

**Report of the Minnesota Conviction Review Unit  
Regarding the 2009 Conviction of Edgar Barrientos-Quintana  
Hennepin County Case No. 27-CR-08-53942**

**July 29, 2024**



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JUDICIAL  
BRANCH

Minnesota Attorney General's Office  
Conviction Review Unit

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SUBJECT: **Conviction Review Unit Report and Recommendation: *State of Minnesota v. Barrientos-Quintana, 27-CR-08-53942***

***EXECUTIVE SUMMARY AND RECOMMENDATION***

Edgar Barrientos-Quintana was sentenced to life without parole after a Hennepin County jury convicted him of first-degree murder in May 2009. The conviction arose out of a drive-by shooting, in an alley in Minneapolis, that killed Jesse Mickelson, a bystander to a gang-related attack.

The state's case was based on two teenage eyewitnesses associated with a rival gang clique who identified Barrientos as the shooter. An accomplice, who the gang-affiliated witnesses indicated may have been the shooter, also testified that he was in the drive-by vehicle and that Barrientos had joined them after they called Barrientos to bring a gun. The accomplice named Barrientos as the shooter. The state argued at trial that Barrientos was motivated to shoot at the teenagers in the alley because they were in a rival gang clique, and he was angry that his girlfriend had been spending time with members of the rival clique.

The state's case was weak. There was no physical evidence linking Barrientos to the murder. The firearm involved in the murder was never found. In fact, Barrientos was seen on video in a grocery store with his girlfriend less than 33 minutes before the shooting on the east side of Saint Paul, which is the other side of the Twin Cities Metro area from the scene of the crime. All

the eyewitnesses described the shooter as “bald” or as having a shaven head. The photo lineups presented to the eyewitnesses who identified Barrientos contained an older photo of Barrientos with a shaved head. But at the time of the shooting, as seen on the grocery store video, Barrientos had a full head of dark hair. Barrientos’s arrest photo, taken just 11 days after the shooting, also showed that he had thick, short, dark hair.

Barrientos has maintained that he was in a suburb east of Saint Paul at the time of the shooting and that he played no role in the murder. He applied to the CRU for relief in 2021.

The Conviction Review Unit’s extensive investigation over several years shows that a confluence of errors made by criminal justice system actors resulted in a wrongful conviction.

First, Barrientos’s alibi supports his claim of innocence. Due to a combination of failures by his defense counsel and the presentation of the evidence to the jury by the prosecutors, the truth did not fully emerge at trial. Barrientos’s alibi at trial was that after he visited the grocery store with his girlfriend, he was in her apartment, in a suburb east of Saint Paul, at the time of the murder. To counter the alibi, a Minneapolis Police Department investigator told the jury that he and his partner had conducted a test drive and there was more than enough time for Barrientos to reach south Minneapolis and carry out the shooting. The CRU consulted with a retired officer from the Minneapolis Police Department who provided an expert report that disagreed with the state’s timeline. He concluded that the MPD investigators failed to account for several important factors, including the accomplice’s version of events, that would have made the drive well over 33 minutes, making it improbable, if not impossible, for Barrientos to be the shooter.

At trial, the prosecutors turned Barrientos’s alibi into evidence of his guilt by arguing that inconsistencies in his alibi witnesses’ accounts were evidence Barrientos had coached them to provide a constructed false alibi for trial. Prosecutors played for the jury an out-of-context snippet of one phone call Barrientos made from jail telling his girlfriend that they would get their stories straight before trial.

The CRU listened to Barrientos’s jail calls and found them exculpatory. The calls make it clear that Barrientos, his girlfriend, and their family members were all struggling to remember what occurred on the day of the murder, which was an uneventful day for them. They initially confused the day after the shooting with the day of the murder because they mistakenly assumed Barrientos’s girlfriend’s mother was working that day, as she typically did. After Barrientos and his girlfriend were initially interviewed by the police, they talked regularly in jail calls that were

recorded. In one call, they remembered their whereabouts near the time of the murder. Barrientos's girlfriend reminded him that near the time of the murder they were in Cub Foods buying limes for her mother, who was making caldo de camarón, or shrimp soup. Barrientos reacted to this sudden realization saying he would tell his attorney to get camera footage from the store. Rather than exposing a plot to construct a false alibi, the jail calls revealed what the scientific research on memory and alibis has shown: Barrientos and his alibi witnesses struggled to remember details of a day full of mundane activities, and they looked for ways to corroborate their whereabouts with video, phone records, diaries, and other relative's memories of the day. This is common behavior when people are trying to ascertain their whereabouts, not evidence of guilt.

Through listening to the jail calls, the CRU also discovered that Barrientos had a memory of being inside his girlfriend's apartment and remembering a specific phone call that occurred around 7:20pm, which was 28 minutes after the shooting, to his girlfriend's apartment. The call came from her brother, who was on his way to the apartment and had called to let them know. This timing was consistent with Barrientos and his girlfriend's accounts that they were together at her apartment after leaving the grocery store. It also conflicted with the accomplice witness's timeline that Barrientos spent at least an hour to an hour and a half with the gang members after the shooting, which occurred around 6:53pm. At trial, Barrientos's defense attorneys failed to effectively present Barrientos's alibi to counter the state's assertion that he pressured witnesses to lie for him. They also failed to review his jail calls.

Second, the CRU concluded the eyewitness descriptions of the shooter provide compelling evidence that Barrientos was not the shooter and that the prosecutors presented the eyewitness accounts in a manner inconsistent with the evidence. Barrientos was identified as the shooter after investigators conducted suggestive and coercive interviews with juvenile members of a rival gang. The night of the shooting, the eyewitnesses uniformly described the shooter as "bald" or having a "shaved head." Investigators had few solid leads after first speaking with the gang-affiliated witnesses. They returned to these witnesses using coercive interviewing techniques, pressuring these boys to name a shooter. The investigators refused to accept their claims that they did not get a good look at the shooter. Instead, the investigators repeatedly told them they must know more than what they were saying. They threatened one juvenile eyewitness—who was also a victim and had shrapnel in his calf from the shooting—by implicating him as an accomplice in the shooting.

Investigators contaminated witnesses' memories on the shooter's hair length through leading questions, and the witnesses' descriptions morphed over time.

Coupled with coercive interviewing techniques, investigators failed to follow eyewitness identification guidelines in their jurisdiction when they presented photo lineups to these boys. An expert on eyewitness identification, who partnered with the Hennepin County Attorney's Office to develop best-practice protocols for photo lineups, provided a report to the CRU. She concluded that the investigators failed to adhere to these protocols. These were not double-blind photo lineups—the investigators administering the lineup knew the target suspect in the lineup, and they provided positive feedback to at least one witness that identified Barrientos. Investigators used an older photograph of Barrientos with a shaved head in the photo lineup array when he had a full head of hair on the day of the shooting and the day of his arrest. Investigators failed to record the lineups that were administered to several witnesses, failed to read the standard precautions, had witnesses take multiple passes through the photographs, and never documented the witnesses' confidence level at the moment they identified Barrientos as the shooter.

Like the alibi evidence, the jury and the courts did not receive all the facts regarding the witnesses' descriptions of the shooter and the identification procedures. The lineup procedures were not adequately challenged in pre-trial motions. While the defense filed a cursory, pro forma notice of a motion to suppress the identifications, the defense failed to present the district court with substantive written or oral arguments regarding the unreliability of the lineups and the tainted lineup procedures. Defense counsel had not reviewed the video of the one recorded identification before submitting the motion.

At trial, the lead investigator testified that the eyewitnesses consistently described the shooter as having "short hair." The prosecution used this inaccurate testimony to argue that Barrientos's short hair fit the eyewitnesses' descriptions. To be clear, the prosecutors' notes and police records show that witnesses had never used the term "short hair." Yet the state presented a different narrative to the jury, claiming witnesses described a shooter with short hair. The defense failed to effectively challenge the investigator's testimony with the abundance of evidence to the contrary. Additionally, an unbiased eyewitness who had a good view of the shooter viewed a lineup containing Barrientos's picture and chose a filler instead of Barrientos. The prosecution reframed the witness's failure to identify Barrientos in the photo lineup as favorable to the state's case by leading the witness to agree that he focused on someone with similar characteristics to the shooter.

Due to defense counsel's failures, the jury was never informed of the highly exculpatory fact that Barrientos was in the lineup presented to this witness and the witness chose someone else as looking like the shooter. The selection of a filler, according to eyewitness identification experts, says, in effect, that the filler looked more like the culprit than Barrientos did, and the selection of a filler is most likely to occur when the suspect is not the culprit.

Third, the CRU concluded that investigators fed a juvenile accomplice witness details of the crime and gave the witness an incentive to testify that Barrientos was the shooter. One witness indicated early in the investigation that he thought this accomplice was the shooter. In a series of interviews over several months, investigators used suggestive and coercive interviewing techniques on this juvenile accomplice witness who was taken into custody for a probation violation just a few days after the shooting. Investigators repeatedly told him that they knew he was in the drive-by vehicle, and they threatened him with charges. They leaked Barrientos's name to this witness as the main shooting suspect, told him Barrientos was already in jail for the crime, and provided him with a plausible motive. On instructions from the prosecutors, in one interview investigators told this accomplice that he would be treated as a witness if he said he was in the drive-by vehicle and identified the shooter. In his final interview, when he finally said Barrientos was the shooter, the accomplice gave several details that were wildly inaccurate and inconsistent with the state's evidence. Many of the points that the state claimed showed that his account was corroborated were facts investigators had leaked to him during interviews or details he could have known from knowledge of the area and people involved.

Interview transcripts and police reports show that on the night of the murder witnesses indicated this accomplice-turned-witness may have been the shooter. But at trial the state elicited testimony from the lead investigator that no one had indicated the accomplice was the shooter. The defense counsel failed to impeach the investigator on this issue. The jury and reviewing courts were left with the incorrect perception that the central witness against Barrientos was never named as a potential shooter.

The CRU also concluded that the prosecution failed to disclose exculpatory and impeachment evidence to the defense. Other exculpatory information that was eventually provided to defense counsel was untimely. For example, the state failed to provide the defense with photo lineups with suspects other than Barrientos that were shown to one witness. The witness can be heard commenting on photos in the undisclosed lineups that would have given the defense clues

to specific characteristics the witness focused on, what the witness thought the suspect actually looked like, and how the suspect differed in appearance to Barrientos. The prosecution also knew that one of the lead investigators made scripted comments for the reality TV show *The First 48*, while the TV crew was following this investigator around during his investigation. The prosecution learned of these scripted comments when the episode aired less than a month before trial. Additionally, an interrogation video involving a potential alternative suspect was only disclosed to the defense a few weeks before trial, even though it had been available to the prosecution for several months. Investigators suspected that the alternative suspect was involved in the murder because a neighbor saw the drive-by vehicle stop in an alley near the alternative suspect's house just seconds after the shooting, and the neighbor heard the car door quickly open and close. The alternative suspect's photo, which shows he is bald with distinct eyebrows, like the witnesses' descriptions of the shooter, was not shown to the defense until the state sought to admit it into evidence near the end of trial.

Finally, the airing of *The First 48* episode, less than one month before trial, almost certainly interfered with the fair administration of justice and contributed to Barrientos's wrongful conviction. The two gang-affiliated witnesses were aware of the episode before trial. One watched footage of Barrientos's arrest and interrogation before he testified at trial. It is likely he also saw another gang-affiliated witness's identification of Barrientos that aired on the episode. The show edited the identification footage to make it appear much stronger than it really was. The show also created hours of film that was never examined by the defense.

For the reasons set forth in this Report, the Conviction Review Unit has concluded that the evidence convincingly establishes Barrientos's innocence and that he was convicted of a crime that he did not commit. Because his conviction lacks integrity, the CRU recommends that his conviction be vacated, and the charges dismissed.

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## I. SUMMARY OF THE CASE AND FACTS

On Saturday, October 11, 2008, just after sunset, Jesse Mickelson, an 18-year-old high school student, was gunned down in his neighbor's driveway, the victim of a drive-by shooting witnessed by at least ten people.<sup>1</sup> The shooting had all the hallmarks of a gang-related drive-by, but no one involved in the case believed that Jesse was the target.<sup>2</sup> By all accounts, he was in the wrong place at the wrong time.

Jesse's killing was an outrageous act of violence that left an irreplaceable hole in his family and the community. As a budding musician, Jesse derived purpose from rap music. He studied music production. He was discovering his native roots and had recently bought recording equipment from money he received from his tribe. Jesse's peers in an American Indian youth hip-hop group described him as a leader and as someone who lifted up others around him when they felt discouraged.<sup>3</sup>

At the time of the shooting, Jesse lived in the Standish neighborhood of South Minneapolis. He attended Roosevelt High School, which could be seen from the alley behind his house. On Jesse's block, the houses were mostly two stories, with unfenced yards, closely nestled next to each other. Detached garages sat behind the houses. A narrow L-shaped alley separated the house just north of Jesse's from the Roosevelt High School practice fields.<sup>4</sup> A chain-link fence created a boundary between the alley and the practice fields. The alley turned to the south and ran between Jesse's house, which fronted 29th Avenue South, and the houses that fronted 28th Avenue South.<sup>5</sup>

The witnesses to Jesse's murder had different vantage points and motivations. One group of witnesses was attending Jesse's cousin's 13<sup>th</sup> birthday party.<sup>6</sup> These boys were throwing a taped-up Nerf football in the narrow entry to the alley when a four-door white Dodge Intrepid slowly drove by them.<sup>7</sup> They moved aside to let the white Intrepid pass, and they peered into the car at the passengers.<sup>8</sup>

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<sup>1</sup> Minneapolis Police Department, Reports for Case # MP 08-315289 (Printed Nov. 1, 2022), at 21–22, 25–32, supplemental reports 11–15 [hereinafter police reports in this case are cited as MPD at \_\_, supp. \_\_].

<sup>2</sup> MPD at 29–30, supp. 13.

<sup>3</sup> Maria Elena Baca, *18-year-old Killed in Alley Drive-by Was Shot in the Heart*, Star Tribune, October 14, 2008, at B1, B4.

<sup>4</sup> See Trial Exhibit 5, *State v. Barrientos-Quintana*, 27-CR-08-53942 (Minn. Dist. Ct. 2008) [hereinafter trial exhibits are referred to “Trial Ex. \_\_” and transcripts are referred to as “Trial Transcript \_\_”].

<sup>5</sup> *Id.*; see also Trial Ex. 39.

<sup>6</sup> See Trial Transcript at 435; MPD at 26, supp. 14.

<sup>7</sup> Trial Transcript at 436; MPD at 25, supp. 15.

<sup>8</sup> MPD at 63, supp. 1; MPD at 26, supp. 14; MPD at 124, supp. 44; MPD at 112, supp. 46; MPD at 128–29, supp. 48.

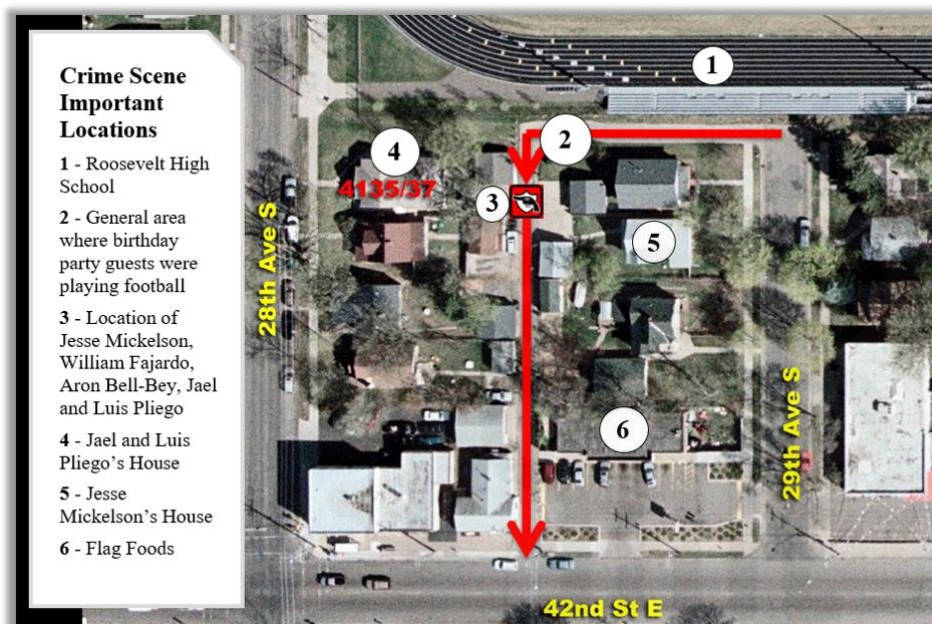


Figure 1 – Crime Scene Locations with Path of Drive-By Vehicle in Red (also attached as Appendix C)

After the car passed them, it came to a stop directly beside a second group of boys.<sup>9</sup> These boys were not attending the birthday party. They were standing in Jael Pliego-Espitia's driveway, across the alley from Jesse's house.<sup>10</sup> Jael was an admitted gang leader of the South Side Raza (SSR) clique,<sup>11</sup> and he was known by his street

name, Puppet.<sup>12</sup> [REDACTED]

[REDACTED].<sup>13</sup>

The SSR-gang-affiliated boys in Puppet's driveway—Puppet's crew<sup>14</sup>—watched as the white Intrepid stopped next to Puppet's driveway. They watched as the backseat passenger reached his arm out of the car's back window and started firing a revolver.<sup>15</sup> Puppet, or one of his crew, was probably the target, but the shooter hit Jesse by mistake.<sup>16</sup> Jesse had been outside for his cousin's party throwing the football with his cousin's friends before he fatefully walked over to talk with the boys who were hanging out in Puppet's driveway.<sup>17</sup>

<sup>9</sup> MPD at 124, supp 44; MPD at 120, supp 45; MPD at 130, supp. 48.

<sup>10</sup> Trial Ex. 5; Transcript of Interview by Robert Dale and Christopher Gaiters with William Fajardo, Oct. 11, 2008 at 5 [hereinafter Tr. of Fajardo Interview 10/11/08]; Transcript of Q and A Interview by Christopher Gaiters with Luis Espitia-Pliego, Oct. 12, 2008 [hereinafter Tr. of Luis Espitia-Pliego Q and A Interview 10/12/08]; see MPD at 26–27, supp. 14 (discussing how Jesse was speaking to Hispanic neighbors across the alley).

<sup>11</sup> South Side Raza was a clique within a wider Sureños 13 gang that was active in Minneapolis in 2008. That year many of the other cliques within the Sureños 13 gang, and other gangs, were feuding with the SSR.

<sup>12</sup> MPD at 30, supp. 13.

<sup>13</sup> [REDACTED]

<sup>14</sup> This report will refer to the witnesses in Puppet's driveway as "Puppet's crew" throughout the report. Puppet's crew includes Jael Pliego-Espitia, Luis Pliego-Espitia, William Fajardo, and Aron Bell-Bey. See attached Appendix B for a list of main actors and witnesses.

<sup>15</sup> MPD at 48 supp. 5; MPD at 118, supp. 45; MPD at 109, supp. 47; MPD at 139, supp. 54.

<sup>16</sup> MPD at 64, supp. 35; MPD at 249, supp. 86.

<sup>17</sup> MPD at 86, supp. 23; MPD at 111–12, supp. 46.

Two bullets struck Jesse; one pierced his heart.<sup>18</sup> Jesse fell to the ground.<sup>19</sup> One of the boys from Puppet’s crew, Aron Bell-Bey, realized later that a bullet had grazed him, leaving a small fragment in his leg. The fragment was later removed at the hospital.<sup>20</sup> Debris from a bullet striking the ground may have hit another boy from Puppet’s crew, William Fajardo, in the face. His injury needed no immediate medical attention.<sup>21</sup>

The police dispatcher received three 911 calls between 6:53 and 6:54pm.<sup>22</sup> Two calls came from Jesse’s family. The third call came from someone in the neighborhood who heard shots while sitting on his porch.<sup>23</sup> No one from Puppet’s crew called 911, even though they had seen Jesse injured, heard him moaning in pain, and saw him lying motionless in Puppet’s driveway.<sup>24</sup>

First responders arrived at the scene shortly after the 911 calls, but it was too late. Jesse was pronounced dead at the scene.<sup>25</sup>

**Minneapolis Police Department (MPD) officers arrive at the scene, and two sets of witnesses with different motivations and different accounts emerged.**

Numerous witnesses saw Jesse collapse.<sup>26</sup> The boys attending the birthday party watched the entire incident and had the best, undistracted view inside the white Intrepid and of its passengers. The first MPD officers at the scene separated the birthday-party witnesses and instructed them not to speak with each other until they were interviewed by police, protecting their memories from contamination. Police interviewed these witnesses at the scene and at the police station shortly after the shooting.<sup>27</sup> These boys cooperated with officers and provided mostly consistent accounts of the incident.<sup>28</sup> These boys described the shooter as a bald Hispanic male, sitting alone in the back passenger seat.<sup>29</sup> Two of them said the shooter was wearing a grey sweatshirt.<sup>30</sup> One boy agreed that the car passed “pretty slowly” and that he was two or three feet

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<sup>18</sup> Trial Transcript at 490–92.

<sup>19</sup> *Id.* at 568.

<sup>20</sup> *Id.* at 672–73.

<sup>21</sup> *Id.* at 562.

<sup>22</sup> *Id.* at 461.

<sup>23</sup> 911 Dispatch, calls recorded at 6:53pm, Oct. 11, 2008.

<sup>24</sup> *See* MPD at 169, supp. 55.

<sup>25</sup> MPD at 44, supp. 9.

<sup>26</sup> MPD at 26–27, supp. 14.

<sup>27</sup> MPD at 21, supp. 11.

<sup>28</sup> Hilary Caligiuri, Barrientos Descriptions of Shooter, Nov. 12, 2008 (attached as Appendix A).

<sup>29</sup> MPD at 26–27, supp. 14.

<sup>30</sup> *Id.*

away on the passenger side when he looked into the car.<sup>31</sup> Another boy on the driver's side said the car "drove slowly by" as he looked inside toward the backseat passenger.<sup>32</sup> He agreed that he was "pretty positive" there was only one person in the backseat.<sup>33</sup>

A neighbor from the next block over told officers that night that he saw three people in a white Dodge Intrepid speeding through his alley 30 seconds after hearing the shots fired. Just up the alley from his house, he heard the car stop, heard a door open and close, and saw the car drive off. That evening, Officer Tapp, who days after became the Roosevelt High School resource officer, searched the area where the Intrepid had stopped, looking for the gun used in the shooting. The gun was never found.<sup>34</sup> The next day an officer from the gang unit told the lead investigators that a house in the area where the neighbor saw the white Intrepid stop, and where the weapon was possibly discarded, belonged to a "documented" Sureños 13 gang member, Arber Meko.<sup>35</sup>

Witnesses on Jesse's side of the alley told officers that "the Mexicans" in the house where Puppet lived were probably the target.<sup>36</sup> Puppet seemed like an obvious target. He had formed a new clique within the Sureños 13 gang without permission.<sup>37</sup> As a result, he had been warring with various Sureños cliques and other gangs in Minneapolis. [REDACTED]

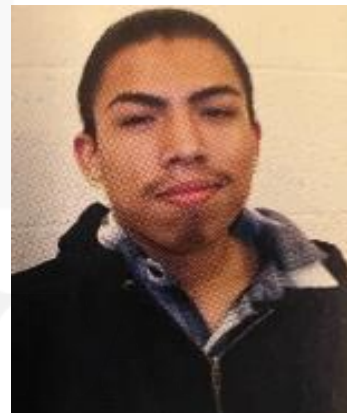


Figure 2 – Yearbook Photo of Jael Pliego-Espitia, aka Puppet

[REDACTED].<sup>38</sup> [REDACTED]

[REDACTED].<sup>39</sup> In addition, Puppet's 13-year-old brother, Luis Pliego-Espitia, who was also in the driveway when Jesse was shot, had been attacked by rival

<sup>31</sup> Transcript of Q and A Interview by Robert Dale and Christopher Gaiters with J.G., Nov. 7, 2008 at 2–3 [hereinafter Tr. of J.G. Q and A Interview 11/7/08].

<sup>32</sup> Transcript of Q and A Interview by Robert Dale with J.B., Nov. 6, 2008, at 3–4 [hereinafter J.B. Q and A Interview 11/6/2008].

<sup>33</sup> *Id.*

<sup>34</sup> MPD at 44, supp. 9.

<sup>35</sup> MPD at 166, supp. 50.

<sup>36</sup> MPD at 29, supp. 13. Members of Jesse's family also believed that Puppet and his brother were the likely targets. Star Tribune, October\_14,\_2008\_(Page\_B1\_SW).

<sup>37</sup> Trial Transcript at 843–45, 881.

<sup>38</sup> [REDACTED].

<sup>39</sup> [REDACTED].

gang members who chased him and beat him with a baseball bat. His injuries were so serious that he was transported by ambulance and treated at the hospital. No one was prosecuted for shooting Puppet. Nor was anyone prosecuted after the assault on Luis, Puppet's younger brother.<sup>40</sup>

Puppet's crew was being shot at, so while they witnessed Jesse's shooting, they immediately ducked and ran for cover when the shooting started. When the car sped away, they pounded on the door to Puppet's house to get inside.<sup>41</sup> They did not call 911, even though they saw Jesse on the ground in pain, and they were uncooperative when the police arrived on the scene.<sup>42</sup> These boys had the time and opportunity to coordinate their story before meeting with investigators. In fact, when officers first arrived on the scene and knocked on Puppet's door, the boys told police they had not seen anything.<sup>43</sup> Later, one of the boys admitted that they had agreed, together, to lie to the officers when questioned.<sup>44</sup>

#### **Homicide investigators arrive with a TV crew.**

The lead investigators, Sgts Robert Dale and Christopher Gaiters, who had recently joined the MPD homicide unit, arrived on the scene a couple of hours after the shooting.<sup>45</sup> They were accompanied by a film crew from *The First 48*, a popular reality TV show that follows investigators in murder investigations.<sup>46</sup> The premise of the show is that a suspect must be found within the first 48 hours, or the case will likely go unsolved.<sup>47</sup>

The investigators immediately focused on Puppet and the boys from his driveway. Dale returned to Puppet's family's home the night of the shooting with Officer Tapp, who spoke Spanish and acted as an interpreter. He learned that the boys in Puppet's crew witnessed the shooting and ran into Puppet's house immediately after.<sup>48</sup>

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<sup>40</sup> See Transcript of Interview by Robert Dale and Christopher Gaiters with Jael Pliego-Espitia October 15, 2008 at 12, 21–23 [hereinafter Tr. of Jael Pliego-Espitia Interview 10/15/08].

<sup>41</sup> MPD at 44, supp. 9; MPD at 136, supp. 51; MPD at 154, supp. 53; MPD at 169, supp. 55; Tr. of Fajardo Interview, 10/11/08, at 7.

<sup>42</sup> MPD at 36, supp. 2 (When officers spoke to the residents in Puppet's house, they said they heard 4 to 8 shots but saw nothing.); MPD at 255, supp. 92 (Aron asked Jesse if he was alright and Jesse told Aron he was in pain).

<sup>43</sup> MPD at 36, supp. 2.

<sup>44</sup> Trial Transcript at 690–91.

<sup>45</sup> *The First 48*, Up in Flames/Drive By (aired April 16, 2009) at 8:40, 9:10.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 00:45.

<sup>48</sup> MPD at 44–45, 86, supps. 9, 23.



### **Investigators learn of two key suspects—Sharky and Sandwich.**

Officers drove Puppet and his crew downtown, where Dale and Gaiters placed them in different rooms and questioned them for hours, pressuring them to divulge leads.<sup>49</sup> They thought the boys knew more than they were saying.<sup>50</sup> These gang-affiliated witnesses gave inconsistent descriptions of what they saw. They did not agree on the color of the car, how many passengers were in the car, whether it was going fast or slow, or whether it stopped or backed up before the shooting began.<sup>51</sup> Their descriptions of the shooter conflicted too. They disagreed about whether the shooter was in the front seat or back seat of the car, or wearing sunglasses, a bandana, or gloves. None of them described the shooter wearing a grey sweatshirt as some of the boys playing football had.<sup>52</sup> They each said they did not recognize the shooter, but they agreed on one detail: the shooter was bald.<sup>53</sup> The boys from Puppet's crew each denied that Puppet was outside, even though Jesse's sister had witnessed Puppet talking to Jesse as the white Intrepid pulled up to the driveway, and she remembered Puppet fleeing on his crutches when the shooting began.<sup>54</sup>

In interviews that night, Dale and Gaiters indulged Puppet's denials about being outside when the shooting occurred.<sup>55</sup> But, at the end of the evening, investigators had few leads. Puppet told Gaiters he heard his younger brother Luis, telling his friends Aron and William, he thought the shooter was Sharky, a rival gang member.<sup>56</sup> The boys from Puppet's house agreed that they had discussed Sharky as the potential shooter before the police arrived. Each boy agreed that Sharky fit the description of the shooter. Sharky was bald.<sup>57</sup>

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<sup>49</sup> MPD at 86–87, supp. 23.

<sup>50</sup> *The First 48*, Up in Flames/Drive By (aired April 16, 2009) at 13:00.

<sup>51</sup> MPD at 104–105, supp. 33; Transcript of Interview by Robert Dale and Christopher Gaiters of Aron Bell-Bey, Oct. 11, 2008 at 4–13 [hereinafter Tr. of Bell-Bey Interview 10/11/08]; Tr. of Fajardo Interview 10/11/08 at 4–10; Interview by Robert Dale and Christopher Gaiters with Luis-Pliego Espitia, Oct. 12, 2008, part 1 at 34:00-50:00 [hereinafter Luis Pliego-Espitia Interview 10/12/08]; Transcript of Q and A interview by Robert Dale and Christopher Gaiters with Luis-Pliego Espitia, Oct. 12, 2008 at 3–6 [hereinafter Tr. of Luis-Pliego Espitia Q and A Interview 10/12/08].

<sup>52</sup> MPD at 104–105, supp. 33; Tr. of Bell-Bey Interview 10/11/08 at 4–13; Tr. of Fajardo Interview 10/11/08 at 4–10; Luis Pliego-Espitia Interview 10/12/08, part 1 at 34:00–50:00; Tr. of Luis-Pliego Espitia Q and A Interview 10/12/08 3–6; MPD at 27, supp. 14.

<sup>53</sup> MPD at 104, supp. 33; Tr. of Bell-Bey Interview 10/11/08 at 16; Tr. of Fajardo Interview 10/11/08 at 8; Luis-Pliego Espitia Interview 10/12/08 at 2:07:25.

<sup>54</sup> MPD at 93, supp. 41. The main accomplice witness, Sharky, testified that Puppet was outside during the shooting. Trial Transcript at 813–814.

<sup>55</sup> See Transcript of Interview by Robert Dale and Christopher Gaiters with Jael Pliego-Espitia, Oct. 11, 2008 at 5, 7 [hereinafter Jael-Pliego-Espitia Interview 10/11/08].

<sup>56</sup> *Id.* at 14, 15 (stating that none of the boys admitted to knowing Sharky's given name even though they had gone to school with him); Jael Pliego-Espitia Interview 10/15/08 at 36.

<sup>57</sup> Tr. of Bell-Bey Interview 10/11/08 at 19; Tr. of Fajardo Interview 10/11/08 at 18.



Figure 3 - Path of Drive-By Vehicle After Shooting

On October 12, the day after the murder, Sgt Dale learned of a potential suspect from a fellow homicide detective. Sgt Fors informed Dale that he had investigated a case that involved a known Sureños 13 gang member named Arber Meko, aka Sandwich, who lived in a house about a block away, just behind the spot where officers believed the gun was discarded after Jesse's murder.<sup>58</sup>

On October 15, Roosevelt High School's resource officer, Officer Tapp, also forwarded a lead to the investigators.<sup>59</sup> Officer Tapp emailed Sgt Dale, alerting him that a girl from Jesse's high school picked a student named Marcelo Hernandez "out of a photo book as being in the car, possibly the shooter."<sup>60</sup> She said his street name was "either Smokey or Sharky."<sup>61</sup> Officer Tapp had familiarity with the investigation, as he had been one of the first officers on the scene after Jesse was shot, and he had attempted to resuscitate Jesse.<sup>62</sup>

### **Investigators continue to press Puppet's crew for other suspects, and they name Smokey.**

On the same day Sgt Dale received Officer Tapp's email about potential suspect Marcelo Hernandez, aka Smokey or Sharky, investigators brought Puppet and his younger brother Luis

<sup>58</sup> MPD at 166, supp. 50.

<sup>59</sup> MPD at 153, supp. 52

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*; For consistency's sake, the CRU spells Marcelo Hernandez's street name as "Sharky" and Edgar Barrientos's street name as "Smokey," despite the variations in spellings in the record. Quotations have been altered to fit these spellings.

<sup>62</sup> MPD at 33, supp. 12.

back to the station. In interviews that started on October 15 and lasted until the early hours of October 16, Dale and Gaiters separated Puppet and Luis and questioned each for more information. Luis told investigators that he remembered that the shooter was in the front seat of the car, and there were three people in the back.<sup>63</sup> He said that the shooter stuck half of his body outside the car window when he fired the gun.<sup>64</sup> Luis described the shooter as bald, with a black bandana on his neck, and having a “little mustache” and athletic body.<sup>65</sup> Luis said he thought the shooter “took [his eyebrows] off.” Gaiters and Dale asked Luis if he meant that the shooter had “plucked” his eyebrows with a tweezers and Luis agreed.<sup>66</sup> Luis mentioned that Sharky came up as a possible shooter when he talked to his friends, but that Aron doubted that Sharky was the shooter.<sup>67</sup>

Dale and Gaiters accused Luis of holding back and told him that his brother Puppet had told them the truth.<sup>68</sup> Luis responded that a member of the Vatos Locos gang who went by the nickname Venom was seated in the back passenger seat of the white Intrepid. Gaiters presented Luis with a photo lineup that contained Venom.<sup>69</sup> When he viewed one of the photos, Luis said, “I’m not sure, it looks kinda like him.”<sup>70</sup> Gaiters asked Luis, “Who does that look like to you?”<sup>71</sup> Luis responded, “I think I saw him in the car.”<sup>72</sup> A few minutes later, Luis said that he did not think anyone in the photos were in the car.<sup>73</sup>

In a separate room, Puppet gave Dale and Gaiters the names of potential suspects and people who had previously caused trouble in the alley behind his house.<sup>74</sup> One name Puppet mentioned was Smokey, who he described as a 28-year-old rival gang member.<sup>75</sup> Puppet claimed that Smokey had driven through the alley looking for his girlfriend, Itzel. Puppet also mentioned that about two weeks before Jesse was shot, Smokey beat up William Fajardo at the Flag Foods store just down the alley from Puppet’s house.<sup>76</sup>

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<sup>63</sup> Interview by Robert Dale and Christopher Gaiters of Luis Pliego-Espitia, Oct. 15–16, 2008, file 5 at 10:33 [hereinafter Luis Pliego-Espitia Interview 10/15/08–10/16/08].

<sup>64</sup> *Id.*, file 5 at 11:00.

<sup>65</sup> *Id.*, file 5 at 12:00–12:50.

<sup>66</sup> *Id.*, file 5 at 12:53–13:25.

<sup>67</sup> *Id.*, file 6 at 6:14.

<sup>68</sup> *Id.*, file 6 at 9:30–12:00.

<sup>69</sup> MPD at 140, supp 54; Luis Pliego-Espitia Interview 10/15/08–10/16/08, file 12 at 15:30.

<sup>70</sup> *Id.*, file 12 at 16:57.

<sup>71</sup> *Id.*, file 12 at 17:03.

<sup>72</sup> *Id.*, file 12 at 17:20.

<sup>73</sup> *Id.*, file 12 at 20:05. (“I’m pretty sure he’s not in there.”).

<sup>74</sup> Tr. of Jael Pliego-Espitia Interview 10/15/08 at 12.

<sup>75</sup> *Id.* at 12–13.

<sup>76</sup> *Id.* at 12–13.

Gaiters again spoke to Puppet's younger brother Luis on October 17.<sup>77</sup> According to Gaiters's report, Luis said that Smokey, who was a 25-year-old gang member, had come through the alley behind his and Puppet's house on several occasions looking for his girlfriend. Luis said Smokey belonged to the CV-155 gang clique, and they did not get along with the SSR, Puppet's gang. Luis said Smokey did not like Itzel hanging out with the SSR gang members at Puppet's house.<sup>78</sup> Then Luis, in a complete turnaround, said Smokey had been in the rear passenger seat of the white car that passed through the alley on October 11, Smokey had pointed a gun in the direction of Jesse, he began firing, and Jesse fell to the ground.<sup>79</sup>

Dale and Gaiters would later discover that Puppet was having an intimate relationship with Itzel, Smokey's girlfriend, and may have had a motive to pin the murder on Smokey.

### **One of Puppet's crew identifies Edgar Barrientos as Smokey.**

The same day Luis told Gaiters that Smokey was the shooter, Dale and Gaiters brought 16-year-old William Fajardo, a member of Puppet's crew, to the station where they conducted a long, coercive interview. William consistently told the investigators that he could not see the shooter because he was looking down fixing his pants as the car pulled up and shots were fired.<sup>80</sup> Dale and

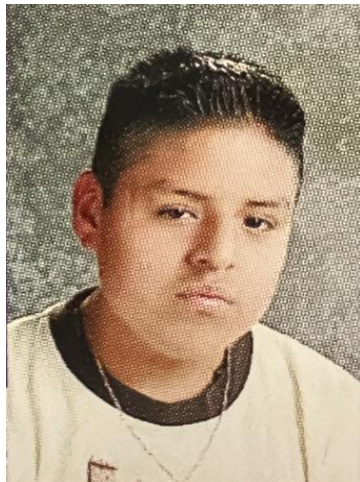
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<sup>77</sup> MPD at 64, supp. 35. When defense counsel requested a recording of the October 17 interview, the prosecutor asserted none existed. The prosecutor said that Gaiters's police report, written on October 28, contained a typo and it meant to reference an interview with Luis on October 21, not October 17. *See* Letter from Kristi McNeilly to Hilary Caligiuri, Jan 16, 2009; Letter from Hilary Caligiuri to Kristi McNeilly, Jan. 21, 2009. The CRU has concluded that Gaiters likely interviewed Luis on October 17, not October 21. First, no interview occurred on October 21—Luis was interviewed on October 20, when he was shown a photo lineup containing Barrientos. *See* Minneapolis Police Department, Sequential Line-up Photo Identification Report for Luis Pliego-Espitia, October 20, 2008; Q and A Interview by Robert Dale and Christopher Gaiters with Luis Pliego-Espitia, Oct. 20, 2008. Second, both Dale and Gaiters interviewed Luis on October 20, however, Gaiters's report on the October 17 interview stated, "I spoke with [Luis]," MPD 64, supp. 35. In other police reports when Gaiters was with Dale he wrote "Sgt. Dale and I spoke with . . ." *See* MPD at 77, supp. 36; MPD at 139–40, supp. 54; MPD at 149, supp. 60. Third, in his report referencing October 17, Gaiters makes no mention of Luis picking Barrientos's photo out of a sequential photo lineup, a key detail that would have been noted if the interview occurred on October 20. *See* MPD at 97, supp. 34 (Dale noting that a sequential lineup was given to Luis on October 20). Finally, Luis naming Barrientos as the shooter before William Fajardo on October 17 is consistent with the investigators' pressure on William later in the day on October 17. They then told William it was time to "come clean" with the truth because Luis and Puppet had done so: "We talked to Puppet okay. We talked to Luis alright. They told us a story okay. You understand that? They told us a story. Don't make yourself look bad. Okay?" Fajardo Interview 10/17/08, File 2 at 20:00.

<sup>78</sup> MPD at 64, supp. 35.

<sup>79</sup> *Id.*

<sup>80</sup> Transcript of Interview by Robert Dale and Christopher Gaiters with William Fajardo, Oct. 17, 2008, at 4–5, 11–12 [hereinafter Tr. of Fajardo Interview 10/17/08].



**Figure 4 - Yearbook Photo of William Fajardo**

Gaiters would not accept William's claims. Gaiters leaned in close to William and warned him: "We talked to Puppet okay. We talked to [his brother] Luis alright. They told us a story okay. You understand that? They told us a story. Don't make yourself look bad. Okay. You think Puppet's a liar?"<sup>81</sup>

Dale suggested that William was not telling the entire truth, and he told William they were giving him another opportunity.<sup>82</sup> After saying, again, he did not get a good look at the shooter, Gaiters placed a photo of Jesse in front of William and encouraged him to speak directly to Jesse.<sup>83</sup> Speaking as Jesse, Gaiters said, "Help me out, help me out, William."<sup>84</sup> William started crying.<sup>85</sup>

After several long pauses and silence between questions, Dale asked William, "[D]id you see who was inside [the car]?"<sup>86</sup> William replied: "I was thinking it was this guy Smokey." He followed up, "Why do you think it was him?" William responded, "Because he's bald. And has arched eyebrows."<sup>87</sup> William then told investigators about how Smokey recently beat him up at Flag Foods.<sup>88</sup> Dale asked William "Was Smokey in the car that night? Saturday night? Was he in the car man?" William said yes and he was "probably in the back[seat]." They asked William what Smokey was doing, and he said, "I think he was the one shooting."<sup>89</sup>

Dale and Gaiters presented William with a photo lineup containing Edgar Barrientos, whose street name was Smokey.<sup>90</sup> The procedure did not comply with MPD protocols. It was not double-blind. The lead investigators who conducted the lineup knew the suspect and where the suspect was placed in the lineup. The lineup contained an older photo of Barrientos from 2005

<sup>81</sup> Tr. of William Fajardo Interview 10/17/08 at 17; Interview by Robert Dale and Christopher Gaiters with William Fajardo, Oct. 17, 2008, file 2 at 20:00 [hereinafter Fajardo Interview 10/17/08].

<sup>82</sup> Fajardo Interview 10/17/08, file 2 at 30:00.

<sup>83</sup> *Id.*, file 2 at 32:00.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*, file 2 at 32:00

<sup>86</sup> *Id.*, file 2 at 39:45.

<sup>87</sup> *Id.*, file 3 at 00:01–00:40.

<sup>88</sup> Tr. of William Fajardo Interview 10/17/08 at 20.

<sup>89</sup> *Id.* at 23.

<sup>90</sup> See Fajardo Interview 10/17/08, file 4 at 42:00–51:00.

with a shaved head.<sup>91</sup> Investigators failed to give William proper instructions and cautions and failed to ask for a statement of confidence.<sup>92</sup>

After going through the photos twice, William identified the photo of Barrientos as “Smokey.”<sup>93</sup> Dale asked William how he recognized Smokey, and William said from the store. Dale replied, “Okay is that it?” William said, “Yeah.” Again, Dale asked, “Do you recognize him from any where else?”<sup>94</sup> In black ink William wrote on the lineup photo how he recognized Barrientos: “Smokey seen in front of Flag Foods.”<sup>95</sup>

After a break, investigators returned, asking for clarification about why William did not write that he recognized Smokey as the shooter.<sup>96</sup> They reminded William that earlier he said Smokey was the shooter and they gave him a blue colored pen to write how he recognized Smokey. William asked, “What do I write?” and they replied, “you know we can’t tell you what to write. That’s not what we’re here for. . . . You know how you just wrote about the store there. You can just write about the same deal with the car.”<sup>97</sup> In blue colored pen, William wrote on the photo: “kinda looks like the shooter.”<sup>98</sup> Dale and Gaiters told William they were “very proud” of him, that he “stood up,” and that he became “a man.”<sup>99</sup>

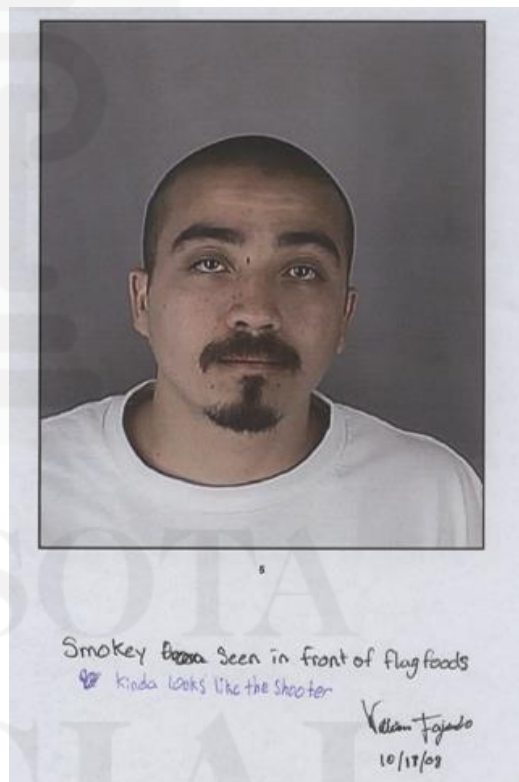


Figure 5 - Trial Exhibit 80

<sup>91</sup> Trial Transcript at 1540–42; Trial Ex. 80; Nancy K. Steblay, Eyewitness Identification Expert Report - *State v. Barrientos-Quintana*, Dec. 14, 2021 (attached as Appendix D), at 29–30 [hereinafter Steblay Report].

<sup>92</sup> Steblay Report at 27-38; Fajardo Interview 10/17/08, file 4 at 42:00; Trial Ex. 80; Trial Transcript at 1540.

<sup>93</sup> Tr. of William Fajardo Interview 10/17/08 at 28.

<sup>94</sup> *Id.*

<sup>95</sup> Trial Ex. 80.

<sup>96</sup> Fajardo Interview 10/17/08, file 5 at 8:15.

<sup>97</sup> Tr. of Fajardo Interview 10/17/08 at 30.

<sup>98</sup> Trial Ex. 80.

<sup>99</sup> Tr. of Fajardo Interview 10/17/08 at 24, 27, 29, 32, 33

**Puppet's brother identifies Barrientos, aka Smokey, in an unrecorded lineup procedure.**

On October 20, three days after presenting William with a photo lineup, Sgt Dale returned to Puppet's little brother, Luis.<sup>100</sup> Luis had ample time to discuss the lineup procedure with William.<sup>101</sup> Unlike William, Luis was presented with the photo lineup in the back of a police car.<sup>102</sup> This lineup procedure, like William's, did not comply with MPD's protocols.<sup>103</sup> And, importantly, it was the same photo lineup—with Barrientos's photo in position number five—that Dale had presented to William, which was also a violation of MPD's protocols.<sup>104</sup> In a Q and A interview recorded *after* the lineup procedure took place, Luis said he recognized Smokey in the lineup as the person who shot Jesse, and he described the shooter as:

kind of brown like my skin, my skin color and then he had like, he had like a lot of beard because you could see like coming out and he had a lot of moustache and then he was bald and then he had black eyes and then he had long like like bushy like eyebrows.<sup>105</sup>

During questioning, Luis also added more details about Smokey and Itzel's relationship. Luis said Itzel was at his house for a barbeque during a homecoming game at Roosevelt High School when Smokey drove through the alley looking for her. Itzel ran from him. Smokey drove after her. He told her to get into his car. Itzel got into Smokey's car, and they sped away.<sup>106</sup>

**Barrientos is arrested, interrogated, and his alibi is ignored.**

On October 22, based on the identifications by William and Luis, Barrientos was arrested.<sup>107</sup> Just eleven days had passed since the shooting, and Barrientos was not bald. The arrest report described his hair as straight, short, and black.<sup>108</sup>

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<sup>100</sup> See Steblay Report at 20.

<sup>101</sup> *Id.*

<sup>102</sup> MPD at 48, supp. 25.

<sup>103</sup> Steblay Report at 28–38.

<sup>104</sup> *Id.* at 20–21.

<sup>105</sup> MPD at 48–53, supp. 25.

<sup>106</sup> MPD at 48–49, supp. 25.

<sup>107</sup> MPD at 101, supp. 26.

<sup>108</sup> MPD at 3.



**Figure 6 - Edgar Barrientos's Booking Photo – October 22, 2008**

Barrientos agreed to talk with investigators. He gave investigators an incorrect phone number. He admitted that he drove through the alley that prior September to pick up Itzel, who he claimed was just a friend.<sup>109</sup> He admitted to punching William at Flag Foods.<sup>110</sup> He said he was no longer in a gang, and he denied participating in the drive-by shooting.<sup>111</sup> Barrientos admitted that he had heard rumors that he and Sharky were involved in Jesse's murder, but he did not know why people were spreading them.<sup>112</sup>

Barrientos sketched out an alibi and provided Dale and Gaiters with the names of witnesses who could back it up.<sup>113</sup> Very early in the interview, Barrientos told Dale

and Gaiters, "I was in Maplewood all weekend . . . staying with a friend."<sup>114</sup> He said he did not know when the shooting took place, but he mentioned that he was at a baptism party from around 9pm to 12 or 1am. And before that, he was in Maplewood.<sup>115</sup> Barrientos told Gaiters he could talk to the "security guard guys" from the baptism party to verify.<sup>116</sup>

<sup>109</sup> Transcript of Interview by Robert Dale and Christopher Gaiters with Edgar Barrientos-Quintana on Oct. 22, 2008, at, 14–15, 176–78 [hereinafter Tr. of Barrientos Interview].

<sup>110</sup> *Id.* at 23.

<sup>111</sup> *Id.* at 36, 60–61.

<sup>112</sup> *Id.* at 20–22.

<sup>113</sup> Barrientos's interrogation is long. It is also illuminating, not just because Barrientos provides various ways that the investigators can check his alibi, but it provides a window into the investigation. During the interrogation, investigators lie to Barrientos; they refuse to accept his explanations; they encourage him to stop asking for a lawyer so that they can continue to talk to him; they continually tell him "you know you did it"; they give him the false impression that Itzel betrayed him even though she hadn't; they tell him Itzel's memory of October 11 is "not even close" to Barrientos's account even though she told them she was with him all day. Tr. of Barrientos Interview at 79, 154, 160, 204, 216, 219, 230.

<sup>114</sup> Interview by Robert Dale and Christopher Gaiters with Edgar Barrientos-Quintana on Oct. 22, 2008, file 2 at 21:20. [hereinafter Barrientos Interview].

<sup>115</sup> Barrientos Interview, file 2 at 22:38.

<sup>116</sup> *Id.*, file 2 at 43:45.



When asked if he talked to anyone else that day, Barrientos said Marcia Cruz, Itzel's mother, might have been at work that day, but she was home by 4 or 5pm. He said that people at the baptism party saw him, like the father or mother of the baby. He also said that Itzel's brother Ricardo, Itzel, and he left Maplewood at about 9pm for the party. Barrientos thought that earlier that day he had watched an On Demand movie. He thought that happened between 1pm and 3pm.<sup>117</sup>

After leaving Barrientos alone for 52 minutes, Dale and Gaiters re-entered the room. "Edgar, our investigation clearly indicates you were involved in this." Barrientos responded, "Are you serious?"<sup>118</sup> Then he immediately corrected part of his alibi: "I just remembered that Marcia did not work that day."<sup>119</sup>



**Figure 7 - Sgt. Christopher Gaiters Interrogating Barrientos**

The investigators talked over Barrientos as he tried to explain. They told Barrientos they had been talking to a lot of people and everything they were told clearly makes him involved. At one point Barrientos interjected, "Can you call Marcia and ask her if I was there?"<sup>120</sup> One of the investigators responded, "That doesn't matter."<sup>121</sup>

Barrientos corrected himself again, saying that he got mixed up about when Marcia worked and that he also thought he saw the On Demand movie on Sunday, not on Saturday, the day of the shooting.<sup>122</sup> Barrientos started to show his frustration: "So my alibi or whatever, if you call that lady and ask her what, I just remembered that was the week she didn't work . . . How can that not matter?"<sup>123</sup> Barrientos gave them Marcia's phone number and more details: "Man, I just

<sup>117</sup> *Id.*, file 3 at 9:08–9:20, 21:53–22:02.

<sup>118</sup> *Id.*, file 4 at 28:46.

<sup>119</sup> *Id.*, file 4 at 29:20.

<sup>120</sup> *Id.*, file 4 at 33:45.

<sup>121</sup> *Id.*, file 4 at 33:47.

<sup>122</sup> *Id.*, file 4 at 36:10.

<sup>123</sup> *Id.*, file 4 at 42:22.

remembered cuz she did shrimp, she make some shrimp soup....that's how I remembered it was Saturday.”<sup>124</sup> Dale asked if there were others there too. Barrientos said Itzel was there, and they had to “go everywhere” to get stuff for dinner. He thought that was around noon or 1pm that they went shopping.<sup>125</sup> After investigators again stated they believed he was involved, Barrientos stated: “You guys are about to convict an innocent person, I’m telling you.”<sup>126</sup>

Barrientos continued to offer corrections to and corroboration for his alibi. He said he thought he was with Itzel when she heard about the shooting when someone called her. He repeated that he and Itzel were at her apartment when Marcia was cooking.<sup>127</sup> He became frustrated that one of the investigators told him “it doesn’t matter” when he tried to explain that Marcia usually worked on Saturdays.<sup>128</sup>

As the interrogation went on, Barrientos kept encouraging the investigators to speak with Marcia. He said that she would tell them the truth. Eventually, Dale and Gaiters left the room and said they were going to call Marcia and Itzel.<sup>129</sup> It would be over four hours before Dale and Gaiters returned to continue their questioning of Barrientos. During those four hours, Dale and Gaiters were interrogating Itzel, who was brought into a different interview room and questioned while Barrientos sat alone.

