

This is a personal recollection of a Death Row Appeal case, the brief outline of which was first published in this magazine in 2014 and became the longest running case I have been involved with.

As an expert in the area of Facial Comparison with over 25 years' experience through creating hundreds of reports for and giving evidence to, courts throughout the United Kingdom, the idea of giving expert testimony in a jurisdiction system outside the UK or Europe, was something I had not thought about in any meaningful way. So, when the opportunity to produce a report for a case in the USA presented itself, I had very few qualms and it seemed to be something I could take in my stride.

Little did I realise that this particular case I agreed to become involved with would turn out to be such a long and complex commitment.

# **Outline:**

The case involved a male called Pablo Ibar, who in 1994, aged 22 along with an alleged associate Seth Panelvar, was charged with three counts of first-degree murder, one count of burglary, one count of robbery, and one count of attempted robbery.

Pablo Ibar was born in the US to a Spanish immigrant father Candido Ibar, a celebrated jai alai player and Cristina Casas his mother of Cuban origin. Pablo is the nephew of Spanish boxing 'great' Jose Manuel Ibar, better known as Urtain, and would later take Spanish nationality in 2000 thereby linking him to his father's home country. Ibar had been convicted in the triple homicide of a nightclub owner Casimir Sucharski, and two females, Sharon Anderson and Marie Rogers.

As the only Spanish national on Death row, his case drew attention from the government of the Basque region of Spain. The case was to become one of the most expensive, long running and convoluted murder trials in Florida State history.

### The facts of the case:

Sunday, June 26, 1994, a Mercedes SL convertible is discovered on fire on a road in the Florida Keys by a Palm Beach County police officer. The Mercedes was registered to the owner of a nightclub called Casey's Nickelodeon, Casmir Sucharski. The officer notifies the Miramar Police Department and an officer is sent to Sucharski's home to tell him that his car had been found. As there was no answer, the officer left a note informing him of the find.

Monday, June 27, 1994, the mother of dancer/model Marie Rogers reported her missing to the Broward County Sheriff's Department. It was known that Rogers had gone to Casey's Nickelodeon on Saturday, June 25, 1994, with her friend, Sharon Anderson but neither girl had returned home. An officer went to Casey's Nickelodeon and learned that

Sucharski had left the club early Sunday morning with the models. The officer then went to Sucharski's home. Anderson's car was in the driveway, but no one answered the door. A blue T-shirt was in the porch area; this T-shirt would be significant. On looking within the house, the officer made a grim discovery. He saw three, bloodsoaked bodies on the floor. Sadly, the individuals found in the house were duly identified as Sucharski, Rogers, and Anderson. All three had died of gunshot wounds to the head.

Sucharski had recently installed a CCTV videotape surveillance camera system around his home. It transpired that the videotape had captured the activities of the previous night in the house, including the actual murders. The grainy, poor quality tape recording revealed that on Sunday, June 26, 1994, at 7:18 a.m., two men entered through the rear sliding door of Sucharski's home. One intruder initially had something covering his face, which we see he uses to wipe sweat from his face. This item was eventually discarded by him at the premises. The garment was identified as the blue T-shirt found in the porch area. This intruder was alleged to be Ibar.

The other intruder, alleged to be Seth Penalver, wore a cap and sunglasses, which were never removed, and carried a firearm. The videotape showed that the intruder in sunglasses had a semiautomatic handgun with him when he entered the home. The other intruder displayed a handgun only after he went into another room having left the camera's view. At one point, the intruder alleged to be Penalver hit Sucharski with the semiautomatic handgun in the face, knocked him to the floor, and beat him on the neck, face, and body. This attack on Sucharski took place over the next twenty-two minutes.

During this time, the intruders searched Sucharski's home. They rummaged through the house entering the bedrooms and the garage. Sucharski was searched and his boots removed. As he struggled, Sucharski was repeatedly hit by both intruders. The intruders were seen putting item in their pockets.

The man later 'identified' as Ibar shot Sucharski, Rogers and Anderson in the back of the head. The intruder alleged to be Penalver then shot Anderson and Sucharski in the back. The State presented evidence that Sucharski kept ten to twenty thousand dollars in cash, carried a gun, and owned a Cartier watch. The watch was not found, and Sucharski's gun holster was empty.

