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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

NO. 28

PALACIOS (MIGUEL ANGEL),

Appellant.

265 East 161st Street
Bronx, New York
March 10, 2026

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

DAVID FITZMAURICE, ESQ.
APPELLATE ADVOCATES
Attorney for Appellant
111 John Street, 9th Floor
New York, NY 10038

WILLIAM H. BRANIGAN, ESQ.
QUEENS COUNTY DISTRICT ATTORNEY
Attorney for Respondents
12501 Queens Boulevard
Kew Gardens, NY 11415

Chrishanda Sassman-Reynolds
Official court Transcriber



1 CHIEF JUDGE WILSON: Next case on the calendar is
2 People v. Palacios.

3 MR. FITZMAURICE: Good morning, Your Honors.
4 Nice short train journey this morning.

5 David Fitzmaurice from Appellate Advocates on
6 behalf of Mr. Palacios. I'd like to reserve three minutes.

7 CHIEF JUDGE WILSON: Yes.

8 MR. FITZMAURICE: Your Honors, when we talk about
9 the prosecution's initial burden at a suppression hearing,
10 what we're really talking about is that the prosecution has
11 to tell the court what happened.

12 So when defense counsel like here makes a
13 specific allegation of a De Bour violation of a - - - of -
14 - -

15 JUDGE RIVERA: So does - - - does - - - I think
16 your position result in both the detective who issues the
17 I-card and the officers who actually make the arrest, do
18 they all have to testify? Is that your rule?

19 MR. FITZMAURICE: Had - - - had they all
20 testified we would be the better for it, I think. Because
21 we would be able to analyze the nature of the initial
22 interaction.

23 JUDGE RIVERA: We all aspire to greatness. But
24 do you need both under your rule?

25 MR. FITZMAURICE: No. No, I don't think you need

1 both.

2 JUDGE RIVERA: Okay.

3 MR. FITZMAURICE: You know, I - - - I don't want
4 you to mistake our position with having a problem with the
5 fellow-officer rule in general. I actually think our
6 position - - -

7 JUDGE HALLIGAN: And - - - and Ramirez-Portoreal
8 suggests that you don't need both necessarily, doesn't it?

9 MR. FITZMAURICE: Absolutely, it does. Yeah.
10 And if we think about Ramirez-Portoreal and we think about,
11 you know, Fleming and Lott on the - - - on the - - - on the
12 roof together with the binoculars.

13 JUDGE HALLIGAN: So you agree then that
14 circumstantial evidence can be sufficient? And - - - and
15 so the question is, is there enough here?

16 MR. FITZMAURICE: Yeah. Absolutely.

17 JUDGE HALLIGAN: Okay.

18 MR. FITZMAURICE: And so we go back to Ramirez-
19 Portoreal. And - - - and it's sufficient in that case
20 because we don't have many unanswered questions that - - -
21 you know, they - - - one sees it, they go down, they get in
22 the same car, they go to the location.

23 JUDGE HALLIGAN: And do you agree also that an I-
24 card can be sufficient if the communication is clear?
25 Probable cause I-card can be sufficient?

1 So if one officer, you know, creates the probable
2 cause I-card, gives it to the other officer, and there's -
3 - - and there's a - - - I understand you're contesting here
4 whether there is a record of communication. But if the
5 record shows communication, is that sufficient?

6 MR. FITZMAURICE: I think it would - - - it would
7 need to show to - - - to - - - yes. But - - - but the - -
8 - the timing actually matters here.

9 JUDGE HALLIGAN: Uh-huh.

10 MR. FITZMAURICE: Because - - - because what
11 we're left with here is, we're - - - we're left with the
12 prosecution asking that - - - that uploading an I-card to a
13 database makes the initial De Bour interaction a level 4.

14 JUDGE HALLIGAN: But you're not - - - you're not
15 - - - I don't take you to be contesting - - - please tell
16 me if I misunderstand - - - the general proposition that an
17 I-card can be relied upon to provide probable cause to
18 arrest?

19 MR. FITZMAURICE: It - - - it absolutely can. It
20 - - - it can commu - - -

21 JUDGE SINGAS: So is the issue that no one
22 communicated between the issuance of that I-card, and then
23 the - - - the defendant coming in? So are you requiring a
24 communication for that second half?

25 MR. FITZMAURICE: I think we're requiring some

1 proof of receipt let's say, right? Because - - -

2 JUDGE SINGAS: So why isn't the proof of receipt
3 the fact that - - - that he shows up at the precinct the
4 next morning, right after the I-card is issued the night
5 before?

6 MR. FITZMAURICE: Well, because I understand that
7 - - - that's - - - that's - - - that's - - - that's
8 tempting, and that's kind of the as night follows day.
9 That's - - - that's the assumption that they're asking you
10 to make. But that doesn't actually tell us the - - - the
11 moment that matters, which is prior to the interaction.

12 So - - - so Your Honor - - - Your Honor's point
13 here, and which is the prosecution's point, that, just
14 maybe at most, tells us that at some stage in the
15 interaction they learned about the I-card, which explains
16 why he ends up the next day - - -

17 JUDGE HALLIGAN: You mean the interaction between
18 the arresting officer and the defendant? Or the
19 interaction between the officer who created the I-card and
20 the arresting officer?

21 MR. FITZMAURICE: No. In that situation, I mean
22 the interaction - - - the initial stop. So - - -

23 JUDGE CANNATARO: So are you - - -

24 MR. FITZMAURICE: - - - between the arresting
25 officer.

1 JUDGE CANNATARO: Was your last comment meant to
2 suggest that in some circumstances it - - - the I-card
3 could provide a post hoc justification for the arrest?

4 MR. FITZMAURICE: No. I don't think so. You
5 know? Unless it - - - the post hoc justification would
6 need to actually explain. Basically, what I'm looking for
7 is something in the record that tells us that the reason
8 for the initial approach - - -

9 JUDGE CANNATARO: Was the I-card?

10 MR. FITZMAURICE: --- was the level 4, was the
11 I-card.

12 JUDGE RIVERA: Well, what's - - - what's the
13 record of the content of the I-card?

14 MR. FITZMAURICE: I'd love to know.

15 JUDGE RIVERA: Well, then how - - - how do you
16 get to your argument that all you need is proof of receipt,
17 if you don't know what he received?

18 MR. FITZMAURICE: Well, it was - - - this is my
19 point, you know. Proof of receipt, and then what they
20 received. So for instance, we don't even know if the I-
21 card here, to the extent it was received prior to the
22 interaction, if it had a photo on it, if it had a
23 description on it, you know? Leaving aside - - -

24 JUDGE RIVERA: Do you then need Det. Hernandez,
25 the person who issues the I-card, to testify for that? Or

1 can the person who received it simply say, this is what I
2 saw on the I-card?

3 MR. FITZMAURICE: Okay. So had he testified to:
4 I issued an I-card; my I-card looked like this; my I-card
5 is in the record, then I could - - - I could kind of
6 understand how an unnamed patrol officer might be able to
7 match the defendant to the I-card before the approach.

8 Because we don't have that here, we're left
9 assuming that - - - the whoever this patrol officer was,
10 knew about the I-card - - -

11 JUDGE TROUTMAN: Could you use hearsay evidence
12 wherein someone testifies, other than the arresting
13 officer, that he indicated that that was, in fact, the
14 basis of the arrest?

15 MR. FITZMAURICE: I think as long as we're
16 steering clear of the kind of the Gonzalez problem, I think
17 so. I mean, I think hearsay does - - - you know, does - -
18 - is a part of suppression hearings. But I just, you know,
19 want to be careful that we're already relying on a - - - on
20 a - - - on a - - - on a - - - on an inference, and we're
21 stacking hearsay on top of the inference in an initial
22 burden. And I do think to answer the first question, the
23 safest thing is obviously to just have the person say, I
24 initiated this encounter because I had the I-card. Or - -
25 -

1 JUDGE RIVERA: But if you don't know the content
2 of the I-card, I still think that doesn't help.

3 MR. FITZMAURICE: Absolutely. And that's - - -
4 you're a hundred percent right. And - - - and the fact
5 that we don't know if it was accessed, or if it was
6 accessed, what it would have shown, means that we cannot
7 assume that this was a level 4 at the outset.

8 JUDGE TROUTMAN: So is it the - - - the problem
9 here is the insufficiency of the record to support that it
10 was the I-card?

11 MR. FITZMAURICE: In this case?

12 JUDGE TROUTMAN: Yes.

13 MR. FITZMAURICE: Yes. Because - - - because
14 we're left - - - I mean, I know they want to talk a lot
15 about how tempting it, you know, how - - - how, you know,
16 the twenty-four hours later, and the same precinct. But
17 what they're actually asking for, and I want to be very
18 specific about this - - - and I'm not putting words in
19 anybody's mouth. They're actually asking for a per se rule
20 that uploading an I-card means the initial encounter - - -

21 JUDGE HALLIGAN: What if it was - - -

22 MR. FITZMAURICE: - - - was a level 4.

23 JUDGE HALLIGAN: What if it was an hour later?
24 What if they were on the same shift, same precinct? Are
25 there any circumstances in which you'd have something a

1 little closer to Ramirez-Portoreal, which is, you know, on
2 a roof together - - -

3 MR. FITZMAURICE: Yeah.

4 JUDGE HALLIGAN: - - - would be sufficient? Or
5 do - - - is your position that the arresting officer has to
6 testify, and has to testify literally to the receipt of the
7 I-card?

8 MR. FITZMAURICE: No. I think - - - I - - - I
9 thought about this. I thought about this preparing. And I
10 think that, yeah, I could imagine a position. I could
11 imagine a situation where - - - where, you know, after
12 developing probable cause and having - - - issuing the I-
13 card, maybe someone within his unit, who is involved in the
14 - - -

15 JUDGE HALLIGAN: So you're not - - - you're not -
16 - -

17 MR. FITZMAURICE: - - - investigation - - -

18 JUDGE HALLIGAN: - - - arguing for, or at least
19 you're not - - - you're not arguing that - - - that we need
20 a rule, in your view, which would always require the
21 arresting officer to testify, as opposed to the officer who
22 created the I-card?