### **Sgts Dale and Gaiters question Itzel, an alibi witness, asking her to “come clean.”**

As Barrientos was waiting in a different interview room, Dale and Gaiters interviewed Itzel. For more than two hours, Itzel, a teenager, faced two investigators who were accusing her of lying and threatening her with jail time.<sup>130</sup>

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<sup>124</sup> *Id.*, file 4 at 43:45.

<sup>125</sup> *Id.*, file 4 at 45:20.

<sup>126</sup> *Id.*, file 4 at 47:20.

<sup>127</sup> *Id.*, file 5 at 5:00.

<sup>128</sup> *Id.*, file 5 at 5:50.

<sup>129</sup> *Id.*, file 5 at 24:50.

<sup>130</sup> See Transcript of Interview by Robert Dale and Christopher Gaiters with Itzel Chavarria-Cruz, Oct. 22, 2008 at 36 [hereinafter Tr. of Itzel Interview]



**Figure 8 - Yearbook Photo of Itzel Chavarria-Cruz from Trial Exhibit 33**

When asked about the Saturday of the murder, Itzel said Barrientos was with her at her house until they went to the baptism party. Dale interrupted her and asked if she wanted to start over. Itzel said, “I am telling the truth, and you are saying I am not telling the truth.”<sup>131</sup> Dale told her they thought she had a good idea who was responsible for the murder.<sup>132</sup> As Dale stepped out of the room, Itzel asked, “When can I leave?”<sup>133</sup>

Left in the interview room alone, Itzel knocked on the locked door and asked someone to tell the detective “I would like to leave now.”<sup>134</sup> Another person opened the door. Itzel again said she “wanted to leave.”<sup>135</sup> When Dale returned 20 minutes later, he told Itzel, “I can tell that you’re upset, so are we . . . because we know you know what happened.” Itzel said she was not going to say anything because they were accusing her of lying. Dale interrupted her. In a stern voice, he told her they were not convinced about whether she was a witness or whether she was involved in what happened.<sup>136</sup> “If and when we find out that you had something to do with this, or you know who did and you are covering for that person, you could be possibly looking at jail time. Aiding an offender, that’s what it is. . . . Do you understand that?” Itzel said “yes.”<sup>137</sup>

For the next several minutes, Dale spoke. He claimed he could read people. He thought she was protecting a killer, or maybe the killer was asking her to lie. He thought she was giving him a “line of crap.”<sup>138</sup> Dale said that if they found out that she was covering for somebody, that makes her just as responsible as the person who did it. Dale said they were giving her a chance to “come clean.” Itzel said she *was* coming clean.<sup>139</sup>

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<sup>131</sup> *Id.* at 33.

<sup>132</sup> *Id.* at 34.

<sup>133</sup> *Id.* at 35.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> Interview by Robert Dale and Christopher Gaiters with Itzel Chavarria-Cruz, Oct. 22, 2008 at 1:41:10 [hereinafter Itzel Interview]. The investigators used this familiar witness or defendant tactic with other witnesses, including Aron, William, Sharky, and Arber Meko. *See* Parts IV.B.3.b., IV.C.2, IV.D.

<sup>137</sup> Itzel Interview at 1:42:20.

<sup>138</sup> *Id.* at 1:43:50

<sup>139</sup> *Id.* at 1:44:00

Dale responded “No. We don’t think you are. Are you telling us . . . that [Barrientos] was at your place the whole time on Saturday? . . . And that you never left sight of him?”<sup>140</sup> Itzel repeated that they were at the house all day and never left until the baptism party, but she added, “unless we went to Cub Foods, which is not even far from my house.”<sup>141</sup> Dale called this a lie. He told her that she said they never left the house and now she is saying they went to Cub Foods. He accused her of not remembering her lies and tripping herself up. Dale told her that Jesse was scratching to get out of his grave, and she was refusing to help him. Itzel responded that there was nothing she could do to change their minds because they obviously did not believe her.<sup>142</sup>

Gaiters told Itzel they had spoken to Barrientos, and they knew that “more took place.” He gave Itzel the impression that Barrientos had confessed.<sup>143</sup> Itzel responded, “I’m telling the truth you guys don’t want to believe me.”<sup>144</sup> She continued, “If he is saying that it was him, it’s a lie because he was at my house, so he has no reason to say it was him when it wasn’t him. He was at my house.”<sup>145</sup>

Dale told Itzel they were giving her an opportunity to get out of this mess. Itzel responded, “I am not lying, I am telling the truth.”<sup>146</sup> Dale suggested that Itzel did not care about Jesse.<sup>147</sup> Itzel got emotional. She raised her voice and said that Jesse was her friend’s brother. Itzel explained that she knew what it was like to lose someone. She started to cry. She asked, “How do you want me to help . . . if I don’t know anything.”<sup>148</sup>

Itzel cried as she spoke: “You’re telling me that he wasn’t at my house; he *was* at my house.”<sup>149</sup> Dale responded, “Not the whole day.”<sup>150</sup> Itzel raised her voice, “One time we went to Cub Foods. One time we went to Cub Foods, we came back home, it is not that far, it does not take that long to go to Cub Foods and come back!”<sup>151</sup> The investigators suggested they try to “straighten

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<sup>140</sup> *Id.* at 1:44:20.

<sup>141</sup> *Id.* at 1:45:35.

<sup>142</sup> *Id.* at 1:47:10.

<sup>143</sup> *See id.*

<sup>144</sup> *Id.* at 1:48:28.

<sup>145</sup> *Id.* at 1:50:33.

<sup>146</sup> *Id.* at 1:51:08.

<sup>147</sup> *Id.* at 1:51:45.

<sup>148</sup> *Id.* at 1:53:28.

<sup>149</sup> *Id.* at 1:53:35.

<sup>150</sup> *Id.* at 1:53:40.

<sup>151</sup> *Id.* at 1:53:38.

this out.” Itzel, still crying, pushed back, “I’m not going to try to straighten anything out ‘cause you guys won’t believe me. . . . I’m just trying to go home.”<sup>152</sup>

Dale told Itzel she had to make them believe her. Itzel cried, “I’m not going to sit here and try to beg some people to fucking believe me when you guys aren’t going to believe me!”<sup>153</sup> She continued, “*All I wanna do is go home*. I don’t want to sit here and talk to you guys no more ‘cause you guys keep telling this thing over and over, and I am telling the truth, and you won’t believe me.”<sup>154</sup>

Gaiters asked Itzel if she wanted to tell them more about the Cub Foods part. Itzel said, “I just don’t want to say anything else.”<sup>155</sup> Still crying, Itzel told Gaiters, “I don’t know anything . . . [Barrientos] was at my house . . . when I found out her brother died it was because Puppet told me . . . Puppet told me . . . I called him, and he told me [A.M.]’s<sup>156</sup> brother just got shot. . . . And [Barrientos] was at my house.”<sup>157</sup> This information was later corroborated in Itzel’s phone records. There was a call from Itzel’s house to Puppet at 8:57pm, from Puppet to Itzel’s house at 8:59pm, and then from Itzel’s house to Puppet at 9:08pm.<sup>158</sup>

Eventually, Dale asked Itzel who was at home with her that Saturday. She said that her mom went to work early, and her brother left for a while.<sup>159</sup>

Itzel asked again when she could leave, but Dale and Gaiters continued to press with questions like, “You don’t wanna help Jesse out?”<sup>160</sup> Itzel gave them more details about when and where her mom worked. Itzel began sobbing, and Gaiters asked if she wanted water. She said, “I just wanna go.”<sup>161</sup> That was at least the eighth time she asked to end the interview and go home.

Gaiters left the room and returned to tell Itzel that there was a car coming for her. Then, he apologized and said she could call him if she wanted to talk. Itzel tried to say something, and

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<sup>152</sup> *Id.* at 1:54:00 (emphasis added).

<sup>153</sup> *Id.* at 1:54:10.

<sup>154</sup> *Id.* at 1:54:30.

<sup>155</sup> *Id.* at 1:55:10.

<sup>156</sup> The CRU refers to witnesses associated with Jesse’s family that were juveniles at the time of the murder by their initials.

<sup>157</sup> *Id.* at 1:55:37.

<sup>158</sup> It is probably not correct that Barrientos was with Itzel the entire time. Phone records show Barrientos was calling Itzel’s residence at that time, probably trying to get back into the apartment after going to the liquor store. *See* Timeline of Phone Calls with Notes, Prosecution File.

<sup>159</sup> Itzel Interview at 2:01:35. Itzel made the same error Barrientos had. She thought her mom went to work that Saturday because she usually worked on Saturday. Marcia made this mistake as well. But later, when the investigators got her work records, they showed that Marcia did not punch in for work that Saturday.

<sup>160</sup> Tr. of Itzel Interview at 47.

<sup>161</sup> Itzel Interview at 2:04:36.

Gaiters interrupted, “Can you just hear me out first though? Just let me finish my thought okay?”<sup>162</sup> He talked to her about second chances. He said that sometimes people get involved in the “legal side of things.”<sup>163</sup> Itzel interrupted. She said she knew that she was telling the truth, and “I’ll prove you guys wrong.”<sup>164</sup> In response, Gaiters reminded her that people can be “almost as responsible as the person who actually did it.”<sup>165</sup> Before Itzel left the room, Gaiters told her that her information about Cub Foods meant a lot to him even if she thought it was insignificant.<sup>166</sup> But as MPD records would show, Gaiters did not request video from Cub Foods for the period of time Itzel claimed she and Barrientos were there.<sup>167</sup> Eventually, Gaiters did get the video from Cub Foods after the state learned the defense had a video and was delaying disclosing it to the prosecution.

**Investigators return to Barrientos to “clear up some confusion.”**

When Dale and Gaiters finished their interview with Itzel, they returned to Barrientos’s interview room. He eagerly asked, “Did you get a hold of them?” Dale asked, “Who?” Barrientos said the people he had told them he was with. Gaiters said, “Yea, we talked to some people.”<sup>168</sup>

Gaiters asked Barrientos to start with the Friday before the shooting and tell them about his day. Barrientos provided a timeline: worked until 4pm, met Itzel at his brother’s house, took Itzel home to Marcia’s apartment in Maplewood, and spent the night there.<sup>169</sup> On Saturday, they woke up around 10am, and then left the apartment for a few hours. Barrientos needed to leave because Itzel’s dad, Jose, did not like him, and her dad had come over to visit and pick up her brother, Ricardo. Barrientos stayed outside until Itzel came out, and they walked the dog together. After her dad left with Ricardo, he and Itzel returned to the apartment and took Marcia shopping sometime after noon. He said they went to a Chinese store that sells fish, and he thought they returned to Marcia’s apartment around 5pm. He told Dale and Gaiters, “I am not good with hours okay . . . I am trying my best.”<sup>170</sup>

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<sup>162</sup> *Id.* at 2:18:50.

<sup>163</sup> *Id.* at 2:20:15.

<sup>164</sup> *Id.* at 2:20:20.

<sup>165</sup> Tr. of Itzel Interview at 50.

<sup>166</sup> Itzel Interview at 2:24:50.

<sup>167</sup> MPD at 219, supp. 107; MPD at 262, supp. 110.

<sup>168</sup> Barrientos Interview, file 9 at 33:00.

<sup>169</sup> *Id.*, file 9 at 34:30.

<sup>170</sup> *Id.*, file 9 at 36:00.

Then, Barrientos said he “remembered something else.” He said he and Itzel went to his brother’s house around 6:30pm.<sup>171</sup> Gaiters had Barrientos clarify. Barrientos said he went to his brother’s house in Minneapolis around 5 or 5:30pm and stayed about an hour “cuz we got on to [Marcia’s] house around 6 something.”<sup>172</sup> Gaiters asked Barrientos to go through this part again, slowly. Barrientos told Gaiters that he and Itzel went to his brother’s house to show him a dog, but he didn’t have his cell phone with him. He said they stayed for about an hour or an hour and a half and left his brother’s house between 6 and 6:30pm.<sup>173</sup> When investigators later got Barrientos’s phone records, there was no activity from Barrientos’s phone between 4:37 and 7:31pm, which aligns with Barrientos’s claim that he did not have his phone with him.<sup>174</sup>

Gaiters asked Barrientos to describe the route he took back to Maplewood. Barrientos said he took I-94 east from his brother’s house. He said he did not stop anywhere between his brother’s house and Maplewood.<sup>175</sup> He thought he got back to Marcia’s around 7pm, and they waited for Itzel’s brother Ricardo to come home to see if he was still planning to go to the baptism party.<sup>176</sup> During his explanation, Barrientos blurted out another part of the evening he remembered—he went to a liquor store near Marcia’s apartment when Ricardo first got home around 8:30pm.<sup>177</sup> Barrientos, Ricardo, and Itzel went to the baptism party around 10 or 10:30pm. They stayed until about 1am, and Barrientos drove them straight home to Marcia’s apartment in Maplewood.<sup>178</sup>

In the interview, Dale confronted Barrientos, telling him that they had been talking to Itzel while he was sitting alone in the interview room. When asked if he believed Itzel is truthful, Barrientos agreed with investigators that “[s]he has no reason to lie.”<sup>179</sup> Dale said Itzel told them everything, and “we have a clear picture” of what happened. Barrientos responded, “Now after talking to her, I am guessing you know I didn’t [do it].”<sup>180</sup> Dale and Gaiters implied that Itzel told them he did do it.<sup>181</sup> Barrientos insisted, “I was around her the whole day . . . so there’s no way I

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<sup>171</sup> *Id.*, file 9 at 38:25.

<sup>172</sup> *Id.*, file 9 at 38:54.

<sup>173</sup> *Id.*, file 9 at 40:09. This timing is supported by phone records and Cub Foods video.

<sup>174</sup> Trial Ex. 87, 88.

<sup>175</sup> Barrientos Interview, file 9 at 40:30.

<sup>176</sup> *Id.*, file 9 at 43:00.

<sup>177</sup> *Id.*, file 9 at 46:15.

<sup>178</sup> *Id.*, file 9 at 49:10.

<sup>179</sup> *Id.*, file 10 at 8:07.

<sup>180</sup> *Id.*, file 10 at 3:38.

<sup>181</sup> *See id.*, file 10 at 3:45–5:00 (Dale saying Itzel “let it all out” and feeling relieved she told the truth).

could have done it.” Dale explained that what Itzel told them did not match up with what Barrientos was telling them.<sup>182</sup>

Gaiters kept telling Barrientos that Itzel told them everything.<sup>183</sup> Barrientos replied, “If she told you everything why do you actually think . . . I was the one who did it.”<sup>184</sup> Neither Gaiters nor Dale replied. Then Dale explained, “From what she’s telling us Edgar and what you tell us . . . they’re not exactly the same.”<sup>185</sup> At one point, Barrientos became confused. He moaned, and then said, “She said that I shot him? . . . no no no no.”<sup>186</sup> Gaiters leaned in close to Barrientos and said, “We know the truth.” Barrientos continued, “Why would Itzel say I did [it] if she knows I didn’t do it?”<sup>187</sup>

Barrientos then said, “Alright book me . . . I need to call a lawyer, and figure out what to do.”<sup>188</sup> Dale and Gaiters kept talking and indicating they were sure he was involved.<sup>189</sup> Barrientos said, “Okay I need to get it over with. Call my lawyer. I didn’t do it.”<sup>190</sup> Dale and Gaiters continued talking while Barrientos repeated, “I wasn’t there . . . I wasn’t there.”<sup>191</sup> Dale and Gaiters left the room.<sup>192</sup> When they were out of the room, Barrientos twice repeated on video, “I need to talk to my lawyer.”<sup>193</sup>

When they returned to the interview room, Gaiters continued with the theme that Itzel had told them everything: he told Barrientos he knows it is hard to believe that Itzel came clean and that she told the truth.<sup>194</sup> Barrientos responded, “I didn’t do it.” Dale and Gaiters continued, saying Itzel told them everything, and they know how he must feel.<sup>195</sup> Barrientos interjected, “You guys haven’t even told me what time this happened.”<sup>196</sup>

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<sup>182</sup> *Id.*, file 10 at 3:30.

<sup>183</sup> Investigators repeated that Itzel “told us everything” 17 times during the interview. Tr. of Barrientos Interview at 138, 147, 151, 153, 154, 157, 159.

<sup>184</sup> Barrientos Interview, file 10 at 15:22.

<sup>185</sup> *Id.*, file 10 at 16:20.

<sup>186</sup> *Id.*, file 10 at 29:30.

<sup>187</sup> *Id.*, file 11 at 6:25.

<sup>188</sup> *Id.*, file 11 at 8:36.

<sup>189</sup> *Id.*, file 11 at 8:50.

<sup>190</sup> *Id.*, file 11 at 10:02.

<sup>191</sup> *Id.*, file 11 at 10:05–13:10.

<sup>192</sup> *Id.*, file 11 at 13:30.

<sup>193</sup> Tr. of Barrientos Interview 10/22/08 at 194.

<sup>194</sup> Barrientos Interview, file 11 at 34:40.

<sup>195</sup> *Id.*, file 11 at 35:21.

<sup>196</sup> *Id.*, file 11 at 36:15.



Gaiters began to give his theory about what happened. Barrientos interrupted, “Am I gonna have a phone call before I get booked?”<sup>197</sup> Gaiters ignored him. Again, Barrientos asked, “Can I use my phone call, man?”<sup>198</sup> Again, they ignored him. He stood up and announced, “I got to talk to my lawyer.” They started describing the car involved in the shooting. Barrientos said they should just book him. Dale and Gaiters left the room.

Another officer came in. He told Barrientos that the reason Dale and Gaiters were not listening to him was because Barrientos wanted to talk to a lawyer. The officer said they wanted to talk to him, but Barrientos would have to let them know he would talk without a lawyer.<sup>199</sup> The officer told Barrientos he would be booked for murder that evening, and if he wanted to talk to Dale and Gaiters again, he needed to make it clear he did not want a lawyer.<sup>200</sup>

Before Dale and Gaiters returned to the interview room, Barrientos, alone in the room, began sobbing. He spoke out loud, “What the hell is wrong with everybody. I didn’t do it.”<sup>201</sup> When Dale returned to the room, he said he wanted Barrientos to be very clear he did not want a lawyer. He also told Barrientos, “If you’re going to say the same things, there is no point [in talking].” Barrientos asked, “Can you tell me what time [the murder] happened?” Dale responded, “What does it matter?” Barrientos responded that it mattered because he could tell them where he was. Dale, passing up an important opportunity to gather alibi information that could have been corroborated, said it did not matter because Barrientos kept telling them he did not do it. Barrientos responded, “Go and look at the camera. I was at the liquor store.” Dale said it did not matter if all his time was accounted for. Barrientos repeated that he was at the liquor store at 8 or 8:30pm and Dale could look at the cameras.<sup>202</sup>

Dale continued to tell Barrientos that “time doesn’t matter.” In fact, they said it eight different times to him when Barrientos tried to provide information.<sup>203</sup> Barrientos continued to insist that he could prove where he was. Barrientos told Dale he could not believe that Itzel would say he did it when he was with her all day. Dale replied, “Betrayal’s a bitch.”<sup>204</sup>

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<sup>197</sup> *Id.*, file 11 at 38:49.

<sup>198</sup> *Id.*, file 11 at 41:19.

<sup>199</sup> *Id.*, file 11 at 49:00.

<sup>200</sup> *Id.*, file 11 at 50:16.

<sup>201</sup> *Id.*, file 12 at 2:40.

<sup>202</sup> *Id.*, file 12 at 9:30.

<sup>203</sup> See Tr. of Barrientos Interview at 65, 215, 220, 227 (“Doesn’t matter. We know you did it.”).

<sup>204</sup> Barrientos Interview, file 12 at 11:45.

Dale and Gaiters ignored multiple requests Barrientos made for a lawyer. Barrientos seemed confused about when he could talk to a lawyer. He seemed to think he needed to be “booked” to end the interview and talk to a lawyer. As Barrientos continued to request that they needed to “book me now ‘cause I need to make a phone call . . . I need to find a lawyer to get me out of there . . . I am telling the truth,” Dale carried on as he had in the past. He repeated, “You know you did it. You know you did it.” Barrientos asked if he had spoken to Marcia, Itzel’s mom. Dale repeated, “We know you did it.”<sup>205</sup>

Dale started to leave the room again, and Barrientos began to cry. He asked, “Can I make a phone call?”<sup>206</sup> Dale told him he could when he got to the jail. Barrientos told Dale, “Please don’t take it as I’m playing. You are getting the wrong person right now.”<sup>207</sup> Dale left the room and came back with more theories: “Maybe you were with someone who was the shooter.” Barrientos said, “No, no, no.” Dale said maybe it was an accident. Barrientos said no, and he wanted to make a phone call and get a lawyer.<sup>208</sup> Before the interview ended, Barrientos said, “I need to know why Itzel blamed it on me when she knows I ain’t do it. . . . That’s, that’s the person that hurts me more.”<sup>209</sup> Dale confessed that Itzel did not say that. Dale told him that they asked Itzel where she was that day and who she was with, and based on that and what he said, it was two different stories about the same day. Barrientos said he could not believe it, and he thought maybe she was wrong about what day it was. Dale responded, “Not even close.”<sup>210</sup>

Dale finally left the room, came back with handcuffs, and escorted Barrientos away.<sup>211</sup>

**Itzel’s brother Ricardo and their mother, Marcia, give statements to police and later correct those statements.**

Marcia, Itzel’s mom, was interviewed on October 24, two days after Barrientos’s interview. She said she worked all day at the Red Roof Inn on October 11, and after she got home, a relative and her two small children visited.<sup>212</sup> Ricardo also told investigators that his mother was working

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<sup>205</sup> *Id.*, file 12 at 16:08.

<sup>206</sup> *Id.*, file 12 at 23:40.

<sup>207</sup> Tr. of Barrientos Interview at 224.

<sup>208</sup> *Id.* at 226–27.

<sup>209</sup> *Id.* at 228.

<sup>210</sup> *Id.* at 230.

<sup>211</sup> *Id.* at 230–31.

<sup>212</sup> MPD at 79, supp. 38; MPD at 161, supp. 57.

that Saturday. He said that he left for the mall around 4pm, and he remembered that his two nieces were over.<sup>213</sup>

The next day, on October 25, Marcia and Ricardo discovered that they got their days mixed up because Marcia was not at work that Saturday as they originally thought, and their relative visited on Sunday, not Saturday. They called investigators to correct their mistake.<sup>214</sup> Marcia went to the police station to correct her earlier statement. She said she did not work on Saturday, October 11. She confirmed much of what Barrientos told Dale and Gaiters—that she went to the store with Itzel and Barrientos around 2pm, Itzel and Barrientos left the apartment around 5:30 or 6pm, they returned at 7 or 8pm, Ricardo's dad returned with Ricardo, and Itzel and Barrientos returned after Ricardo got home. Barrientos, Itzel, and Ricardo went to the baptism party.<sup>215</sup>

Ricardo accompanied his mom to the police station on October 25, and he also corrected his first statement. He also said he mixed the days up. He recounted what he could remember of October 11. His dad picked him up, they went to fix his dad's mobile home, he made a call to the apartment from his dad's phone when they were returning, they returned to the apartment around 9:40 or 9:50pm, and he, Barrientos, and Itzel went to the baptism party after that.<sup>216</sup>

Itzel, too, wanted to provide the investigators with an updated account of her whereabouts on October 11. On October 26, she sent an email that outlined her day: she and Barrientos woke up, watched TV, went outside when her dad came to pick up Ricardo, went to a Chinese store to get crabs and shrimp for her mom to cook, watched TV, went with Barrientos to his brother's at about 6pm, stayed until about 7pm, stopped for limes at Cub Foods because her mom had asked her to, got back to the apartment and her dad was there, she and Barrientos went out to smoke a cigarette and went to the liquor store near Cub Foods, Ricardo let them in the apartment, they got ready for the baptism party, they left for the party, they returned home around 2 or 2:30am.<sup>217</sup>

### **Investigators interrogate Arber Meko, aka Sandwich.**

In early November, Dale and Gaiters interrogated Meko, aka Sandwich, about October 11. Meko had been a suspect since the day after the shooting when Sgt Fors notified Sgt Dale about

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<sup>213</sup> MPD at 79–80, supp. 38.

<sup>214</sup> MPD at 69, supp. 39; MPD at 77, supp 36.

<sup>215</sup> MPD at 161–62, supp. 57.

<sup>216</sup> MPD at 71–72, supp. 39.

<sup>217</sup> MPD at 77–78, supp. 36.

Meko's gang ties and his proximity to the alley where the gun was thought to have been discarded. Meko was an active Sureños 13 gang member. [REDACTED]

[REDACTED]<sup>218</sup> [REDACTED]

[REDACTED]<sup>219</sup>

[REDACTED]<sup>220</sup> [REDACTED]

[REDACTED]<sup>221</sup>

Initially Meko lied to Dale and Gaiters about his Sureños 13 gang ties.<sup>222</sup> Dale and Gaiters confronted Meko with photographs showing him with several Sureños 13 members.<sup>223</sup> Dale told Meko that a voice stress analyzer was hooked up to Meko's voice and that it showed deception.<sup>224</sup> Dale said he was "almost 100 percent sure" Meko was in the car on October 11, or that he knew who was.<sup>225</sup> Dale revealed to Meko that a witness saw the drive-by car stop behind his house 30 seconds after the shooting.<sup>226</sup> The witness heard a car door open and quickly shut.<sup>227</sup> Dale did not believe Meko's alibi—that he was at home playing video games.<sup>228</sup> He told Meko he had a choice to make: he was either going to be a witness or a suspect.<sup>229</sup> Dale told him they could help him become a witness.<sup>230</sup> Meko did not cooperate, did not change his account, and his interrogation

218 [REDACTED]

219 [REDACTED]

220 [REDACTED]

221 [REDACTED]

<sup>222</sup> Interview by Robert Dale and Christopher Gaiters with Arber Meko, Nov. 3, 2008, part 2 at 00:00–28:00 [hereinafter Arber Meko Interview 11/3/08].

<sup>223</sup> *Id.*, part 4 at 19:09.

<sup>224</sup> *Id.*, part 4 at 17:10. The CRU in its review of the police and prosecutor files found no evidence that a voice stress analyzer was used on Meko during this interview.

<sup>225</sup> *Id.*, part 4 at 33:05.

<sup>226</sup> *Id.*, part 4 at 22:15.

<sup>227</sup> MPD at 35, supp. 10; MPD at 37, supp. 3.

<sup>228</sup> Arber Meko Interview 11/3/08, part 4 at 31:30.

<sup>229</sup> *Id.*, part 4 at 21:30.

<sup>230</sup> *Id.*, part 4 at 22:27. A video confirms that he was in a Cub Foods near Maplewood less than 33 minutes before the shooting.



**Figure 9- Meko on November 3, 2008**

ended.<sup>231</sup> Meko’s hair length on the November 3 video was much closer to a shaven bald than Barrientos’s hair was on October 22, when Barrientos was arrested.<sup>232</sup>

### **The last witness from Puppet’s crew identifies Barrientos.**

Almost a month after the shooting, and after local media had published photographs of Barrientos, Dale and Gaiters showed up at Aron Bell-Bey’s high school, pulled him from class, and interviewed him in the principal’s office without a parent present.<sup>233</sup> Evidence suggests that Dale and Gaiters had spoken with him the day before, but there is no record of this interview in the police reports.<sup>234</sup> They presented Aron with a photo lineup but did not record the lineup procedure.<sup>235</sup> Nor did they follow any of the other MPD protocols.<sup>236</sup> Instead, in a Q and A interview, they asked Aron a series of leading questions, and Aron said he remembered what the shooter looked like: “bald.”<sup>237</sup> Aron agreed that he was shown six photos, he looked at them twice, and he recognized photo number three (an older photo of Barrientos with a shaved head) as the shooter.<sup>238</sup> The prosecutor’s witness summary notes indicate that Aron was “pretty sure” about his pick.<sup>239</sup>

<sup>231</sup> *Id.*, part 4 at 00:00 to 11:02.

<sup>232</sup> *Id.*, part 7 at 9:35; see Figure 9.

<sup>233</sup> See Paul Walsh, *Suspected Gang Member Charged in Fatal Shooting of Minneapolis Teen*, Star Tribune, October 29, 2008 at B2; see Q and A Interview by Robert Dale and Christopher Gaiters with Aron Bell-Bey, Nov. 6, 2008, at 00:00–00:30 [hereinafter Bell-Bey Q and A Interview 11/6/08].

<sup>234</sup> See MPD at 118–121, supp. 45 (Aron is reminded that he told the investigators something “yesterday,” but there is no report or record of an interview with Aron 11/05/08).

<sup>235</sup> Trial Ex. 81; see Steblay Report at 35–36.

<sup>236</sup> Steblay Report at 28–38.

<sup>237</sup> MPD at 119, supp. 45.

<sup>238</sup> MPD at 121, supp. 45.

<sup>239</sup> Hilary Caligiuri, Barrientos descriptions of shooter Nov. 12, 2008. There’s no record that investigators asked Aron for a statement of confidence. This statement must have referred to the prosecutor’s interview of Aron on November 12, 2008. The statement in the Summary of the Witness Meeting disclosed to the defense was more definitive: “Face in photo line-up looks exactly like shooter’s face.” Hilary Caligiuri and Susan Crumb, Summary of Witness Meeting with Aron Bell-Bey, November 12, 2008.

**Jesse’s cousin, who got a view of the shooter, selects a filler from a photo lineup.**

6up Subject Image Lineup ID: 2068 28111



The day after Aron’s identification, Dale and Gaiters showed Jesse’s cousin, J.G., a lineup that contained a photograph of Barrientos.<sup>240</sup> This lineup failed to meet MPD protocols,<sup>241</sup> and neither the interview nor the photo lineup process was recorded.<sup>242</sup>

J.G., who was standing two to three feet away from the shooter as the car slowly passed by, did not select the photo of Barrientos.<sup>243</sup> He focused on photo number one, and he said the person in photo number one looked similar to the shooter.<sup>244</sup>

Figure 10 - Photo Lineup Shown to J.G.. Jesse’s Cousin.

**The grand jury indicts Barrientos.**

Given the media and intense pressure to solve the case, prosecutors convened a grand jury

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

<sup>240</sup> MPD at 109, supp. 47; Minneapolis Police Department, Sequential Line-up Photo Identification Report for J.G., Nov. 7, 2008 at 2.

<sup>241</sup> Steblay Report at 12, 21, 26–38.

<sup>242</sup> *Id.*

<sup>243</sup> MPD at 108–09, supp. 47.

<sup>244</sup> Tr. of J.G. Q and A Interview 11/7/08 at 2–3.

<sup>245</sup> [REDACTED]

[REDACTED]

<sup>246</sup> [REDACTED]

<sup>247</sup> [REDACTED]

<sup>248</sup> [REDACTED]

<sup>249</sup> [REDACTED]

<sup>250</sup> [REDACTED]

[REDACTED]

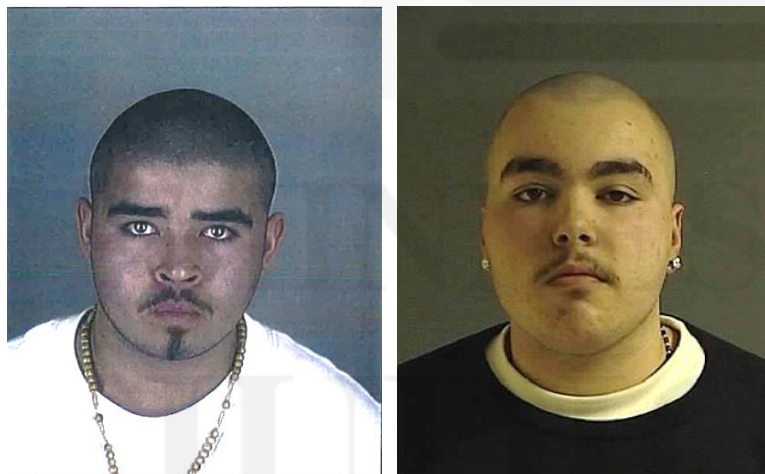
[REDACTED]

[REDACTED]

[REDACTED]

**The prosecutors direct Dale and Gaiters to interview the earliest suspects, Sharky and Meko, aka Sandwich.**

Once the grand jury issued an indictment, prosecutors asked Dale and Gaiters to “[t]ake another run at Sharky and [Arber Meko, aka] Sandwich.”<sup>252</sup> Prosecutors thought these two were almost certainly in the car. They told Dale and Gaiters to offer the two suspects a choice: “Do they want to be a witness or a defendant?”<sup>253</sup> Interviewing Meko made sense, as Meko’s features resembled the person J.G. focused on in the photo lineup.<sup>254</sup> And Meko’s eyebrows looked similar to Luis’s early descriptions of the shooter’s eyebrows—bushy and like tweezers had been used.



**Figure 11 - Filler # 1 in J.G. Lineup and Photo of Arber Meko**

Prosecutors also asked Dale and Gaiters to obtain a search warrant for Meko’s home. They thought he may have been responsible for hiding the gun used in the shooting.<sup>255</sup> Dale and Gaiters got a search warrant and conducted a search on Meko’s house, but no gun was found.

<sup>251</sup> [REDACTED]

<sup>252</sup> Investigative Request from Hilary Caligiuri and Susan Crumb to Robert Dale and Christopher Gaiters, Nov. 24, 2008.

<sup>253</sup> *Id.*

<sup>254</sup> See Photograph of Arber Meko, Prosecution File; Minneapolis Police Department, Sequential Line-up Photo Identification Report for J.G., Nov. 7, 2008 at 2.

<sup>255</sup> MPD at 166, supp. 50; see Arber Meko Interview 11/3/08, part 4 at 22:10; Application for Search Warrant and Supporting Affidavit, and Search Warrant of Arber Meko’s Residence (Nov. 24, 2008).

Dale and Gaiters interviewed Sharky three times over a five-month period while he was at a juvenile placement center in southern Minnesota.<sup>256</sup> In each interview, Dale and Gaiters provided Sharky details of the crime through leading questions that aligned with their theory of the case: that Smokey committed the shooting because he was driven by jealousy about Puppet's involvement with Itzel.<sup>257</sup>



**Figure 12 - Marcelo Hernandez aka Sharky**

In interviews with the investigators, Sharky's accounts began to morph to match information he received from Dale and Gaiters. In their first interview in November 2008, Dale and Gaiters had a detailed, unrecorded conversation with Sharky.<sup>258</sup>

Investigators later reported that they brought up the topic of "Smokey" and that Sharky began crying and said he did not want to go to jail.<sup>259</sup> In the recorded part of the interview, Sharky said he learned the day after the shooting that his friends Manny and Slappy were the shooter and the driver. Sharky denied being in the car.<sup>260</sup> Dale then asked Sharky, "Was Smokey in the car too?"<sup>261</sup> Sharky denied hearing that Smokey was involved.<sup>262</sup>

In their second meeting in January 2009, Dale and Gaiters told Sharky that Smokey was already in jail for the crime. They also introduced the idea that the shooting may have been because Smokey was angry about Itzel hanging out with rival gang members.<sup>263</sup> After Dale and Gaiters minimized the moral and legal culpability of being in the car during the shooting, Sharky said he might have been in the car, but could not remember because he was intoxicated.<sup>264</sup>

<sup>256</sup> See MPD at 171, supp. 66; MPD at 196, supp. 81; MPD at 256, supp. 93; *see also* MPD at 153, supp. 52.

<sup>257</sup> See Interview by Robert Dale and Christopher Gaiters with Marcelo Hernandez, Jan. 30, 2009, part 2 at 17:35 (Sharky stating that investigators told him last time that Smokey was mad Itzel was hanging out with SSR members) [hereinafter Hernandez Interview 1/30/09].

<sup>258</sup> MPD at 243, supp. 82 ("Our conversation with Marcelo Hernandez was partially recorded.") The interview transcript begins, "Marcello I just want to make sure I got this right? Okay?" Interview by Robert Dale and Christopher Gaiters with Marcelo Hernandez, Nov. 14, 2008, part 1 at 00:27. [hereinafter Hernandez Interview 11/14/08].

<sup>259</sup> MPD at 243, supp. 82.

<sup>260</sup> Transcript of Q and A Interview by Robert Dale and Christopher Gaiters with Marcelo Hernandez, Nov. 14, 2008, at 1–2 [Tr. of Hernandez Q and A Interview 11/14/08].

<sup>261</sup> Hernandez Interview 1/30/09, part 2 at 12:40.

<sup>262</sup> *Id.*

<sup>263</sup> Hernandez Interview 1/30/09, part 2 at 15:53, 17:15.

<sup>264</sup> *Id.*, part 2 at 17:20.



Dale and Gaiters gave Sharky a choice in his second interview: he could be a witness or a suspect. Sharky could “spend a lot of time in prison” if he was involved in the shooting. But if Sharky was “just kind of riding in the car and saw the shooting,” he was just a witness, and investigators could help him. Dale and Gaiters reminded Sharky that Smokey was already in jail for shooting Jesse.<sup>265</sup> When Sharky continued to insist that he was not in the car and that Manny was the shooter, Dale and Gaiters insisted over and over that Sharky was lying and that they knew he was in the car. They, again, raised the idea that the shooting was because of Itzel. They challenged Sharky’s claim that Manny shot Jesse because of Itzel: “If Smokey did it you can understand... but in the same token, you can’t tell us that Manny did it [for Smokey’s girl] ... two people couldn’t have done it, and you’re giving us two people.”<sup>266</sup> Eventually, Sharky began to echo the account Dale and Gaiters had given him and agreed that he could have been in the white Intrepid that evening.<sup>267</sup>

**Defense counsel makes a cursory, pro forma challenge to the eyewitness identification procedures.**

In February 2009, Barrientos’s defense attorneys filed a one-sentence notice of motion stating that they would seek to suppress witness statements identifying Barrientos as the shooter.<sup>268</sup> At a hearing, counsel asserted that the identifications were based upon “suggestive identification procedures” or “coercive tactics engaged in by the State.”<sup>269</sup> However, defense counsel presented little factual support or legal argument for her assertions.<sup>270</sup> Counsel told the court that she suspected that the police interview was suggestive because in one line of William Fajardo’s interview, investigators stated “What’s that? Ready for the next or?” after Barrientos’s photo was shown.<sup>271</sup> Counsel, though, admitted she had not watched videos of the eyewitness interviews.<sup>272</sup> Counsel argued, based on the transcript of William’s interview, that the interview was suggestive, and requested suppression “*if* that video actually shows that the identification is suggestive.”<sup>273</sup>

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<sup>265</sup> *Id.*, part 2 at 17:15.

<sup>266</sup> *Id.*, part 2 at 16:20.

<sup>267</sup> *Id.*, part 2 at 44:10.

<sup>268</sup> Def’s First Notice of Demand for Omnibus Hearing, State v. Barrientos-Quintana, 27-CR-08-53942 (Filed Feb. 12, 2009).

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

<sup>271</sup> Trial Transcript at 105–07.

<sup>272</sup> *Id.*

<sup>273</sup> *Id.* at 105–07 (emphasis added).

Prosecutors questioned whether the defense was challenging all three of the juvenile witnesses' identifications.<sup>274</sup> Defense counsel also promised to challenge all eyewitness identifications as coercive and suggestive once they had received all the discovery, but they failed to follow up with oral or written arguments for suppression.<sup>275</sup>

Like the defense, the state did not brief the trial court and offered no argument as to why the identifications were valid.<sup>276</sup> Prosecutors submitted the interviews and photo lineups under seal to the court.<sup>277</sup> The defense stipulated to this procedure.<sup>278</sup>

The trial court rejected the defense's motion to suppress. It noted, "Defendant did not submit any affidavits or a memorandum with his Motion. The court is unable to determine any specific complaints Defendant has regarding 'unlawfully suggestive identification procedures' or 'coercive tactics.'" <sup>279</sup> Without the benefits of briefing by the parties, the court concluded there was no basis to suppress the photographic lineup identifications made. The court made no mention that the lineup procedures violated the lineup protocols developed by the Hennepin County Attorney's Office.<sup>280</sup>

**As the trial date approached, investigators retrieve a new video confirming Barrientos's alibi.**

The state turned back to Barrientos's alibi. Itzel said they had been in Cub Foods on the east side of Saint Paul near the time of the murder. The prosecutors asked the investigators to search for video from a liquor store where Barrientos went the night of the murder to "show that he was bald."<sup>281</sup> But investigators were unsuccessful in securing video from the liquor store. Now with the trial looming, neither the investigators nor the prosecutors had seen video or photos of Barrientos from the day of the shooting, so they had not seen that Barrientos had a full head of dark hair.

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<sup>274</sup> *Id.* at 108–09.

<sup>275</sup> *Id.* at 109–110; Order, *State v. Barrientos-Quintana*, 27-CR-08-53942 (Minn. Dist. Ct. Feb. 24, 2009).

<sup>276</sup> See Trial Transcript at 109–114.

<sup>277</sup> *Id.* at 110–12.

<sup>278</sup> *Id.*

<sup>279</sup> Order, *State v. Barrientos-Quintana*, 27-CR-08-53942 (Minn. Dist. Ct. Feb. 24, 2009).

<sup>280</sup> *Id.*

<sup>281</sup> Investigative Request from Hilary Caligiuri and Susan Crumb to Robert Dale and Christopher Gaiters, Nov. 24, 2008 at 2, paragraph 11.

In late February, near the time trial was originally scheduled to begin, the investigators finally retrieved and viewed video from the east Saint Paul Cub Foods. The video confirmed that Barrientos and Itzel were inside the grocery store at 6:20pm, less than 34 minutes before the first 911 caller reported the shooting. Barrientos and Itzel had just purchased groceries and were casually talking as they walked toward the exit. Itzel had a small grocery bag in her hand. Barrientos had a full head of short, dark hair, and he was wearing a white t-shirt and jeans.<sup>282</sup>



**Figure 13 - Security Camera Video of Barrientos and Itzel Leaving Cub Foods**

### **Dale and Gaiters return to Sharky a third time.**

As the trial date approached, Dale and Gaiters met with Sharky again in the first week of March 2009. They applied similar pressure on Sharky as they had in January and told him this was his last opportunity. Sharky then changed his story. This time, Sharky said Valentin Olivera, aka

<sup>282</sup> Cub Foods Surveillance Video, Oct. 11, 2008 at 18:19:54.

Beaver, was driving the car. He said the car's owner, Ramiro Pineda, aka Slappy, was the front passenger. Sharky said he was with Smokey in the back seat, and Smokey was the shooter.<sup>283</sup> Sharky also gave the motive suggested by Dale and Gaiters in prior interviews: Smokey knew that Itzel was hanging out with SSRs, and Smokey was "pissed."<sup>284</sup>

Much of what Sharky told Dale and Gaiters in this meeting conflicted with other verifiable evidence in the case.<sup>285</sup> For example, Sharky claimed they met up with Smokey near Powderhorn Park and drove to the alley to shoot at the SSRs around 4pm. Dale and Gaiters corrected Sharky, telling him it was already dark when the shooting occurred, so it must have been more like 6:30pm.<sup>286</sup> Running with the jealousy motive, Sharky also said Jesse was dating Itzel. Obviously incorrect, investigators ignored this comment and left it out of their Q and A interview, which they conducted later that day.<sup>287</sup> Sharky also said Itzel was at the party and went to the ground when the shots were fired.<sup>288</sup> Sharky said that immediately after the shooting they did not drive north through an alley. Instead, they took a right and went south to a park.<sup>289</sup>

**Dale and Gaiters drive the route from the Cub Foods to Powderhorn Park and the crime scene.**

After receiving and viewing the Cub Foods video in late February, Dale and Gaiters conducted a test drive from the Cub Foods to the scene of the crime.<sup>290</sup> According to Gaiters, they began timing the trip when they left the Cub Foods parking lot.<sup>291</sup> From there they drove to the northeast corner of Powderhorn Park, which was the closest part of the park from their route on I-94, which they timed at 21 minutes.<sup>292</sup> Then they drove from Powderhorn Park to the rear of the

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<sup>283</sup> Interview by Robert Dale and Christopher Gaiters with Marcelo Hernandez, March 3, 2009, part 1 at 1:10:30 [hereinafter Hernandez Interview 3/3/09].

<sup>284</sup> Transcript of Q and A Interview by Robert Dale and Christopher Gaiters with Marcelo Hernandez, March 3, 2009 at 8. [hereinafter Tr. of Hernandez Q and A 3/3/09].

<sup>285</sup> See *infra* Part IV.C.3

<sup>286</sup> Tr. of Hernandez Q and A 3/3/09 at 2–4.

<sup>287</sup> Hernandez Interview 3/3/09, part 1 at 1:08:20; see Tr. of Hernandez Q and A 3/3/09.

<sup>288</sup> Hernandez Interview 3/3/09, part 1 at 1:24:00.

<sup>289</sup> *Id.* at 1:19:00.

<sup>290</sup> MPD at 260, supp. 105; MPD at 262, supp. 107; Letter from Bridget Landry to Hilary Caligiuri and Susan Crumb (Feb. 25, 2009).

<sup>291</sup> Trial Transcript at 1129.

<sup>292</sup> MPD at 260, supp. 105.

victim's house, which they timed at seven minutes.<sup>293</sup> According to Dale's report, they drove the route twice, and each time the total drive took 28 minutes.<sup>294</sup>

***The First 48* episode on Jesse's murder airs before Barrientos goes to trial.**

In April 2009, one month before the trial started, *The First 48* aired the episode it had been filming.<sup>295</sup> Parts of the episode were scripted. Events happened out of order, and Dale and Gaiters staged scenes that were not part of the investigation. The episode portrayed William's tentative identification of Smokey as the moment that caused the investigation to break wide open. But that is not how it happened. Puppet had already named Smokey as someone who came around his alley causing trouble. Also, Luis named Smokey as the potential shooter on October 17, according to Gaiters's police report.<sup>296</sup> These things occurred before investigators told William that Puppet and Luis had "come clean" and then presented William with a lineup. Also, witnesses had first named Sharky as a potential shooter, but the episode did not present that important fact. The episode never mentioned that Puppet was romantically involved with Barrientos's girlfriend, which gave Puppet a motive to identify Barrientos as the shooter. The episode also left out the important fact that every witness who saw the shooter agreed the shooter had a bald, shiny bald, or shaved head.<sup>297</sup>

Aron admitted to prosecutors before trial that he had watched the episode and had seen Barrientos being arrested.<sup>298</sup> William said he knew the episode aired but said he did not watch it.<sup>299</sup>

**As the trial approaches, there is no physical evidence connecting Barrientos to the crime.**

Before trial, the white Intrepid involved in the shooting had been located, towed, and tested. There was no forensic evidence such as fingerprints or DNA linking Barrientos to the car. Sharky's DNA was never compared to the DNA found in the car. However, DNA found on a cigarette linked Beaver to the car. The murder weapon was never recovered, although police thought it may have been discarded near Arber Meko's house. Video evidence revealed Barrientos was with Itzel, on

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<sup>293</sup> *Id.*

<sup>294</sup> *Id.*

<sup>295</sup> *The First 48*, *Up in Flames Drive By* (aired April 16, 2009).

<sup>296</sup> MPD at 64, supp. 35.

<sup>297</sup> *See infra* Part IV.G.

<sup>298</sup> Hilary Caligiuri and Susan Crumb, Summary of Witness Meeting with Aron Bell-Bey (May 5, 2009).

<sup>299</sup> Hilary Caligiuri and Susan Crumb, Summary of Witness Meeting with William Fajardo (May 8, 2009).

the east side of Saint Paul, at a grocery store, less than 33 minutes before the murder. Yet, the prosecution pushed forward with the eyewitnesses and with Sharky, the accomplice who agreed to cooperate in return for the state's promise to treat him as a witness. Simply put, on the eve of trial, the case was based on eyewitness identifications that were produced from rival gang members using methods proven to be unreliable and on the account of an incentivized accomplice witness whose story changed in each interview.

**At trial the jury convicts after three days of deliberation.**

At trial, prosecutors argued Barrientos was motivated to shoot at SSR members because he was in a rival gang and because he was jealous that his girlfriend Itzel was spending time with the SSR leader, Puppet. Aligning with *The First 48* narrative, prosecutors argued that William broke open the investigation by being the first person to identify Barrientos, aka Smokey, as the shooter.

The state's central witness, Sharky, testified that on the afternoon of the murder he was riding in the back seat of a white Dodge Intrepid with his fellow gang members Beaver and Slappy. He said they did not get along with Puppet's clique, SSR. The three got a call from another gang member hostile to Puppet telling them an SSR party was occurring in the alley behind Puppet's house. Sharky said that the group planned a drive-by shooting and called Barrientos to obtain a gun. He said Barrientos arrived, alone, about 20 minutes later at Powderhorn Park in Minneapolis. Sharky testified that after Barrientos got into the car with the other three, he was told that Itzel was at the party. Sharky told the jury that the four of them drove through Puppet's alley and that Barrientos fired the weapon killing Jesse.<sup>300</sup>

The state also presented the jury with three of the eyewitnesses: J.G. (Jesse's cousin), William Fajardo, and Aron Bell-Bey. The state did not call Puppet's brother Luis to testify even though he had been interviewed by Dale and Gaiters more times than any other witness in the case. The prosecutor claimed that Luis could not be found before trial and was uncooperative.<sup>301</sup>

When the state presented the three eyewitnesses, none of them were asked to make in-court identifications of Barrientos. The state entered Aron and William's out-of-court identifications through Sgt Gaiters.<sup>302</sup>

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<sup>300</sup> Trial Transcript at 785–906.

<sup>301</sup> Memorandum from Susan Crumb and Hilary Caligiuri on *The First 48* to Pete Connors, June 8, 2009 at 2.

<sup>302</sup> Trial Transcript at 1066–82.

J.G. had consistently described the shooter as bald before trial, and he had chosen a filler from the lineup as someone looking like the shooter. But at trial, the prosecutor led J.G. on direct to testify in a way that left the impression he had chosen someone from the lineup that looked very similar to Barrientos. The jury was never told that Barrientos was present in the lineup but that J.G. passed on his picture and focused on someone else. The prosecutor also led J.G. to testify that the shooter “didn’t ha[ve] a lot of hair,”<sup>303</sup> a description J.G. had never used before trial.

Aron’s eyewitness testimony was brief. He told the jury that the shooter had a “shave head and bald-headed” and thick eyebrows. The prosecutor asked if he had an opportunity to view a lineup by the MPD and whether he told investigators that he saw the shooter in the lineup. Aron said, “Yep.”<sup>304</sup>

William testified that he did not get a good look at the shooter. He explained that he only later placed Barrientos as the shooter when he remembered him from a confrontation at a nearby convenience store. He was not asked to identify Barrientos in the courtroom.<sup>305</sup>

Dale was not called to testify. Prosecutors discovered that before trial he had been filmed giving scripted answers to accommodate *The First 48* film crew, and they wanted to avoid cross-examination that could have been damaging to their case.<sup>306</sup>

Gaiters testified at trial that he gave all the required cautions to eyewitnesses before he presented them with photo lineups, including the caution that the suspect may or may not be in the lineup.<sup>307</sup> Gaiters said on cross-examination that witnesses consistently described the shooter with “short hair,” disagreeing with the defense assertions that the shooter’s hair was consistently described as bald or shaved.<sup>308</sup> Gaiters said that William was the first to identify the shooter, and he said it was Smokey.<sup>309</sup> Gaiters also said that no one had ever indicated to him that Sharky was the shooter.<sup>310</sup>

The state rested its case without presenting any physical evidence like DNA or fingerprints showing Barrientos was in the white Intrepid. No weapon was discovered. Barrientos’s cellphone

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<sup>303</sup> See Trial Transcript at 440, 448.

<sup>304</sup> *Id.* at 665, 673.

<sup>305</sup> *Id.* at 556–94.

<sup>306</sup> Memorandum from Susan Crumb and Hilary Caligiuri on *The First 48* to Pete Connors (June 8, 2009) [hereinafter *The First 48* memo].

<sup>307</sup> Trial Transcript at 1069–71. The “suspect may not be in the lineup” caution was never given to William Fajardo. Also, Dale conducted William’s photo lineup, not Gaiters, who was merely present.

<sup>308</sup> *Id.* at 1176–77.

<sup>309</sup> *Id.* at 1179.

<sup>310</sup> *Id.* at 1131.

records did not show he was in Minneapolis at the time of the murder. There were no call records showing he received a call from Slappy or his fellow gang members before the shooting.

Barrientos presented an alibi and mistaken identity defense. Itzel and her family members testified they were with Barrientos before and during the shooting. The defense stressed that Barrientos could not have been the shooter because videos showed he had a full head of hair and that he was in Cub Foods at 6:20pm with Itzel, less than 34 minutes before the first 911 call.<sup>311</sup>

On rebuttal the state played a snippet of a jail call between Barrientos and Itzel. On the snippet, Barrientos told Itzel they would get their “stories straight” if he got charged. The statement, taken out of context, was meant to leave the impression that Barrientos was directing witnesses to lie for him.<sup>312</sup>

In their closing arguments, prosecutors told the jury that investigators painstakingly corroborated each detailed piece of what Sharky had told them. The state argued, without evidence, that it took Barrientos only “20 minutes” to get to the scene.<sup>313</sup> Using the short clip of a jail phone call, prosecutors argued that Barrientos’s alibi was “constructed.”<sup>314</sup> Prosecutors implied that Barrientos was directing witnesses on what to say. Finally, prosecutors twice argued to the jury that Barrientos no longer enjoyed the presumption of innocence.<sup>315</sup>

After both sides rested, the district court decided it would not read the standard cautionary instruction on accomplice testimony. The instruction would have informed the jury that it could not rely only on the uncorroborated testimony of the accomplice, Sharky, to convict Barrientos.<sup>316</sup>

The jury struggled to reach a verdict. It deliberated for three days before informing the court that the jurors were deadlocked with three jurors strongly favoring acquittal.<sup>317</sup> To break the deadlock, the jury asked to review the portion of the transcript that focused on Sharky’s testimony about the planning and execution of the drive-by shooting. The court read the requested testimony to the jury. That same day, the jury reached a verdict, finding Barrientos guilty of first-degree premeditated murder for the benefit of a gang. He was sentenced to life in prison without the possibility of parole.<sup>318</sup>

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<sup>311</sup> *See id.* at 1395-1542.