At the crime scene, of all the fingerprints from the many surfaces touched and T-shirt worn by one perpetrator, the blood stains, DNA fragments, shoe prints and latent prints collected, non were of Ibar.

Police extracted frames from the videotape system and produced a flyer with the grainy images of the intruders that was sent to law enforcement agencies.

Three weeks after the murders, the Miramar county police department received a call from the Metro-Dade county police department informing them that they had a man in custody on a separate and unrelated charge who resembled the photo on the flyer. The man in custody at the Metro-Dade Police Department was Pablo Ibar. In interviews by Miramar investigators, he told police he lived with his mother, and that on the night of the murders he had been out with his girlfriend. When told about the murders, Ibar agreed readily to checks on his house, his whereabouts and his alibi. He had four people independently verify his whereabouts on the night of the murders.

Ibar at that time, lived with several friends in a rented home in Hollywood, Florida. It was alleged that one of his housemates initially identified Ibar and the second male Seth Penalver, as the men on the videotape. In the initial trial, the housemate told police that early on the morning of the murders, Ibar and Penalver rushed into the Lee Street home, grabbed a Tec-9 semi-automatic firearm that was kept at the house, and left. In subsequent proceedings, this witness asserted that he had no memory of identifications in his earlier statements. On police prompting, other witnesses who had also given statements to police that the men in the photo resembled Ibar also denied making firm identifications. Many of these witnesses were successfully challenged by the Defence team as improper identifications by the police.

In 1997, both Ibar and Penalvar were tried together. Penalver's defence attorney asserted that Penalver was not the subject wearing the hat and glasses seen in the grainy videotape, and in his defence, utilised an expert in forensic anthropology to opine on the poor state of the footage which precluded a reliable identification the face of the subject and Penalver. Although not retained by Ibar's lawyer (which would be significant) the expert also opined that the deficiencies in the video and subsequent stills distilled from the footage, would also preclude a reliable identification of Ibar. After a hung jury, a mistrial was declared.

In 1999 the case was separated and Penalver was tried for a second time, the jury found him guilty of the charges and he was sentenced to death.

# Ibar's second trial

In 2000, Ibar was tried for a second time, the jury found him guilty and sentenced him to death. In this trial, Ibar's lawyer Kayo Morgan, had issues with drugs, illness, his own jailing for battery of his pregnant girlfriend and failing to give his client correct advice. Morgan also admitted to failing to procure the services of the correct experts including a facial identification expert, failing to introduce relevant evidence such as the expert evidence of the anthropologist from the first trial. All this was cited as being due to his deteriorating health. These and other failings would open the way for a new trial with a different defence team.

# My involvement:

In 2007, I was contacted through my academic links, by a US attorney. The lawyer, Mr. Benjamin Waxman was at the time, a partner at Robbins, Tunkey, Ross,

Amsel, Raben & Waxman, P.A. a Miami based firm described as 'super lawyers' and skilled in the area of Appellate Practice. I had heard of appellate practice but did not know precisely what it entailed and how it compared with the UK courts system.

In the USA all cases are initially tried at the trial court level. The losing party may appeal their case to higher courts known as appellate courts. Appellate attorneys concentrate their practice on advocating cases before state and federal appellate courts, including state supreme courts and the United States Supreme Court. These attorneys seek to correct errors of trial court judges and change the law by persuading appellate courts to overturn lower court decisions or to expand or change the interpretation of statutory law.

The attorneys job is to start with a case that has already been unsuccessful at least once in the lower courts, review and analyse trial records and other documents, research and analyse case law, draft persuasive briefs and appellate documents to try to earn something for their client, whether it is a new trial, the client's freedom, or something in between.

Taken from: https://bestlawfirms.usnews.com/appellate-practice/overview Taken from: https://www.thebalancecareers.com/appellate-practice-2164642

By the time I was approached, Ibar had spent almost fourteen years in a Florida prison, nine of those on Death Row.

I agreed to review the case outline and based on the limited material I had received by email, tentatively accepted the instruction and organised for payment in advance as it was an overseas case. I subsequently received some very grainy footage and proceeded to analyse the material. Having been stored on video tape which had deteriorated very badly, the footage showed the incident from one camera within the house with the three victims and the two intruders. However, the quality was so poor, it was impossible to clearly make out features. I requested that the lawyer approach the police and obtain an analogue to digital copy converted to the ITU-R-601 standard. In due course, a 'better' copy along with photographs and many further documents and photographs pertaining to additional evidence was sent to me by post.

