

MARTIN, Circuit Judge, concurring, in which J. PRYOR, Circuit Judge, joins.

The majority holds that Mr. Alfred's application is barred by In re Baptiste, 828 F.3d 1337 (11th Cir. 2016), which held that "the federal habeas statute requires us to dismiss a claim that has been presented in a prior application" to file a § 2255 motion. Id. at 1339. I have stated my view that Baptiste has no basis in the text of the habeas statute:

Baptiste was construing 28 U.S.C. § 2244(b)(1), which says any "claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed." Of course, [] § 2255 motions . . . are filed by federal prisoners [and] § 2255 motions are certainly not brought "under section 2254," which governs petitions filed by state prisoners. But the Baptiste panel ruled that even though § 2244(b)(1) does not mention § 2255 motions, it applies to them anyway, since "it would be odd [] if Congress had intended to allow federal prisoners" to do something state prisoners can't do.

In re Clayton, 829 F.2d 1254, 1266 (11th Cir. 2016) (Martin, J., concurring). And

Baptiste is inconsistent with the statute in a second way. The text of the habeas statute shows that it requires courts to dismiss only claims that were already presented in an actual § 2255 motion, as opposed to a mere request for certification of a successive § 2255 motion. Both § 2244 and § 2254 distinguish between "applications" (which are the § 2254 petitions and § 2255 motions filed in district courts) and "motions" (which are the earlier request for certification filed in a court of appeals). Baptiste assumes that "motion" and "application" mean the same thing, even though Congress carefully distinguished the two. When Congress uses different words in this way, courts must presume those words mean different things.

In re Anderson, 829 F.3d 1290, 1296 (11th Cir. 2016) (Martin, J., dissenting). My colleagues have articulated other problems with Baptiste. See In re Jones, 830 F.3d 1295, 1297 (11th Cir. 2016) (Rosenbaum and Jill Pryor, J.J., concurring).

I am concerned that Baptiste is blocking relief to prisoners who ask us to take a second look at their case after we got it wrong the first time. Nevertheless Baptiste is binding precedent

in this Circuit, so Mr. Alfred will not be allowed to present his case to a District Court for an examination of whether his sentence is legal.

Ex. 2

Q: Are you positive that Peter did not have a gun with him?

A: I'm positive.

Q: How are you so sure?

A: I am sure Peter didn't have a gun on him.

Q: Did you see Larry standing on 35TH Street.

A: No.

Q: So you didn't, you weren't sure that they were out there?

A: (Inaudible.)

Q: You were out when the gun shots happen, right?

A: Yes ma'am.

Q: How many shots did you hear?

A: Five.

Q: Okay, when you heard the shot what did you do?

A: I just got up and started walking, like towards the gas station, 'cause I was on the bus stop. But at the moment I heard Tina coming from around the corner, "They shot him, they shot him, Peter is laying on the sidewalk."

Q: Did, did Tina tell you who shot him?

A: No, she sure didn't.

Q: Did she say Larry shot him, Larry shot him?

A: Nope.

Q: Okay, do you know of any kind (inaudible) between Larry and Peter.

A: No ma'am.

Q: Did they ever have any problem before?

A: No ma'am.

Q: Do you know why Larry shot him?

A: Do I know why Larry shot him?

Q: Yes.

A: Over the argument at the gas station.

Q: Are you positive that Peter did not have a gun with him?

A: I'm positive.

Q: How are you so sure?

A: I am sure Peter didn't have a gun on him.

Q: Did you see Larry standing on 35TH Street.

A: No.

Q: So you didn't, you weren't sure that they were out there?

A: (Inaudible.)

Q: You were out when the gun shots happen, right?

A: Yes ma'am.

Q: How many shots did you hear?

A: Five.

Q: Okay, when you heard the shot what did you do?

A: I just got up and started walking, like towards the gas station, 'cause I was on the bus stop. But at the moment I heard Tina coming from around the corner, "They shot him, they shot him, Peter is laying on the sidewalk!"

Q: Did, did Tina tell you who shot him?

A: No, she sure didn't.

Q: Did she say Larry shot him, Larry shot him?

A: Nope.

Q: Okay, do you know of any kind (inaudible) between Larry and Peter.

A: No ma'am.

Q: Did they ever have any problem before?

A: No ma'am.

Q: Do you know why Larry shot him?

A: Do I know why Larry shot him?

Q: Yes.

A: Over the argument at the gas station.

Q: There no, nothing else to?

A: No ma'am.

Q: That simple.

A: That's it.

Q: What was Larry trying to buy at the gas station?

A: A Minute Maid.

Q: Juice?

A: Juice.

Q: Orange juice.

A: Yeah, yeah orange Minute Maid.

Q: Okay, is there anything else this case, that I haven't ask you that you want to add to your statement?

A: (Inaudible) can give you more information.

Q: Okay.

A: (Inaudible.)

Q: (Inaudible.)

A: A white, white Chevrolet, it says for sale on the back window, back windshield written in pink. After we finish with this we can ride by his house and I can show you.

Q: Did you see Larry run by after the shooting?

A: Yes.

Q: Which way, direction did he run?

A: He ran toward 34TH, and 34TH Terrace and 1ST, 'cause he rode, he ran right by my brother's house. That's where he took his shirt off and threw it on the ground. Which it might still be on the sidewalk over there.

Q: What kind of shirt was it?

A: A white tee shirt. Like the this one, like the one I have (inaudible).

Q: Did you see him with a gun?

A: No.

Q: You didn't?

A: Uh-huh.

Q: Was he alone?

A: Yes.

Q: Did you see any of the boys run by, after the shooting happen?

A: No, I seen them walk by.

Q: Okay, walk by. Who?

A: Uh, I was at, see I was sitting at the bus stop on 2ND, they were on 3RD, I couldn't tell you who they were.

Q: (Inaudible.)

A: It was four of them.

Q: Were they black or white?

A: One was white, which I know for a fact it was Felix, and the other three was black.

Q: Where did they go?

A: Towards 37TH and 1ST, 37TH and third.

Q: Okay, anything else then?

A: No, no.

Q: It's Saturday October 10, 1998 and 16:05 hours (inaudible).

## CERTIFICATE

I hereby certify that the foregoing pages, having been transcribed [and translated] to the best of my ability, constitute a true and correct transcription [and translation] of the tape provided to me.