23 MR. FITZMAURICE: No. I'm asking for no rules
24 here. No. Absolutely not.

25 CHIEF JUDGE WILSON: How do we know, if we do,

1 that the police department issues I-cards only when an
2 officer believes there's probable cause?

3 MR. FITZMAURICE: We don't know that. This is -
4 - - this is - - - we have to assume that that's the basis.
5 This is a kind of a - - - you know - - -

6 JUDGE HALLIGAN: But we have some testimony - - -

7 MR. FITZMAURICE: - - - it was pretty - - -

8 JUDGE HALLIGAN: - - - don't we have some
9 testimony - - -

10 MR. FITZMAURICE: I was about to quote it. Yeah.
11 It was a, you know, it was a - - - basically, an arrest
12 warrant, but like an arrest warrant, but for the NYPD only.
13 Which, of course, you know, means that it hasn't gone
14 through a magistrate. It also - - - it also doesn't have
15 the right to counsel - - -

16 JUDGE HALLIGAN: But I thought it was - - -

17 JUDGE CANNATARO: Didn't the officer say
18 something - - -

19 JUDGE HALLIGAN: - - - called it probable cause
20 I-card specifically?

21 MR. FITZMAURICE: Right.

22 JUDGE HALLIGAN: Right?

23 JUDGE CANNATARO: He implied that there were
24 different types of I-cards.

25 MR. FITZMAURICE: There - - - there are. I think

1 there's - - - I think there's witness I-cards and probable
2 cause I-cards. Yeah. Absolutely. And - - - you know.
3 And - - - and I think that they have different - - -
4 different rules.

5 But in a probable cause I-card, essentially what
6 they're doing is, you know, prior to I-card, this would
7 probably go to a - - - to - - - to - - - to a magistrate
8 and it would trigger the - - - trigger the right to counsel
9 under New York law.

10 JUDGE HALLIGAN: But - - - but I thought you
11 already told us that - - - that you're not arguing that an
12 I-card cannot provide a basis for arrest? And I didn't
13 hear you to be arguing that you have to go to a magistrate,
14 and that an I-card is - - - is necessarily - - -

15 MR. FITZMAURICE: No. You - - - you definitely
16 don't. I mean, look, the fellow-officer rule is - - - is a
17 - - - is a - - - is a - - - is a vehicle for transferring
18 probable cause. So you know, there's nothing inherently
19 inconsistent with an - - - an I-card being the modern-day -
20 - - you know, telephone or bulletin or - - - or whatever,
21 from some trooper in Pennsylvania, or wherever the - - -
22 the old cases were about, you know. But - - - but in those
23 situations - - -

24 JUDGE GARCIA: Counsel, I'm sorry. Can I ask - -
25 -



1 MR. FITZMAURICE: - - - we had receipts.

2 JUDGE GARCIA: - - - you a different question?

3 Let's assume here we learn that this is a level 2
4 violation. They go up to the person and they ask for ID.
5 They didn't have a basis for doing that. They get the ID.
6 They run it. And they - - - it spits out the I-card.
7 Which assume again, hypothetically, has the information and
8 the probable cause is established in the document the
9 officer receives. Same subsequent facts. What's the
10 analysis of the admissibility of the statement in that
11 case?

12 MR. FITZMAURICE: So just to understand. So - -
13 -

14 JUDGE GARCIA: Level 2 violation, right? I come
15 up to a person on the street, I ask for ID, I don't have a
16 - - - a basis for doing that.

17 MR. FITZMAURICE: So it is a level 2 violation?

18 JUDGE GARCIA: Right. Violation. But I get the
19 ID. I run the ID. I-card spits out. And assume again,
20 hypothetically, I-card is in good order. Has the basis for
21 probable cause. And it identifies the defendant, has a
22 photo. Now, the same facts as we have here: brought to
23 the station; Mirandized; statement.

24 What's the analysis of the admissibility of the
25 statement?

1 MR. FITZMAURICE: I think that, you know, if - -
2 - if we look at - - - if, Your Honor - - - if Your Honor's
3 hypothetical is tweaked slightly to - - - to they discover
4 an arrest warrant?

5 JUDGE GARCIA: No. No. The I-card.

6 MR. FITZMAURICE: Well - - - well, we - - - I - -
7 - I think it would still be this. I think we'd still need
8 to analyze whether - - - whether the I-card was enough of
9 an attenuating factor. And you know, the United States
10 Supreme Court has said that -- - that - - - that arrest
11 warrants don't per se attenuate in Utah v. Strieff. So I
12 think that we'd have to analyze whether the full
13 attenuation analysis, Bradford - - -

14 JUDGE RIVERA: How - - - how is that possible? I
15 thought under De Bour, if the initial interaction is
16 unlawful, the interaction that follows cannot be considered
17 to somehow erase the illegality of the initial approach.

18 MR. FITZMAURICE: I'd like to think it would fail
19 the attenuation analysis.

20 JUDGE RIVERA: Well, I thought that was a
21 question.

22 MR. FITZMAURICE: What I think - - - well, I
23 think we would perform that attenuation analysis - - -

24 JUDGE GARCIA: You would? That was my question.

25 MR. FITZMAURICE: Yeah.

1 JUDGE GARCIA: You would perform an attenuation?

2 MR. FITZMAURICE: Yeah. Absolutely, yes.

3 JUDGE RIVERA: But in this hypothetical, it's
4 immediate. Where's the attenuation?

5 MR. FITZMAURICE: You're right. It's immediate.
6 And - - - and I think that, you know, the attenuation
7 analysis requires timing and intervening factors. So
8 you're right.

9 JUDGE GARCIA: I thought we didn't even know what
10 the timing is here, right? Do we have an idea of when the
11 actual arrest took place?

12 MR. FITZMAURICE: In this situation?

13 JUDGE GARCIA: Yeah. Our case. This case.

14 MR. FITZMAURICE: Back to the real world?

15 JUDGE GARCIA: Yeah. Real world.

16 MR. FITZMAURICE: I don't even know what borough
17 it was. Yeah. No. No timing. No nothing.

18 JUDGE GARCIA: Right. It's very hard to do an
19 attenuation analysis. Is - - -

20 JUDGE RIVERA: No. But in the hypothetical that
21 was posed. I'm sorry. In the hypothetical, that was - - -
22 I just didn't understand your answer about attenuation in
23 that hypothetical. Of course, there's an attenuation,
24 potential attenuation argument in what happened in this
25 case given the timing. But I thought in the - - - I just

1 didn't understand your answer in the hypothetical.

2 MR. FITZMAURICE: The hypothetical is that if
3 there was a level 2 De Bour. He shows up. He says level
4 2, he loses - - -

5 JUDGE RIVERA: You just go up to them. You got
6 no reason to go up to them. You ask them - - -

7 MR. FITZMAURICE: Yeah. I'm just - - -

8 JUDGE RIVERA: - - - for ID.

9 MR. FITZMAURICE: - - - absolutely - - -

10 JUDGE RIVERA: They give you ID. You go back,
11 you run it, you find the I-card, you arrest them. I
12 thought that was the hypothetical.

13 MR. FITZMAURICE: And I think that, in that
14 situation, you know, it's not a case of Eureka, I found an
15 I-card, we're - - - we're good. No. I think that, you
16 know, the I-card would - - - would - - - and the arrest,
17 and then the fact that the statements are made immediately
18 upon being brought to the precinct, it would all be fruit
19 of that level 2 violation.

20 JUDGE GARCIA: Okay. All right.

21 MR. FITZMAURICE: So here, since we can't even
22 conduct that analysis - - -

23 JUDGE RIVERA: Yes.

24 MR. FITZMAURICE: - - - because we don't even
25 know enough to know the nature of the initial interaction -

1 - -

2 JUDGE RIVERA: The potential attenuation
3 argument?

4 JUDGE GARCIA: Right.

5 MR. FITZMAURICE: Yes.

6 JUDGE RIVERA: In this case?

7 MR. FITZMAURICE: Yes.

8 JUDGE RIVERA: Okay.

9 MR. FITZMAURICE: And we - - - we - - - we just
10 don't know enough. So if we just think about what the
11 Supreme Court did in - - - in Strieff, you know, the whole
12 case is actually about - - -

13 JUDGE RIVERA: But even in the hypothetical - - -

14 MR. FITZMAURICE: - - - the stop itself.

15 JUDGE RIVERA: - - - aren't we stuck with - - -
16 unless there is testimony that what this I-card, or
17 evidence - - - excuse me. What the - - - the content of
18 the I-card?

19 MR. FITZMAURICE: Say that again?

20 JUDGE RIVERA: Even in the hypothetical, aren't
21 we stuck with the content of the I-card? I mean, you don't
22 have this here.

23 MR. FITZMAURICE: You don't have this here.

24 JUDGE RIVERA: Isn't that, I thought, really the
25 core of your argument on this issue - - -

1 MR. FITZMAURICE: Is that you - - -

2 JUDGE RIVERA: - - - was you don't know what's in
3 the I-card?

4 MR. FITZMAURICE: We don't know if it was seen,
5 what was seen, how it was seen. I - - -

6 JUDGE RIVERA: But even if it was seen, if you
7 don't know what it - - -

8 MR. FITZMAURICE: We don't know what's in it.

9 JUDGE RIVERA: - - - contains - - -

10 MR. FITZMAURICE: Absolutely. We don't know
11 what's in it.

12 JUDGE RIVERA: You have to - - - okay.

13 MR. FITZMAURICE: I - - - look, I - - - I'm - - -
14 I - - - that - - - that is exactly the problem here. And -
15 - - and I don't - - - and I don't want to suggest that - -
16 - that - - - that - - - I don't suggest that there's any -
17 - - any legal devices that could - - - that could paper
18 over this or whatever - - - attenuate. No. We - - - we
19 don't get off the ground here, and it looks like - - -

20 JUDGE RIVERA: Your red light is on. Do you want
21 to make a quick point - - -

22 MR. FITZMAURICE: I guess, I'll just - - -

23 JUDGE RIVERA: - - - about the second point?

24 MR. FITZMAURICE: The second point. It's a
25 little more unusual. You know, I - - - I think that it's

1 similar to the I-card point insofar as the prosecution is
2 now left, you know, trying to defend very unusual
3 litigation tactics at the suppression hearing.

