

**STATE OF MICHIGAN**  
**IN THE SUPREME COURT**

**Appeal from the Court of Appeals**  
**Gleicher, C.J., Markey, and Patel, JJ**

**PEOPLE OF THE STATE OF MICHIGAN,**

Plaintiff—Appellant,

vs.

Supreme Court No. 165296

Court of Appeals No. 353052

St. Clair County Circuit Court  
No. 19-002078-FH

**LANTZ HOWARD WASHINGTON,**

Defendant—Appellee.

\_\_\_\_\_ /

**PLAINTIFF-APPELLANT'S**  
**REPLY BRIEF**

**\*\*\*ORAL ARGUMENT REQUESTED\*\*\***

Melissa J. Keyes (P56532)  
Senior Assistant Prosecuting Attorney  
201 McMorran Blvd., Room 3300  
Port Huron, MI 48060  
Direct Telephone: (810) 985-2425  
Fax: (810) 985-2424  
Email: mkeyes@stclaircounty.org

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## ARGUMENT

The responsive briefs of Defendant and Amicus are unavailing, solely relying on cases clearly distinguishable from these facts. Simply stated, a categorical, bright-line rule foreboding the admission of inferential evidence of a testimonial statement at trial – announced by the Court of Appeals – will compound the confusion surrounding whether the out-of-court statement was testimonial (or not), whether it was introduced to show the truth of its substance (or not), what test should be applied when analyzing the declarant’s purpose in making the statement, whether the statement is implied hearsay or an implied assertion, and what was inferable to a factfinder from the implication. Instead of providing courts and litigants direction and clarity, this new rule will exacerbate the existing debate over the meaning of “testimonial.” What was once made clear by the United States Supreme Court in *Davis v Washington*; 547 US 813; 126 S Ct 2266 (2006); namely, “that not all those questioned by the police are witnesses and not all interrogations by law enforcement officers are subject to the Confrontation Clause,” *Michigan v Bryant*, 562 US 344, 355; 131 S Ct 1143 (2011), is upended by this “all or nothing approach” excluding not only all verbal statements, but inferential evidence of statements as violative of the Confrontation Clause.

Such a sea-change in Michigan law is unnecessary, considering these facts. The prosecution did not admit testimonial hearsay against Defendant, never admitting the truth of the communications between the Canadian officer (Lavers) and United States officer (Stockwell) to establish possession. To the contrary, the

prosecution's questioning of Stockwell explained the origins of the case, chain of custody, and why Stockwell acted as he did – legitimate, non-hearsay purposes. The prosecution established possession through Defendant's statements, admitting that he wore body armor.

Should this Court determine "implied hearsay" was improperly admitted, it can still find the alleged error in this case harmless beyond a reasonable doubt. Defendant's admissions that he was wearing body armor, made to booking officers and his mother were admissions of fact, not confessions of guilt excluded by the corpus delicti rule. The Court of Appeals eviscerated this distinction between admissions and confessions – arguably, a more egregious error. Its decision should be reversed.

**I. Lavers' "communications" with Stockwell were not testimonial under a primary purpose test or *Fackelman* analysis.**

Defendant argues Michigan applies a "broader approach" than the primary purpose test, relying on *People v Fackelman*, 489 Mich 515; 802 NW2d 552 (2011). In *Fackelman*, this Court addressed the issue of analyzing whether a statement is testimonial, declining to extend the primary purpose test set forth in *Davis v Washington*, 547 US 813; 126 S Ct 2266 (2006) to non-emergency situations. It concluded the primary purpose test had never "[b]een applied beyond the ongoing-emergency context." *Fackelman*, 489 Mich at 558. This Court emphasized that "circumstances and context in which the statement was made are highly relevant, if not determinative in deciding whether its admission offends the Confrontation Clause." *Id.* at 560. The Court adopted an objective inquiry, focusing on whether the

witness was a person bearing testimony, defined as a solemn delaration or affirmation made for the purpose of establishing or proving some fact. *Id.* citing *Crawford v Washington*, 541 US 36; 124 S Ct 1354 (2004). *Fackelman* is the last time this Court addressed the Confrontation Clause’s applicability to out-of-court statements in this context. Nonetheless, should this Court apply this inquiry, it must consider the circusmtances and context in which the statement was made.

