

**[Material that is irrelevant to Los Tocayos Carlos and contains sensitive personal information about one or more persons has been removed.]**

**JSL's Notes and Impressions from Interview with Hector DePena at Homewood Suites Lobby on 12/3/04**

**[Material removed]**

Works part time as a temporary judge and does a little work on side. Former used to support him, but now the legislature has cut back funds and he can't support himself; asking me (in effect) if I could help him in any way.

HDP was Carlos DeLuna's lawyer in CDL's capital case.

HDP offers some "background" on the case:

When Jim and I first got this case, when we started out, CDL [was saying] he wasn't even there. He went to the bowling alley with a girlfriend. It took as a great deal of effort to get CDL to tell us more.

Difficulty getting allowance for appointment of investigator. Old fashioned judge, wouldn't let go of the funds in 'court appointed attorney' case. Originally, limited to \$500 for investigator so we (lawyers) had to do the footwork.

The woman he said he was with that night was at home having a baby shower that night.

JSL asked who found that woman (Mary Ann Benevides). HDP is vague on exactly who on defense side did this but he says, "we" (lawyers and investigator, evidently) were trying to track this girl down.

On the day of trial, we were at a loss for an opening statement, b/c CDL kept placing himself closer and closer to the gas station; his story kept changing. On the day of the trial, the story was that [I am not sure I trust HDP on the specifics here, because he later told me that CDL's trial testimony was the same as the point he had reached with his lawyers by the day of trial, and that testimony isn't quite what HDP was remembering here]: CDL was in a car across from the station at the stripper club that used to have a big nearly naked woman (effigy) as an advertisement (Wolfy's or Babe's). CDL was in car; his friend went to gas station to get cigarettes or something.

HDP remembers civil suit brought by victim's family against Shamrock. A customer had initially reported a "suspicious looking guy"; customer was concerned because saw guy put a knife in his pocket. Customer kept watching, including after he left and used access road (near Homewood Suites) to get back on highway; watching; saw young man go in."

**HDP on CDL: “To this day, I can’t tell you if he [CDL] did it [killed the victim]; my opinion is that his friend killed her.”**

**CDL would never [this turns out to be an exaggeration; see below, re: CDL naming CH to his lawyers] come forward with the friend’s name. Said, if he gave the name, “‘I’d be as dead on the street’ as he would be if he didn’t give the name and got executed.”**

We never located him.

He later heard of Carlos Hernandez.

We learned later that he {CH} was a suspect in another killing several years before the Diamond Shamrock killing [obviously the Saucedo thing].

At penalty phase, CDL had going against him that he was not yet 21 years old and he still had other crimes. HDP says that they knew about the unconvicted case in Corpus Christi involving the mother of his friend, but the documents they had showed only that it was a criminal trespass in the woman’s home; it wasn’t ‘til the old woman got on the stand and testified that they learned it involved a rape. HDP believes this was devastating to CDL’s sentencing phase situation.

[Comes back to this point later, describing the old woman who testified at sentencing. There had been a party at CDL’s friend’s house upon their return from prison. The woman who testified was old, walked with a cane, stringy hair; “how anyone could look at a woman like that” was beyond HDP. He explained CDL’s side of the story: CDL’s step dad had loaned him his car that night, first night back from prison. He was scared of the step-dad. Then, his friend from prison meets a girl at the party and goes off with CDL’s dad’s car against CDL’s wishes. CDL goes back to the house and demands that the woman help him find her son and CDL’s car. Then, evidently, he drops his pants. “All we knew about was that it was treated as a trespass by the police.” We had the official offense report, which said it was just a trespass. When she got on the stand, HDP says to James Lawrence, “Oh Shit!” Court reporter who had been on HDP’s case the whole trial for talking too softly laughingly told HDP later that that ‘Oh Shit’ was the one thing she heard him say the whole trial. We “never knew” what was coming.]