4 JUDGE HALLIGAN: Can I just ask you what is
5 standard practice?

6 JUDGE CANNATARO: Yeah. How unusual is that?

7 MR. FITZMAURICE: Oh, it's very.

8 JUDGE HALLIGAN: So - - - so there must be some
9 number of - - - of interviews that take place in a
10 different language.

11 MR. FITZMAURICE: Every day.

12 JUDGE HALLIGAN: What happens?

13 MR. FITZMAURICE: Every day. Before they were
14 recorded, what - - - what would happen is they would put in
15 the physical Spanish - - -

16 JUDGE HALLIGAN: I mean, in terms of translation?

17 MR. FITZMAURICE: - - - language - - -

18 JUDGE HALLIGAN: Yeah.

19 MR. FITZMAURICE: - - - the Spanish language
20 Miranda card, back before they - - - now they're recorded.
21 You know, what happens is - - - is normally that there's a
22 sworn translation, or normally that the witness who's there
23 is shown the translation and can at least - - -

24 JUDGE CANNATARO: There's a sworn translation by
25 whom?

1 MR. FITZMAURICE: I mean, I think that by - - -
2 by anybody if there's no issue. But - - - but that - - -
3 I've even seen situations where, you know, there's been an
4 issue as to translation and the court has actually
5 employed, you know, the court reporter to - - - to - - -

6 JUDGE HALLIGAN: So - - - so in your experience -
7 - -

8 MR. FITZMAURICE: - - - to resolve - - -

9 JUDGE CANNATARO: At a hearing? At a suppression
10 hearing?

11 MR. FITZMAURICE: Absolutely. And has taken
12 judicial notice of the court reporter's determination. So
13 nobody likes these - - -

14 JUDGE SINGAS: That's when the defense attorney
15 raises an objection to a translation?

16 MR. FITZMAURICE: Yes. Yes. Which is - - -
17 which is, you know, kind of - - - you know. I want to be
18 very clear. That was done below. And this idea, if - - -
19 there's really - - - this - - - this kind of hinges on - -
20 - on - - - on one - - - one word, and that is the word
21 "aid". It's not an aid.

22 And - - - and the reason why we know it wasn't an
23 aid is just - - - there's one example in the - - - in the
24 cross-examination where - - - where, you know, they're - -
25 - they're fighting over a comment, you know, you - - - you

1 have to answer the question, right? That was what the
2 prosecution's theory was. And again, this is during a
3 Miranda colloquy that there's confusion and there's needed
4 to be rewarnings.

5 So you know, being told you have to answer the
6 question; not that bad. But on cross-examination, he
7 actually holds his feet to the fire. Plays a video again.
8 Plays the video again - - -

9 JUDGE HALLIGAN: But is that an objection to the
10 accuracy of the translation, or to what the translation, in
11 fact, says?

12 MR. FITZMAURICE: Well, so it's actually - - -
13 it's - - - it's - - - it's both because he manages to
14 elicit an admission. The comment was you have to answer,
15 not you have to answer the question. But then when we go
16 to the translation, we see that the - - - or we go to the
17 court's opinion, the finding of fact says you have to
18 answer the question.

19 So this aid is actually taking the place of sworn
20 testimony because the testimony has disavowed that version.
21 So there's no universe where we can keep calling this an
22 aid, you know, and I think that this is really easy to
23 avoid. Courts avoid it every day. I don't think you're
24 going to see this issue - - -

25 JUDGE TROUTMAN: So what do you do?

1 JUDGE CANNATARO: So what would be the correct
2 way to do these hearings going forward? You know, if - - -
3 if you have a recorded foreign-language interrogation like
4 this, and you have to review it, what - - - what - - -
5 what's the way it should happen at the hearing?

6 MR. FITZMAURICE: The way it happens in literally
7 every other suppression hearing case I've seen. And I see
8 them every week. You - - - you actually have a translation
9 that's a hearing exhibit, or you have enough - - -

10 JUDGE CANNATARO: Who does that translation come
11 from?

12 MR. FITZMAURICE: - - - testimony. Pardon me?

13 JUDGE CANNATARO: Who does that translation? Can
14 it be supplied by the People, like it was in this case?

15 MR. FITZMAURICE: Oh, it absolutely can. A
16 hundred percent. It can even come from the detective
17 himself.

18 JUDGE CANNATARO: Okay.

19 MR. FITZMAURICE: You know it can, you know. He
20 can be the one who prepared it, or he can be the one who
21 signed off on it.

22 JUDGE HALLIGAN: So then is the problem that it
23 was not an exhibit or that it was not sworn?

24 MR. FITZMAURICE: I think that the - - - the - -
25 - the fact that it wasn't an exhibit is - - - is - - - is

1 why it - - - the fact that it wasn't sworn is why it's not
2 an exhibit. So had this been an exhibit, there'd be no
3 issue here, like - - - like is frequently the case, you
4 know? We see the video, we read the exhibit, you know, we
5 paste it in our briefs. We - - - we litigate the Miranda
6 issues on appeal. There's no issue. There's no, you know,
7 transcript appearing for the first time in the
8 prosecution's appendix, you know.

9 JUDGE GARCIA: So could they have admitted this
10 transcript - - -

11 MR. FITZMAURICE: Pardon me?

12 JUDGE GARCIA: - - - as this a court exhibit?
13 Could they have admitted it here?

14 MR. FITZMAURICE: So I don't think they could
15 have admitted it because I don't think it was - - - it was
16 a, you know, it was a - - -

17 JUDGE GARCIA: It's a hearing, right? It's not a
18 trial.

19 MR. FITZMAURICE: No. But it's - - - it - - -
20 it's - - - it is - - - nobody has sworn to its accuracy or
21 - - - you know. So - - - so I don't think we know enough
22 to - - - I think he was dead-right. And he's - - - this
23 isn't pulling a fast one at the end. He's alerting. He's
24 jumping up and down saying this is a problem, and - - - you
25 know. During, after, post-hearing briefs, the continuation

1 motions - - -

2 JUDGE TROUTMAN: If you - - - if the officer here
3 who did the transcribing, if questions - - -

4 MR. FITZMAURICE: We don't know who did the
5 transcript.

6 JUDGE TROUTMAN: If - - - if he had?

7 MR. FITZMAURICE: Okay.

8 JUDGE TROUTMAN: If he had been the one - - -

9 MR. FITZMAURICE: Yes.

10 JUDGE TROUTMAN: - - - who transcribed it and he
11 is the interviewer, if he testified under oath verbatim as
12 to what was taking place in the - - - during the
13 questioning, would that suffice?

14 MR. FITZMAURICE: Yeah. That would absolutely
15 suffice. Because then it would really shift over to
16 defense counsel then, to - - - to - - - you know, the
17 burden would shift, and he - - - it will be up to him - - -

18 JUDGE TROUTMAN: Because he would be under oath
19 at that - - -

20 MR. FITZMAURICE: Yeah. And he could cross-
21 examine properly. And he could, you know. He'd have all
22 the facts in front of him. But here, that's not what's
23 happening. The only sentence he said is, I read him his
24 Miranda rights.

25 JUDGE CANNATARO: Leaving the substance - - - the



1 substance out of it. I just want to make sure that I'm
2 getting this. The - - - the problem with the court relying
3 upon the translation they were given is, if I understand
4 you correctly, simply the lack of appropriate
5 certification?

6 MR. FITZMAURICE: Yeah.

7 JUDGE CANNATARO: So if - - -

8 MR. FITZMAURICE: And - - - and the fact, then,
9 therefore, that it's not in the record, so that, therefore,
10 when we read its findings of fact, it's now gone outside of
11 the hearing record.

12 JUDGE RIVERA: Let - - - let me ask you this. If
13 you look at the video, he does appear to be reading off a
14 card. If he said - - - if they didn't admit that card, and
15 he simply said that card is - - - in this case, Spanish - -
16 - the Spanish-language version of Miranda rights; I read
17 that. If he - - - if he said that, do you agree, at that
18 point, then, it shifts to the defendant to challenge?

19 MR. FITZMAURICE: Certainly, closer. Yeah. If
20 he said I - - - I didn't paraphrase it. I didn't, you
21 know, ad lib, you know? I - - - I read verbatim the card.
22 I've seen cases where the card itself is put in. Yeah,
23 absolutely.

24 JUDGE RIVERA: Or even without the card being put
25 in?

1 MR. FITZMAURICE: Even without the card put in.

2 JUDGE RIVERA: The officer saying, and that card
3 was a correct translation of the Miranda rights in Spanish.
4 I'm a Spanish speaker. I read them to him.

5 MR. FITZMAURICE: I - - - I think - - - I think
6 we're now starting to look like what these Huntley hearings
7 normally look like.

8 JUDGE RIVERA: Look like?

9 MR. FITZMAURICE: Absolutely. And that's why
10 this is - - -

11 JUDGE GARCIA: And that could be also one
12 question to the officer: Have you reviewed the transcript
13 and is it fair and accurate translation?

14 MR. FITZMAURICE: I think, then - - - I think,
15 then, I'm not making this argument to this court.
16 Absolutely. Whatever right defense counsel may be still
17 trying to, you know, push the burdens below and - - - and
18 stress test things, I'm not including it as a point 2, in -
19 - - in this brief. I can tell you that much.

20 If there are no further questions, Your Honor, I
21 will rest on my briefs.

22 CHIEF JUDGE WILSON: Thank you.

23 MR. BRANIGAN: Good morning, Your Honors.

24 William Branigan, for the Office of District
25 Attorney Katz. May it please the courts. May it please



1 the court.

2 Your Honor, as to the first issue. Because the
3 detective's probable cause was communicated by this I-card,
4 and because the defendant was arrested the next day and
5 brought to the officer's precinct - - -

6 JUDGE RIVERA: What's the content of the I-card?
7 Was that anywhere in the record?

8 MR. BRANIGAN: No, Your Honor. He only testified
9 that the - - - that this I-card gave probable cause. It's
10 a probable cause - - -

11 JUDGE RIVERA: But how - - -

12 MR. BRANIGAN: - - - I-card for the - - -

13 JUDGE RIVERA: How - - -

14 MR. BRANIGAN: - - - for arrest of this - - -

15 JUDGE RIVERA: How can that be enough? How can
16 that be enough?

17 MR. BRANIGAN: Because that I-card gave probable
18 cause to arrest this defendant, and the court - - -

19 JUDGE RIVERA: But I'm saying how would a judge
20 know that, if they don't have the I-card? Or at least an
21 explanation of what the officer put in the I-card?