<sup>312</sup> *Id.* at 1547-1558.

<sup>313</sup> Trial Transcript Volume 15 at 56.

<sup>314</sup> *Id.* at 66.

<sup>315</sup> *Id.* at 89.

<sup>316</sup> *Id.* at 3–4.

<sup>317</sup> Jury Notes to the Court, *State v. Barrientos* (“We are divided. 9 – guilty & a strong 3 not guilty.”).

<sup>318</sup> Trial Transcript at 1809-11.



**The Minnesota Supreme Court affirms the verdict with one strong dissent.**

Barrientos appealed and argued there was plain error in not cautioning the jury against Sharky's accomplice testimony.<sup>319</sup> The state argued Barrientos waived this argument for not objecting. In the alternative the state argued Sharky was corroborated by the eyewitness testimony, including that Jesse's cousin, J.G., "picked out Appellant's picture from a photo lineup as being similar to Appellant."<sup>320</sup>

The Minnesota Supreme Court affirmed. Even though the Court found that there was plain and obvious error in failing to warn the jury about inherently distrustful accomplice testimony, it concluded the error did not prejudice Barrientos because Sharky's testimony was corroborated by the eyewitnesses. The Court noted that William at least tentatively identified Barrientos and that Aron later "confidently" selected Barrientos from a photo lineup. It is not clear how the Court concluded that Aron "confidently" selected Barrientos.<sup>321</sup> Aron did not testify that he was confident in his identification, and there is no indication he was asked his level of confidence when the lineup was given. The prosecution's notes describe Aron as "pretty sure" of his identification.<sup>322</sup> The Court also found that Barrientos's alibi was "weak."<sup>323</sup>

Justice Paul Anderson disagreed and dissented. He noted that the jury could have reasonably rejected all the eyewitness testimony and convicted Barrientos solely on uncorroborated testimony from an accomplice. Justice Anderson noted that Barrientos had "very close-cut hair" in his older lineup photo like the eyewitnesses' descriptions, but that pictures of Barrientos taken on the date of the offense showed his hair was "much longer."<sup>324</sup>

After his appeal, Barrientos filed a post-conviction petition in 2012 with a few inconsequential claims regarding his defense counsel failing to provide him discovery and failing to challenge Sharky's testimony. The petition was summarily denied as procedurally barred without a hearing.<sup>325</sup>

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<sup>319</sup> Appellant's Brief at 23, *State v. Barrientos-Quintana*, 787 N.W.2d 603 (Minn. 2010) (No. A09-1613).

<sup>320</sup> Respondent's Brief at 8, *State v. Barrientos-Quintana*, 787 N.W.2d 603 (Minn. 2010) (No. A09-1613).

<sup>321</sup> *State v. Barrientos-Quintana*, 787 N.W.2d 603, 613 (Minn. 2010). There is no audio or video of Aron's identification of Barrientos, only a post-ID Q and A statement where no confidence statement was given.

<sup>322</sup> Hilary Caligiuri, Barrientos Descriptions of Shooter, Nov. 12, 2008, at 1.

<sup>323</sup> *Barrientos-Quintana*, 787 N.W.2d at 613.

<sup>324</sup> *Id.* at 616 (Anderson, J., dissenting).

<sup>325</sup> Order and Memo Denying Motion for PC Relief, *State v. Barrientos* (Jan. 8, 2013).

**An innocence project investigates Barrientos's claim of innocence.**

In 2016, the Minnesota Innocence Project (which later became the Great North Innocence Project) spoke to William Fajardo about his testimony. William recanted his testimony and stated he did not believe Barrientos was the shooter. William told the Innocence Project that during trial he wanted to say that Barrientos was innocent, but he was afraid of what the police would do. William said he did not know the identity of the shooter and he did not get a good look at the shooter.<sup>326</sup> William died in 2018, before the CRU began its investigation.

The Innocence Project also found Aron Bell-Bey, but Aron denied knowing anything about the case.<sup>327</sup> The CRU found Aron and requested to interview him. Aron said he would not feel comfortable speaking about the case without being compensated for his time.<sup>328</sup> The CRU declined to pay Aron for his statement, and the interview did not occur.

The Great North Innocence Project (GN-IP) worked with the CRU to identify and retain experts for the CRU's review. The CRU spoke with Nancy Steblay, PhD, and she agreed to review the eyewitness identification evidence in the case and to write a report for the CRU's consideration. The CRU also requested a report from Barbara Bergman on defense counsel's performance in the Barrientos case. Bergman is a nationally known defense attorney and law professor. The GN-IP provided the funds to hire Dr. Steblay and Prof. Bergman. The GN-IP also paid for an additional report from Jed Stone, an experienced criminal defense attorney and expert on ineffective assistance of counsel issues.

After a full investigation of the relevant facts, the CRU concluded that neither the eyewitness testimony nor the accomplice testimony was reliable and, therefore, could not support a conviction. In addition, the CRU concluded that Barrientos's alibi was supported by persuasive evidence that the jury never heard. For reasons the CRU will further explain, the truth did not emerge at trial or on appeal, and Barrientos's conviction resulted in a miscarriage of justice.

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<sup>326</sup> Memorandum from Priya Sunkara on William Fajardo, Oct. 4, 2016.

<sup>327</sup> Great North Innocence Project PowerPoint Presentation for State v. Barrientos-Quintana.

<sup>328</sup> CRU Phone Call to Aron Bell-Bey, Dec. 13, 2023, at 1:45.

## ***II. SCOPE OF REVIEW***

The CRU reviewed the following:

- Grand jury transcripts
- Trial transcripts
- All pleadings, including exhibits and affidavits
- All court orders and opinions
- Appellate briefs and post-conviction petitions
- The entire prosecution file
- Minneapolis Police Department (MPD) reports, including supplemental reports
- Audio, video and written transcripts of witness and suspect interviews with police
- A PowerPoint presentation from the Great North Innocence Project
- A Memo on William Fajardo from the Minnesota Innocence Project, dated October 4, 2016
- Cell phone data extraction reports
- Hennepin County jail recorded phone calls
- Minnesota court opinions, statutes, and rules relating to the issues in the case
- Expert reports and affidavits including:
  - Eyewitness Identification Expert Report in *State v. Barrientos-Quintana* by Dr. Nancy K. Steblay, dated December 14, 2021
  - Affidavit of Jed Stone regarding ineffective assistance of counsel, defense attorney and Fellow of the American Board of Criminal Lawyers, dated April 20, 2022
  - Report on Ineffective Assistance of Counsel in *State v. Barrientos-Quintana* by Barbara Bergman, Professor of Law, dated April 19, 2022
  - Affidavit of Dale Burns, retired MPD investigator, regarding the travel timing between Cub Foods and the murder scene, dated June 15, 2023
  - Affidavit of John Carney, in *Cynthia Padilla v. Minneapolis Police Department*, dated March 24, 2021

The CRU interviewed the following people:

- Susan Crumb, Assistant Hennepin County Attorney

- Benjamin E. Myers, trial counsel for Barrientos
- Sergeant Robert Dale, lead investigator
- Sergeant Dale Burns, retired MPD investigator
- Itzel Chavarria-Cruz
- Justine Korte
- Christopher Korte
- Priya Sunkara
- Patrick Tapp
- Edgar Barrientos-Quintana
- John Carney
- Mark Lanterman

The CRU attempted to interview the following people, but they refused or were uncooperative:

- Luis Pliego-Espitia
- Aron Bell-Bey
- Marcelo Hernandez

The CRU attempted to interview William Fajardo but discovered that he was deceased.

### ***III. SPECIAL CONSIDERATIONS***

An investigation that takes place more than a decade after the relevant events offers both challenges and opportunities. Since the initial criminal investigation in this case, science has advanced. We now have a better understanding of the conditions that may lead to a wrongful conviction. In this report, the CRU attempts to contextualize the evidence that was available or presented at trial with scientific understandings of human perception and decision-making to determine whether the evidence tends to undermine confidence in the conviction.

**A. Confirmation bias or “tunnel vision” is often a factor in wrongful convictions.**

Research shows that humans are subject to predictable biases in our decision-making, and we are not well-equipped to identify or control these biases when they affect us.<sup>329</sup> Studies have demonstrated that once people formulate a belief or hypothesis, they seek and interpret information in a way that validates their original hypothesis.<sup>330</sup> This process of understanding, reasoning, and supporting a particular hypothesis often happens outside our awareness. Simply put, we are motivated to find support for our hypotheses or beliefs, but we are rarely aware of our biases and how they may drive our judgments and decisions.<sup>331</sup>

The scientific community calls this phenomenon confirmation bias.<sup>332</sup> In the law enforcement context, it is more commonly known as tunnel vision. Tunnel vision describes what happens when investigators get locked into their own version of events, building a case that supports their theory while missing other possibilities.<sup>333</sup>

Tunnel vision leads investigators to interpret ambiguous evidence in a way that supports their theory of the case and discounts evidence that does not support their theory. Armed with a theory they believe is correct, investigators may pressure suspects to confess, eyewitnesses to identify a particular suspect, and alibi witnesses to change their accounts. They use the evidence gained from these witnesses to pressure other suspects or witnesses, developing more evidence that fits their theory. Meanwhile, and equally important, they fail to pursue promising leads that do not fit their theory of the crime.<sup>334</sup>

When there is pressure to quickly identify and arrest perpetrators, the effect of tunnel vision likely increases.<sup>335</sup> For instance, in the investigation of Jesse Mickelson’s murder, the pressure to find and convict the killer was likely amplified by *The First 48*’s influence on the investigation and the trial narrative. Once *The First 48* recorded investigators telling the family that they had

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<sup>329</sup> Keith A Findley, “Tunnel Vision” in *Conviction of the Innocent: Lessons from Psychological Research* at 6–9 (Brian L. Cutler ed. 2010), available at: <https://ssrn.com/abstract=1604658>.

<sup>330</sup> *Id.* at 6–12.

<sup>331</sup> *Id.*

<sup>332</sup> *Id.* at 7.

<sup>333</sup> *Id.* at 3–4.

<sup>334</sup> *Id.* at 10.

<sup>335</sup> *See id.* at 4, 6 (describing institutional and cultural pressures on police contributing to tunnel vision).

solved the crime, it would have been incredibly difficult to go back to the producers and the family to say they got it wrong.<sup>336</sup>

**B. Research shows our memories often fail, but in predictable ways.**

When witnesses to a crime are questioned, they do not provide facts. They provide memories. And memories are limited, malleable, and quick to fade.<sup>337</sup> Our memory does not record our experiences like a video camera. Instead, the accuracy of our memories depends on how information is acquired, encoded, and retrieved. At the acquisition stage of eyewitness memory formation, reliability is based on whether the witness had a good view and was paying attention to the relevant details for the time required to form a memory.

Attention to relevant detail is required to form a memory, and so is focus. Many witnesses fail to retain important details of events that happen right in front of them because their attention is focused on something else.<sup>338</sup> The best example of this “inattentive blindness” is what has been called “The Gorilla Experiment.” In this experiment, researchers had people watch two teams pass a basketball and count the number of passes for one of the teams. In the middle of the activity a person in a gorilla suit walked right through the middle of the game. When asked after the game how many passes were made, most viewers got the number correct. When asked if anyone noticed a gorilla walking through the game, at least half had no memory of seeing the gorilla. The experiment showed that our attention is limited and that most of us are unaware that we could miss something that happens right in front of our eyes.<sup>339</sup>

Once acquired, memories are not perfectly retained. Images and sounds encoded into memory are not stored in perfect condition, and they can be forgotten, revised, and distorted with time. Retrieving a memory is not like hitting re-play on a recording device. Memories are not

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<sup>336</sup> At the 2023 Minnesota Judicial Conference, Carol Tarvis spoke about the cognitive dissonance that affect us all, and especially how it affects lawyers, judges, and prosecutors. Her recent book explains how the prime suspect in an investigation can quickly become the only suspect, how announcing a prosecution in a high-profile case makes it extremely difficult for a prosecutor to back down, and how a conviction creates a motivation to reject all subsequent arguments of innocence. See Carol Tarvis and Elliot Aronson, *Mistakes Were Made (But Not by Me), Why We Justify Foolish Beliefs, Bad Decisions, and Hurtful Acts* at 173–216 (3rd ed. 2020).

<sup>337</sup> Steblay Report at 3; see Elizabeth Loftus, *Planting Misinformation in the Human Mind: a 30-year Investigation of the Malleability of Memory*, 12 *Learning and Memory* 361, 361–366 (2005).

<sup>338</sup> Alia Wulff & Ira Heyman, *Crime Blindness: The Impact of Inattentive Blindness on Eyewitness Awareness, Memory, and Identification*, 36 *Applied Cognitive Psychology* 166, 166-68, \*3–7 (2021).

<sup>339</sup> See Daniel Simons, *But Did You See the Gorilla? The Problem With Inattentive Blindness*, *Smithsonian Magazine* (Sept. 2012); Daniel Simons, *The Monkey Business Illusion*, YouTube.com (April 28, 2010), [https://www.youtube.com/watch?v=IGQmdoK\\_ZfY](https://www.youtube.com/watch?v=IGQmdoK_ZfY).

simply retrieved; they are reconstructed using current knowledge. Every time a witness revisits a memory, there is opportunity for revision and distortion that takes place outside of the witness's awareness. Witness interviews can, and often do, affect the retrieval process and contaminate the memory. As memory researcher Elizabeth Loftus said in a 2013 TEDTalk, "Memory works . . . like a Wikipedia page. You can go in there and change it, but so can other people."<sup>340</sup>

Misinformation, whatever the source, can corrupt memory even more easily when witnesses recall events in a social setting. This problem arises in cases where multiple witnesses discuss an event. Naturally, witnesses tend to talk to each other after witnessing an unusual event. But because witnesses have different perspectives, they are likely to see or notice different things. They also remember things differently. When witnesses talk to each other about the event, they may reinforce common memories of the event and they may also contaminate each other's memories of the event.<sup>341</sup>

Some basic rules of thumb for investigations of events that happened long ago are:

- memories that are recalled close to the time of the event are likely the most reliable,
- everyone's memories are subject to distortions when they recall an event, and these distortions do not necessarily mean the witness is lying,
- two people can witness the same event and have different memories of it,
- leading questions can alter a person's memory of the event, and
- objective evidence that corroborates the memory is the best indication that the memory is accurate.<sup>342</sup>

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<sup>340</sup> Elizabeth Loftus, How Reliable is Your Memory? TEDTalk, YouTube.com (Sept. 23, 2013) at 5:24, <https://www.youtube.com/watch?v=PB2Oeg16wvI>.

<sup>341</sup> For a good explanation and collection of resources on this topic, see *Eyewitness Testimony and Memory Biases*, at <https://nobaproject.com/modules/eyewitness-testimony-and-memory-biases#content>.

<sup>342</sup> See Steblay Report at 3–6; see also Elizabeth Loftus, *Planting Misinformation in the Human Mind: A 30-year Investigation of the Malleability of Memory*, 12 *Learning and Memory* 361, 361–366 (2005); see *Parts IV*. (describing more of the research on witness memory).

**C. Although the Reid Technique of interviewing has been widely used by law enforcement, research links its use to false confessions and false identifications.**

The Reid Technique is a widely used method of interrogation developed in the 1940s and still in use today.<sup>343</sup> The technique has been criticized for its potential to lead suspects to falsely confess to crimes they did not commit.<sup>344</sup>

Investigators employing the Reid Technique are trained to isolate their suspect in a private room.<sup>345</sup> Investigators control the interview, shutting down a suspect's denials of guilt and attempts to offer evidence of innocence. A sense of hopelessness is created, leading a suspect to confess to the crime.<sup>346</sup>

Investigators use the Reid Technique when they become confident that a particular suspect is guilty. In an initial pre-interrogation interview, investigators first ask behavioral-provoking questions (e.g. "What do you think should happen to the person who committed this crime?") to assess verbal and nonverbal cues to detect deception.<sup>347</sup> If investigators come to believe the subject is lying based on these verbal and behavioral cues, they are unleashed to employ a nine-step process enticing the subject of the interrogation with both negative and positive incentives to confess.<sup>348</sup>

As part of the nine-step process, the interrogator is trained to employ "maximization" and "minimization" tactics to produce a confession. Maximization occurs, for example, when interrogators confront the suspect with certainty of their guilt, bolstered by real or false evidence.<sup>349</sup> The interrogator will refuse to accept any proclamation of innocence, alibis, or denials of involvement in the crime.<sup>350</sup> It is "particularly common for interrogators to communicate as a means of inducement, implicitly or explicitly, a threat of harsher consequences in response to the

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<sup>343</sup> Fred E. Inbau, John E. Reid et al., *Criminal Interrogation and Confessions* at ix (4th ed. 2004) [hereinafter Inbau et. al., *Criminal Interrogation*].

<sup>344</sup> Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 *Law & Hum. Behav.* 3, 14–15 (2010) [hereinafter Kassin et. al., *Police-Induced Confessions*].

<sup>345</sup> Inbau et al., *Criminal Interrogation* at 51.

<sup>346</sup> Kassin et al., *Police-Induced Confessions* at 12; Richard A. Leo, *Police Interrogation and American Justice* 26, 112, 122, 133 (2008) [hereinafter Leo, *Police Interrogation*].

<sup>347</sup> Kassin et al., *Police-Induced Confessions* at 6; Inbau et al., *Criminal Interrogation* at 121–53.

<sup>348</sup> Kassin et al., *Police-Induced Confessions* at 7.

<sup>349</sup> *Id.* To this day, use of false evidence ploys is permitted while interrogating adults in most jurisdictions, including Minnesota.

<sup>350</sup> *Id.*



suspect's denials" during this phase.<sup>351</sup> During minimization, the interrogator may offer sympathy and moral justification for committing the crime.<sup>352</sup> The interrogator may also offer suggestions of how or why the suspect committed the crime, termed "introducing themes," which minimize the crime.<sup>353</sup>

In recent years, psychologists have criticized the Reid Technique for its likelihood to produce false confessions and false information.<sup>354</sup> First, they have discredited the idea that police can accurately detect deception through a behavioral analysis, which is the first step in determining whether to treat a subject as a guilty party and coercively interrogate them. They note that the research has "consistently shown that most commonsense behavioral cues are not diagnostic of truth and deception."<sup>355</sup> Reid and Associates dispute these studies arguing they did not produce accurate results.<sup>356</sup> Second, some psychologists conclude that a suspect will confess to escape the stressful situation, avoid punishment, or to gain an advantage suggested by the interrogator.<sup>357</sup> Leading scholars on the topic found that the suspect's desire to bring an end to the interview and avoid additional pressure is particularly effective for those who are young, desperate, socially dependent, or susceptible to fear of detention.<sup>358</sup> That desire is manufactured through isolation, presentation of false evidence, and minimization.<sup>359</sup>

The use of coercive interrogation techniques is even more problematic when it is employed on witnesses. One study explains why there is reason to believe that coercive interviewing might be even more influential with non-suspect witnesses to produce false information than with suspects: "Suspects are pressured to implicate themselves by confessing to the crimes under investigation" and risk detention and prison. By contrast, "the non-suspect witness who succumbs to coercive influences and falsely accuses or implicates someone else does not face the negative

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<sup>351</sup> *Id.* at 12; see Richard A. Leo and Richard J. Ofshe, *The Truth About False Confessions and Advocacy Scholarship*, 37 *The Criminal Law Bulletin* 293, 348, 354–55 (2001).

<sup>352</sup> Kassir et al., *Police-Induced Confessions* at 7.

<sup>353</sup> *Id.*

<sup>354</sup> *Id.* at 14; Leo, *Police Interrogation* at 98–99.

<sup>355</sup> Kassir et al., *Police-Induced Confessions* at 6 (citing Bond, C. F., & DePaulo, B. M., *Accuracy of deception judgments*, 10 *Personality & Social Psychology Review* 214–34 (2006)); Meissner, C. A., & Kassir, S. M., 'He's guilty!': Investigator bias in judgments of truth and deception, 26 *Law and Human Behavior* 469–80 (2002); Vrij, A., *Detecting lies and deceit: Pitfalls and opportunities* (2008); Leo, *Police Interrogation* at 99.

<sup>356</sup> Reid and Associates, *The Disingenuous Testimony from Social Psychologists About the Reid Technique*, <https://reid.com/pdfs/Inv-Tip-The-Disingenuous-Testimony-from-Social-Psychologists-About-the-Reid-Technique.pdf>.

<sup>357</sup> Kassir et al., *Police-Induced Confessions* at 14.

<sup>358</sup> *Id.*

<sup>359</sup> *See id.* at 16.

potential outcomes that a suspect would face, but rather garners the support of the police and prosecutor.”<sup>360</sup> There are fewer deterrents to naming a suspect than to confessing to a crime, they explain.<sup>361</sup> Similar to the risk producing false confessions, a witness subjected to such pressure “could be persuaded, using the same tactics, to transform, invent, or retract an eyewitness account so that it conforms to the inferred wishes of the interviewer.”<sup>362</sup>

Research on eyewitness memory shows that “the most effective interviewing techniques for eyewitnesses involve the Cognitive Interview,” which involves several techniques meant to aid retrieving memories.<sup>363</sup> The authors of the Reid Technique recommend cognitive interviewing on witnesses, but give an exception for eyewitnesses believed to be deceptive or withholding information:

Whenever a witness or other prospective informant refuses to cooperate because he is deliberately protecting the offender’s interests or because he is antisocial or antipolice, an investigator should seek to break the bond of loyalty between the witness and the offender or accuse the witness of the offense and proceed to interrogate the witness as though he were actually considered the offender.... When all other methods have failed, **the investigator should accuse the subject of committing the crime (or of being implicated in it in some way) and proceed with an interrogation as though the person was, in fact, considered to have involvement in the crime.** A witness or other prospective informant, thus, faced with a false accusation, may be motivated to abandon his efforts to protect the offender or to maintain antisocial or antipolice attitudes.<sup>364</sup>

Dale and Gaiters used aspects of the Reid Technique in their interviews of suspects, important alibi witnesses, accomplices, and eyewitnesses, many of whom were juveniles.

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<sup>360</sup> Danielle M. Loney, Brian L. Cutler, *Coercive Interrogation of Eyewitnesses Can Produce False Accusations*, 31 J. Police Crim. Psych. 29, 30 (2016) [hereinafter Loney et al., *Coercive Interrogation of Eyewitnesses*.].

<sup>361</sup> *Id.*

<sup>362</sup> Timothy E. Moore, Brian L. Cutler, and David Shulman, *Shaping Eyewitness and Alibi Testimony with Coercive Interview Practices*, The Champion (Oct. 2014).

<sup>363</sup> Loney et al., *Coercive Interrogation of Eyewitnesses* at 31.

<sup>364</sup> Inbau et al., *Criminal Interrogation and Confessions* at 409 (emphasis added).

#### ***IV. FINDINGS OF THE CONVICTION REVIEW UNIT***

##### **A. Barrientos's Alibi Supports His Claim of Innocence.**

When Barrientos was arrested and interviewed on October 22, he offered an alibi. He said that on October 11, he was with Itzel and her family all day in Maplewood. Itzel was also interviewed on October 22. She said she was with Barrientos the entire day and evening of October 11.

Like most people, Barrientos and Itzel's attempts to reconstruct the details from an uneventful Saturday eleven days earlier were imperfect. In their interviews and jail calls, they tried to recall where they were on October 11. This did not mean that Barrientos's alibi was fabricated or "constructed" as the state argued at trial. Social science research demonstrates how challenging it is to remember details of a day when nothing extraordinary happened.<sup>365</sup> The way they struggled to remember their whereabouts and engaged in strategies to try to determine where they were comports with the scientific literature and research on memory, alibis, and how we remember or forget mundane activities.<sup>366</sup>

After reviewing the state's file, the defense file, and the court file, consulting with a law enforcement expert, and conducting interviews, the CRU concluded that Barrientos could not have been at the crime scene when Jesse was shot. A video confirms that he was in a Cub Foods near Maplewood less than 33 minutes before the shooting.<sup>367</sup> After leaving Cub Foods, phone records support Barrientos's alibi, that he was in Maplewood at the time of the shooting. The fact that the alibi witnesses found it challenging to reconstruct what occurred on October 11 comports with the scientific research on memory and alibis.

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<sup>365</sup> See *infra* Part IV.A.1, footnotes 368–88.

<sup>366</sup> Emily V. Shaw and Elizabeth F. Loftus, *Punishing the Crime of Forgetting*, 9 J. Applied Research. in Memory and Cognition 24, 25 (2020) [hereinafter Shaw and Loftus, *Punishing the Crime of Forgetting*].

<sup>367</sup> Barrientos last appeared on the Cub Foods video at 6:19:56pm and the 911 call occurred at 6:53:17pm, a difference of 33 minutes and 21 seconds. It took longer than 21 seconds for the 911 caller to gather up the children, bring them to safety, and call 911. See Cub Foods Surveillance Video, Oct. 11, 2008; 911 Dispatch, calls recorded at 6:53pm, Oct. 11, 2008; Trial Transcript at 427.

**1. Research shows that innocent people struggle to give detailed, accurate, and consistent alibis.**

Research psychologist Elizabeth Loftus writes, “It is hard to overstate how challenging the task of providing a flawless alibi can be for the average person.”<sup>368</sup> Studies have found that “innocent people struggle to give accurate, consistent alibis.”<sup>369</sup> In one study, participants were asked to describe their location and activities during a specific afternoon three weeks prior.<sup>370</sup> One week later, when they tried to repeat their “alibi,” nearly half the participants “were inconsistent between their first and second account; many were completely unable to provide any supporting evidence at all.”<sup>371</sup>

Another study of alibi accuracy found that, when people were given two days to check their own alibi, a substantial proportion of the alibis (36%) were mistaken, requiring either a change in narrative or a change in corroborating evidence.<sup>372</sup> The study also found that the majority of investigated alibis relied on evidence that evaluators would consider “weak.”<sup>373</sup> For instance, most people spend much of their time with friends and family, but alibis corroborated by “motivated familiar others” are seen as less trustworthy.<sup>374</sup>

People consistently encounter errors in remembering alibi details because they are more likely to accurately recall events “that were more detailed at the time of encoding.”<sup>375</sup> Loftus notes that remembering where you were and what you were doing during a discrete time period “is inevitably linked to whether there was anything significant about that time period.”<sup>376</sup> So, for example, a trip to the grocery store may be easily forgotten.

Additionally, even if we encode a memory, there is no guarantee we will be able to produce those details when the police ask for an alibi. What we encode “decays rapidly” and will be either forgotten or rendered inaccessible.<sup>377</sup> Encoded memory also is easily distorted over time through

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<sup>368</sup> Shaw and Loftus, *Punishing the Crime of Forgetting* at 24–28.

<sup>369</sup> *Id.*

<sup>370</sup> Deryn Strange, Jennifer Dysart, and Elizabeth F. Loftus, *Why Errors in Alibis Are Not Necessarily Evidence of Guilt*, 222 *Zeitschrift für Psychologie*, 82–89 (2014) [hereinafter Strange et al., *Errors in Alibis*].

<sup>371</sup> *Id.*

<sup>372</sup> Elizabeth Olson and Steve Charman, ‘*But can you prove it?*’ – *Examining the Quality of Innocent Suspects Alibis*, 18 *Psychology, Crime and Law* 453, 464 (2012).

<sup>373</sup> *Id.*

<sup>374</sup> *Id.*

<sup>375</sup> Strange et al., *Errors in Alibis* at 87.

<sup>376</sup> *Id.*

<sup>377</sup> William E. Cozier, Deryn Strange, and Elizabeth F. Loftus, *Memory Errors in Alibi Generation: How an Alibi Can Turn Against Us*, 35 *Behav. Sci. Law* 6, 9 (2017) [hereinafter Cozier, et al., *How an Alibi Can Turn Against Us*].

such things as talking to other people.<sup>378</sup> People also tend to “fill in” information they do not recall by relying on what typically happens during a particular time, which can lead to errors in recall.<sup>379</sup>

Although forgetting is usually seen as a memory defect, it has an important function in a mind bombarded with information: “It ensures our minds are as orderly and up-to-date as possible, giving rise to the virtues of clarity, abstraction.”<sup>380</sup> Loftus explains:

When an activity is rather ordinary, like biking to work each day, it is not particularly useful to remember in detail. Unless something occurs to prompt memory retention, it may be most efficient for the memory to be effectively erased. In the context of alibi recollection, if the activity that a person is called to account for is ordinary, it may be more likely to be forgotten and subsequently misreported. Moreover, the task of alibi reporting is made even more difficult by the nature of the prompt that produces the alibi. Many memories are not stored in ways specific to a particular date or time, but this is often what investigators are seeking an account of when they request an alibi.<sup>381</sup>

Because we spend much of our time engaged in mundane and unimportant tasks, information about what occurred is usually not sufficiently encoded for accurate and ready recall later. This is true even as the consequences for forgetting increase, like, for instance, an innocent suspect trying to provide an alibi from a relatively insignificant day.<sup>382</sup>

As the science demonstrates, providing an alibi is an extremely difficult task, and most people do not understand the difficulty of providing a detailed, accurate, and consistent account of what they did days or weeks later. The problem is that in the criminal justice context, an “inconsistent alibi can directly—in the absence of any other information—make a suspect appear guilty, even if the inconsistency is due to a common error in memory.”<sup>383</sup> People are convicted of crimes *because* of their alibis, not in spite of them.<sup>384</sup> In fact, a review of 377 DNA exonerations in the Innocence Project database, shows that a staggering 65 percent of these wrongly convicted

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<sup>378</sup> *Id.* at 10.

<sup>379</sup> *Id.*

<sup>380</sup> Jonathan M. Fawcett & Justin C. Hulbert, *The Many Faces of Forgetting: Toward a Constructive View of Forgetting in Everyday Life*, 9 J. of Applied Rsch. in Memory and Cognition 1, 9 (2020).

<sup>381</sup> Shaw and Loftus, *Punishing the Crime of Forgetting* at 24.

<sup>382</sup> *Id.* This is not to say that October 11, 2008, was not a significant day. It was an extremely significant day for Jesse Mickelson and his family. But it would not have seemed like a significant day to someone who did not know what was happening at Jesse’s house at the time.

<sup>383</sup> Cozier, et al., *How an Alibi Can Turn Against Us* at 11.

<sup>384</sup> *Id.* at 7.

exonerees had presented an alibi at trial.<sup>385</sup> However, there is an inherent assumption in criminal cases that “people will be accurate, in part, because the consequences of an error are so great.”<sup>386</sup> And contrary to the science, laypeople, police, and prosecutors “tend to believe that a suspect’s alibi, if truthful, should remain consistent over time.”<sup>387</sup> “An inconsistent alibi is often a red flag to investigators, who are trained to see such inconsistencies as evidence of lying or guilt.”<sup>388</sup> Common sense assumptions in the criminal justice system, assumptions that were operating during Barrientos’s investigation and trial, fly in the face of the established research on memory that has proven these assumptions wrong.

## **2. Barrientos, Itzel, and their families struggle—in a way most people would— to provide a consistent alibi.**

The common but incorrect assumptions about memory and alibi formation played a role in Barrientos’s prosecution and conviction. All the witnesses who could support Barrientos’s alibi struggled, as is normal, to remember what occurred on Saturday, October 11. One reason for their struggle was that October 11 was an ordinary day for them. When they did remember events that took place, they could not recall the exact times these events took place. When they compared their recall against phone records, they had to correct their evolving timelines.

For example, initially, Barrientos and all the alibi witnesses incorrectly filled in their memories of the weekend based on Itzel’s mother’s typical work schedule. Normally, Marcia Cruz worked on Saturdays at the Red Roof Inn until the late afternoon. Itzel told investigators on October 22 that her mom was at work all day on October 11 and that she did not return home until 4 or 5pm.<sup>389</sup> Marcia, Itzel’s mom, also said in her first interview that she worked all day on October 11, and after she got home, a relative and her two small children visited. Ricardo, Itzel’s brother, told investigators that his mother was working that Saturday and said that he left for the mall around 4pm.<sup>390</sup> Barrientos also thought Marcia might have been working, returning home around 4 or 5pm.<sup>391</sup>

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<sup>385</sup> Wendy P. Heath, Joshua R. Stein & Sabreen Afiouni, *“But I Wasn’t There!” The Alibis of DNA Exonerees*, 2 *Wrongful Conv. L. Rev.* 240, 248–49, 268–69 (2021).

<sup>386</sup> *Id.*

<sup>387</sup> Strange et al., *Errors in Alibis* at 82.

<sup>388</sup> Shaw and Loftus, *Punishing the Crime of Forgetting* at 25 (citing Inbau, et al., *Criminal Interrogations*).

<sup>389</sup> Tr. of Itzel Interview at 47.

<sup>390</sup> MPD at 79–80, supp. 38.

<sup>391</sup> Barrientos Interview, file 3 at 3:28.

All of the witnesses self-corrected once they realized that Marcia did not work that day, something Dale and Gaiters confirmed with the Red Roof Inn. During his interview, Barrientos caught his initial mistake and alerted Dale and Gaiters: “I just remembered that Marcia did not work that day,” he said.<sup>392</sup> This led him to recall another important detail, that Marcia cooked a seafood soup that day.<sup>393</sup>

On October 25, Marcia and Ricardo discovered that Marcia did not work that Saturday as they had thought when Dale and Gaiters first interviewed them. They realized they had mixed up Sunday, October 12, with Saturday, October 11. Marcia corrected her initial statement. She confirmed that Ricardo’s dad came inside the apartment to pick him up late that morning, Barrientos had to leave, she cleaned the apartment, she went shopping at a Chinese store with Itzel and Barrientos around 2pm, Itzel and Barrientos left the apartment around 5:30 or 6pm, they returned at 7 or 8pm. Later, Barrientos, Itzel, and Ricardo went to the baptism party.<sup>394</sup>

Ricardo recalled in his corrected statement that he got up around 9:30 or 10am, his dad picked him up, they went to fix his mobile home, he made a call to the apartment from his dad’s phone when they were returning, and they returned to the apartment around 9:40 or 9:50pm. He said that later that night Barrientos, Itzel, and he went to a baptism party, and they returned around 2:05 or 2:10am. He thought they might have stopped at Cub Foods on the way home.<sup>395</sup>

In her corrected statement, Itzel remembered getting seafood at the grocery store earlier in the day for Marcia’s seafood soup. She said they watched TV, she went with Barrientos to his brother’s at about 6pm, they stayed until about 7pm, they stopped for limes at Cub Foods because her mom had asked her to, they got back to the apartment and her dad was there. She and Barrientos went out to smoke a cigarette and went to the liquor store near Cub Foods, Ricardo let them in the apartment, they got ready for the baptism party, they left for the party, and they returned home around 2 or 2:30am.<sup>396</sup>

Once the landline phone records for Itzel’s home and the Cub Foods video were discovered, the alibi witnesses’ timelines shifted again. Itzel testified at trial that she thought they left Cub Foods at 6:30pm, when previously she wrote in her e-mail they were at Barrientos’s brother’s until

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<sup>392</sup> *Id.*, file 4 at 29:20.

<sup>393</sup> *Id.*, file 4 at 43:46.

<sup>394</sup> MPD at 161–62, supp. 57.

<sup>395</sup> MPD at 71–72, supp. 39.

<sup>396</sup> MPD at 77–78, supp. 36.

7pm and then returned to Maplewood stopping at Cub Foods.<sup>397</sup> Ricardo said at trial that he arrived back at Marcia's at 7:45pm, when before he stated he returned with his dad around 9:40 or 9:50pm.<sup>398</sup> Marcia testified at trial that she recalled that Barrientos and Itzel returned from Cub Foods with the limes, but she could not remember the exact time they returned.<sup>399</sup> She remembered, though, that Barrientos ate her seafood soup, and he was at her home before Ricardo and Itzel's father arrived.<sup>400</sup>

These memory errors about Marcia's work schedule, and their self-corrections based on phone records and discussions with each other, had a catastrophic and cascading effect on the whole case. Investigators and prosecutors took it as a sign of guilt.

During Itzel's interrogation, for example, Dale and Gaiters accused her of lying because she failed to mention going to Cub Foods until later in the interview. "Before you told us that you never left. And now you're telling us that you guys went to Cub Foods," Dale said. "We're trying to believe you. You have to make us believe you."<sup>401</sup> Likewise, when Barrientos tried to explain his alibi, Dale and Gaiters talked over him. When he asked them to "call Marcia and ask her if I was there," one of the investigators responded, "That doesn't matter."<sup>402</sup>

Dale and Gaiters corroborated portions of the witnesses' timelines. They interviewed the general manager of the Red Roof Inn, where Marcia worked. He verified that Marcia did not punch in for work on Saturday, October 11.<sup>403</sup> They requested video from Cub Foods, but only asked for video between 1:36am to 3:00am on October 12, the time Ricardo mentioned they may have been in the store after the baptism party.<sup>404</sup> The video did not show them in the store during those hours. Investigators did *not* request Cub Foods video from earlier in the day when Itzel said she and Barrientos stopped for limes. Nor did they immediately request video from the liquor store Barrientos and Itzel said they visited that evening. Only later, after Barrientos's attorneys got the Cub Foods video, were they able to confirm that Barrientos and Itzel were leaving the store at 6:20pm on October 11.

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<sup>397</sup> Trial Transcript at 1500.

<sup>398</sup> *Id.* at 1407; Transcript of Interview by Robert Dale and Christopher Gaiters with Ricardo Chavarria-Cruz, Oct. 25, 2008 at 3 [hereinafter Tr. of Ricardo Interview 10/25/08].

<sup>399</sup> Trial Transcript at 1437.

<sup>400</sup> *Id.*

<sup>401</sup> Tr. of Itzel Interview at 43–44.

<sup>402</sup> Barrientos Interview, file 4 at 33:47.

<sup>403</sup> MPD at 66–67, supp. 37.

<sup>404</sup> MPD at 219, supp. 110.



The evidence that confirmed Barrientos's alibi did not change the course of the investigation or prosecution. Instead, the prosecutors took full advantage of the changes in the alibi witnesses' statements. In closing arguments, the prosecutor discredited the alibi witnesses by pointing out three different versions of their "stories" and argued that was evidence that Barrientos "constructed" an alibi.<sup>405</sup> In her closing, the prosecutor queued up a short, out-of-context, jail phone call where Barrientos mentioned to Itzel that they could "get their stories straight" if he got charged. This, according to the prosecutor, was evidence that Barrientos was orchestrating the changes in the alibi witnesses' timelines.

While the alibi inconsistencies may have seemed to support the prosecutor's argument, they provided the wrong lens through which to view the alibi witnesses' inability to accurately recall mundane activities of a typical Saturday. The alibi witnesses in this case found it challenging to reconstruct what happened on a typical Saturday just as memory research predicts. Most people have difficulty providing accurate alibis. Additionally, the research suggests that the most difficult thing to accurately recall is not what, where, or who, but *when* something occurred.<sup>406</sup>

If anything, Barrientos's alibi witnesses' inability to perfectly align their memories and timelines shows that they are human. It does not support an inference that they conspired to construct an alibi that would favor Barrientos. In fact, the video evidence, landline phone call records, and jail phone calls demonstrate that Barrientos was in Maplewood with Itzel's family after they left Cub Foods at 6:20pm.

### **3. Video evidence supports Barrientos's alibi.**

Security video from the Cub Foods near Maplewood confirms that Barrientos was leaving the store, with Itzel, at 6:20pm, on October 11. The murder occurred shortly before 6:53pm, less than 33 minutes later. For Barrientos to have committed the crime, he had to get from inside Cub Foods to his car, abandon Itzel, drive to the south side of Powderhorn Park in Minneapolis, notify Sharky's crew that he was there, park in an alley, get into Slappy's car, and drive to the alley where the shooting occurred. He had to do all of this in under 33 minutes. This feat, alone, would have been impossible. But even if Barrientos had been able to drive to the scene of the crime in under

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<sup>405</sup> Trial Transcript Volume 15 at 66–69.

<sup>406</sup> See Strange et al., *Errors in Alibis* at 86 ("44% of participants were inconsistent about the timing of the events of the afternoon, while only 19% were inconsistent about where they were. Put another way, people are more likely to be wrong about the when compared to the what.").

33 minutes, as the state suggested, his actions would have directly contradicted Sharky's account of the shooting, making Sharky an obviously unreliable accomplice witness.

The state's theory at trial was that Barrientos could have made the trip from Cub Foods to the crime scene in just 28 minutes, leaving "more than enough time" to carry out the crime.<sup>407</sup> The state based its argument on evidence that Dale and Gaiters developed. In April, they conducted a test drive from the Cub Foods to the crime scene.<sup>408</sup> Gaiters testified at trial that they began timing the trip when they left the Cub Foods parking lot. From there they drove to the northeast corner of Powderhorn Park, which was the closest part of the park from their route on I-94. They stopped, and then they drove from Powderhorn Park to the rear of the victim's house. Dale reported that they began their drive at 6:16pm, reached the park at 6:37pm, and then arrived at the crime scene at 6:44pm. Altogether, the drive took 28 minutes, according to Gaiters's testimony.<sup>409</sup> That left five minutes to spare.

To test the state's timeline, the CRU turned to Sgt Dale Burns, a retired officer from the Minneapolis Police Department who agreed to provide the CRU with an expert report.<sup>410</sup> In his detailed report, Burns demonstrated the errors in the state's timeline and the implausibility of the state's theory that Barrientos could have carried out the crime. Burns made three test-drives on three different Saturdays. He started from inside Cub Foods, where Barrientos was captured on video. He walked to his car in the parking lot, then drove the most direct route to where Sharky

<sup>407</sup> Trial Transcript at 1131; Trial Transcript Volume 15 at 70.

<sup>408</sup> Letter from Bridget Landry to Hilary Caligiuri and Susan Crumb (Feb. 25, 2009); MPD at 260, supp. 105; MPD at 262, supp. 107.

<sup>409</sup> The drive time was poorly documented. Although Dale and Gaiters called in to MPD Dispatch to record an accurate time for their trip, the times from dispatch do not align with Gaiters's testimony. (Dispatch record below.) At trial, when questioned on the dispatch record, Gaiters admitted that the dispatch times show a 31-minute drive, not a 28-minute drive. On redirect, he explained that the call time did not match the actual time because "we're speaking of course, time is elapsing when we're talking to them." Trial Transcript at 1249-51. Minneapolis Police Department, Incident Detail Report, Incident # 09-104179, Apr. 11, 2009.

Comments	Date	Time	User	Type	Comments
	4/11/2009	18:14:44	112875	Response	← CUB FOODS CAR 720...MISC
	4/11/2009	18:15:39	112875	Response	CAR 720 WILL CB WHEN CLEAR FROM CALL
	4/11/2009	18:15:50	112875	Response	DESTINATION IS POWDERHORN PARK
	4/11/2009	18:39:27	112876	Response	720 CALLING FRM POWDERHORN PARK
	4/11/2009	18:45:52	CT111084	Response	CALLTIME 1844
	4/11/2009	19:29:48	068028	Response	STILL CHKING TIMES ON THIS. WILL CB WHEN CLEAR
	4/11/2009	19:39:16	068028	Response	710 IS NOW CLEAR

Minneapolis Police Department, Incident Detail Report, Incident # 09-104179, April 11, 2009.

<sup>410</sup> The Great North Innocence Project consulted Sgt Burns, who agreed to review and investigate aspects of the case and provide his opinions. The CRU met several times with Sgt Burns to discuss his findings. The CRU also asked him to write a report containing his findings. The CRU found Sgt Burns's opinions helpful and credible, especially given his background in law enforcement and in teaching other law enforcement officers.

claimed Barrientos joined them. He waited 15 seconds, and he drove to the scene. The fastest journey from inside Cub Foods to the crime scene was 33 minutes.<sup>411</sup>

Burns concluded that Barrientos could not have gone from inside the Cub Foods to the scene of the crime, with a stop to change cars, within the time necessary to complete the crime. Burns disagreed with Gaiters's conclusion that the journey could have been completed in 28 minutes, and he noted that Gaiters's testimony did not account for several important factors.<sup>412</sup>

Burns demonstrated that Dale and Gaiters shaved minutes off the trip by leaving out important steps. First, Burns took issue with where Dale and Gaiters started timing their journey. For instance, Dale and Gaiters began timing the trip when they started to drive their car. Burns, instead, started his watch inside the Cub Foods store, from the same place Barrientos was captured on video at 6:20pm. Burns timed the walk from inside the Cub Foods store to his car in the parking lot; it took 90 seconds.<sup>413</sup>

Second, Dale and Gaiters drove from the Cub Foods to the northeast corner of Powderhorn Park, which was the closest part of the park to their exit from Interstate 94.<sup>414</sup> But this route is not the route Sharky described. Sharky said that they picked Barrientos up on the south end of Powderhorn Park, near an alley. Powderhorn Park is a large city park—8 to 10 city blocks wide and about 3½ blocks long. Dale and Gaiters never drove to the south area of the park where Sharky said they picked up Barrientos,<sup>415</sup> and the route through the south end of the park would have added more time to the drive.<sup>416</sup>

Third, the state's theory that Barrientos had plenty of time relied on the state's faulty interpretation of when Barrientos left Cub Foods and when the shooting occurred. There was video

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<sup>411</sup> Affidavit of Dale Burns, June 15, 2023 (attached as Appendix E) [hereinafter Burns Affidavit]. Burns drove the following route: "I started my time from inside the store approximately where Edgar and Itzel were shown by the surveillance camera. I attempted to walk at a normal pace to my car which I parked in the middle of the Cub parking lot halfway between the Cub door and the parking lot exit. I got in my vehicle, backed out of my parking spot, and drove to the parking lot exit. I then drove west on interstate 94 to Cedar Avenue south, I went west on 35<sup>th</sup> street and turned south in the alley between 12<sup>th</sup> avenue and 13<sup>th</sup> avenue (which is the approximate center of the south side of Powder Hom Park). I stopped in the alley for 15 seconds to simulate Edgar getting in my car. I then drove south in the alley to 36<sup>th</sup> street and turned east. I drove to Cedar Avenue, turned south Cedar and then to 42nd street. I turned east on 42nd street and then drove to 29<sup>th</sup> avenue and turned north on 29<sup>th</sup> and then west in the alley, then south to the rear of 4137 28<sup>th</sup> avenue south. I drove this route on three separate Saturdays approximately at the same time of evening that shooting occurred. My fastest time trial was 33 minutes. During this test drive, I obeyed all traffic regulations, drove with the flow of traffic, and followed the most obvious route to the destinations." Burns Affidavit at 8–9.

<sup>412</sup> Burns Affidavit at 6–7.

<sup>413</sup> *Id.* at 9–10.

<sup>414</sup> MPD at 260, supp. 105; Burns Affidavit at 10–11.

<sup>415</sup> Burns Affidavit at 10–11.

<sup>416</sup> *Id.* at 10–11.

proof from Cub Foods that Barrientos was in the store at 6:19:56pm, but the state started its timeline at 6:19pm, adding an additional 56 seconds to the window of time Barrientos had to get to the scene.<sup>417</sup>

Likewise, the state added additional time when calculating the time of the shooting. The state used 6:53pm as the time of the shooting. Sgt Burns took issue with this assumption. He pointed out that 6:53pm was the time the 911 call came in, not the time of the shooting. Paula Gizachew, Jesse's aunt who made the 911 call, did not call immediately when the shots were fired. Gizachew testified that she gathered up the children who were in the backyard, brought them inside the house, situated them in an upstairs hallway for their safety, and then called 911 once they were safe.<sup>418</sup> Although Gizachew testified that it took about one minute to accomplish this task, stressful events can distort the passage of time. Burns concluded that it was unlikely that all the children were gathered and safely upstairs in just 60 seconds.<sup>419</sup> Even so, as Burns pointed out, the state should have calculated their timeline as if the shooting occurred at 6:52pm or earlier. Instead, the state constructed their timeline in a way that gave Barrientos at least one extra minute to reach the crime scene.

According to Burns, the state's theory that Barrientos could get to the scene in just 28 minutes fails when accounting for all the variables in the journey. For example, Dale and Gaiters's 28-minute drive ignored these elements in the timeline:

- The 90 second walk from inside the Cub Foods to the car brings the journey to 29.5 minutes.
- To drive the longer route to the south end of Powderhorn Park would take additional minutes putting the drive time over 31 minutes.
- The one-minute delay from time of shooting to the 911 call means that Barrientos had only 32 minutes to drive to the scene.
- The time for Barrientos to change cars would have added approximately 15 seconds.

These small corrections to the timeline demonstrate that there was not "more than enough" time to get to the scene of the crime.<sup>420</sup> In fact, if anything, there were just seconds to spare. But

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<sup>417</sup> See Hilary Caligiuri, Barrientos Closing, May 21, 2009 (PowerPoint slides).

<sup>418</sup> Trial Transcript at 426–27.

<sup>419</sup> Burns Affidavit at 8.

<sup>420</sup> Trial Transcript at 1131; Trial Transcript Volume 15 at 70.

even so, to believe the state's theory that Barrientos could have made it to the scene in less than 33 minutes, you must *disbelieve* Sharky.

Sharky's account did not align with the state's timeline. Sharky claimed that Barrientos parked his car in an alley and called Slappy to pick him up.<sup>421</sup> He also said that once they picked



Figure 14 - Itzel and Barrientos leaving Cub Foods

up Barrientos, they "cruised around" before heading to the scene of the crime.<sup>422</sup> Sharky's account would have added at least 10 to 15 minutes to the timeline. Sharky's account does not align with the state's claim that Barrientos could have made it to the scene before 6:53pm.

The state's own timeline demonstrates that Sharky was lying because, if one believes Sharky, it would have been *impossible* for Barrientos to get to the scene in less than 33 minutes. And, in addition, the state's theory does not account for what happened to Itzel. Barrientos and Itzel were walking casually, talking, and laughing, while inside Cub Foods. Barrientos was not in a hurry.<sup>423</sup> If Barrientos took Itzel back to her apartment, that would have added an additional five minutes to the drive. Had Barrientos ditched Itzel in the Cub Foods parking lot and made her walk home (a 21-minute journey),<sup>424</sup> Itzel probably would have recalled that. But the CRU found nothing in the numerous jail calls and interviews to suggest that their trip to Cub Foods ended with Itzel, suddenly left on her own, in the Cub Foods parking lot, with no ride home.<sup>425</sup> Finally, Sharky initially told investigators that Itzel was in Puppet's

<sup>421</sup> MPD at 199, supp. 81.

<sup>422</sup> MPD at 199–200, supp. 81; Trial Transcript at 861, 896.

<sup>423</sup> Burns Affidavit at 10; Cub Foods Surveillance Video, Oct. 11, 2008.

<sup>424</sup> *Id.* at 10.

<sup>425</sup> In fact, in a recent interview with the CRU, Itzel never mentioned being stranded at Cub Foods by Barrientos. CRU Interview with Itzel Chavarria-Cruz, Apr. 18, 2023. She became emotional when shown the photograph of herself and Barrientos leaving the store with a small bag of items. CRU Interview with Itzel Chavarria-Cruz, April 18, 2023, part 1, at 28:03.

driveway during the shooting,<sup>426</sup> but that was impossible. Itzel is on the Cub Foods video with Barrientos near the time of the murder. She could not have been in the alley with Puppet's crew that evening.

Based on the video evidence and Sgt Burns's detailed analysis, the drive from Cub Foods could not have aligned with the evidence and the argument the state presented to the jury. The Cub Foods video is persuasive evidence of Barrientos's innocence.

#### **4. Phone records support Barrientos's alibi.**

Phone records from Itzel's mother's residence support Barrientos's timeline. Everyone at Itzel's mother's apartment remembered her brother Ricardo and his dad coming back to the apartment in the evening of October 11, but they did not agree when that occurred.<sup>427</sup> In Barrientos's interview with Dale and Gaiters, he recalled that Ricardo and his dad got to the apartment around 7pm.<sup>428</sup> Ricardo said it was between 9:30 and 10pm.<sup>429</sup> Phone records aligned more closely with Barrientos's memory. The records show that Ricardo called the apartment from his dad's phone at 7:20pm to alert them that he and his dad were on their way. At 7:46pm, phone records show that Ricardo called again, when he and his dad arrived at the apartment, to have Marcia or Itzel let them in.<sup>430</sup> In jail calls, Barrientos remembered the call at 7:20pm, and he reminded Itzel that Ricardo had made the call from his dad's cell phone. Barrientos's memory of this call makes sense because Barrientos had to leave Itzel's apartment before her dad and Ricardo arrived.<sup>431</sup> Barrientos could only have remembered the 7:20pm call if he was inside the apartment at that time because when he provided these details, he had not seen the call records from Itzel's home. The jail call, in which Barrientos remembered this incoming call from Ricardo, in conjunction with the phone records of Itzel's landline, was highly exculpatory. It shows that he had a memory of being inside Itzel's apartment just 28 minutes after the shooting, and that memory was later corroborated by the phone records.