The United States Supreme Court reiterated its use of the “primary purpose test” post-*Fackelman* and post-*Michigan v Bryant*, 562 US 344, 359; 131 S Ct 1143 (2011) (“when determining whether the confrontation clause bars the admission of a statement at trial, it should determine the primary purpose of the interrogation by objectively evaluating the circumstances in which the encounter occurs and the statements and actions of the parties.”) It also extended the applicability of the “primary purpose test” to non-emergent circumstances, “when a statement is not pruocured with the primary purpose of creating an out-of-court substitute for trial testimony.” *Id.* at 374.

The Court continued to “flesh out” the meaning of “testimonial” in *Ohio v Clark*, 576 US 237; 135 S Ct 2173 (2015), incorporating the “primary purpose test,” but also acknowledging “[t]he primary purpose test is a necessary but not always sufficient, condition for the exclusion of out-of-court statements under the Confrontation Clause.” *Id.* at 245-246. The Court set forth several factors to be considered when determining whether the Confrontation Clause barred an court-of-court statement, including: (1) whether the primary purpose of the statement was to

establish facts of a past crime; (2) whether the statement was elicited during a formal interrogation; and (3) whether the declarant reasonably expected the statement would be used in the prosecution of a crime at the time it was made. *Id.* at 244-246.

The prosecution did not admit inferential evidence of a testimonial statement under either a *Fackelman* analysis or a “primary purpose” test with the additional factors articulated in *Ohio v Clark*, *supra*.

Lavers, a Canadian officer, did not bear testimony as defined in *Crawford* for the purpose of establishing or proving some fact. Nor did he reasonably expect his statements would be used in the prosecution of a crime at the time of its making. Lavers returned Defendant to the United States within an hour of apprehension.

While Defendant resisted Canadian authorities when they tried to place him into their car, Lavers chose not to arrest, detain, or request charges against Defendant in Canada. While officers removed the vest from Defendant before transporting him to the United States, the vest is not illegal *per se*. Defendant’s status as a violent felon – discovered by Stockwell after Defendant was returned to the United States – made it illegal for him to possess it. Objectively, Lavers had no reason to believe he would be called as a witness at a later trial involving Defendant at the time he communicated with Stockwell because he (1) did not know Defendant’s status as a violent felon; (2) possessing body armor is not illegal; (3) the communications were not formal interrogations; and (4) Defendant’s behaviors in Canada were outside the jurisdictional authority of the United States or Port Huron.

Accordingly, it does not trigger the Confrontation Clause under a *Fackelman* or primary purpose inquiry.

Defendant's factual assertion that Lavers' statements to Stockwell caused Stockwell to initiate the process of arresting and criminal charging Defendant is false. Def Br 39. Stockwell testified that his agency inspects every person that re-enters the United States to determine whether they can enter the country.<sup>1</sup> On April 8, 2019, a toll-jumping incident took place at 5:00 p.m. CBSA called Stockwell. Stockwell met with Lavers and assumed custody of Defendant, body armor, and a truck at the same time. Stockwell did not process or criminally charge Defendant based on the information provided by Lavers. Indeed, Stockwell lacked jurisdictional authority to do so. And, at the time Defendant was handed over to Stockwell, Defendant's status as a violent felon was unknown to either officer.

Defendant further argues the prosecution's questioning of Stockwell was intended to "lead the jurors to the inescapable inference that Officer Lavers reported Mr. Washington was, in fact wearing a bullet proof vest," pointing to the prosecution's opening statement as illustrative evidence. Def Br 22. Defendant omits the prosecution's complete statement, critically important for context:

The next thing you're going to hear is that -and you're going to hear from Agent Stockwell from the American Border Patrol, Customs Border Patrol, CBP. Agent Stockwell was on duty that same day and at on or around 6:00 p.m. the Defendant was returned from, with – strike that. Was returned in custody by Officer Lavers from the Canadian Border Service agency. So basically the

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<sup>1</sup> Appx A: 28a-29a.