22 MR. BRANIGAN: Your Honor, because the court can
23 infer that by the fact that the defendant was arrested and
24 brought to this - - - this detective the following day.

25 And so the - - - the particulars of the I-card -



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JUDGE CANNATARO: The court can infer that there's probable cause in the I-card from the fact that the defendant was arrested the following day?

MR. BRANIGAN: No, Your Honor. The - - - the - - - the - - - the court can infer that because the detective testified that this probable cause was - - - that this I-card was based on probable cause after the witness had identified this defendant - - -

JUDGE RIVERA: What - - - what if it just says arrest Mr. Palacios, and that's all it said? Is that enough?

MR. BRANIGAN: Your Honor, it - - - well, actually, it - - - it - - - it would be enough, based on this card's - - - this - - - based on the court's fellow-officer rule. So ordinarily, if there's - - - if - - - if officers are told that they can arrest a particular person, and they arrest that person, the - - - the burden would then shift, of course, to the defense to - - - to, you know, to make allegations at the - - -

JUDGE SINGAS: Yeah. But in the fellow-officer rule - - -

MR. BRANIGAN: Right.

JUDGE SINGAS: - - - the way I understand it, Mr. Branigan, there has to be some communication between

1 officers. Are you saying that the I-card is - - - is a
2 substitution for that communication that stands as another
3 officer? Is that your argument?

4 MR. BRANIGAN: Well, first, Your Honor, I - - - I
5 - - - I just want to back up for a second. In this case,
6 we had an officer testifying to what the probable cause
7 was, and that the probable cause was - - - was
8 communicated. It's not a situation where a person's being
9 told, where - - - where we have - - -

10 JUDGE HALLIGAN: But communicated other than - -
11 -

12 JUDGE SINGAS: It was communicated how, though?

13 JUDGE HALLIGAN: - - - through the I-card? You
14 just said there's testimony that probable cause was
15 communicated.

16 MR. BRANIGAN: No. The - - -

17 JUDGE HALLIGAN: Is there testimony that it was
18 communicated other than through the creation of the I-card?

19 MR. BRANIGAN: No, Your Honor.

20 JUDGE HALLIGAN: Okay.

21 MR. BRANIGAN: The - - - the testimony here is
22 that the probable cause is communicated through this - - -
23 this I-card.

24 JUDGE SINGAS: So the I-card is - - - is the
25 fellow officer?

1 MR. BRANIGAN: Well, the - - - the fellow officer
2 is the - - - I mean, the fellow-officer rule is the
3 communication. This is the communication.

4 JUDGE SINGAS: I mean, normally you would bring
5 in the officer who made the stop, and you would talk about
6 that as being the fellow officer who was relying on the
7 information. I'm saying there is no other officer here,
8 there's an I-card. And is it your position that the I-card
9 is taking the place of that officer?

10 MR. BRANIGAN: No, Your Honor. I - - - I'm
11 saying that this court can infer - - - can in - - - can
12 infer that communication. Or - - - or rather, that there
13 was a - - - that the recipient received that communication,
14 based on Det. Hernandez's testimony that this I-card was -
15 - - that this I-card communicated the probable cause for
16 arrest to the entire police department.

17 CHIEF JUDGE WILSON: I thought Mr. Palacios was
18 wanted for something else as well. No?

19 MR. BRANIGAN: I - - - I'm sorry. Could you
20 repeat the question, Your Honor?

21 CHIEF JUDGE WILSON: Was - - - is there something
22 in the record indicating that Mr. Palacios was wanted for
23 some other reason as well?

24 MR. BRANIGAN: Yes, Your Honor. During - - -
25 during the interview, detective - - - the Det. Tavares, I

1 think, joined the interview because he had suspected the
2 defendant in a - - - in a - - - in a separate robbery.

3 CHIEF JUDGE WILSON: So then - - -

4 JUDGE RIVERA: So did that suspicion rise to
5 probable cause to arrest for that potential offense?

6 MR. BRANIGAN: That's - - - that's not the - - -
7 that's not in the record, Your Honor.

8 And again, we're - - - we're not - - - it - - -
9 it's - - - I'm not arguing that there isn't - - - there
10 isn't some other possibility out there that they were
11 looking at him for that. But the - - - the evidence before
12 the court allowed this inference - - - allowed the
13 inference that - - -

14 JUDGE GARCIA: Counsel. Counsel, I'm sorry. It
15 - - - how do you exclude my hypothetical about a De Bour
16 violation?

17 MR. BRANIGAN: First - - - first, Your Honor. I
18 - - - I'd go back to Ramirez-Portoreal. And I - - - I
19 don't think that there was - - - there was this type of
20 analysis that could have been done, even in that situation,
21 where you have a close in time and - - - and proximity
22 arrest.

23 JUDGE GARCIA: But you have overnight here,
24 right? You have no testimony from the person that arrested
25 the defendant. How do we know the circumstances of that,

1 and why we wouldn't need to do an attenuation analysis?

2 MR. BRANIGAN: Well, first, Your Honor, the - - -
3 the court - - - the court can make the inference. And - -
4 - and the defendant's allegations here - - -

5 JUDGE GARCIA: Well, it seems that you're asking
6 the court to make that inference on the fact that an I-card
7 which isn't in the record but has probable cause in it
8 according to the testimony, was somehow viewed by that
9 officer the day after, at some point. We don't even know
10 the timing. And then that was the basis for the stop. But
11 why?

12 MR. BRANIGAN: Well, why? Because the - - - the
13 fact that that officer arrested the defendant brings him
14 back to the - - -

15 JUDGE SINGAS: Yeah. But we don't know how he
16 arrested him. What if he went into his house and arrested
17 him and brought him into court? Like, wouldn't that be
18 information that the hearing court should know and
19 evaluate?

20 MR. BRANIGAN: Well, the defendant's allegations
21 here were that he was arrested on the street. And he
22 didn't make any allegations either, that he was in a house,
23 that he was - - - that he was - - - that he was otherwise
24 mistreated. So those allegations are consistent - - -

25 JUDGE CANNATARO: The inference that you're

1 arguing for, can't be dependent on what the defendant says
2 to - - - to challenge the arrest, right? You're - - - I
3 understand your argument to be that there's close temporal,
4 maybe, physical proximity, and therefore you can assume
5 courts that the reason why he was arrested was because of
6 the I-card.

7 MR. BRANIGAN: That's correct, Your Honor.
8 That's - - - that is our argument.

9 JUDGE HALLIGAN: And - - - and is your position
10 that some temporal and physical proximity is required, or
11 that any I-card, any borough, any time is sufficient?

12 MR. BRANIGAN: No. I'm saying under these facts,
13 where it's the next day - - -

14 JUDGE HALLIGAN: But what's the rule that you're
15 asking us for?

16 MR. BRANIGAN: Your Honor, I'm - - - I'm not
17 asking for a per se rule. I'm asking that this court - - -

18 JUDGE RIVERA: Well, you are asking for part of a
19 rule because in response to me, you said the I-card is
20 enough.

21 MR. BRANIGAN: I - - -

22 JUDGE RIVERA: You don't need to know its
23 contents.

24 MR. BRANIGAN: I - - - Your - - - well, that is
25 true. As long as the I-card is providing - - -

1 JUDGE RIVERA: Well, that's your rule. You don't
2 need to have the contents; you just need testimony.
3 Whether it's the arresting officer who says I saw an I-
4 card, or it's the officer who filled out - - - or however
5 you call it - - - initiated, distributed the I-card,
6 correct?

7 MR. BRANIGAN: Your Honor, we - - - you need
8 testimony that - - - you need testimony that the - - - the
9 I-card provided probable cause for - - - for certain - - -

10 JUDGE RIVERA: Well, how do you do that without
11 knowing the content?

12 MR. BRANIGAN: Because the - - - the - - - the -
13 - - well, what we don't - - - it - - - it would be better
14 if we had the I-card. We don't have that. What we do have
15 is testimony that the I-card provided probable cause for
16 the arrest of Mr. Palacios.

17 JUDGE RIVERA: No. You have testimony. The
18 detective says, based on what a - - - an alleged victim
19 said to me, I believe that - - - and identified, of course,
20 Mr. Palacios - - - I believe that I had probable cause to
21 arrest - - - for him to be arrested. That's what you have.

22 You don't have, and that's what I put in the I-
23 card, or I put something in the I-card.

24 MR. BRANIGAN: No. No. Your Honor, he did say
25 that this was a probable cause I-card, and that this I-card

1 provided probable cause to the entire - - -

2 JUDGE RIVERA: But again, what does that mean?
3 That it just says arrest Mr. Palacios?

4 MR. BRANIGAN: I - - - I don't know. I don't
5 know what was written in the I-card.

6 JUDGE RIVERA: But isn't that - - -

7 MR. BRANIGAN: I know - - -

8 JUDGE RIVERA: - - - that's what I'm saying.
9 Isn't that a - - - a challenge to your position?

10 MR. BRANIGAN: Your Honor, I - - - I don't think
11 it's a challenge because there was probable cause to arrest
12 him. And we know what the probable cause - - -

13 JUDGE TROUTMAN: How do we know, here, that it
14 was - - - it wasn't something besides the I-card that
15 caused the arresting officer to arrest, without your
16 inference?

17 MR. BRANIGAN: Because the strongest inference
18 from the facts here, which the hearing court drew, was that
19 this I-card was the basis. The - - - it - - - it - - - the
20 - - - it's - - - it's possible - - -

21 JUDGE TROUTMAN: But you agree it's - - - it's
22 based on an inference? There's no - - - is there - - - let
23 me ask you. Is there anywhere in the record where it
24 clearly says that the basis of the arrest was, in fact, the
25 I-card, without the inference?

1 MR. BRANIGAN: Well, we - - - no, Your Honor. We
2 do not have the - - - we do not have the arresting officer.
3 The court could draw that inference, though, based on - - -
4 based on these circumstances.

5 CHIEF JUDGE WILSON: Suppose we kept all the
6 facts the same, but the arrest takes place three days
7 later. Does that affect anything?

