IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
LAKE COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
	)	
Respondent-Plaintiff,	)	
	)	
-vs-	)	**No. 92 CF 2751**
	)	
	)	
JUAN A. RIVERA	)	The Honorable
	)	Christopher C. Starck,
	)	Judge, Presiding.
Petitioner-Defendant.	)	

PETITION FOR RELIEF FROM JUDGMENT
PURSUANT TO 735 ILCS 5/2-1401

Juan Rivera was sentenced to natural life for the 1992 murder and sexual assault against eleven-year-old Holly Staker. Rivera is innocent. Now some 13 years after Holly Staker's murder, new developments in DNA technology show conclusively that Staker's assailant was not Juan Rivera. Recent DNA testing of semen found on a vaginal swab obtained during Staker's autopsy has produced for the first time a genetic profile of the person who deposited semen in Staker's vagina. That individual is not Juan Rivera.

The prosecution's case against Rivera was marginal. No physical evidence ever linked Rivera to the crime, though hundreds of items of evidence were collected and analyzed from the scene. The prosecution's case was based on statements which Rivera allegedly made to the police and jailhouse snitches. There were huge problems with the

reliability of the statements attributed to Juan Rivera. Rivera had a verbal IQ of 76 and a history of medical problems and suicide attempts. His statements to the police were made in the middle of the night after four days of intensive interrogation and at a time when medical personnel at the jail determined that he was in a psychotic state. According to law enforcement, he got 80% of the facts wrong in his first inculpatory statement. His second statement, obtained a few hours later, allegedly admitted some details of the crime. These details, however, were *all* known to the police, and the defense argued at trial that the police suggested these details to him.

The jury struggled with the prosecution's case against Rivera and had tremendous difficulty reaching a verdict. It deliberated for nearly 36 hours over the course of four days, which is said to be longest jury deliberation in Lake County history. It twice indicated to the judge that it was deadlocked due to the lack of physical evidence. In this closely balanced case, there is definitely a probability that the DNA evidence would have made a difference. In light of the weaknesses of the prosecution's case, had the jury heard the definitive evidence that Juan Rivera did not deposit the semen found in Holly Staker's vagina, it is likely that it would have had a reasonable doubt as to Rivera's guilt. Juan Rivera now petitions this Court to set aside his conviction for first-degree murder.

JURISDICTION AND TIMELINESS

1. This petition for relief from judgment is brought under 735 ILCS 5/2-1401. Because it is based on DNA evidence obtained pursuant to 725 ILCS 5/116-3, this petition is not subject to the ordinary two-year limitation period. 735 ILCS 5/2-1401(c).

PROCEDURAL HISTORY

2. In 1993, Juan Rivera was convicted of the first-degree murder of Holly Staker and sentenced to natural life imprisonment following a jury trial in Lake County. His conviction was reversed on direct appeal and the cause was remanded for a new trial. *See* Exhibit A (*People v. Rivera*, No. 2-94-0075, November 19, 1996) (unpublished order).

3. In October 1998, Rivera was retried and a jury again convicted him of first-degree murder; the trial court sentenced him to natural life in prison. His conviction and sentence were affirmed on appeal. *See* Exhibit B (*People v. Rivera*, No. 2-98-1662, December 5, 2001) (unpublished order).

4. On March 11, 2004, Rivera filed a motion requesting DNA testing of certain biological material pursuant to 725 ILCS 5/116-3. The Lake County State's Attorney did not object to the testing. The parties ultimately agreed that testing should begin with the material collected from the vaginal swabs taken from the victim at the time of the autopsy.

EVIDENCE ADDUCED AT TRIAL

5. On the evening of August 17, 1992, eleven-year-old Holly Staker was raped and murdered while babysitting Dawn Engelbrecht's two children, Blake Arena (male age five) and Taylor Arena (female age 32 months), at Engelbrecht's apartment at 442 Hickory in Waukegan, Illinois. Blake was outside of the apartment playing at the time of the crime, but Taylor was inside. R. 8902-15.

6. At autopsy it was determined that Holly had been stabbed 27 times and strangled. R. 10289. Injuries to the vagina and rectum indicated forcible penetration while

the victim was still alive. R. 10251-52, 10255, 10257-58. Semen was present in Holly's vagina but not her rectum. R. 9501.

Lack of Physical Evidence

7. In the aftermath of the attack, the police collected hundreds of pieces of evidence. Vaginal and rectal swabs were taken from the victim, along with hair samples, including pubic hairs and fingernail scrapings. R. 10230-31. Although spermatozoa were found on the vaginal swabs, experts from both sides were unable to perform discriminating DNA testing on the samples. R. 9458-61, 9501. In his closing summation to the jury, Assistant State's Attorney Michael Mermel addressed the shortcomings of the DNA testing conducted in 1993 on the sperm from the vaginal swabs; arguing that the savagery of Rivera's attack on Staker created so much blood that it overwhelmed the sperm, and the sperm could not be analyzed:

> "Now, unfortunately, the DNA in this case was no help. But the thing is, is that the savagery of the defendant's attack on poor little Holly Staker is what prevented the sperm DNA from having any possible probative value.
>
> You recall the testimony from Dr. Jones, and you also recall the testimony, I believe, maybe from Elizabeth Benzinger, the DNA scientist, or could have been one of the other blood experts, that the Q-tips that were used to swab Holly Staker's vagina were so bloody that essentially her DNA overwhelmed the very tiny, tiny amount of sperm that was found in Holly Staker.
>
> And so basically like a drop in the ocean, it just cannot be analyzed. There was so little sperm DNA that he had made Holly Staker's

> vagina bleed so profusely by the savagery of his attack that prevented the scientists from being able to develop any results on the sperm.
>
> It is no one's fault but the defendant that that can't be analyzed. I mean there is nothing that can be done about it. The scientists tried everything they could, and it couldn't be developed."

R. 11006-07.

8. Foreign hairs were found on the victim's body, including a pubic hair on the victim's labia majora, which did *not* match Rivera. R. 9495-96, 9534-36. The prosecution argued forcefully in both its opening and rebuttal closing argument that the pubic hair found on the victim's labia majora that did not match Rivera was "meaningless" because the scene was precontaminated and hairs transfer easily:

> "Basically the apartment was so precontaminated that the trace evidence, what we call trace evidence, hairs, fibers, are essentially worthless from a forensic standpoint. Think about it. She had I don't know how many hairs that were stuck to her underwear that were animal hairs. She had animal hairs encrusted on her body. She had animal hairs on her labia minora, the most inner part of the exterior of her vagina had animal hair on it. There were no pets in the house. What can you tell from pieces of hair on Holly Staker, other than she was encrusted in the filth that she had to lay in as she died oozing her own blood?"

R. 10998-99.

> "To make the assumption that that pubic hair necessarily belongs to the killer, you have to also be able to buy the assumption that the cat

> hair that was found on the labia minora also came from the killer: in which case you'd have to conclude she was raped and murdered by a cat. We know that didn't happen."

R. 11107.

9. A great deal of blood was splattered around the bedroom where Holly Staker's body was discovered, and samples of this blood were taken from sheets, carpets, clothing, walls, and household items. R. 9314-31. *None* matched Rivera. R. 9307-29, 9396-9416.

10. Seventy-four fingerprints were lifted from the crime scene. Thirty-two of these prints were suitable for comparison. *None* matched Rivera. Some of these prints could not be matched to any known prints in the examiner's possession. R. 9126-38.