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<sup>426</sup> Hernandez Interview 3/3/09, part 1 at 1:16:00.

<sup>427</sup> See Barrientos Interview, Tape 9 at 39:10; Transcript of Q and A Interview by Robert Dale and Christopher Gaiters with Marcia Cruz-Nolasco, Oct. 25, 2008, at 7–8; Tr. of Ricardo Interview 10/25/08 at 3; MPD at 77–78, supp. 36.

<sup>428</sup> Barrientos Interview, file 9 at 39:10.

<sup>429</sup> Tr. of Ricardo Interview 10/25/08 at 2–3.

<sup>430</sup> Trial Ex. 89; Susan Crumb, Phone Log, Edgar Rene Barrientos-Quintana (disclosed May 12, 2009) [hereinafter Phone Log 10/12/09]; Trial Transcript at 1405.

<sup>431</sup> Barrientos Call from Hennepin County Jail at 16:22 on Nov. 12, 2008 (12265285746122754920) at 11:53.

Importantly, the phone records contradict Sharky's testimony. First, Sharky testified that Barrientos did not return to his car until 60 to 90 minutes after the shooting, which was near 8 to 8:30pm.<sup>432</sup> Cell tower data show that Barrientos was in Maplewood calling Itzel's residence at 8:12pm; therefore, he could not have been with Sharky and the others in the white Intrepid after the shooting like Sharky said.<sup>433</sup> Second, Sharky testified that he called Barrientos minutes before the shooting to obtain a gun.<sup>434</sup> But cell phone records show that no calls were made to or from Barrientos's cell phone from 4:37pm to 8:12pm.<sup>435</sup>

The phone records from Barrientos's cell phone and from Itzel's apartment provide concrete evidence that corroborates Barrientos's alibi. He and Itzel were at her apartment at 7:20pm when Ricardo called, they left the apartment around 7:46pm when Ricardo and their dad arrived, and they called Itzel's apartment at 8:12pm to see if Itzel and Ricardo's dad had left the apartment. Other calls from Barrientos's cell phone show that he was likely at the liquor store between 8:12 and 9pm, just as he had told Dale and Gaiters.<sup>436</sup> These records are consistent with Itzel's account that she and Barrientos were together on October 11.<sup>437</sup>

### **5. Jail calls support Barrientos's alibi.**

The CRU spent approximately 160 hours listening to Barrientos's jail calls. In most of the calls, the speakers spoke at least partially in Spanish. The CRU summarized these calls, with special attention to any calls that may have contained any incriminating evidence.<sup>438</sup> The CRU concluded that the calls were exculpatory, and the state's claim that Barrientos was falsely constructing an alibi was inconsistent with the evidence. The jail calls support the conclusion that Barrientos did not know what time the murder occurred and was not pressuring witnesses to perjure themselves.

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<sup>432</sup> Trial Transcript at 824.

<sup>433</sup> Trial Exs. 87, 88.

<sup>434</sup> Trial Transcript at 797–800

<sup>435</sup> Trial Exs. 87, 88. The CRU attempted to discover location data on Barrientos's cell phone through forensic expert analysis. Mark Lanterman, an expert forensic cell-phone analyst, analyzed the phone and was unable to identify any geolocation information.

<sup>436</sup> *Id.*

<sup>437</sup> The prosecutors' work product also shows that the call records support Barrientos's alibi. Prosecutors' Phone Calls Timeline with Notes at 1.

<sup>438</sup> Many jail calls contained conversations in English and Spanish. For ease of reading, this report has translated all Spanish into English.

In the first few weeks after his arrest, Barrientos made several calls in which he discussed his whereabouts with witnesses who were later called to trial to support his alibi. Instead of exposing a plot to fabricate an alibi, these calls provide evidence that Barrientos and the alibi witnesses were engaged in the process of honestly trying to remember their activities on an uneventful Saturday. In fact, Barrientos continually advised Itzel and her family to say what they remembered, even if it differed from what he remembered.

For example, on October 24, the day Ricardo and Marcia first met with Dale and Gaiters, Itzel told Barrientos that her mom and brother thought Marcia had been at work on Saturday, October 11.<sup>439</sup> Marcia and Ricardo had told Dale and Gaiters that they did not spend the day with Itzel and Barrientos. Marcia said a family member and her two young kids came to the apartment. Ricardo said he went to the mall.<sup>440</sup> To Dale and Gaiters this conflict between Barrientos's account and Marcia's account was a sign of guilt. But the jail calls and employment records show that Marcia and Ricardo were mistaken about which day Marcia worked that weekend.

The same day Marcia and Ricardo were interviewed, Barrientos spoke to Itzel. Itzel told him that Marcia and Ricardo told Dale and Gaiters that they never crossed paths with Itzel and Barrientos on Saturday, October 11. Itzel said Marcia worked on Saturday and that Barrientos must have his days mixed up. Barrientos told Itzel to check her calendar, he thought they had their days mixed up.<sup>441</sup>

The next day, Barrientos and Itzel spoke on the phone again. Itzel told Barrientos that her mom thought that Barrientos had his days mixed up. He suggested that they could figure it out by calling their cousin to ask what day she came over with the kids. Barrientos also told Itzel to ask her dad when he picked up Ricardo from the apartment. Itzel and Barrientos went back and forth about the day and what happened. Barrientos seemed genuinely confused. He told Itzel, "[T]he only thing I know is I'm telling the truth and you're telling the truth." Barrientos said either he had the days mixed up or Itzel's family did, but it is not anyone's fault because "[w]e're doing what we can, man, to tell the truth."<sup>442</sup>

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<sup>439</sup> Barrientos Call from Hennepin County Jail at 18:28 on Oct. 24, 2008 (12248909926122754920) at 10:15.

<sup>440</sup> Transcript of Q and A Interview by Robert Dale and Christopher Gaiters with Marcia Cruz-Nolasco, Oct. 24, 2008; Transcript of Q and A Interview by Robert Dale and Christopher Gaiters with Ricardo Chavarria-Cruz, Oct. 24, 2008.

<sup>441</sup> Barrientos Call from Hennepin County Jail at 18:28 on Oct. 24, 2008 (12248909926122754920) at 9:49.

<sup>442</sup> Barrientos Call from Hennepin County Jail at 10:10 on Oct. 25, 2008 (12249475113202950604) at 3:22–5:02.



Later that day, Itzel told Barrientos on a jail call that Marcia had discovered that they got their days mixed up and that Saturday was the day they were at the house and then all went to buy food together. Barrientos responded, "I told you."<sup>443</sup> In another call that day, Itzel told Barrientos that Marcia and Ricardo had called investigators to correct their mistake. Itzel said she thought October 11 was the day she and Barrientos went to his brother's house. Barrientos asked if she could remember what time they left for his house. Itzel thought they got there around 6pm. Barrientos said he couldn't remember the timing. He instructed Itzel to tell the investigators what she remembered:

BARRIENTOS: Well, I don't know, you guys say whatever you guys remember at the time. I can't help out with the times, you know?

ITZEL: Uh-huh.

BARRIENTOS: It's that I don't remember. I think it was around...to me, yeah it was closer to seven when we left Carlos's house.

ITZEL: Uh-huh.

BARRIENTOS: But I know by 7:30 we were at your mom's, 7:20. You know what I'm saying?<sup>444</sup>

During these exchanges about the timing of their day, Barrientos was not behaving like someone who was orchestrating an alibi. In fact, he behaved like someone who did not know what time the shooting occurred. If he did, he would have been focusing on 6:50pm and trying to create an alibi for that time. Instead, Barrientos seemed focused on what was happening later in the evening.

On October 25, he and Itzel discussed what time they went to the liquor store on the evening of October 11:

ITZEL: Because you were drinking with your brother.

BARRIENTOS: No! I didn't drink with my brother.

ITZEL: Oh, so you already had it?

BARRIENTOS: No, we went to buy it at the liquor store, Itzel!

ITZEL: Oh yeah, ok!

BARRIENTOS: Oh my...

ITZEL: Oh, now I remember!

BARRIENTOS: ...my god.

ITZEL: So, did you say that too?

BARRIENTOS: I told them that...

<sup>443</sup> Barrientos Call from Hennepin County Jail at 16:31 on Oct. 25, 2008 (12249703373202950604) at 1:22--:38.

<sup>444</sup> Barrientos Call from Hennepin County Jail at 20:28 on Oct. 25, 2008 (12249845543202950604) at 6:30--6:48.

ITZEL: So they go and see the cameras, right?  
 BARRIENTOS: I told them to look at me on the camera, or in other words yeah, at the liquor store (unintelligible).  
 ITZEL: And that happened like after, a little while after we arrived, right? From your brother's house?  
 BARRIENTOS: Something like that, yeah.  
 ITZEL: Oh. Ok.  
 BARRIENTOS: Yup.<sup>445</sup>

In that same jail call, Barrientos eventually learned from Itzel the approximate time the shooting occurred:

BARRIENTOS: And that guy that got killed – what time was he killed?  
 ITZEL: Ahh, like at seven or around then.  
 BARRIENTOS: Like at seven?  
 ITZEL: Uh-huh.  
 BARRIENTOS: Damn, and do you know where I was at seven?  
 ITZEL: Shortly after seven.  
 BARRIENTOS: And do you know – oh – they shot him shortly after seven?  
 ITZEL: Uh-huh.  
 BARRIENTOS: Well, you know that we were on our way like at seven, no?  
 ITZEL: (Talking to someone else) Well turn the light on! Uh-huh.  
 BARRIENTOS: Yeah, well I, at that time, we were on our way to...  
 ITZEL: (Talking to someone else) Well you don't listen! Oh, shit.  
 BARRIENTOS: We were on our way to your house at that time.  
 ITZEL: Eh?  
 BARRIENTOS: Sort of around that time we were on our way to your house.  
 ITZEL: Yeah.  
 BARRIENTOS: Damn.<sup>446</sup>

The day after Barrientos learned the time of the shooting, Itzel reminded him of their stop at Cub Foods on their way home from his brother's:

BARRIENTOS: Ok. Downstairs, what did your mom tell them [the investigators]?  
 ITZEL: Huh?  
 BARRIENTOS: What did your mom tell 'em?  
 ITZEL: About what?  
 BARRIENTOS: About...

<sup>445</sup> Barrientos Call from Hennepin County Jail at 20:28 on Oct. 25, 2008 (12249845543202950604) at 10:39–11:08.

<sup>446</sup> *Id.* at 11:21–:57.

ITZEL: Nothin' that she doesn't really know what went down before and stuff. And then umm, nothing, just really that they should ask me, because I was the one with you and she doesn't know what we did, and then...

BARRIENTOS: We were back...

**ITZEL: And that day we bought limes, right?**

**BARRIENTOS: Oh yeah, huh, we went to Cub Foods first, huh?**

**ITZEL: Yeah, we went and bought limes, because I told you, that...**

**BARRIENTOS: Ah there you go, man!**

**ITZEL: Huh?**

**BARRIENTOS: There we go, nah man, we should be ok, man, you know why?**

**ITZEL: Why?**

**BARRIENTOS: Just try to remember what time we got back at your house, at your mom's house...**

ITZEL: I will.

BARRIENTOS: And - what time did they say that happened?

ITZEL: Like a little bit after 7 or 7.

BARRIENTOS: Oh, at that time?

ITZEL: Mhm.

BARRIENTOS: Well, I don't know cuz, ok, well what I can do is tell my lawyer and if they charge me...

ITZEL: Mhm.

**BARRIENTOS: I can tell my lawyer to go get the cameras at (stutters) what?**

**ITZEL: And the two cameras.**

**BARRIENTOS: Yeah (stutters) at Cub Foods.**

**ITZEL: Mhm.**

**BARRIENTOS: And it should tell 'em what time I was there. And from there...**

**ITZEL: And the liquor store?**

**BARRIENTOS: No, the liquor store, we went afterwards, around 9.**

**ITZEL: Huh?**

**BARRIENTOS: The liquor store we went around 9.**

**ITZEL: Mhm.**

**BARRIENTOS: Especially knowing if that's the time that shit happened, you know?**

**ITZEL: Mhm.**

**BARRIENTOS: Everything, and if it happened a little bit after 7, I'm pretty sure we left my brother's around 6:45, then we'd be over there 7. You understand?**

ITZEL: Whatever you want.

BARRIENTOS: I don't remember, ok? But don't worry, I'll stick to it, now that you remind me that we went and bought the limes.

ITZEL: Mhm.

BARRIENTOS: I kinda went like: "Ok, ok we were...around that time, we were in Cub Foods." You know?

ITZEL: Yeah, that's around the time we just got here.

BARRIENTOS: I think around 7. If they said it was a little after 7, it don't matter. If we got to Cub Foods at 7, there's no way we could've made it over there. Well, depends what time it happened, you know what I'm saying?

ITZEL: Mhm.

BARRIENTOS: And I know your mom knows we got there at least, I don't know, earlier. You know?

ITZEL: Mhm.

BARRIENTOS: I don't know, I hope it turn out ok, but the only problem is, I don't know man.<sup>447</sup>

On October 28, Barrientos spoke with his sister Cynthia about Cub Foods, and he believed he and Itzel were there around 7pm.<sup>448</sup> On November 3, Barrientos learned from his sister Cynthia that she had his cell phone records. Cynthia said the last two calls were to his brother, Carlos at 4:37pm, then to Itzel's house at 8:12pm. Barrientos again tried to remember what they did that day and said that they went to Itzel's house, went to Cub Foods, then went back to the house but then he had to leave because of Itzel's father. Barrientos remembered he was still eating dinner when he had to leave Itzel's house.<sup>449</sup>

On November 12, Barrientos remembered a crucial detail of the evening that could be corroborated through phone records. He told Itzel he wanted his attorney to get the phone records for Itzel's mom's house.<sup>450</sup> Barrientos said he thought the records would show the time Itzel's father and Ricardo had called up to be let in on the evening of October 11. Before he had seen these records, Barrientos asked if Itzel remembered that "Ricardo called from your dad's phone?" Itzel said she remembered. Barrientos responded, "Yeah so, at that time, like 20 minutes after, we left [the apartment]."<sup>451</sup> This call showed that Barrientos remembered the call from Itzel's dad's phone to the apartment at 7:20pm. He was not relying on phone records or others' memories for this fact; he had not yet seen the phone records from Itzel's house. In his interview with Dale

<sup>447</sup> Barrientos Call from Hennepin County Jail at 17:24 on Oct. 26, 2008 (12250599126122754920) at 14:03–16:25 (emphasis added) (transcript available).

<sup>448</sup> Barrientos Call from Hennepin County Jail at 17:39 on Oct. 28, 2008 (12252336166122754920) at 5:46.

<sup>449</sup> Barrientos Call from Hennepin County Jail at 19:39 on Nov. 3, 2008 (12257628156122754920) at 1:05.

<sup>450</sup> Barrientos Call from Hennepin County Jail at 16:22 on Nov. 12, 2008 (12265285746122754920) at 11:42.

<sup>451</sup> *Id.* at 11:54.

and Gaiters, Barrientos alluded Ricardo returning to Itzel's with his dad.<sup>452</sup> This memory, corroborated by the phone records, strongly indicates that Barrientos was in the apartment in Maplewood at 7:20pm on October 11, when Ricardo called to say he and his dad were on their way.

In sum, the way Barrientos's alibi developed over the course of the jail calls is not surprising nor incriminating. Research has shown that struggling to remember details of days full of mundane activities is common. The jail calls demonstrate that Itzel, Ricardo, and their mom, Marcia, were simply mistaken about their activities on a weekend when Marcia did not work when she typically would have worked. Employment records verified Marcia did not work on Saturday, October 11, as she originally thought, and phone logs indicated Itzel's relative with the two small children came to the apartment on Sunday, not Saturday. After this discovery, the family promptly informed law enforcement investigators and corrected their statements.

The jail calls do not indicate Barrientos pressured or influenced Itzel or her family to change their statements. Instead, he told them numerous times to say what they remembered even if it conflicted with what he remembered. Throughout October and November 2008, Barrientos, Itzel, and Ricardo used the techniques we all use to remember our whereabouts. They checked their calendars, asked others who may have been with them, looked at phone records, and requested surveillance video. They began to recall a general order of events that day: Itzel and Barrientos were at Itzel's house Saturday, they went shopping with Marcia, they went to Carlos's, they returned to Maplewood, they stopped at Cub Foods, they returned to Itzel's house, Ricardo and his father called and said they were coming over, Itzel and Barrientos left to avoid Itzel's father, they went to a liquor store, and they went to a baptism party. Consistent with memory research, they were able to piece together the different places they were, but they struggled remembering exactly *when* each event occurred.<sup>453</sup>

It seems impossible, after listening to the jail calls and reviewing the corroborating records, that Barrientos was playacting throughout the calls, masterminding a scheme to fabricate an alibi while seeming forgetful and clueless about the timing of the murder. Some of the details he remembered, such as going to Carlos's house, and his mistaken memory of when he was there, were harmful to his alibi, not helpful. Barrientos and Itzel's emotional reactions to remembering

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<sup>452</sup> Tr of Barrientos Interview at 86, 119–120, 123.

<sup>453</sup> Strange et al., *Errors in Alibis* at 86.

that they bought limes at Cub Foods seemed genuine. Barrientos hoped these memories would lead to security camera videos that verified his claims.

Finally, one fact stands out as entirely consistent with actual innocence. Barrientos recalled, before obtaining the phone records from Itzel's home, that Ricardo called Itzel's apartment around 7pm to say he was on his way back to the apartment. No one else in the family remembered this at first. But Barrientos's memory was corroborated by call records showing Itzel's dad's cell phone connected with Itzel's residence at 7:20pm and again at 7:46pm, when Ricardo and his dad arrived.<sup>454</sup> These calls strongly indicate that Barrientos was at Itzel's home at 7:20pm, less than 30 minutes after the shooting. This corroborated fact cannot be squared with the state's theory of the case. Barrientos could not have been at the scene of the shooting and then back inside Itzel's apartment just 28 minutes later.

**6. The defense fails to effectively present Barrientos's alibi and counter the state's assertion that he pressured witnesses to lie for him.**

***a. Defense counsel fails to promptly obtain the Cub Foods video and disclose it to the state.***

The Cub Foods video was highly exculpatory. It undermined several parts of the state's case. It showed that Barrientos was not bald, shiny bald, or closely shaven, as described by the eyewitnesses. It showed Barrientos casually walking out of Cub Foods with Itzel less than 33 minutes before the murder. It corroborates Itzel's first interview in which she told Dale and Gaiters that she and Barrientos went to Cub Foods on October 11.

Defense attorney Kristi McNeilly<sup>455</sup> began to represent Barrientos a few days after Barrientos was arrested, but she failed to hire an investigator.<sup>456</sup> In late November 2008, McNeilly told Barrientos on a recorded jail phone call that she was acting as the investigator in the case and

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<sup>454</sup> Trial Ex. 89; Phone Log, 10/12/09; Trial Transcript at 1404–05.

<sup>455</sup> McNeilly was convicted of convicted of theft by swindle in 2021. *State v. McNeilly*, No. A22-0468, 2022 WL 17747792, at \*1 (Minn. App. Dec. 19, 2022), *review granted* (Mar. 14, 2023). She was disciplined for conduct occurring during this case. *In re Disciplinary Action against McNeilly*, 860 N.W.2d 135 (Minn. 2015); Elizabeth Mohr, *St. Paul Lawyer Disciplined for Mishandling Cases*, St. Paul Pioneer Press, Feb. 25, 2015.

<sup>456</sup> See Barrientos Call from Hennepin County Jail at 16:06 on Oct. 28, 2008 (12252280466122754920) at 3:16; Register of Actions, *State v. Edgar Rene Barrientos-Quintana*, Ct. File No. 27-CR-08-53942.

trying to track down pieces of evidence to show Barrientos was not in Minneapolis at the time.<sup>457</sup> In late November, McNeilly said she had attempted to get security camera video from the liquor store Barrientos visited on October 11. Even though Barrientos and Itzel remembered being at Cub Foods on October 11, defense counsel did not obtain that video and make the video available to the state until February 26, 2009, the weekend before the trial was originally scheduled.<sup>458</sup>

Obtaining the Cub Foods and liquor store videos should have been defense counsel's first priority. The video had enormous potential for exculpatory evidence, and there was a high likelihood the videos could get erased as time went by. Barrientos understood the exculpatory nature of video. In fact, when he learned that the shooting occurred at 7pm, he knew he needed to request that his defense counsel obtain the video to prove his innocence. He believed that he and Itzel were in Cub Foods very near that time. But defense counsel delayed.

The video narrowly limited the window of opportunity for Barrientos to get to the scene of the crime. Up until the video was discovered, the state could show that Barrientos had a window of time between 4:37pm to 8:12pm for which his alibi was not corroborated by independent evidence.<sup>459</sup> During that time, he could have been in Minneapolis planning and participating in a murder. Absent the video, Barrientos was a much better suspect, and the state's case was stronger. But the video that captured Barrientos and Itzel in Cub Foods near the time of the murder substantially weakened the state's case. How could the state prove beyond a reasonable doubt that Barrientos was the shooter when there was such a small window of time to get from Maplewood to the scene of the crime and back? And how could the state prove beyond a reasonable doubt that Barrientos was the shooter when he did not fit the description given by *any* of the witnesses at the scene?

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<sup>457</sup> Barrientos Call from Hennepin County Jail at 2009 on Nov. 24, 2008 (12275790746122754920) at 02:45. The HCAO file contains hundreds of recordings of Barrientos jail calls. Several times throughout 2008 and 2009, attorney/client discussions were recorded by the jail because the defense attorneys spoke with Barrientos via three-way call through Barrientos's sister Cynthia connecting them. If the jail had the ability to not record attorney calls based on phone numbers, it would have recorded these calls because they were through Cynthia's number. The defense attorney should have known that this call set up would have vitiated any privilege claim because she was hesitant to give specific details on those calls knowing they were recorded. *See id.* at 2:56.

<sup>458</sup> Barrientos Call from Hennepin County Jail at 17:24 on Oct. 26, 2008 (12250599126122754920) at 15:05; E-mail from Hilary Caligiuri to Benjamin Myers (Feb. 17, 2009); MPD at 274, supp. 107.

<sup>459</sup> Trial Exs. 87, 88. A call from Barrientos's cell phone at 4:37pm showed he was in Oakdale, which is consistent with being in Maplewood. *Id.* At 7:31 and 7:45pm, Barrientos was texting his sister Jennifer, but texts do not cause a location to be noted through a cell tower. *See id.*; Phone Log, 5/12/09; Timeline of Phone Calls with Notes, Prosecution File. At 8:12pm, a call from Barrientos's phone showed that he was back near Maplewood. Trial Exs. 87, 88.

It appears defense counsel subpoenaed Cub Foods on November 3, 2008, for “any and all video surveillance” during the relevant hours on October 11, 2008.<sup>460</sup> But, according to the defense counsel in an e-mail to prosecutors, the defense did not actually obtain the subpoenaed Cub Foods video showing Barrientos on camera until sometime around February 15, 2009.<sup>461</sup> It also appears the defense mistakenly believed the state already had the video. Defense counsel wrote to the prosecutor: “My understanding is that your office actually requested it first in time and law enforcement actually acquired it days after the shooting. We only recently acquired the same footage.”<sup>462</sup> On February 17, the prosecutor told the defense that the state did not have the Cub Foods video.<sup>463</sup> That same day, the district court ordered the defense to disclose “surveillance videotape reportedly obtained by the defense from Cub Foods” to the state by February 26.<sup>464</sup> Sgt Dale wrote a report in late April explaining that he and Gaiters obtained video from Cub Foods sometime between February 23 and 27 and that the video was given to prosecutors.<sup>465</sup> The dates and time stamps of the video and the video’s contents were not described in Dale’s report.<sup>466</sup> Gaiters also wrote a report in April stating that he and Dale obtained Cub Foods video from October 11 and October 12. He noted that he only watched the portion from 1:36am to 3am on October 12, times Barrientos was not in the store. Gaiters also made no mention in his report of the contents of the Cub Foods video from October 11. It appears, based on these records, that the prosecution did not view the Cub Foods video until late February 2009.

Had defense counsel obtained and disclosed the Cub Foods video earlier in the investigation, there is a reasonable possibility that the investigation would have shifted its focus to the alternative suspects who fit the description of the shooter, did not have an alibi, and had never been ruled out as the shooter, for example, Sharky and Arber Meko, aka Sandwich.

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<sup>460</sup> Benjamin Myers, Unsigned Subpoena for Cub Foods Video, Nov. 3, 2008. The digital files of the Cub Foods videos obtained by the CRU have creation dates of Nov. 3 and 4, 2008. This corresponds to the date of the subpoena the CRU obtained from defense counsel.

<sup>461</sup> E-mail from Benjamin Myers to Hilary Caligiuri, Feb. 15, 2009.

<sup>462</sup> *Id.*

<sup>463</sup> E-mail from Hilary Caligiuri to Benjamin Myers, Feb. 17, 2009.

<sup>464</sup> Order, *State v. Barrientos-Quintana*, 27-CR-08-53942 (Minn. Dist. Ct. Feb. 17, 2009).

<sup>465</sup> MPD at 262, supp. 107.

<sup>466</sup> *Id.*



***b. Defense counsel fails to accurately investigate, document, and present the drive time between Cub Foods and the crime scene.***

Once discovered, the Cub Foods video could have been a cornerstone of the defense counsel's case. But it was not enough to simply show the video to the jury. Counsel had to show reasonable doubt that Barrientos could have traveled from inside the Cub Foods store near Maplewood to the south edge of Powderhorn Park, switch cars, then drive to the scene of the crime in less than 33 minutes. The state's investigators timed the drive but skipped essential steps and failed to accurately document their movements.

Defense counsel recognized the need to test the drive time and hired an investigator to do so. But the investigator did not take a witness on the test drive nor record the drive time with a video for corroboration. Worse, the defense investigator testified that his drive times were "approximately" 23 minutes to Powderhorn Park and "approximately" 10 minutes to the murder scene.<sup>467</sup> Most importantly, he did not time the trip from inside the Cub Foods, which would have resulted in a trip time of over 33 minutes—too long to carry out the murder. Such careless oversight in the investigation of a first-degree murder case is troubling.<sup>468</sup>

***c. Defense counsel fails to investigate and present the exculpatory nature of Barrientos's jail calls.***

Counsel failed to investigate Barrientos's recorded jail calls. Without an investigation, defense counsel could not rebut the state's assertions that Barrientos coached the alibi witnesses and encouraged them to present a fabricated alibi. Some of the most damaging evidence in the case came from a few out-of-context statements Barrientos made on these calls, and the state amplified this evidence in closing argument. The prosecutor accused Barrientos of orchestrating the changes in the alibi witnesses' accounts. The prosecutor selected a single snippet from hours of jail calls to make her point. Using a PowerPoint slide quoting what Barrientos said to Itzel, the prosecutor argued,

We also heard the defendant's own voice on one of the jail calls. He said I'll find out if they charge me or not, you know, and then, you know, if we will, 'we'll be able to get our stories straight, when if I go to court or whatever.' We'll be able to get our stories straight.

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<sup>467</sup> Trial Transcript at 1472–73.

<sup>468</sup> See Bradshaw Anderson, *Investigations Report for Bridget Landry of McNeilly Law Firm*, March 21, 2009.

Well, we've got the story straight, but we've got it straight with the evidence that we've heard, the testimony that we've heard from the witnesses that have testified in this trial.<sup>469</sup>

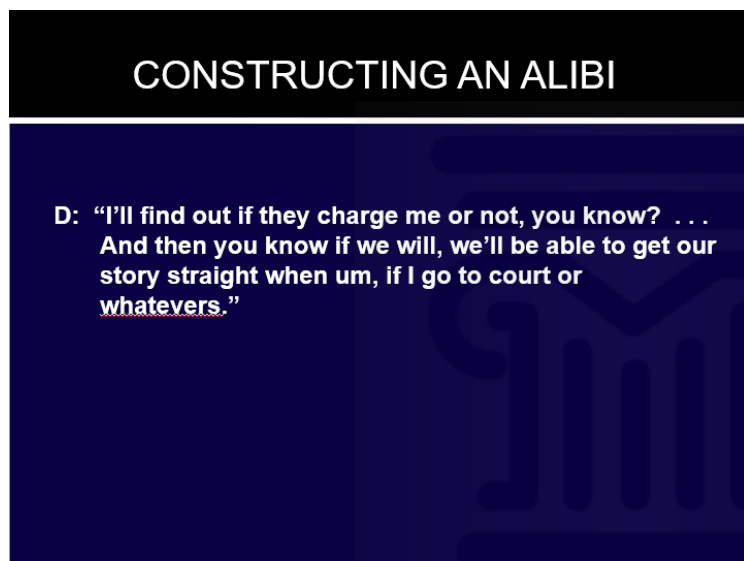


Figure 15 - PowerPoint Slide from the State's Closing

The state used one short snippet of one phone call—where Barrientos told Itzel, “We’ll be able to get our stories straight”—to argue that Barrientos was directing Itzel and her family to concoct an alibi and commit perjury.<sup>470</sup> Defense counsel objected and argued that the audio snippet was “out of context.” When the court asked for an explanation, defense counsel could not provide an answer because, he told the court, the defense

had not transcribed the calls: “This is not one we’ve transcribed ourselves, so I can’t even speak to whether or not it is completely out of context.”<sup>471</sup> The court overruled the objection.<sup>472</sup>

Had defense counsel adequately investigated the jail calls, they would have discovered why the short clip was out of context and misleading. In the same phone call that prosecutors used to prove that Barrientos was concocting an alibi, he had instructed Itzel, several times, to tell investigators only what she remembered. “Look, Itzel. You say what you remember, ok?” He continued, “I said what I remember, which is going to be a little different, but we’ll see what happens because I don’t want them going around saying that I was telling you what to say to them like I already told you. . . .”<sup>473</sup> Based on Barrientos’s instruction, Itzel also instructed her brother Ricardo to only say what he remembered.<sup>474</sup>

Because defense counsel failed to review the jail calls, they were unable to explain why the jail calls were out of context. The jury heard the calls as curated by the prosecution. Referring

<sup>469</sup> Trial Transcript Volume 15 at 70–71.

<sup>470</sup> Trial Ex. 134; Court Exhibit I; Trial Transcript 1553; Trial Transcript Volume 15 at 71.

<sup>471</sup> Trial Transcript at 1554.

<sup>472</sup> *Id.*

<sup>473</sup> Barrientos Call from Hennepin County Jail at 20:28 on Oct. 25, 2008 (12249845543202950604) at 8:36.

<sup>474</sup> *Id.*

to these calls, the state argued in its closing that Barrientos was attempting to get everyone's stories "straight," when, actually, he was instructing them to tell police only what they remembered and not what he told them to say.

Had defense counsel reviewed the jail calls, counsel could have persuasively argued that the entire jail call should be played for the jury under the rule of completeness.<sup>475</sup> And, given the exculpatory nature of the calls, the jury would have been given a reason to believe that Barrientos was with Itzel and her mother and not at the scene of the crime.

***d. Defense counsel fails to effectively present Barrientos's alibi witnesses.***

The defense also failed to effectively present Barrientos's alibi witnesses.<sup>476</sup> All of the alibi witnesses—Itzel, Ricardo, and Marcia—had confused Sunday, October 12, with Saturday, October 11, when they first spoke with investigators. When they learned they were mistaken, they promptly corrected their statements. Professor Bergman, the expert defense attorney who reviewed this case for the CRU, noted that during defense counsel's direct examination of these witnesses, counsel failed to ask the witnesses any questions about their changed statements. This allowed the state to discredit the witnesses on cross-examination, giving the jury the impression that the defense was hiding the truth. Counsel "failed to defuse the impact of the changed statements" through having the witnesses explain their initial confusion about the dates.<sup>477</sup> The state took full advantage of this, using it to paint a picture of a concocted story in their closing argument.<sup>478</sup>

Barrientos was prejudiced by defense counsel's performance. While the jury was deliberating, it requested to hear "all conversations" of the jail phone calls, signaling that those calls had an effect on the jury's decision.<sup>479</sup> But the court denied the request.

Barrientos's central defense was his alibi, and the botched presentation of this evidence, along with the cherry-picked presentation of the jail calls, allowed the state to argue that Itzel and her family were colluding with Barrientos to construct an alibi. The jail calls demonstrate

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<sup>475</sup> *Dolo v. State*, 942 N.W.2d 357, 365 (Minn. 2020); Minn. R. Evid. 106. The evidentiary rule of completeness applies when proposed additional material (1) relates to the facts offered in an excerpt of a recorded statement or writing and (2) is necessary to correct a misleading or distorted impression of the facts created by the admitted excerpt or writing.

<sup>476</sup> Barbara E. Bergman, Report on Ineffective Assistance of Counsel in *State v. Barrientos-Quintana*, April 19, 2022 (attached as Appendix F), at 21 [hereinafter Bergman Report].

<sup>477</sup> *Id.*

<sup>478</sup> *Id.*

<sup>479</sup> Trial Transcript at 1712.

otherwise, and had defense counsel listened to them, they would have welcomed the ability to supplement the state's misleading presentation of the calls. Had defense counsel investigated and effectively presented the alibi evidence that existed, there is a reasonable probability Barrientos would not have been convicted.

*e. Defense counsel fails to cross-examine Sgt Gaiters on an alleged incriminating admission by Barrientos.*

Sgt Gaiters asserted [REDACTED] at trial that Barrientos mentioned that he was with Ramiro Pineda, aka Slappy, at the baptism party on the night of the murder.<sup>480</sup> Slappy was the owner of the white Intrepid involved in the drive-by shooting. Therefore, the evidence that Barrientos met up with Slappy after the shooting was inculpatory. However, the CRU found no evidence that Barrientos made such an admission or that Slappy was at the baptism party.

Gaiters interrogated Barrientos after his arrest and asked him who he was with at the baptism party on October 11. The transcript from the prosecutor's file reads as follows:

GAITERS: Okay. Who else uh, who, who you see out there? Your old friends you saw out there?

BARRIENTOS: Um, Miguel.

GAITERS: Miguel?

BARRIENTOS: Yeah.

GAITERS: Okay.

BARRIENTOS: **Um I don't know [Inaudible] Slappy I don't know if you guys know him.**

GAITERS: Sappy or Slappy?

BARRIENTOS: Sappy, no.

GAITERS: Okay, yeah.

BARRIENTOS: That was pretty much it.

GAITERS: That's okay.

BARRIENTOS: That's from a long time ago that I know him.

GAITERS: Right.

BARRIENTOS: And.

GAITERS: A few years back?

BARRIENTOS: Yeah, Um

GAITERS: Yeah

BARRIENTOS: Ever since maybe when I used to hangout with the wrong, put it the wrong crew.<sup>481</sup>

<sup>480</sup> [REDACTED]; Trial Transcript at 1101, 1203-05.

<sup>481</sup> Tr. of Barrientos Interview at 12 (emphasis added).

The state’s transcript of this interview, however, appears to be incorrect. When the CRU listened closely to the interview, several times, it sounds like Barrientos says “AKA” (also known as) within the section labelled “[Inaudible]” and that he was referring to Miguel’s nickname as “Sappy.” The interview audio reveals the following:

GAITERS: Miguel?

BARRIENTOS: Yeah.

GAITERS: Okay.

BARRIENTOS: Um I don’t know AKA Sappy. I don’t know if you guys know him.

GAITERS: Sappy or Slappy?

BARRIENTOS: Sappy, no.<sup>482</sup>

The CRU’s conclusion that Barrientos named Miguel, who went by a name sounding like “Sappy” makes sense in the context of the entire interview. Later in the interview, Gaiters eventually did question Barrientos about Slappy. In fact, Gaiters showed Barrientos a picture where he is seen with other Sureños 13 gang members, including Slappy. Gaiters then asked a series of questions:

GAITERS: Who’s this guy? Slappy.

BARRIENTOS: Slappy.

GAITERS: When’s the last time you saw Slappy?

BARRIENTOS: Um, we went to a rodeo one day.

GAITERS: How long ago was that?

BARRIENTOS: Two months ago probably. But I didn’t go with him. I went to rodeo and he was there.

GAITERS: Okay.

BARRIENTOS: Probably two months ago.

GAITERS: That’s the last time you saw him ... ?

BARRIENTOS: Yeah, same time him he probably three months, four months. Him, a while ago [sic].<sup>483</sup>

During this exchange, Gaiters did not question Barrientos on this potential conflict in his account—that earlier he said he saw Slappy the night of the baptism. Neither did Gaiters mention in his report that Barrientos admitted to being with Slappy, the owner of the white Intrepid, on the

<sup>482</sup> Barrientos Interview, file 2 at 29:12.

<sup>483</sup> Tr. of Barrientos Interview at 167–68. [REDACTED]

night of the murder.<sup>484</sup> Instead, Gaiters wrote in his report that Barrientos picked out Slappy from a photograph and that he had “no additional information regarding ‘Slappy.’”<sup>485</sup>

Prior to the grand jury proceedings, the prosecution reviewed the Barrientos interrogation transcript. Lines containing “Miguel” and “Um I don't know [Inaudible] Slappy I don't know if you guys know him” were highlighted and the page was tabbed with a label saying “Slappy.”<sup>486</sup> The prosecutor’s outline for this portion of Gaiters’ grand jury testimony reads: “Δ’s admissions & denial . . . Mentioned baptism party that night – says saw ‘Slappy’ – ‘Slappy’ is Pineda = owner of Intrepid.”<sup>487</sup>

[REDACTED]

[REDACTED]

[REDACTED] Gaiters then testified to this at trial too.

The defense made a muddled attempt to challenge Gaiters on this point at trial:

DEFENSE COUNSEL: Now, Detective – Sergeant, during your interview with Mr. Barrientos he also indicated that he saw an individual by the name of Sappy at that baptism; is that correct?

GAITERS: No, sir.

...

DEFENSE COUNSEL: Office – do you remember that interview pretty clearly?

GAITERS: Yes, sir. I – I remember what I believe you’re speaking about Sappy, and I thought he asked – I thought it was Slappy that he said.

DEFENSE COUNSEL: Well, let me show you part of that interview.

GAITERS: Okay.

DEFENSE COUNSEL: Maybe that will refresh your recollection of what was actually said.

DEFENSE COUNSEL: May I approach, Your Honor?

THE COURT: You may.

DEFENSE COUNSEL: Take a look from the mid-portion down to the bottom of the page, please.

GAITERS: The highlighted portion?

DEFENSE COUNSEL: Just all of it.

GAITERS: Okay.

<sup>484</sup> MPD at 148, supp. 60.

<sup>485</sup> *Id.*

<sup>486</sup> Highlighted Pages from Barrientos Interview from Prosecution File.

<sup>487</sup> Hilary Caligiuri, Outline for Grand Jury Witness, Nov. 10, 2008.

<sup>488</sup> [REDACTED]

DEFENSE COUNSEL: Does that refresh your recollection as to the conversation that you had with Mr. Barrientos?

GAITERS: Yes, sir.

DEFENSE COUNSEL: So after your reviewing this document, isn't it correct that the individual that he indicated that he saw at the baptism was Sappy –

GAITERS: No, sir.

DEFENSE COUNSEL: Not Slappy?

GAITERS: No, sir. After I asked, trying to clarify it was Sappy or Slappy, then I believe I said Slappy and he says no. And that indicated to me that, no, it was Slappy, not Sappy (sic).

DEFENSE COUNSEL: So did he also indicate to you what Sappy's first name was?

GAITERS: I don't recall.

DEFENSE COUNSEL: Do you want me to re-approach and let you review this again to refresh your recollection?

GAITERS: Yes, sir.

DEFENSE COUNSEL: I might just leave this up here with you this time.

GAITERS: Thank you.

DEFENSE COUNSEL: Thank you. So I'll ask you again, Sergeant. Did Mr. Barrientos indicate to you as to who Sappy was?

GAITERS: He mentioned two people, plural, friends, and he mentions a person by the name of Miguel.

DEFENSE COUNSEL: And from reviewing that document in front of you, is Miguel also Sappy?

GAITERS: I – my understanding of it, no.<sup>489</sup>

As Professor Bergman pointed out in her report, Gaiters's testimony made no sense and the defense failed to properly challenge it.<sup>490</sup> Counsel failed to confront Gaiters with the precise words in the transcript: "Q: Sappy or Slappy? A: Sappy, no." Counsel also failed to confront Gaiters with the fact that he never included in his reports that Barrientos admitted that he was with Slappy the night of the murder. Investigators had learned by the time they arrested Barrientos that the white Intrepid was registered to Slappy, so this would have been a key admission to note.<sup>491</sup> Finally, defense counsel failed to demonstrate that later in the interview Barrientos said the last time he saw Slappy was two-months ago. Had Gaiters understood Barrientos to have admitted being with Slappy at the baptism party the night of the murder, why would Gaiters have accepted, without question, Barrientos's claim that he last saw Slappy two months prior?

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<sup>489</sup> Trial Transcript at 1203-05

<sup>490</sup> Bergman Report at 22.

<sup>491</sup> MPD Supplement 54

The CRU investigated this question and found corroboration that Barrientos likely said he saw Miguel, aka Zappy, at the baptism party and that he did not say he saw Slappy at the baptism party. First, the CRU reviewed the 90-minute video footage from the baptism party, several times. Slappy cannot be seen in any of the baptism video footage.<sup>492</sup> Second, the CRU interviewed Itzel. She said Slappy did not know the family hosting the baptism and that Slappy was not at the party.<sup>493</sup> Itzel said that neither Barrientos nor her brother Ricardo had a reason to invite Slappy to the baptism themselves.<sup>494</sup> Third, the CRU interviewed Barrientos and asked him to identify people in the baptism video.<sup>495</sup> In one screenshot from the video, Barrientos thought he recognized a man in a white t-shirt. Barrientos said he thought the man was Miguel.<sup>496</sup> Barrientos said he remembered seeing Miguel with his partner and their baby. When asked if Miguel had a nickname, Barrientos said it was “Zappy.”<sup>497</sup> Although he admitted he knew Slappy, Barrientos denied seeing Slappy or his associates at the baptism party.<sup>498</sup>

Because the defense failed to use readily available evidence to effectively attack Gaiters’s inculpatory claim that Barrientos admitted to seeing Slappy at the party, the state was able to argue at closing: “The defendant also admitted to the police that he [had] been with Pineda, Slappy, the very same night as the murder.”<sup>499</sup>

## **B. Eyewitnesses’ Descriptions of the Shooter Provide Compelling Evidence that Barrientos Did Not Shoot Jesse Mickelson.**

### **1. Eyewitness identifications are an exercise in memory science.**

For decades, scientists have been researching eyewitness identifications and the problems that may occur when eyewitnesses remember past events. This science is essential to assess how law enforcement investigators, prosecutors, jurors, and judges collected, presented, and weighed the identifications in this case. Jurors in criminal cases tend to place a high value on eyewitness

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<sup>492</sup> See Trial Ex. 128, Baptism Video, Oct. 11, 2008.

<sup>493</sup> CRU Interview with Itzel Chavarria-Cruz, Jan. 16, 2024, part 1 at 1:07:33–1:09:30.

<sup>494</sup> *Id.*

<sup>495</sup> CRU Interview with Edgar Barrientos-Quintana, May 2, 2024 at 16:15.

<sup>496</sup> *Id.* at 22:06–22:55.

<sup>497</sup> *Id.* at 23:05–25:30.

<sup>498</sup> *Id.* at 53:55.

<sup>499</sup> Bergman Report at 23; Trial Transcript Volume 15 at 62.



identifications, even though eyewitnesses are often unreliable.<sup>500</sup> Eyewitnesses' memories "become a patchwork of memory fragments, speculation, guessing, and intrusions of new information as witnesses fill in gaps in the story of the event."<sup>501</sup> Eyewitness identifications, like other memories, can be remarkably accurate or remarkably inaccurate, and a witness's confidence does not correlate with the witness's accuracy. Without objective evidence, accurate identifications are indistinguishable from inaccurate ones.<sup>502</sup>

A flood of exonerations since DNA became widely used in the criminal justice system demonstrates what researchers have been saying for decades—there is a high probability that many eyewitness identifications are inaccurate. In fact, a study of the first 200 DNA exonerations showed that eyewitnesses identified the wrong person in 79% of the exoneration cases, a number even criminal justice experts found stunning.<sup>503</sup> Eyewitness identification remains the leading cause of wrongful convictions in DNA exonerations.<sup>504</sup>

Despite the growing, established evidence on the fallibility of memory and eyewitness identification, courts have not kept up with the science. Courts continue to follow law established by the United States Supreme Court in 1972 to assess whether eyewitness identification evidence, gathered through suggestive procedures, should be admitted at trial.<sup>505</sup> Courts also regularly prohibit defense experts from educating jurors about the reliability of eyewitness identification. A common explanation for disallowing expert testimony is that jurors are adequately equipped to assess eyewitness identification because they, themselves, regularly experience the phenomenon of recognizing and remembering people.<sup>506</sup> Yet studies show that most people do not understand how witnesses' memories work and how easily their memories are contaminated.<sup>507</sup> For example,

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<sup>500</sup> See Steblay Report at 6–7.

<sup>501</sup> *Id.* at 3.

<sup>502</sup> *Id.*; Cara Laney & Elizabeth Loftus, Eyewitness Testimony and Memory Biases, Noba Project.com (2024), available at <https://nobaproject.com/modules/eyewitness-testimony-and-memory-biases>.

<sup>503</sup> Brandon L. Garrett, Judging Innocence, 108 Colum. L. Rev. 55, 60 (2008).

<sup>504</sup> Steblay Report at 3.

<sup>505</sup> *Neil v. Biggers*, 409 U.S. 188, 199–200 (1972). Courts determine whether to allow the evidence after assessing these factors: 1) the opportunity of the witness to view the perpetrator, 2) the witnesses degree of attention, 3) the accuracy of the witness's prior description, 4) the witness's level of certainty, and 5) the length of time between witnessing the crime and identifying the perpetrator. Minnesota uses the *Biggers* test. *State v. Bellcourt*, 312 Minn. 263, 251 N.W.2d 631, 633 (1977) (citing *Biggers*); *State v. Ostrem*, 535 N.W.2d 916, 921 (Minn. 1995). The test was applied in this case to the defense's inadequate pretrial motion to suppress the eyewitness identifications.

<sup>506</sup> Edward B. Arnolds, et al., *Admissibility of Expert Testimony on the Issue of Eyewitness Identification in Criminal Trials*, 2 Northern Illinois University Law Review 59, 66 (1981).

<sup>507</sup> Steblay Report at 6.

even after decades of research, people continue to believe that a confident identification is a reliable identification despite studies that show confidence does not correlate with reliability.<sup>508</sup>

Proper law enforcement identification protocols are important to increase the reliability of eyewitness identifications. However, these protocols target only the witnesses' ability to accurately retrieve their memories. The other aspects of memory—acquisition and retention—cannot be improved no matter the protocols. Each of the following stages of the process must be assessed to determine the reliability:

*Acquisition.* Whether a witness forms a reliable memory depends on the conditions under which the witness observed the perpetrator—for how long, under what conditions, with what type of view, with what attention focus.

*Retention.* Memories quickly deteriorate over time. They can be forgotten, distorted, or changed depending on the circumstances, i.e., how much time passed between the event and the identification, and what opportunities were there for the memory to become distorted or contaminated.

*Retrieval.* Each time a memory is recalled, there is an opportunity for distortion and revision. Police interviews play an important role at this stage of memory, and they may unintentionally contaminate a witness's memory during this process.<sup>509</sup> Most reforms to law enforcement protocols focus on the retrieval stage.

Although eyewitness identifications can be highly unreliable, there are proven methods for increasing their reliability.<sup>510</sup> In Minneapolis, Hennepin County prosecutors partnered with law enforcement and researchers to improve the reliability of eyewitness identifications and reduce the risk of convicting an innocent person. They memorialized their efforts and findings in two academic articles, and they implemented new protocols with the expectation that the protocols would “help improve police investigations, strengthen prosecutions and better protect the rights of

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<sup>508</sup> *Id.* at 6–7.

<sup>509</sup> Steblay Report at 10.

<sup>510</sup> These protocols had been widely studied, recommended, and adopted long before the investigation of Jesse's murder. *See, e.g.,* American Bar Association, *Statement for Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures* (August 2004), available at [https://www.nacdl.org/getattachment/1c32ccb-7d28-4526-865e-9d8aaf316e18/aba\\_statement\\_of\\_best\\_practices.pdf](https://www.nacdl.org/getattachment/1c32ccb-7d28-4526-865e-9d8aaf316e18/aba_statement_of_best_practices.pdf) [hereinafter ABA, *Best Practices*].

innocent people while convicting those who are guilty.”<sup>511</sup> The new protocols that were designed by the Hennepin County Attorney’s Office in 2003 include:

- the use of double-blind lineup administration;
  - the documentation of the witness’s statement of certainty at the time of identification;
  - the effective use of fillers;
  - the use of a cautionary instruction that the perpetrator might not be present in the lineup;
- and
- the sequential presentation of the lineup photographs.<sup>512</sup>

*Double-blind administration* is intended to minimize the potential for suggestion from the administrator to affect the lineup procedure. Research shows that witnesses’ identifications may be influenced by even unintentional behaviors that the administrator displays. To reduce this effect, the lineup should be administered by a person who does not know which photo is the suspect. A double-blind administration also requires that the witness be informed that the administrator does not know the identity of the suspect.<sup>513</sup> By implementing these procedures, the witness will not be looking to the administrator for clues of which photo is the suspect.

The purpose of documenting a *witness’s level of certainty* at the time of the identification is to memorialize the witness’s confidence level at the moment of identification, uninfluenced by any confirmatory information from law enforcement. This practice also prevents the witness from making comparisons between the photographs and picking the person who looks most similar to the perpetrator.<sup>514</sup>

Using *effective fillers*, *i.e.*, photos other than the suspect that fill out the lineup, also reduces the witness’s ability to use relative judgment to select the person who looks most like the perpetrator. The fillers should closely resemble the witness’s description of the perpetrator, and the suspect should not “stand out” compared to the fillers. This reduces the tendency of the witness to use relative judgement in selecting the perpetrator.

When witnesses are given a *cautionary instruction*—that the suspect may or may not be in the lineup—the witness is less likely to choose a person from the lineup simply because the person

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<sup>511</sup> Amy Klobuchar & Hilary Caligiuri, *Protecting the Innocent/convicting the Guilty: Hennepin County's Pilot Project in Blind Sequential Eyewitness Identification*, 32 William Mitchell Law Review 1, 26 (2005) [hereinafter Klobuchar & Caligiuri, *Protecting the Innocent*]

<sup>512</sup> *Id.* at 19.

<sup>513</sup> *Id.* at 8.

<sup>514</sup> *Id.* at 11.

looks most like the perpetrator. This instruction provides the witness with an indication that “no choice” is a legitimate option when the witness does not believe the photo represents the person they saw.

Another way to decrease the likelihood that a witness will use relative judgment to select a perpetrator is to *present the photos sequentially*, allowing the witness to look at only one photo at a time. The administrator must obtain the witness’s confidence statement before moving on to the next photo.<sup>515</sup> In the Hennepin County pilot study, the use of the sequential lineup reduced misidentification of an innocent suspect by 26%.<sup>516</sup> Although sequential lineups have been shown to be highly effective in reducing misidentifications, they are *only* effective when used in combination with the other protocols. For example, when the double-blind protocol is not used, the effectiveness of the sequential lineup completely erodes.<sup>517</sup> Finally, best practices require, whenever practicable, that the police “digitally video record the lineup procedures, including the witness’s confidence statements and any statements made to the witness by the police.”<sup>518</sup>

When assessing the reliability of an eyewitness identification of a stranger in a photo lineup, it is important to focus on the protocols law enforcement investigators used to obtain the identification. As the data from the Hennepin County study showed, when the above procedures are not followed, the likelihood of identifying an innocent person significantly increases.

When Jesse Mickelson’s murder was investigated in 2008, the Hennepin County Attorney’s Office and the Minneapolis Police Department knew of the best practices for eyewitness identification procedures.<sup>519</sup> In fact, the lead prosecutor in this case was a co-author of a law review article that explained the Hennepin County Attorney’s Office partnership with MPD to study and revise the eyewitness identification procedures to secure more reliable identifications and to prevent wrongful convictions. The lead prosecutor also co-authored an article with Dr. Nancy Steblay, who had conducted the field study that led MPD to adopt new protocols to increase the reliability of eyewitness identifications in Hennepin County.<sup>520</sup> In Barrientos’s case,

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<sup>515</sup> *Id.*

<sup>516</sup> *Id.* at 14.

<sup>517</sup> *Id.*

<sup>518</sup> ABA, *Best Practices* at 1.

<sup>519</sup> Klobuchar & Caligiuri, *Protecting the Innocent* at 21, 24 (Stating the new protocol for the pilot was approved by the respective chiefs of police following several policy discussions, and after the pilot police departments were “committed to making these changes permanent within their jurisdictions”).

<sup>520</sup> Amy Klobuchar, Nancy K. Steblay & Hilary L. Caligiuri, *carl Eyewitness Identifications: Hennepin County’s Blind Sequential Lineup Pilot Project*, 4 *Cardozo Pub. L. Pol’y & Ethics J.* 381 (2006). [hereinafter Klobuchar, et al., *Improving Eyewitness Identifications*].

the investigators obviously failed to follow these protocols. Nevertheless, the prosecutors used these corrupted photo lineups to convict Barrientos—a man who did not fit the description of *any* eyewitness at the scene.