Over a short number of weeks, a fully research supported report was prepared outlining what we could see and importantly, what we could not see of the face of the intruder alleged to be Ibar. A limited conclusion was reached which indicated that while we could not conclusively exclude the two men by clear and demonstrable differences, there were five apparent differences which suggested that they were not the same person. The report was then submitted to the attorney in the normal format.

In 2008, the decision was made to take this report forward to a post-conviction evidentiary hearing, I was requested to submit the report in the form of an affidavit. I spent several more days with the attorney, transposing my findings into a form that the US Supreme Courts could use. This was then submitted to the courts and was the start of a process that would conclude over a decade later.

In 2009, I was called to testify to the circuit court, trial level as an expert witness in facial identification. I was going to have to face intense US state attorney cross questions in open court. Despite there being established US organisations dealing with facial comparison (FISWG), unbeknownst to me, no expert had ever given evidence based solely on facial identification to a US court. The science was untested in the US justice system. If my report did not reach the requisite evidentiary standards, precedence would be set, probably leading to the exclusion of this form of evidence in the US courts. This would inevitably have ramifications for the use of this evidence in the UK. The stakes were high.

#### **Frve Standard**

The Frye Standard is used in the US to determine the admissibility of an expert's scientific testimony, established in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). A court applying the Frye standard must determine whether or not the method by which that evidence was obtained was generally accepted by experts in the particular field in which it belongs. The Frye standard has been abandoned by many states and the federal courts in favour of the Daubert standard, but it is still law in some states.

Taken from: https://www.law.cornell.edu/wex/frye standard#

#### **Daubert Standard**

This is the standard used by a trial judge to assess whether an expert witness's scientific testimony is based on scientifically valid reasoning that which can properly be applied to the facts at issue.

This standard comes from the Supreme Court case, Daubert v. Merrell Dow Pharmaceuticals Inc., 509 U.S. 579 (1993).

Under the Daubert standard, the factors that may be considered in determining whether the methodology is valid are: (1) whether the theory or technique in question can be and has been tested; (2) whether it has been subjected to peer review and publication; (3) its known or potential error rate; (4) the existence and maintenance of standards controlling its operation; and (5) whether it has attracted widespread acceptance within a relevant scientific community. The Daubert standard is the test currently used in the federal courts and some state courts. In the federal court system, it replaced the Frye standard, which is still used in some states.

Taken from: https://www.law.cornell.edu/wex/Daubert standard

## The 3rd trial - Evidentiary Hearing

This is where the complexity of the case became very real to me. As usual, there had been no need for me to know the details that do not impact on my report, so I steered away from anything that might bias my opinion. Arriving in Miami, USA, I first met with Waxman and the full defence team for Ibar. They were, as many Floridians are, extremely polite and professional. Located in plush, downtown Miami offices, I could not help but think of the many American law dramas I had seen over the years, featuring the very clever fast-talking lawyers who had all details of their case at their fingertips. The team were certainly very bright and knew their stuff but were actually very reassuring and helpful; and in no way

pushy or coercive. During that first briefing, we went through the entire history of the case, the reasons why my report was so important to the case and how my position as a defence expert would be viewed by the prosecution. Although it was said with a little jocularity, nonetheless, I was a little taken aback when warned verbatim 'you know you will be viewed as the defence whore!' That broke the ice. Apparently, unlike in the UK where experts like myself regularly do defence AND prosecution work, that is not necessarily the situation in the US. One is generally a defence or prosecution expert. Sadly, the defence expert is often viewed as someone paid to get a result favourable for the defence. I thought it was going to be a task to ensure that my impartiality was visible to all and remained intact. Instead, the team were quite insistent that my impartiality came through to the judge and demonstrate that the same report conclusions would have been reached by anyone qualified to do this work had someone been instructed at the first trial.