Canadian border customs guy or border guy brings the Defendant back in custody, brings back the body armor that the Defendant well, you're going to hear that the Defendant had in his possession when he's stopped in Canada.<sup>2</sup>

The prosecution never attributed the source of the information that Defendant had body armor in his possession in Canada to Lavers or anyone else. In fact, the jury would hear that Defendant had body armor in his possession through his own admissions. The prosecution's closing argument also undermines Defendant's claims the prosecution "designed" his questioning to lead jurors to the "inescapable inference he was wearing a bullet proof vest." In fact, the prosecution argued that direct (video and still shots) and circumstantial evidence established Defendant was driving the Ford F-250 pickup truck when it blew through the toll lane and was returned by the CBSA along with the truck and body armor. The prosecution conceded:

Now, those are the surrounding circumstances. Those are all the things you've got to consider. Now, I would agree with Mr. Politano that if the only evidence that the People had to present was the Defendant being turned over by border services from Canada not wearing body armor at the time, and that was it, nothing else, then you would not have enough to convict the Defendant beyond a reasonable doubt, because there is just no factual connection.

Rather than designing questioning to lead the jurors to believe Defendant was possessing body armor through an inescapable inference, the prosecution admitted

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<sup>2</sup> Appx K: 204a-205a

he was unable to meet his burden of proving possession without Defendant's admissions to wearing body armor.<sup>3</sup>

The facts here are analogous to *People v Chambers*, 277 Mich App 1, 10; 742 NW2d 610 (2007) and *People v Putman*, 309 Mich App 240, 247; 870 NW2d 593 (2015). While the cases cited by Defendant concluded the Confrontation Clause was violated by the admission of implied testimonial hearsay, those decisions turned on a finding the testimony contained an implicit accusation against the named defendant. In the cases cited in the responsive briefs, the testifying detective relayed information provided by co-defendants, co-conspirators, or witnesses during interrogations, accusing defendant of wrongdoing. In that way, the individuals were defendant's accusers. In this case, Lavers was not Defendant's accuser. Moreover, in *State v Roscoe*, 198 A3d 1232 (RI, 2019), the reviewing court considered the prejudice of the plain implications by applying certain factors in its harmless error analysis. These factors included the importance of the testimony, whether the testimony was cumulative, the presence or absence of evidence corroborating (or contradicting) the testimony, and the overall strength of the prosecution's case. *Id.* at 254. The Court of Appeals here did not conduct a similar analysis, ending its inquiry with a conclusion based on what it identified as the plain implication (Defendant wearing body armor). As stated previously, this error is precisely what makes a rule extending the Confrontation Clause to implications so dangerous.

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<sup>3</sup> Appx K: 206a-211a

Moreover, many of the cases cited by Defendant, including *State v Roscoe*, recognize that testimony containing hearsay may be admissible not for its truth but as background information if the non-hearsay purpose is relevant and the probative value of the evidence is not outweighed by the danger of unfair prejudice resulting from the impermissible hearsay use of the declarant's statement. *Id.* at 252. Stockwell's testimony is admissible under this inquiry because background information was relevant to show why Stockwell acted the way that he did and was not outweighed by the danger of unfair prejudice because the Defendant admitted to wearing body armor.

Finally, Stockwell was entitled to testify about what he saw (Defendant, body armor, and a truck) and what he did (took custody of Defendant, body armor, and a truck, and called the Port Huron Police Department). Reasonable inferences could be drawn based on those facts (and the fact the same truck blew through the toll lane only an hour before) that Defendant had body armor in his possession at the time it happened. In his brief, Amicus suggests evidence that "Washington was being delivered together with body armor" would not have violated the Confrontation Clause. Def-Amicus Br 9. Yet, there is no substantive difference between Amicus' suggestion and the prosecution's questioning.<sup>4</sup> Nor is there any difference between the questioning by the prosecution and asking Stockwell what he did based "on

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<sup>4</sup> The full exchange can be found in People's Brief, pp 6-7 and 18-19

information received” [took custody of the Defendant and the body armor at the same time].<sup>5</sup>

This Court should not extend its Confrontation Clause jurisprudence to exclude inferences drawn from evidence admitted for purposes other than the truth of the matter asserted – which is what occurred in this case. The decision reached by the Court of Appeals should be reversed.