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INFORMATION PROCESSING OPERATOR  
STATE ATTORNEY'S OFFICE  
ELEVENTH JUDICIAL CIRCUIT

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## TRANSCRIPTION

KEY:

Q: DETECTIVE CARTER

A: CARMEN FONT RIVERA

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TODAY IS UM SATURDAY, OCTOBER THE 10TH, 1998, UH, AND IT'S 14:52 HOURS. I'M DETECTIVE CARTER, PRESENT WITH ME IN THE CITY MIAMI HOMICIDE OFFICE IS CARMEN FONT RIVERA. WE'RE GONNA TAKE A STATEMENT, IN REFERENCE TO A HOMICIDE THAT OCCURRED ON TODAY DATE OCTOBER 10, 1998, APPROXIMATELY 5:34 IN THE MORNING. UM, IN THE SIDEWALK IN FRONT OF 338 NORTHWEST 35 STREET. IT IS IN REFERENCE TO CASE NUMBER 2831232X-XRAY.

Q: Carmen would you raise your right hand please? Do you solemnly swear from the statement you are about to give will be the truth, the whole truth and nothing but the truth, so help you God.

A: Yes.

Q: Thank you. State your complete name.

A: Carmen Rivera, Carmen Font Rivera.

Q: Okay, can you spell Font and Rivera for me?

A: F-o-n-t is Font, Rivera R-i-v-e-r-a.

Q: What's your birthday?

A: . . . . .

Q: Where do you live at?

A: 160 Northwest 31 Street.

Q: That's 1-6-0, right?

A: 1-6-0.

Q: Okay, do you have a phone there?

A: . . . . .

Q: Do you know your social security number?

A: . . . . .



Q: Okay, do you work?

A: No ma'am.

Q: Were you out last night?

A: Yeah ma'am.

Q: In what area?

A: I was at the gas station on Northwest 2ND and 36TH Street.

Q: About what time?

A: Um, I got there let's say about 2 in the morning.

Q: How long did you stay there?

A: I was there till the incident with Pedro Delgado happen.

Q: Okay, how long was that?

A: Um, that happened at about 4:00-4:30 in the morning.

Q: Okay, what were you doing at the gas station?

A: I was just hanging out.

Q: Who else do you remember being there?

A: Um, me, um Claudia, um there was a whole bunch of other people, but precisely it was just Claudia and I.

Q: You two were together?

A: Yes we were standing there.

Q: Okay, was Claudia there when Peter walked up?

A: No, Claudia had left.

Q: Okay, who was there when, when uh Peter walked up?

A: Peter walked up with Tina and Mike. I myself was there, um there was a whole bunch of other people.

Q: Who is Mike?

A: Mike is Peter's best friend.

Q: Is he white or black?

A: White.

Q: Do you know his last name?

A: No I don't.

Q: Okay, but what happen when Peter walked up?

A: Um, we were standing in line at the window, waiting to buy something, and uh, Larry had just finished buying something from the window. There was about three people ahead of Peter, and when it was Peter's turn, to order what he wanted, Larry jumped in front of him. And Peter said to him "Look nigger you're gonna respect me, you're gonna wait your turn." And at that moment, Larry turned around and hit Peter in the mouth. So they ended up getting into a fight, and they broke up the fight and um, Larry said, no Peter said to Larry, "It's not over with, you got you buddies with you right now, but it's gonna be a one-on-one." So Larry told him "any time". Peter, Larry, Tina, Felix and the other guy, all of them walked off together. And hour and a half later, we hear 5 gun shoots. And that's when I seen Tina, Peter's girlfriend, coming from around the corner, yelling, "They killed him, they shot him, they shot him, he's laying in the street." At that moment we stopped a Metro-Dade Police Officer and told him that they had shot her boyfriend, on 35TH and 3RD. I got there at same moment, when the police officer, when the police officer got there, I kneeling, next down to Peter telling him, hitting him and telling him you can't leave us, you can't leave us. But Larry shot Peter five times.

Q: Okay, did you see Larry shoot Peter?

A: No I didn't.

Q: Okay, how do you know that then?

A: Because Larry was the one that threaten him.

Q: Okay, so, you're just making an assumption (inaudible)?

A: Yeah.

Q: Okay, um so since you weren't there when the shooting happened, let's not talk about that part of it, let's talk about the thing at the gas station. So we have Peter in line and Larry is trying to jump in front?

A: No Larry jumped in front of him.

Q: Okay, what did Larry buy the first time?

A: A honey bun and a soda.

Q: Okay, how long past between the time Larry...

A: To make his first purchase.

Q: I didn't finish the question.

A: Sorry.

Q: Between the time Larry purchased the honey bun and the soda and the time Peter showed up?

A: Ten minutes.

Q: Okay, when Peter shows up, how many people are in line then?

A: Say 'bout 10 people ahead.

Q: But, Peter waited in line like he was suppose to?

A: Yes ma'am.

Q: And what was Larry doing, during this time?

A: He was hanging out to the ice machine.

Q: Did he eat his honey bun and soda?

A: Yes (inaudible).

Q: So now Peter gets to the front of the line?

A: Yes ma'am.

Q: And Larry does what?

A: Jumps in front of Peter, and says, orders a Minute Maid. And Peter said, "Yo, yo nigger you gonna respect me, it's my turn, you're gonna wait your turn" (inaudible).

Q: How many people were in line between Peter at this time?

A: About four.

Q: Okay, the line wasn't that long, that he could've waited? So Peter doesn't allow him to make the purchase?

A: No ma'am.

Q: And Larry does what?

A: Hits Peter.

Q: Punches him?

A: Uh-huh, yes ma'am.

Q: In the face?

A: In the face.

Q: Okay, what does Peter do?

A: They started fighting, Peter kicked him on the leg, that's all Peter did to him.

Q: Why is that?

A: 'Cause afterwards you know, they were gonna fight, so when when Peter kick him, after Larry punched him, that's when um, Peter kicked him.

Q: But, what broke the fight up?

A: The guys.

Q: Which, who are the guys?

A: I don't know their names, the guys that were with him.

Q: With who?

A: Peter, um, Larry?

Q: So Larry's friends kept the two of them from getting into a fight.

A: Yes ma'am.

Q: Okay, but before they parted ways, there more words exchanged?

A: Yes.