11. The back door to the apartment was found damaged, with an opening punched through it near the bottom. R. 8991-93. Neither the doorjamb nor the portion of the frame that lodged the locking mechanism was damaged, however, leading investigators to conclude that the door had not been forcibly opened. R. 8991-93. A partial footprint was observed on the door. R. 9388-92. Particles of blue material were found embedded on woodchips from the door which, according to a forensic serologist, could have come from a blue mop stored outside the door. R. 9056, 9507-10.

12. In addition, a hair with tissue attached was found inside the forced opening to the door. R. 9510. A PCR based DNA analysis using the DQ alpha genetic marker system was performed on the tissue, but such testing can only be used to exclude potential sources (comparable to blood-typing as opposed to fingerprinting). Rivera was *excluded* as the source of the tissue. R. 9461-63. The prosecution argued that this exclusion was the

"biggest red herring of all," because hair and skin easily transfer to other surfaces, and there is no way to know whether this particular hair with tissue attached is related to the crime:

> "Now, where was this found? It was found on one of the threads on the outside or actually the inside of the door on the apartment. Now we know Holly Staker had animal hairs not only encrusted on her body but on her vagina. Did she come in contact with a nonexistent pet while she was in the apartment? Of course not. What does that tell you about the floor of this apartment and what it had? That it had floating debris, that it had pieces of hair, that it had little flecks of skin from who knows how long."

R. 11008-09.

> "But you know and I can prove to you that that piece of skin, the tissue, or whatever that little fleck that is, has nothing to do with this case any more than the animal hairs on Holly Staker's vagina. You know that because this door was not the point of entry for a mystery killer. And if this door was not the point of entry for a mystery killer, then whatever you find on it doesn't mean anything."

R. 11009.

> "The hair -- the only problem with hair is it can be picked up and transferred very easily; and the same thing with the hair on this door. The proposition that the person rams this mop through here and at the same time their hand went all the way through, past the imaginary gloves, and then one hair came off their wrist is just almost too ridiculous to talk about."

> "This door was taken off its hinges. Again the evidence technicians are doing everything they can to preserve the scene, but there's hair all over this apartment. When they walk through, even with their protective clothing, they can pick up hair that's there at the scene and inadvertently transfer it to another source."

R. 11107-08.

13. A knife, broken in two, was also found behind a residence two houses north of the duplex where Dawn Engelbrecht lived. R. 9047-48. Engelbrecht identified the knife as one from her kitchen, and the pathologist testified that the knife could have been the weapon wielded in the attack on Holly Staker. R. 8924, 10276. As with the other evidence, the knife could not be tied to any potential perpetrator.

Circumstances of the Confession

14. Nearly two months after the murder, Rivera was brought to the police's attention due to the suggestion of Edward Martin, who was himself incarcerated for an unspecified offense relating to his own child, and who also was a suspect in this case. R. 9160-61, 9189-90. Martin stated to the police that a fellow inmate, Juan Rivera, knew who had killed Holly Staker. R. 9175.

15. On October 2, 1992, Officers James Genticlore and James Held traveled to Hill Correctional Center to speak with Rivera. R. 9225, 9245.[1] Rivera was friendly and cooperative and agreed to give the police samples of his blood and hair. R. 9238, 9242, 9258. Rivera told these officers the same thing he had told Martin: On the night of the

[1] On August 31, 1992, Rivera began serving a three-year sentence for burglary following the revocation of his probation. C. 1670-71.

crime he had been at a party at Shanita Craig's house, which was close to where the murder occurred. A man, identified by Rivera as Robert Hurley, repeatedly left the party, and at one point returned -- sweaty, out-of-breath and with a fresh scratch. When the partygoers saw police cars, they went to investigate. Rivera then spoke to the woman for whom Staker had been babysitting, describing her as the "Mexican lady" who bartends at Cheers. R. 9230-31, 9248-52, 9255-56, 9273.[2]

16. Following this interview, the police investigated Rivera's story and discovered that it was not true. There had not been a party at the Craig house and Rivera had not been present at the Craig house. App. A at 3. There was, however, a party at Bobby Hughes' house, which was also close to the site of the murder, but Rivera was not there either. R. 9372-73, 9922-23.

17. On October 27, 1992, the police summoned Rivera from Hill Correctional Center to the Lake County Jail under the guise of a subpoena duces tecum, ostensibly to give testimony before the grand jury. App. A at 13. Rivera never testified; instead, he was subject to four days of "intensive" interrogation. *See* App. A at 3.

18. On October 27, Officers Michael Blazincic, Lou Tessmann and Donald Meadie transported Rivera to John Reid and Associates in Chicago for the purposes of interrogation and polygraph testing. R. 9342. Michael Masokas, a licensed polygraph examiner, questioned Rivera in the morning and then again in the afternoon. R. 9343-45, 9683-84. Rivera made no incriminating statements. Instead, he continued with his story

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[2] Dawn Engelbrecht, the mother for whom Holly Staker was babysitting the night of the crime, is not Mexican. R. 9262-63.

about how on the night of the murder he had attended a party at Shanita Craig's house and witnessed suspicious behavior by an individual named Robert. R. 9681. Rivera was given a polygraph test on whether he was involved in the Staker murder and on his whereabouts the night of the crime. R. 9710-11. Masokas had a difficult time interpreting the results of the polygraph and recommended that Rivera be brought back for additional testing at a time when Rivera had had more sleep. R. 9685, 9712.[3]

19. On October 28, Officer Blazincic began questioning Rivera at 9:30 a.m. R. 9345-46. Rivera again repeated the Shanita Craig story. R. 9347-54. Blazincic then asked Rivera to put his story in writing, and Rivera agreed. R. 9356. That statement is attached as Exhibit C. Blazincic admitted on cross-examination that Rivera's written statement contained simple wording, many misspellings and a host of grammatical errors. R. 9376-78.[4]

20. Officer Blazincic then put Rivera in a room alone with Michael Jackson. R. 9280, 9358.[5] Rivera, who was upset at the time, told Jackson that the police were trying to railroad him for something that he did not do and asked Jackson to provide him with an alibi. R. 9280-83, 9286. Jackson refused, and reported his conversation with Rivera to the police. R. 9282.

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[3] The night before the test Rivera had slept for only one hour -- on the floor of the jail. R. 9707-08.

[4] For example, Rivera spells August as "ogust", stood as "stued", awhile as "awill", little as "littel", know as "no", accident as "axedent". R. 9377-78; *see also* Exhibit C.

[5] Michael Jackson was someone Rivera claimed to be present at Shanita Craig's party. R 9249, 9682.

21. Officers Blazincic and Tessmann then took Rivera on a "ride around" so that Rivera could show them the house where he had claimed to be the night of the crime. R. 9362. Rivera directed the police to Shanita Craig's house. R. 9364. The officers then drove Rivera to Bobby Hughes's house -- the location of the real party. R. 9364, 9379. Rivera did not recognize the house. R. 9364. On the way back to the jail, the police also drove by the murder scene. The officers did not remark as they drove by the scene, and Rivera did not seem to notice. R. 9365-66, 9379.