Dr. Steblay reviewed the eyewitness identifications in this case and prepared a report for the CRU. Based on Steblay's report, and other reasons set forth below, the CRU found that the eyewitness identifications do not support Barrientos's conviction.

## **2. False identifications are linked to wrongful convictions.**

False identifications occur when a witness identifies a suspect, not because the witness recalls the suspect from the crime, but because the witness was pressured to name the suspect or had other motivations to identify a suspect that they could not link to the crime through their own memory.<sup>521</sup> False identifications, like false confessions, are often the result of coercive tactics like the Reid Technique.<sup>522</sup> There is growing evidence that false identifications play a role in wrongful convictions. For this reason, the CRU assessed the identifications of Barrientos by Luis, William, and Aron, not only for procedural flaws in the eyewitness identification protocols, but also for signs that personal motivations or coercive interrogation tactics may have led them to falsely identify Barrientos as the shooter.

## **3. Barrientos does not match the descriptions of any eyewitness, and prosecutors rely on flawed pre-trial identification procedures.**

Six witnesses at the scene, who saw the shooter, gave discrepant details about the car, the number of passengers, and what the shooter was wearing, but they immediately agreed on one detail: the shooter had a bald or shaved head. Below is a chart of each time the shooter's hair length

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<sup>521</sup> The National Registry of Exonerations features several of such cases. See, e.g., John Edward Smith, National Registry of Exonerations, Sept. 24, 2012, available at <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3998>; Shawn Drumgold, National Registry of Exonerations, July 20, 2022, available at <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3191>; Jennifer Gonnerman, When a Witness Recants, *The New Yorker*, (October 25, 2021); Antoine Pettiford, National Registry of Exonerations, Dec. 28, 2012, available at <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4082>, Alfred Chestnut, Andrew Stewart and Ransom Watkins, National Registry of Exonerations Dec. 9, 2019, available at <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5641>; see also

<sup>522</sup> See Timothy E. Moore, Brian L. Cutler, & David Shulman, *Shaping Eyewitness And Alibi Testimony With Coercive Interview Practices*, *The Champion*, 34, 39 (2014).

was mentioned by an eyewitness before Barrientos's arrest as recounted in MPD reports and interview transcripts:

<i>Table 1 - Descriptions of the Shooter's Hair in Interviews</i>		
Cite	Description	Witness
<b>Birthday Party Witnesses</b>		
MPD at 21, supp 11.	"[J.G.] believed there where two black males in the front seat and one mixed race, partially Hispanic male, in the back seat. [J.G.] also believed the male in the back seat was <b>bald.</b> "	J.G., interviewed by Off. Johnson 10/11/2008
MPD at 27, supp. 14.	"[J.G.] also described the shooter as a Hispanic male wearing a grey hooded sweater, light complected and <b>bald.</b> "	J.G., interviewed by Off. Klund 10/11/2008
Transcript of J.G. Q and A Interview 11/7/08 at 2.	Q: Bald or shaven head? A: Yeah it was <b>more of a bald.</b> Q: More of a bald.	J.G., interviewed by Sgts Dale and Gaiters 11/7/2008
MPD at 27, supp. 14.	"[E.P.N.] . . . Recalled seeing a <b>bald</b> Mexican in the back seat, behind the front passenger."	E.P.N., interviewed by Off. Klund 10/11/2008
MPD at 27, supp. 14.	"[J.B.] described the rear passenger as light complected, <b>shaved head</b> and wearing a grey hoodie."	J.B., interviewed by Off. Klund 10/11/2008
Transcript of J.B. Q and A Interview 11/6/08 at 2.	"He had a <b>shaved head.</b> "	J.B., interviewed by Sgts Dale and Gaiters 11/6/2008
MPD at 26, supp. 14.	"He observed a <b>bald</b> Hispanic male with a mustache."	A.L., interviewed by Sgt Klund.
<b>Puppet's Crew</b>		
MPD at 104, supp. 33.	"[Aron] described the suspect as a light skin (then later stated dark skin) Mexican, 5-7 to 5-8, with a <b>shiny bald head.</b> "	Aron Bell-Bey, interviewed Sgts Dale and Gaiters 10/11/2008
Transcript of Bell-Bey Interview 10/11/08 at 8	Q: What his hair look like? A: <b>He didn't have no hair.</b> Q: He's bald? A: Yeah, it was like. Q: Closely shaven? Bald? A: It was like <b>shiny bald.</b>	Aron Bell-Bey, interviewed Sgts Dale and Gaiters 10/11/2008

MPD at 105, supp. 33.	“[William] described the suspect as a Hispanic male, brown skin, <b>bald</b> head, wearing sunglasses.”	William Fajardo, interviewed by Sgt Dale 10/11/2008
Transcript of Fajardo Interview 10/11/08 at 8.	Q: . . .What’s he look like? A: <b>He’s like bald.</b>	William Fajardo, interviewed by Sgt Dale 10/11/2008
MPD at 139, supp. 54.	“[Luis] said that he noticed that this suspect had a <b>bald</b> head like Jael Pliego, dark eyes, brown skin.”	Luis Pliego, interviewed by Sgt Gaiters 10/15/2008
MPD at 169, supp. 55.	“[Aron] assumed Brownny was the shooter because he has a <b>bald</b> head.”	Aron Bell-Bey, interviewed by Sgt Dale 10/16/2008
MPD at 170, supp. 55.	“[Aron] described [the] suspect as <b>bald or shaved head</b> , wearing sunglasses, a dark colored bandana on his face, and a black shirt.”	Aron Bell-Bey, interviewed by Sgt Dale 10/16/2008
MPD at 140–141, supp. 54.	“[William] said the shooter was <b>bald</b> and he remembered his eyebrows, and possibly had on Black sunglasses.”  “[William] said that he saw the shooter shoot the gun and the shooter had bushy eyebrows on the face of the shooter and believed the shooter to be <b>bald.</b> ”	William Fajardo, interviewed by Sgt Gaiters 10/17/2008
Transcript of Luis Pliego-Espitia Q and A Interview 10/20/21 at 3.	“He had like a lot of beard because you could see like coming out and he had a lot of moustache and then he was <b>bald</b> and then he had black eyes and then he had long like like bushy like eyebrows.”	Luis Pliego, interviewed by Sgt Dale 10/20/2008

Video of Barrientos on the day of the shooting shows that he was not bald.



**Figure 16 - Zoomed Still Showing Barrientos's Hair Profile from Baptism Party Video, Oct. 11, 2008**



**Figure 17 - Zoomed Still Showing Barrientos's Hair Length from Cub Foods Video - Oct. 11, 2008**

And photos of him the day of arrest should have alerted the investigators to that fact.



**Figure 18 - Still from *The First 48* Footage of Barrientos's Arrest on Oct. 22, 2008**



**Figure 19 - Barrientos's Arrest Photograph, Oct. 22, 2008**

If the shooter had a bald or shaved head at the time of the shooting, the question arises: How did three eyewitnesses come to identify Barrientos as the shooter when Barrientos had a full head of dark hair on the day of the shooting?

The CRU's investigation found that Dale and Gaiters failed to gather reliable eyewitness identifications from unbiased witnesses, and instead went straight to Puppet and his crew and



pressured them to name a suspect. This method of gathering identifications with coercive interviewing techniques resulted in the false identification of Barrientos as the shooter.

***a. Investigators rely solely on Puppet's crew to name and identify the person who shot Jesse Mickelson.***

The eyewitness identifications were problematic from the start because the state relied entirely on Puppet's crew. These witnesses had the worst opportunity to view and encode the shooter's appearance and had a motive to falsely accuse Barrientos.<sup>523</sup>

At the time of the shooting, Puppet, the leader of the SSR gang clique, was at war with other Sureños 13 cliques in Minneapolis. Puppet's clique had broken away from the Sureños without permission, [REDACTED]

[REDACTED]<sup>524</sup>

When Jesse was shot, Puppet had a motive to lie about his own presence at the scene of the crime and to deny that he had been outside that evening. His presence in the neighborhood had disturbed the neighbors. Police broke up parties at Puppet's house because they were concerned about the gang activity.<sup>525</sup> And there was cause for concern. Law enforcement obtained a photo of Puppet on a bike holding a handgun. His house was a constant target for gang activity.<sup>526</sup> Puppet was shot in his own driveway, in the same location Jesse was killed, exactly five months before Jesse's death.



**Figure 20 - Puppet with a handgun.**

Puppet's brother had been attacked in that driveway too. Luis was beaten with a baseball bat so badly he was taken to the hospital in an ambulance.<sup>527</sup> [REDACTED]

[REDACTED].<sup>528</sup> According to one of their friends, William Fajardo once grabbed a gun

<sup>523</sup> Steblay Report at 13. Although the low lighting created a poor foundation to remember the shooters face for all witnesses, the witnesses who were shot at had the worst opportunity to encode memories. *See Id.* Their encounter with the shooter was brief, unexpected, and very frightening, triggering a fight or flight response as they were viewing the shooter. Additionally, the "weapon focus effect" meant their attention was distracted by the firearm. *Id.* The young boys playing football, however, saw the shooter before a weapon was pulled or fired. *Id.*

<sup>524</sup> Trial Transcript 843-45; [REDACTED]

<sup>525</sup> Trial Transcript at 1359.

<sup>526</sup> Trial Transcript at 1359.

<sup>527</sup> Tr. of Jael Pliego-Espitia Interview, 10/15/08 at 12, 21-22.

<sup>528</sup> [REDACTED]

out of Puppet's garage and brandished it when people from a rival gang drove by.<sup>529</sup> Sharky said that Puppet shot a firearm at him one week prior to October 11, about four streets away from Flag Foods, giving Sharky (the state's central witness against Barrientos) a motive to retaliate and shoot at Puppet.<sup>530</sup>

Dale and Gaiters knew that Puppet was likely the target of the shooting, and they pressed Puppet for leads over hours of interviews.<sup>531</sup> They accepted his account—that he had not been outside all evening—despite evidence to the contrary.<sup>532</sup> For example, Jesse's sister placed Puppet outside with Jesse when the shooting started. Her description had the hallmarks of reliability. She knew Puppet. She gave consistent descriptions each time she was interviewed. Her descriptions were detailed, and she recounted memorable facts. She described how Puppet struggled with his crutches as he fled the gunfire.<sup>533</sup> None of the other boys standing with Jesse was on crutches that night.

Puppet had a motive to name Barrientos, who he knew as Smokey, as the shooter. Puppet had become romantically involved with Itzel, Barrientos's girlfriend. Puppet and Itzel spent time together, and they called each other.<sup>534</sup> Barrientos knew this and did not approve.<sup>535</sup> Puppet and Itzel had sex.<sup>536</sup> Barrientos did not know this, and he certainly would not have approved.<sup>537</sup>

On the evening of the shooting Dale and Gaiters learned that Puppet's crew had gathered inside Puppet's house immediately after the shooting and had discussed the shooting with each

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<sup>529</sup> CRU Interview with Christopher Korte, Jan. 4, 2024, at 25:05.

<sup>530</sup> Trial Transcript at 855.

<sup>531</sup> See Tr. of Jael Pliego-Espitia Interview, 10/15/08; Tr. of Jael Pliego-Espitia Interview, 10/11/08; Transcript of Interview by Robert Dale with Jael Pliego-Espitia, October 27, 2008.

<sup>532</sup> See Interview by Erick Fors with A.M., Oct. 11, 2008, at 5:30 (A.M. indicating “for sure” Puppet was in the alley during the shooting because she remembered him running with his crutches); MPD at 49, supp 25 (investigators told Luis they believe him when he said Puppet was not outside); MPD at 86, supp. 23 (Sgt Dale reported, “Officer Tapp learned that several individuals inside [Puppet's] residence had been standing near the victim when the victim was shot. These individuals ran into the residence immediately following the shooting. The witnesses, Luis and Jael, were transported to City Hall”); MPD at 29, supp. 13 (Gino Eagle “mentioned that there were ‘Mexicans’ across the alley from the victim's home and he thought that they were probably the intended targets.”). Sharky also testified that Puppet was outside. Trial Transcript at 813–14.

<sup>533</sup> MPD at 93, supp 41; MPD at 30, supp. 13; Interview by Erick Fors with A.M., Oct. 11, 2008 at 5:30.

<sup>534</sup> MPD at 164–65, supp. 56.

<sup>535</sup> See Barrientos Call from Hennepin County Jail at 18:38 on Nov. 22, 2008 (12274007716122754920) at 18:20; Barrientos Call from Hennepin County Jail at 9:16 on Nov. 11, 2008 (12264166276122754920) at 13:43; 14:52; 18:55.

<sup>536</sup> CRU Interview with Itzel Chavarria-Cruz, Jan. 16, 2023, part 1, at 1:10:20.

<sup>537</sup> Ironically, investigators eventually agreed on a motive for the crime – Barrientos wanted to shoot Puppet because he was jealous. But they apparently didn't consider the fact that Puppet also had a motive to get rid of Barrientos and would have had a motive to frame Barrientos for the murder of Jesse Mickelson. See Barrientos Call from Hennepin County Jail at 8:26 on Nov. 21, 2008 (12272776733202950604) at 1:40.

other. During interviews downtown, they continued to press Puppet to name suspects, while also reassuring Puppet that they believed he was not outside and that he did not see the shooting.<sup>538</sup> Puppet was the first to mention Sharky as the suspect. Puppet told Dale and Gaiters that he heard Luis, William, and Aron talking about a guy named Sharky, thinking it was Sharky that came and shot Jesse.<sup>539</sup> Dale and Gaiters took this information into their interviews with the rest of Puppet's crew. Each member of Puppet's crew agreed that Luis thought the shooter was Sharky. Each agreed that Sharky fit the description of the shooter; Sharky was bald. Sharky later said that Puppet shot a firearm at him a week before October 11.<sup>540</sup> But Aron Bell Bey insisted that Sharky would not have shot at Aron because Sharky and Aron were friends. Sharky ultimately became the state's chief witness against Barrientos even though he was one of the first-named suspects.

***b. With a motive to implicate Barrientos, Puppet's crew provide the eyewitness identifications.***

Eventually, in an interview with Puppet that began on October 15 and continued into the early morning of October 16, Puppet began naming other potential suspects. Seemingly unsatisfied, Dale and Gaiters kept pressing.<sup>541</sup> Dale asked Puppet about any other guys that were causing trouble, and Puppet named Smokey, who was "like 28 already" and beat up William a couple of weeks before the shooting.<sup>542</sup> Puppet said that Itzel was with Smokey when Smokey hit William.<sup>543</sup> Dale responded with approval: "This is going to do nothing but help us man."<sup>544</sup> Immediately after this revelation, the investigators turned their focus to Smokey.<sup>545</sup>

On October 17, Gaiters interviewed Puppet's brother, Luis, who provided a new and surprising factual account of the shooting that contradicted what he had said in past interviews.<sup>546</sup> Luis told Gaiters he knew "the suspect" as "Smokey," and Luis said he was with William at Flag

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<sup>538</sup> See Tr of Jael Espitia Interview 10/15/08 at 34-35; Tr. of Jael Pliego Interview, 10/11/08 at 16.

<sup>539</sup> Tr of Jael-Espitia Interview 10/11/08 at 14-15.

<sup>540</sup> Trial Transcript at 855.

<sup>541</sup> MPD at 154, supp. 53; Tr. of Puppet Interview 10/15-16/08 at 10-12.

<sup>542</sup> Tr. of Puppet Interview 10/15-16/08 at 12-13.

<sup>543</sup> *Id.* at 13.

<sup>544</sup> *Id.*

<sup>545</sup> Although it's not clear exactly why investigators abandoned other suspects and single-mindedly pursued Barrientos aka Smokey, it could have been based on Officer Tapp's email on October 15. The email said that Lookingelk identified Marcelo Hernandez, who she thought went by Sharky or Smokey, as the shooter. This was the first mention of a Smokey. MPD at 153, supp. 52.

<sup>546</sup> MPD at 64, supp 35.

Foods when Smokey attacked William.<sup>547</sup> Luis then turned to the events of October 11. Luis said that the man he knew as “Smokey” was seated in the backseat passenger side of the car that drove through the alley and that he saw Smokey point a gun at Jesse and begin shooting.<sup>548</sup>

Luis told Gaiters that Smokey was a member of the CV-155 clique, and that CV-155 and SSR, Puppet’s gang clique, did not get along. Luis said that Smokey seemed to be upset that his teenage girlfriend was hanging out with individuals who were known to be part of Southside Raza.<sup>549</sup> When Luis provided this information, he made no mention of Sharky being in the car with Smokey.<sup>550</sup>

The interview was not recorded, so it is impossible to know how this significant change in Luis’s account came about.<sup>551</sup> In two previous interviews, Luis had discussed Sharky, Venom, and Brownly as potential shooters. But on October 17, less than two days after Puppet had mentioned Smokey as a potential suspect, Luis, with certainty, named Smokey as the shooter.<sup>552</sup>

There is no evidence in the MPD reports that investigators presented Luis with a photo lineup on October 17. Instead, they waited until October 20 with no explanation for why there was a three-day delay between Luis naming Barrientos as the shooter and Luis identifying Barrientos in a photo lineup.<sup>553</sup> Nor do the MPD records explain why the lineup procedure was unrecorded and conducted in a police car.

The same day that Luis first mentioned Smokey as the shooter, Dale and Gaiters shifted their focus to William, bringing him into the station for additional questioning. They had heard from Puppet that Barrientos beat up William a few weeks earlier, providing William a motive to identify Barrientos.<sup>554</sup>

In his interview on October 17, William did not name Smokey as a suspect right away, and as the interview progressed, Dale and Gaiters used coercive tactics that are hallmarks of the Reid Technique. In this interview, William said he saw the shooter’s bald head and arched eyebrows, and he asserted several times that that was the only thing he saw regarding the shooter’s

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<sup>547</sup> Summary of Witness Meetings, *State v. Edgar Barrientos-Quintana*, May 1, 2009.

<sup>548</sup> MPD at 64, supp. 35. This was also the first time Luis said the shooter was sitting in the back seat. In earlier interviews, he said the shooter was in the front passenger seat and stuck his body halfway outside the front window.

<sup>549</sup> *Id.*

<sup>550</sup> *Id.* Investigators seemed to have abandoned Sharky as a suspect until shortly before the grand jury hearing.

<sup>551</sup> See footnote 77.

<sup>552</sup> MPD at 64, supp. 35.

<sup>553</sup> See Minneapolis Police Department, Sequential Line-up Photo Identification Report for Luis Pliego-Espitia, October 20, 2008.

<sup>554</sup> Tr. of Jael Espitia-Pliego Interview 10/15/08 at 12.

appearance.<sup>555</sup> Dale and Gaiters did not accept his answer, and they told William several times they thought he was holding back. William explained that when the car pulled up, he was looking down and messing with his pants.<sup>556</sup> He said he did not get a good look at the shooter. He said the shooter had sunglasses on, the back windows of the car were tinted, and that the other kids in the alley saw everybody in the car.<sup>557</sup>

Dale pressed William again, saying to him: “Remember we talked to a lot of people. Including those that were there. This is your time. Luis already stood up. Puppet stood up. Aron stood up.”<sup>558</sup> Dale told William that giving them more information would make him a man. Dale said Luis was only 14 and gave them information. They reminded William he was much older than Luis.<sup>559</sup> Dale falsely told William that Aron gave police information on the shooter. “What you thinking man? It is time?” he asked William.<sup>560</sup>

After a number of long, uncomfortable, pauses, Gaiters applied more aggressive pressure, leaning in closer. In a frustrated voice Gaiters said:

We talked to Puppet okay. We talked to Luis alright. They told us a story okay. You understand that? They told us a story. Don't make yourself look bad. Okay? You think Puppet's a liar?

....

You think Luis is a liar? Aron? We talked em'. Why do you think we're talking to you and giving you this opportunity again? Okay. We know a whole lot more now by talking to em'. That's all we know. It's time man. You ever seen Puppet cry before? You know Puppet right? You know Puppet. Oh he's a tough guy. You know that. He's a tough guy. If I told you I saw Puppet cry. Hmm? Sitting in that same seat and he came clean with it. Cause enough is enough. Enough is enough. **It's time to come clean with it. It's time to come clean.** Yeah. It's time. They did it. It's time. You want the truth out right? I know you do. So did Louise [sic]. So did Puppet. They wanted the truth out. It's time for the truth. Tell us the truth.<sup>561</sup>

William again denied he knew more. “I was just there,” he said. Dale and Gaiters continued to pressure William to name someone in the car, saying that William would have to live with what

<sup>555</sup> Tr. of Fajardo Interview 10/17/08 at 11–12.

<sup>556</sup> *Id.* at 4–5.

<sup>557</sup> *Id.* at 9, 12.

<sup>558</sup> *Id.* at 16.

<sup>559</sup> *Id.*

<sup>560</sup> *Id.*

<sup>561</sup> *Id.* at 17 (emphasis added).

happened the rest of his life and this was his opportunity to “set things right for Jesse.”<sup>562</sup> Once again, William said he saw nothing more—he said that when the car pulled up he was messing with his pants.<sup>563</sup> William said, “I don’t know what else to tell you, that’s the only thing.”<sup>564</sup> They showed William Jesse’s picture. They reminded William that he left Jesse in the alley to die. Speaking as if he was Jesse, Gaiters said, “Help me out, help me out, William.” They told William to speak to Jesse. William became emotionally shaken and began to cry.<sup>565</sup>

William started describing the events again. William said that he was thinking that the car was brown and not white.<sup>566</sup> He said the two back windows were tinted.<sup>567</sup> Dale replied, “Jesse’s thanking you right now.”

After several long pauses and silence between questions, Dale asked William, “[D]id you see who was inside [the car]?”<sup>568</sup>

WILLIAM: This guy name Smokey. That’s who I think he looks like.

DALE: [Inaudible] Why you think it’s him?

WILLIAM: Because of, because he’s bald and he is got like arched eyebrows. Like I’ve seen him like face to face.<sup>569</sup>

After describing how Smokey assaulted him at Flag Foods, investigators asked:

DALE: Was Smokey in the car that night? Saturday night? Was he in the car man?

WILLIAM: Yeah.

DALE: You just, where did you see him in the car?

WILLIAM: He was probably in the back.

DALE: He was in the back seat? Yeah?

WILLIAM: [No audible answer]

DALE: What was he doing?

WILLIAM: I think he was the one shooting.

DALE: Did you see his face man?

WILLIAM: It was like all, it was bald and those eyebrows. You can see he’s got the kinda bushy eyebrows.<sup>570</sup>

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<sup>562</sup> *Id.* at 18–19.

<sup>563</sup> *See id.* at 19 (“Like I said, I looked up too late, I as messing around with my thing.”).

<sup>564</sup> *Id.* at 19.

<sup>565</sup> Fajardo Interview 10/17/08, file 2 at 32:00-40:04.

<sup>566</sup> Tr. of Fajardo Interview 10/17/08 at 19–20.

<sup>567</sup> *Id.*, file 2 at 37:00.

<sup>568</sup> *Id.*, file 2 at 39:45.

<sup>569</sup> *Id.* at 20.

<sup>570</sup> *Id.* at 23.

Smokey ~~found~~ seen in front of flag foods  
 kinda looks like the shooter  
 William Fajardo  
 10/17/08

Figure 21 - William's Statements in Trial Exhibit 80

When shown a lineup, William picked Barrientos's photo. Dale asked William how he recognized Smokey, and William said from the Flag Foods store. Dale replied, "Okay is that it?" William said, "Yeah." Again, Dale asked, "Do you recognize him from any where else?"

William did not say he recognized him from the shooting.<sup>571</sup> In black pen William wrote on Barrientos's photo: "Smokey seen in front of Flag Foods."<sup>572</sup>

After a break, Dale and Gaiters returned and said they had a couple of issues. They reminded William that earlier he said Smokey was the shooter and they gave him a blue colored pen to write how he recognized Smokey. William asked, "What do I write?" and they replied, "you know we can't tell you what to write. That's not what we're here for. . . . You know how you just wrote about the store there. You can just write about the same deal with the car."<sup>573</sup> In blue colored pen, William wrote on the photo: "kinda looks like the shooter."<sup>574</sup> Dale and Gaiters told William they were "very proud" of him, that he "stood up," and that he became "a man."<sup>575</sup>

Portions of William's lengthy interrogation were filmed by *The First 48* and aired shortly before Barrientos's trial. They were misleading. They did not show investigators telling William that Puppet, Luis, and Aron had come forward and named a shooter. It did not show William saying that he thought the shooter was bald. The episode's storyline concealed the fact that William was less than certain in his identification and that Barrientos did not match William's description on the day of the shooting.<sup>576</sup> Barrientos was not bald.

It should be noted that in 2016, William recanted his statements in an interview with an attorney and a law student from the Minnesota Innocence Project.<sup>577</sup> William said that he did not

<sup>571</sup> *Id.*

<sup>572</sup> Trial Ex. 80; Tr. of Fajardo Interview 10/17/08 at 28–29. William also told investigators that he had never seen Smokey before the store—that was his first time he had seen Smokey.

<sup>573</sup> Tr. of Fajardo Interview 10/17/08 at 30.

<sup>574</sup> Trial Ex. 80.

<sup>575</sup> Tr. of Fajardo Interview 10/17/08 at 24, 27, 29, 32, 33

<sup>576</sup> *The First 48, Up in Flames Drive By* (aired April 16, 2009).

<sup>577</sup> Memorandum from Priya Sunkara on William Fajardo, Oct. 4, 2016. The CRU interviewed Priya Sunkara who is now an attorney in Chicago, Illinois. She confirmed that she wrote a memo in 2016 about William's recantation. MS. Sunkara stated that she remembers writing the memo the same day she and attorney Julie Jonas interviewed William

believe that Barrientos was the shooter despite what he said at trial. Consistent with his original statement, William said that he did not get a good look at the shooter because he had bent down to fix his pants, and then once the shooting started, he ran.<sup>578</sup> He said he only saw the shooter from the nose up. He confirmed that he got into a fight with Barrientos at Flag Foods a few weeks prior to the shooting. William said that he felt pressured by investigators to name Barrientos. He said he wanted to say Barrientos was innocent at trial, but he felt like he could not because he did not know what the police would do.<sup>579</sup>

Once William provided his somewhat tentative identification, Dale and Gaiters returned to Luis on October 20 with the same photo lineup they presented to William three days earlier. The investigators got Luis's identification of Barrientos nine days after the shooting, and based on his and Williams's eyewitness identifications, the state obtained a warrant for Barrientos's arrest.<sup>580</sup>

Dale and Gaiters used similar tactics to get Aron to identify Barrientos. After two earlier attempts to get Aron to name a shooter, they showed up at Aron's school and interviewed him in his principal's office. This was after substantial press coverage of Barrientos's arrest and numerous rumors being passed around the high school.

During his first interview, Aron had said he did not get a good look at the shooter, who he described as "shiny bald."<sup>581</sup> Aron's second interview ended after Dale and Gaiters threatened him, suggesting that he could do time for failing to name the shooter.<sup>582</sup> Dale and Gaiters accused him of holding back: "We know you know a little more than what you're telling us."<sup>583</sup> Gaiters asked Aron, a victim of the shooting, "maybe you had something to do with it, did you shoot Jesse?"<sup>584</sup> Gaiters threatened Aron with "consequences" if he did not name a suspect.<sup>585</sup> Dale and Gaiters used a Reid Technique tactic designed for reluctant witnesses or informants, just as they later did

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at the Hennepin County Government Center. CRU Interview with Priya Sunkara, Jan. 1, 2024. The CRU attempted to find William but discovered that he is deceased and died in a drug overdose in 2018.

<sup>578</sup> Memorandum from Priya Sunkara on William Fajardo, Oct. 4, 2016.

<sup>579</sup> *Id.*

<sup>580</sup> Note that these two witnesses claimed to know Barrientos and what he looked like before the shooting. Therefore, the witnesses were simply picking someone from a lineup that they already knew, lessening the probative value of the photo lineup.

<sup>581</sup> Tr. Bell-Bey Interview 10/11/08 at 16.

<sup>582</sup> Interview by Robert Dale and Christopher Gaiters of Aron Bell-Bey, Oct. 16, 2008, File 2 at 37:00 [hereinafter Bell-Bey Interview 10/16/08].

<sup>583</sup> Bell-Bey Interview 10/16/08, File 2 at 22:56.

<sup>584</sup> *Id.*, File 2 at 25:08.

<sup>585</sup> *Id.*, File 2 at 37:00.



with Sharky.<sup>586</sup> When investigators believe a witness is being uncooperative or protecting someone, they are instructed to treat the witness like a suspect and “accuse the subject of committing the crime (or of being implicated in it in some way).”<sup>587</sup> “A witness or other prospective informant, thus, faced with a false accusation, may be motivated to abandon his efforts to protect the offender or to maintain antisocial or antipolice attitudes.”<sup>588</sup>

These tactics led to an identification. In his principal’s office on November 6, Aron identified Barrientos from a photo lineup as the shooter. The interview was not recorded. Dale and Gaiters memorialized the identification after the fact with leading questions. They continued to use an older photo of Barrientos even though they had a more recent photo from Barrientos’s October 22 arrest. Barrientos had short hair in his arrest photo, but he was nearly bald in the photo Dale and Gaiters used in the lineup.<sup>589</sup>

***c. Investigators ignore the witnesses with the best view of the shooter after one of those witnesses failed to identify Barrientos.***

Puppet, who had sway over Luis, William, and Aron, was able to guide the investigators directly to Smokey and three eyewitness identifications.<sup>590</sup> But Puppet did not have influence over Jesse’s cousin and the friends attending his birthday party. Therefore, when Jesse’s cousin J.G. could not identify Barrientos from a photo lineup that included a photo of Barrientos, the investigators should have questioned whether Barrientos was the right suspect. Not only did J.G. fail to recognize Barrientos, he chose a filler who had similar features to Arber Meko, one of the people believed to have been in the car and responsible for hiding the gun after the shooting.<sup>591</sup> Arber Meko also appeared to have tweezed eyebrows like the ones described by Luis in one of his early interviews.<sup>592</sup> Sgt Fors had raised the prospect that Arber Meko may have been involved in

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<sup>586</sup> See *infra* Part IV.C.2–3.

<sup>587</sup> See Inbau et al., *Criminal Interrogation* at 408–410 (discussing when to apply interrogation techniques on a witness).

<sup>588</sup> *Id.*

<sup>589</sup> Trial Ex. 81; Booking Photo of Edgar Rene Barrientos-Quintana, Oct. 22, 2008.

<sup>590</sup> See Trial Transcript at 878 (describing Puppet as the leader of the SSR).

<sup>591</sup> Minneapolis Police Department, Sequential Line-up Photo Identification Report for J.G., Nov. 7, 2008; Trial Transcript at 448 (J.G. stating he chose a photo); Hilary Caligiuri, Barrientos Descriptions of Shooter, Nov. 12, 2008; see MPD at 166, supp. 50; Investigative Request from Hilary Caligiuri and Susan Crumb to Robert Dale and Christopher Gaiters, Nov. 24, 2008; Application for Search Warrant of Arber Meko's Residence and Supporting Affidavit, Nov. 26, 2008; Tr. of J.G. Q and A Interview 11/7/08 at 3; Photograph of Arber Meko, Prosecution File.

<sup>592</sup> Luis Pliego-Espitia Interview 10/15/08–10/16/08, file 5 at 12:53–13:25.

the shooting the day after Jesse's murder. Puppet, too, had mentioned Meko as a potential suspect in his interview on October 15–16.<sup>593</sup>

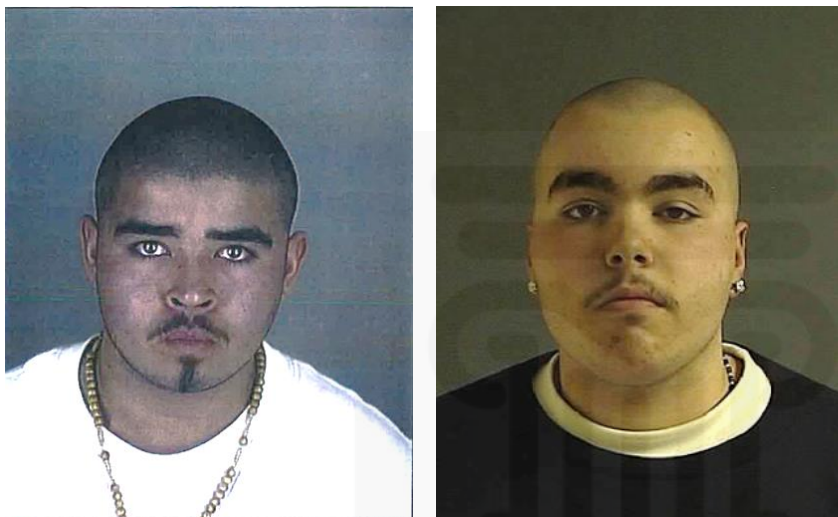


Figure 22 - Filler # 1 in J.G. Lineup and Photo of Arber Meko

Yet instead of shifting their focus from Barrientos to other suspects, such as Arber Meko or Sharky, the investigators avoided the prospect of another failed lineup that may have weakened their case against Barrientos. They showed none of the other witnesses from J.G.'s birthday party a photo

lineup even though some of the birthday party witnesses had an unimpeded view of the shooter and no motivation to lie to investigators.

Some of the birthday party witnesses had a better opportunity to encode and accurately recall their memories of the shooter based on the circumstances of the crime. These witnesses had a longer time to view the perpetrator. The car slowly passed them. These witnesses were paying attention as the car passed, and their attention went unimpeded by loud noises, gravel flying, chaotic fleeing, and other visual distractions because they saw the shooter before the shots rang out.<sup>594</sup> These witnesses' memories were not affected by "weapon focus," a phenomenon where a witness's focus is drawn away from a person's face and toward a threatening weapon and sound.<sup>595</sup> They were able to focus their attention on the car's occupants and perpetrator's face. Finally, these witnesses were not viewing the shooter under high-stress conditions. And as the research shows, those in high-stress conditions are more likely to commit identification errors because stress reduces the amount of information witnesses can process and store in their memory.<sup>596</sup>

<sup>593</sup> Tr. of Jael Pliego-Espitia Interview 10/15/08 at 15. Later at trial Sgt Gaiters testified that Trigger is Valentin Olivera's, aka Beaver's, nickname. Trial Transcript at 1229–30. But Jael's description of where Trigger lived, near the parking lots of Roosevelt High, corresponds with Meko's residence. Trial Ex. 38.

<sup>594</sup> Steblay Report at 10, 13, 16.

<sup>595</sup> See *id.* at 13 (describing "weapon focus effect").

<sup>596</sup> *Id.* at 16.

Puppet's crew—Luis, William, and Aron—witnessed the event under different circumstances than the birthday party witnesses, and that would have made it hard to encode and retain a reliable memory for the shooter's face. They stood in a driveway next to a garage that blocked their view of the car and its passengers as it approached them. When the car stopped beside them, a man stuck his arm out and started shooting. These boys ducked, took cover, ran, and hid. A bullet fragment was lodged in Aron's calf, which suggests he was turned to run when the bullets were being fired. William was hit in the face with debris or gravel. For these boys, the incident was brief and unexpected. The situation was frightening and life-threatening. And, as a result, their identifications would have been weaker.<sup>597</sup>

***d. The investigators ignore MPD protocols to obtain the eyewitness identifications that led to Barrientos's arrest.***

Not only did the investigators rely on unreliable witnesses, but they also failed to follow the MPD protocols to obtain their identifications. Dale and Gaiters ignored the MPD protocols in place at the time: double-blind administration, recording witness statements of certainty, effective use of fillers, giving cautionary instructions, and giving a sequential presentation of photos.<sup>598</sup>

*Double-blind Administration.* The double-blind procedure is meant to decrease the risk that an officer may intentionally or unintentionally influence the witness through cues and creating false confidence by making the witness feel good about their pick.<sup>599</sup> Sgt Dale conducted William's interview and lineup procedure on October 17, Luis's interview and lineup on October 20, and Aron's interview and lineup on November 6. None of these lineup procedures was double-blind. Dale presented the photo lineups to all three witnesses. Dale knew which photo in the lineup was Barrientos, the suspect. After William picked Barrientos out of the lineup, Dale gave positive reinforcement by commenting that William had "stood up" and that he was "very proud" of him.<sup>600</sup> This would have inflated William's confidence about the identification, which was extremely low.<sup>601</sup>

<sup>597</sup> *Id.* at 13, 16, 17.

<sup>598</sup> Klobuchar & Caligiuri, *Protecting the Innocent* at 8, 19–21.

<sup>599</sup> Steblay Report at 29.

<sup>600</sup> Tr. of Fajardo Interview 10/17/08 at 33.

<sup>601</sup> Klobuchar & Caligiuri, *Protecting the Innocent* at 11 ("Researchers have found that confirming feedback, whether from an investigator or another witness, can overinflate the confidence level of the eyewitness, while playing no role in ensuring the accuracy of the identification made."); [REDACTED]

*Witness statement of certainty.* Dale did not ask for William's statement of certainty as he went through each photo, and there is no record that he asked Luis or Aron for statements of certainty for each photo when presented with the lineup containing Barrientos.<sup>602</sup>

*Effective Use of Fillers.* Dale and Gaiters did not create a lineup with effective fillers. The fillers should all match the witnesses' description of the shooter. In this case, all fillers should have been bald. William and Luis were given the same lineup, which included Barrientos and two others with close shaved heads. The other three photos in the lineup were of men with short hair.<sup>603</sup> Aron was also provided with a lineup in which three of the fillers had short to medium-long hair. These lineups were the functional equivalent of a three-person lineup, which would have biased the witness by turning their attention to the three members with shaved heads.<sup>604</sup> This increased the odds that, through the process of elimination, William, Luis, and Aron would pick Barrientos. Three of the men did not fit their description of the shooter.<sup>605</sup>

*Cautionary Instructions.* Cautionary instructions are to remind the witness that the perpetrator may not be in the lineup and that the witness should not feel compelled to make an identification.<sup>606</sup> Dale did not provide William with such an instruction, even though the instruction was on the lineup form.<sup>607</sup> Neither did he provide Luis or Aron with this instruction for the lineups containing Barrientos's photograph.<sup>608</sup>

*Sequential Presentation of Photos.* Although Dale presented each photo in the six-person lineup sequentially, he did so in a way that completely undermined the purpose of sequential lineups, which rendered the sequential factor of these identifications meaningless. For instance, after William viewed each of the six photos without comment, Dale asked William if he wanted to see any of the photos again.<sup>609</sup> This kind of a nudge by the non-blind administrator implies that

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<sup>602</sup> Neither Luis nor Aron's lineup procedures were recorded. *See* Tr. of Fajardo Interview 10/17/08 at 28–29.

<sup>603</sup> Trial Ex. 80; Minneapolis Police Department, Sequential Line-up Photo Identification Report for Luis Pliego-Espitia, October 20, 2008.

<sup>604</sup> Steblay Report at 27 (“The other three lineup members could easily be ruled out.”).

<sup>605</sup> *Id.*; Trial Ex. 81.

<sup>606</sup> Steblay Report at 33.

<sup>607</sup> Trial Exs. 80, 81.

<sup>608</sup> Gaiters testified at trial that all standard cautionary instructions were given. Trial Transcript at 1078–79. However, William's recorded interview shows they were not all given. Tr. of Fajardo Interview 10/17/08 at 28. The Q and A interviews with Aron and Luis do not indicate cautionary instructions were provided. *See* Transcript of Q and A Interview by Robert Dale with Luis Pliego-Espitia, Oct. 20, 2008 at 5 [hereinafter Tr. of Luis Pliego-Espitia Q and A Interview 10/20/08]; Transcript of Q and A Interview by Robert Dale and Christopher Gaiters with Aron Bell-Bey, Nov. 6, 2008, at 6 [hereinafter Tr. of Bell-Bey Q and A Interview 11/6/08].

<sup>609</sup> Tr. of Fajardo Interview 10/17/08 at 28 (“You wanna see them again?”).

the suspect is in the lineup and negates the effects of a sequential lineup. As Dr. Steblay indicated in her report:

Best practices require that the witness's response to *each* photo be recorded, and that a second lap through the lineup be only allowed at the witness's request. A non-blind lineup administrator who encourages a second lap through the lineup after the witness does not make a selection during the first lap has egregiously influenced the witness.<sup>610</sup>

There is no record of what was said when Dale presented the photos to J.G., Luis, and Aron, and they were each shown the photos twice.<sup>611</sup>

*Overall Unreliability.* In addition to the lack of adherence to the protocols, William and Luis's identifications are unreliable because each of them was selecting from a lineup a man they already knew before the shooting occurred. As Steblay pointed out in her report, "the lineup task [for William and Luis] was to find this familiar person in the lineup, which they did. This identification evidence cannot speak clearly to their original memory of the crime event; rather, the lineups provided confirmation that he was the Smokey they knew."<sup>612</sup> Yet they each had to make two turns through the six photos before they selected Barrientos. Even then, William was uncertain. He said the man he selected "kinda looks like the shooter."<sup>613</sup>

Luis selected Barrientos, but the interview was not recorded, and it took place in the back seat of a car, several days after he originally named Smokey as the shooter.

***e. Investigators contaminate witnesses' memories on the shooter's hair length and continue to disregard MPD eyewitness identification protocols.***<sup>614</sup>

The specifics about Barrientos's hair were an essential component in the case because the conviction relied on eyewitness identifications and the eyewitnesses uniformly described the

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<sup>610</sup> Steblay Report at 30.

<sup>611</sup> See Tr. of Q and A Bell-Bey Interview 11/6/08 at 6; Tr. of J.G. Q and A Interview 11/7/08 at 3; Tr. of Luis Pliego-Espitia Q and A Interview 10/20/08 at 5.

<sup>612</sup> Steblay Report at 11.

<sup>613</sup> *Id.*; Trial Ex. 80.

<sup>614</sup> The problem of memory contamination has been studied for decades. See, e.g., Elizabeth F. Loftus, et al., *Semantic Integration of Verbal Information into a Visual Memory*, 4 *Journal of Experimental Psychology* 19, 29–30 (1978) (demonstrating that witnesses' visual memory of a car crash was altered when exposed to misleading information in questions). For example, social psychologist Elizabeth Loftus has demonstrated that subtle changes in the wording of a question affects witness memory and testimony. In one study Loftus had subjects watch a one-minute video of a

shooter having a bald or shaved head.<sup>615</sup> After Barrientos's arrest, Dale and Gaiters shifted away from describing the shooter as "bald" in their interview questions and adopted a different description of the shooter as "close shaven." Prosecutors also engaged in this shift: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]



**Figure 23 - Comparison of Barrientos's Arrest Photo and Lineup Photo**

Upon Barrientos's arrest on October 22, MPD records described his hair as "straight, short."<sup>617</sup> In interviews after the arrest, Dale and Gaiters began using descriptors that more closely aligned with what Barrientos looked like in the photo lineup they used for eyewitness

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five-car bumper-to-bumper collision. See Elizabeth Loftus & Guido Zanni, *Eyewitness Testimony: The Influence of the Wording of a Question*, 5 *Bulletin of the Psychonomic Society*, 86, 86–87 (1975). Some subjects were asked "did you see *the* broken headlight?", while others were asked "did you see *a* broken highlight?" *Id.* In some of the videos the car had a broken headlight present and in others it was not present. *Id.* When the indefinite article was used, participants answered that did not know with double or triple the frequency than when the definite article was used in the question. *Id.* at 88. In a larger study involving subjects viewing a picture of a car stopped at either a stop sign or yield sign, Loftus demonstrated that questions containing misinformation about the car being stopped at a stop sign or yield sign caused subjects to reconstruct a visual "memory" that was never actually experienced. Loftus, et al., *Semantic Integration of Verbal Information into a Visual Memory* at 31. Loftus also showed how witnesses exposed to misleading information from others regarding facial characteristics affected those witnesses' memory of a person's face. Elizabeth Loftus & Edith Greene, *Warning: Even Memory for Faces May be Contagious*, 4 *Law Hum Behavior* 323–334 (1980).

<sup>615</sup> See *supra* Table 1 - Descriptions of the Shooter's Hair in Interviews.

<sup>616</sup> [REDACTED].

<sup>617</sup> MPD at 3.

identifications. For example, on November 6, when Dale interviewed Aron for the third time, Dale asked leading questions that prompted Aron to change his original description of the shooter from “bald” or “shiny bald” to “close shaved bald”:

DALE: Do you remember what he looked like the shooter?  
 ARON: He was bald.  
 DALE: **Was he like all the way bald or was he like close shaven**  
 you know?  
 ARON: Yeah like a close shave bald.  
 DALE: **Close shave.**  
 ARON: Yeah.<sup>618</sup>

On November 7, Dale interviewed Jesse’s cousin J.G. The identification procedure was plagued by the same procedural problems as other photo lineup problems in the investigation. The procedure was not recorded. Originally, when shown a photo lineup, J.G. chose a filler rather than Barrientos, whose photo was in the lineup.<sup>619</sup> This was a highly exculpatory fact for Barrientos.<sup>620</sup> And J.G., unlike the other eyewitnesses, stood by his earlier “bald” description of the shooter. In response to Dale’s leading questioning, J.G. reasserted his original description of the shooter as bald:

DALE: Then did you get a look at the backseat passenger?  
 J.G.: Yes I saw a little bit.  
 DALE: You described him as a Mexican or Hispanic male?  
 J.G.: Yes.  
 DALE: **Bald or shaven head?**  
 J.G.: Yeah it was **more of a bald.**  
 DALE: More of a **bald.**  
 J.G.: **Yes.**<sup>621</sup>

But when Dale wrote his report summarizing J.G.’s November 7 interview, he changed what J.G. said in a seemingly minor but extremely meaningful way. Dale reported that *J.G.* was the one who described the shooter as having a shaved head:

[J.G.] described the rear passenger as a Hispanic male, **bald**, light-colored skin, goatee, and wearing a gray colored hooded sweatshirt.

<sup>618</sup> MPD at 119, supp. 45.

<sup>619</sup> Minneapolis Police Department, Sequential Line-up Photo Identification Report for J.G., Nov. 7, 2008.

<sup>620</sup> Steblay Report at 26. Steblay noted that empirical literature makes it clear that the identification of a filler has “directional diagnostic value indicating that the suspect in the lineup is not the culprit saying (in effect) that the filler looks more like the culprit than does the suspect.” Not surprisingly, she writes, this is most likely to occur when the suspect is not the culprit. Both complicated probability statistics and common-sense show that “filler identifications point in the direction of innocence.” *Id.*

<sup>621</sup> Tr. of J.G. Q and A Interview 11/7/08 at 2 (emphasis added).

[J.G.] stated that rear passenger was not wearing sunglasses or a bandana.

After viewing a photo lineup, [J.G.] was not able to identify anyone. [J.G.] stated that the individual in photograph #1 [a filler] had the same skin tone, facial hair features (goatee), and **shaved head** as the person in the rear seat of the suspect vehicle.<sup>622</sup>

The interview transcript shows that J.G. affirmed that the person in the filler photo had the same skin tone and facial hair, but J.G. *never* said that the shooter had a “shaved head.”<sup>623</sup>

Because witnesses’ memories deteriorate quickly, the first recalling of the event should be the most accurate. In this case, the witnesses’ initial descriptions of the shooter as having a bald head became a problem because Barrientos’s appearance did not align. Barrientos was not bald. Yet, by the time Barrientos’s trial began, the eyewitnesses’ testimony started to align with investigators leading questions that suggested the shooter had more of a shaven head, and that changed the evidence the jury heard.<sup>624</sup> At trial, the jury did not hear that all witnesses described the shooter as bald because the state argued that the witnesses gave various descriptions of “short hair.”<sup>625</sup> The prosecutor argued Barrientos had had “short hair the whole time.”<sup>626</sup> These “short hair” descriptions from the prosecutor were inconsistent with the evidence obtained by the police investigation. Not a single witness described a shooter with short hair. Instead, two different groups of boys who saw the shooter consistently and independently described the shooter as bald.<sup>627</sup>

*f. Investigators ignore alternative suspects who fit the description.*

Another problem with the state’s shifting description of the shooter’s hairstyle from bald to short hair is that it necessarily discounted from consideration alternative suspects who were, in fact, bald. Two of the earliest suspects—Sharky and ██████████—were described as bald or

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<sup>622</sup> MPD at 124–25, supp. 44 (emphasis added). One of the problems with the investigators’ Q and A statements is that they can make it difficult to see the subtle ways that the investigators contaminated witnesses’ memories. They also make it difficult to discover the flawed procedures that led to eyewitness identifications which shielded them from attacks by defense counsel.

<sup>623</sup> Tr. of J.G. Q and A Interview 11/7/08 at 2.

<sup>624</sup> See Loftus & Zanni, *Eyewitness Testimony: The Influence of the Wording of a Question* at 86–87; Loftus, et al., *Semantic Integration of Verbal Information into a Visual Memory* at 31; Loftus & Greene, *Warning: Even Memory for Faces May be Contagious* at 332–334.

<sup>625</sup> Trial Transcript Volume 15 at 51.

<sup>626</sup> *Id.*

<sup>627</sup> See Hilary Caligiuri, *Barrientos Descriptions of Shooter* (Nov. 12, 2008); Appendix A.



shaved.<sup>628</sup> When it became clear to investigators that Barrientos was not bald, they had the opportunity to determine whether either of the suspects mentioned a few days after the shooting might have been the shooter.

Investigators could have shown photo lineups of each of these two bald suspects to the birthday party witnesses to either rule them in or out. This would have been especially useful after J.G. had chosen a filler that looked like Arber Meko. But no one created a photo lineup with Sharky or Arber Meko's photo, and none of the eyewitnesses were given a chance to determine whether they saw either of these suspects in the white Intrepid.

**4. At trial, the eyewitness identifications appear much stronger than they were.**

At trial, the prosecution and Gaiters's representations likely left the jury with three inaccurate impressions: 1) that the shooter was not bald; 2) that J.G. selected Barrientos, or someone who looked very much like him, from a photo lineup; and 3) that the investigators followed MPD protocols when administering the photo lineups.

***a. At trial, the investigator denies that the eyewitnesses uniformly described the shooter as bald and testifies he gave proper instructions when administering photo lineups.***

At trial, Gaiters denied that the witnesses consistently described the shooter as having a bald or shaved head. Defense counsel attempted to cross-examine Gaiters on this question:

DEFENSE COUNSEL: Now, after speaking to witnesses, each one of those witnesses told you that they saw the shooter and the shooter was bald; is that correct?

GAITERS: There – they say bald, but there's a variation of what they called bald.

DEFENSE COUNSEL: Okay.

GAITERS: Different – different – some would bald [sic], some would say close-shaven, some would say a fade, which is kind of like fading from bald into hair.

DEFENSE COUNSEL: Okay. But pretty much the consistent theme from all these witnesses was that the shooter had very little to no hair; is that accurate?

<sup>628</sup> Tr. of Bell-Bey Interview 10/11/08 at 17–18; [REDACTED]

GAITERS: Short.  
DEFENSE COUNSEL: I'm sorry.  
GAITERS: Short hair.<sup>629</sup>

This testimony was inconsistent with the facts. None of the eyewitnesses described the shooter as having “short hair.”<sup>630</sup> The only mention of short hair in the entire record originates from either Dale and Gaiters or the prosecutors. Gaiters’s testimony left the jury with the incorrect impression that the witnesses’ descriptions were consistent with a shooter who had “short hair” and *not* consistent with the eyewitness statements actually given—that the shooter was bald.

Gaiters also testified that before administering a photo lineup to William Fajardo he gave the proper cautionary instruction that a suspect may or may not be in the lineup.<sup>631</sup> This testimony bolstered the credibility of the lineup as following protocols.<sup>632</sup> This testimony was wholly inconsistent with the factual record. No instruction was given to William that the shooter may or may not be in the lineup.<sup>633</sup> Additionally, Gaiters did not administer the lineup, Dale did. Gaiters was merely present.<sup>634</sup>

***b. At trial, the state offers no in-court shooter identification, rather the prosecutors finesse the weak eyewitness identifications, making them appear much stronger, without counter by the defense.***

During the state’s case-in-chief, prosecutors finessed weak eyewitness identifications by not asking any of the eyewitnesses to identify the shooter in the courtroom, and later presented their lineup statements through Gaiters’s testimony. When Aron testified, he described the shooter as a light-skinned Latino man around age 21 with “thick eyebrows.”<sup>635</sup> He said the shooter had a mustache and a beard.<sup>636</sup> He also said the shooter had “like, a shave head and bald-headed.”<sup>637</sup> The prosecutor asked Aron about his previous identification of the shooter:

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<sup>629</sup> Trial Transcript at 1176–1177.

<sup>630</sup> See Hilary Caligiuri, Barrientos Descriptions of Shooter (Nov. 12, 2008); Appendix A.

<sup>631</sup> Trial Transcript at 1069–70.

<sup>632</sup> See Steblay at 33 (explaining “Eyewitnesses should be told explicitly that the person in question might not be in the photo array” because eyewitness should not feel compelled to make an identification without the instruction it encourages a “best guess” approach which risks misidentification).

<sup>633</sup> Fajardo Interview 10/17/08, file 4 at 42:00

<sup>634</sup> *Id.* At trial, Gaiters testified the *he* provided Fajardo with the typical precautions and that *he* presented the photo lineup to Fajardo. Trial Transcript at 1069–71.