Q: Okay, who exchanged the words?

A: They both, Peter and Larry.

Q: Okay, what did Larry say?

A: "I'm going to kill you yet."

Q: And what did Peter say?

A: "Any day, any day, whenever you're ready, I'm ready."

Q: But they parted ways?

A: Yes ma'am.

Q: Okay, now how much time passed, between the time that they split up, at the gas station and the time Peter went back to where Larry was.

A: About an hour.

Q: Okay, was Peter alone at this time?

A: No, with Tina.

Q: But, you spoke with Peter before he walked down?

A: Yes ma'am, I told him Peter, watch your back.

Q: Did Peter have a gun?

A: No.

Q: Did Tina have a gun?

A: No.

Q: So what, what Peter reason for going to, have a confrontation with him?

A: I don't know.

Q: Didn't he tell you what he was thinking, why he walking over there?

A: No ma'am, no ma'am.

Q: Does he know Larry?

A: Yes ma'am, they were good friends, they was all, they was all, he hangs out with them. Peter never bothered anybody.

Q: Peter never said anything to like, I gonna try to resolve this?

A: No.

Q: No, just walked, walked that way?

A: That's it.

Q: He knew where he could find Larry.

A: Yes ma'am.

Q: How did, how do you think he knew that?

A: We're all from the same neighborhood.

Q: I mean, is Larry always there on 36TH Street...

A: Yes ma'am.

Q: Every night?

A: Yes ma'am

Q: What does Larry do then?

A: Drug, drug dealer.

Q: Did he also take them, drugs?

A: Who?

Q: Larry.

A: No, that I know of.

Q: Did he appeared to high on drugs...?

A: No ma'am.

Q: (Inaudible.)

A: No ma'am.

Q: What about Peter?

A: No Peter was sober, he didn't drink.

Q: How much time past between the time he walk by, and the time you heard the gun shots?

A: An hour.

Q: He was down there an hour before the shooting happen, between the time he walked pass you to go to 35TH Street, and the time...

A: It took me, it took me, I went to my house must've been in my house 10 minutes, 20 minutes.

Q: Okay, after Peter walked to 35TH.

A: Uh-huh.

Q: You went home (inaudible)?

A: No after Peter, when Peter got to 35TH, I was already home. I had just walked by him, and told him to watch his back. And I went home, but I came back to the gas station. Let's say I had just finished sitting on the bus stop, when I heard the fire, the gun shots.

Q: Okay, tell me exactly where you were when you passed Peter and Tina going to 35TH.

A: I was going home. I was on 2ND Avenue and 34TH, getting ready to cross the street to go home. And he was, him and Tina was coming towards me, from going from the corner from park, which is 34TH.

Q: (Inaudible.)

A: 34TH and 2ND.

1 friends had a big fight and they were shooting amongst friends,  
2 shooting at each other. When I heard the five gunshots the  
3 ~~first thing that came out of my mouth they were at it again. At~~  
4 35th and 3rd, they're at it again, but ten  
5 later I get up to walk inside the gas stat  
6 running behind me. Carmen, they killed him. They killed him.  
7 He's laying on the sidewalk. Jerry just killed Peter. At that  
8 moment I started running towards 35th and 3rd. There is a  
9 Metro-Dade cop coming around the corner so Tina runs in the  
10 middle of the street and told him my boyfriend just got shot on  
11 35th and 3rd, but before the Metro-Dade got to the scene I was  
12 already there and was kneeling down next to him. He was still  
13 alive. I'm kneeling down next to him. Peter, you can't leave  
14 me. I started hitting on him. You can't leave me like this,  
15 wake up, and that's when he did like this and he died with his  
16 eyes open. I closed them and that's when the Metro cop pulled  
17 me out of the way and says you have to move for now.

18 Q Okay. Now, back at the store while all of you guys  
19 were hanging out I know you indicated that you had not purchased  
20 anything or did anything with Jerry at that time?

21 A Correct.

22 Q Have you done any drugs at all that day?

23 A No.

24 Q None at all?

25 A No.

Ex.3

1 Q When was the last time before this incident date?

~~2~~ A Before that, on the 9th. I couldn't, I wasn't going

~~3 to get high. I was high enough as I was. I had just woken up.~~

4 I just got up and left the house to go to the gas station.

5 Q When you went back home before hearing the shots you  
6 didn't do anything?

7 A No.

8 Q How far is your house from the store itself? Would  
9 you say it's three or four blocks?

10 A Two blocks.

11 Q Well, now you live somewhere else. From your house,  
12 your front door, you're not able to see the store itself?

13 A No.

14 Q Now going back Tina brings you back. As a matter of  
15 fact she runs up to you?

16 A Correct.

17 Q Tells you Jerry had shot him?

~~18~~ A Yes.

19 Q You go back to the scene?

20 A Yes.

21 Q Was any of the individuals, did you see any of the  
22 individuals that were there earlier there when you returned,  
23 Felix --

24 A No, none of them.

25 Q Jerry?



1 A None of them. Oh, as I was sitting on the bus stop  
2 when I heard the five shots Jerry zoomed by me, and he had on a  
3 ~~white t-shirt and took it off and threw it on the corner, but he~~  
4 zoomed by me.

5 MR. BERNSTEIN: Did you see a gun in his hand?

6 THE WITNESS: No, I couldn't tell you. He was really  
7 fast and kept looking back.

8 BY MR. EVERETT:

9 Q You said that he was wearing a white t-shirt?

~~10~~ A White t-shirt, brown pants. The pants did not have a  
11 belt. The pants had a black shoe string.

12 Q Are these the same items that he was wearing earlier  
13 that evening?

~~14~~ A Yes.

15 Q About two hours earlier?

16 A Yes.

17 Q You said that he took off the t-shirt. Did you see  
18 where he threw it?

19 A Right at the gas station and landed on one of the  
20 pumps.

21 Q Now, when you see Jerry run by you are you at the bus  
22 stop near your house or back at the store?

23 A I was still at the gas station.

24 Q Let's back up a second. I'm a little bit confused.

25 Your home is near the bus stop?

CERTIFICATE

STATE OF FLORIDA )

SS:

COUNTY OF DADE )

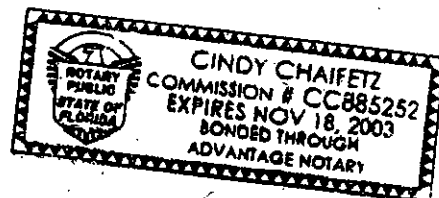
I, CINDY CHAIFETZ, Court Reporter, certify that I was authorized to and did stenographically report the foregoing deposition; and that the foregoing transcript is a true record of the testimony and given by the witness.