Back to Shamrock crime:

Young lady [victim] was on phone trying to get police to station and trying to give description. As the man entered the door, there was a counter all the way across the width of the store, except at the end away from the door, you could pick up the counter in order to get to the back, behind the counter. She kept trying to describe person, and they [911 operator] kept trying to get a description of the man, rather than dispatch a patrol car.

HDP doubts that stab was made across the counter: “very difficult for him [perp.] to get across [the counter] to stab her. He thinks the stabber went around the counter and

stabbed her. He has theory that there were two people, one distracted her while the other lifted up the counter and went back behind to knife her. **[When asked, though, HDP has no explanation of why it would be the case, or recollection, that Baker was outside during the robbery and saw only one person there and coming out.] Later he returns to having come with up with the notion of 2 people doing it.**

He said that on the tape, you hear the woman screaming and then you hear the phone drop, but it doesn't go dead immediately. Fact that phone was found in its cradle by the police suggests that the perp hung it up.

Found CDL underneath a car "1 block away."

JSL asked HDP whether he heard of a 60 Minutes story on the case. No. Remembers CDL being on death row for 10 years (actually it was 6 years, 4 months, and some days).

**HDP remembers that there were TWO PHONE CALLS FROM LOPEZ TO POLICE. First one was when customer outside by the pump came in and warned Lopez. Second was when the perpetrator came in. He remembers that this information coming from the civil suit. At trial they did not know about the earlier call, only the second call. We didn't hear about 1<sup>st</sup> call until civil suit was litigated; Rene Rodriguez handled that suit. Sill in town.**

HDP vaguely remembers the two calls being the "basis for the suit"; they [they family] got a few bucks from the suit; led to establishment of protected booths and requirement of two people working. [Wrong: the SPID Shamrock store to this day is configured exactly the same way; has no protected booth; and only one person works there at night; there are, however, cameras.]

**HDP: I was just appalled that there had been an earlier call and (at trial) we hadn't heard of it. We were appalled that dispatcher didn't send someone out. [Of course, if this is so, it is striking that HDP and James Lawrence never contacted habeas counsel about this; and if it happened while Lawrence was still prosecuting the appeal, he never raised it on appeal]**

**Prosecutor Steve Schiwetz offered CDL life, and he [CDL] wouldn't take it because he was innocent. He wouldn't take the plea. "I'm innocent; I don't want to take the plea." That was his (CDL's) mindset. I didn't believe he anticipated [my notes cut off here].**

HDP: I finally got a name from CDL [i.e., Carlos Hernandez's name]. We tried to find him. At the time, I had a really good friend in the I.D. department at the Sheriff's office named Ray Flores. I asked him to go through his log, find all of the Carlos Hernandez's so we could compare fingerprints with available prints from those men. At the time it wasn't Miami CSI, where you could get a match in a computer.

HDP confirms that Gulf skating rink and bowling alley was at Kostryz and SPID; near

where they cross. First was a skating rink; then a bowling alley; now a big metal storage shed there [this would evidently place the rink on the south side of SPID and on the west side of Kostoyz.]

The final story CDL told his lawyers on the eve of trial was the one in his testimony at trial; he was inside Wolfy's [this is how HDP put it the second time around; no mention now of CDL's being inside a car ....] **CDL never said he was inside the store.**

First, he said he was at a party[??] at roller rink.

Girl was having a baby shower. Mary Ann Perales (although HDP at first remembered this as Linda Perales). **Our investigator located her. We knew before trial what her testimony would be. [IF THIS IS SO, THEN HOW COULD THEY LET CDL TAKE THE STAND AND SAY WHAT HE DID!?!?!]**

CDL stripped himself. The police found him down to his pants, no shirt.

HDP tells story of being "aghast" during James Lawrence's closing argument. His friend Albert Pena was in the courtroom to watch the closing arguments and made a motion showing a man nailing the last nail into CDL's coffin, because the argument was trying to talk a death qualified jury out of imposing the death penalty.