8 MR. BRANIGAN: It is a factor. It's a worst - -
9 - it's a worst case in this case.

10 CHIEF JUDGE WILSON: Why?

11 MR. BRANIGAN: Because I - - - I think the - - -

12 CHIEF JUDGE WILSON: The probable cause hasn't
13 diminished, right?

14 MR. BRANIGAN: Because any - - - Your Honor, it's
15 - - - it's the same thing. The - - - the closer you get in
16 time and space, the more likely it is that this was, in
17 fact, the - - - the - - - that this provided the probable
18 cause. The further you go out, the more - - -

19 JUDGE CANNATARO: Was it close in space? Was he
20 arrested nearby where the - - - the probable cause crime
21 occurred?

22 MR. BRANIGAN: There's - - - there's no record of
23 - - - of that, Your Honor.

24 JUDGE CANNATARO: So all you have in this case is
25 time? It was a short time later?

1 MR. BRANIGAN: Well, I - - -

2 JUDGE CANNATARO: Because you can't even - - -
3 we're - - - we're certainly not allowed to infer that it
4 happened close to where the other crime happened, are we?

5 MR. BRANIGAN: I - - - I - - - well, I wouldn't -
6 - - I - - - I wouldn't guess as - - - I wouldn't guess as
7 to - - - to the - - - to the location. But - - - but he
8 was brought to the precinct of the - - - the issuing
9 officer. And the issuing officer - - -

10 JUDGE HALLIGAN: So the location - - -

11 MR. BRANIGAN: - - - immediately spoke to him.

12 JUDGE HALLIGAN: - - - is simply the precinct?
13 Not anything more specific than that?

14 MR. BRANIGAN: Correct.

15 JUDGE HALLIGAN: And I take it you agree that,
16 then - - - that temporal and physical proximity matter in
17 determining whether the fellow-officer card can be invoked
18 - - - rule can be invoked with an I-card?

19 MR. BRANIGAN: Yes, Your Honor.

20 JUDGE SINGAS: Yeah. But in your - - - in - - -
21 in this situation, a police officer could have just made an
22 arrest, and then ran it, and said, oh, look, lucky me, I've
23 got an I-card now, so that can justify this arrest. How do
24 we know that didn't happen here?

25 MR. BRANIGAN: Your Honor, I can't exclude that

1 completely. But that's speculation. And - - - and the
2 court could still infer - - - the court could still infer
3 from the circumstances, that, again, the closer - - -

4 CHIEF JUDGE WILSON: It's not clear what the line
5 here is between speculation and inference.

6 MR. BRANIGAN: On - - - that the - - - well, the
7 - - - the line is that the - - - the inference has some
8 support in - - - in the record. Here, the - - - the - - -
9 the court's finding that this arrest was based on - - - on
10 the I-card, is based on - - - on that issuance, based on
11 the actual probable cause, and based on the - - - the
12 immediate return to the precinct, and the - - - and the
13 detective's interview.

14 So the - - - the court here had all of these - -
15 - all of this evidence to - - - to draw that inference.

16 JUDGE TROUTMAN: So again, so that I'm clear.
17 Even without us having the I-card to review, the mere fact
18 that someone says it was issued, we have to assume, presume
19 that it did suffice to establish probable cause, just
20 because someone said they created it?

21 MR. BRANIGAN: Well, no, Your Honor. Because
22 here we actually have the - - - the testimony that the - -
23 - that the witness had identified the - - - the defendant
24 as the perpetrator in - - - in the arson. So - - - so we
25 actually have the probable cause.

1 JUDGE CANNATARO: Is the - - - is the inference
2 rebuttable?

3 MR. BRANIGAN: Yes, Your Honor.

4 JUDGE CANNATARO: If the defendant comes in and
5 says, you know, that cop who arrested me was giving me a
6 look. He just wanted to arrest me. It had nothing to do
7 with the I-card at all.

8 MR. BRANIGAN: Yes, Your Honor.

9 JUDGE CANNATARO: Can they do that?

10 MR. BRANIGAN: Yes, Your Honor. And - - - and -
11 - - and again, something similar happened in one of the
12 cases cited by - - - by the defense. In Gonzales, the - -
13 - there was a - - - a testimony - - -

14 JUDGE CANNATARO: And without the arresting
15 officer there? I don't mean to conflate it too much with
16 the actual facts of this case, but without the arresting
17 officer there, how do you - - - how do you greet that
18 rebuttal? How do you, as a district attorney? Well, I
19 don't have the arresting officer here, so all I can tell
20 you is you should rely on the fact that an I-card was
21 issued. Is that a good argument to make to a court?

22 MR. BRANIGAN: Your Honor, that would be not a
23 good argument. We - - - you know, if there was something
24 more. But I - - - I - - - again, you'd have to imagine
25 what they would come in and actually say. You know, oh,

1 there was something - - - there was something bad in this -
2 - - in this initial - - - in this initial stop. Then I - -
3 - I think our argument would have to - - - would have to
4 change.

5 JUDGE RIVERA: Can I ask, in your experience, is
6 this - - - is this unusual not to do one of the following:
7 bring in an I-card or a depiction of the I-card that was
8 issued; or testimony as to the contents of the I-card and
9 how it's distributed?

10 MR. BRANIGAN: I - - - I - - - Your Honor, I
11 think, again, I actually - - - I actually don't know how
12 often they're - - - they're put into - - - into evidence in
13 our cases. But I - - - but - - - you know, I - - - I - - -
14 in different cases, you'll - - - you'll find, certainly,
15 you'll find different - - - different evidence.

16 JUDGE HALLIGAN: Can I ask you about the Miranda
17 question for a minute? So it seems to me that what we have
18 here - - - let's assume I don't speak Spanish, and I want
19 to evaluate the transcript to test the Miranda claim that
20 we have. So the transcript, I think, appears only in the
21 appendix to this court, for the first time; is that right?

22 MR. BRANIGAN: That's correct.

23 JUDGE HALLIGAN: Okay. That seems highly unusual
24 to me. Is - - - is that standard practice?

25 MR. BRANIGAN: No, Your Honor. I think the - - -

1 I mean, so as far as the - - - well, there's - - - there's
2 a few things here. First of all, the - - - the court - - -
3 the court relied on this as its aid, and - - - and - - -
4 and maintained - - -

5 JUDGE HALLIGAN: But I'm focused on - - - on the
6 - - - the reviewability question. It sounds to me like
7 there was not a translation that was provided to the Second
8 Department. Maybe - - - maybe none was necessary. Maybe -
9 - - maybe everyone spoke Spanish. I don't know. But - - -
10 but the notion that something is not part of the record,
11 and it - - - we're being asked to evaluate it for its
12 substance, which I think we are, and then it - - - it just
13 is presented in an appendix to this court. I - - - I'm not
14 sure I can think of another example where I've seen that.

15 MR. BRANIGAN: Your Honor, my first response, my
16 first argument, is that this is part of the record. And
17 that the fact that the - - -

18 JUDGE HALLIGAN: Well, wait a minute. When you
19 say, "it's part of the record", it was not, as I understand
20 it, in the record as it left the trial court. And it was -
21 - - it's only before us now, as I understand it, and I
22 thought you just said, because you provided it to us in - -
23 - in an appendix?

24 MR. BRANIGAN: That's correct, Your Honor. But
25 that came out of the court file.

1 JUDGE HALLIGAN: Okay. So - - - so it was not
2 accepted as an exhibit, but it was in the court file?

3 MR. BRANIGAN: It was in the court file, yes.

4 JUDGE HALLIGAN: Okay. And so you're asking us
5 to take notice of it just as something that's in the court
6 file?

7 MR. BRANIGAN: Yes, Your Honor. But I'm actually
8 asking you to take notice of this because it was something
9 that was relied on the court in making its decision. And I
10 - - - I did cite, I think, Appellate Division law and court
11 rules - - -

12 JUDGE HALLIGAN: But defense counsel did object
13 to - - - to putting it in as an exhibit, I thought. Is
14 that not right?

15 MR. BRANIGAN: He did. And the court used it as
16 an aid, and the court relied on it.

17 JUDGE HALLIGAN: And did not take it in as an
18 exhibit?

19 MR. BRANIGAN: That's correct, Your Honor.

20 JUDGE HALLIGAN: But based on - - -

21 JUDGE RIVERA: Did counsel object to the use of
22 it, even as an aid?

23 MR. BRANIGAN: I - - - I don't know the exact - -
24 - the exact objection, but he objected that it was - - -
25 that he couldn't put it in as an exhibit, and that was - -

1 - it was not - - - it was not certified.

2 JUDGE HALLIGAN: Is it typical practice not to
3 have either? I think you heard a couple of - - - of
4 questions when your adversary was up - - - you know, for
5 example, certification or a question as to whether or not
6 the translation was accurate. Something along those lines
7 to establish its accuracy. Is that typical to proceed that
8 way?

9 MR. BRANIGAN: Your Honor, I - - - I don't know
10 how often it is done this way. I can say there were other
11 ways that could have been done here. The - - - the
12 detective could have just testified to what he had said
13 without - - - without going through any of this. That
14 would have - - - that would have precluded this issue.

15 But the - - - the - - - the fact is, here, this -
16 - - the exhibit itself, the - - - the - - - the tape of the
17 - - - of the interview that was the evidence here, that was
18 given to the defense ahead of time. They produced their
19 own translation. Each side came in with its own
20 translation. The defense could have asked the court to
21 look at their - - - to look at their translation as - - -
22 as well. So the process here, even though this was unusual
23 - - -

24 JUDGE CANNATARO: They didn't do that?

25 MR. BRANIGAN: - - - the process here was fair.



1 JUDGE CANNATARO: Counsel, the defense didn't try
2 to hand up its, I don't know, competing, or maybe not
3 competing, translation?

4 MR. BRANIGAN: No, Your Honor. No, Your Honor.

5 And - - - and again, when you look at the - - -

6 JUDGE HALLIGAN: So your view is that - - - that
7 - - - that objecting to taking it as an exhibit was not
8 sufficient. Why - - - why is that?