The first day of the hearing arrived and I admit, I was somewhat apprehensive. While a great deal less formal than the wigs and gowns in UK criminal courts, the atmosphere in and around the court was tense. The courtroom was filled with family and reporters and cameras, and the setting of those courtroom dramas once more came to mind. The judge entered and after some preliminary introductions, the voir dire examination began. I was asked if I understood that these proceedings were a criticism of the trial attorney for failing to call an expert in the trial in 2000 and that we would be talking about my qualifications both at this time as well as in 2000. The questions ranged from my own personal qualifications and experience in analysis, report writing, the state of facial comparison use in the UK in 2000, the state of it now, was it accepted as a discipline on 2000, could someone from my department (or any others) at the time have done similar work. The prosecutor was also very interested in the growth of the discipline itself and explored the formation of the Forensic Image Analysis Group (FIAG), the creation of the six point scales of support we devised as a group (no support, limited support, moderate support, support, strong support and powerful support). She also explored in depth, the role of the now defunct Council for the Registration of Forensic Practitioners (CRFP) for which I was at the time, one of the very few certified national assessors. She also knew a considerable amount about the office of the Forensic Science regulator and how it was set to look at the processes involved in all forensic disciplines. These questions were ones which I had not been briefed on, and were essentially away from my report conclusions, but they were indicative of the hearing throughout.

There followed an in-depth exploration of my publications ranging from forensic and scientific journals to book chapters, she explored my managerial, teaching and training experience and responsibilities at the University where I worked at the time, along with affiliations to various forensic and medi-

cal art associations. It was clear, that the thrust of the questioning was to demonstrate that I was not qualified to do this sort of work, it was not available in 2000, and on a number of occasions during the trial, the prosecutor would make several challenges under Frye that whatever discipline this was and regardless of the literature produced, I was not an impartial and disinterested expert. The prosecutor made clear reference to my being paid to appear, the clear implication was that I had something to gain from appearing. I now fully understood the warning from the defence team that these tactics were pretty much standard in these hearings.

During the course of the hearing, I had to leave the stand as points of law were discussed, and due to the fact that I was eventually able to receive the full transcript of the trial and my testimony, I can see that the Court (trial Judge) reviewed the standards required and was sufficiently comforted to allow the trial to proceed and for me to continue with my testimony. Over the following two days on the stand, the prosecutor eventually found her way to the contents of my affidavit and I spent many hours under questioning explaining my findings, their significance to the identification of Ibar, their difference to anthropological measurements and my conclusions.

After the second day, this part of the case was done. After gathering my materials and being thanked by the judge for coming over from the UK, I was excused from the stand. I then had a few hours to reflect. I had worked with a team of lawyers from an unfamiliar jurisdiction, I had seen the inner workings of a large and complex trial. I had faced some really stiff questioning from the prosecutor and indeed from the Court. The experience forced me to review how I give evidence in courts that appear more adversarial even than our own. We would now await the Supreme Court's ruling on Ibar's case, I prepared myself for a relaxing flight back to the UK. On arriving at the airport, to my surprise, I was approached by a small group of Hispanic reporters who asked me while filming, about the case. Again, I had not been warned that this might happen, and over the following years, I would receive requests to expound on the case. I felt I did a professional job and the attorneys agreed; Benjamin Waxman, partner and case lawyer went so far as to publicly state that "Ray Evans was very professional, easy to work with, and a formidable expert in the courtroom. He worked seamlessly with me from across the pond, through email, fax, and telephone, and delivered a detailed affidavit under a tight timeline. He provided me a wealth of background materials of which I was otherwise unaware. In court he was poised and articulate.."

This court would eventually deny Ibar's motion for post-conviction relief, but the Defence team continued its task of working towards an appeal.

For the next few years, while awaiting the Supreme Court's ruling, I would communicate with the defence team, exploring ideas and refining the nuances exposed in my report.

### A glimmer of hope

In 2012, after a 5-month trial, the courts reversed Penalver's conviction due to a number of errors and issues having to do with evidence not disclosed to the defence, Penalver was granted a retrial at which he was acquitted. Although the identification scenario was somewhat different, this was a good sign for the Ibar case.