I further certify that said witness was duly sworn according to law.

I further certify that I am not a relative, employee, attorney, or counsel or any of the parties, nor am I a relative or employee or any of the parties' attorney or counsel connected with the action, nor am I financially interested in the action.

Dated this 22 day of Jan, 2001.Cindy Chaifetz  
Cindy Chaifetz,

Court Reporter



Q: Are you positive that Peter did not have a gun with him?

A: I'm positive.

Q: How are you so sure?

A: I am sure Peter didn't have a gun on him.

Q: Did you see Larry standing on 35TH Street.

A: No.

Q: So you didn't, you weren't sure that they were out there?

A: (Inaudible.)

Q: You were out when the gun shots happen, right?

A: Yes ma'am.

Q: How many shots did you hear?

A: Five.

Q: Okay, when you heard the shot what did you do?

A: I just got up and started walking, like towards the gas station, 'cause I was on the bus stop. But at the moment I heard Tina coming from around the corner, "They shot him, they shot him, Peter is laying on the sidewalk."

Q: Did, did Tina tell you who shot him?

A: Larry, she sure did.

Q: Did she say Larry shot him, Larry shot him?

A: Yep.

Q: Okay, do you know of any kind (inaudible) between Larry and Peter.

A: No ma'am.

Q: Did they ever have any problem before?

A: No ma'am.

Q: Do you know why Larry shot him?

A: Do I know why Larry shot him?

Q: Yes.

A: Over the argument at the gas station.

Ex. 4

Q: There no, nothing else to?

A: No ma'am.

Q: That simple.

A: That's it.

Q: What was Larry trying to buy at the gas station?

A: A Minute Maid.

Q: Juice?

A: Juice.

Q: Orange juice.

A: Yeah, yeah orange Minute Maid.

Q: Okay, is there anything else this case, that I haven't ask you that you want to add to your statement?

A: (Inaudible) can give you more information.

Q: Okay.

A: (Inaudible.)

Q: (Inaudible.)

A: A white, white Chevrolet, it says for sale on the back window, back windshield written in pink. After we finish with this we can ride by his house and I can show you.

Q: Did you see Larry run by after the shooting?

A: Yes.

Q: Which way, direction did he run?

A: He ran toward 34TH, and 34TH Terrace and 1ST, 'cause he rode, he ran right by my brother's house. That's where he took his shirt off and threw it on the ground. Which it might still be on the sidewalk over there.

Q: What kind of shirt was it?

A: A white tee shirt. Like the this one, like the one I have (inaudible).

Q: Did you see him with a gun?

A: No.

Q: You didn't?

A: Uh-huh.

Q: Was he alone?

A: Yes.

Q: Did you see any of the boys run by, after the shooting happen?

A: No, I seen them walk by.

Q: Okay, walk by. Who?

A: Uh, I was at, see I was sitting at the bus stop on 2ND, they were on 3RD, I couldn't tell you who they were.

Q: (Inaudible.)

A: It was four of them.

Q: Were they black or white?

A: One was white, which I know for a fact it was Felix, and the other three was black.

Q: Where did they go?

A: Towards 37TH and 1ST, 37TH and third.

Q: Okay, anything else then?

A: No, no.

Q: It's Saturday October 10, 1998 and 16:05 hours (inaudible).

## CERTIFICATE

I hereby certify that the foregoing pages, having been transcribed [and translated] to the best of my ability, constitute a true and correct transcription [and translation] of the tape provided to me.

INFORMATION PROCESSING OPERATOR  
STATE ATTORNEY'S OFFICE  
ELEVENTH JUDICIAL CIRCUIT

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## TRANSCRIPTION

UPDATED

KEY:

Q: DETECTIVE CARTER

A: CARMEN FONT RIVERA

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TODAY IS UM SATURDAY, OCTOBER THE 10TH, 1998, UH, AND IT'S 14:52 HOURS. I'M DETECTIVE CARTER, PRESENT WITH ME IN THE CITY MIAMI HOMICIDE OFFICE IS CARMEN FONT RIVERA. WE'RE GONNA TAKE A STATEMENT, IN REFERENCE TO A HOMICIDE THAT OCCURRED ON TODAY DATE OCTOBER 10, 1998, APPROXIMATELY 5:34 IN THE MORNING. UM, IN THE SIDEWALK IN FRONT OF 338 NORTHWEST 35 STREET. IT IS IN REFERENCE TO CASE NUMBER 2831232X-XRAY.

Q: Carmen would you raise your right hand please? Do you solemnly swear from the statement you are about to give will be the truth, the whole truth and nothing but the truth, so help you God.

A: Yes.

Q: Thank you. State your complete name.

A: Carmen Rivera, Carment Font Rivera.

Q: Okay, can you spell Font and Rivera for me?

A: F-o-n-t is Font, Rivera R-i-v-e-r-a.

Q: What's your birthday?

A: 6-20-58.

Q: Where do you live at?

A: 160 Northwest 31 Street.

Q: That's 1-6-0, right?

A: 1-6-0.

Q: Okay, do you have a phone there?

A: 576-2539.

Q: Do you know your social security number?

A: 262-45-5282.

Q: Okay, do you work?

A: No ma'am.

Q: Were you out last night?

A: Yeah ma'am.

Q: In what area?

A: I was at the gas station on Northwest 2ND and 36TH Street.

Q: About what time?

A: Um, I got there let's say about 2 in the morning.

Q: How long did you stay there?

A: I was there till the incident with Pedro Delgado happen.

Q: Okay, how long was that?

A: Um, that happened at about 4:00-4:30 in the morning.

Q: Okay, what were you doing at the gas station?

A: I was just hanging out.

Q: Who else do you remember being there?

A: Um, me, um Claudia, um there was a whole bunch of other people, but precisely it was just Claudia and I.

Q: You two were together?

A: Yes we were standing there.

Q: Okay, was Claudia there when Peter walked up?

A: No, Claudia had left.

Q: Okay, who was there when, when uh Peter walked up?