9 MR. BRANIGAN: Well, Your Honor, it's not
10 sufficient as far as - - - if - - - if the idea is that by
11 objecting, they can somehow make an absent record? No. If
12 they want to say that there was a defect in this
13 translation, they should have explained that this is why it
14 was - - - it was defective and couldn't support this. But
15 not to the point - - -

16 JUDGE RIVERA: Isn't - - - isn't your burden to
17 establish that the translation is an accurate one, before
18 they have to do anything?

19 MR. BRANIGAN: No, Your Honor. We - - - we
20 provided - - - we provided the translation. We provided
21 the tape to the defense. They had the ability to view it.
22 During the - - - during the hearing itself - - -

23 JUDGE RIVERA: You can - - - you can provide a
24 document without saying who worked on it, what is their
25 language capability, and then the burden shifts to them to

1 somehow challenge that?

2 MR. BRANIGAN: I don't - - - I don't - - - Your
3 Honor, I don't like - - -

4 JUDGE RIVERA: Or - - - or it's acceptable - - -
5 I should say this.

6 MR. BRANIGAN: I - - -

7 JUDGE RIVERA: It's acceptable, given that
8 representation?

9 MR. BRANIGAN: I don't like the analogy of - - -
10 of this being - - - that the evidence we put in was - - -
11 was the tape.

12 JUDGE RIVERA: Yes.

13 MR. BRANIGAN: We gave that to the - - -

14 JUDGE RIVERA: But the video, no one can rely on
15 it because it's in another language. You obviously need it
16 translated, correct?

17 MR. BRANIGAN: I'm - - - you - - - yes. Most of
18 the people - - -

19 JUDGE RIVERA: I mean, even if the judge knew
20 Spanish, the judge can't be a witness in the case.

21 MR. BRANIGAN: Your Honor - - -

22 JUDGE RIVERA: And say I understand what was
23 said, and here's my conclusion based on what I understand
24 what was said?

25 MR. BRANIGAN: Your Honor, there's nothing that

1 prevent - - - would prevent the judge from doing that. If
2 the judge spoke Spanish - - -

3 JUDGE RIVERA: There's nothing that prevents the
4 judge from being a witness in the case?

5 MR. BRANIGAN: He's not being a witness. I - - -
6 I don't think that analogy is proper. The - - - the - - -
7 the evidence here is - - - is the video itself.

8 JUDGE CANNATARO: So are you saying the judge
9 could have watched the video of the interview and said, I
10 got it; I watched it; I understood it; I know what was
11 said; and here's my ruling now on the suppression motion?

12 MR. BRANIGAN: The judge could have said - - -
13 assuming - - - and again, Your Honor, the - - - the - - -
14 the real issue here is whether there's a fair process. So
15 here, where - - -

16 JUDGE TROUTMAN: How do you have a fair process
17 for appellate review?

18 JUDGE CANNATARO: I'm really trying to understand
19 how that's a fair - - -

20 JUDGE RIVERA: And how could counsel - - - what
21 would counsel do? Judge, I need you to take the stand and
22 tell us your linguistic capacity to be able to actually
23 understand this video?

24 MR. BRANIGAN: Well, the - - - the defense
25 attorney could - - - could object to the - - - to that.

1 But here, if the - - - if - - - so - - - so for instance,
2 in - - - in this - - -

3 JUDGE RIVERA: And should that objection have
4 been recognized?

5 MR. BRANIGAN: Well, it didn't - - -

6 JUDGE RIVERA: Should the Judge have said - - -

7 MR. BRANIGAN: Well, it didn't - - -

8 JUDGE RIVERA: - - - you know, you're right - - -

9 MR. BRANIGAN: - - - first of all - - -

10 JUDGE RIVERA: - - - I really shouldn't rely on
11 my - - -

12 MR. BRANIGAN: Your Honor, it - - - it - - -

13 JUDGE RIVERA: - - - own understanding?

14 MR. BRANIGAN: - - - it did not - - - it did not
15 happen here.

16 JUDGE RIVERA: Okay.

17 MR. BRANIGAN: My - - - my - - - my point is, is
18 that the video - - - is that the video is evidence. That
19 it was given to the defense. That both sides had
20 translations.

21 JUDGE RIVERA: All I'm saying is - - -

22 MR. BRANIGAN: That they were - - -

23 JUDGE RIVERA: - - - that the video in and of
24 itself is not - - - I agree there is a video. I'm not
25 going to say, otherwise, that it doesn't matter. But no

1 use could be made of that for purposes of the suppression
2 hearing without an accurate translation, you agree?

3 MR. BRANIGAN: Yes. It needs to - - - it needs
4 to be translated. But it is still the evidence - - -

5 JUDGE CANNATARO: Wouldn't it be good if we were
6 all sort of working under the same set of facts? If there
7 is one translation that's certified and admitted, or - - -
8 or even if you want to, we could go take this further and
9 have competing translations. But if - - - if you could
10 just get one thing in where everybody agrees this is the
11 official translation of what was said. And then we make
12 rulings based on an agreed set of facts. Isn't that better
13 than just sort of this, I don't know, loosey-goosey thing
14 where you hand up a translation and you say, okay, judge,
15 use this as an aid. And the judge says, all right, I'll
16 use it as an aid. But we don't even know how they're using
17 it or what they're using it for.

18 MR. BRANIGAN: Yes, Your Honor. But the - - -
19 again, there - - - there - - - there is a - - - a video
20 that - - - that the court can watch and follow along with,
21 and you could watch the interaction between - - -

22 JUDGE HALLIGAN: But if you don't speak Spanish -
23 - -

24 JUDGE CANNATARO: What are you following along
25 with?

1 MR. BRANIGAN: You're following along with - - -
2 with the - - - with the translation aid. And if the
3 defense had an issue with something - - -

4 JUDGE HALLIGAN: No, wait a second. I - - - I
5 really find that hard to - - - to follow. If I don't speak
6 Spanish, then what use is watching the video, which I
7 understand is in Spanish?

8 MR. BRANIGAN: Your Honor, my argument is that
9 the video is evidence. That this translation is an aid in
10 understanding that. In other courts have found that
11 translations are - - - or - - - or transcriptions are aids
12 in following an admitted videotape.

13 So here, that is what's admitted.

14 JUDGE RIVERA: Yes. But you have the burden of
15 establishing that the translation is accurate. Otherwise,
16 what's the point of an inaccurate translation?

17 MR. BRANIGAN: But Your Honor, I don't think - -
18 - if - - - if you're suggesting that as a rule, I - - - I
19 don't think - - - I don't think that is - - - is a
20 necessary rule. I think, Your Honor, as - - - as long as
21 the - - - as long as the court - - -

22 JUDGE RIVERA: It's unnecessary to get it right?

23 MR. BRANIGAN: It - - - it is, Your Honor. But
24 the - - - but once the People came in with this, the
25 defendant, instead of simply saying I'm not going to - - -

1 JUDGE TROUTMAN: No. Are you - - - are you
2 really saying that you could bring in a transcript, doesn't
3 have to be certified, you don't have to attest to its
4 accuracy, and somehow the burden shifts to the defendant?
5 It's not your responsibility. It's not your burden. Is
6 that what you're saying?

7 MR. BRANIGAN: I - - - I am - - - I am saying it
8 - - - Your Honor, if that is all that we did, that would be
9 a problem. That would be a problem for the process of the
10 hearing. But here, where the - - - the tape was provided
11 ahead of time and they had their own translation, that - -
12 - then it is not a problem.

13 JUDGE CANNATARO: And then the court inquired of
14 defendant about using that translation, and the defendant
15 said, I object. And the court said, all right. I'll just
16 use it as an interpretive aid then. And I don't understand
17 what else it could have been used as, other than that.

18 So I mean, how - - - how is this not that - - -
19 that unacceptable scenario? The court took it, as you
20 said, it's in the court's file. It became part of the
21 record. It was used in some fashion, and - - - and it
22 wasn't agreed to.

23 MR. BRANIGAN: Your Honor, because we had a - - -
24 a hearing here, everyone was able to follow the hearing
25 because both sides had produced translations. The

1 defendant was Spanish speaking. They were able to cross-
2 examine the witness. And even in part, if you - - - if you
3 read the testimony, the defense attorney is using the
4 Spanish language to cross-examine him. So - - -

5 JUDGE RIVERA: Well, then why do you need the
6 video at all? Why do you need the video at all?

7 MR. BRANIGAN: Well, the video is the - - -

8 JUDGE RIVERA: I've got my translation. You've
9 got your translation. Judge, figure it out.

10 MR. BRANIGAN: No, Your Honor, the - - - but the
11 - - - the - - - without the video, the - - - then - - -
12 then the - - - the aids don't even - - - don't even make
13 sense. You have to watch the interaction between the
14 defendant and the - - - and - - - and the detective on the
15 video. And again - - -

16 JUDGE RIVERA: The interaction tells you whether
17 or not he - - - he - - - Tavares said, you have to answer -
18 - - or you have to answer that question?

19 MR. BRANIGAN: No, Your Honor. The - - - the - -
20 - the aids do that. The translation aids do that.

21 JUDGE CANNATARO: And what if you have - - - how
22 does watching the video in any way aid - - - excuse me. I
23 don't want to use that word.

24 How does using the video in any way resolve that
25 question?

1 MR. BRANIGAN: Well - - -

2 JUDGE CANNATARO: What the - - - what the
3 detective said?

4 MR. BRANIGAN: Again, you - - - you do need the
5 aid, and you do need the - - - the testimony. And - - -
6 and again, here - - -

7 CHIEF JUDGE WILSON: But didn't the testimony
8 demonstrate that the aid was wrong? Or had mistranslation?

9 MR. BRANIGAN: Your Honor, there - - - there was
10 - - - I - - - I - - - we're - - - we're pointing to one
11 word, or possibly - - -

12 CHIEF JUDGE WILSON: Sometimes a word can be
13 important.

14 MR. BRANIGAN: - - - the - - - the detective is
15 being asked - - - the detective is being asked about
16 whether he said, did you - - - you have to answer the
17 question. He - - - the - - - the defense attorney saying
18 to him, no, it's you have to answer the - - - the - - - I'm
19 sorry. You have to answer verse you have to answer the
20 question.