<sup>635</sup> Trial Transcript at 665–66

<sup>636</sup> *Id.* at 666.

<sup>637</sup> *Id.* at 665

PROSECUTOR: Now, Mr. [Aron] Bell-Bey, did you have the opportunity to view a group of photos shown to you by the Minneapolis Police Department?

ARON: Yep.

PROSECUTOR: And did you sign that?

ARON: Yeah.<sup>638</sup>

With this limited exchange, the prosecutor moved on and waited to introduce the photo lineups through Gaiters, who testified after Aron.

When William testified, the prosecutor did not ask him to identify the shooter or the person he knew as “Smokey” in the courtroom.<sup>639</sup> The prosecutor asked William, “[D]id you get a look at the person who fired the shots.” He said, “No.”<sup>640</sup> William said he got a “partial look” and saw only half of the shooter’s face from the nose up.<sup>641</sup> He admitted he did not immediately recognize the shooter but only placed him later.<sup>642</sup> When asked by the prosecutor how he came to recognize the shooter, William said he tried to think back on what he saw at the shooting, and he compared that to the photos the police gave him.<sup>643</sup> William also recalled the altercation he had with a man named “Smokey” at Flag Foods sometime before the shooting.<sup>644</sup>

William testified that when he was shown a photo lineup, he was not able to make a 100 percent certain identification of the shooter in the lineup.<sup>645</sup> Instead, he “pick[ed] out somebody that [he] believe[d] was the shooter” and the person’s name was Smokey.<sup>646</sup>

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

<sup>638</sup> *Id.* at 673.

<sup>639</sup> *See id.* at 577–78.

<sup>640</sup> *Id.* at 568.

<sup>641</sup> *Id.* at 568–69.

<sup>642</sup> *Id.* at 569–70.

<sup>643</sup> *Id.* at 569. Steblay warns that is an indication of an unreliable identification. Steblay Report at 23. (“This is not facial recognition; this is a speculation, a conclusion about who might have been the shooter, given the police suspect.”).

<sup>644</sup> Trial Transcript at 570–576.

<sup>645</sup> *Id.* at 577.

<sup>646</sup> *Id.*



of a filler as being consistent with Barrientos's guilt. The state did this through leading questions that may have left a false impression that J.G. chose someone from the lineup who looked like the shooter and obscured the fact that Barrientos himself was in the lineup, and yet J.G. did not select him.

When the prosecutor asked J.G. to say what he noticed about the shooter's hair, he testified that the shooter "didn't have a lot of hair and he had a goatee."<sup>650</sup> This was the first time J.G. described the shooter's hairstyle as anything but bald.<sup>651</sup> The prosecutor continued questioning J.G. on the photo lineup:

PROSECUTOR: [A]fter Jesse Mickelson was killed, were you shown a line-up?

J.G.: Yes.

PROSECUTOR: Where did you do that line-up?

J.G.: At my house.

PROSECUTOR: Okay. Do you remember how many pictures were in that line-up?

J.G.: I don't remember how many there was, **but I remember which number I chosen [sic].**

PROSECUTOR: Does six sound right? If it – do you think it might have been six pictures that you saw?

J.G.: Yeah, I think so.<sup>652</sup>

During the exchange, when J.G. gave a nonresponsive answer to the prosecutor's question indicating that he *chose* a photo in the lineup, the prosecutor moved on with another series of leading questions. First, the prosecutor described the photos in the lineup that J.G. viewed, asking him to agree with her description that all the men were bald or had real short hair. Then she asked if the photos had similarities.

PROSECUTOR: Okay. And were all the people in those six or seven pictures, **were they all real short hair or bald, goatee, light complected people that matched the description that you had given?**

J.G.: Yes.

PROSECUTOR: What were those similarities?

J.G.: **Had really short hair and he had a goatee,** and the way it looked, like it was the same skin tone, and that's it.

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<sup>650</sup> Trial Transcript at 440.

<sup>651</sup> See MPD at 21, supp. 11; Tr. of J.G. Q and A Interview 11/7/08 at 2.

<sup>652</sup> Trial Transcript at 447–48 (emphasis added).

PROSECUTOR: Okay. Were you able to tell for certain if one of those pictured was a picture of the shooter?

J.G.: Not for certain.<sup>653</sup>

The jury never heard that J.G. went through the lineup twice, passed on Barrientos's photo twice, and "chose" a filler. In fact, the jury never heard that Barrientos's photo was in the lineup.<sup>654</sup> In addition, through the prosecutor's leading questions, the jury may have been left with the misimpression that J.G. chose photo number one because the person in that photo had "really short hair" just like the shooter.<sup>655</sup>

This exchange was extremely misleading. J.G. chose a filler as looking like the shooter. He did not choose Barrientos's photo. And J.G. had *never* previously used the phrase "short hair" to describe the shooter's appearance.

Apparently, even the prosecutor who litigated the appeal in the case was confused by the trial prosecutor's representations, and the inaccuracies about J.G.'s lineup leaked into the appellate record. The state's brief to the Minnesota Supreme Court claimed that J.G. "picked out Appellant's picture from a photo line-up as being similar to the Appellant."<sup>656</sup> This non-sensical statement may have left the Court with the impression that J.G. either picked Barrientos from the lineup as the shooter or picked Barrientos as looking similar to the shooter. Neither was true. J.G. did not even comment on Barrientos's photo. He chose a filler.

***d. At trial, the prosecutor mischaracterizes the eyewitness descriptions of the shooter.***

The prosecutors told the jury that the shooter had "short hair."<sup>657</sup> Specifically, the state's closing argument characterized the shooter's hair as "short," matching the picture of Barrientos's hair on the day of his arrest:

Ladies and gentlemen, the defense would like you to hear and remember maybe just one word from this trial, and that was bald. We certainly heard the word bald plenty. But as the Judge has told you, and as you know, the evidence in this case is not what the attorneys say, not me, not any one of us. The evidence is what we

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<sup>653</sup> *Id.* at 448–49.

<sup>654</sup> *See id.*

<sup>655</sup> *Id.*

<sup>656</sup> Respondent's Brief at 8, *State v. Barrientos-Quintana*, 787 N.W.2d 603 (Minn. 2010) (No. A09-1613).

<sup>657</sup> Trial Transcript Volume 15 at 51.

hear from the witness stand. **And from the witness stand, we've heard a lot of different descriptions. We've heard didn't have a lot of hair, shaved head, short hair.** We've heard all those words from the witness stand, where we get our actual testimony. You heard in the defense opening that in order to have committed this crime, Edgar Barrientos would have had to left Cub Foods, quickly shaved his head, and then gone to the scene of the crime to do the shooting. That's not at all what the State is arguing. That's clearly not what happened. Nobody suggests that, not Sharky, Marcelo Hernandez. Nobody suggests that. **The defendant had short hair when he was at Cub Foods. He had short hair at the time of the shooting.** He had short hair when he was again captured on video 10:00 or 10:30 at night at the baptism party. Nobody is going out and cutting hair. **He had short hair the whole time.**<sup>658</sup>

Evidence collected throughout the investigation, however, indicated that the shooter was bald. There were no mentions of "short hair" or "fade" in the hundreds of pages of written police reports.<sup>659</sup> Luis, Puppet's brother, said the night of the shooting the shooter was "bald."<sup>660</sup> William also said bald, and he thought Barrientos looked like the shooter because he was "bald."<sup>661</sup> Aron was also clear the day of the shooting when he pushed back in his interview, describing the shooter as "shiny bald."<sup>662</sup> J.G., A.L., and E.P.-N. said "bald,"<sup>663</sup> J.B., another birthday party witness, described the shooter as having a "shaved head."<sup>664</sup>

Deviations in the police reports from the witnesses' descriptions of a bald shooter occurred through contamination. For example, after Barrientos's arrest, Aron said that the shooter was "bald." Dale and Gaiters, asked, "Was he like all the way bald or was he like close shaven you know?"<sup>665</sup> Only then did Aron adopt "close shave bald."<sup>666</sup> No evidence in the record supports Gaiters's testimony on cross-examination that the eyewitnesses described a shooter with "short hair."

Despite their characterization that the shooter had short hair at trial, the prosecutors' work product also shows that witnesses described the shooter as bald, and not with "short hair," prior to

<sup>658</sup> *Id.* at 50–51 (emphasis added).

<sup>659</sup> See Minneapolis Police Department, Reports for Case # MP 2008-315289 (Printed Nov. 1, 2022).

<sup>660</sup> MPD at 139, supp. 54.

<sup>661</sup> MPD at 140, supp. 54; Tr. of Fajardo Interview 10/17/08 at 11.

<sup>662</sup> Tr. of Bell-Bey Interview 10/11/08 at 16.

<sup>663</sup> MPD at 21, supp. 11; MPD at 26–27, supp. 14.

<sup>664</sup> MPD at 27, supp. 16; MPD at 112, supp. 46. The state never showed J.B., A.L., or E.P.-N. a photo lineup.

<sup>665</sup> Tr. of Bell-Bey Q and A Interview 11/6/08, at 4.

<sup>666</sup> *Id.*

trial.<sup>667</sup> The prosecution made a table of the witnesses' descriptions of the shooter.<sup>668</sup> The table showed that witnesses consistently said the shooter was bald. Only one witness said the shooter had a shaved head.<sup>669</sup> Yet, the state elicited testimony from one of its witnesses—via leading question on direct examination—that recharacterized the description from bald to short hair. Specifically, the prosecutor asked J.G. at trial whether he agreed that the shooter had “real short hair or bald.” But J.G. had never described the shooter as having “real short hair” in any of his pretrial statements.<sup>670</sup> The state also failed to correct Gaiters when he testified during his cross-examination the witnesses said the shooter had “short hair.”<sup>671</sup>

Prosecutors have a heightened duty of candor, and should not make a statement of fact or law to a court, or offer evidence that the prosecutor does not reasonably believe to be true.<sup>672</sup> If a prosecutor learns that material evidence previously presented is inaccurate, they must correct any misstatements and prevent prejudice caused by the false evidence.<sup>673</sup> Furthermore, the United States Supreme Court has long recognized that prosecutors are prohibited from eliciting false or misleading testimony to obtain a conviction.<sup>674</sup> The Court held that a due process violation results when a prosecutor presents misleading testimony that gives a jury a false impression regarding a material fact or a fact that relates to the credibility of a witness.<sup>675</sup> A prosecutor need not have personal knowledge that testimony is false or misleading, or have malintent, for a defendant's due process rights to be violated.<sup>676</sup>

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<sup>667</sup> Hilary Caligiuri, *Barrientos Descriptions of Shooter*, Nov. 12, 2008; Investigative Request from Hilary Caligiuri and Susan Crumb to Robert Dale and Christopher Gaiters, Nov. 24, 2008; Hilary Caligiuri, *Outline for Trial Witnesses*, Feb. 9, 2009.

<sup>668</sup> See Hilary Caligiuri, *Barrientos Descriptions of Shooter* Nov. 12, 2008; Appendix A.

<sup>669</sup> *Id.*

<sup>670</sup> Trial Transcript at 448. Had he provided the state with a description other than “bald,” his changed statement should have been disclosed to the defense. Non-disclosure of a material fact would violate Barrientos's right to due process. *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

<sup>671</sup> See Trial Transcript at 1176–1177

<sup>672</sup> American Bar Association, *Criminal Justice Standards - Prosecution Function*, Standard 3-1.4(b) (4th Ed. 2017); see National District Attorney's Association, *National Prosecution Standards*, Standard 7-1.1, -1.3 (24th ed. 2023) (stating that during trial a prosecutor must only offer evidence “that is believed to be truthful and accurate”).

<sup>673</sup> *Id.* at 7-1.1, -1.3.

<sup>674</sup> *Mooney v. Holohan*, 294 U.S. 103, 112 (1935).

<sup>675</sup> *Alcorta v. State of Tex.*, 355 U.S. 28, 31. (1957); *Napue v. People of State of Ill.*, 360 U.S. 264, 269 (1959).

<sup>676</sup> *Id.*; see *Mesarosh v. United States*, 352 U.S. 1, 10 (1956) (reversing a conviction under the court's supervisory powers when a prosecutor's solicitation of testimony was later learned to be false and unintentional); see also *Giglio v. United States*, 405 U.S. 150, 153 (1972) (uncorrected false evidence may require a new trial even when it was not intentionally solicited).



In short, the state presented the eyewitness descriptions of the shooter in a manner inconsistent with the evidence and failed to correct the record. Without these representations, there is a reasonable probability the jury would have acquitted Barrientos.

**5. Defense counsel<sup>677</sup> fails to adequately challenge the state’s eyewitness evidence.**

When the state or its witnesses present inaccurate or misleading information to the jury, competent defense counsel subjects the state’s case to adversarial testing through effective cross-examination, impeachment of witnesses, and the presentation of exculpatory evidence. In theory, a jury should be able to sift through the conflicting accounts and come to the truth. In this case, defense counsel failed to test the state’s case, especially regarding the eyewitness identification evidence.

***a. Defense counsel fails to investigate and develop a defense to the demonstrably weak eyewitness identifications.***

Defense counsel failed to sufficiently investigate and pursue a meaningful challenge to the eyewitness identifications, which were central to the state’s case.<sup>678</sup> Defense counsel filed a one-sentence notice of motion stating that it would seek to suppress witness statements identifying Barrientos as the shooter.<sup>679</sup> Counsel boldly asserted that the identifications were based upon “suggestive identification procedures” or “coercive tactics engaged in by the State,”<sup>680</sup> but later presented no factual support or argument.<sup>681</sup> When the court heard the motion, the record is clear: the attorneys had not investigated the law or facts demonstrating the problems with the witnesses’

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<sup>677</sup> Barrientos retained private defense attorneys Kristi McNeilly, Benjamin Myers, Bridget Landry, and Geoffrey Colosi to defend him at trial. Attorney McNeilly was the first attorney to represent Barrientos in this case and she withdrew as counsel before the start of trial. Attorney Bridget Landry joined the defense team for trial. Attorney Myers acted as lead counsel at trial. Attorney Landry passed the Minnesota Bar in April 2009, one month before the start of trial. She gave the closing statement. While different attorneys had different roles, and shared roles, during the pre-trial proceedings and trial, the CRU collectively refers to them all as “defense counsel” in this report.

<sup>678</sup> The American Bar Association Standard on the Defense Function makes clear that a defense attorney has a basic duty to investigate the relevant issues in their client’s case. American Bar Association, Criminal Justice Standards for the Defense Function, Standard 4-4.1(c) (4th ed. 2017).

<sup>679</sup> Def’s First Notice of Demand for Omnibus Hearing, *State v. Barrientos-Quintana*, Ct. File No. 27-CR-08-53942 (Feb. 12, 2009); see ABA, *Defense Function*, Standard 4-4.6(a) (explaining that a defense attorney must be adequately prepared in advance for court proceedings).

<sup>680</sup> Def’s First Notice of Demand for Omnibus Hearing, *State v. Barrientos-Quintana*, Ct. File No. 27-CR-08-53942 (Feb. 12, 2009).

<sup>681</sup> *Id.*

identifications. For example, defense counsel admitted that she had not watched videos or listened to audio of the eyewitness interviews.<sup>682</sup> Specifically, defense counsel informed the court that she had not watched the video of William’s interview. Instead, she simply mentioned that the interview was suggestive and argued for its suppression “*if that video actually shows that the identification is suggestive.*”<sup>683</sup> Defense counsel also promised to challenge all eyewitness identifications as coercive and suggestive *once they had received* all the witness interview videos.<sup>684</sup> But after receiving the videos and audio, counsel failed to follow up with any oral or written argument for suppression.<sup>685</sup>

Defense counsel’s performance was also deficient because counsel did not consult with or call an expert in eyewitness identification to testify even though experts were “available to testify and would have done so,” and the witness’s testimony would have been favorable to the defense.<sup>686</sup> Dr. Nancy Steblay could have testified that the lineup procedures, which were designed to prevent mistaken identifications, were not followed in this case.<sup>687</sup> In 2006, Steblay, along with one of the prosecutors in this case and then County Attorney Amy Klobuchar<sup>688</sup> wrote a law review article stressing the importance of five lineup procedures: the effective use of fillers, cautionary instructions, documentation of confidence statements, double-blind administration, and sequential presentation.<sup>689</sup> Many of the studies and sources Steblay cited in her 2021 report were available in 2009.<sup>690</sup> In addition, Steblay could have testified that the witnesses in Puppet’s driveway likely could not have accurately encoded the shooter’s face in their memory because of poor lighting and

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<sup>682</sup> Trial Transcript at 105–107.

<sup>683</sup> *Id.* (emphasis added).

<sup>684</sup> *Id.* at 109–110 (emphasis added).

<sup>685</sup> Order, *State v. Barrientos-Quintana*, 27-CR-08-53942 (Minn. Dist. Ct. Feb. 24, 2009).

<sup>686</sup> See *Day v. Quarterman*, 566 F.3d 527, 538 (5th Cir. 2009) (explaining that to prevail on an ineffective assistance claim based on counsel's failure to call an expert witness, the petitioner must name the witness, demonstrate that the witness was available to testify and would have done so, set out the content of the witness's proposed testimony, and show that the testimony would have been favorable to a particular defense); see ABA, *Defense Function*, Standards 4-4.1(d), 4-3.7(g) (Whenever defense counsel “is confronted with specialized factual or legal issues with which counsel is unfamiliar, counsel should, in addition to researching and learning about the issue personally, consider engaging or consulting with an expert in the specialized area.).

<sup>687</sup> Steblay Report at 12.

<sup>688</sup> Although United States Senator Amy Klobuchar was the Hennepin County Attorney at the time the eyewitness identification policies were adopted, she was not the County Attorney when this case was prosecuted. Senator Klobuchar was sworn in as a United States Senator in January 2007. See *Senator Amy Klobuchar*, Congress.gov, <https://www.congress.gov/member/amy-klobuchar/K000367> (last visited May 8, 2024).

<sup>689</sup> Klobuchar, et al., *Improving Eyewitness Identifications* at 393.

<sup>690</sup> Steblay Report at 53–57.

because a shooter pulled a gun on them.<sup>691</sup> Steblay would have testified that the identifications were significantly delayed,<sup>692</sup> and that William’s memory of Barrientos from a prior encounter likely confounded and confused his memory of the crime event.<sup>693</sup>

Steblay’s central findings conflict with the trial court’s findings in the order denying defense counsel’s pro forma motion to suppress.<sup>694</sup> Had the court been presented with Steblay’s findings, or another expert with comparable knowledge and expertise, it most likely would have granted the motion to suppress. The prosecutor would have found it difficult to credibly argue that the eyewitness identification reforms she helped establish were meaningless and need not be followed.

<b>Table 2 – Comparison of Court’s Findings on Biggers Factors and Steblay’s Findings.</b>		
Legal Factor <sup>695</sup>	Court’s Finding <sup>696</sup>	Steblay’s Findings <sup>697</sup>
Opportunity of witness to view criminal	“[A]ll three witnesses, [Luis Pliego, William Fajardo and Aron Bell-Bey], had an opportunity to view the shooter at the time of the crime. All three were eyewitnesses to the shooting and in close proximity to the shooting.”	“The conditions of the crime event provided a poor foundation for the witnesses’ memory of the offender’s face” due to brief encounter, poor lighting, weapons focus and stress and fear. William Fajardo said he was looking down at his pants and Bell-Bey indicated he was focused on the weapon.
Witness’ degree of attention	“[T]he witnesses each described their attention to the scene, i.e. that their attention was drawn to the vehicle and the shooter and they each saw the shooter’s face to the extent it was uncovered.”	Limited for same reasons as above. “Often action draws more attention than do facial or physical features. If a crime takes place in a chaotic manner, or if there are multiple distractions for attention (e.g., culprit’s face, threatening objects, co-witnesses, or other surrounding visual ‘noise’), attention to a single visual aspect will be diminished.”
Accuracy of the witness’ prior description of the criminal	Unknown for [Luis Pliego and Aron Bell-Bey] because lineup procedure not recorded; William “accurately described Defendant’s lack of hair (‘bald’) at the time of the shooting and his distinctive eyebrows.”	“The witnesses’ initial descriptions of the offender did not match Mr. Barrientos-Quintana.” All consistently said shooter was bald/shaved. The lineup photograph was out-of-date and showed Barrientos with a shaved head. Barrientos had a full head of hair.
The level of certainty by the witness and the photo display	Luis Pliego and Aron Bell-Bey “exhibited much certainty in identifying Defendant’s photograph.” William was certain that the photograph was the person who he saw at Flag Foods.	Contrary to MPD policy, “No confidence statements are documented in this case. This is unfortunate, in that false confidence is likely to increase across time and triers-of-fact are unable to compare courtroom confidence with

<sup>691</sup> *Id.* at 13.

<sup>692</sup> *Id.* at 21.

<sup>693</sup> *Id.* at 22.

<sup>694</sup> Order, *State v. Barrientos-Quintana*, 27-CR-08-53942 (Minn. Dist. Ct. Feb. 24, 2009).

<sup>695</sup> From *Biggers*, 409 U.S. at 199–200; *Ostrem*, 535 N.W.2d at 921.

<sup>696</sup> Order, *State v. Barrientos-Quintana*, 27-CR-08-53942 (Minn. Dist. Ct. Feb. 24, 2009).

<sup>697</sup> Steblay Report at 12 and 16.

	“[A]fter the initial identification, [William] affirmatively described Defendant as the shooter in the car.”	confidence expressed at the time of the identification.” Poor documentation. Non-blind administration and poor use of fillers can inflate confidence.
The time delay between the crime and viewing of the photo array.	Witnesses’ identification occurring 6 days, 9 days, and 26 days after the crime were “near in time to the crime.”	Delay of 6 to 27 days was “lengthy” and “substantial.” “The greatest loss of memory is within the first 24 hours after an event. The drop in memory for details is precipitous within the first 9 hours, and then levels off across time.”
Conclusion	Under legal standard, procedures were not “impermissibly suggestive and <b>they did not cause a very substantial likelihood of irreparable misidentification.</b> ”	Scientifically supported principles are useful to understand how “limitations imposed on eyewitness memory by the circumstances of the crime event (e.g., brief view, stress, weapon-focus), the aftermath of the event (memory loss and memory interference), and poor identification procedures <b>may have contributed in this case to eyewitness identification error and false eyewitness confidence.</b>

The prosecutor noted in her law review article that the intended effect of a sequential lineup presentation is only realized if the other protocols, such as cautionary instructions and double-blind administrations, are also used.<sup>698</sup> Defense counsel missed a critical opportunity to use the prosecutor’s own work to reveal the significance of Dale and Gaiters’s failure to follow the eyewitness identification protocols that were necessary to prevent misidentifications and wrongful convictions.

***b. Defense counsel fails to effectively challenge the eyewitnesses’ and Sgt Gaiters’s testimony.***

Jesse’s cousin J.G. told police on multiple occasions that the shooter was bald.<sup>699</sup> J.G. said he got a good look into the backseat of the car and saw the shooter. Despite these consistent descriptions of “bald,” J.G. testified on direct examination that the shooter “didn’t have a lot of hair.”<sup>700</sup>

The defense utterly failed to expose this sudden shift at trial. Competent counsel would have led J.G. to agree that he wanted to give an accurate description of the shooter to help police

<sup>698</sup> Klobuchar & Caligiuri, *Protecting the Innocent* at 14. In other words, when a lineup administrator fails to follow the protocols, the sequential presentation has no usefulness. It does not curb the suggestiveness of the process.

<sup>699</sup> MPD at 21, supp. 11; Tr. of J.G. Q and A Interview 11/7/08 at 2.

<sup>700</sup> Trial Transcript at 440.

find the person who murdered his cousin, that he provided an accurate description near the time of the shooting, and that in each of his prior statements he described a bald shooter.

Defense counsel asked none of the leading questions that should have been asked and would have supported the defense theory of the case—that Barrientos could not have been the shooter because he was not bald. Instead, defense counsel violated the number one rule of effective cross-examination—never ask a non-leading question.<sup>701</sup> Then defense counsel gave the witness the opportunity to further the perception the jury was being left with—that the shooter had short hair:

DEFENSE COUNSEL: When you talked to the officers you stated - you gave a description of who you saw in the car; correct?

J.G.: Yes.

DEFENSE COUNSEL: And you stated, as to his head, that he had more of a bald head; correct?

J.G.: Yes.

DEFENSE COUNSEL: And you - you were pretty close to the vehicle?

J.G.: Yes.

DEFENSE COUNSEL: So when you stated that he was **more of a bald, was he - was he like a shiny bald or like really short like [defense counsel's] hair?**

J.G.: Yes, about like his.

DEFENSE COUNSEL: Like his haircut. Okay. All right. Thank you.<sup>702</sup>

Through this exchange, defense counsel elicited evidence to support the state's theory that the shooter was not bald, but rather that the shooter had short hair. The result of this unplanned, bungled cross-examination was that defense counsel gave the state the ability to argue to the jury facts that were not uncovered in the investigation, but instead came out on the witness stand during the trial. The state took advantage and argued that Barrientos had "short hair the whole time."<sup>703</sup> This cross-examination of a critical witness "was actually harmful to the defense."<sup>704</sup> The defense failed to establish the fact that J.G. was in an excellent position to view the shooter, two to three feet away on the passenger side of the white Intrepid. And defense counsel also failed to establish that J.G. consistently described the shooter on many occasions as bald, never as having short-hair.

<sup>701</sup> See Larry S. Pozner & Roger Dodd, *Cross-Examination: Science and Techniques* §§ 10.11–10.23 (3d ed. 2018).

<sup>702</sup> Trial Transcript at 450.

<sup>703</sup> Trial Transcript Volume 15 at 51.

<sup>704</sup> Bergman Report at 6.

Instead, defense counsel’s question reinforced the testimony on direct that the shooter had some hair, but not a lot.<sup>705</sup>

The most consequential of defense counsel’s failures occurred when counsel failed to establish on cross-examination that J.G. was presented a photo lineup that included Barrientos, yet J.G. did not pick Barrientos from that lineup as the shooter—instead, J.G. chose a filler from the lineup as resembling the shooter. As Dr. Steblay explained, “the identification of a filler [likely indicates] that the suspect in the lineup is not the culprit.” This says, in effect, “that the filler looks more like the culprit than does the suspect. And, not surprisingly, this is most likely to occur when the suspect is not the culprit.”<sup>706</sup>

Defense counsel completely failed to effectively educate the jury about the exculpatory nature of J.G.’s early descriptions of the shooter and his selection of someone other than Barrientos.

[REDACTED]

<sup>705</sup> *Id.*  
<sup>706</sup> Steblay Report at 26.  
<sup>707</sup> [REDACTED]



Defense counsel made similar errors with Aron Bell-Bey. When counsel established that Aron previously told investigators that the shooter's head was shiny bald, he again asked a non-leading question:

DEFENSE COUNSEL: Okay. Now, when you say, "a shiny bald head," was his head – was his hair like completely gone, like he had no hair at all?

ARON: No. It was like shaved. There was still a little bit of hair on his head.<sup>712</sup>

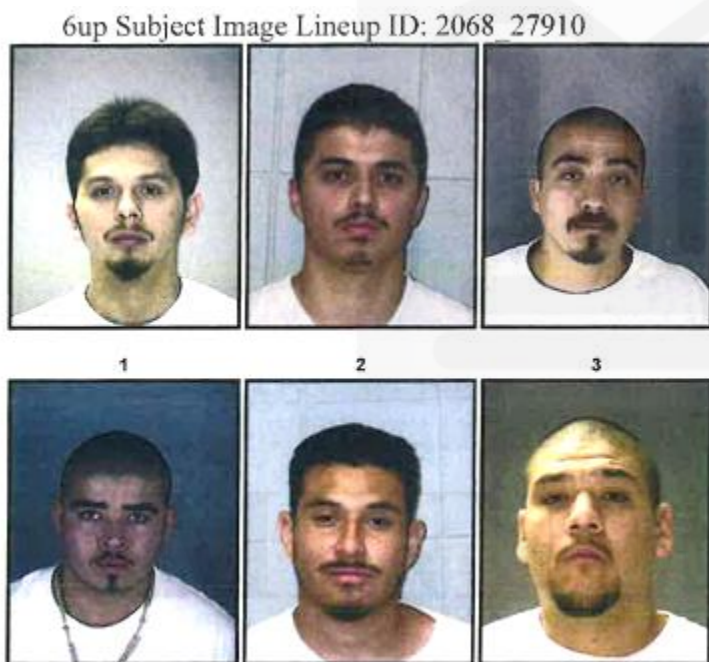


Figure 24 - Lineup Shown to Aron Bell-Bey in Trial Exhibit 81

The Minnesota Supreme Court described Aron's identification as corroborating Sharky and wrote that he "confidently" selected Barrientos from the lineup.<sup>713</sup> Aron's identification, however, was weak. The defense failed to properly challenge it with the available evidence. Had the defense consulted with Dr. Steblay or a similar expert, it could have established through effective cross-examination that Aron was not in a good position to encode a memory. [REDACTED]

[REDACTED].<sup>714</sup> Aron saw a gun, and his attention was likely drawn to the weapon, not the shooter's face.<sup>715</sup> [REDACTED]<sup>716</sup>

Competent defense counsel would have also established during cross the additional and numerous problems with Aron's identification. In two separate interviews Aron denied seeing the shooter. His account changed only after he was threatened by officers that he might be considered a suspect in the shooting if he did not come forward with more information. Aron identified

<sup>712</sup> Trial Transcript at 688.

<sup>713</sup> *State v. Barrientos-Quintana*, 787 N.W.2d 603, 613 (Minn. 2010).

<sup>714</sup> [REDACTED]

<sup>715</sup> Steblay Report at 13.

<sup>716</sup> [REDACTED].



Barrientos in an unrecorded interview that was 26 days after the crime, a timeframe Steblay found to be significantly delayed.<sup>717</sup> Steblay noted that the time delay between Luis and William’s lineups, and Aron’s, set up the possibility that information was shared.<sup>718</sup> The delay also allowed Aron opportunities to view Barrientos in the flood of media reports that followed Barrientos’s arrest. Competent defense counsel would have established that “eyewitness memory is vulnerable to very rapid decay” with greatest loss of memory within the first 24 hours after an event.<sup>719</sup> Counsel should have noted through cross-examination that Aron took two laps through the photographs and that the lineup administration was non-blind and not recorded. This significantly increased the chance of a false identification.<sup>720</sup>

Finally, Aron’s lineup statements were inadmissible hearsay and counsel should have objected when they were entered into evidence through Gaiters.<sup>721</sup> Counsel should have argued with the help of an expert that Aron’s identification was not reliable and therefore inadmissible under the hearsay rules.

*c. Defense counsel fails to impeach Sgt Gaiters.*

The defense also failed to impeach Gaiters after he testified that the witnesses consistently said the shooter had “short hair.” Defense counsel asked Gaiters, “Now, after speaking to [the witnesses from Puppet’s driveway], each one of those witnesses told you that they saw the shooter and the shooter was bald; is that correct?” Gaiters pushed back, “. . . but there’s a variation of what they called bald . . . some would say bald, some would say close-shaven, some would say a fade, which is kind of like fading from bald into hair.” Defense counsel asked, “Okay. But pretty much the consistent theme from all these witnesses was that the shooter had very little to no hair; is that accurate?” Gaiters responded, “Short hair.”<sup>722</sup> Defense immediately and inexplicably moved on without follow up. This left the jury with two incorrect impressions—that the eyewitnesses did not consistently describe a bald shooter and that eyewitnesses described a shooter with short hair. Defense counsel failed to use the obvious available impeachment evidence that showed every eyewitnesses but one described the shooter as bald or shiny bald, and the one witness who did not

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<sup>717</sup> Steblay Report at 21.

<sup>718</sup> *Id.* at 20.

<sup>719</sup> *Id.* at 21.

<sup>720</sup> *Id.* at 30.

<sup>721</sup> *See* Trial Transcript at 1079.

<sup>722</sup> Trial Transcript at 1177 (emphasis added),

describe the shooter as bald, said he had a shaved head.<sup>723</sup> Defense counsel’s failure allowed the state to argue at closing that the jury had already heard “a lot of different descriptions” of the shooter’s hair from the witness stand.

Defense counsel’s failure to impeach Gaiters was particularly unreasonable because the defense’s theory at trial was that the shooter was bald, and Barrientos could not have been the shooter because he was not bald when the shooting occurred. Defense counsel’s lack of investigation regarding the eyewitness identifications was not strategic. Once the defense recognized and formulated a strategy to present a mistaken identity theory at trial, it was objectively unreasonable for the defense to fail to consult an expert, fail to properly support and argue a pre-trial motion to suppress, fail to effectively cross-examine and impeach witnesses on issues surrounding the identification and lineup procedures, and fail to object to leading or misleading questions from the prosecutor. Had the defense used the tools available to challenge the eyewitness identifications, there is a reasonable probability that Barrientos would not have been convicted.

***d. The defense fails to present highly exculpatory eyewitness evidence.***

Defense counsel failed to effectively cross-examine Jesse’s cousin J.G. about the photo lineup he viewed. Defense counsel allowed a false impression created by the prosecution to linger—that J.G. chose a person from the lineup that looked similar to the shooter and that Barrientos’s photo was not in the lineup.<sup>724</sup> Steblay noted that J.G.’s attention to a filler was meaningful exculpatory evidence.<sup>725</sup> Barrientos’s photo was in the lineup and J.G. did not choose his photo. The idea that filler identification points toward innocence is common sense. Identification of a filler is a “diagnostic value” that indicates that the suspect in the lineup is *not* the culprit.<sup>726</sup> The photo lineup shown to J.G. was never entered into evidence by the defense. Instead, the defense accepted the state’s incomplete and inaccurate statement that J.G. was shown a photo lineup and made no identification.

Defense counsel’s failure to establish that J.G. chose a filler over Barrientos reverberated after the conviction. The Minnesota Supreme Court, in part because of a misrepresentation in the

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<sup>723</sup> Hilary Caligiuri, Barrientos Descriptions of Shooter, Nov. 12, 2008.

<sup>724</sup> Bergman Report at 6.

<sup>725</sup> Steblay Report at 26.

<sup>726</sup> *Id.*

state's briefing, left open the possibility that J.G. could have chosen Barrientos—which is the exact opposite of what occurred. The Supreme Court wrote: “The record does not show whether the person J.G. chose from the lineup was Barrientos-Quintana or someone else.”<sup>727</sup>

The defense also failed to call the other boys who were playing football at J.G.'s party. These witnesses could have fortified the defense that Barrientos did not fit the description of the shooter and discredited Sharky's testimony that there were four people in the white Intrepid. For example, birthday party witness A.L. told police that he “observed a bald Hispanic male with a mustache” shoot Jesse.<sup>728</sup> He said there was only one person in the backseat of the vehicle, which he saw passing in the alley.<sup>729</sup> Birthday party witness J.B. also observed the vehicle as it slowly passed by him in the alley and only saw one person in the back seat.<sup>730</sup> He described the shooter as having a “shaved head” to responding officers. J.B. told Sgt Dale in November 2008 that he looked inside the back seat of the vehicle as it slowly passed.<sup>731</sup> He described the shooter being “huddled up,” wearing a grey sweatshirt and having a shaved head.<sup>732</sup> J.B. said he was “pretty positive” there was only one person in the back seat.<sup>733</sup>

These witnesses' accounts were exculpatory because they conflicted with the core of Sharky's account that there were two people in the back seat. They were unbiased bystanders who had an excellent, unobstructed, and close-up view inside the vehicle. Their testimony would have also supported the defense's argument that the shooter was bald. Defense experts who reviewed defense counsel's performance for the CRU agreed that counsel had a duty to present this powerful evidence to the jury. As one expert noted, counsels' performances were deficient because a reasonable defense in this first-degree murder case would recognize that “exculpatory witnesses like [J.B.] and [A.L.], must be found, interviewed, and presented to the triers of fact. [Defense counsel] did none of that.”<sup>734</sup>

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<sup>727</sup> *State v. Barrientos-Quintana*, 787 N.W.2d 603, 607 (Minn. 2010).

<sup>728</sup> MPD at 26–27, supp. 14.

<sup>729</sup> *Id.*

<sup>730</sup> *Id.*

<sup>731</sup> J.B. Q and A Interview 11/6/2008 at 2–3.

<sup>732</sup> *Id.*

<sup>733</sup> *Id.*

<sup>734</sup> Bergman Report at 20; Affidavit of Jed Stone, April 20, 2022 (attached as Appendix G), at 9 [hereinafter Stone Affidavit].

## **6. The eyewitness evidence supports Barrientos's claim of innocence.**

The consistent eyewitness descriptions of the shooter provided strong evidence of Barrientos's innocence. The improper use of photo lineups, coercive interview tactics, and reliance on biased witnesses with an interest to name Barrientos, created a flawed identification. Due to the state's misrepresentations and the defense's deficient performance, the jury, the trial court, and the Supreme Court received inaccurate information on the witnesses' descriptions of the shooter, how the identifications were produced, and the reliability of those identifications. The decision-makers in this case lacked the information they needed to make a fully informed and just decision.

### **C. Investigators Feed Sharky, the Juvenile Accomplice Who Was Essential to the State's Case, Details of the Crime and Give Him a Significant Incentive to Lie.**

The state's reliance on Marcelo Hernandez, aka Sharky, as its central witness to implicate Barrientos as the shooter, was unsound and a main contributor to Barrientos's wrongful conviction. These facts demonstrate why Sharky's testimony was highly problematic and should not have been relied on to convict Barrientos:

- An eyewitness first named Sharky as the shooter, but investigators did not pursue this lead.
- Sharky said Puppet had shot at him a week before the shooting, which gave Sharky a motive to retaliate.
- Days after the shooting, Sharky was taken into custody due to a probation violation and was sent to Elmore Academy.
- Investigators applied coercive interviewing techniques when interviewing Sharky, a 16-year-old juvenile in custody.
- Sharky went un-Mirandized in the first two of three interviews even though prosecutors believed he was in the car that fired the shots that killed Jesse.
- After Barrientos's indictment, prosecutors asked investigators to "take another run" at Sharky to give him the option of being either a "witness or a defendant."
- In interviews, investigators told Sharky that Barrientos was already in jail for the crime and then presented Sharky with a choice of cooperating and saying he was in the car with the shooter, or risk being charged as a defendant.

- Sharky's statements to police were, at times, wildly inaccurate and inconsistent, which should have been a red flag to investigators and prosecutors.
- During the interviews, investigators provided key details to Sharky through leading questions and corrections.
- Key facts in the case conflicted with Sharky's account of Barrientos being the shooter.
- Investigators failed to record significant portions of the interviews when Sharky was given details about the crime.
- At trial, the state denied that Sharky was identified as the shooter.
- At trial, the state argued that Sharky's testimony corroborated the eyewitnesses, but Sharky's testimony only corroborated that Sharky himself was in the vehicle or indicated that he knew publicly available information about the shooting.
- The defense failed to sufficiently challenge Sharky and failed to effectively cross-examine the investigator who testified that Sharky was never identified as a shooter by witnesses.
- Because of defense counsel's ineffective assistance, the Minnesota Supreme Court was unaware of the serious flaws in Sharky's testimony and the significant incentive he was offered to testify.

### **1. Sharky emerges as the first suspect.**

Immediately after the shooting, and before they were questioned by police, the eyewitnesses from Puppet's crew talked to each other in Puppet's house about what happened and who they thought carried out the shooting. At the police station, investigators put them in separate rooms and interviewed them each individually. These interviews were recorded. In interviews that extended into the early morning hours of October 12, the lead investigators went from room to room, questioning each boy and moving on to another boy as they gathered information and probed for more details.



**Figure 25 - Sharky**

Sgt Dale interviewed Puppet. Dale asked what the boys who were standing in his driveway said after the shooting. Puppet said that "they were talking about, about some guy named Sharky

and stuff.” He continued: “And they’re like oh Sharky, blah, blah, blah. . . . They, they were thinking that it was a guy Sharky that came and shot that, that they didn’t know if it was him or not.”<sup>735</sup>

Dale continued:

DALE: We, we need you all’s help. I mean if you, you know, I think I’ve gotten past the point um, of you not being out there. But anything that Aron or William or your brother [Luis] said to each other or to you or to your mom or, or anything when they came into that house is gonna help us out.

PUPPET: Um.

DALE: Then we’ll find out who killed your friend.

PUPPET: Like I said that’s all they said. They thought it was Sharky, that’s it.

DALE: Like, I mean specifically like, I think it was Sharky or?

PUPPET: [Inaudible] like, like man I thought it was Sharky like, cause I don’t know why they didn’t say that name cause I don’t even know that name guy, guy named Sharky. And that’s it.

DALE: Did they say where the, where the shooter was? Like was the shooter in the front seat?

PUPPET: Hmm.

DALE: Or the backseat?

PUPPET: Like they never said. They said who the shooter was then I thought it was Sharky.<sup>736</sup>

Sgts Gaiters and Dietrich interviewed Puppet’s brother, Luis. Unprompted, Gaiters asked if Luis had ever heard of a guy named Sharky.<sup>737</sup> Luis confirmed that Sharky is from the South Side Parkeros (SSP), a clique of Sureños 13, and said he is bald with a small beard and mustache, and tall and skinny.<sup>738</sup> Luis said he has had “personal problems” with Sharky and that Sharky had been by his house before.<sup>739</sup> Luis said he told his friends it was Sharky who shot Jesse, but they did not think so.<sup>740</sup> Especially Aron. Luis stated that Aron said he thought he saw the shooter

<sup>735</sup> Tr. of Jael Pliego Interview 10/11/08 at 14.

<sup>736</sup> *Id.* at 16.

<sup>737</sup> Interview by Robert Dale and Christopher Gaiters with Luis Pliego-Espitia, Oct. 11, 2008, part 2 at 2:07:00 [hereinafter Luis Pliego-Espitia Interview 10/11/08]. This question came immediately after Gaiters and Dietrich had presented Luis with a 9-person lineup. The lineup did not include a photo of Sharky. It did contain a photo of Slappy, the person whose car was used in the shooting. Luis could not identify anyone in the lineup, and the state never provided the lineup to the defense in this case. And the state never showed a lineup that contained a photo of Sharky to any of the eyewitnesses in the case.

<sup>738</sup> *Id.* at 2:07:30. According to Sharky, the SSP operated near Powderhorn Park and had around 50 members in 2009, with some incarcerated and deported. Trial Transcript at 829.

<sup>739</sup> Luis Pliego-Espitia Interview 10/11/08, part 2 at 2:08:10.

<sup>740</sup> *Id.* at 2:08:30–2:09:30.

earlier in a green car.<sup>741</sup> Aron thought maybe it was Vatos Locos who did the shooting.<sup>742</sup> Luis said there had been some fighting between the SSPs and Puppet's SSR clique.<sup>743</sup> [REDACTED]

[REDACTED].<sup>744</sup> Sharky also admitted at trial that Puppet shot a firearm at Sharky near the Flag Foods grocery store.<sup>745</sup>

When investigators interviewed Aron that same evening, Aron claimed it was too dark and that he could not see the shooter. Out of the blue, Dale asked:

DALE: Alright man, I told ya I'd be back. Alright. I talked to everybody else out there. Everybody else that came down with us.

William, Puppet, Luis. Who's Sharky?

ARON: Sharky?

DALE: Yeah. Who's Sharky? How do you know Sharky?

ARON: I don't know, that's my friend.

DALE: Sharky's your friend?<sup>746</sup>

Dale asked Aron what the shooter's hair looked like. Aron said, "It was like shiny bald."<sup>747</sup> Dale asked Aron to describe Sharky.<sup>748</sup> Aron responded:

ARON: Then he got like, kinda like a bald head, but it's like a little bit of hair on his head.

DALE: Does he ever shave it all the way?

ARON: Like he shave it well enough that it looked bald.<sup>749</sup>

Dale asked whether Aron had talked to the other guys about who might have done this. Aron asked, do you mean "who we thought did it?" Aron told Dale that Luis said "it kinda looked like Sharky," but Aron said no, that Sharky did not have the same skin color, so it could not be him.<sup>750</sup> Aron said that William was not sure, and that William said "Man, I don't know. He had

<sup>741</sup> *Id.*

<sup>742</sup> *Id.*

<sup>743</sup> *Id.* at 2:09:45.

<sup>744</sup> [REDACTED]

<sup>745</sup> Trial Transcript at 855.

<sup>746</sup> Tr. of Bell-Bey Interview 10/11/08 at 15.

<sup>747</sup> *Id.* at 16.

<sup>748</sup> *Id.* at 18.

<sup>749</sup> *Id.*

<sup>750</sup> *Id.* at 19.

eyebrows like this and came down, kinda looked like Sharky.”<sup>751</sup> But Aron said Sharky would not shoot if he saw Aron because they’re friends. Aron said, “No, honestly, I don’t think it was [Sharky]. It didn’t look like him.”<sup>752</sup>

On October 15, 2008, Officer Tapp, then the school resource officer at Roosevelt High School, e-mailed Dale about a potential suspect from a student who heard a friend talk about the shooting. He wrote, “A student picked a Marcelo Giron Hernandez . . . out of a photo book as being in the car, possibly the shooter. His street name is either Smokey or Sharky.” Sharky’s home address and mother’s name was included.<sup>753</sup> As it turned out, Marcelo Hernandez was known as Sharky, and he became the state’s primary witness against Barrientos.

The student, Endonnis Lookingelk, later told investigators that she gave this information she heard from a friend to Officer Tapp, the school resource officer. She confirmed that she pointed out Sharky’s photo in the yearbook as being either the shooter or a person in the car, and that she knew him as either Sharky or Smokey.<sup>754</sup>

Luis was interviewed again on October 15. Luis said he was “kinda sure” the shooter was a Vatos Locos gang member, or it was Sharky.<sup>755</sup> Luis said he also talked to others who said that Sharky was at some house hanging with his brothers at about 7 or 8pm, so it could not be Sharky. Luis confirmed that he knew what Sharky looked like because Sharky goes to Roosevelt High. Luis remembered that Sharky walked by Luis’s house once. He had seen Sharky at the store too, so Luis had seen him at least 5 times before.

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<sup>751</sup> *Id.* Investigators also had an extensive exchange with William who confirmed that Sharky was bald, but William repeatedly told Dale that he didn’t know if Sharky was in the car. Tr. of William Fajardo Interview 10/11/08 at 8. William’s interview ended with this exchange:

DALE: Was it Sharky?

WILLIAM: I don’t know. It could have been him. I don’t know.

DALE: Was it, was it, was it him?

WILLIAM: I don’t even know.

DALE: I think you’re lying. Alright, come on, get you out of here.

Tr. of Fajardo Interview 10/11/08 at 18–19.

<sup>752</sup> Tr. of Bell-Bey Interview 10/11/08 at 20.

<sup>753</sup> MPD at 153, supp. 52.

<sup>754</sup> Transcript of Q and A Interview by Robert Dale and Christopher Gaiters with Endonnis Lookingelk, Feb. 26, 2009 at 1–2.

<sup>755</sup> MPD at 139, supp. 54; Luis Pliego-Espitia Interview 10/15/08–10/16/08, File 6 at 6:05.



**2. Investigators use coercive interview techniques on Sharky, a juvenile in custody, and feed him details of the crime through leading questions.**

Despite the many leads to Sharky, investigators did not talk to him until weeks after Barrientos had been arrested for the crime. Days after the shooting, Sharky was arrested on a probation violation, and he was sent to an out-of-home placement at Elmore Academy, unable to leave.<sup>756</sup>

**a. In Sharky's first interview, investigators leak Smokey as a suspect and suggest a motive.**

When Dale and Gaiters interviewed Sharky at Elmore Academy on November 14, Sharky denied he was in the car. But Sharky remembered that, on October 11, he heard other gang members Manny and Slappy brag that they were involved in the shooting. Dale and Gaiters had extensive discussions with Sharky before they started recording.<sup>757</sup> The investigators later filled in the details that were unrecorded when they wrote their report. The report noted that they informed Sharky that they wanted to speak with him about the homicide of Jesse Mickelson. They also noted that they were the first to mention Smokey, telling Sharky they had talked to and interviewed “a lot of individuals regarding the homicide, including talking to an individual named Smokey.” According to the investigators’ report, Sharky “hung his head and began to cry” and said “Smokey.”<sup>758</sup> There’s no corroboration of Sharky’s reaction to the mention of Smokey’s name because Dale and Gaiters failed to record this essential part of the interview.<sup>759</sup>

After the unrecorded conversation, Sharky repeated, this time with the recorder on, his account of October 11. He said that he was at Marcos’s house drinking and watching movies that night and that Slappy and Manny came over to spend the night there. He said that the next morning they all watched the news on TV, and there was a story about Jesse being shot. Slappy and Manny

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<sup>756</sup> Trial Transcript at 224, 825-26; *see* Tr. of Hernandez Q and A 3/3/09 at 2. Elmore Youth Academy was a juvenile placement in southern Minnesota near the border with Iowa.

<sup>757</sup> MPD at 243, supp. 82; The interview transcript begins, “Marcello I just want to make sure I got this right? Okay?” Interview by Robert Dale and Christopher Gaiters with Marcelo Hernandez, Nov. 14, 2008, part 1 at 00:27. [hereinafter Hernandez Interview 11/14/08]. This shows investigators already had a detailed unrecorded discussion with Sharky before the interview began. If Sharky was ever charged for this crime, the investigators’ tactic of not recording the initial part of the interview might have violated *State v. Scales*, which holds that all custodial interrogation including any questioning “shall be electronically recorded where feasible and must be recorded when questioning occurs at a place of detention.” 518 N.W.2d 587, 592 (Minn. 1994).

<sup>758</sup> MPD at 243, supp 82.

<sup>759</sup> *Id.*

were laughing and said something like they “got one.”<sup>760</sup> Sharky said that Slappy and Manny dropped the gun off at either Beaver’s or Sandwich’s (Arber Meko) house. Sharky said that Slappy was the driver and Manny was the shooter.<sup>761</sup> He said only two people were in the car.<sup>762</sup> Some facts in Sharky’s first account were corroborated. For example, Slappy’s car was tied to the shooting, and there was evidence to suggest that the gun was discarded near Sandwich’s house 30 seconds after the shooting.

Investigators, not Sharky, were the first to mention Smokey as being in the car. Investigators offered Smokey’s name immediately after speaking to Sharky about the possibility of negotiating incentives with prosecutors. Referring to the earlier unrecorded portion of the conversation, Sharky asked investigators, “So you thought I’m lying?” The following discussion occurred:

DALE: I didn’t say that. We’re not going to forget about you either, that I can guarantee ya’. I wanna be sure, Marcelo, did, umm, I’m going to write down your concerns so that when I talk to the county attorney on our way back to Minneapolis, I want to be exact on what your concerns are, ok? I mean, I already told you what I’m gonna tell her, about how you told us the truth.

SHARKY: You keep saying you want me to tell the truth but I first I don’t want to be.

DALE: Right, at first you weren’t telling us the truth.

SHARKY: Of course. I was thinking of the worst thing that can happen to me.

DALE: About your family, right?

SHARKY: Right.

Unprompted, Dale brought up Barrientos:

DALE: Was Smokey in the car too?

SHARKY: No, I mean they never talk about him.

DALE: They never talk about him?

SHARKY: I don’t think so, because he not can get along like together [sic].

DALE: Cuz they don’t get along together?

SHARKY: Kinda.

DALE: Like Slappy and Manny don’t get along with Smokey?

SHARKY: Yeah they don’t, honestly, they don’t do something like that.

DALE: They don’t go do something like that together?

<sup>760</sup> Hernandez Interview 11/14/08, part 1 at 01:40; Tr. of Hernandez Q and A Interview 11/14/08 at 1–2.

<sup>761</sup> Hernandez Interview 11/14/08, part 1 at 06:45.

<sup>762</sup> *Id.* at 5:45.

SHARKY: Yeah.  
DALE: Ok.<sup>763</sup>

Sharky made it clear that he “want[ed] to try to get out of this,” and “start a new life, go back to Mexico,” and try to help his family.<sup>764</sup> Dale said he would bring Sharky’s concerns about his family back to the county attorney, but that he could not give any promises.<sup>765</sup> Gaiters and Dale then recorded a formal “Q and A” statement with Sharky where he repeated his version of events with Slappy and Manny without mentioning Smokey.<sup>766</sup>

[REDACTED]

On November 24, 2008, after Sharky’s first interview at Elmore Academy, prosecutors sent a memo to Dale and Gaiters requesting that they “Take another run at Sharky and Sandwich, who both were almost certainly in that car. (Do they want to be a witness or a defendant?)”<sup>769</sup>

***b. Using coercive interviewing techniques in Sharky’s second interview, Dale and Gaiters explain how a suspect can become a witness.***

Dale and Gaiters returned to Elmore Academy to interview Sharky in late January 2009. This interview was more coercive, and Dale and Gaiters deployed Reid-style tactics.<sup>770</sup> Gaiters, in fact, received a certification of completion of the Reid Technique in 2003 and put his training to use. Dale and Gaiters used both minimization (lessening the moral or criminal consequences of participating) and maximization (overstating what investigators know, false evidence ploys, and threats to implicate) in their interview with Sharky. They educated Sharky on how he could avoid jail time by becoming a witness. During this process, they leaked several names and facts to Sharky, which he adopted as part of his statement.

<sup>763</sup> *Id.* at 12:40.

<sup>764</sup> *Id.* at 17:00.

<sup>765</sup> Marcelo Hernandez Interview 11/14/08, part 2 at 02:40.