22. On October 29, at 11:30 a.m., Officers James Held and Richard Davis took Rivera back to John Reid and Associates for more questioning and a second polygraph examination. R. 9730. Rivera was again interviewed by Michael Masokas, beginning at 1:00 p.m. Rivera related the same story about how on the night of the crime he had been at a party at Shanita Craig's house. R. 9688-89. At 2:15 p.m., Masokas accused Rivera of lying about the party. R. 9689-90. Rivera responded that yes, he had lied about the party in order to get the police off his back. R. 9690. Rivera also said that he had lied about approaching Dawn Engelbrecht on the night of the crime and that he had really approached her the next day. R. 9690. Masokas then told Rivera that Engelbrecth had identified Rivera as the person who had approached her on the night of the crime. R. 9691.[6] In response Rivera told a new story. He rode his bike to the Craig's house at 5:00 p.m. and waited there for about two or three hours to see if there was going to be a party. When he

[6] Although it was true that Engelbrecht initially identified Rivera as the person who approached her on the night of the crime, she recanted that identification prior to the first trial. App. A at 19.

saw flashing lights, he walked to the scene of the crime, approached Engelbrecht and asked her what was going on. R. 9691-92.

23. Officers Held and Davis then joined the questioning and told Rivera that it would be impossible for him to see flashing lights from the front of the Craig's house. R. 9693. Rivera responded by stating that before going to the Craig's house he walked around the neighborhood, broke into a car and stole some speakers, walked home to drop off the speakers and then walked back to the Craig's house. R. 9691. When he saw the police lights, he walked down Hickory Street where he approached Engelbrecht. R. 9691. He spoke with Engelbrecht because he knew that Holly was babysitting for her that evening. R. 9691-92.

24. At this point it was after 5:00 p.m. and Masokas, in the presence of Officers Held and Davis, accused Rivera of being involved in the homicide. R. 9696. According to Masokas, Rivera reacted angrily to the accusation. R. 9273. When Masokas continued to accuse Rivera of the crime, "he maintained that he had no involvement in this." R. 9696, 9724. The questioning at Reid ended at 6:20 p.m., and Rivera was taken back to the Lake County Jail. R. 9697. Masokas testified that the results of Rivera's second polygraph exam showed evidence of deception but he could not isolate the questions on which Rivera was being deceptive -- Rivera was questioned on his whereabouts the night of the crime and on whether he was involved in the Staker murder. R. 9713-14.

25. At 8:00 p.m., back at the jail, Officer Blazincic resumed the interrogation of Rivera, confronting him with the factual inaccuracies of his statement. R. 9875. At 8:45

p.m., Officer Fernando Shipley entered the room and confronted Rivera with the fact that no one had reported a car burglary the night of the crime. R. 9916, 9935.

26. At 9:25 p.m., Blazincic left the room frustrated and asked that he be replaced by another interrogator. R. 10402-03. Shipley continued with the interrogation for about 50 minutes, telling Rivera that he had a problem with his story, that he was going to leave him alone for a few minutes to "think about it," and that when he returned "we need to come to an agreement as to what really happened." R. 9918-19, 9961-62. Shipley then left the room. R. 9919.

27. At 10:15 p.m., Shipley returned with Officer Donald Meadie, and the two of them continued to press Rivera on his out of square story. R. 9919-24, 9966, 9988. Rivera eventually told Shipley, "Okay. Okay. I lied. I lied about everything." R. 9925.

28. At 11:30 p.m., Officer Shipley left the room, and Officers Meadie and Fagan continued with the interrogation of Rivera. R. 9927-28, 9993, 10320. The officers pointed out to Rivera that every story Rivera had told them had turned out to be a lie and that he was digging himself deeper and deeper into a hole. R. 9994, 10322-23. Rivera became increasingly agitated and kept inquiring if he was going to be sent to a maximun security prison. R. 10323-25. Fagan told Rivera that his cooperation would be noted to the State's Attorney's Office. R. 10323.

29. On October 30, at 12:15 a.m, Rivera broke down and started sobbing uncontrollably. R. 9995, 10332, 10411. When the officers asked Rivera if he had been in the apartment with Holly, Rivera could only nod yes to his involvement. R. 9995, 10332. At this point, Rivera was crying so hard that he soaked his clothes and he could not talk.

The interrogation stopped for twenty minutes. R. 10332, 10407. After the break and for the next few hours, Rivera, through questions and answers, gave an account of how he committed the crime. R. 9997-10002, 10042, 10334-35. Officer Meadie took notes. R. 10003. Rivera, who before this time had not refused one request of the police, said that he did not want his statement to be taped, nor did he wish to write out the statement in his own words. R. 10002-03, 10336, 10436-37. At 3:00 a.m., the interrogation ended. R. 10103-04. Officer Fagan admitted on cross-examination that, at the suppression hearing in 1993, when asked why he stopped interviewing Rivera, he said, "Frankly, we were dead tired. I had been up for over two days, over 48 hours, and we felt, that, you know, he had nothing else to offer." R. 10426. The officers left Rivera alone in the room, and Meadie began the task of preparing a typed statement for Rivera to sign. R. 10003, 10337.

30. A few minutes later, Officer Held notified Meadie and Fagan that Rivera was "tapping" his head against the cinder block wall of the interview room. R. 10024, 10339, 10466. When Meadie and Fagan returned to the interview room, Rivera was being restrained by Officers Blazincic and Shipley. R. 10468, 10477. He lay on the floor in a fetal position and was unresponsive to verbal commands. *Id*. Both Officers Held and Balzincic testified that Rivera did not seem to recognize them and that he just stared into space. R. 10474, 10482. Rivera then began to hyperventilate. R. 10339, 10469. The officers tried to get him to blow into a paper bag but were unsuccessful. R. 10341. At this time, he was forcibly cuffed at his hands and ankles, and taken to a padded cell, otherwise known as the "rubber room." R. 10342, 10466-70, 10478.

31. At 4:00 a.m., Toi Coleman, a psychiatric nurse with ten years experience, looked in on Rivera and found him pacing back and forth, banging his head against the wall and speaking incoherently. R. 10617. Coleman observed that "his head was swelling" and that "he had a hematoma on the side of his head." *Id.* When Coleman tried to tend to his injuries, he would not allow her near him. *Id*. When she asked Rivera if he knew his name and where he was, he was unresponsive and kept hitting his head against the wall. R. 10619. According to Coleman he was disoriented "times three" -- not aware of who he was, where he was or what was going on. R. 10618. Rivera was placed on suicide watch. R. 10619. When Coleman returned to the padded cell to check on Rivera, he was lying in a fetal position, and had pulled out a "tuft of hair with scalp on it." *Id.*

32. Coleman last observed Rivera at 6:45 a.m. He was crouched in the corner and curled into a ball. R. 10620. Coleman testified Rivera displayed all of the characteristics of a person having a psychotic episode. R. 10620-23.

33. At 8:10 a.m., Officers Meadie and Fagan visited Rivera in the padded cell and read to him a typed summary of his statement. R. 10345. Rivera's confession essentially states that Holly attacked him with a kitchen knife because he refused to have sex with her, and that in self-defense he killed her. R. 10035-42; *see also* Exhibit D. Rivera signed the statement, and Meadie and Fagan claimed that he appeared cogent and responsive when he did so. R. 10026-30, 10347-49, 10448-49.