**II. This Court should conclude Defendant’s statements constituted admissions of fact, not confessions of guilt barred by the corpus delicti rule.**

The Court of Appeals critically erred in its harmless error analysis, characterizing Defendant’s statements as confessions of guilt rather than admissions of fact. Defendant’s brief does little to defend the Court of Appeals’ harmless error analysis, citing cases that only strengthen the People’s argument.

This Court announced the corpus delicti rule applies only to confessions of guilt in *People v Porter*, 269 Mich 284, 290; 257 NW 705 (1934), finding:

A confession, although differently phrased by different courts, being an acknowledgment, in express terms, by a party in a criminal case, of the truth of the crime charged, by the very force of the definition logically excludes: ‘First, acts of guilty conduct; second, exculpatory statements; third, admission of subordinate facts that do not constitute guilt. Much of the confusion that exists in the case law would be readily avoided if courts carefully measured every confession by the rule of direct acknowledgment of guilt, as entirely distinguished from acts, exculpatory statements,

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<sup>5</sup> See ROBERT P. MOSTELLER, gen. ed., McCormick on Evidence §249 (2022). The McCormick treatise cites a number of federal cases favoring this approach when offered for a legitimate, non-hearsay purpose.

and admissions. [*Id.* at 290 quoting 2 Wharton’s Criminal Evidence (10<sup>th</sup> ed), § 622b.]

Defendant tries distinguishing *Porter* from this case, claiming defendant’s statements to the investigating officer was not barred by the corpus delicti rule because they (1) required other evidence to establish she was guilty of arson; and (2) *Porter* never admitted she was guilty. Def Br 50-51. There are no differences between *Porter* and this case justifying a different result. Like defendant *Porter*, Defendant never confessed to committing a crime, telling his mother that “possession of body armor” was “no charge” and the police were “holding [him] to protect [him].” Defendant further explained that he was wearing body armor (which is not a crime) because he was threatened and “fear[ed] for [his] life,”<sup>6</sup> an excuse rather than a confession of guilt. Though Defendant admitted to wearing body armor, “an admission of one, but not of all, the essential elements of the crime is not a confession.” *Id.* at 291. Defendant never told his mother that he was unable to wear (or possess) body armor because of a prior conviction involving a violent felony - an essential element of the crime.

This Court held the corpus delicti of possession of cocaine was that cocaine existed and was possessed by *someone*. *People v Konrad*, 449 Mich 263, 270; 536 NW2d 517 (1995). The Court rejected defendant’s claim that the corpus delicti rule required independent evidence establishing the cocaine was constructively possessed by defendant, noting proof of identity of the perpetrator of the crime is not required.

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<sup>6</sup> Appx A: 48a-49a

*Id.* “[T]he position that the corpus delicti of a crime includes the identity of the perpetrator is too absurd indeed to be argued with, because it would require that the entire crime be proved before a confession could ever be admitted.” *Konrad*, 449 Mich at 270. Defendant was also charged with a possessory crime. Here, the corpus delicti was satisfied by independent proof the (1) body armor existed; and (2) was possessed by *someone*. Since proof of identity is not required by *Konrad*, Defendant’s statements that he possessed the body armor were admissible to establish he possessed it. The People were also required to prove Defendant was ineligible to possess the body armor, a stipulated fact. Defendant’s stipulation at trial to being a violent felon does not transform his admissions of fact into a confession of guilt.

This Court should find the People satisfied the corpus delicti, rendering any alleged error harmless beyond a reasonable doubt.

**RELIEF REQUESTED**

WHEREFORE, for the reasons set forth above, as well as in its original brief, the People request that this Court reverse the decision of the Court of Appeals, and affirm Defendant's conviction and sentence.

Respectfully Submitted,

Michael D. Wendling  
Prosecuting Attorney

By: /s/ Melissa J. Keyes  
Melissa J. Keyes (P56532)  
Senior Assistant Prosecuting Attorney

Dated: January 18, 2024

**CERTIFICATE OF COMPLIANCE**

I hereby certify that this document complies with the formatting rules in MCR 7.212(B)(1) and contains 2,776 countable words. The document is set in Century Schoolbook and the text is in 12-point type, double spaced.