21 So there was a - - - a dispute between the
22 detective and/or - - - and the defense attorney - - - or
23 rather, that was the subject of cross-examination. I - - -
24 I don't think it was a material difference. And the - - -
25 and the - - - the defense counsel was able to cross-examine

1 him on that.

2 JUDGE RIVERA: Well, then why didn't the court,
3 based on the testimony, rely on the testimony rather than
4 the aid?

5 MR. BRANIGAN: Because the - - - the - - -
6 testimony - - - what we're - - - what we're talking about
7 here, and there was testimony about the - - - about the - -
8 - the Miranda, but it wasn't sufficient. The - - - the
9 argument here, and I think it was below, is that the - - -
10 the - - - what the detective did not do in this case was to
11 go through - - - was to go through each warning.

12 So that - - - that was not - - - so - - - so that
13 was not covered - - - that was not covered by his
14 testimony. And the - - - and the detective, of course, did
15 testify that he was a fluent Spanish speaker.

16 CHIEF JUDGE WILSON: Thank you.

17 MR. BRANIGAN: Thank you, Your Honors.

18 JUDGE HALLIGAN: Counsel, on the Miranda point -
19 - - over here. Are you objecting to the accuracy or to the
20 procedure? To - - - to the - - - you know, lack of - - -
21 of some attestation to its accuracy?

22 MR. FITZMAURICE: I - - - think that they're - -
23 - they're two sides of the same coin because I think that
24 had the accuracy been established, there'd be no reason to
25 - - - to object to this coming in.

1 JUDGE HALLIGAN: But are you - - - are you here
2 objecting to the accuracy? Are you saying - - - I - - -
3 your - - - the People argued just now that - - - that you
4 didn't object to the accuracy in the moment. And I - - - I
5 think that one could read the record that way.

6 Are you objecting now to the accuracy?

7 MR. FITZMAURICE: No. There was an objection
8 below to the accuracy.

9 JUDGE HALLIGAN: Back and forth about did he say
10 - - - did he instruct him to answer the question?

11 MR. FITZMAURICE: Well, so that was - - - that
12 was the testimony he elicited. But - - - but if you read
13 his - - - his papers afterwards, he objects to it being
14 entered into the record. He objects to it being used in
15 any capacity, even as an aid.

16 JUDGE HALLIGAN: Yes, I understand.

17 MR. FITZMAURICE: So - - - so he made - - - he
18 maintained accuracy and - - - and foundation objections to
19 this, which is why we have never seen it until - - - until
20 now, which is quite shocking, you know. Yes, it's from the
21 court file. You know, I'll just note that - - -

22 JUDGE SINGAS: But you saw it at the hearing, did
23 you not? They provided a copy to you at the hearing.

24 MR. FITZMAURICE: So - - - so defense counsel was
25 - - - you're - - - you're - - - to be clear, yes.

1 JUDGE SINGAS: Okay.

2 MR. FITZMAURICE: Defense counsel was provided.

3 I will say - - -

4 JUDGE SINGAS: And the - - - and the defense had
5 their own translation?

6 MR. FITZMAURICE: Yes.

7 JUDGE SINGAS: And did the defense ever say, hey,
8 judge, don't use theirs. Can you use ours?

9 MR. FITZMAURICE: No. But I think that - - -
10 that - - - don't use theirs means there's a zero in the
11 column. And the column is that they need to prove the
12 validity of Miranda beyond a reasonable doubt. So I think
13 - - -

14 JUDGE SINGAS: But is your objection that the
15 court relied on it as part of the evidence? And really - -
16 - is that really your objection?

17 MR. FITZMAURICE: The - - - the objection is that
18 - - -

19 JUDGE SINGAS: Because - - - because sometimes a
20 Spanish speaking officer can testify without a transcript,
21 correct? And just say, this is the process I went through.
22 I read these rights. I'm a Spanish speaker. And just give
23 testimony without a transcription.

24 MR. FITZMAURICE: You're right. But there was no
25 testimony here. And that's actually what - - -

1 JUDGE SINGAS: No, I know. but I'm just saying
2 in general that could happen, right?

3 MR. FITZMAURICE: It - - - it does. And - - -
4 and the suppression hearing is normally a lot longer as a
5 result. And that's one thing that we agree on. They - - -
6 they didn't do that way here, where maybe you would elicit
7 direct testimony about the Miranda and the exchange. And
8 that way you don't need the video because the video is
9 immaterial. You have sworn testimony that you could cross
10 from the person involved who speaks both languages.

11 JUDGE GARCIA: Counsel, just so - - -

12 MR. FITZMAURICE: But here, they've outsourced it
13 to the video.

14 JUDGE GARCIA: Just so I'm clear, to go back to
15 Judge Halligan's question. Is there anywhere in the
16 argument below where the defense came in and said, you
17 translated this word as X into English, but it means Y?

18 MR. FITZMAURICE: There was a few - - - there was
19 a few points where - - - where - - - when he invoked his
20 right to silence and whether he said no [Spanish] or just
21 no, and so there were - - - were a handful. But there was
22 never a time where - - - you're right, he said - - -

23 JUDGE GARCIA: Was that audibility, or is that
24 you translated it different?

25 MR. FITZMAURICE: Pardon me?

1 JUDGE GARCIA: Is it an audibility issue? He
2 said two words, or is it these two words mean something
3 else, and you translated it inaccurately?

4 MR. FITZMAURICE: He never said to the judge
5 specifically, this is wrong, this is wrong, this is wrong,
6 and this is wrong.

7 JUDGE GARCIA: Or even one? One this is wrong.

8 MR. FITZMAURICE: Well - - -

9 JUDGE GARCIA: One, this word is not an accurate
10 translation. One?

11 MR. FITZMAURICE: Well, he - - - he elicited
12 testimony. So - - - so what he did was he - - - he - - -
13 he got the - - - he got the officer to - - - to walk back
14 that version and - - - and to provide, you know, to provide
15 testimony about it.

16 JUDGE GARCIA: I've read that testimony. I think
17 it can also be read as the nuance of what was being said,
18 the tone. What did I mean by that? Instead of this word
19 in the transcript, isn't there and - - - or this word in
20 the transcript I - - - this translation is wrong.

21 MR. FITZMAURICE: You're right. It - - - it
22 could be nuance. I mean, Spanish language is subject to a
23 lot of nuances, a lot of different dialects.

24 JUDGE CANNATARO: No, no, but Counsel.

25 MR. FITZMAURICE: You know, but - - -

1 JUDGE CANNATARO: There's no - - - there's no
2 dispute here that the words that were translated were, no,
3 which is the same in English and Spanish as I understand
4 it. And then sometimes he says, [Spanish] after he says
5 no, right?

6 And - - - and really what they were debating is,
7 well, what does that mean?

8 MR. FITZMAURICE: Well, what it means within the
9 context of someone who is admittedly confused and needs to
10 be re-Mirandized.

11 JUDGE GARCIA: Agreed. But it's not a question
12 of what are the words say? It's a question of how did he
13 mean them? So it's not those two words should be
14 translated differently. You can argue those two words
15 translated, but that's meant something else. And I think
16 that, to me, seems like what that back and forth is about.

17 MR. FITZMAURICE: But - - - but so - - - but the
18 - - - but the bigger problem here is that - - - is that the
19 record does not have the translation in the record.

20 JUDGE HALLIGAN: That's the process point.

21 JUDGE GARCIA: Yeah.

22 MR. FITZMAURICE: So that's a process point,
23 which is why I think, their - - - their - - - that, you
24 know, and because of these issues is why he objected. Had
25 there been no issues with the translation, he wouldn't have

1 taken the unprecedented step of objecting.

2 Note that the codefendant's counsel didn't object
3 to the issue. So - - - so he did have misgivings. He had
4 his own version. He cross-examined using his own version.
5 He managed to get him to walk back some of the - - - some
6 of the inaccuracies, and then he objects. And then it's
7 not in the court file until now. It's not in the court
8 file when - - - when judgment is perfected, and when we're
9 assigned to the case. It's in the court file. I accept
10 that the prosecutor got it from the court file. But I can
11 tell you that it wasn't there - - -

12 JUDGE RIVERA: Well, even if it is in the court
13 file, what does that mean? I'm going to - - -

14 MR. FITZMAURICE: Well, so - - -

15 JUDGE RIVERA: - - - I speak Spanish and I read
16 Spanish. I'm going to read it and inform my colleagues who
17 may not know Spanish, oh, this is what this says?

18 MR. FITZMAURICE: Well, it just tells us that,
19 you know.

20 JUDGE RIVERA: We'll look at the video and the
21 translation and say, yeah, it looks accurate or it doesn't.

22 MR. FITZMAURICE: But - - - you know, the video's
23 in the court file because it was a hearing exhibit.

24 JUDGE RIVERA: I understand that.

25 MR. FITZMAURICE: We've seen the video. So the

1 translation is not in the court file. It's not a hearing
2 exhibit. That's why - - - that's why there's all this
3 confusion and - - - and you know, all - - - all this back
4 and forth.

5 JUDGE RIVERA: But no. But it doesn't seem to be
6 a dispute that it wasn't admitted. And it doesn't seem to
7 be a dispute that the judge used it as an aid. I mean,
8 counsel just said that.

9 MR. FITZMAURICE: Yeah. But - - - but now - - -

10 JUDGE RIVERA: So the fact that it's in the
11 record, it's - - - I mean, what would we make - - - let me
12 ask you this. What would we do with the fact that it would
13 have been in the record in some way?

14 MR. FITZMAURICE: It - - - it wasn't in the
15 record, though.

16 JUDGE RIVERA: Yes. Right. It's not in the
17 record. So I'm not - - - but my point is, I don't
18 understand what difference that happens to make other than
19 yes, we shouldn't look at it even if they've presented it
20 now.

21 MR. FITZMAURICE: A bit different - - -

22 JUDGE RIVERA: But all I'm saying is, if it was
23 in the record and you have no testimony, no other evidence
24 about whether or not it's an accurate translation, what
25 would we make of it? Other than deal with that issue and

1 you don't need the document for that because they, of
2 course, did not put in any evidence about the accuracy of
3 it.