A: Peter walked up with Tina and Mike. I myself was there, um there was a whole bunch of other people.

Q: Who is Mike?

A: Mike is Peter's best friend.

Q: Is he white or black?

A: White.

Q: Do you know his last name?



A: No I don't.

Q: Okay, but what happen when Peter walked up?

A: Um, we were standing in line at the window, waiting to buy something, and uh, Larry had just finished buying something from the window. There was about three people ahead of Peter, and when it was Peter's turn, to order what he wanted, Larry jumped in front of him. And Peter said to him "Look nigger you're gonna respect me, you're gonna wait your turn." And at that moment, Larry turned around and hit Peter in the mouth. So they ended up getting into a fight, and they broke up the fight and um, Larry said, no Peter said to Larry, "It's not over with, you got you buddies with you right now, but it's gonna be a one-on-one." So Larry told him "any time". Peter, Larry, Tina, Felix and the other guy, all of them walked off together. And hour and a half later, we hear 5 gun shoots. And that's when I seen Tina, Peter's girlfriend, coming from around the corner, yelling, "They killed him, they shot him, they shot him, he's laying in the street." At that moment we stopped a Metro-Dade Police Officer and told him that they had shot her boyfriend, on 35TH and 3RD. I got there at same moment, when the police officer, when the police officer got there, I kneeling, next down to Peter telling him, hitting him and telling him you can't leave use, you can't leave us. But Larry shot Peter five times..

Q: Okay, did you see Larry shoot Peter?

A: No I didn't.

Q: Okay, how do you know that then?

A: Because Larry was the one that threaten him.

Q: Okay, so, you're just making an assumption (inaudible)?

A: Yeah.

Q: Okay, um so since you weren't there when the shooting happened, let's not talk about that part of it, let's talk about the thing at the gas station. So we have Peter in line and Larry is trying to jump in front?

A: No Larry jumped in front of him.

Q: Okay, what did Larry buy the first time?

A: A honey bun and a soda.

Q: Okay, how long past between the time Larry...

A: To make his first purchase.

Q: I didn't finish the question.

A: Sorry.

Q: Between the time Larry purchased the honey bun and the soda and the time Peter showed up?

A: Ten minutes.

Q: Okay, when Peter shows up, how many people are in line then?

A: Say 'bout 10 people ahead.

Q: But, Peter waited in line like he was suppose to?

A: Yes ma'am.

Q: And what was Larry doing, during this time?

A: He was hanging out to the ice machine.

Q: Did he eat his honey bun and soda?

A: Yes (inaudible).

Q: So now Peter gets to the front of the line?

A: Yes ma'am.

Q: And Larry does what?

A: Jumps in front of Peter, and says, orders a Minute Maid. And Peter said, "Yo, yo nigger you gonna respect me, it's my turn, you're gonna wait your turn" (inaudible).

Q: How many people were in line between Peter at this time?

A: About four.

Q: Okay, the line wasn't that long, that he could've waited? So Peter doesn't allow him to make the purchase?

A: No ma'am.

Q: And Larry does what?

A: Hits Peter.

Q: Punches him?

A: Uh-huh, yes ma'am.

Q: In the face?

A: In the face.

Q: Okay, what does Peter do?

A: They started fighting, Peter kicked him on the leg, that's all Peter did to him.

Q: Why is that?

A: 'Cause afterwards you know, they were gonna fight, so when when Peter kick him, after Larry punched him, that's when um, Peter kicked him.

Q: But, what broke the fight up?

A: The guys.

Q: Which, who are the guys?

A: I don't know their names, the guys that were with him.

Q: With who?

A: Peter, um, Larry?

Q: So Larry's friends kept the two of them from getting into a fight.

A: Yes ma'am.

Q: Okay, but before they parted ways, there more words exchanged?

A: Yes.

Q: Okay, who exchanged the words?

A: They both, Peter and Larry.

Q: Okay, what did Larry say?

A: "I'm going to kill you yet."

Q: And what did Peter say?

A: "Any day, any day, whenever you're ready, I'm ready."

Q: But they parted ways?

A: Yes ma'am.

Q: Okay, now how much time passed, between the time that they split up, at the gas station and the time Peter went back to where Larry was.

A: About an hour.

Q: Okay, was Peter alone at this time?

A: No, with Tina.

Q: But, you spoke with Peter before he walked down?

A: Yes ma'am, I told him Peter, watch your back.

Q: Did Peter have a gun?

A: No.

Q: Did Tina have a gun?

A: No.

Q: So what, what Peter reason for going to, have a confrontation with him?

A: I don't know.

Q: Didn't he tell you what he was thinking, why he walking over there?

A: No ma'am, no ma'am.

Q: Does he know Larry?

A: Yes ma'am, they were good friends, they was all, they was all, he hangs out with them. Peter never bothered anybody.

Q: Peter never said anything to like, I gonna try to resolve this?

A: No.

Q: No, just walked, walked that way?

A: That's it.

Q: He knew where he could find Larry.

A: Yes ma'am.

Q: How did, how do you think he knew that?

A: We're all from the same neighborhood.

Q: I mean, is Larry always there on 36TH Street...

A: Yes ma'am.

Q: Every night?

A: Yes ma'am

Q: What does Larry do then?

A: Drug, drug dealer.

Q: Did he also take them, drugs?

A: Who?

Q: Larry.

A: No, that I know of.

Q: Did he appeared to high on drugs...?

A: No ma'am.

Q: (Inaudible.)

A: No ma'am.

Q: What about Peter?

A: No Peter was sober, he didn't drink.

Q: How much time past between the time he walk by, and the time you heard the gun shots?

A: An hour.

Q: He was down there an hour before the shooting happen, between the time he walked pass you to go to 35TH Street, and the time...

A: It took me, it took me, I went to my house must've been in my house 10 minutes, 20 minutes.

Q: Okay, after Peter walked to 35TH.

A: Uh-huh.

Q: You went home (inaudible)?

A: No after Peter, when Peter got to 35TH, I was already home. I had just walked by him, and told him to watch his back. And I went home, but I came back to the gas station. Let's say I had just finished sitting on the bus stop, when I heard the fire, the gun shots.

Q: Okay, tell me exactly where you were when you passed Peter and Tina going to 35TH.

A: I was going home. I was on 2ND Avenue and 34TH, getting ready to cross the street to go home. And he was, him and Tina was coming towards me, from going from the corner from park, which is 34TH.