<sup>766</sup> Tr. of Hernandez Q and A Interview 11/14/08 at 1–6.

<sup>767</sup> [REDACTED]

<sup>768</sup> [REDACTED].

<sup>769</sup> Investigative Request from Hilary Caligiuri and Susan Crumb to Robert Dale and Christopher Gaiters, Nov. 24, 2008.

<sup>770</sup> *See* Part III.C (describing the Reid Technique).

In the poorly recorded interview on January 30, Sharky made several attempts to convince investigators that he had nothing new to say.<sup>771</sup> About 50 minutes into the interview, investigators brought up Smokey and showed Sharky a photo of Barrientos in a six-photo lineup.<sup>772</sup> Investigators were the first to mention Itzel, and they asked Sharky, “So you know Itzel as Smokey’s girlfriend, right?”<sup>773</sup> Sharky confirmed he knew her.<sup>774</sup>

Dale and Gaiters leaked to Sharky that they believed more than two people were in the vehicle. In a barely audible portion of the interview, Sharky spoke about who he heard was in the car. Dale responded: “No listen, we know for a fact that there were more than two people in the car, we know that for a fact.”<sup>775</sup> Sharky pushed back saying there were only two people in the car, in the front. Dale pushed too, “How can you be so sure?”<sup>776</sup> Then, after Dale’s cue, Sharky changed his account and said that “for sure” Beaver was in the car with Manny and Slappy because Beaver owns guns.<sup>777</sup>

Next, Dale suggested that Sharky was in the car. Dale reminded Sharky that in his last interview, Sharky said he could possibly go to jail for what he knows. The prosecutors’ notes also reflect that Sharky was very concerned about going to jail.<sup>778</sup>

Carrying out the prosecutors’ suggestion, Dale provided Sharky a scenario—a way he could admit to being in the car and be treated as a witness rather than a defendant.<sup>779</sup> Dale said there was “a good chance if you were there . . . you know, the prosecution is either gonna treat you

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<sup>771</sup> Hernandez Interview 1/30/09, part 1, at 00:00–01:20. Parts of the interview where Sharky is clearly going over the events of Oct 11 are mostly indecipherable on the audio tape. He seems to be repeating his former version where Slappy and Manny were in the car and they returned to Marcos’s apartment.

<sup>772</sup> *Id.* at 50:00–54:00.

<sup>773</sup> *Id.* at 58:00, 59:37.

<sup>774</sup> *Id.* at 59:37.

<sup>775</sup> *Id.* at 1:07:10.

<sup>776</sup> *Id.*

<sup>777</sup> *Id.* at 1:08:00.

<sup>778</sup> Prosecutor Note on Conversation with Christopher Gaiters Regarding Hernandez Interview on Nov. 14, 2008.

<sup>779</sup> Two sources corroborate the fact that the prosecutors urged Sgts Dale and Gaiters to interview Sharky a second time and offer him the option of being a witness to the crime rather than a defendant. The first source is a memo directing Dale and Gaiters to tie up loose ends in the investigation. It was written by the prosecutors after the grand jury indicted Barrientos. The second source is the CRU’s interview with Sgt Dale on September 6, 2023. In response to a question about how he felt about having failed to prosecute anyone other than Barrientos for the murder, Dale responded that sometimes you have to turn a suspect into a witness. He said sometimes the prosecutor authorizes this, and sometimes investigators decide, on their own, to do it. He said he had no problem with the fact that sometimes police and prosecutors have to let guilty people get away with murder in order to convict someone of the crime. *See* Investigative Request from Hilary Caligiuri and Susan Crumb to Robert Dale and Christopher Gaiters, Nov. 24, 2008 at 1; CRU Interview Notes, Robert Dale, Sept. 6, 2023 at 4.

as a witness or a suspect.”<sup>780</sup> Dale continued, “If you’re being treated as a witness, you saw something and you tell people what you saw, you get it?”<sup>781</sup> Dale explained, “We have some other information that leads us to believe you were in the car.”<sup>782</sup>

Minimizing Sharky’s role in the crime, even if he *was* in the car, Dale explained, “Marcelo if you were in the car we can work with you to get through it, do you know what I am saying?”<sup>783</sup> Sharky again denied he was in the car and said he was telling the truth “100 percent.”<sup>784</sup> Dale made putting himself in the car more enticing to Sharky by further minimizing his responsibility, *if he admitted he was in the car*. Dale: “I mean we can understand if, let’s say you were in the car, let’s say you were, and you didn’t know it was about to happen you know just driving around smoking whatever. . . .”<sup>785</sup>

Dale and Gaiters then began to craft a narrative for Sharky, suggesting he was an unwitting passenger in the drive-by car:

GAITERS: Well maybe you were drunk you know probably went out rolling with those guys you know...driving around.

SHARKY: [unintelligible]...shot somebody...drunk, nowhere to go... [unintelligible].

GAITERS: Yeah cus sometimes you don’t know, sometimes people just you out there with your friends and they do something stupid and you’re just there you know what I mean.

SHARKY: You know...watch them...

DALE: Is that what happened man?

SHARKY: What happened?

DALE: Is that what happened?

SHARKY: No...

DALE: Cus that would make sense.

SHARKY: What you say?

GAITERS: That makes sense to you that makes...that’s understandable.

SHARKY: [unintelligible] . . . you know I try to...picture...myspace you will find a lot of pictures...Jesse Puppet shot...[unintelligible]

DALE: Marcelo if that’s what happened you were out there and you were rolling with them...like ‘god damn what just happened’ if you didn’t know it was about to happen then you didn’t know, ya know?

<sup>780</sup> Hernandez Interview 1/30/09, part 1 at 1:10:40.

<sup>781</sup> *Id.* at 1:10:50.

<sup>782</sup> *Id.* at 1:11:20.

<sup>783</sup> *Id.* at 1:12:18.

<sup>784</sup> *Id.*

<sup>785</sup> *Id.* at 1:14:13.

Like say you're with your friend and he like steals a candy bar or something and you didn't know it was gonna happen...<sup>786</sup>

....

**DALE: I mean I don't think you realize what we're trying to do here.**

SHARKY: Not really.

**DALE: No? We're trying to help you too that's what we're trying to do.**

SHARKY: What...

DALE: You know what I'm saying.

SHARKY: [Unintelligible]

**DALE: We're trying to help you get to the truth.**

SHARKY: I say the truth...things I don't know. I know that people say that I was in the car...you know.

**DALE: We think you were in the car.**<sup>787</sup>

Sharky continued to deny he was in the car. Dale continued to minimize Sharky's criminal and moral culpability, explaining that if Sharky just admitted he was in the car he would be treated differently in the courts:

You know people do a lot of stupid things sometimes or maybe they do one big stupid thing it doesn't mean they're stupid you know what I'm saying...one day doesn't mean I'm an idiot...you know. If a mistake happened or something stupid happened we can understand that you know that makes sense but if you go out there and you know there's a difference between people going out there and just being a hard ass, you know, cold blooded killer, just going around killing people not caring about human life and what not, you know, there's a difference between that kind of person and the person we think you are you know who might of just gotten caught up in something that they didn't see coming maybe you made a mistake, you know what I'm saying. Those are the people that are treated differently, you know what I'm saying...<sup>788</sup>

Sharky said, "I can't remember you know . . . I was drunk." Dale replied, "Well how about this, maybe you were in the car and you don't even remember. You were so drunk and high . . . ." <sup>789</sup>

<sup>786</sup> Hernandez Interview 1/30/09, part 2, at 04:00–08:30.

<sup>787</sup> *Id.* (emphasis added).

<sup>788</sup> *Id.* at 11:30.

<sup>789</sup> *Id.* at 12:40.

Dale mentioned Barrientos again and reminded Sharky that Barrientos was in jail. Sharky said they told him last interview that Smokey was in jail for the shooting.<sup>790</sup> Investigators told Sharky they believed Barrientos was the shooter and there was only one shooter. This gave Sharky a roadmap for what they wanted him to say.

DALE: Yeah. Why do you think [Barrientos] is still in jail?

SHARKY: I don't know, you told me last time he was in jail.

DALE: I mean you're telling us that Manny's the shooter, but Smokey is in jail for shooting him, there can't be two shooters, right? Only gotta be one.

SHARKY: Only one.

DALE: Yeah. Do you know what my point is?

SHARKY: Somebody is lying.

DALE: I mean somebody is lying.

SHARKY: I don't know if Smokey was there.<sup>791</sup>

Sharky jumped to the jealousy motive that the investigators had provided. He referred back to what the investigators said to him during his first interview: "You tell me last time that Smokey was already in jail for that . . . something about his girlfriend you know it starts making sense . . . was kicking it with SSR and all that stuff then Smokey. Probably Smokey got mad and did something you know."<sup>792</sup>

Speaking in a thinly veiled hypothetical, Dale explained exactly how Sharky could become a "witness" in this case, what that means, and, conversely, what to avoid saying to become a suspect:

**DALE: I mean you understand the difference between a witness and a suspect right?**

SHARKY: Not really.

DALE: No?

SHARKY:...any of this you know.

DALE: Uh, you know how a witness is treated, let's say you're walking down the street and you see somebody shoot somebody right, **let's say you're in the car and somebody from the car shoots somebody, k, you didn't know all that was going to happen or whatever, you didn't know it was coming, you'd be treated as a witness, ok, so all you do is just you know, like you don't have to serve any jail time, you don't have to go to prison you know all you do is just testify saying yeah that's, you know I was with him, that the dude that shot him, you know.** If you are

<sup>790</sup> *Id.* at 15:53.

<sup>791</sup> *Id.* at 15:50.

<sup>792</sup> *Id.* at 17:00.

treated as a suspect you know, let's say you know somebody whoever is investigating that case thinks that you know more about then what you're telling or if they think, let's say you switch positions, saying you know that I wasn't even with them, you know, and then later on those investigators or one investigator finds out that you were with the person, you know you'll be treated like a suspect now, **and you can spend a lot of time in prison, you know what I'm saying?**

SHARKY: Yeah...

DALE: **Here huh... you know you can apply it.**

SHARKY: I say I can see I'm a lot more witness...

GAITERS: The thing is that what he's saying is that if a person saw what happened okay if he saw what happened okay you're a witness you saw it right if somebody says yeah the person was there but he didn't do anything **he was riding in the car and you saw it, you're a witness, ok.**

SHARKY: Yeah.

GAITERS: That's a witness that's what he's saying.

SHARKY: ...suspect.

GAITERS: Well, say you were driving the car and you're driving the car and you say were gonna go over here and we're gonna shoot somebody, well there's a difference. See what I'm saying?

SHARKY: Yeah.

GAITERS: See what I'm saying? If you're just in the car, **I mean if you were in somebody's car say five of your friends went out and they were gonna go out somewhere and they decided not to go exactly instead of lets say get something to eat they decided to go somewhere else, you don't have much control over that do you?**

SHARKY: No you're not.

GAITERS: No exactly. So if something happens then you just kind of witnessed it you know?

SHARKY: I know... you know.

GAITERS: Huh?

SHARKY: I say...remember...

DALE: I mean if you were there in the car, like you said.

SHARKY: You said I was there.

DALE: **If you were inside the car Marcelo, and if you weren't driving, you were just in the back seat or the front seat or whatever, I mean you can't get out of a moving car right?**

SHARKY: No really cus...

DALE: No you get hurt. You know you didn't know it was gonna go down, and you're just like oh damn whats happening? And it's too late to bail. **You know if you were in there, that's what we're talking about. That you, that you were just there and you didn't have control over it.**



SHARKY: Well...

...

DALE: Were you, Marcelo were you driving the car?

SHARKY: Driving no.....

DALE: Yes or no, were you driving the car?

SHARKY: No.

DALE: Did you shoot Jessie?

SHARKY: No.

DALE: Ok. so you ain't gotta worry about that, right?

SHARKY: No cus I wasn't driving the car I wasn't shooting the gun.

...

DALE: Those are the people that we're really after. Those are the people we really care about. **You know. If someone else was in the car, like yourself who had no control over it had no control over where that car was gonna go or what the other people inside the car were gonna do. Those people can really help out, that's what we're looking for.**<sup>793</sup>

Later Dale was more direct: "Witnesses do not go to jail."<sup>794</sup>

Despite the clear direction, Sharky said again that he was not in the car. But, catching on, Sharky asked: "You want me to say I was?"<sup>795</sup> Dale replied, "No I want you to tell me the truth. And the truth is what we're thinking is that you were in the car." Dale backed off and said: "I don't want you to say something cause I want you to say it. That's not what we're here for. Do you understand? . . . I don't want you to say anything that's not true."<sup>796</sup>

Sharky then changed his statement and said he possibly was in Slappy's car at one time, but he wasn't certain.<sup>797</sup> Dale replied, "Marcelo you know what we're trying to get at here? Ok, just because you were in the car doesn't mean you committed a crime."<sup>798</sup>

The January 30 interview concluded without Sharky admitting he witnessed the shooting from inside the car. Sharky seemed to sense that this was not his last interview, and as he was leaving the room, Sharky said, "See you next time," to Dale and Gaiters.<sup>799</sup>

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<sup>793</sup> *Id.* at 19:00-23:00 (emphasis added).

<sup>794</sup> *Id.* at 42:49.

<sup>795</sup> *Id.* at 23:00.

<sup>796</sup> *Id.*

<sup>797</sup> *Id.* at 24:00.

<sup>798</sup> *Id.* at 25:50.

<sup>799</sup> *Id.* at 57:40.

***c. Investigators return to interview Sharky a third time—unwilling to take no for an answer.***

Dale and Gaiters returned to interview Sharky on March 3, 2009. This time, Sharky was *Mirandized*. Again, Sharky repeated his account, which involved Manny and Slappy being in the car, but he still excluded himself. Dale and Gaiters upped the pressure. True to the Reid Technique, Dale did most of the talking. He shifted between minimization and maximization.

Dale minimized the moral culpability of being involved in a gang shooting and downplayed the seriousness of the crime in a series of monologues:

[G]angbangers sometimes make mistakes themselves, you know, just because they're gangbangers doesn't mean that they're, they're all bad people all the time, you know. We understand that, that even gangbangers make mistakes, you know, maybe they didn't mean to shoot that person, you know I'm talkin in general now, maybe meant to, scare like a group a people and just kinda shoot up in the air or shoot towards them but they didn't really mean to hit them, probably didn't mean to kill them, you know, probably just wanted to scare some people.<sup>800</sup>

And later in the interview:

[W]e're not saying you were the shooter, we're not saying that, do you understand that, there is a difference between being the shooter in the car and someone who is just sittin in the car. *Huge difference*, you know what I'm sayin, *huge*. You know if you're in a position to tell us that you, you know, you if you told us that, that you were in the car, and we want you to be honest with us, you know, and you can you know you can tell us what really happened out there, you know.<sup>801</sup>

Dale told Sharky that punishment for someone being inside the car as a witness would be far less than the person engaged in the shooting. Sharky questioned this and asked about accomplice liability. Suggesting that full accomplice liability would not apply here, Dale stated: “Well I’m telling you just it doesn’t always work out that way. We are being honest.”<sup>802</sup>

Dale also used maximization techniques, repeatedly asserting the certainty that Sharky was in the car and accusing Sharky of lying. Like in other interviews, Dale exaggerated what they knew by saying they had talked to “*a lot of people*.” Dale said that he and Gaiters had reason to believe

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<sup>800</sup> Hernandez Interview 3/3/09, part 1 at 27:30.

<sup>801</sup> *Id.* at 36:00.

<sup>802</sup> *Id.* at 37:20.

Sharky was lying.<sup>803</sup> Dale went even further, following the suggestion in the Reid Technique manual to accuse the witness or potential informant of “committing the crime (or of being implicated in it in some way).”<sup>804</sup>

DALE: We’ve also learned or received from other people that, you know, you have actually, you may have actually been involved in this.

SHARKY: What, with the shooting?

DALE: Uh huh [affirmative]

SHARKY: Me?

DALE: Yea you, yea, why would these people . . .

SHARKY: Cause they’re haters , you know.

DALE: We need more than that, we need more than “haters.”<sup>805</sup>

True to the Reid-style interrogation tactics of “stopping denials,” Dale and Gaiters kept repeating that they knew Sharky was in the car.<sup>806</sup> Dale said that they received information from trusted uninterested witnesses that Sharky was in the vehicle and involved in the shooting. “[S]omebody’s gotta be lying,”<sup>807</sup> and “what you have told us so far, doesn’t make any sense.”<sup>808</sup>

Dale and Gaiters repeated the theme:

- “We believe that you were there.”<sup>809</sup>
- “As far as you not being in the car, we’re beyond you not being in the car, is all we’re saying, alright?”<sup>810</sup>
- “We, we know you were in the car. We know that.”<sup>811</sup>
- “You know we’re talking to somebody right now that, that we know was in the car.”<sup>812</sup>
- “We believe that you know for sure. And you know how we know that? Because we know you were in the car.”<sup>813</sup>

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<sup>803</sup> *Id.* at 31:00.

<sup>804</sup> Inbau, et al., *Criminal Interrogation* at 409.

<sup>805</sup> Hernandez Interview 3/3/09, part 1 at 31:00.

<sup>806</sup> Inbau, et al., *Criminal Interrogation* at 303–330.

<sup>807</sup> Hernandez Interview 3/3/09, part 1 at 33:00.

<sup>808</sup> *Id.* at 33:45.

<sup>809</sup> *Id.* at 34:10.

<sup>810</sup> *Id.* at 44:00.

<sup>811</sup> *Id.* at 44:08.

<sup>812</sup> *Id.* at 50:00

<sup>813</sup> *Id.* at 53:45.

- “It doesn’t matter what car it was, to be honest with you, doesn’t matter, because we know for sure that you were in that car, in the car that went down the alley and shot that kid.”<sup>814</sup>
- “We know you were in that car, what we need to know from you is why.”<sup>815</sup>
- “We’re saying that you were in the car, we know that already, ok?”<sup>816</sup>
- “We know for a fact that you were in that car, ok, well like my partner said, we’re beyond that, ok, we need to talk about why this happened, and exactly how it went down, can you do that for us?”<sup>817</sup>
- “And I hope to god that you make the right decision here, we know you were in the car, like I said, we’re passed that, ok?”<sup>818</sup>

To be clear, nothing in the police file or the discovery or the prosecutor’s file provides evidence that investigators knew with certainty Sharky was in the car. Investigators never presented Sharky’s photograph in a lineup to witnesses. No forensic evidence placed Sharky in the car. The only evidence putting Sharky in the car were Luis’s statements that he thought Sharky was the shooter and the high school student’s identification of Marcelo Hernandez, aka Sharky, from a yearbook “as being in the car, possibly the shooter.”<sup>819</sup> Hence, investigators were overstating the evidence in a ploy to influence a juvenile witness’s statement.

Only after Dale and Gaiters continued with Sharky—insisting he was in the car, and then minimizing his role in the crime—did Sharky change his statement. Through leading questions, Dale got Sharky to confirm he was in the car in the afternoon of October 11.<sup>820</sup> Sharky said that Beaver was driving, Slappy was in the front passenger seat, and Barrientos was seated behind Slappy. He said that Rider called and said there was an SSR party in the back alley near Roosevelt High School. Then Slappy called Barrientos.<sup>821</sup> According to Sharky, the group of four went down

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<sup>814</sup> *Id.* at 56:05.

<sup>815</sup> *Id.* at 56:40.

<sup>816</sup> *Id.* at 59:30.

<sup>817</sup> *Id.* at 1:02:00.

<sup>818</sup> *Id.* at 1:04:20.

<sup>819</sup> MPD at 153, supp. 52.

<sup>820</sup> Hernandez Interview 3/3/09, part 1, at 1:08:30 (“So you were in the car. Was Smokey? Who else was in the car?”).

<sup>821</sup> *Id.* at 1:09:40.

the alley and shot at the SSR gang. After the shooting, Barrientos and Sharky were on the floor in the backseat to avoid detection.<sup>822</sup>

### 3. Sharky provides statements and testimony on crucial details that were wildly inaccurate and inconsistent with the state's evidence.

Sharky gave several details that were not credible and inconsistent with the state's other evidence. For example, in his March 3 interview, Sharky came up with an explanation—that Jesse was dating Itzel—to fit the jealousy motive fed to him by investigators. Sharky recalled what Dale and Gaiters told him “last time,” that Itzel was hanging out with SSR members and that Smokey was jealous.<sup>823</sup> Sharky used this information to develop a nonsensical account. Sharky remembered what he learned in an earlier interview—that the shooting happened “because of his girl.”<sup>824</sup> But Sharky invented an impossible account when he told investigators that Barrientos shot Jesse because Jesse “took [Itzel] from him.”<sup>825</sup> Dale indicated his disapproval with this clearly inaccurate statement and questioned whether this was true.<sup>826</sup>

Sharky got other key details about Itzel wrong. He first said that Itzel had broken up with Smokey and was at Powderhorn park on October 11 with another girl named Jasmine.<sup>827</sup> His story then shifted and he said that Itzel was at Puppet's house that day, hanging out in the alley when they did the drive-by.<sup>828</sup> Sharky said Itzel and others were in the garage smoking pot and that they got weed before the party.<sup>829</sup> Sharky also claimed that Itzel was at the party and that she went to the ground when the shooting started.<sup>830</sup> Dale just ignored these comments.

Sharky also said that the car immediately headed southward to a park after the shooting. He said they hid there waiting for Rider, and Rider took them back to Marcos's house.<sup>831</sup> Sharky said that later Rider and Barrientos brought the gun to Sandwich's house.<sup>832</sup> This conflicted with

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<sup>822</sup> This account conflicts with the witnesses attending J.B.'s birthday party and with the neighbor a block away who identified the car and saw three passengers. *See* MPD at 26–28, *supp.* 14.

<sup>823</sup> Hernandez Interview 3/3/09, part 1 at 29:20.

<sup>824</sup> *Id.* at 1:08:10.

<sup>825</sup> *Id.* at 1:08:15.

<sup>826</sup> *Id.*

<sup>827</sup> *Id.* at 1:16:00.

<sup>828</sup> *Id.*

<sup>829</sup> *Id.* at 1:17:10.

<sup>830</sup> *Id.* at 1:24:00.

<sup>831</sup> *Id.* at 1:19:00. Sharky was likely referring to either Minnehaha Parkway or a park area near Lake Nokomis, which are south from Roosevelt High.

<sup>832</sup> *Id.* at 1:22:00.

the neighbor on the next block who was sure he saw the white Dodge Intrepid go north through his alley and stop behind Sandwich's house just seconds after the shooting.<sup>833</sup>

Sharky said he thought Slappy's car was green.<sup>834</sup> Slappy's car, the car involved in the shooting, was white. Sharky said that Barrientos put a blue bandana over the gun as he shot it out the window, and then later burned the bandana at a park.<sup>835</sup> Not one witness described a bandana being over the revolver.

Sharky later indicated that Barrientos was wearing overalls, a blue sweater, a white t-shirt, and white shoes.<sup>836</sup> Barrientos was not wearing overalls. Thirty-three minutes before the shooting he was wearing jeans, white shoes, and a white t-shirt.<sup>837</sup> Some witnesses said the shooter was wearing a grey sweatshirt, while others said he was wearing a dark colored or black t-shirt.<sup>838</sup>

Despite these wildly incorrect details, Dale expressed approval for the details Sharky was providing, saying, "You're doing a really good job here. Very proud. I mean if that means anything."<sup>839</sup>

Dale tried his best to correct Sharky's account. For example, when Sharky said the car went south to a park, Dale directed him back to the facts from the investigation that showed the car went immediately to Sandwich's house, which was the opposite direction.

**DALE: Did you ever go to ahh, did you go to umm Sandwich's house?**

**SHARKY: No.**

**DALE: Right afterward, are you sure?**

**SHARKY: I'm sure . . .**<sup>840</sup>

Sharky told the investigators that Slappy called Smokey at 5:00pm.<sup>841</sup> Dale signaled that Sharky's account was incorrect: "Well this didn't happen for a couple hours later, what happened in those two hours?" he asked.<sup>842</sup>

Rather than having to correct Sharky about an important fact, Dale simply suggested that the type of gun was a revolver through a leading question:

<sup>833</sup> MPD at 37, supp. 3; MPD at 35, supp. 10.

<sup>834</sup> Hernandez Interview 3/3/09, part 1 at 1:13:30.

<sup>835</sup> Tr. of Hernandez Q and A Interview 3/3/09 at 6.

<sup>836</sup> Hernandez Interview 3/3/09, part 2 at 4:15.

<sup>837</sup> Cub Foods Surveillance Video, Oct. 11, 2008 at 18:19:54.

<sup>838</sup> MPD at 26–28, supp. 14.

<sup>839</sup> Hernandez Interview 3/3/09, part 1 at 1:18:00.

<sup>840</sup> *Id.* at 1:18:40.

<sup>841</sup> *Id.* at 1:26:40.

<sup>842</sup> *Id.* at 1:27:00.

DALE: Uh huh, what kind of gun was it?

SHARKY: Like (inaudible)

DALE: Was it like a revolver, or?

SHARKY: Yea it was a revolver.

DALE: A revolver?

SHARKY: Yeah.<sup>843</sup>

In Sharky's more formal "Q and A" statement, Sharky again claimed that Slappy called Barrientos at about 5:00pm to obtain a weapon.<sup>844</sup> Sharky said he was "sure" they called Barrientos's cell phone and that it only took Barrientos 20 minutes to arrive.<sup>845</sup> Dale corrected this timeline, telling Sharky it was getting dark out when they picked up Barrientos: "So you couldn't have met him after 20 minutes so you think it was probably some more time after that?"<sup>846</sup> Sharky agreed and said they cruised around while waiting for Barrientos, then they picked Barrientos up, then they cruised around some more waiting for it to get dark.<sup>847</sup> Sharky said when Barrientos arrived at the park, he called the group asking to be picked up.<sup>848</sup> This statement later conflicted with the Cub Foods video, which showed it was impossible for Barrientos to have driven to Powderhorn Park, wait for a pick-up, and then cruise around before heading to the alley. Additionally, cell phone records show that no calls were made to or from Barrientos's cell phone from 4:37pm to 8:12pm.<sup>849</sup> Sharky's statement that the group needed to call Barrientos for a gun also conflicted with his prior statements to Dale and Gaiters that Beaver and others had guns in their homes.<sup>850</sup>

In a May 15 interview with prosecutors, Sharky continued to repeat his account—that the car went south immediately after the shooting, which conflicted with the neighbor's account of seeing the car go north up the alley.<sup>851</sup> Sharky's timeline in this statement also conflicted with phone records. Sharky said that the group spent five minutes in a park after the shooting. Then Rider drove them to Scrappy's house. Then, about one hour later, Rider drove Barrientos back to

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<sup>843</sup> *Id.* at 1:28:00.

<sup>844</sup> MPD at 199, supp. 81; Tr. of Hernandez Q and A Interview 3/3/09 at 4.

<sup>845</sup> Tr. of Hernandez Q and A Interview 3/3/09 at 4.

<sup>846</sup> *Id.*

<sup>847</sup> *Id.* Of course, there is no way that Barrientos could have been with Sharky during that time period.

<sup>848</sup> *Id.*

<sup>849</sup> Trial Ex. 87, 88.

<sup>850</sup> See Hernandez Interview 1/30/09, part 1 at 32:00 (Sharky saying Beaver, Sandwich and Danger have guns in their home).

<sup>851</sup> Hilary Caligiuri, Summary of Witness Meeting with Marcelo Hernandez, May 15, 2009.

his car.<sup>852</sup> This would have been around 8:00pm. Barrientos's phone records show he was in Maplewood at 8:12pm.<sup>853</sup> Barrientos would not have had time to drive back to Maplewood by 8:12pm.

At trial, Sharky repeated facts Dale and Gaiters had leaked to him. He repeated the jealousy motive, and he testified that the guys in the car told Barrientos that Itzel was at the party.<sup>854</sup> He testified that the gun used in the shooting was a revolver.<sup>855</sup> Sharky also testified that the car was white, admitting that "I didn't remember what I said before" regarding the car's color.<sup>856</sup> Sharky repeated that he was in the car with Beaver and Slappy, and that Slappy called Barrientos for a gun.<sup>857</sup> Sharky testified that it took Barrientos 20 minutes to arrive at Powderhorn Park, and they drove five minutes to meet him there once they got his call.<sup>858</sup>

Sharky also gave new details at trial. He testified that Puppet and another person named Playboy were outside in the alley.<sup>859</sup> Also inconsistent with his March 3 statement, he said he did not see Itzel in the driveway.<sup>860</sup> He testified to other facts that were inconsistent with Barrientos being at the scene of the crime. For example, Sharky testified that Barrientos left "like an hour, hour and a half" after they arrived at Scrappy's house after the shooting.<sup>861</sup> The timing on this account conflicts with Barrientos and Itzel's phone records, and Barrientos's memory of Ricardo returning to Itzel's apartment before 8pm.

At trial, likely in order to deal with all the inconsistencies, the state established through leading questions that Sharky was not totally sober and "that had some impact on [his] ability to remember details of the day."<sup>862</sup>

To be sure, minor inconsistencies or inaccuracies within a witness's statement do not necessarily indicate that a witness is unreliable or fabricating evidence. As described above, memory errors are common and they are not necessarily evidence of dishonesty.<sup>863</sup> But here,

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<sup>852</sup> *Id.*

<sup>853</sup> Trial Ex. 87.

<sup>854</sup> Trial Transcript at 805–810.

<sup>855</sup> *Id.* at 805.

<sup>856</sup> *Id.* at 790.

<sup>857</sup> *Id.* at 797.

<sup>858</sup> *Id.* at 801.

<sup>859</sup> *Id.* at 813.

<sup>860</sup> *Id.* at 816.

<sup>861</sup> *Id.* at 824-25; Trial Exs. 87, 88.

<sup>862</sup> Trial Transcript at 793.

<sup>863</sup> *See supra* Part IV.A.1.



Sharky's inaccuracies went well beyond typical memory errors, like those of the alibi witnesses who engaged in self-correction after verifying Marcia's work attendance. Sharky's inaccuracies increased in number and in gravity the more he spoke. They went to basic perceptions, such as whether it was night or day when the shooting occurred, who was at the scene, and what occurred after the shooting. The fact that Sharky said he saw Itzel in the alley or that Jesse was dating Itzel is glaring evidence that Sharky was making up facts to fit the jealousy motive presented to him. If Sharky could fabricate these details to fit what he believed investigators wanted to hear, he was also capable of falsely implicating Barrientos as the shooter for the same reason. In addition, unlike errors in remembering an uneventful day, the shooting would have been memorable to Sharky had he experienced it. The investigators' coercive interviewing techniques played a role too. They introduced facts and concepts through leading questions, contaminating Sharky's memory. Finally, Sharky was an accomplice and the state's central witness. His statements should receive greater scrutiny than those of other witnesses. The law recognizes an "inherent distrust of testimony from accomplices" because of their tendency and incentive to testify against another in the hope of or upon a promise of immunity.<sup>864</sup> Although the Minnesota Supreme Court found Sharky's testimony was corroborated by Aron and William's identifications, the Court was not aware of the depth and breadth of Sharky's inaccuracies, which went well beyond typical memory errors.

**4. Sharky gives testimony that puts himself in the car during the shooting but provides no evidence that independently corroborates Smokey as the shooter.**

In closing arguments, the state claimed that Sharky's testimony was corroborated by the police investigation. But the state's points of corroboration were either facts leaked to Sharky through Dale and Gaiters's leading questions, facts Sharky would already know from being a student at Roosevelt High and an SSP gang member, or facts Sharky would know if he were in the car and the shooter. They do not corroborate Sharky's specific claim that Barrientos was in the car and was the shooter.

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<sup>864</sup> *Barrientos-Quintana*, 787 N.W.2d at 610.

The state walked the jury through the following slides.<sup>865</sup>



Figure 26 - Prosecution's Closing Argument PowerPoint Slides

Dale and Gaiters leaked the details about “Itzel hanging out with Puppet” and SSR members as the motive.<sup>866</sup> “Getting dark when picked up Smokey” came from Dale and Gaiters when they corrected Sharky on his timeline.<sup>867</sup> Investigators were the first to use the word “revolver” in interviews with Sharky.<sup>868</sup> Contrary to what the prosecutor argued, these bits of information do not corroborate Sharky’s account. Sharky was just repeating for the jury what Dale and Gaiters first told him.<sup>869</sup>

As a student of Roosevelt High and a gang member, Sharky would have known that the shooting occurred at Puppet’s during a party. Sharky also knew Slappy and could have known the color of his car. He was familiar with the alley behind Roosevelt High at Puppet’s house.<sup>870</sup> Therefore, the general details about the shooting occurring in the alley at a party would have been

<sup>865</sup> Trial Transcript Volume 15 at 55; Hilary Caligiuri, Barrientos Closing, May 21, 2009 (PowerPoint slides).

<sup>866</sup> See Hernandez Interview 1/30/09, part 2 at 17:17 (Sharky indicating that after Dale and Gaiters told him last interview that Smokey was in jail for the shooting, and after they explained that his girlfriend Itzel was “kicking it with SSR,” that things started to make sense); see also Hernandez Interview 3/3/09, part 1 at 29:00 (Dale telling Sharky they believed Smokey acted out of jealousy, and Sharky stating investigators “told him last time” about Itzel “kicking it with SSR”).

<sup>867</sup> Tr. of Hernandez Q and A Interview 3/3/09 at 4.

<sup>868</sup> Hernandez Interview 3/3/09, part 1 at 1:28:00.

<sup>869</sup> Trial Transcript Volume 15 at 54–55. The state asserted that “[I]nvestigators in this case went back and worked exhaustively to figure out whether they could corroborate information that Marcelo Hernandez had given them, whether they could support that, show that it was true with other evidence, and they corroborated piece after piece after piece after piece of information that Marcelo Hernandez had given them.”

<sup>870</sup> See MPD at 256, supp. 93 (Sharky stating he knew where Puppet lived); see Hernandez Interview 1/30/09, part 2 at 00:01–02:00 (Sharky describing how Puppet shot at him at a store near Roosevelt High).

available to Sharky through others and his own knowledge. Of course, if Sharky was the shooter himself, he would have known these things firsthand.

The prosecution argued that several other details Sharky provided were corroborating. But they were actually inconsistent with known facts. For example, Sharky's statement that Beaver was in the car was inconsistent with Beaver's alibi, an alibi strong enough that the state never charged Beaver. Also, while the state's theory was that the car took a left out of the alley and then went north through another alley, Sharky claimed the car took a right and went southward.<sup>871</sup> Sharky's testimony that Rider drove both Slappy and Barrientos back to their vehicles one hour to one and one-half hours after the shooting is inconsistent with Barrientos's phone records, which shows he was near Itzel's home at 8:12pm.<sup>872</sup>

Finally, most of Sharky's testimony would be highly inculpatory if Sharky were standing trial as the shooter. He knew, approximately, the number of shots fired. Of course, given that the gun was a revolver, it could have been an educated guess. He knew that Slappy's car was discovered near Powderhorn Park and that William Fajardo was at the scene. This was information that Sharky would have known from either being the shooter himself or being around Roosevelt High and his gang. It does not corroborate that Barrientos was the shooter.

##### **5. Prosecutors elicit testimony from Sgt Gaiters that no one indicated Sharky was the shooter.**

At trial, the prosecutors elicited from Sgt Gaiters on direct examination that no one indicated to him that Sharky was the shooter. The prosecutor's notes show that the state expected this testimony from Gaiters:

"Had you heard that name earlier in the investigation? Did anyone indicate that Sharky was the shooter? (No)"<sup>873</sup>

The testimony that resulted came out as favorable to the prosecution:

PROSECUTOR: All right. Had you heard [the name Sharky] at some point during your investigation?

GAITERS: Yes, ma'am.

PROSECUTOR: All right. Did anyone **ever** indicate to you that Sharky was the shooter?

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<sup>871</sup> Trial Ex. 38.

<sup>872</sup> See Trial Exs. 87, 88.

<sup>873</sup> Susan Crumb, Outline of Direct Examination of Christopher Gaiters at 5.

GAITERS: No, no one ever indicated that.”<sup>874</sup>

Witnesses, however, did indicate that Sharky was the shooter. Officer Tapp e-mailed the investigators and said that a Roosevelt High school student “picked a Marcelo Giron Hernandez . . . out of a photo book as being in the car, possibly the shooter.”<sup>875</sup> The student believed Hernandez’s street name to be Sharky or Smokey.<sup>876</sup> Additionally, investigators learned from Puppet that Luis said he thought the shooter was Sharky. In his first interview on October 11, Puppet said he overheard his brother Luis, Aron, and William saying they thought Sharky was the shooter.<sup>877</sup> Puppet repeated this several times during the interview.<sup>878</sup> He said, Luis and his friends, “were thinking that it was a guy Sharky that came and shot.”<sup>879</sup> On October 15, Puppet again said that Luis, Aron, and William thought the shooter was Sharky.<sup>880</sup>

Based on Puppet’s information, Dale told William: “We have a feeling you guys know a lot more than what you are telling us. . . What’s Sharky’s last name?”<sup>881</sup> After William said he didn’t know if Sharky was in the car, Dale asked:

DALE: You and Aron and Luis? Were you guys talking about it might be [Sharky]?”

WILLIAM: Yeah, Luis was talking about it. Like he’s saying that could’ve been him.

DALE: That could’ve been Sharky?

WILLIAM: Yeah.<sup>882</sup>

At trial William admitted that during his first interview that he “probably” told Gaiters that Sharky was the shooter.<sup>883</sup> William also admitted that on October 11 he told Luis and Aron he believed the shooter was Sharky.<sup>884</sup>

When Dale and Gaiters interviewed Aron on October 11, they used the information they had gained about Sharky being the potential shooter. Without giving any context for the question, out of the blue, they asked Aron, “Who’s Sharky?”<sup>885</sup> Aron said later in the interview that he did

<sup>874</sup> Trial Transcript at 1131 (emphasis added).

<sup>875</sup> MPD at 153, supp. 52.

<sup>876</sup> *Id.*

<sup>877</sup> Tr. of Jael Pliego-Espitia Interview 10/11/08 at 14-16.

<sup>878</sup> *Id.*

<sup>879</sup> *Id.* at 14.

<sup>880</sup> Tr. of Jael Espitia-Pliego Interview 10/15/08 at 38.

<sup>881</sup> Tr. of Fajardo Interview 10/11/08 at 8.

<sup>882</sup> *Id.* at 9.

<sup>883</sup> Trial Transcript at 627-28.

<sup>884</sup> *Id.* at 628.

<sup>885</sup> Tr. of Bell-Bey Interview 10/11/08 at 15

not think the shooter was Sharky, but he said that Luis had indicated he thought the shooter looked like Sharky.<sup>886</sup> Aron said the others said, “man that kinda look like Sharky cause he’s bald.”<sup>887</sup>

The prosecutors’ notes on some of the interviews in this case noted the investigators’ focus on Sharky as the shooter. In their description of Aron’s October 11 interview, for example, they wrote in a spreadsheet, “Who’s Sharky?” quoting Dale’s question to Aron.<sup>888</sup>

	A	B	C	D	E	F	G
	NAME	Date of Interview	PI Number	Transcribed	Officer	Format	Notes
5	Mickelson, Angel ("E")	10/11/2008	08-40929	(Supplement 13)	Fors	CD - wav	Duplicate of DVD
6	Mickelson, Angel	10/11/2008	08-40929	(Supplement 13)	Fors	DVD	Duplicate of CD
7	Mickelson, Angel	10/25/2008	08-40929	(Supplement 58)	Dale	CD - wav	Didn't contact Itzel - not till next Thurs
8	Mickelson, Angel	10/27/2008		Supplement 41	Dale	NONE	
9	Bell-Bey, Aron ("C")	10/11/2008	08-40929			Video	"who is Sharky?"
11	Bell-Bey, Aron	10/16/2008		(Supplement 55)	Dale	Video	
12	Bell-Bey, Aron	11/6/2008	08-42262	Supplement 45	Gaiters	CD - wav	TWO INTS ON THIS CD

Figure 27 - Screenshot from List of Interviews Spreadsheet, Prosecution File

Finally, later in March 2009, when investigators confronted Sharky at his third interview, Dale told Sharky: “[W]e’ve also learned or received from other people that, you know, you have actually, you may have actually been involved in this.”<sup>889</sup> When Sharky replied, “What with the shooting? . . . Me?” Dale replied, “Yeah, you.”<sup>890</sup>

The prosecution’s elicitation of Gaiters’s testimony, that no one ever indicated Sharky was the shooter, erodes the integrity of Barrientos’s conviction.<sup>891</sup> And here, there is a reasonable likelihood that the use of this testimony affected the jury’s verdict.<sup>892</sup> The prosecutor’s notes say that Sharky told Gaiters that he “doesn’t want to go to jail.”<sup>893</sup> The fact that Sharky was named as a shooter before trial was highly exculpatory for Barrientos because it gave Sharky a significant

<sup>886</sup> *Id.* at 19–20.

<sup>887</sup> *Id.*

<sup>888</sup> List of Interviews, Prosecution File (Excel Spreadsheet). Dale asked this question because they heard Luis indicated to others that Sharky was the shooter.

<sup>889</sup> Hernandez Interview 3/3/09, part 1 at 31:30.

<sup>890</sup> *Id.*

<sup>891</sup> See *Mooney*, 294 U.S. at 112 (finding a due process violation when the state presents false testimony); *Mesarosh*, 352 U.S. at 10 (reversing a conviction under the court’s supervisory powers when a prosecutor’s solicitation of testimony was later learned to be false and unintentional); *Alcorta*, 355 U.S. at 31 (finding a due process violation when the state presents misleading evidence); *Napue*, 360 U.S. at 269 (concluding a due process violation results when the state fails to correct false evidence that goes to the credibility of a witness); *Giglio*, 405 U.S. at 153 (uncorrected false evidence may require a new trial even when it was not intentionally solicited).

<sup>892</sup> See *United States v. Agurs*, 427 U.S. 97, 103–104 (1976) (holding a conviction obtained by the knowing use of perjured testimony is fundamentally unfair and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury).

<sup>893</sup> Prosecutor Note on Conversation with Christopher Gaiters regarding Marcelo Hernandez Interview on Nov. 14, 2008.

incentive to say Barrientos was the shooter to avoid prison.<sup>894</sup> Further, had the jury been aware that witnesses first indicated Sharky was the shooter, it would have also damaged the trust in the investigation. The jury would have been looking for evidence as to why Sharky was ruled out as a shooting suspect. In sum, the prosecution's use of Gaiters's testimony, that no one ever indicated Sharky was the shooter, likely altered the outcome of the trial in favor of the state.

#### **6. Defense counsel fails to challenge Sharky's testimony in any meaningful way.**

Defense counsel failed to effectively challenge critical parts of Sharky's testimony with available evidence at hand.<sup>895</sup> Counsel failed to form a clear narrative regarding why Sharky had a motive to lie and how his story evolved after investigators leaked details during his interviews.

In closing argument, defense counsel mustered only a passing reference to Sharky's shifting version of events.<sup>896</sup> Defense counsel never showed the jury Sharky's tearful reaction to the thought of going to prison during his November 14 interview.<sup>897</sup> Defense counsel failed to expose the investigators' relentless Reid-style tactics, repeatedly telling Sharky they knew he was in the vehicle and they knew he was lying. Defense counsel failed to demonstrate that Sharky was given two options—either go to jail or cooperate as a witness, and he was told exactly how to become an indispensable witness against Barrientos at trial. Defense counsel failed to show, for example: (1) how investigators were the first to raise crucial details, like the motive of jealousy, that prosecutors claimed were signs of corroboration; and (2) how investigators corrected Sharky when his account differed from verifiable facts.<sup>898</sup>

According to Professor Bergman, defense counsel “clearly had no idea how to conduct an effective impeachment” of Gaiters's tactics that led Sharky to implicate Barrientos.<sup>899</sup> Defense counsel approached Gaiters with nonleading questions and “paraphrased what had been said rather

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<sup>894</sup> The prosecutor's notes say that Sharky told Gaiters that he “doesn't want to go to jail.” Prosecutor Note on Conversation with Christopher Gaiters regarding Marcelo Hernandez Interview on Nov. 14, 2008.

<sup>895</sup> See Bergman Report at 12; Stone Affidavit at 8.

<sup>896</sup> Trial Transcript at 92.

<sup>897</sup> MPD at 243–44, supp. 82; Bergman Report at 17.

<sup>898</sup> See Hernandez Interview 1/30/09, part 2 at 17:17 (Sharky indicating that after Dale and Gaiters told him last interview that Smokey was in jail for the shooting, and after they explained that his girlfriend Itzel was “kicking it with SSR,” that things started to make sense); see also Hernandez Interview 3/3/09, part 1 at 29:00 (Dale telling Sharky they believed Smokey acted out of jealousy, and Sharky stating investigators “told him last time” about Itzel “kicking it with SSR”).

<sup>899</sup> Bergman Report at 14.

than using the precise words. . . . By asking if [Gaiters] “remembered what had been said,” counsel bungled an effort to refresh the detective’s memory and to directly impeach him.”<sup>900</sup> This gave Gaiters the ability to describe, in his own words, how he was simply explaining to Sharky the fact that witnesses are people who merely observe what occurred and do not participate in the crime like suspects.<sup>901</sup> The jury, therefore, was left with the incorrect impression that investigators were explaining, in general, how witnesses and suspects are treated in the system. The jury was not shown through effective defense work that the investigators’ statements gave Sharky the motivation and means to implicate Barrientos and be treated like a witness who would not spend any time in jail. The jury was not shown how Dale and Gaiters instructed Sharky exactly how to become a “witness” in this case: “testify that you were in the car,” “that you didn’t know what was going on,” and say, “you know I was with him, that[s] the dude that shot him.”<sup>902</sup>

In its closing argument, the defense was able to highlight a few inconsistencies with Sharky’s testimony. For example, the defense pointed out that Sharky testified the car went south after the shooting, which conflicted with the neighborhood witness who observed the white Intrepid drive north through his alley seconds after the shooting.<sup>903</sup> The defense also argued that Sharky’s testimony about Puppet being outside at the time of the shooting was contradicted by other testimony.<sup>904</sup> The defense briefly asserted that Sharky’s testimony conflicted with the timing of the Cub Foods video and with Barrientos’s cell phone record.<sup>905</sup>

Defense counsel, however, utterly failed to expose several other key inconsistencies. Defense counsel did not impeach Sharky with the fact that he told Dale and Gaiters he saw Itzel in the alley when the car pulled up to shoot and that she went to the ground when the shooting occurred.<sup>906</sup> This was obviously incorrect and inconsistent with the Cub Foods video.<sup>907</sup> Defense counsel should have made this glaring inconsistency one of the cornerstones of the closing argument. It was impossible for Itzel to be on video at Cub Foods and also be with Puppet’s crew at the scene of the crime.

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<sup>900</sup> *Id.*

<sup>901</sup> *See* Trial Transcript at 1183–87; Bergman Report at 15.

<sup>902</sup> Hernandez Interview 1/30/09, part 2, at 19:00-30:00.

<sup>903</sup> Trial Transcript Volume 15 at 93.

<sup>904</sup> *Id.*

<sup>905</sup> *Id.*

<sup>906</sup> Hernandez Interview, 3/3/09, part 1 at 1:24:00.

<sup>907</sup> The prosecutor recognized that it was impossible for Itzel to be at the party. “In fact, it’s not true. His girl wasn’t there.” Trial Transcript at 806.

Defense counsel also failed to call out Sharky's incorrect statement that Jesse was dating Itzel. This statement undermined the state's theory that Jesse was an innocent bystander, and that Barrientos was called to bring a gun to shoot at SSR gang members.

Defense counsel did not expose Sharky's unfamiliarity with the basic facts of the crime, like his belief that the car was green, not white, or his obviously incorrect timing when he said that Slappy called Smokey at 4 or 5pm and it took him 20 minutes to arrive. The defense failed to develop these inconsistencies at trial or show how investigators corrected Sharky each time he provided obviously incorrect facts and fed Sharky key details about the crime through leading questions.

Defense counsel also failed to call witnesses that would have undermined the state's case. Valentin Olivera, aka Beaver, or any of his family members, would have undercut Sharky's testimony about who was in the car at the time of the shooting.<sup>908</sup> Four of Beavers' family members told investigators, in April and May of 2009, that they were with him at a large family gathering the entire night of October 11.<sup>909</sup> Because of this alibi, prosecutors chose not to charge Beaver even though Beaver's DNA had been found on a cigarette butt in the white Intrepid, and Sharky claimed, in his later interviews, that Beaver drove the car.<sup>910</sup> The two defense experts who examined this case agreed that defense counsel was ineffective for not investigating and presenting Beaver's alibi to the jury, which would have further discredited Sharky's testimony that Beaver was driving the white Intrepid.<sup>911</sup> One expert explained that trial counsel "had a duty to challenge the believability of [Sharky's] uncorroborated claims. Yet counsel failed to call [Beaver] or his many family members who proved this alibi as witnesses."<sup>912</sup>

Defense counsel should have investigated and called the witnesses who were attending J.B.'s birthday party. These witnesses would have directly undermined Sharky's testimony. A.L. and J.B. would have testified that they were able to peer into the back of the white Intrepid, and they could only see one person in the back seat of the car. This testimony from unmotivated witnesses would have discredited Sharky's testimony that both he and Barrientos were in the back seat of the car.

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<sup>908</sup> Stone Affidavit at 7.

<sup>909</sup> MPD at 271–295, supps. 120–125, 128.

<sup>910</sup> Notes on CRU Interview with Susan Crumb, May 31, 2023, at 4.

<sup>911</sup> Bergman Report at 20; Stone Affidavit at 5.

<sup>912</sup> Stone Affidavit at 5.



The jury likely would have acquitted had it considered the full context of the benefit Sharky received, how he was fed crime details by investigators, and the glaring inconsistencies and inaccuracies. Despite defense counsel's overwhelming failures, the jury deliberated for three days.<sup>913</sup> On the third day, the jury said it was divided "9 - guilty [and] a strong 3 not guilty."<sup>914</sup> The jury twice requested the court read them a transcript of Sharky's testimony regarding the planning and execution of the shooting.<sup>915</sup> Soon after the testimony was read, the jury returned to its deliberations, and returned a guilty verdict. The record indicates that Sharky's testimony, re-read to the jury, broke their deadlock. Had defense counsel effectively discredited Sharky there is a substantial likelihood that the jury would either have voted not guilty or the trial would have ended in a hung jury.

Finally, due to deficient performance of the defense trial attorneys, the Minnesota Supreme Court was unaware of the serious flaws in Sharky's testimony. The Court upheld the conviction even though the jury was never given an accomplice instruction. The Court described the issue as "close," but found that Sharky's testimony was corroborated by William and Aron's identification.<sup>916</sup> While the dissent noted that Sharky's testimony was untrustworthy because he was told he could be treated as a witness, the Supreme Court was unaware of the full extent of the problem.<sup>917</sup> The Court did not know that the investigators acted on instructions from the prosecutors, in November 2008, to explore an offer to grant Sharky witness status. This was an implied promise from the state not to prosecute Sharky. The offer was presented to Sharky in January, and he had more than one month to think about it. During that month, he remained at Elmore Academy, unable to leave.<sup>918</sup> And because it was not raised by the defense attorneys, the Supreme Court was unaware that investigators fed Sharky crime details and told him exactly how to become a witness. In sum, because of the defective defense performance, the Court was never aware of Sharky's many inaccurate statements and how investigators leaked or corrected details of Sharky's account through leading questions.

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<sup>913</sup> Trial Transcript Volume 15 at 118.

<sup>914</sup> Trial Transcript at 1725-26; Jury Notes to the Court, *State v. Barrientos*.

<sup>915</sup> Trial Transcript at 1728, 1752.

<sup>916</sup> *State v. Barrientos-Quintana*, 787 N.W.2d 603, 613 (Minn. 2010).

<sup>917</sup> *Id.* at 616.

<sup>918</sup> The CRU found evidence that Sharky faced a new felony charge in early 2009, but the CRU has not been able to obtain those records.

#### **D. The Defense Attorneys' Conduct Aligns with Other Conduct Leading to Their Discipline.**

Three of Barrientos's defense attorneys—Kristi McNeilly, Ben Myers, and Geoffrey Colosi—have a history of misconduct that is consistent with their lack of diligence in this case. McNeilly was “publicly reprimanded” by the Minnesota Supreme Court in 2015, in part, for a “pattern of misconduct” of “failing to act diligently, failing to adequately communicate with clients, failing to promptly return client files . . . and making misrepresentations” from 2008 to 2010.<sup>919</sup> McNeilly explained that 2009 was a “real hard year” for her because she was going through a divorce and was in a “public and violent dispute with her father.”<sup>920</sup> In 2021, McNeilly was convicted of theft by swindle after telling her client she could help him avoid criminal charges if he agreed to “pay \$50,000 to the police union” and then taking \$15,000 from the client for this purpose.<sup>921</sup> Attorney disciplinary proceedings related to the conviction are still pending.<sup>922</sup>

In 2015, Myers was suspended for 60 days from practicing law for unethical behavior including “commencing a frivolous lawsuit, . . . harassing an assistant city attorney, . . . failing to provide a client with an accounting, . . . and failing to maintain required trust account books and records.”<sup>923</sup>

Colosi was disbarred in 2022 by the Minnesota Supreme Court for a “years-long pattern of excessive compensation from the limited funds of a vulnerable adult.”<sup>924</sup> As a fiduciary for a “vulnerable, elderly adult with dementia,” Colosi “improperly drained substantial funds from the [client]’s trust by paying himself excessive fees from the trust’s assets.”<sup>925</sup> Colosi’s misconduct leading to his disbarment began in 2008, overlapping with his representation of Barrientos in this case. For several months in 2008 he “failed to maintain an accounting” of approximately \$300,000 in net proceeds from a client’s sale of a business.<sup>926</sup> Colosi also gave “false testimony” and made “misrepresentations” at the hearing on the misconduct allegations.<sup>927</sup>

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<sup>919</sup> *In re Disciplinary Action against McNeilly*, 860 N.W.2d 135, 135 (Minn. 2015); Elizabeth Mohr, *St. Paul Lawyer Disciplined for Mishandling Cases*, St. Paul Pioneer Press, Feb. 25, 2015.