Respectfully Submitted,

Michael D. Wendling  
Prosecuting Attorney

Dated: January 18, 2024

By: /s/ MELISSA J. KEYES  
Melissa J. Keyes (P56532)  
Senior Assistant Prosecuting Attorney

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**APPENDIX**  
**TO**  
**PLAINTIFF-APPELLANT'S REPLY BRIEF**

**\*\*\*ORAL ARGUMENT REQUESTED\*\*\***

Melissa J. Keyes (P56532)  
Senior Assistant Prosecuting Attorney  
201 McMorran Blvd., Room 3300  
Port Huron, MI 48060  
Direct Telephone: (810) 985-2425  
Fax: (810) 985-2424  
Email: [mkeyes@stclaircounty.org](mailto:mkeyes@stclaircounty.org)

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K. Relevant transcript pages

You're going to hear evidence from Denise Fenner who was working the toll booth on April the 8th, 2019 at around 5:00 p.m. in the afternoon that a car came through without paying. In other words, a car paid her the money, there's the draw arm, it goes up, the car that paid goes through and the Defendant's vehicle, the People's evidence will show, drove behind that van, and so essentially jumped the toll.

You're going to hear what Denise Fenner did as a result of that, about calling that forward, notifying her superiors about that. And you're also going to see the video within the toll booth of that, of that incident. And you're also going to see still printings from that incident, because it's, it's not a very long video you'll see. It's a quick thing, and it's not a great video from the perspective, but you can certainly see what happened.

The next thing you're going to hear is that -- and you're going to hear from Agent Stockwell from the American Border Patrol, Customs Border Patrol, CBP. Agent Stockwell was on duty that same day and at on or around 6:00 p.m. the Defendant was returned from, with -- strike that.

Was returned in custody by Officer Lavers from the Canadian Border Service agency. So basically the Canadian border customs guy or border guy brings the

Defendant back in custody, brings back the body armor that the Defendant -- well, you're going to hear that the Defendant had in his possession when he's stopped in Canada.

In addition to the Defendant and the body armor being returned to the, the Border Patrol, the Defendant's truck was also returned. But you're going to hear that Officer -- and then you're going to see the body armor. The body armor will be admitted into evidence. But you're going to hear that Officer Whitten from the Port Huron Police Department was called by the Border Patrol on the American side, the border agent to that they have an individual that was in possession of body armor. And Officer Whitten came and placed the Defendant under arrest, took possession of the body armor and the Defendant's truck was impounded.

But you're also going to hear is that the Defendant while he was being process for the charges that night made a statement at the jail facility in St. Clair County here that he was wearing the body armor. You're also going to hear a recording that the Defendant made on April the 27th, so approximately 19 days later, that the Defendant made in a call to his mother. And you're going to hear that. And you're going to hear the Defendant admit to his mother that on the date in question he was,

Okay. How did we get to this point? And that gets to evidence that I want you to think about. There is direct evidence in the legal world which is as Mr. Politano was asking Officer Whitten and all the officers do you have direct evidence that you, yourself, saw the Defendant wearing the body armor. And the answer was no. None of those, none of those folks ever saw body armor being worn by the Defendant. That would be direct evidence obviously. But there is other evidence. There is what's called circumstantial evidence. And the Judge is going to instruct you what is circumstantial evidence. Circumstantial evidence is essentially the circumstances surrounding what is known about a case.

So, I may not directly see the individual possess the body armor, but the circumstances surrounding it what do we know. The Defendant is brought back to the American side with him in custody, body armor given over at the same exact time. His Ford F-250 pick up truck is brought back at the same time. We know that -- what else do we know? Circumstantially that at five o'clock, approximately an hour earlier, the Defendant what the People are going to argue, this was the Defendant jumping the toll.

Now, do I have direct evidence that says this is the Defendant? Well, this itself is direct evidence, but

there's no one that can make that absolute identification. What are the circumstances though of this that should lead you to believe that it was the Defendant? One, and you guys, when you go back to deliberate if you have any questions about any of these exhibits, you can ask to see them and they'll be provided to you. You can look at them directly. And I, I would recommend that you do because you can see a lot better closer up than it is on a screen or from me holding it up here.