Q: (Inaudible.)

A: 34TH and 2ND.

1 MR. BERNSTEIN: Judge, this is -- we have to go side  
2 bar on this and I'll explain why.

3 (Thereupon, the following proceedings were had at  
4 side bar, out of the hearing of the jury panel:)

5 MR. BERNSTEIN: This is a problem. Here's the  
6 objection I have.

7 I gave Mr. Egleston a corrected version of the  
8 transcript, okay, and the the first correction was a prior  
9 prosecutor made a mistake.

10 They decided to put in Jerry whenever it said Larry in  
11 here. I don't know why they did that. I  
12 and I sent an amended transcript to the previous defense  
13 counsel that made that correction.

14 In the corrections as well as in this transcript, if  
15 you hear the tape--

16 THE COURT: This is the tape you didn't want him to  
17 play?

18 MR. BERNSTEIN: Yes, I understand that, but I'm  
19 telling you, the amended transcript, Judge, it says here,  
20 "Did Tina tell you who shot him?"

21 "Answer, Larry. She sure did."

22 "Did she say Larry shot him?"

23 "Larry shot him, yeah."

24 We have listened to that tape over and over. That's  
25 what we feel it says.

Ex. 5

1 In this case, if he wants to play that--

2 THE COURT: Have you listened to the tape?

3 MR. EGLESTON: Like five times.

4 I'm going to a different part of the tape, too.

5 MR. BERNSTEIN: Well, that's where it says it.

6 MR. EGLESTON: I know, but there's other -- your  
7 Honor, my -- if you will remember my question, I asked  
8 specifically, when you first see Tina, what does she say to  
9 you, and her response was, the fucking nigger killed my  
10 boyfriend.

11 In her taped statement, in the beginning of her taped  
12 statement, she doesn't mention anything about a fucking  
13 nigger or about what the nigger did. She starts mentioning  
14 they, they, they.

15 THE COURT: So the impeachment goes to the issue of  
16 the word fucking nigger versus they; is that--

17 MR. EGLESTON: Well, what she's implying is that she  
18 came up and said him, meaning Jerry or Larry.

19 In the tape -- I can even play it for the Court, if  
20 you want to, outside the presence of the jury.

21 So, you see, what I'm trying to do here, she does  
22 not--

23 THE COURT: Well, let me--

24 MR. EGLESTON: Yes?

25 MR. BERNSTEIN: And somewhere else that I'm referring

1 to, if it is--

2 THE COURT: Let me just get to the issue that  
3 Mr. Bernstein is raising.

4 He's saying that the transcript was -- I think what  
5 he's afraid of is that your's going to be using an  
6 incorrect transcript.

7 MR. EGLESTON: No.

8 MR. BERNSTEIN: You're going to use the same  
9 transcript?

10 MR. EGLESTON: No, no, no, no.

11 Mr. Bernstein gave me a revised--

12 THE COURT: Okay.

13 MR. EGLESTON: --transcript with the proper names.

14 THE COURT: All right. So that's what you're using?

15 MR. EGLESTON: I'm not using--

16 MR. BERNSTEIN: Show me what you're going to use and I  
17 might not have an objection.

18 Why don't you show me before you read it to the jury,  
19 so I know what it is. That will negate my concern.

20 MR. EGLESTON: "That's when I see Tina and that's when  
21 I seen Tina, Peter's girlfriend, coming around the corner  
22 yelling, they killed him, they shot him."

23 MR. BERNSTEIN: Okay. If you're going to use that,  
24 that's fine. I'm not going to object to that.

25 THE COURT: All right.



1           (Thereupon, the following proceedings were had in open  
2       court:)

3       Q.    (By Mr. Egleston) Ms. Rivera, you remember giving  
4       your sworn statement to the -- to Detective Carter the day of  
5       the incident?

6       A.    Yes.

7       Q.    And do you remember telling Detective Carter this:  
8       That when you were explaining what happened, you said, "and a  
9       half an hour later" -- well, we can start with, "So Larry told  
10      him, any time."

11           "Peter, Larry, Tina, Felix and the other guys, all of  
12      them walked off together, and an hour and a half later, we hear  
13      five gunshots, and that's when I see Tina, Peter's girlfriend,  
14      coming from around the corner yelling, they killed him, they  
15      shot him, they shot him. He's laying on the street.".

16           Do you remember telling that specifically to Detective  
17      Carter?

18      A.    Yeah. I also remember saying that she said, that  
19      fucking nigger killed him. I also remember saying that.

20      Q.    Okay. Did you tell that to Detective Carter?

21      A.    Yes, I did.

22      Q.    Oh, you did. Okay.

23           Isn't it a fact, when she asks -- when the detective  
24      asked you specifically, "Did she say anything," you said, "She  
25      said Larry"?

1 A. Just about a second.

2 Q. And did you see a gun in his hands?

3 A. No.

4 Q. And did he do anything as he ran past you?

5 A. Took his shirt off.

6 Q. What did he do with it?

7 A. Threw it away.

8 Q. Now was that the same shirt that he was wearing eithe

9 earlier when you saw him in the gas station in a fight with

10 Peter?

11 A. Yes.

12 Q. Now, what happened next after you saw him run by, what

13 was the next thing that happened?

14 A. Tina came running up.

15 Q. And what was her emotional state?

16 A. She was hysterical.

17 Q. And did she say anything to you?

18 A. Yes, she did.

19 MR. EGGLESTON: Objection.

20 THE COURT: Overruled.

21 BY MR. MCCORMACK:

22 Q. What did she say?

23 A. She said that fuckin nigger, Larry. Larry killed him.

24 Peter is laying on the sidewalk. He killed him. He killed him.

25 Q. Now, you testified that Tina used the word nigger,

Ex. 6

1 straight once and for all because too much has been made of  
2 this.

3 First of all I submit to you, ladies and gentlemen  
4 that in a case where people know each other, what they were  
5 wearing isn't as important as it would be if strangers were  
6 involved. It simply isn't.

7 They are focused on each others face. Mr. Egleston  
8 was up here for half an hour. Not once did he attack this  
9 fact that these people knew each other well.

10 Because it is obvious that they knew each other. Two  
11 people make it clear. Rizal Ecle and Carlos Mendez tell  
12 you these people hung out on those streets every day.

