CASE --  
>> EXPLAIN THAT.  
>> THE EVIDENCE IN THIS CASE ALSO SHOWS THAT CLOTHES AND OTHER THINGS WERE SHARED IN THAT HOUSE AND WE DON'T KNOW THAT MR. IBAR ACTUALLY WORE THAT SHIRT.  
WE DO KNOW THAT HE HAD IT ON HIS HEAD.  
SO --  
>> COULD YOU AGREE THAT -- DO YOU AGREE THAT IS THE SHIRT THE MURDERER HAD ON?  
>> THAT IS THE STATE'S THEORY. THERE WAS A CONNECTION BETWEEN MR. IBAR AND THE LOGO ON THAT SHIRT.  
>> WAS THERE ACTUALLY HAIR FOUND ON THE SHIRT?  
>> WAS THERE A HAIR FOUND ON THE SHIRT.  
>> I BELIEVE THERE WAS.

>> SO THERE WAS HAIR, SWEAT AND BLOOD FOUND ON THE SHIRT?

>> THE TESTIMONY AT THE TRIAL, I DON'T BELIEVE THERE WAS ANY BLOOD FOUND ON THAT SHIRT BUT THE TESTIMONY AT THE TRIAL WAS THAT GREAT EFFORTS WERE MADE TO FIND DNA DURING THE TRIAL.

IT WAS AFTER THE TRIAL THAT ADDITIONAL EFFORTS WERE MADE AND SOME DNA WAS FOUND.

WITH RESPECT TO MR.--

>> GO BACK AND ASK YOU ABOUT MR. FALSETTI AND THE DEFENSE'S INTERACTION WITH MR. FALSETTI.

>> NO.

>> SO THERE WAS NO PAYMENT TO HIM?

>> NO.

BUT WE KNOW THERE WAS A MOTION GRANTED SEEKING FUND FOR HIM. WE ALSO KNOW THERE WERE PHONE CALLS, AT LEAST ONE PHONE CALL AND THERE WERE FAXES BACK AND FORTH BETWEEN BARBARA BRUSH AND MR. MORGAN AND THERE WAS, THERE WERE TWO FAXES THAT DISCUSSED THAT AND ALSO ONE SAID THAT DR. FALSETTI WAS GOING TO BE THE DEFENSE EXPERT.

NOW SOMETIME BETWEEN THE APRIL START OF TRIAL AND WHERE THE DEFENSE PUTS ON ITS CASE WITH REGARD TO ALIBI, DR. FALSETTI IS SET ASIDE AND THE STATE, THE DEFENSE WENT WITH THE ALIBI.

ALSO --

>> TELL ME ABOUT THE CO-COUNSEL WHO DID NOT TESTIFY IN THE EVIDENTIARY HEARING.

IS THERE AN EXPLANATION OF HER ABSENCE FROM THE PROCEEDING IN THE EVIDENTIARY HEARING?

>> THAT WOULD BE SOMETHING FOR MR. IBAR TO ANSWER.

>> BUT AS FAR AS THE RECORD DOESN'T SHOW ANYTHING ABOUT HER BEING DEAD OR ANYTHING LIKE THAT?

>> NO, NO.