34. Both Meadie and Fagan admitted that Rivera's confession was "farfetched" and inconsistent with the known facts of the crime. R. 10006, 10076. According to Fagan, 80% of the statement was false. R. 10419. For example, it was not true: 1) that Holly was

Holly was wearing a sleeveless top and tight shorts; 2) that Holly put on a nightgown before seducing Rivera; 3) that the sex act was consensual; 4) that both children were inside the apartment; 5) that Rivera tickled the little girl; 6) that Holly changed Taylor's diaper; 7) that it was dark inside the apartment; 8) that Holly and Rivera kissed on the couch where a pizza had been placed; 9) that Holly and Rivera had intercourse on a cushion taken from the rocking chair; 10) that Holly cut Rivera on the arm with the knife; and 11) that after the crime Rivera burned his clothes in the dumpster behind his house. R. 10006-10, 10065-78. Also troubling to the officers was that Rivera did not remember if he had caused damage to the back door or that there was a pizza on the couch. R. 10007, 10009, 10073. Meadie testified that he did not challenge Rivera on the information the police knew to be false because "those were the words of Mr. Rivera and I did not want to be suggestive in any way." R. 10006.

35. Officers Meadie and Fagan also allowed that the document that they prepared and gave to Rivera to sign was summary of what Rivera had said, written *not* in Rivera's words but in *their* words. R. 10043-44, 10431. For example, Rivera did not use the words "intercourse," "penis," "vagina," "seduce," "anus," "ejaculate," "virginity," "pubic hair," or "orgasm." R. 10043-44, 10078-83, 10432-34. The notes of Rivera's actual words were destroyed. R. 10005. When the statement was read back to Rivera, he never questioned the meaning of any of the words in the statement. R. 10044-45. The officers also admitted that there is nothing in the statement indicating Rivera's refusal to submit to a videotaped confession or his refusal to write out a statement in his own hand. R. 10083-84, 10443-44.

36. At 9:00 a.m., a meeting was called at State's Attorney Michael Waller's office. R. 10046. Meadie and Fagan briefed those at the meeting, including Officer Michael Maley, on the substance of Rivera's confession. R. 10046. It was agreed that Rivera's confession as to how the crime occurred was factually inaccurate and "somewhat hard to believe." R. 10046-47. Waller suggested that Meadie and Fagan ask Rivera to read his statement aloud in order to ensure that he understood its contents. R. 10357-58. It was further suggested that Meadie and Fagan reinterview Rivera in order to "clarify" some of the "inconsistencies in his statement." R. 10047, 10357-58. Although Fagan and Meadie agreed to ask Rivera to read his statement aloud, they declined to interrogate Rivera further, because they had been up all night and were exhausted. *Id.*

37. At 9:30 a.m., Correctional Officer David Wathen observed Rivera rocking his head back and forth, and hitting it against the glass window of the rubber room. R. 10633. Out of concern for Rivera's safety, jail personnel asked nurse Pam Enyeart for assistance. R. 10634.

38. When nurse Enyeart entered the rubber room shortly after 9:30 a.m., Rivera was lying on his left side. R. 10640. His hands were cuffed behind his back and his legs were shackled together. *Id*. Enyeart knelt down beside Rivera, identified herself, and told him that she was there to help him. R. 10641-43. According to Enyeart, Rivera did not move or verbally respond. R. 10643. Enyeart testified that although Rivera's eyes were open, there was no indication that he knew who she was. *Id*. Enyerat then treated an abrasion on Rivera's head. R. 10644.

39. After leaving the cell, Enyeart contacted the jail's consulting psychiatrist Dr.

Dr. Juan Barrionuevo, who prescribed that Rivera be injected with the psychotropic drug Haldol and also be given Cogentin and Ativan. R. 10645. Nurse Enyeart then contacted Dr. Dennis McCreary, the medical director of the jail, who gave Enyeart permission to administer the drugs should they be needed. R. 10647. Enyeart last saw Rivera sometime around 10:30 a.m. R. 10647. He was still lying on his side. Enyeart again tried to have a conversation but Rivera was unresponsive. R. 10648. The prescribed drugs were never administered because it was decided that Rivera no longer posed a danger to himself. R. 10648-49.

40. At about 10:30 a.m., Officers Meadie and Fagan returned to the padded cell and told Rivera that they would like to go over his statement one more time. R. 10349-50. The officers removed Rivera from the padded cell and took him to an interview room at the jail. R. 10352. The officers then asked Rivera to read his statement aloud and make any corrections. R. 10034, 10353. Rivera read the statement and asked that one change be made -- that the word "both" be crossed out of one of the sentences. R. 10034, 10354. The new sentence now reads "I put my penis into her vagina and anus during intercourse" instead of "I put my penis into both her vagina and anus during intercourse." *See* Exhibit D. Fagan then told Rivera that they had "a little bit of a problem with [his] statement. We feel that there are some inconsistencies with this." R. 10355. Fagan asked Rivera if he would agree to be interviewed by Officers Tessmann and Maley, and Rivera said yes. R. 10355.

41. At 11:30 a.m., Officers Tessmann [7] and Maley [8] resumed the interrogation of Rivera for the purpose of "clarifying some details." R. 10116, 10118, 10135, 10355, 10522. Neither Tessmann nor Maley had read Rivera's prior statement. R. 10174. While Maley testified that he had been apprised of the nature of Rivera's first statement and its concomitant problems, Tessmann claimed complete ignorance of the substance of the first statement. R. 10116, 10568-69, 10577. Officer Fagan acknowledged, however, that he had briefed both Tessmann and Maley on Rivera's initial confession, and that "they were aware" of the inaccuracies in the statement. R. 10453-54.

42. Maley testified that the format of the interview was question and answer, with Tessmann asking most of the questions. R. 10124. Tessmann, on the other hand, testified that for the most part Rivera gave a narrative: "[I]t was not really a question and answer type conversation that was going on. He was pretty much telling us the story, but every once in a while we would need something clarified." R. 10535. The officers did not have a tape recorder and they did not take notes. R. 10141, 10175, 10535. The officers never asked Rivera if they could videotape or audiotape his statement or whether he was willing to write out a statement in his own hand. R. 10578-79.

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[7] Tessmann, a sergeant with the Waukegan Police Department and member of the Lake County Major Crimes Task Force, was assigned the role of team leader during the investigation of the Staker homicide. As a team leader he attended briefings on the case and directed the actions of the other investigators, though he conducted some interviews himself. R. 10510-11, 10590, 10593.

[8] Maley, a lieutenant with the Illinois State Police, testified that at the time of the Staker homicide he was an assistant commander of the Lake County Major Crimes Task Force. It was his responsibility to track all of the leads in the Staker homicide. He admitted that his role enabled him to have a good overall knowledge of the investigation. R. 10112-13.

43. Sometime between 12:30 and 1:00 p.m., the officers emerged from the interrogation room and began the process of creating from their collective memories a summary, in narrative form, of what Rivera had told them. R. 10141-42, 10194-95, 10536-37. Tessmann and Maley worked together on the statement, with Tessman at the typewriter and Maley sitting beside him. R. 10142, 10537. While crafting this second statement, they left Rivera in the interview room with Officer David Ostertag. R. 10141, 10537.

44. Shortly after 1:00 p.m., Tessmann and Maley returned to the interview room and read to Rivera a three-page summary of his second statement. R. 10143, 10539. Tessmann and Maley then asked Rivera to read the statement aloud and inform them of any mistakes. R. 10143, 10540. Rivera read the statement aloud and while doing so, requested that 15 changes be made -- everything from inserting new phraseology to correcting spelling and grammar. R. 10145-60, 10541-62. Both Tessmann and Maley testified that Maley made the corrections. R. 10160, 10588. Tessmann admitted, however, that he testified at the suppression hearing in 1993 that Rivera had inserted the corrections himself. R. 10589. Rivera was then asked to sign the prepared statement, which he did. R. 10563-65.