13 Remember ladies and gentlemen he wants you to focus on  
14 one line in this sworn statement, but remember and I'm  
15 going to read it out in the sworn statement, the questions  
16 and answers because they were read into evidence to you.

17 What was Larry wearing last night.

18 Answer: A white tank top.

19 Question: At the gas station?

20 Answer at the gas station a white top, tank top and  
21 like dockers, like navy dockers.

22 Isn't that interesting she said the exact same thing  
23 in her sworn statement. She said that.

24 He makes a lot about this issue with Detective Agüero.  
25 Let's talk about something before. He wants to say

Ex. 7

1 Detective Aguero was the one who had the best chance to  
2 talk to her.

3 What did Detective Aguero tell you. He told you she  
4 was hysterical. He told you she was upset. He told you  
5 she wasn't thinking clearly. She was saying for example  
6 different things.

7 He didn't try to hide to his report. He wasn't making  
8 it out like there is something hidden here. There is  
9 nothing hidden because if there was something hidden Aguero  
10 would have destroyed his report.

11 He kept this report and all the reports in the case.  
12 Nothing is hidden from you. You get all the information.

13 Think about this. The first person, very first person  
14 who heard Tina Crews, it wasn't. It was Carmen. Carmen  
15 told you clearly what she said.

16 They killed him. They killed him and then she said  
17 that fuckin --I won't use the word. That fuckin "N" word.  
18 Larry killed him.

19 Seconds after this. Not an hour, not when she is  
20 crying. Not when she is sitting there crying her eyes out  
21 not being cohesive, coherent, not explaining it.

22 The very first thing she says is Larry, that guy did  
23 it. That's the first thing she says. What corroborates  
24 that little bit of testimony from Rizal Ecle, but you had  
25 to pay attention to it.

1           Maybe you didn't see it. When she says right after  
2           the shooting first person she sees there is Carmen. Carmen  
3           is right there with Tina when Tina is flagging down the  
4           Metro cop.

5           That means she was in fact right there. That means  
6           she was right with Tina. That means she did talk to Tina  
7           and what Tina said from the beginning was Larry was the one  
8           who did it.

9           That's the first person. Not Detective Aguero. The  
10          very first person is Carmen Font.

11          This issue of the thrown t-shirt. She never said she  
12          pointed out that T-shirt. All she said was she told the  
13          police about that. She couldn't have pointed it out to the  
14          police.

15          As you heard from her testimony she pointed out hours  
16          later because she left the scene.

17          This is not the issue in the case this white t-shirt.  
18          What are some of the other things, ladies and gentlemen.  
19          He tries to talk to you about oh how could they have been  
20          out there.

21          They were looking for him. They were looking and  
22          looking, but they knew he was on 35th Street. That is not  
23          what Tina Crews said.

24          He can say that all he wants. This is what she said.  
25          What she said I was trying to keep him away. I was trying

# WASSON & ASSOCIATES

## CHARTERED

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April 28, 2011

Re: *Alfred v. State*  
Case No. F98-35550.  
Our File No. 01294

#### To Whom It May Concern:

I am former appellate counsel for the Defendant, Jerry Neil Alfred. This will serve to vouch for the meritorious nature of my former client's Motion to Vacate Conviction/Sentence bearing certificate service date of October 21, 2010.

I have reviewed Mr. Alfred's motion concerning discrepancies between the recorded statements taken from Carmen Rivera (a/k/a Carmen Font) concerning what she was told by the victim's girlfriend, Tina Cruise, shortly after the victim was shot. The version of the transcription of that statement attached to Defendant's motion as Exhibit 1 reflects that Tina Cruise did not tell Ms. Rivera who shot the victim. To the contrary, when specifically asked "did Tina tell you who shot him," Ms. Rivera's response was: "No, she sure didn't."

On the other hand, the version of the transcription of Ms. 1 attached to Defendant's motion as Exhibit 2 specifically identifies the Defendant (using the name "Larry" as the Defendant was known to the witnesses at trial) as the shooter.


I have listened to the audio recording of Ms. Rivera's statement several times and it is clear that the version attached as Exhibit 1 is accurate and Exhibit 2 is inaccurate. The audio recording clearly establishes that Ms. Rivera was not told by Ms. Cruise that Mr. Alfred was the perpetrator.

Ex. 8

Therefore, it is my opinion that Mr. Alfred's motion is meritorious insofar as it is asserts the ineffective assistance of his trial counsel in failing to perform sufficient pretrial investigation and to impeach the prosecution's account of the events which occurred shortly after the crime in question./

Please note that I do not represent Mr. Alfred and am offering the foregoing opinion solely as an attorney in good standing with The Florida Bar with experience in post-conviction matters as a professional courtesy to my former client. Mr. Alfred is proceeding *pro se* in this matter.

Sincerely,



Roy D. Wasson

RDW/dpj

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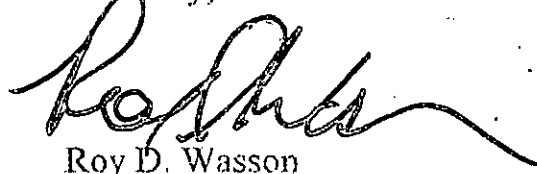
Jerry N. Alfred  
Inmate No. M12748  
Union Correctional Institution  
7819 NW 228<sup>th</sup> Street  
Raiford, FL 32026-4000

Re: *Alfred v. State*  
Our File No. 01294

Dear Mr. Alfred:

I received your letter of April 21, 2011 with another copy of your motion to vacate your conviction/sentence. I also listened to the audio recording of the witness' statement. Enclosed is a letter from me vouching for the legitimacy of your position. Good luck with your efforts to overturn your conviction.

Sincerely,



Roy D. Wasson

RDW/dpj  
Enclosure





4425 US Hwy 1 South - Suite 107  
St. Augustine, Florida 32086  
(904) 797-1866

## Report of Services Rendered

April 7, 2022

I, Jim Stafford, am a certified, court-qualified expert in video forensics and image analysis. I am also equally certified in audio forensics. I have performed such work in many cases, seventeen so far in 2022. I attend advanced training sessions in these disciplines as well as participate in peer forums.