SHE WAS NOT CALLED.  
WHAT ABOUT MORGAN WAS SAYING HE  
PUT A LOT OF THE RESPONSIBILITY  
FOR THE DISCOVERY AND WITH THE  
EXPERTS ON MS. RUSH.  
THEREFORE IT WAS INCUMBENT UPON  
MR. IBAR TO BRING FORWARD THAT  
EXPERT IN ORDER TO PROVE THAT  
WHATEVER DECISIONS WERE MADE  
WERE UNREASONABLE IN LIGHT OF  
WHAT WAS DISCOVERED BY  
MS. BRUSH.  
THE EVIDENCE REMAINS ON THE  
DEFENDANT TO PROVE BOTH  
DEFICIENCY AND PREJUDICE.  
>> LET ME ASK YOU THIS.  
WHAT, TELL ME, LAY OUT FOR ME,  
WHAT YOU BELIEVE IS LEFT OF THE  
EVIDENCE THAT THE STATE  
PRESENTED AGAINST MR. IBAR?  
>> THERE IS STILL THE VIDEOTAPE  
WHICH THE JURY WAS ABLE TO VIEW.  
AND THE JURY LOOKED AT MR. IBAR  
FOR A NUMBER OF MONTHS AND THEY  
LOOKED AT THE VIDEOTAPE.  
THEREFORE, THEY CERTAINLY WERE  
CAPABLE OF DISCERNING WHETHER OR  
NOT IT WAS MR. IBAR ON THAT TAPE  
AND WHETHER IT WAS MR. IBAR WHO  
PULLED THOSE TRIGGERS.  
ALSO THERE IS MR. FOY.  
MR. FOY HAS MAINTAINED HIS  
IDENTIFICATION OF MR. IBAR FROM  
DAY ONE.  
THE TESTIMONY IS THAT MR. FOY  
KNEW THAT THE PHOTO THAT HE WAS  
INITIALLY SHOWN WAS MR. IBAR.  
HE WAS SCARED.  
HE REALLY DIDN'T WANT TO  
TESTIFY.  
HE KNEW IT WAS A MURDER CASE.  
THEREFORE HE NAMED A SECOND,  
PICKED OUT A SECOND PHOTOGRAPH.  
BUT HE KNEW IT WAS MR. IBAR.  
THEN AT THE LINEUP IMMEDIATELY  
MR. FOY PICKED OUT MR. IBAR AS  
THE PERSON WHO STARED HIM DOWN  
WHEN THEY WERE LEAVING THE  
VICTIM'S AREA.  
LEAVING HIS HOME AND GETTING OUT

OF THE NEIGHBORHOOD.

WE ALSO HAVE --

>> SO YOU REALLY PUT A LOT ON MR. FOY.

MY CONCERN WITH EYEWITNESS IDENTIFICATION IS WHAT THE FLORIDA, THE INNOCENCE COMMISSION REVEALED, EYEWITNESS MISIDENTIFICATION OR IDENTIFICATION WAS LEADING CAUSE OF WRONGFUL CONVICTIONS IN FLORIDA.

SO WHAT MY, MY CONCERNS ARE THAT AND HOW IN VIEW OF THE SUGGESTIVENESS OF SHOWING HIM THE INITIAL PHOTO, AND ALSO THAT WE DID HAVE IN THE INITIAL TRIAL, AT LEAST THREE OR FOUR OF A CERTAIN NUMBER OF THE INDIVIDUALS, LAY WITNESSES THAT TESTIFIED, THAT WE SAID ERROR BUT WE ENDED UP IN THE INITIAL TRIAL SAYING IT WAS HARMLESS. YET WHEN YOU LOOK AT THE WHOLE PICTURE NOW, THE QUESTION REALLY IS, SHOULD OUR CONFIDENCE IN THE OUTCOME OF THIS GUILT PHASE BE UNDERMINED BY THIS WHOLE CONSTELLATION OF CONCERNS THAT HAVE BEEN RAISED THIS MORNING?

>> NO, I DON'T BELIEVE THAT CONFIDENCE IN THIS OUTCOME HAS BEEN UNDERMINED AND THE REASON BEING WE, NOT ONLY DO WE HAVE MR. FOY AND WE HAVE THE VIDEOTAPE BUT WE ALSO HAVE THE LAY WITNESSES.

JUST TO REMIND THE COURT, THE LAY WITNESSES, IF YOU, IF YOU'RE LOOKING AT THE TESTIMONY OF THE OFFICERS, IS THAT BEFORE THEY KNEW THAT THE STILLS THAT THEY WERE LOOKING AT, THAT THEY WERE BEING SHOWN WERE STILLS FROM THE VIDEOTAPE, THEIR TESTIMONY, THEIR STATEMENTS WERE, THAT, THIS REALLY WAS MR. IBAR.

THERE WERE MUCH MORE CONFIDENT.

>> ALSO, DON'T YOU HAVE THE FACT THAT -- TESTIMONY HE WAS BESIDE

IT AND TESTIMONY IBAR WAS IN THE CAR IMMEDIATELY AFTER THE MURDER?

>> THAT IS DEFINITELY SUPPORT --

>> WOULDN'T THAT SORT OF BUTTRESS THE, THE CONFIDENCE IN THE EYEWITNESS IDENTIFICATION.

>> ABSOLUTELY, YOUR HONOR.

AND WE ALSO HAVE THE WITNESSES AT THE HOUSE THAT ARE PUTTING MR. IBAR AND MR. PENALVER IN THIS --

>> IN THE CAR.