Back to CDL's statements to his lawyers: he started us down different rabbit trails about where he was that night; his location; whereabouts.

**CDL was "very definitely scared of Carlos Hernandez." He said, "I'm dead whether I'm out or in if I identify him." HDP says, "I pleaded with CDL to give me something to go on. He said he knew, but he wouldn't give us the name. I prevailed on him to give us the name, but nothing else."**

**In the aftermath of the case, later one, he was discussing the case with Steve Schiwetz. Later on. Schiwetz recollected a woman found in a van with a kid still alive under her. Some indication that Carlos Hernandez committed that crime. They were never able to tie him to it. He remembers this occurring within the first year following the trial. It never really came up until afterwards, in coffee shop kind of conversation; aftermath; coffee shop kind of things. The killing of the woman was "several years prior" to the Shamrock killing.**

"This was one of my first trials. My wife helped me. She couldn't understand how I could fight him on the case inside the court, then go have a cup of coffee with Schiwetz afterwards. She was very mad at him. [JSL asks why?] Because she knew CH existed and couldn't believe Schiwetz would argue he didn't exist. For HDP, it was just doing a job. It wasn't a personal with Schiwetz.

Comes back to this later: My wife was peeved. That prosecutors said CH was figment of CDL's imagination; the "phantom" comment. She knew there was a real person. She was

involved. She listened to the 911 tape with him; motivator to him on a big case.

**“I honestly believe to this day that Carlos didn’t do it.”**

HDP describes slowing down the 911 recording to see if they could pick up other voices. He describes the counter in the store as 3 foot wide, 48” high. Hard to leap over it to stab. Believes perpetrator came up behind her. She realizes at the last minute that she’s going to be stabbed.

JSL asked if there was a man’s voice on it, not that of 911 dispatcher. Answer: only voices on tape are hers and dispatcher.

“Whoever stabbed her --- you hear phone drop, clunk. Then someone put the phone on the receiver. Hit floor and then (later? How much later?) you heard dial tone. [He is surmising here; dial tone could have been caused by 911 operator hanging up, maybe...] She’s screaming. Hand set hits something. Then within 10 seconds you hear it go dead. In between you can hear scuffling. He surmises that phone hung up by perp.

He offers to help us get record. I gave him the cause number. He said he would help us. He doesn’t think the records would be destroyed.

Steve Schiwetz was the more liberal of the two prosecutors; would help you out some. Ken Botary’s view was “you’ve got to win it yourself, I’m not going to help you.” Ken was hard to talk to. He was out to get a conviction. Steve was looking for justice; not to win a case.

HDP says (disingenuously?) that as he evolved as a judge, he saw prosecutors evolving from trying to find truth to “putting notches in their belts.”

“Historically, you never saw cases based on prosecutor’s evidence as you do now [something is garbled here; can’t remember what he said]. Ends justify the means. Used to be you could call up the other side and get things done by handshake and gentlemen’s agreement. Now, it’s Rambo tactics.”

For him it was a financial struggle to get through law school, so wouldn’t want to risk what he gained by ethical breach. Contrasts that with disciplinary risks lawyers take; how people do that is stupid.

They made the competence motion because HDP said CDL was a kid; figured something was amiss. Kutnick always pro-state; always found them competent if they were minimally oriented in time and space; Plaisted was more neutral. HDP says that, “from a standard education perspective, you might say CDL was retarded; my experience with these guys is that they are street smart; they can survive on streets. From clinical point of view, maybe retarded; but in true to life terms he was ok.”

Talks about Plaisted preying on little kids. His church (HDP’s church), Paradise Baptist, would find Plaisted patients. Baptist church school would refer kids to Plaisted, with

some getting molested.

He was grateful it wasn't tried to Judge Blackmun, retired JAG officer, who was a stickler for procedure.

Records: burned. HDP was officing with other lawyers and their office was firebombed and his records were destroyed, in 1987, it looks like. Suggests we go to James Lawrence.

Says CDL

S case had no scientific evidence in it.