# The Ruling

In 2016 there was a ruling. In a 22-page decision, it was declared that a majority of the Supreme Court's justices ruled that Ibar had now provided enough evidence to change their minds. In summary, the justices wrote:

"Ibar has established prejudice, given the relatively weak case against Ibar with no physical evidence linking him to the crime, the critical role of his identification derived from the video, and the errors we previously identified in Ibar's direct appeal,"

Ibar's DNA was not found on a blue t-shirt recovered from the crime scene which was allegedly used to partially cover the face of the perpetrator whom the State claimed to have been Ibar.

Ibar's private defense attorney, was found to be deficient as he failed to present a facial identification expert or forensic anthropologist despite Ibar's request and his defense lawyer's agreement to do so. At the postconviction evidentiary hearing, Ibar's attorney, who detailed a litary of personal and professional issues that were occurring at the time of trial, testified that he did not understand "why [he] failed in this absolutely critical feature of the case" in not having a facial identification expert testify, among other failings.

As this record bears out, there was simply no excuse for the numerous deficiencies and failures of Ibar's defense attorney. None of the failures can be attributed to strategic moves nor could remotely constitute acceptable conduct for an attorney defending a first-degree murder charge with the death penalty being sought. Under any definition of "deficient performance," Morgan could not be deemed to be functioning as defense counsel must perform to fulfill his or her crucial obligations to the defendant under the Sixth Amendment. While there were numerous deficiencies in performance, the most salient was the failure of trial counsel to present a facial identification expert to explain the physical differences between Ibar and the perpetrator alleged to have been him in the video, and to demonstrate that the quality of the images were so poor that they were inadequate to make a reliable identification. As we more fully explain, Ibar has established prejudice, given the relatively weak case against Ibar with no physical evidence linking him to the crime, the critical role of his identification derived from the video, and the errors we previously identified in Ibar's direct appeal. Simply put, we cannot and do not have confidence in the outcome of this trial. Accordingly, we reverse the trial court's denial of postconviction relief and remand for a new trial".

## They further wrote:

"Although Ibar's postconviction expert Raymond Evans opined that it was impossible to say with certainty that Ibar and the perpetrator are the same person, Evans further testified that he could not completely exclude Ibar as a potential match because of the general similarities between them

and the low quality of the videotape. Evans described Ibar and the perpetrator as having similar bilateral asymmetrical eyebrows and cheek bone widths. When Evans' description of the discrepancies is considered against his description of the similarities between Ibar and the perpetrator, the likelihood that the outcome of Ibar's trial may have been different is only conceivable, not substantial. Furthermore, the trial court found Ibar failed to establish that there was any generally accepted scientific field of facial identification at the time of his trial. It is unclear how Morgan's securing such an expert could have made a difference in the outcome at trial".

Taken from: https://caselaw.findlaw.com/fl-supreme-court/1725404.html

While the facial identification evidence did not fully convince the justices that it would have removed Ibar as a suspect, there was doubt and the way was clear for another trial and just as importantly, facial comparison could be used in a US trial. On this basis, Ibar is released from Death Row and placed in a regular prison.

### The Deposition

In 2017, I was called to give a Deposition from the UK via video link to the US State prosecution. This again, was a new experience for me. The point of a deposition is for the opposing side to get as much information from the witness as possible. This information is taken in conjunction with the first testimony given in court from 2009. My first task was to re-familiarise myself with the 250 plus pages of my initial testimony. My second task was to recall any phone calls, texts, emails or relevant phone calls about the case with the defence team over that period. I had several months to prepare for this, but it was still a mountain of information to digest again. The rules of engagement are exactly as in a full courtroom, an oath is taken and the questioning as intense as in a trial. It is important to remain as close to the original testimony as possible, any new information leads to more questions and prolongs the questioning. I was questioned for over five hours.

#### The 4th Trial

In 2018, I was again called to Florida to give evidence at the 4th trial of Pablo Ibar. I now had a better idea of what to expect. I again worked closely with the defence who helped me organise the additional information and talk me through the system I was facing. On the day of the trial, the courtroom was once again filled with family, reporters, cameras and also, a delegation of members of the Spanish Parliament. Ten members of Spain's Parliament attended the hearing to hear the prosecution and Ibar's defence team present their initial arguments. According to a local news outlet EFE, the delegation travelled to the court in Fort Lauderdale to ensure both that Ibar received a fair trial and to show their opposition to the death penalty.