### Case

Case No. 19-024476 CA 32 Jerry Neil Alfred vs. Kimberlyn Duncan and City of Miami

### Items Relied Upon

1. Audio CD labelled: City of Miami, Office of the City Attorney  
Jerry Neil Alfred vs. Kimberlyn Duncan and City of Miami  
Case No. 19-024476 CA 32  
Statements of Carmen Rivera and Tina Crews  
Case No. 283132-X
2. Excerpt of an interview by Detective Carter of Carr  
identified by the computer path: S:\Archive\KHCarmen  
Rivera.doc|11|3/26/99|Revision

Ex. 9

3. Excerpt of an interview by Detective Carter of Carmen Font Rivera identified by the computer path: S:\Archive\KHCarmen Rivera.doc|11|3/13/01|Revision
4. Sound Forge Pro 15
5. iZotope RX7 Audio Editor
6. Excerpt of Trial Transcript

## **Purpose**

The purpose of this investigation was to see if the recorded statement of Carmen Rivera was true and consistent with the trial statement by the prosecutor, Mr. Bernstein, labelled as Ex.3 (attached) and the transcript excerpt, entered at trial, of Carmen Rivera, labelled as Ex.2 (attached) or if it was true and consistent with the transcript excerpt labelled as Ex. 1 (attached).

## **Process and Examination Steps**

I began by loading the Audio CD into Sound Forge Pro 15. It was a WMA (Windows Media Audio) file. Windows Media Player has limited capabilities so, in Sound Forge, I converted the file into a .WAV file. This conversion has no effect on the content of the file but does enable it to be brought into forensic audio software.

I listened through until I reached the section of the recording relevant to the Purpose above. I observed significant background noise but found the section intelligible. I then created an audio file I labelled as: Unfiltered original recording of Carmen Rivera's statement.wav (attached).

I then brought the original Audio CD file into iZotope RX7. There I used two filters: Dialogue Isolate and Voice DeNoise. I then created a new file that I labelled: Carmen Rivera Interview p 8 lines 9-18 with background

noise reduction.wav. (attached). With the background noise reduced it is easier to discern what is being said.

## **Discussion**

The trial transcript (Ex. 3) indicates that Mr. Bernstein did not want the Carmen Rivera interview to be played in court as evidenced by this exchange with the Judge:

"THE COURT: This is the tape you didn't want him to play?

MR. BERNSTEIN: Yes, I understand that, but I'm telling you, the amended transcript, Judge, it says here,

"Did Tina tell you who shot him?

Answer, Larry, she sure did.

Did she say Larry shot him?

Larry shot him, yeah."

We have listened to that tape over and over. That's what we feel it says."

Mr. Bernstein's statement does not match either of the interview versions I was given.

The transcript version entered into the trial (Ex.2) says:

"Did, did Tina tell you who shot him?

Larry, she sure did.

Did she say Larry shot him, Larry shot him?

Yep."

The 2<sup>nd</sup> transcript version I was given (Ex.1) has this exchange:

"Did, did Tina tell you who shot him?

No, she sure didn't.

Did she say Larry shot him, Larry shot him"?

Nope."

## Conclusion

In conclusion, based on my education, training and experience as an audio forensic expert, there is no question that the Ex.1 version of the transcript is the true and consistent version when compared to the Audio CD.

"Did, did Tina tell you who shot him?

No, she sure didn't.

Did she say Larry shot him, Larry shot him"?

Nope."

Although the original recording has background noise, Ms. Rivera's answer "No" to the question "Did, did Tina tell you who shot him?" is clearly audible and clearly intelligible. The entire exchange is clearly intelligible. On the file I created: Carmen Rivera Interview p 8 lines 9-18 with background noise reduction.wav.

It is my professional opinion that the original recording should have been played for, and heard by, the jury in this case.



Jim Stafford, Forensic Examiner

Eclipse Forensics

930

Ex 1

Q: Are you positive that Peter did not have a gun with him?

A: I'm positive.

Q: How are you so sure?

A: I am sure Peter didn't have a gun on him.

Q: Did you see Larry standing on 35TH Street.

A: No.

Q: So you didn't, you weren't sure that they were out there?

A: (Inaudible.)

Q: You were out when the gun shots happen, right?

A: Yes ma'am.

Q: How many shots did you hear?

A: Five.

Q: Okay, when you heard the shot what did you do?

A: I just got up and started walking, like towards the gas station, 'cause I was on the bus stop. But at the moment I heard Tina coming from around the corner, "They shot him, they shot him, Peter is laying on the sidewalk."

Q: Did, did Tina tell you who shot him?

A: No, she sure didn't.

Q: Did she say Larry shot him, Larry shot him?

A: Nope.

Q: Okay, do you know of any kind (inaudible) between Larry and Peter.

A: No ma'am.

Q: Did they ever have any problem before?

A: No ma'am.

Q: Do you know why Larry shot him?

A: Do I know why Larry shot him?

Q: Yes.

A: Over the argument at the gas station.

Ex. 2

Q: Are you positive that Peter did not have a gun with him?

A: I'm positive.

Q: How are you so sure?

A: I am sure Peter didn't have a gun on him.

Q: Did you see Larry standing on 35TH Street.

A: No.

Q: So you didn't, you weren't sure that they were out there?

A: (Inaudible.)

Q: You were out when the gun shots happen, right?

A: Yes ma'am.

Q: How many shots did you hear?

A: Five.

Q: Okay, when you heard the shot what did you do?

A: I just got up and started walking, like towards the gas station, 'cause I was on the bus stop. But at the moment I heard Tina coming from around the corner, "They shot him, they shot him, Peter is laying on the sidewalk."

81. Q: Did, did Tina tell you who shot him?

A: Larry, she sure did.

Q: Did she say Larry shot him, Larry shot him?

A: Yep.

Q: Okay, do you know of any kind (inaudible) between Larry and Peter.

A: No ma'am.

Q: Did they ever have any problem before?

A: No ma'am.

Q: Do you know why Larry shot him?

A: Do I know why Larry shot him?

Q: Yes.

A: Over the argument at the gas station.

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17 play?

18 MR. BERNSTEIN: Yes, I understand that, but I'm  
19 telling you, the amended transcript, Judge, it says here,  
20 "Did Tina tell you who shot him?"

21 "Answer, Larry. She sure did."

22 "Did she say Larry shot him?"

23 "Larry shot him, yeah."

24 We have listened to that tape over and over. That's  
25 what we feel it says.

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