But I will say in these exhibits, specifically People's Exhibit A (sic), you see -- I'm not going to set that 360 view, you see right here what I would argue is a F-250 long pick up truck. The F-250 is bigger than the F-150, if you know anything about trucks. And you also see on the side there the F, and it's sort of a blur, 50 logo on the truck, which just happens to be the same truck that was brought back with the Defendant.

You also heard Officer Stockwell said the Defendant was wearing a red shirt. When you look at this photograph of People's Exhibit 8 close, you can see in the driver's side window red. And I would argue to you that's the Defendant's red shirt.

Now, those are the surrounding circumstances. Those are all the things you've got to consider. Now, I would agree with Mr. Politano that if the only evidence

that the People had to present was the Defendant being turned over by border services from Canada not wearing body armor at the time, and that was it, nothing else, then you would not have enough to convict the Defendant beyond a reasonable doubt, because there is just no factual connection.

However, that's not the only evidence the People presented. The People also presented two statements from the Defendant. If you recall which ones they were, there was one statement made by the Defendant at the jail processing center on April the 8th in which Officer Whitten from Port Huron testified to hearing the Defendant saying I was wearing body armor and that was because I was afraid. That's an admission. That when combined with the surrounding circumstances of the Defendant being brought back from Canada around this time is the evidence that you need to convict the Defendant. But don't just take Officer Whitten's word for it. You can also take the Defendant's word for it because what did you hear from the Defendant? You heard the Defendant talking to his mother in the jail on April the 27th on a recorded phone call. And that recorded phone call was very specific as to what he said. There is obviously some confusion about a phone number. You heard that part of it. But then there was talks about this James, James Griffin or Griffith and I'm

going to read it to you, but then I want to play it just to make sure you know that I'm telling you what, what we actually heard, which is the mom finally gets the phone number correct and she says, "What happened?"

The Defendant said, "What happened is I was getting threats, right, and James gave me a bulletproof vest. I put on the bulletproof vest."

Mom responds, "That's what I heard, you had a bulletproof vest on."

Then the Defendant stated, "And I went to the police with it on. I was in fear, I was fear for my life, they was threatening me."

You know, I just want to make one thing clear, regardless of whether Defendant felt threatened or not, whatever was going on in his mind, there is, that is not a defense to possession of a body armor by a violent felon. Why is that? Because a person in that situation if they feel threatened can go to the police, can do other things that are appropriate that allow them to protect themselves. They do not have a right to possess body armor. That is not a defense if they felt threatened. It doesn't matter. It doesn't matter within the Defendant's mind about how he feels.

But then the next question, and this becomes important because let's talk about the jurisdictional part

of it. I have to prove that this happened in the city of Port Huron. That the Defendant at some time before crossing the bridge was in the United States. That he didn't just come from Canada, that he was in the United States before he went to Canada. And again, that gets to the circumstantial evidence that you have a bridge, a toll jumper and he's brought back. But what does mom say?

"Why you in Port Huron?"

"I went to Port Huron because Tamika was looking up the property and the lawyer's in Port Huron that I had the property." That had, that I had for the property.

"So what are you being charged with?"

I'm being charged with "Possession of body armor, which is no charge. They're just holding me to protect me, mother."

So the Defendant admits the Port Huron part, right. That he came to Port Huron for a specific purpose. He admits to possessing the body armor, that James give him, that he put it on. So the Defendant, Defendant admits to what we know circumstantially. We know he's brought back with the body armor and he admits to it. That's all that you need. When you have that admission you don't need the Canadian Border Service Agency anymore. Under the law that's enough if it satisfies you beyond a reasonable doubt that the Defendant possessed it. And I'm

arguing with you, using your reason and common sense based on the facts and circumstances of this case it is enough. It's beyond reasonable doubt if you use reason and common sense. Don't leave that at the door.

Two more points. One is when it gets to, I told you I was going to play the recording, I don't want to forget that, so let me play that really quick.

"I got 248-636-6368."

"No, no, 6338."

"Then why did you give me 6368?"

"I don't know if I gave you 6 -- 248 --"

"638."

"Nope. 248-636."

"Yep."

"6338."

"That's not enough numbers."

"What else you got?"

"248"

"Yep."

"636"

"Yep."

"6338."

"Yeah. That's enough numbers."

"Okay, I'll call him."

"Okay."