4 MR. FITZMAURICE: Yes, so they - - - they - - -
5 what I'm saying is they've outsourced all of this to the
6 video. They've elicited no testimony on direct. One word,
7 I read a Miranda. Defense counsel has chipped away as
8 pursuant to his burden, he's chipped away and explained,
9 you know, why there's some confusion and - - - and - - -
10 and - - - and he didn't understand certain things, and he
11 invoked his right to silence, but then he kept talking.

12 So - - - so they've outsourced the answer to all
13 these questions to the video. But then the video is not -
14 - - but - - - but then the video is not translated. And so
15 it's really just a - - - you know, it's - - - it's - - -
16 it's an accuracy problem. It's a process problem.

17 Judge Cannataro, your - - - your question about
18 isn't it better to just have an official version? Yes.
19 And that's what we see all day. And that's why no one has
20 been able to point to a single example of this happening
21 before. And I don't - - -

22 JUDGE RIVERA: And yes, that's another point.
23 Because if it's not an official or a certified translation,
24 again, what is an appellate court going to - - - you can't
25 read it and then decide for yourself.

1 MR. FITZMAURICE: I - - - I - - -

2 JUDGE RIVERA: Right?

3 MR. FITZMAURICE: - - - I don't know. Yes, I
4 don't know.

5 JUDGE RIVERA: Yes. Okay.

6 MR. FITZMAURICE: Because, you know, if you just
7 think about what the Appellate Division did, it said - - -
8 it - - - it affirmed the - - - the denial of suppression
9 based on the evidence in the record. It didn't have the
10 translation.

11 JUDGE SINGAS: But isn't your position that
12 there's certified transcripts of foreign language
13 statements at Huntley hearings, that there are certified
14 versions? That's your experience?

15 MR. FITZMAURICE: Yeah. All the time.

16 JUDGE SINGAS: Conducted by whom? The - - - the
17 People?

18 MR. FITZMAURICE: Literally - - - literally,
19 whoever made this one could have just attested to it.

20 JUDGE SINGAS: Okay. So that's - - - so it's
21 different than having an official - - -

22 MR. FITZMAURICE: No. No. Yeah.

23 JUDGE SINGAS: Yes. Okay. Got it.

24 MR. FITZMAURICE: Sometimes. I have seen cases
25 where actually they - - - they use - - - they use, you

1 know, maybe a court interpreter.

2 JUDGE SINGAS: At trial, right? I could see
3 that. Yes.

4 MR. FITZMAURICE: At a trial when there's a jury,
5 I get that. Absolutely. So I - - -

6 JUDGE RIVERA: Your position is if they had done
7 that - - - if, let's say, the person who had actually
8 composed this translation had taken the stand, that then
9 the burden shifts to the defendant?

10 MR. FITZMAURICE: Yeah. I think so.

11 JUDGE RIVERA: Is that what you're saying? At
12 that point to then challenge either - - - perhaps they got
13 it wrong, but they're qualified to do it, or despite what
14 they say are their qualifications, they are not actually
15 able to accurately translate?

16 MR. FITZMAURICE: Absolutely. And when we
17 actually read the exhibit that was part of the - - - the
18 appendix and - - - you know, whoever typed it said
19 "unintelligible", but then someone else came along and
20 hand-wrote what they thought it meant.

21 JUDGE RIVERA: I get it.

22 MR. FITZMAURICE: So we're just - - - this is not
23 - this is not - - -

24 JUDGE RIVERA: Can I ask you - - -

25 MR. FITZMAURICE: - - - this is not consistent -



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JUDGE RIVERA: Can I ask you on the first - - -

MR. FITZMAURICE: - - - with the evidentiary - -

-

JUDGE RIVERA: Can I ask you on the first question, since your red light is on. Your position on his response to my question if the - - - if the I-card had said arrest Mr. Palacios, would that have been enough? If either Henriquez has testified to that, or there's other evidence that's admitted that that is the actual content, and that's the only content, would that have been enough?

MR. FITZMAURICE: No. Because that wouldn't tell us how he knew who Mr. Palacios was without doing an initial stop. So that wouldn't be enough to tell us that the initial stop necessarily was - - - was a level 4. Maybe if it was arrest Mr. Palacios, here's what he looks like, you know, photo, description. Then, maybe, we can say, okay, well, maybe someone walking around the street if they happen to see - - - see somebody, maybe. Although I'm not even sure that's tenable because there's an untold number of I-cards in place.

So the record doesn't tell us what was on the I-card, whether it was accessed, how it was accessed. And I want to be very clear, they are - - - they are asking for a per se rule here. You know, when they come along and they

1 say that this was a level 4, and - - - and to quote the
2 circumstances of the - - - of the underlying encounter were
3 not relevant such that we don't even know who the arresting
4 officer was, that's asking for a per se rule that the
5 assumption applies to everybody in the New York City Police
6 Department. All because they wouldn't just produce the
7 witness at the hearing.

8 So they're asking this court to bend over
9 backwards and write a NYPD, per se I-card rule, simply
10 because it's - - - it's objectively out of step with the
11 fellow-officer rules, actual communication, Ramirez-
12 Portoreal, know everything except maybe the final
13 communication.

14 So they are asking for a per se rule. And if you
15 look at what the First Department and the Second
16 Department, who are the only two departments who deal with
17 this, they are. They're using words like issuing an I-card
18 mandates the inference. That's a per se rule. And that's
19 why we're here - - - here - - - here to ask this court to
20 intervene.

21 And I don't really know how to square this with
22 De Bour. I don't know how someone can - - - can establish
23 a De Bour violation in an I-card case. Because if someone
24 comes along, like we have here, and says, hey, this was a
25 De Bour violation. The response is, too bad, there's an I-

1 card. We don't even need to tell you what the level was or
2 even the name of the officer.

3 And so - - - so actually we have a - - - a - - -
4 a De Bour 1, 2, and 3 not applying because we just assume
5 that it's a De Bour level 4, because someone uploaded an I-
6 card to the I-card database. And I think that - - - you
7 know, the last thing I'll say is, it's interesting to hear
8 about the - - - the - - - the time and space, you know,
9 proximity issue.

10 Because there was another investigation and it
11 was - - - it was about an offense that was from - - - from
12 a month earlier. And because they didn't introduce the I-
13 card here, we don't know if the I-card corresponded to that
14 investigation too. Which I submit that if it did, it would
15 really take the wind out of their sails. Because this idea
16 that twenty-four hours later he was picked up - - -

17 JUDGE RIVERA: But the - - - that's the - - - the
18 testimony is that the I-card is issued based on the
19 statements of an alleged victim, Tuan Enriquez, and the
20 victim's identification of the defendant.

21 MR. FITZMAURICE: Yes, Your Honor. But what I'm
22 saying is when he's brought to the precinct, he's - - -
23 he's - - - he's interrogated by - - - by Tavares about an
24 offense from a month earlier.

25 JUDGE RIVERA: No. No, I understand that.

1 MR. FITZMAURICE: But we don't know - - -

2 JUDGE RIVERA: But I'm just saying, with respect
3 to the I-card, I - - - I don't see how this other - - -

4 MR. FITZMAURICE: I know, but - - -

5 JUDGE RIVERA: - - - potential investigation has
6 anything to do with the I-card.

7 MR. FITZMAURICE: Well, because it would - - - it
8 would show that if there was actually an I-card in place
9 for the - - - for the month before this - - -

10 JUDGE RIVERA: Oh, I see what you're saying.

11 MR. FITZMAURICE: Exactly.

12 JUDGE RIVERA: That maybe there was another I-
13 card out there?

14 MR. FITZMAURICE: And this is - - - exactly. And
15 this is why - - - or maybe it's the same I-card that has
16 both, probably, has both things on it. And this is why we
17 go back to the thing I said at the very beginning, where
18 this is an initial burden. You just have to tell us what
19 happened and let defense counsel then litigate the issue.

20 JUDGE RIVERA: If - - - if the arresting officer,
21 either had been the only one to testify, or also testified
22 and said, I saw the I-card and that's why I arrested him;
23 is that enough? If you do not know the content of the I-
24 card?

25 MR. FITZMAURICE: It's - - - that's a good

1 question because at least - - -

2 JUDGE RIVERA: Thank you.

3 MR. FITZMAURICE: - - - at least - - - at least
4 we have some target then for, well, there's something in
5 the record that confirms that some - - - some human is
6 saying, I - - - initiated a level 4. Not some legal
7 abstraction, a human saying it. So - - - so maybe you'd
8 still have a problem, and maybe - - - but maybe that
9 problem - - -

10 JUDGE RIVERA: Because aren't you at that point
11 communicating Enriquez's - - -

12 MR. FITZMAURICE: Yeah, exactly.

13 JUDGE RIVERA: - - - probable cause - - - I have
14 probable cause. I'm telling you to arrest him.

15 MR. FITZMAURICE: Exactly. And - - - and - - -
16 and so then it - - - you know, the fellow-officer rule has
17 never demanded parity of information with the receiving
18 officer. The receiving officer has never needed to know
19 the ins and outs of the probable cause. So yeah, I - - - I
20 think that in that situation we'd - - - we'd be - - -

21 JUDGE RIVERA: Well, we do need to know what the
22 communication is.

23 MR. FITZMAURICE: The communication, but not the
24 - - - but not the ingredients of - - -

25 JUDGE RIVERA: Yes.

1 MR. FITZMAURICE: - - - probable cause. And
2 that's the whole point of - - - this is why I'm saying, my
3 position is consistent with the fellow-officer rule. It
4 involves no per se - - - per se requests. And it's just
5 asking this court, you know, to - - - to - - - to - - - to
6 uphold De Bour, Gonzales, fellow-officer rule. And I think
7 that, you know, when we look around nationwide, this is not
8 the time for this court to roll back decades of very robust
9 street encounter jurisprudence. And - - - and to allow a
10 fiction of an NYPD only, you know, arrest warrant - - -
11 except it's not an arrest warrant, to - - - to carve gaping
12 holes into all of these cases.

13 CHIEF JUDGE WILSON: Thank you.

14 MR. FITZMAURICE: If there are no further
15 questions, Your Honors, I rest on my briefs.

16 (Court is adjourned)

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C E R T I F I C A T I O N

I, Chrishanda Sassman-Reynolds, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Palacios (Miguel Angel), No. 28 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers
Address of Agency: 7227 North 16th Street
Suite 207
Phoenix, AZ 85020
Date: March 18, 2026