<sup>920</sup> Elizabeth Mohr, *St. Paul Lawyer Disciplined for Mishandling Cases*, St. Paul Pioneer Press, Feb. 25, 2015.

<sup>921</sup> *State v. McNeilly*, No. A22-0468, 2024 WL 2043477, at \*2 (Minn. May 8, 2024).

<sup>922</sup> *In re Disciplinary Action against McNeilly*, A22-0574 (Minn. 2022).

<sup>923</sup> *In re Disciplinary Action against Myers*, 864 N.W.2d 151, 151 (Minn. 2015).

<sup>924</sup> *In re Disciplinary Action Against Colosi*, 977 N.W.2d 802, 807–08, 813 (Minn. 2022).

<sup>925</sup> *Id.* at 816.

<sup>926</sup> *Id.* at 806.

<sup>927</sup> *Id.* at 809, 815–16.

Attorney Bridget Landry is the only attorney from Barrientos's team who has not been convicted, disciplined, or disbarred. But she faced other obstacles to mastering a vigorous and effective performance in the Barrientos case. Landry was assigned the task of presenting the closing argument in the case even though she had passed the Minnesota bar just one month before trial and the California bar five months prior.<sup>928</sup>

The stakes for closing argument in the Barrientos case were extremely high given the unexpected evidence from the state's witnesses—for example, denying Sharky was an initial suspect, suggesting witnesses described a shooter with short hair, and opposing an accomplice jury instruction. And defense counsels' decision not to present an opening statement made the closing argument the only chance to distill the case into a persuasive narrative of reasonable doubt.<sup>929</sup> Assigning an attorney with no trial experience in a case of this magnitude, where the client was facing a sentence of life without the possibility of parole, is a risky, if not foolish strategy destined to underwhelm.

#### **E. The Prosecutors Withhold, or Fail to Timely Disclose, Exculpatory and Impeachment evidence.**

Prosecutors failed to disclose exculpatory and impeachment evidence to the defense. Other exculpatory information that was eventually provided to defense counsel was untimely.

The United States Constitution requires the state to disclose evidence favorable to the defendant, including evidence that is exculpatory or impeaching.<sup>930</sup> A new trial is required when the undisclosed evidence is material, i.e., when there is a reasonable probability that had the

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<sup>928</sup> See Attorney Profile, Bridget Rose Landry, The State Bar of California, <https://apps.calbar.ca.gov/attorney/Licensee/Detail/260949>; see also Lawyer Details for Bridget Landry, Minnesota Judicial Branch, <https://mars.courts.state.mn.us/AttorneyDetail.aspx?attyID=0389611>.

<sup>929</sup> Two expert defense attorneys concluded that the defense's decision to forgo an opening statement in this case resulted in defective representation. Bergman Report at 19–20; Stone Affidavit at 7. Bergman explained that there was no strategic reason for not presenting an opening statement because the state was aware of Barrientos's defenses. She wrote:

Defense counsel gave up their opportunity to cogently present its themes and theories at the beginning of the trial immediately after the state's opening, leaving only the state's theories and themes for the jurors to consider as they listened to all the state's witnesses. . . . The fact that the defense failed to present an opening statement before the state's case-in-chief likely made it impossible for the jury to critically evaluate the state's evidence as it was presented.

Bergman Report at 20.

<sup>930</sup> *Brady v. Maryland*, 373 U.S. 83, 86–87 (1963); *Smith v. Cain*, 565 U.S. 73, 75–76 (2012).

evidence been disclosed the outcome would have been different.<sup>931</sup> A reasonable probability does not mean more likely than not; it means that the likelihood is enough to undermine confidence in the outcome.<sup>932</sup> Minnesota courts apply a standard more favorable to the defendant than the United States Constitution affords.<sup>933</sup> Minnesota courts have evaluated discovery violations under a harmless error analysis, granting a new trial if the undisclosed evidence “could have affected the judgment of the jury.”<sup>934</sup>

The Minnesota Rules of Criminal Procedure provide for an open-file discovery policy.<sup>935</sup> Prosecutors must make continuing disclosure when new materials are added to the file after defense counsel has looked at it.<sup>936</sup> Prosecutors cannot circumvent the requirement of open-file discovery “by not taking notes or by not putting things in the file that belong in the file.”<sup>937</sup>

Prosecutors may withhold witness names and statements if they obtain a court order after showing that such disclosure could subject a witness to harm.<sup>938</sup> In this case prosecutors obtained a court order to withhold some witness names and identifying information, but they were required to provide the defense with redacted transcripts.<sup>939</sup> Later, the prosecutors agreed to provide transcripts and full unredacted interviews of all the witnesses for defense counsel to view.<sup>940</sup> The prosecution told the court on February 12 that the state had completed providing the defense all CDs and DVDs containing full witness interviews.<sup>941</sup>

In its review, the CRU found exculpatory and impeachment evidence that was not disclosed to the defense. Other evidence was disclosed too late in the process to be used in a meaningful way by competent defense counsel.

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<sup>931</sup> *Cone v. Bell*, 556 U.S. 449, 469–70 (2009).

<sup>932</sup> *Kyles v. Whitley*, 514 U.S. 419, 434 (1995).

<sup>933</sup> “The state’s obligations in discovery derive from the Minnesota Rules of Criminal Procedure and also from the constitutional guarantees of due process.” *State v. Hunt*, 615 N.W.2d 294, 298–300 (Minn. 2000). The Minnesota Supreme Court may also grant a new trial without a showing of prejudice when it is in the interest of justice. *State v. Kaiser*, 486 N.W.2d 384, 386 (1992).

<sup>934</sup> *Hunt*, 615 N.W.2d at 300.

<sup>935</sup> Minn. R. Crim. P. 9.01, subd. 1; *Kaiser*, 486 N.W.2d at 386.

<sup>936</sup> *Kaiser*, 486 N.W.2d at 387.

<sup>937</sup> *Id.*

<sup>938</sup> Minn. R. Crim. P. 9.01, subd. 3(2).

<sup>939</sup> See Order with Respect to Prosecutor’s Certificate, *State v. Barrientos-Quintana*, 27-CR-08-53942 (Filed Jan. 2, 2009).

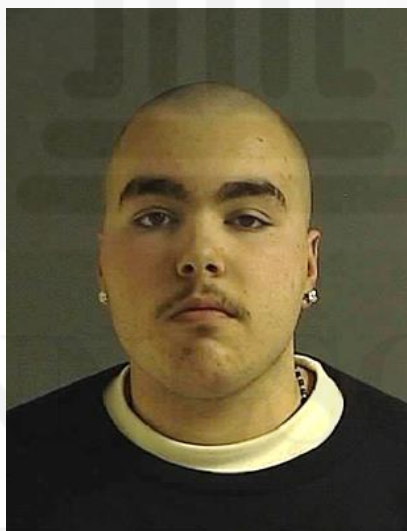
<sup>940</sup> Letter from Hilary Caligiuri to the Honorable Jeannice Redding, Feb. 12, 2009.

<sup>941</sup> *Id.*

First, two photo lineups shown to Luis Pliego-Espitia, in interviews conducted on October 11 and on October 15–16, were not disclosed to the defense.<sup>942</sup> The first lineup, given on October 11, contained nine photographs including one of Ramiro Pineda, aka Slappy, the owner of the white Dodge Intrepid.<sup>943</sup> Luis viewed the lineup once through and did not identify the shooter. Luis paused and commented on photo number three, a person who was wearing an earring in the photo. Luis said photo number three looked like the shooter because they had similar eyebrows. When asked how confident he was that number three was the shooter, Luis said he was only 50 to 60 percent sure.<sup>944</sup> The state never transcribed the portion of the interview when investigators showed Luis a photo lineup on October 11, and none of this information was included in Gaiters's police report.<sup>945</sup>



**Figure 28 – Photo # 3 in 9-Person Lineup**



**Figure 29 – Photograph of Arber Meko**

The nine-person lineup was exculpatory in at least two ways. First, Slappy's photo was in the nine-person lineup, but Luis did not even pause when looking at Slappy's photo.<sup>946</sup> This is exculpatory because the state's theory at trial was that Slappy was in the front passenger seat. Before Sgts Gaiters and Diedrich showed Luis the lineup, Luis had told

them that the shooter was in the front passenger seat, yet Luis could not identify Slappy's photo in the lineup. Second, Luis focused on photo number three, mentioning similarities to the shooter,

<sup>942</sup> State Discovery Evidence Tracking Sheet in Prosecution File at 2; Receipts of Discovery in Prosecution File at 1.

<sup>943</sup> Luis Pliego-Espitia Interview 10/11/08, part 2 at 2:00:09; Minneapolis Police Department, 9-Person Sequential Lineup Shown to Luis Pliego-Espitia, Oct. 11, 2008.

<sup>944</sup> Luis Pliego-Espitia Interview 10/11/08, part 2 at 2:03:30; Minneapolis Police Department, 9-Person Sequential Lineup Shown to Luis-Pliego-Espitia, Oct. 11, 2008.

<sup>945</sup> See Tr. of Luis Pliego-Espitia Q and A Interview; MPD at 138–142, supp 54. This lineup was conducted by Sgts Gaiters and Diedrich.

<sup>946</sup> Luis Pliego-Espitia Interview 10/11/08, part 2 at 2:00:09; Minneapolis Police Department, 9-Person Sequential Lineup Shown to Luis Pliego-Espitia, Oct. 11, 2008.

specifically the eyebrows. As can be seen in this photo comparison, the person in photo number three arguably has features more similar to Arber Meko, aka Sandwich, than to Barrientos.<sup>947</sup>

Luis also was shown a six-person sequential photo lineup by Gaiters during his October 15–16 interview.<sup>948</sup> Luis paused and focused on photo number three for a long time, making several comments about the person’s facial hair and eyes. Before saying he did not recognize anyone, Luis said, when looking at photo number three, “I’m not sure, it looks kinda looks like him. . . . I think I saw him in the car.”<sup>949</sup> This information did not end up in police reports. This lineup was not entered into MPD property.<sup>950</sup> The lineup was described in Gaiters’s report as including a Vatos Locas gang member, Venom.<sup>951</sup> Gaiters wrote that Luis said none of the people he viewed were in the car.<sup>952</sup> There is no indication this lineup with Venom was disclosed to defense counsel.<sup>953</sup> Without this photo lineup, defense counsel wasted time investigating Venom and Vatos Locos as potential alternative suspects when the state had evidence that Luis did not recognize Venom when presented with a lineup.<sup>954</sup>

Prosecutors also failed to disclose photographs of alternative suspect Arber Meko, aka Sandwich, and delayed disclosing an important video of his interrogation until late April 2009, right before trial. At trial, the state sought to admit a photo of Arber Meko, even though it had never been disclosed to the defense. The prosecutor agreed it had not been disclosed but argued it was not exculpatory.<sup>955</sup> Defense counsel argued that they could have used the photo to interview the children at J.B.’s party to find out if they recognized Arber Meko as the shooter.<sup>956</sup> The court did not receive the exhibit into evidence and reserved ruling on the issue.<sup>957</sup>

One of the state’s photos of Arber Meko depicts a person matching the bald and shaven hair description. He also had the distinct eyebrows that Luis Pliego had described. The photo is

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<sup>947</sup> Compare Photo # 3 in Minneapolis Police Department, Sequential Line-up Photo Identification Report for Luis Pliego-Espitia, Oct. 20, 2008 with Photograph of Arber Meko, Prosecution File, and Booking Photo of Edgar Rene Barrientos-Quintana, Oct. 22, 2008.

<sup>948</sup> Luis Pliego-Espitia Interview 10/15/08–10/16/08, file 11 at 15:30–20:20.

<sup>949</sup> *Id.* at 17:00.

<sup>950</sup> Three photo lineups are in MPD property pertaining to Luis Pliego-Espitia. These lineups were shown to Luis on 10/12/08 (PI 2009-15558), 10/20/08 (PI 2008-41774-2) and 3/31/09 (PI 2009-10717). See MPD at 327, 354, 379.

<sup>951</sup> MPD at 140, supp. 54.

<sup>952</sup> *Id.*

<sup>953</sup> Receipts of Discovery in Prosecution File; State Discovery Evidence Tracking Sheet in Prosecution File.

<sup>954</sup> Trial Transcript at 141–43, 180.

<sup>955</sup> *Id.* at 820; Photograph of Arber Meko, Prosecution File.

<sup>956</sup> Trial Transcript at 820.

<sup>957</sup> *Id.* at 821. The court never was asked to make a final ruling and the photo in Trial Ex. 62 was not entered into evidence.

exculpatory because it potentially links Meko to the shooting. Meko's hair and eyebrows match descriptions of the shooter.<sup>958</sup> Meko lived in the house where the white Dodge Intrepid stopped just after the shooting. Law enforcement investigators thought the gun was discarded at Meko's house. The prosecutors thought Meko was likely in the car. And J.B. focused on a filler that looked like Meko in the lineup he was presented.<sup>959</sup>

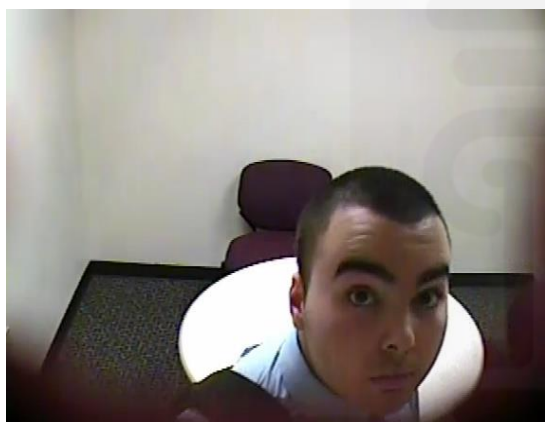


Figure 30 - Meko on November 3, 2008

Although Meko was interviewed on November 3, and the interview was recorded on video, prosecutors did not disclose the video until a few weeks before trial on April 23.<sup>960</sup> In the video, Dale and Gaiters accused Meko of being inside the drive-by vehicle. A brief police report on the interview, created on April 15, five months after the interview, did not adequately describe what occurred during that interrogation.<sup>961</sup> And even this short summary of the interview was withheld from defense

counsel until less than a month before trial. This was a violation of Minnesota's discovery rules, which require timely disclosure of such evidence before the omnibus hearing, or promptly after it is discovered.<sup>962</sup>

The video, that should have been disclosed in November 2008, shows Meko blatantly lying to Dale and Gaiters about his Sureños 13 gang ties.<sup>963</sup> After a break, Dale and Gaiters returned to aggressively confront Meko with photographs showing him with several Sureños 13 members.<sup>964</sup> Dale told Meko that a voice stress analyzer was hooked up to Meko's voice and that it showed deception.<sup>965</sup> Dale told Meko he was "almost 100 percent sure" Meko was in the car on October

<sup>958</sup> Photograph of Arber Meko, Prosecution File.

<sup>959</sup> Investigative Request from Hilary Caligiuri and Susan Crumb to Robert Dale and Christopher Gaiters, Nov. 24, 2008; Tr. of J.G. Q and A Interview 11/7/08 at 2; Minneapolis Police Department, Sequential Line-up Photo Identification Report for J.G., Nov. 7, 2008.

<sup>960</sup> MPD at 314, Property Report # 09004678; Receipt of Discovery in Prosecution File, April 23, 2009.

<sup>961</sup> MPD at 257, supp. 102.

<sup>962</sup> Minn. R. Crim. P. 9.01, subd. 1, 9.03, subd. 2; *see id.* at 9.01, subd. 1 cmt. (describing the "open file" policy of Rule 9.)

<sup>963</sup> Meko Interview 11/3/08, part 2 at 16:20 to 16:46.

<sup>964</sup> *Id.*, part 4 at 19:09.

<sup>965</sup> *Id.* at 17:10. The CRU in its review of the police and prosecutor files found no evidence that a computerized voice stress analyzer (CVSA) was used on Meko during this interview. Interrogators often use the CVSA in a ploy to elicit confessions. Leo, *Police Interrogation* at 91–93, 145–146.

11, or that he knew who was.<sup>966</sup> Dale told Meko they believed that the white Intrepid stopped right behind his garage in the alley seconds after the shooting.<sup>967</sup> Just as he had with Sharky, Dale told Meko that he could be treated as a witness or a suspect.<sup>968</sup> He presented minimization themes, saying things like Meko could have been in the wrong place at the wrong time. Dale attacked and doubted Meko's alibi—that he was home playing video games and never left his house, which was a few blocks from the shooting.<sup>969</sup> Meko's hair length on the November 3 video was shorter than Barrientos's hair on October 22 and closer to shaven bald.<sup>970</sup> Meko also had eyebrows like the witnesses had described—arched and bushy.<sup>971</sup>

Using reports from other officers, Dale confronted Meko with several prior bad acts.<sup>972</sup> Meko admitted that he was pulled over in a vehicle with Beaver and that a handgun was discovered in the car.<sup>973</sup> Dale confronted Meko with another case [REDACTED]

[REDACTED]

[REDACTED].<sup>974</sup> [REDACTED]

[REDACTED].<sup>975</sup> [REDACTED]

[REDACTED].<sup>976</sup> A few weeks after this interview, prosecutors requested that Dale and

Gaiters “take another run” at Meko because they thought he was “certainly in that car.”<sup>977</sup>

The state also failed to provide the defense with summaries of witness statements that should have been created. In the prosecutors' *First 48* memo, they described how the production crew “scripted” damaging comments for an investigator, and then directed him to read the comments, despite his reluctance to do so.<sup>978</sup> Presumably this information came from Dale or Gaiters, who were witnesses. The CRU found no witness statements from Dale or Gaiters

<sup>966</sup> Meko Interview, 11/3/08, part 4 at 33:05.

<sup>967</sup> *Id.*, part 4 at 22:15. Informing Meko of this fact tipped him off that police believed a firearm or evidence was in Meko's house. A search warrant was not executed on Meko's house until late November. Application for Search Warrant of Arber Meko's Residence and Supporting Affidavit (Nov. 24, 2008).

<sup>968</sup> *Id.*, part 4 at 21:30.

<sup>969</sup> *Id.*, part 4 at 31:35.

<sup>970</sup> *Id.*, part 7 at 9:35; see Figure 30 (screenshot of video showing Meko's hair length).

<sup>971</sup> Tr. of Fajardo Interview 10/17/08 at 11, 23; see MPD at 139, supp. 54 (reporting that Luis said the shooter had “distinct eyebrows”).

<sup>972</sup> Meko Interview, 11/3/08, part 6 at 17:45.

<sup>973</sup> *Id.*

<sup>974</sup> [REDACTED].

<sup>975</sup> [REDACTED].

<sup>976</sup> [REDACTED].

<sup>977</sup> Investigative Request from Hilary Caligiuri and Susan Crumb to Robert Dale and Christopher Gaiters, Nov. 24, 2008.

<sup>978</sup> *The First 48* memo.



disclosing this fact. The information that one investigator was playacting for a reality TV crew during their investigation was impeachment evidence for both Dale and Gaiters, and it should have been disclosed.

The cumulative effect of the undisclosed materials prejudiced Barrientos and violated his constitutional right to a fair trial and due process. The untimely disclosure of the November 3 interrogation of Arber Meko and the failure to disclose the photograph of Meko with a shaven bald head prevented the defense from fully developing Meko as an alternative perpetrator. A defendant has the right to present a meaningful defense and that includes the right to present evidence that a third party may have committed the crime for which the defendant is charged.<sup>979</sup> Before such evidence is admissible, though, a defendant must show there is an “inherent tendency to connect a person alleged to be the alternative perpetrator to the commission of the charged crime.”<sup>980</sup> The photo of Meko with a shaven bald head, Dale’s accusation that Meko was in the drive-by vehicle, and Meko’s history of being arrested near firearms in cars, all creates this tendency. Furthermore, Meko was connected to the crime by a witness who saw the white Intrepid stop in the alley near his house, heard a door quickly open and close, and saw the car drive away.

Defense counsel needed to inform the state of any third-party perpetrator defense in writing by the time of the omnibus hearing.<sup>981</sup> The time to give a notice for such a defense had long expired when the prosecutor finally disclosed Meko’s photo and interview. Defense counsel only received permission to receive the MPD Gang Strike Force records on Arber Meko by a court order on April 9, and the video of Meko’s interrogation was not handed over until April 23.<sup>982</sup> Given that the information on Meko was not disclosed until a few weeks before trial, and his photo was not disclosed at all, there was little time to fully investigate Meko as an alternative suspect.

Additionally, the state was required to disclose all photo lineups shown to Luis. Not only were they relevant, they were exculpatory. Luis told investigators and prosecutors that he saw the shooter in the front seat of the car.<sup>983</sup> But Luis passed on Slappy’s photograph showing no indication that he recognized Slappy. This evidence contradicted Sharky’s testimony that placed Slappy in the front passenger seat of the white Intrepid.

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<sup>979</sup> *State v. Jenkins*, 782 N.W.2d 211, 226 (Minn. 2010).

<sup>980</sup> *Id.*

<sup>981</sup> Minn. R. Crim. P. 9.02, subd. 1(5); *State v. Sailee*, 792 N.W.2d 90, 94 (Minn. App. 2010).

<sup>982</sup> Order, *State v. Barrientos-Quintana*, 27-CR-08-53942 (Filed April 8, 2009); Receipts of Discovery in Prosecution File.

<sup>983</sup> MPD at 139, supp. 54.

Finally, the information that investigators participated in “scripting” with *The First 48* was impeachment evidence that the defense could have used to effectively cross-examine either investigator.

In sum, the state’s failure to timely disclose this material violated Barrientos’s right to due process. It also violated the open-file policy of the Minnesota Rules of Criminal Procedure. Had the state complied, there is a reasonable probability that the result could have been different.

**F. The Prosecutors Fail to Respect Barrientos’s Constitutional Rights, Arguing That Barrientos Lost His Presumption of Innocence.**

The Minnesota Supreme Court reached only one issue on appeal in this case, the failure to provide an accomplice instruction. The Court held that the absence of the accomplice instruction was plain error. The Court’s majority found that the error did not prejudice Barrientos because the eyewitness identifications corroborated Sharky’s testimony.<sup>984</sup> One dissenting justice disagreed and would have vacated the conviction on account of the error.<sup>985</sup>

One fundamental trial error was never brought to the Court’s attention. The prosecutors in the Barrientos case told the jury in closing argument that Barrientos had lost the presumption of innocence. The state made this argument twice, like bookends to its closing.

The prosecutor first argued:

“Ladies and gentlemen, as the Judge has told you, the defendant is presumed innocent until and unless proven guilty beyond a reasonable doubt. At this point, the defendant has lost that presumption of innocence because of the evidence received over the course of this trial.”<sup>986</sup>

At the end of its closing, the state re-asserted:

“The defendant has lost his presumption of innocence, and I ask you for the only verdict that fits with the facts and the law that the defendant is guilty on all counts.”<sup>987</sup>

It is error for a prosecutor to argue a defendant has lost the presumption of innocence before the jury begins its deliberations.<sup>988</sup> “It is axiomatic that criminal defendants are presumed innocent

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<sup>984</sup> *State v. Barrientos-Quintana*, 787 N.W.2d 603, 613 (Minn. 2010).

<sup>985</sup> *Id.* at 614.

<sup>986</sup> Trial Transcript Volume 15 at 46.

<sup>987</sup> *Id.* at 89.

<sup>988</sup> *State v. Portillo*, 998 N.W.2d 242, 250 (Minn. 2023); compare *State v. Young*, 710 N.W.2d 272, 280 (Minn. 2006) (concluding that prosecutor’s argument about a defendant no longer being an innocent man appears in context to be that the state had produced sufficient evidence of defendant’s guilt to overcome the presumption of innocence and not plain error).

until proven guilty beyond a reasonable doubt.”<sup>989</sup> The Minnesota Supreme Court has addressed this issue several times. The Court has made it clear that “[t]he presumption of innocence is a fundamental component of a fair trial under our criminal justice system,” a “bedrock ‘axiomatic and elementary’ principle whose ‘enforcement lies at the foundation of the administration of our criminal law.’”<sup>990</sup> Only “[o]nce a defendant has been afforded a fair trial and convicted of the offense for which he was charged” does the presumption disappear.<sup>991</sup>

In applying this principle, the Court has danced around it, finding error in the same argument the prosecutors made in Barrientos’s closing, but often finding that the error did not rise to “plain” error. Despite this, the Court has never condoned prosecutors making an argument that a defendant no longer enjoys a presumption of innocence. In fact, the Court has repeatedly cautioned prosecutors that arguments like this are “clearly improper.”<sup>992</sup> The Court has warned that prosecutors risk reversal in making such an argument.<sup>993</sup> In 2023, the Court acted on its warnings. The Court reversed a criminal sexual conduct conviction concluding that a prosecutor committed misconduct in arguing that a defendant lost the presumption of innocence. In that case, like here, the prosecutor argued to the jury that the state produced enough evidence to carry its burden of proof, hence the defendant lost the presumption of innocence.<sup>994</sup>

It is true, under the caselaw in effect in 2009, the state may have won this issue on appeal if raised by the defense.<sup>995</sup> However, if the prosecutors in Barrientos’s case had made the same argument in a murder trial today, the Court would likely overturn the conviction. The prosecution’s argument that Barrientos lost his presumption of innocence, along with the trial court’s failure to provide the jury with an accomplice instruction, further undermines the confidence in Barrientos’s conviction and the fairness of his trial.

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<sup>989</sup> *Portillo*, 998 N.W.2d at 248–49.

<sup>990</sup> *State v. Peterson*, 673 N.W.2d 482, 486 (Minn. 2004) (quoting *In Re Winship*, 397 U.S. 358, 363 (1970)).

<sup>991</sup> *Portillo*, 998 N.W.2d at 251 (quoting *Herrera v. Collins*, 506 U.S. 390, 399 (1993)).

<sup>992</sup> *State v. Jensen*, 242 N.W.2d 109, 111 (Minn. 1976); *State v. Thomas*, 239 N.W.2d 455, 457 (Minn. 1976) (noting that the Mississippi State Supreme Court also found similar arguments improper in *Keith v. State*, 197 So.2d 480 (Miss. 1967)); *State v. Vue*, 797 N.W.2d 5, 14 (Minn. 2011).

<sup>993</sup> *State v. Bohlsen*, 526 N.W.2d 49, 50 (Minn. 1994) (“Prosecutors who use an argument such as this with respect to the presumption of innocence in the future will risk reversal in the interests of justice.”); *Vue*, 797 N.W.2d at 14; *State v. Jensen*, 242 N.W.2d at 111.

<sup>994</sup> *Portillo*, 998 N.W.2d at 249.

<sup>995</sup> *See Young*, 710 N.W.2d at 280.

**G. *The First 48* Airs its Episode Less Than a Month Before Trial and Skews the Facts in Favor of the State.**

The presence of the reality TV show, *The First 48*, interfered with the fair administration of justice. *The First 48* is a popular reality cable TV show that follows homicide detectives in American cities during the first hours of their investigations. The show rests on a premise that if police do not develop solid leads within the first 48 hours, the case will go cold. *The First 48* filmed several episodes in Minneapolis in 2008–2009. Jesse Mickelson’s murder was featured in an episode that aired April 16, 2009, about one month before Barrientos’s trial.

*The First 48* has created controversy in other criminal cases. In Miami, Florida, 2009, the show aired an episode in which police falsely accused one man of a double homicide that he was later cleared of. In that episode police said that they had “strong” circumstantial evidence showing guilt. The suspect spent 19 months in jail before the charges were dismissed. The cleared suspect was later awarded \$850,000 for a wrongful arrest civil suit against the City of Miami and the show was prominently featured in the lawsuit.<sup>996</sup> In another Florida homicide case, a detective admitted to playacting scenes for the show, and the trial judge ruled that prosecutors could not show the jury a heavily redacted version of an interrogation which aired on the show.<sup>997</sup> In Detroit, Michigan, 2010, a 7-year-old African American girl was shot and killed in a police raid that was filmed by *The First 48*.<sup>998</sup> Police unnecessarily sent the SWAT team to raid a suspect’s apartment. The team raided the wrong apartment, which was unlocked, entered the residence by using a flashbang, and shot and killed the unarmed 7-year-old.<sup>999</sup> The raid seemed manufactured for good television.<sup>1000</sup> One producer on the show lied to prosecutors about the video footage she shot of the raid and was convicted of obstructing justice in 2013.<sup>1001</sup>

<sup>996</sup> David Ovalle, *Miami Man Awarded \$850,000 in Wrongful Arrest Case Involving ‘The First 48’ Show*, Miami Herald, May 29, 2019, available at <https://www.miamiherald.com/news/local/community/miami-dade/article24604327.html#storylink=cpy>.

<sup>997</sup> Appellee’s Answer Brief at 17, 35, *State v. Cummings*, 159 So. 3d 865 (Fla. Dist. Ct. App. 2015), 2013 WL 12219504; David Ovalle, *Appeals Court, Citing ‘The First 48’ Reality Cop Show Footage, Puts Miami Murder Case in Doubt*, Miami Herald, Feb. 5, 2015, available at <https://www.miamiherald.com/news/local/community/miami-dade/article9225473.html#storylink=cpy>.

<sup>998</sup> Mary M. Chapman and Susan Saulny, *A Tragedy in Detroit, With a Reality TV Crew in Tow*, New York Times, A8, May 22, 2010.

<sup>999</sup> See Charlie Leduff, *What Killed Aiyana Stanley-Jones?*, Mother Jones, Nov.–Dec. 2010 Issue, available at <https://www.motherjones.com/politics/2010/09/ayiana-stanley-jones-detroit/>

<sup>1000</sup> *Id.*

<sup>1001</sup> Gus Burns, MLive, *A&E ‘The First 48’ Producer Who Filmed Aiyana Jones Shooting Admits to Obstructing Justice*, June 20, 2013, available at [https://www.mlive.com/news/detroit/2013/06/ae\\_the\\_first\\_48\\_producer\\_who\\_f.html](https://www.mlive.com/news/detroit/2013/06/ae_the_first_48_producer_who_f.html).

*The First 48*'s presence in this case influenced the prosecutors' trial strategy. After securing a conviction against Barrientos, the prosecutors sent a memo to the leadership at the Hennepin County Attorney's Office. The memo outlined their concerns about *The First 48*'s airing of the show before trial. The memo noted that the show's production staff scripted lines for Sgt Dale to say on camera during the filming of the episode.<sup>1002</sup> Additionally, prosecutors determined that "the order of occurrences during the investigation was edited to make it appear that certain portions of the investigation happened in an order that they did not."<sup>1003</sup> Prosecutors wrote that, given the "scripting" and "editing," they could not call Dale to testify "in hopes of avoiding cross-examination that would have been damaging to our case."<sup>1004</sup> The memo suggested that in the future, episodes filmed by *The First 48* should not be aired before the suspect's trial.

Dale was a lead investigator in Jesse's murder and was the most active participant during the witness interviews. He presented the photo lineups to almost every witness. Several crucial police reports bear only his name, and at times he was the only investigator questioning a witness. In deliberations, the jury would have been better served had it heard Dale's testimony on direct, and had it observed the defense effectively cross-examining him. The jury was not allowed to hear from a crucial witness, in part, because of *The First 48*'s interference during the investigation.

Prosecutors also indicated that because the episode aired before trial, Aron Bell-Bey's in-court identification of the defendant was "tainted" because "he had seen a significant portion of *The First 48* episode, including the Defendant being arrested and interviewed."<sup>1005</sup> Notes indicate that William Fajardo also was aware Barrientos was featured on the show.<sup>1006</sup> This may explain the reason why prosecutors never asked Aron or William to identify the shooter in court.

The production crew of *The First 48* created evidence by filming the investigation in the hours after Jesse's death, and that evidence was never provided to the defense. The production team was at the crime scene the night of the murder and was on scene before the medical examiner.<sup>1007</sup> It recorded an interview with one person from the victim's family giving a statement to police.<sup>1008</sup> In one portion of the aired episode, investigators examined security videos from Flag

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<sup>1002</sup> *The First 48* memo. Dale, who appeared in at least six episodes of the show during his career, willingly engaged in this playacting for the camera. *Id.*; CRU Interview with Sgt Robert Dale, September 23, 2023.

<sup>1003</sup> *The First 48* memo.

<sup>1004</sup> *Id.*

<sup>1005</sup> Hilary Caligiuri and Susan Crumb, Summary of Witness Meeting with Aron Bell-Bey, May 5, 2009.

<sup>1006</sup> Hilary Caligiuri and Susan Crumb, Summary of Witness Meeting with William Fajardo, May 8, 2009.

<sup>1007</sup> Minneapolis Police Department, Crime Scene Entry Log, Oct. 11, 2008.

<sup>1008</sup> *The First 48*, Up in Flames/Drive By (aired April 16, 2009) at 10:15.

Foods, the convenience store where the white Intrepid exited the alley after the shooting. *The First 48* blurred out the timestamps on the security footage.<sup>1009</sup> Additionally, officers likely had discussions with the store owner about the timing of the videos being off by several minutes.<sup>1010</sup> These crucial facts related to the timing of the murder were highly relevant and contested, and the timestamps on the video, along with the discussions with the owner may have been filmed.<sup>1011</sup> This evidence was central to Barrientos's alibi, and it would have been critical for building a defense.

Prosecutors also confirmed that *The First 48* destroyed the raw footage after airing the piece, and they noted in an internal memo that this created the potential that the state “could have been deemed to have destroyed evidence.”<sup>1012</sup> What is clear from the prosecutors' memo is that *The First 48* scripted an investigation that did not reflect the actual investigation. The show scripted lines for the lead detective to say on TV. The show created evidence during the investigation and then destroyed it without allowing Barrientos to inspect it. Defense counsel should have been provided with this evidence before trial.

Finally, *The First 48* contributed to the investigators' tunnel vision. The show filmed Dale and Gaiters visiting Jesse's family and telling them they had made an arrest, implying the case was solved.<sup>1013</sup> Once this footage was recorded and was set to air before trial, it would have been incredibly difficult for investigators to return to the family and the show producers, after they received the exculpatory Cub Foods video, to report they may have the wrong person. Instead, consistent with the research on confirmation bias and tunnel vision, investigators sought out and interpreted information in a way that validated their original hypothesis.<sup>1014</sup> Locked into their own version of events, which had been recorded for a TV show, investigators ignored and downplayed the fact Barrientos was not bald. They pressured Sharky to implicate Barrientos in early March 2009. In April 2009 they conducted test drives from the Cub Foods to Minneapolis in a manner that ignored Sharky's timeline.

*The First 48*'s presence in this case hindered the fair administration of justice, and the show contributed to Barrientos's wrongful conviction.

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<sup>1009</sup> *Id.* at 14:00–15:00.

<sup>1010</sup> See Trial Transcript at 740-41.

<sup>1011</sup> *Id.*; see *The First 48*, Up in Flames/Drive By (aired April 16, 2009) at 14:00-15:00.

<sup>1012</sup> *The First 48* memo.

<sup>1013</sup> *The First 48*, Up in Flames/Drive By (aired April 16, 2009) at 35:40.

<sup>1014</sup> See Part III.A, see also Findley, “Tunnel Vision.”

## H. The Trial Prosecutor Raises Other Evidence of Barrientos's Guilt.

In an interview with the CRU, one of the trial prosecutors<sup>1015</sup> cited the following evidence as clearly indicating Barrientos's guilt: (1) jailhouse informants' allegations that Barrientos confessed to the crime, and (2) alleged comments Itzel made to Barrientos's brother Carlos asking if he thought Barrientos committed the crime.<sup>1016</sup> The CRU found this evidence unpersuasive.

### 1. Jailhouse informants give accounts of a confession, but they do not testify at trial.

The prosecutor alleged that Barrientos confessed to two different people, and these confessions were convincing evidence of Barrientos's guilt. Even though these witnesses did not testify at trial, the CRU investigated the alleged confessions because the prosecutor found them convincing.

The allegation that Barrientos confessed to Jesse Mickelson's murder came from two jailhouse informants, Rashad Russell and Robert Batchelor. Jail housing logs show that Russell and Batchelor were housed with Barrientos for a short time in late 2008, before Barrientos was moved to a different area of the jail.<sup>1017</sup>

Rashad Russell gave two statements. In November 2008, he reached out to police through his girlfriend saying he had information on some cases.<sup>1018</sup> When the interview began, Russell was immediately clear that he wanted to be released from custody.<sup>1019</sup> He first gave police information on a gun-store robbery involving Somali defendants.<sup>1020</sup> He said that Somalis do not guard their

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<sup>1015</sup> Prosecutor Susan Crumb met twice with the CRU, in April 2023 and November 2023.

<sup>1016</sup> Prosecutor Susan Crumb also stated that the issues of the hair length and the alibi were fully litigated at trial, and she credited Sharky's testimony. Notes on CRU Interview with Susan Crumb, May 31, 2023, at 7; CRU Interview with Prosecutor Crumb on Nov. 17, 2023, at 28:20 (hair length) and 1:29:00 (alibi). As described above in Parts IV.A and IV.B, the CRU does not agree that hair length and alibi were fully litigated. The jury and courts did not receive all the relevant facts due the conduct of the prosecutors and defense, and several of the state's representations regarding each topic were inconsistent with the evidence. Additionally, the CRU explained in Part IV.C that Sharky's testimony is highly suspect. Again, the jury did not receive all the relevant facts regarding Sharky due to the conduct of both parties.

<sup>1017</sup> Hennepin County Jail Inmate Housing History for Barrientos-Quintana, Russell, & Batchelor, March 25, 2009.

<sup>1018</sup> Interview by Sgt. J. Harvey with Rashad Russell, November 28, 2008 at 0:00–1:45 [hereinafter Russell Interview 11/28/08].

<sup>1019</sup> *Id.* at 1:20, 03:24.

<sup>1020</sup> *Id.* at 1:20.

paperwork like others trying to prevent people from “jumping” on their case, and he was able to get their names by looking through the paperwork.<sup>1021</sup>

Once he had informed on the Somali defendant, Russell shifted to Barrientos. Russell gave police details that he could have read in the newspaper or in Barrientos’s complaint. He said Barrientos admitted to shooting Jesse in a driveway by a backyard alley at a party.<sup>1022</sup> At that time, the news media had already printed detailed information about the offense from the criminal complaint, showed a picture of Barrientos, referred to him as “Smokey,” and noted that Jesse was not the intended target.<sup>1023</sup> Notably, Russell was incorrect on details not in the media. For instance, he incorrectly said, per Barrientos, that Jesse was killed because he was part of the Latin Kings gang.<sup>1024</sup>

Russell gave a second statement to Sgts Dale and Gaiters in February 2009. It was even less accurate. According to Russell, Barrientos claimed the shooting was because of “money and guns” and because of a dispute with the Latin Kings. Russell claimed Barrientos said that he had initially pulled up to the front of Puppet’s house, and that when no one was there, he decided to go in the back after hearing loud music.<sup>1025</sup>

Despite providing details that were not true, Russell was given a plea deal. According to case records, Russell had been in custody since September of 2008 on an aggravated robbery case after his conditional release was revoked.<sup>1026</sup> Russell also had a second pending aggravated robbery case involving a dangerous weapon.<sup>1027</sup> Russell and his attorney signed a deal with the Hennepin County Attorney’s Office cutting his sentence on both aggravated robbery cases to 60 months, a downward sentencing departure, in return for his cooperation in the Barrientos case.<sup>1028</sup> Even though he pleaded guilty to violent offenses with presumptive prison time, and even though

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<sup>1021</sup> *Id.* at 2:50.

<sup>1022</sup> *Id.* at 19:00.

<sup>1023</sup> Paul Walsh, *Suspected Gang Member Charged in Fatal Shooting of Minneapolis Teen*, Star Tribune, October 29, 2008 at B2; *see also Teen Shot and Killed at Home at South Minneapolis Home*, Star Tribune, October 12, 2008 at B1; Maria Elena Baca, *18-year-old Killed in Alley Drive-by Was Shot in the Heart*, Star Tribune, October 14, 2008, at B1, B4.

<sup>1024</sup> Russell Interview 11/28/08 at 20:00.

<sup>1025</sup> Transcript of Interview by Robert Dale and Christopher Gaiters with Rashad Russell, Feb. 10, 2009 at 1.

<sup>1026</sup> Register of Actions, *State v. Russell*, 27-CR-08-10484.

<sup>1027</sup> Register of Actions, *State v. Russell*, 27-CR-08-42887.

<sup>1028</sup> Letter from Charles Weber to Robert M. Paule, March 26, 2009.



he never testified against Barrientos, it appears Russell was allowed release from custody, pursuant to these terms, and he received the downward departure.<sup>1029</sup>

The second informant, Robert Batchelor, was in custody in the fall of 2008, accused of a violent offense and of an unlawful firearm possession.<sup>1030</sup> [REDACTED]

[REDACTED] and the information Batchelor gave to police was worse than no good. He told Dale and Gaiters that Barrientos admitted to shooting Jesse and said that he rolled through an alley and shot at some Latin Kings.<sup>1032</sup> He said there was a party in the back and that he did not mean to shoot “the little kid,” referring to Jesse.<sup>1033</sup> Batchelor said that Latin Kings did something to Barrientos earlier causing him to want to get revenge.<sup>1034</sup> According to Batchelor, Barrientos said he thought he was going to “get away with it,” however he made a mistake of telling his friend. Batchelor said that Barrientos said his friend “turned him in” and told the police what Barrientos told him.<sup>1035</sup> All of this information was obviously false.

Batchelor also said that Barrientos admitted to inadvertently killing the “little boy” with a stray bullet through a brown wooden fence.<sup>1036</sup>

I recall he said something about I guess one of the bullets or something *must have went through a fence out there*. It was like a fence or something out there. *I guess that is where the little kid got hit*. He was saying there was like a fence out there like one of those brown wooden fence.<sup>1037</sup>

In one crime scene photo, a tall wooden fence is pictured in the far background dividing Puppet’s house with a neighbor.<sup>1038</sup> However, Jesse was not near that fence when he was shot; he was in a driveway. Jesse, of course, was not a “little kid,” and he was not killed by a stray bullet going

<sup>1029</sup> See Transcript of Interview by Robert Dale and Christopher Gaiters with Rashad Russell, Feb. 10, 2009 at 1; Register of Actions, *State v. Russell*, 27-CR-08-1048; Letter from Charles Weber to Robert M. Paule, March 26, 2009.

<sup>1030</sup> See Register of Actions, *State v. Robert Batchelor*, 27-CR-08-31169; Register of Actions, *State v. Robert Batchelor*, 27-CR-08-22265.

<sup>1031</sup> [REDACTED].

<sup>1032</sup> Interview by Robert Dale and Christopher Gaiters with Robert Batchelor, Dec. 22, 2008 at 2:00 [hereinafter Batchelor Interview 12/22/08]; Transcript of Q and A Interview by Robert Dale and Christopher Gaiters with Robert Batchelor, Dec. 22, 2008 at 1–2 [hereinafter Tr. of Batchelor Q and A Interview 12/22/08].

<sup>1033</sup> Tr. of Batchelor Q and A Interview 12/22/08 at 1.

<sup>1034</sup> *Id.* at 2.

<sup>1035</sup> *Id.*

<sup>1036</sup> *Id.* at 3.

<sup>1037</sup> *Id.*

<sup>1038</sup> See “MX-C401\_20090423\_102017” in Disc titled Exhibit A/Photos -Crime Scene in Prosecution File.

through a fence, as the informant stated. The information conflicted with the real events and is not credible.

Batchelor also was given a benefit for his promise to testify. Even though he pleaded guilty to a violent assault involving biting off a portion of a victim's eyelid and a prohibited gun possession, he was allowed to be released from custody pending sentencing and promised a 100-month reduction in his sentence.<sup>1039</sup> Batchelor failed to show up to sentencing.<sup>1040</sup>

The CRU found Russell and Batchelor's statements highly questionable. Both witnesses were looking for a benefit for their testimony. Both received incentives—less prison time and release from custody before sentencing. The details that the informants said Barrientos provided about the shooting were either publicly available, inaccurate, or concocted. Russell and Batchelor were housed close to each other in the same jail area for several weeks and would have had time to coordinate.<sup>1041</sup> Russell indicated in his first interview that he was surreptitiously reading inmates' papers.<sup>1042</sup> It seems Russell took notes from these papers, which he gave to the officers. In his notes, Russell referred to the victim in Barrientos's case as "Jesse Leon Omar Mickelson," an indication that Russell was reading Barrientos's papers too. Although this was Jesse's full name, a perpetrator would not likely have used the victim's full name when describing the crime.<sup>1043</sup>

Prosecutors made the correct decision to not call these witnesses. But the fact that they pursued these witnesses and rewarded them with sentencing deals and releases from custody demonstrates they felt their case was weak and that they needed these witnesses. Once Sharky changed his account, the jailhouse informants became a liability rather than a necessity. In sum, the jailhouse informants' statements are not evidence of Barrientos's guilt.

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<sup>1039</sup> See Respondent's Brief at 4–5, *State v. Batchelor*, 786 N.W.2d 319 (Minn. App. 2010), 2010 WL 3423884.

<sup>1040</sup> *Batchelor*, 786 N.W.2d at 321.

<sup>1041</sup> Note from Rashad Russell, Nov. 28, 2008.

<sup>1042</sup> Russell Interview 11/28/08 at 02:55–03:30.

<sup>1043</sup> Note from Rashad Russell, Nov. 28, 2008; see, e.g., *Maxwell v. Roe*, 628 F.3d 486, 502, 505 (9th Cir. 2010) (describing jailhouse informant methodology gaining "physical proximity to a high-profile defendant [and] get[ting] information about the case from the media, usually a newspaper"); Valerie Alter, *Jailhouse Informants: A Lesson in E-Snitching*, 10 J. Tech. L. & Pol'y 223, 225 (2005) ("[B]y reading newspapers in the prison library, informants keep up-to-date on criminal investigations and then use the information they obtain to claim credibly that a cellmate, or another inmate housed in the same prison, confessed to the crime.").

## 2. Prosecutors see a comment Itzel made to Barrientos's brother as highly incriminating.

The trial prosecutor also stressed that an alleged comment Itzel made to Barrientos's brother Carlos was strong evidence of Barrientos's guilt.<sup>1044</sup> When Carlos testified that he did not remember talking to Itzel about the offense, the prosecution was able to introduce a statement Carlos made to investigators about Itzel.<sup>1045</sup> More than three months after Barrientos had been arrested, Carlos was interviewed. He told investigators that Itzel "tried to ask me . . . what I think about if [Barrientos] did [it] or not and I'm like I don't know. I am just wait[ing] to see what people find."<sup>1046</sup> When cross-examined, Itzel denied that she asked Carlos whether he thought Barrientos "did it."<sup>1047</sup> The prosecutor used this alleged statement from Itzel, and Carlos's reaction, to counter Barrientos's alibi. At trial, the state argued, based on this alleged comment: "So these are two of the people that supposedly are accounting for Edgar Barrientos's whereabouts over this period of time. They don't sound like people who are sure about those whereabouts."<sup>1048</sup>

In an interview with the CRU, Itzel denied that she asked Carlos if his brother "did it" in the manner the state suggested. She explained that it would not make sense for her to ask Carlos this question because she knew she was with Barrientos that day.<sup>1049</sup> Itzel explained that if she made any comment like this it was in the context of trying to discover whether Carlos had any doubt about Barrientos's innocence. Because Itzel and Barrientos left Carlos's house to return to Maplewood, Carlos may have had doubts about whether Itzel and Barrientos were telling the truth.<sup>1050</sup> So, according to Itzel's explanation, the question to Carlos may have been posed, "Do *you* think he did it?" rather than, "Do you think *he* did it?"

The jail phone calls between Barrientos and Itzel corroborate Itzel's account. The calls indicate that Itzel and her mom, Marcia, initially mixed up the events of Sunday, October 12, with October 11.<sup>1051</sup> Once they remembered October 11, neither Itzel nor Barrientos waived. They both held fast to their claim that they did not separate that day after they were at Cub Foods near

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<sup>1044</sup> CRU Interview with Susan Crumb, Nov. 17, 2023, at 1:35:38.

<sup>1045</sup> Trial Transcript at 1488.

<sup>1046</sup> Transcript of Q and A Interview by Robert Dale and Christopher Gaiters of Carlos Barrientos, Jan. 29, 2009 at 8–9.

<sup>1047</sup> Trial Transcript at 1535.

<sup>1048</sup> Trial Transcript Volume 15 at 70.

<sup>1049</sup> CRU Interview with Itzel Chavarria-Cruz, Jan. 16, 2024, part 2, at 36:29.

<sup>1050</sup> *Id.* at 44:55.

<sup>1051</sup> Barrientos Call from Hennepin County Jail at 16:31 on Oct. 25, 2008 (12249703373202950604) at 1:24.

the time of the murder.<sup>1052</sup> The jail calls show that Itzel and Barrientos remembered that they were at Cub Foods getting limes, and that they went back to Itzel's home after Cub Foods.<sup>1053</sup> Itzel and Barrientos remembered during those calls that they needed to avoid Itzel's father that evening, that they were home by 7:20pm when Ricardo called to report their father was returning, and that Itzel and Barrientos went outside, then to the liquor store to avoid him.

Additionally, on one jail call, Itzel and Barrientos discussed that Itzel's mother, Marcia, questioned why and whether Itzel went to Minneapolis the day of the murder.<sup>1054</sup> Barrientos was worried that Marcia did not believe them when they said they were not in Minneapolis at the time of the shooting.<sup>1055</sup> Itzel and Barrientos's anxiety about their family not believing them is consistent with Itzel asking Carlos if he thought Barrientos did it. It makes sense that she was asking this, not to know the actual answer, but to see whether Carlos believed Barrientos's alibi.

In sum, the CRU does not believe that Itzel's question to Carlos, if it even was posed, is evidence of his guilt. And it certainly would not outweigh other evidence clearly indicating innocence.

## V. CONCLUSION

The CRU conducted an extensive investigation in Edgar Barrientos-Quintana's case, and the CRU has concluded that he was wrongly convicted of first-degree murder. The evidence supports his claim that he was not at the scene of the crime and that he did not shoot Jesse Mickelson. Barrientos immediately offered an alibi, but investigators ignored it and continued to build a case with evidence from unreliable juvenile witnesses, using coercive interviewing techniques. Evidence used against Barrientos was, in many instances, provided to these motivated juvenile witnesses by investigators through leading questions and corrections. Evidence against alternative perpetrators was not fully pursued. Instead of dismissing the case, as evidence of Barrientos's innocence began to mount, prosecutors presented the evidence in a way that was not consistent with facts gathered early in the investigation, including the shooter's appearance,

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<sup>1052</sup> Barrientos Call from Hennepin County Jail at 17:24 on Oct. 26, 2008 (12250599126122754920) at 14:32; Barrientos Call from Hennepin County Jail at 17:39 on Oct. 28, 2008 (12252336166122754920); Barrientos Call from Hennepin County Jail at 14:35 on Oct. 29, 2008 (12253089866122754920) at 6:40; Barrientos Call from Hennepin County Jail at 19:39 on Nov. 3, 2008 (12257628156122754920) at 3:10; Barrientos Call from Hennepin County Jail at 16:22 on Nov. 12, 2008 (12265285746122754920) at 11:42.

<sup>1053</sup> Barrientos Call from Hennepin County Jail at 17:24 on Oct. 26, 2008 (12250599126122754920) at 14:32.

<sup>1054</sup> *Id.* at 11:55–13:30.

<sup>1055</sup> *Id.*

witnesses' early accounts indicating the accomplice was the shooter, and the fact one witness who saw the shooter identified a filler rather than Barrientos when presented with a photo lineup. The state also presented the photo lineups as if MPD followed best practice protocols when the record shows they did not. In addition, defense counsel failed to subject the state's case to true adversarial testing. As a result, the courts and the jury did not have an accurate picture of what occurred.

In conclusion, the evidence convincingly establishes Barrientos' innocence, and the evidence that he committed this crime is implausible. Considering the entirety of the evidence the CRU reviewed, Barrientos could not be found guilty, beyond a reasonable doubt, of any crime related to the murder of Jesse Mickelson. Therefore, the CRU recommends that his conviction be vacated and the charges dismissed.

The CRU understands this decision will leave an impact on Jesse Mickelson's family. Jesse's family lost him when he was just a senior in high school. Jesse was known for being quiet, reserved, and easygoing. He was a talented and aspiring young musician and a leader amongst his peers, all qualities that made him beloved by his friends and family. The CRU acknowledges the pain and suffering Jesse's family and friends most certainly have endured. The decision to vacate this conviction is made with careful consideration of both the need for justice and the rights of the accused, to ensure the integrity of our legal process while being sensitive to the experiences of those who knew, loved, and lost Jesse Mickelson.