>> IN A BIG, BLACK, SHINY NEW CAR OR IN A MERCEDES WITH TAN INTERIOR, SO --

>> WHAT RELATIONSHIP TO THE TIME OF THE MURDER WERE THESE OBSERVATIONS MADE?

>> THE OBSERVATIONS WERE MADE BY MR. FOY RIGHT AFTER THE MURDER.

>> I KNOW MR. FOY WAS BUT I'M TALKING ABOUT GENE AND, I BELIEVE THERE WAS ONE OTHER PERSON WHO SAID -- TWO PEOPLE TESTIFIED OTHER THAN MR. FOY THAT HE WAS IN THE MERCEDES.

>> WE HAVE THREE PEOPLE. WE HAVE MR. KLIMECZKO WHO PUT THE TEC-9 IN THE POSSESSION OF MR. PENALVER AND MR. IBAR BEFORE THE MURDER.

MR. KLIMECZKO THAT TESTIFIED THAT MR. PENALVER AND MR. IBAR WERE IN A BIG NEW, BLACK SHINY CAR. WE HAVE KIM SANDS AND, I THINK DAVID PHILLIPS WHO TESTIFIED THEY WERE IN A MERCEDES.

>> AND THOSE ARE THE ONES, I WANT TO KNOW, WHAT RELATIONSHIP TO THE TIME OF THE MURDER, WHAT WAS THE TIME OF THE MURDER IN RELATIONSHIP TO WHEN THEY MADE THESE OBSERVATIONS?

>> IT WAS SHORTLY AFTER THE MURDER BUT IT WAS BEFORE, OF COURSE, THAT THE CAR WAS FOUND OUT ON, I THINK IT IS ROUTE 27 WHERE IT WAS IN FLAMES. IT HAD BEEN TORCHED.

SO IT IS SOMETIME AFTER THE  
MURDER AND IN THE MORNING.  
EARLIER IN THE MORNING.

>> THE TEC-9 THAT WAS SUPPOSEDLY  
THE MURDER WEAPON, APPARENTLY  
WAS EXCLUDED FROM THE ONE AT THE  
LEE STREET HOUSE?

>> YES.

>> THROUGH -- SAID WAS NOT THE  
MURDER WEAPON THEY HAD BEEN  
TALKING ABOUT?

>> THE WEAPON THAT MR. IBAR  
CLAIMED TO HAVE BEEN, TO HAVE  
SOLD BEFORE THE MURDER WAS  
RECOVERED AND IT WAS FOUND NOT  
TO BE THE MURDER WEAPON.  
HOWEVER, WE HAVE MR. KLIMECZKO  
SAW THE TEC-9 THAT MORNING,  
5:00 IN THE MORNING AROUND THEN,  
SAW IT IN THE POSSESSION OF  
MR. PENALVER AND MR. IBAR BEFORE  
THEY LEFT THE HOUSE.

THE STATE NEVER SAID THAT THE  
TEC-9 THAT WAS SEIZED WAS  
THE MURDER WEAPON  
BUT IT IS CLEAR ON THE VIDEOTAPE  
THAT A TEC-9 WAS USED.

SO THE MERE FACT THAT ANOTHER  
TEC-9 WAS IN THAT HOUSE AT SOME  
TIME AND SOLD HAS NO BEARING ON  
WHAT WE SEE ON THE VIDEOTAPE AND  
THE TESTIMONY THAT WE HAVE.  
AND I SEE THAT I HAVE EXPENDED  
MY TIME.

UNLESS THE COURT HAS ANY OTHER  
QUESTIONS, I RELY ON MY BRIEF  
AND I ASK THE COURT TO AFFIRM  
THE DENIAL OF POST-CONVICTION  
RELIEF AND DENY THE HABEAS  
PETITION.

THANK YOU.

>> REBUTTAL.

>> JUST WANT TO BRIEFLY ADDRESS  
THE ISSUE OF JUSTICE PERRY  
BROUGHT UP.

IBAR WAS NEVER PLACED IN A  
VEHICLE IN A MERCEDES OR OTHER.  
THE TESTIMONY CAME FROM KLIMECZKO  
THAT HE WAS SEEN WITH  
PENALVER WHO IS NOW BEEN

ACQUITTED AND A BIG, BLACK,  
SHINY CAR.

THE BIG, BLACK, SHINY CAR,  
CERTAINLY DOESN'T SCRUB THE  
MERCEDES COUPE THAT WAS  
MR. SUCHARSKI'S CAR.