45. In his second statement Rivera abandons his claim that he killed the victim in self-defense, and instead states that he killed the eleven-year-old in a fit of rage after she mocked his inability to get an erection. *See* Exhibit E. Maley and Tessmann both admitted that Rivera's second statement still contained many factual inaccuracies.

R. 10197, 10608. Despite factual inaccuracies, however, the second statement was "largely consistent with the known facts of the case." App. A at 5.

46. Although in his first statement, Rivera could not explain the damage to the back door; in his second statement he states that when he left through the back door, he used a mop to break a hole in the door in order to make it look like a burglary. R. 10137-38. Tessmann admitted on cross-examination that he testified previously that Rivera stated that he used a "broomstick" (not "mop") to damage the back door. R. 10590. Tessmann was not able to give any explanation as to why he and Maley wrote the word "mop" rather than "broomstick" in the typed confession, other than Rivera must have said mop. R. 10590-93 When asked if he inserted the word "mop" into the statement because he knew that the investigators had matched a mop stored outside the door to the damage that had been done to the door, Tessmann testified that prior to Rivera's confession he was not even aware that the back door had been damaged, let alone that investigators believed that a mop had caused the damage. R. 10590-93. Although a team leader and in the "informational loop," Tessmann testified that he did not attend all the briefings on the case. R. 10590, 10610. This was in direct contradiction to Tessmann's testimony at the first trial where he admitted that he attended *all* the briefings on the case and "was aware of just about eveything that had gone on." R. 5262-63.

47. Although in his first statement Rivera incorrectly describes Holly's clothing as "tight shorts" and a "sleeveless top," in the second statement he accurately describes her clothing as a "multi-colored shirt" and "black stretch pants with stirrups." R. 10135. Although in his first statement Rivera states that Holly had put on a night gown, Officer

Maley challenged Rivera directly on this point, and Rivera agreed that Holly had not been wearing a night gown. R. 10135, 10181.

48. David Ostertag, an investigator for the Lake County Major Crimes Task Force, was assigned to sit with Rivera while Tessman and Maley prepared a summary of Rivera's statement. R. 10484. According to Ostertag, Rivera said that he was sorry for what he did to Holly, that he had written in his Bible that if he was caught for Holly's murder he would kill himself, and that the teardrop tattoo under his eye was for his twin brother who had died at birth, his dead grandmother and Holly. R. 10486-88. Other evidence at trial revealed that there was no suicide inscription in Rivera's Bible, Rivera did not have a twin brother who died at birth and Rivera's grandmother was alive at the time. R. 10488-89, 10738-40.

Jailhouse Snitch Testimony

49. *Frank McDonald.* [9] Frank McDonald and Juan Rivera were both prisoners at the Lake County Jail between November 1992 and February 1993. R. 9788. McDonald was serving time for deceptive practices and DUI. R. 9788-89. Rivera told McDonald that he did not commit the crime and asked McDonald to review his discovery materials to uncover information on another possible suspect, Dion Markadonis. R. 9796, 9805-06. McDonald agreed, and was in possession of Rivera's discovery for several weeks. R. 9797, 9805. McDonald testified that when he returned these materials to Rivera, Rivera admitted killing Staker. R. 9799.

50. McDonald acknowledged, however, that he did not come forward with this information until a week before Rivera's first trial, and after he had denied knowledge of any such statement to Detective Michael Blazincic just three days earlier. R. 9801-03, 9814. He further testified that, though Rivera had confessed to him, he met with a Tribune reporter and suggested to the reporter that he "follow-up and investigate Dion Markadonis." R. 9808-09. McDonald also testified that thereafter he attempted to sell the reporter a copy of Rivera's confession, and that his reason for doing so was to raise money for Rivera's defense. R. 9812-13, 9816.

51. *David Crespo*. During several months in 1997, David Crespo and Juan Rivera were both prisoners at the Lake County Jail; Crespo was in custody on a petition to revoke probation for felony theft and Rivera was awaiting retrial. R. 9597. Crespo

[9] Although McDonald testified at Rivera's first trial, he was unavailable for Rivera's retrial. His transcribed testimony from the first trial was read to the jury. App. B at 7.

testified that, in May 1977, after he and Rivera attended a Spanish Bible study meeting together, Rivera volunteered "I killed that little girl." R. 9597, 9607.

52. Crespo admitted, however, that he did not reveal Rivera's statement to the authorities until the fall of 1997, after Crespo was jailed in Cook County on two new charges of robbery and attempt robbery. R. 9640, 9645-47. Crespo acknowledged that he was awaiting sentencing in Cook County on the new charges, and that he also faced the possibility of a consecutive sentence in Lake County for a violation of his probation. R. 9638. Crespo further revealed that his sentencing date in the Cook County case was scheduled to be one week after his testimony in Rivera's trial, and that he had not resolved the case three weeks earlier because his attorney "was still trying to get a few more years knocked off the sentence . . . ." R. 9653.

53. Crespo testified that after hearing Rivera's confession he did not want to have anything more to do with Rivera, however, he then admitted on cross-examination that upon his release from the Lake County Jail in July of 1997, he had visited Rivera and given him money. R. 9664. Crespo also admitted that he had then gone to live with Rivera's parents -- until they kicked him out for using drugs. R. 9609-11, 9628. Crespo admitted that he had been a drug addict for the past 20 years, that the pending charges of robbery and attempt robbery in Cook County would make him a six-time convicted felon, and that he had needed medication to be found fit for trial in his pending Cook County case (where he had been found "fit for trial with medication"). R. 9596, 9636-37, 9649.

54. *Ed Martin*. In September of 1992, Ed Martin and Juan Rivera were incarcerated at the Lake County Jail on separate charges unrelated to this case. R. 9159-60. At the time, Rivera was not a suspect in the Staker murder, but Martin was.[10] R. 9160. Martin testified that on September 16, 1992, he and Rivera had a conversation about the Staker homicide wherein Rivera stated that on the night of the crime he had been at a party at Shanita Craig's house and had witnessed the strange behavior of a Gangster Disciple who at some point returned to the party all sweaty and with scratches. R. 9163-68. Martin further testified that Rivera said that Holly Staker was a little bitch, a tease and that she deserved all 27 times. R. 9169-70.

55. Martin admitted, however, that when he originally contacted the police about his conversation with Rivera he only said that Rivera had some information about the crime and might know who had committed the crime. R. 9173, 9175-76. It was not until after Rivera was charged with the crime, and at a time when Martin was trying to collect a reward for leading the police to the perpetrator, that Martin claimed that Rivera had stated that Staker was a bitch and a tease and deserved all 27 times. R. 9211-12, 9215. In an effort to substantiate his story, Martin later produced a sheet of paper which he claims he wrote at the jail on September 16, 1992, detailing Rivera's exact words. R. 9215, 9220. The defense presented evidence that the paper on which the details were written was not available to inmates incarcerated at the Lake County Jail. R. 10776.