This time, during one full day of questioning, the emphasis was solely on my report / affidavit. The question of whether facial comparison as a discipline that reached the required standard, had already been answered with the 2016 Supreme Court ruling.

Again, the questioning was direct and robust, but I did not feel as intimidated now as previously, I hesitate to say it was enjoyable, but the courtroom experience was certainly less stressful the second time around. Maybe that also had something to do with my better understanding of the processes, or perhaps the decade of cases between my first appearance and the second. In this trial, the defence produced its evidence from the previous trials and the facial comparison report. The prosecution produced further (disputed) information. After 23 years, the significance of the blue T-shirt was again brought to bear on the case. Despite not finding Ibar's DNA from the hair, blood, sweat or saliva in the previous trials, the prosecution claimed to have now found key data.

Using a complex probabilistic genotyping 'black box algorithm' software, the prosecution claimed from the mixed DNA on the T-shirt, that they had obtained a partial match of Ibar's DNA on the blue Tshirt. This is a controversial method of boosting co-mingled DNA material. The T-shirt by now had been handled multiple times including by individuals who had access to Ibar and been shown in open court. The garment had also been received by the testing lab in an unsealed evidence bag and the DNA expert acknowledged that this single spot of DNA could have been transferred to the T-shirt by the touch of an intermediary, even by the comingling of other packages containing items that either belonged to Ibar (such as his shoes) or may have been previously touched by Ibar.

Despite these and many other strong defence objections such as matching bloody prints from shoes found on a separate suspect (not Ibar), the new 'evidence' was allowed before the jury.

#### The Verdict

Charged with the triple murder committed in Florida in 1994, and after spending 25 years in prison 16 of them on Death Row, Ibar was found guilty of the six counts brought against him in the long running case which became known as the Casey's Nickelodeon murders, an obvious reference to the name of Sucharski's business. The State once again sought the death penalty.

However, after an appeal by the defence and only 90 minutes deliberation, the jury refused the death penalty option and instead imposed a life sentence amounting to a further 60 years.

This left the way clear to file a new motion to the Florida District Court of Appeal. If that appeal fails, Ibar would still have the opportunity to appeal again to the Florida Supreme Court.

Taken from: https://www.youtube.com/watch?v=H6v\_fDMJSKc See: https://deathpenaltynews.blogspot.com/2019/05/convicted-murdererpablo-ibar-escapes.html

### The future

A motion for a new trial has been filed in The Circuit court of the Seventeenth Judicial Circuit in and for Broward County, Florida Criminal Division.

Florida Rule of Criminal Procedure 3.600 states that the court "shall grant a new trial" if "[t]he verdict is contrary to law" or "the weight of the evidence." In the instant case, a new trial is required because the verdict is both contrary to law and contrary to the weight of the evidence. In this case, the greater weight of the state's highly suspect trial evidence was consistent with Ibar's innocence and against the verdicts of guilt.

I don't think I've heard the last of this case...

### About the author

**Ray Evans** founded **SRi Forensics** as a Private limited company in 2004.

SRi Forensics is an independent image analysis and e-forensics company located in overlooking the River Irwell on Exchange Quay, part of the famous Salford Quays complex.

We provide a number of vital services to the Criminal Justice system, both for the Prosecution and the Defence. Police forces have long recognised the power of CCTV as a crime-fighting tool and have increased their investment in this technology; consequently, the UK boasts the highest concentration of CCTV cameras in the world. SRi Forensics provides analyse of CCTV and provides expert opinion on the evidential usefulness of this material for use in Facial Comparison (Facial Mapping) and Video enhancement cases.

Their expertise is recognised around the world, being involved in many of the cases seen in the News and regularly receive instruction from places as diverse as Asia, Europe and the USA.

The importance of digital presentation of evidence in court is acknowledged as an important time and cost saver by authorities such as the CPS and the SFO. Under the CPS National Framework, SRi Forensics is a recognised provider of services to these authorities.

As one of the earliest adopters of digital evidence presentation technology, our experience has been gained through years of working closely with the Criminal Justice System on some of the largest and most high-profile cases in the UK, Europe, Asia and the USA.

Our in-house services include, Expert Facial and body comparison, a full Electronic Presentation of Evidence (EPE) design and coding service, Medical Illustration & Injury Depiction as well as Video editing & analysis.

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