KIMBERLY SAND AND WITNESSES  
THERE DIDN'T KNOW MR. IBAR AND  
THEY DESCRIBED SOMEONE WITH HAIR  
GOING DOWN THE BACK OF HIS NECK  
THAT SIMPLY DIDN'T DESCRIBE  
MR. IBAR.

THE TESTIMONY THAT WAS GIVEN BY  
MR. EVANS WAS IDENTICAL TO THE  
TESTIMONY THAT THIS COURT  
ENDORSED IN, IN ITS PENALVER  
DECISION.

IT SAYS TO THE COURT, DR. MEHMET  
ISCAN, IN PENALVER'S CASE,  
TESTIFIED THAT BECAUSE OF THE  
POOR QUALITY OF THE VIDEO AND  
THE LIGHTING CONDITIONS, HE  
COULD NOT REACH A POSITIVE  
CONCLUSION ABOUT WHETHER THE  
INDIVIDUAL IN THE VIDEO WAS  
PENALVER.

DR. ISCAN NOTED THAT THERE WERE  
DISCREPANCIES IN THE LOWER HALF  
OF THE FACE WHICH LED HIM TO  
LEAN TO A CONCLUSION THAT THE  
INDIVIDUAL ON THE TAPE WAS NOT  
PENALVER.

THIS WAS THE SAME TESTIMONY THAT  
IBAR VITALLY NEEDED AND DIDN'T  
GET.

THIS IS THE SAME TESTIMONY THAT  
MR. EVANS GAVE AT THE  
POST-CONVICTION HEARING.

HE SAID THAT THE MATERIALS WERE  
SO DEFICIENT THAT THEY COULD NOT  
BE THE BASIS FOR A  
SCIENTIFICALLY RELIABLE  
IDENTIFICATION AND WE NEVER HAD  
EVEN BEEN ADMITTED IN A COURT IN  
THE U.K.

HE TESTIFIED ABOUT THE FIVE  
SPECIFIC DISCREPANCIES THAT  
DISTINGUISH IBAR FROM THE  
MURDERER.

IMPORTANTLY HE TESTIFIED THAT



LAYPERSONS, PEOPLE LIKE US, ARE HARD-WIRED TO FOCUS ON SIMILARITIES AND THAT'S WHY WHEN HOW YOU PUT A DOUBLE IN THE MOVIE WE'RE WILLING TO ACCEPT THAT PERSON IS THE MOVIE STAR WHEN IN FACT IT'S NOT.

THIS WAS VITAL INFORMATION FOR THIS JURY TO RECEIVE WHERE THE KEY AND THE PRIMARY AND THE SOURCE, REALLY SOURCE OF ALL OF THE OTHER EVIDENCE.

IT WAS THE SOURCE OF THE PICTURE SHOWN TO THESE OTHER WITNESSES THAT ACTUALLY DENIED HAVING IDENTIFIED MR. IBAR.

HE NEEDED THAT TESTIMONY AND THERE'S NO WAY IN PARTICULARLY IN A DEATH CASE THAT THIS COURT'S CONFIDENCE IN THIS VERDICT CAN NOT BE UNDERMINED.

>> I THOUGHT FROM MY READING OF THE MATERIALS THAT THE DESCRIPTION OF THE PERSON WHO OBSERVED MR. IBAR IN THE VEHICLE IS MORE CLOSELY WITH JUSTICE PERRY HAD SUGGESTED, THAT IT, WASN'T THIS OBSERVED COMING OUT OF THAT NEIGHBORHOOD OR IN THE VICINITY OF THE VICTIM?

>> DRIVEWAY I THINK, WASN'T IT.

>> I'M SORRY?

>> OBSERVED COMING OUT OF THE DRIVEWAY OF THE VICTIM'S HOUSE.

>> I'M SORRY, I THOUGHT, BECAUSE WE IMMEDIATELY WENT INTO THE DISCUSSION OF MR. KLIMECZKO WHO CLAIMED TO HAVE OBSERVED --

>> WE'RE TALKING ABOUT THAT -- PLEASE ADDRESS THAT. I WAS UNDER THE IMPRESSION, AS I THINK MY COLLEAGUE WAS ALSO, THAT IT WAS RIGHT FROM THIS VICTIM'S PLACE. IT WAS NOT JUST A MATTER OF SECONDS.