[10] On September 14, 1992, the police questioned Martin about the Staker homicide and took samples of his blood, hair and saliva. R. 9193-95. Presumably, the police were interested in Martin because Martin lived close to the site of the murder and had a history

"So-called" Eyewitness Identification

56. No witness came forward in the first trial who could identify Rivera as the assailant. At the second trial, Taylor Arena, who was thirty-two months old at the time of the crime, was called by prosecutors, in the absence of any other person who could place Rivera at the scene, to identify Rivera as Holly Staker's attacker. Taylor Arena had already *failed* to recognize Rivera when faced with a one person show-up years earlier, close in time to the actual events. R. 8943-46. She also had failed to pick him out of a photo array. R. 8986-88. On the stand, she again did not identify Rivera as the assailant. R. 8759-67. She completed her testimony and court was dismissed at the end of the day. Taylor was recalled to the stand again the next day, and at that time she did identify Rivera. R. 8834. After the jury returned its verdict but prior to sentencing, defense counsel alerted the court that psychologist Dr. John Lynch had conducted a post-trial interview of Taylor Arena and that during that interview Taylor had not only recanted her identification of Rivera as the man who committed the crime, but also informed Dr. Lynch that Rivera was not the murderer. C. 1792; R. 11293-95.

Rivera's Psychological History

57. Dr. Larry Heinrich, a licensed clinical psychologist, a board certified school psychologist and a board certified forensic examiner in psychology, testified that in 1993 he conducted a clinical evaluation of Rivera. R. 10825, 10831. Dr. Heinrich interviewed Rivera on three occasions, examined his social history, administered a battery of

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of sexually abusing his children. R. 9183, 9192, 9202.

of psychological tests and reviewed police reports in the case, including the details of Rivera's confession and interrogation. R. 10831-33, 10835.

58. Rivera's social history reveals that while attending school in New York as a child he was a special education student, had been referred for psychiatric evaluation and eventually given medication for attention deficit disorder with hyperactivity. R. 10834, 10836. Rivera twice tried to commit suicide, the last time in 1991, when he was hospitalized at Saint Therese Medical Center after ingesting various pills and shampoo. R. 10834, 10837, 10853.

59. Rivera has a full-scale IQ of 79, a verbal IQ of 76 and a performance IQ of 89. Heinrich explained that these scores put Rivera in a range that would require special education placement in the public schools. Rivera's reading level measured at a fourth grade level, which means that 99% of the population in his age group can read at a higher level. R. 10858.

60. Dr. Heinrich diagnosed Rivera as suffering from borderline personality disorder, which is typically characterized by impulsive behavior, difficulty adjusting in school and work, and frequent suicide attempts. R. 10866. Heinrich testified that people who suffer from borderline personality disorder have serious identity problems and low self-esteem. R. 10866.

61. Dr. Heinrich opined that on October 30, 1992, when Rivera admitted to committing the murder, he was "decompensated," that is, he was unable to respond in a manner that would be consistent with a logical, coherent, and integrated manner.

R. 10871-72. Dr. Heinrich elaborated that Rivera was under such stress that in response he would do anything or say anything to escape the stressful situation that he was in. R. 10872. According to Dr. Heinrich, Rivera had what is considered to be a mental and emotional breakdown. *Id*. Dr. Heinrich was of the opinion that Rivera's state of decompensation began when he broke down crying during the interrogation and would not have ended until he had some knowledge that he was out of the stressful situation. R. 10872-73, 10875-76. He further opined that once Rivera's will was broken he would not have had the ability to refuse to sign a statement he had purportedly given. R. 10876. Heinrich came to these conclusions because of the weaknesses of Rivera's personality, including his limited intelligence, and the process of repeated interrogation. R. 10878.

Jury Deliberations

62. The jury deliberated nearly 36 hours over the course of four days, which is said to be the longest jury deliberation in Lake County history. On two occasions the jury informed the court that it was at an impasse due to the lack of physical evidence. On day two of its deliberations, the jury sent the judge a note stating:

> "Your Honor, as foreman of the jury, I believe I must inform you that I believe the jury is at a state of serious impasse. The issue is as follows: we have certain members of the jury that believe that without physical evidence (blood, hair, fingerprints, videotapes of the confession, et cetera) they cannot agree as to a guilty verdict beyond a reasonable doubt. We have a larger number of jurors who believe beyond a reasonable doubt that Juan Rivera is guilty. At this time the division is strong, and we do not see a way to move the parties. Signed the foreman."

R. 11177. On day three of it deliberations, the jury sent a second note stating :

> "Your Honor. As mentioned yesterday, we have an issue of lack of evidence (blood, fingerprints, hair, videotape confession). We have tried to review direct testimony to get past this issue but, have failed. Quite frankly, continued discussion has only served to escalate a tense situation. We are not progressing and have not progressed for the last 4-6 hours of deliberation. We are more than willing to discuss this issue with you, face-to-face, but a simple "keep deliberating"message is not going to move this jury forward."

C. 1636; R. 11241. On day four of its deliberations, the jury found Rivera guilty in three different ways -- that Rivera knew his acts would cause death or great bodily harm to Staker, that the act was committed during the course of an aggravated criminal sexual assault, and that Rivera knew his acts created a strong probability of death or great bodily harm. R. 11251.

63. Rivera was sentenced to natural life in prison. The court found that the repeated stab wounds and the sexual acts committed upon the victim warranted the maximum sentence. R. 11351-52.

NEWLY DISCOVERED EVIDENCE

64. On March 11, 2004, Rivera filed a motion requesting DNA testing of the material collected from the vaginal swabs taken from the victim at the time of the autopsy.

65. In early January of 2005, by agreement of the parties, half of the remaining sexual assault specimens from the victim was sent to Rivera's designated expert -- Dr. Edward Blake of Forensic Science Associates -- for DNA evaluation and testing. That evidence consisted of: 1) one vaginal swab stick; 2) one empty vial that originally

contained the swab stick; and 3) one vaginal smear slide. It was agreed that Rivera would bear the expense of this testing.

66. Dr. Blake prepared three reports: a preliminary report dated January 17, 2005, evaluating the biological specimens and making recommendations for analysis (Exhibit F); a report dated February 15, 2005, analyzing spermatozoa from the Holly Staker vaginal samples (Exhibit G); and a report dated March 25, 2005, analyzing an oral swab from Juan Rivera and comparing it to the profile extracted from the vaginal samples (Exhibit H).

67. After discovering an estimated 420 spermatozoa in the vial and swab combined (Exhibit F at 3-4), Dr. Blake differentially extracted the sperm from each item and combined the sperm pellets for DNA extraction (Exhibit F at 3-4). From his PCR based analysis of STR genes, a highly discriminating genetic profile from a single male emerged from the "sperm" fraction of the vaginal swab and vial. Exhibit G at 4-9. When compared to the DNA profile Dr. Blake obtained from an oral swab of Juan Rivera, ***Juan Rivera was excluded as the source of the DNA obtained from the sperm found in the victim's body.*** Exhibit H at 6.

BASIS FOR VACATION OF JUDGMENT

68. To be entitled to relief under section 2-1401, a petitioner must show: (1) the existence of a meritorious claim or defense; (2) due diligence in presenting the claim or defense to the court in the original action; and (3) due diligence in filing the section 2-1401 petition. *People v. Coleman*, 206 Ill. 2d 261 (2002). In order to obtain vacation of a judgment on the basis of newly discovered evidence, a petitioner must show that the new

evidence was not known to him at the time of trial and could not have been discovered with the exercise of reasonable diligence. The new evidence must be so conclusive that it would probably change the result if a new trial were granted. The petitioner must prove his allegations by a preponderance of the evidence. *People v. Waters*, 328 Ill. App. 3d 117, 127 (1st Dist. 2002). Rivera has satisfied all of the above requirements by much more than a preponderance of the evidence.

69. Holly Staker was only eleven years old when she was murdered. Because of her age (11) and because her body showed signs of recent sexual trauma, it is reasonable to assume that she was sexually assaulted by the man who murdered her. This man left his semen in Holly's vagina.

70. The newly discovered evidence consists of a genetic profile obtained from STR DNA testing on the semen left by the perpetrator. This form of testing is known as "genetic fingerprinting" because the profile obtained can only belong to one person. This profile was compared to the profile obtained from Juan Rivera. The profiles were not the same. The semen left by the perpetrator absolutely could not have come from Juan Rivera.

71. The outcome of the trial most certainly would have been different if the newly-discovered DNA evidence had been available at the time of trial. Rivera's confession to the police formed nearly the entirety of the prosecution's case. There were many reasons to doubt the reliability of the confession.

72. First, Rivera was in a psychotic mental state, or a borderline psychotic mental state at the time he gave the incriminating statements. Rivera's behavior during the seven-hour time period between his initial confession and his final statement was so bizarre

bizarre -- banging his head against the wall, pulling out tufts of his hair and scalp and speaking incoherently -- that the jail psychiatrist ordered that Rivera be injected with the psychotropic drug Haldol. That medical staff at the jail described Rivera variously as "unresponsive" and "disoriented times three" calls into doubt the testimony of officers who claimed that Rivera was lucid at the time he made the incriminating statements. A clinical psychologist testified that Rivera's mental state at the time of the confession was one where he was willing to agree to anything that the police suggested. The psychologist testified that Rivera "decompensated" at the time of the initial confession, was under such stress, after being interrogated for four days by nine different officers, that he would do anything or say anything to escape the situation that he was in, and that once Rivera's will was broken, he would have lacked the capacity to refuse to sign a statement he had purportedly given.

73. Second, a huge reason to doubt the reliability of the confession is that there was *no* physical evidence to tie Rivera to the crime. Indeed all of the physical evidence pointed guilt *away* from Rivera. A pubic hair was found on the victim's labia majora; it did not belong to Rivera. A hair with tissue attached was found inside the hole of the damaged door; Rivera was excluded as the source. The defense argued at trial that these hairs belonged to the killer and that they did not match Rivera. The prosecution countered that the forensic evidence could be explained because hair is easily transferable and these hairs were not related to the crime. Although the prosecution was able to persuade the jury to discount the hair evidence, it is not possible to explain away the semen found in the victim's vagina. Holly Staker was the victim of a brutal rape. Her vagina and rectum

sustained serious injury. We now know that the individual who raped eleven-year-old Holly Staker was *not* Juan Rivera.

74. Third, Rivera got the facts wrong in his statements to the police. His first statement got *everything* wrong. Even law enforcement admitted that Rivera got 80% of the facts wrong and that his story -- that he killed the eleven-year-old victim in self-defense -- was "far-fetched." Since he got the facts wrong and his account was so implausible, the confession gave no real indication that Rivera had even been to the scene or knew more about the crime than anyone else in Waukegan. As stated by Rivera's trial lawyer during closing arguments, it would be as if somebody in 1963 went to the FBI and claimed to have killed John F. Kennedy "with a bow and arrow." R. 11052.

75. Rivera's second statement, obtained just minutes after Rivera affirmed his first confession, bore nearly no resemblance to the first, and he still got many of the facts wrong. For example, Rivera claimed that he stabbed and then raped the victim on the *bed* farthest from the door, but this account was inconsistent with blood splatter evidence indicating that the victim was stabbed on the *floor* where her body was found. R. 10585-86. Officer Maley testified that Rivera's demonstration of *how* he stabbed the victim in the chest and throat did not comport with the way in which the wounds looked in the autopsy photographs. R. 10133-34. Rivera claimed that he burned his bloody clothes in a dumpster behind his house but an inspection of the dumpster revealed no burn marks.
R. 10788. Rivera claimed that he played with the children (Blake and Taylor) inside the apartment, but this was contradicted by Blake and Taylor who testified at trial. R. 10583. Rivera claimed that after he left by way of the back door, he tried to run in a westerly

direction but that a fence kept him from doing so. Evidence at trial revealed that although there was a fence in the back yard it had been trampled to the ground. *See* R. 10190-91.

76. Fourth, while much of Rivera's second statement was consistent with the physical evidence, the defense argued, and the jury could reasonably have found, that Rivera was led to the accurate facts that were included in his second statement. It is significant that Rivera *never* came up with any new information which was not already known to the police, so that the officers could have led Rivera to everything that he said. It is also significant that Rivera, over the course of four days, was interrogated by eight different officers plus one polygrapher. Any one of those officers may have suggested to Rivera the details of the crime through leading questions, and then those details were captured in Rivera's second statement.

77. Because there was no videotape, audio tape or other verbatim recording of Rivera's confession or the interview, we do not know exactly what Rivera said or how the questions to him were worded. Was it the police or Rivera who first stated the significant facts? The only record of the statement is a police summary made shortly after the interview, which Rivera signed. The statement did not purport to be a verbatim account and the officers admitted that Rivera did not say the words they used in the statement. For example, although the words "consume" and "en route" appear in the statement, these were not Rivera's words. R. 5288-90. In fact, the results of a verbal test given to Rivera before trial show that Rivera did not even know the meaning of the word "consume."

R. 6157. Similarly, although Rivera's second statement reads as though Rivera described the victim's clothing as a "multi-colored shirt" and "black stretch pants with stirrups," these words -- which coincidentally track an earlier police report authored by Maley -- were not Rivera's words but rather the officers' words. R. 10135*; see also* R. 5295-96. Because Rivera could not accurately describe the victim's clothing in his initial confession, it was important to know exactly how Rivera described the clothing the second time. The jury seemed especially troubled by the fact that there was no clear record of the confession. During deliberations, the jury twice indicated in notes to the judge that one of the reasons it was at an impasse was due to the fact that there was not a videotaped confession.

78. The officers denied that they led Rivera to the statements that he made, but the jury could have found the officers' account to be unreliable because the officers' testimony about the questions and answers given during the interview was inconsistent and contradictory. For example, Officer Maley testified that the format of the interview was question and answer, whereas Officer Tessmann testified that Rivera gave a narrative. Maley testified that he made the 15 corrections to the statement whereas Tessmann originally testified that Rivera inserted the corrections himself. Tessmann claimed that he showed Rivera photos of Blake and Taylor, but Maley testified that he has no recollection of any photos being shown to Rivera. R. 10195. Tessmann gave inconsistent testimony on whether Rivera said he used a "broomstick" or a "mop" to break the door. This seemingly minor detail was extremely important. If Rivera said "broomstick," why was the word "mop" inserted in the typed statement? The answer is that a blue mop stored outside the back door just happened to match the damage done to the door.

79. Another indication that Rivera may have been led to facts that were included in the second statement is that the language used in the second statement often tracks, identically, earlier police reports. For example, Tessmann testified that during the interview Rivera states that he wanted "to take Holly's virginity because he had done that before." R. 5311. This exact phraseology appears in a police report Tessmann authored *before* Rivera became a suspect. *Id.* Rivera also states in his second statement that he threw the knife in the back yard because "I wanted everybody to think that somebody was playing with the knife." That Blake played with knives in the backyard was the subject of a police report authored by Officer Maley *before* Rivera was a suspect. R. 5264-65.