THAT HE WAS BEING FOLLOWED. HE SAW THEM IN THE REAR VIEW MIRROR AND THAT THERE WAS THIS PULLING UP OF THE VEHICLES EVENLY AND THE WITNESS BEING

STARED DOWN BY MR. IBAR?

>> I MISUNDERSTOOD, JUSTICE PERRY.

I THOUGHT YOU WERE ALLUDING TO THE TESTIMONY OF MR. KLIMECZKO. WITH REGARD TO THE FOY, THE EYEWITNESS --

>> RIGHT.

>> AGAIN, HIS IDENTIFICATION SUFFERED AS OUR EXPERT POINTED OUT IN OUR AFFIDAVIT, SUFFERED FROM EVERY CONCEIVABLE VAGUERY THAT UNDERMINES THE RELIABILITY OF THOSE TYPES OF IDENTIFICATION.

>> I UNDERSTAND THAT'S YOUR VIEW OF THE EVIDENCE AND POSITION BUT DID THE JURY HEAR TESTIMONY OF A MAN LOOKING STRAIGHT IN THE FACE OF ANOTHER MAN FOR A SIGNIFICANT PERIOD OF TIME, NOT JUST A PASSING GLANCE.

>> NO, WHAT THE JURY HEARD IS THE TESTIMONY OF FOY.

>> RIGHT.

>> WHO FOR A PERIOD OF 10 -- HE PASSED BY THE HOUSE. HE CONTINUED TO DRIVE, HE DIDN'T STOP AND --

>> I UNDERSTAND.

BUT HE SAID HE SAW THEM THROUGH THE REAR VIEW MIRROR, DID HE NOT?

>> HE DID.

AS HE LEFT THE COMMUNITY HE WAS DRIVING.

AND OUR EXPERT TALKED ABOUT THE VAGARIES OF SOMEONE WHO IS DUAL FUNCTIONING --

>> AND THE CAR WHICH IBAR WAS A PASSENGER.

>> COULDN'T IDENTIFY PENALVER, THE DRIVER.

>> WELL HE WASN'T ASKED TO I GUESS.

>> NO, HE WAS ACTUALLY ASKED TO.

>> BUT REASON HE COULD IDENTIFY IBAR IS BECAUSE HE STARED HIM DOWN.

WASN'T THAT THE TESTIMONY?

>> THAT WAS THE TESTIMONY FOR  
10 --  
>> DID THAT HAPPEN?  
THAT IS IN THIS RECORD?  
>> IT DID.  
>> AND JURY HEARD THAT.  
>> AND THE JURY HEARD THAT AND  
THE TESTIMONY WAS THAT THIS WAS  
FOR 10 TO 15 SECONDS, AT AN  
ANGLE, INTO THE RISING SUN,  
THROUGH TWO SETS OF TINTED  
WINDOWS, IN BETWEEN HEAD RESTS,  
THAT HE HAD THAT MOMENT IN WHICH  
HE ULTIMATELY WENT TO A PHOTO  
ARRAY, DIDN'T PICK ONE PICTURE.  
PICKED TWO PICTURES.  
AFTER ELIMINATING THE OTHERS,  
WHICH OUR EXPERT SHOWED IS A, IS  
A STRATEGY THAT IS ASSOCIATED  
WITH UNRELIABLE IDENTIFICATIONS  
AND THAT HE ULTIMATELY SAID,  
THIS LOOKS MORE LIKE THE GUY IN  
THE CAR THAN ANYONE ELSE.  
WHICH IS RELATIVE JUDGMENT AND  
ANOTHER FEATURE OF  
IDENTIFICATION THAT'S ASSOCIATED  
WITH UNRELIABLE IDENTIFICATIONS.  
AND THAT WAS ALL THEY HAVE.  
AGAIN, AGAINST THAT EVIDENCE YOU  
HAVE THE EXONERATING T-SHIRT,  
THE EXONERATING FINGERPRINTS,  
THE ENTIRE EVIDENTIARY SCHEME IS  
RECAST BY THESE POST-CONVICTION  
PROCEEDINGS, AND IT'S OUR  
POSITION THAT THIS COURT CAN NOT  
HAVE ANY CONFIDENCE IN THIS  
VERDICT AND WE WOULD ASK THAT  
THE COURT REVERSE THE JUDGMENT  
BELOW AND GRANT MR. IBAR A NEW  
TRIAL.  
THANK YOU.  
>> THANK YOU FOR YOUR ARGUMENTS.