80. In the nearly thirteen years since Rivera's confession, the role that false confessions play in wrongful convictions has been increasingly recognized. At the time Juan Rivera confessed, the problem of false confessions was among the least discussed and least understood of the causes of wrongful convictions. Although social scientists have been studying police interrogations and confessions for decades, in recent years, psychologists from the clinical, personality, developmental, cognitive, and social areas have brought their theories and research methods to bear on an analysis of confession evidence, how it is obtained, and what impact it has on judges, juries, and other people. In the most recent issue of *Psychological Science in the Public Interest*, Professors Saul M. Kassin and Gisli H. Gudjonsson conduct an extensive review of this research, most of which has been published in the last decade or so. Saul M. Kassin & Gisli H. Gudjonnson, *The Psychology of Confessions: A Review of the Literature and Issues,* 5 Psychol. Sci. Public Interest (November 2004). *See also*, Sharon Begley, *Interrogation Methods Can Elicit False*

Confessions, Wall Street Journal, April 15, 2005, at B1. These studies make a compelling point that there is a link between the use of certain psychological interrogation tactics and false confessions and that certain persons (juveniles, the mentally retarded, the mentally ill, and the highly suggestible) may be more likely to falsely confess when pressured by police.

81. The confession in this case was the product of four days of "intensive" interrogation culminating in a 26-hour marathon session conducted by nine different officers. Juan Rivera's low IQ (verbal 76), history of suicide attempts and compliant personality as evidenced by the fact that for four days he did not refuse one single request of the police, certainly fits the profile of someone who might falsely confess.

82. In addition to social science, numerous proven false confession have surfaced since Rivera was convicted, largely, but not exclusively as a result of DNA evidence. According to data collected by the Innocence Project, at least 37 of the first 157 DNA exonerations have involved false confessions. Moreover, a recent study documented 125 proven false confessions, most of which involved exonerations in the past ten years. Of the 125, 81% involved murders, many of which were murder-rapes. Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World,* 82 N.C. L. Rev. 891(March 2004). According to the study, more proven false confessions have been uncovered in Illinois than in any other single state (27 or 22%), including a recent false confession in Lake County in the case of Colleen Blue. *Id.*, at 946, 974.

83. Here in Illinois, the problem of false confessions has been particularly severe in capital cases. Of the 18 Illinois men who have been exonerated from Illinois'

death row, eleven have been convicted based upon false confession evidence, either their own or the false confessions of co-defendants. For example, Gary Gauger and Rolando Cruz and Alex Hernandez were convicted on the basis of "dream statements," or hypotheticals, or other inculpatory statements that police construed as confessions. Joseph Burrows was convicted of a murder based, in part, on the false confession of his co-defendant Ralph Frye. Ronald Jones was beaten by Chicago police until he signed a confession to a murder. Leroy Orange, Stanley Howard, Aaron Patterson, and Madison Hobley, were all tortured by Chicago police into confessing to murders for which they were later pardoned. Dennis Williams and Verneal Jimerson were convicted on the basis of the false confession of seventeen year old, mentally retarded Paul Gray. These exonerations, all of which occurred after Rivera had been arrested and numerous other Illinois false confessions involving children and teenagers, led the Illinois General Assembly to require that all custodial interrogations in homicide cases be electronically recorded, beginning in July 2005. Drizin & Leo, at 999-1000.

84. The linchpin of the prosecution's case was Rivera's confesion to the police. Without the confession, Rivera would not have been convicted and would never have been charged. The prosecution's case otherwise consisted of statements from three jailhouse snitches of questionable motives and credibility and a vacillating identification from an eight-year-old child who allegedly witnessed the crime at the age of 32 months.

85. The statements attributed to Rivera from the three jailhouse snitches is wholly unreliable. First, snitch testimony is notoriously unreliable. Of the 111 death row exonerations since capital punishment was resumed in the 1970's, 51 of those men were

sentenced to death based in whole or part on the testimony of witnesses with incentives to lie -- in the vernacular, snitches. That makes snitch testimony the leading cause of wrongful convictions in United States capital cases.[11] All three snitches here had strong motives to make false statements to the police about Rivera. And, none of the witnesses provided any detailed information to the police. Frank McDonald's sudden revelation to police a week before trial that Rivera had confessed to him is incredible where he denied the existence of any such statement just three days earlier. When one considers McDonald's conviction for deceptive practices and his attempts to sell Rivera's discovery to a Tribune reporter, all credibility is lost. David Crespo's testimony that Rivera confessed to him after a Spanish Bible study class was extraordinarily convenient considering the threat of consecutive sentencing in Lake County and the sentencing date he faced in Cook County one week after his testimony in Rivera's trial. And finally, Ed Martin's testimony was clearly driven by pecuniary motives; he had hired an attorney to collect a reward for leading the police to the perpetrator.

86. Even without the newly-discovered DNA evidence, the jurors at the second trial agonized over reaching a verdict. With only a police-prepared confession obtained under questionable circumstances and accusations by convicted felons of questionable credibility, the jury deliberated for over 35 hours before reaching a verdict. During that time, the jury sent two notes to the judge indicating that it was at an impasse due to the fact that there was no physical evidence linking Rivera to the crime. It is virtually certain -- and at least reasonably probable -- that the jury would have had a reasonable doubt as to

[11] http://www.law.northwestern.edu/depts/clinic/wrongful/Causes/Snitch.htm.

Rivera's guilt if it had known that the semen deposited in the victim's vagina was not Juan Rivera's. The jury did not know this at the time of trial. Due to the state of the evidence (the semen contained on the vaginal swabs was drenched in Holly Staker's blood), the prosecution argued that the DNA evidnce had been compromised, specifically that it was "the savagery of [Rivera's] attack that prevented the scientists from being able to develop any results on the sperm."

TIMELINESS

87. Rivera has exercised due diligence in pursuing his claim of innocence and in bringing this claim to the Court. The technology of STR based DNA testing was not available at the time of his trial. Fortunately, due to the enactment of section 116-3, Rivera was able to request post-conviction DNA testing of the evidence. Rivera received the test results in late March.

88. Accordingly, Rivera is entitled to relief under section 2-1401 from the wrongful judgment of conviction against him.

CONCLUSION

The new DNA evidence in this case changes everything. The unique genetic profile of the man who sexually assaulted Holly Staker has now been determined. This man is not Juan Rivera. Had this evidence been available in 1992, it is doubtful that Rivera would have been charged with the crime, much less brought to trial and convicted. This case is the poster child for how, as DNA technology continues to improve, so does its ability to identify the true perpetrators and exclude those who are wrongfully suspected, charged or convicted.

The new DNA evidence constitutes a powerful rebuttal to Rivera's problematic confession, one that would almost certainly change the outcome of any retrial. The new DNA evidence is infinitely more reliable than the confession evidence presented against Rivera. We know this because of the empirical evidence that has recently emerged showing that innocent people do confess.

It is to be hoped that this new evidence will be championed by law enforcement officials whose principal interest has always been to protect the innocent as they apprehend the guilty. We now have the opportunity to correct a tragic mistake, to begin the search for the real killer and to offer true closure to Holly Staker and the Waukegan community in which she lived. But whether or not this happens, and whether or not the Lake County State's Attorney chooses to retry Juan Rivera despite the DNA exclusion, one thing is clear: the original judgment of conviction against Juan Rivera cannot stand. Juan Rivera therefore requests that this Court grant him relief under section 2-1401 and set aside the judgment of conviction against him.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JUAN A. RIVERA, Plaintiff, v. ROBERT S. MUELLER, Director of the Federal Bureau of Investigation, Defendant.	)	Case No. PH

COMPLAINT FOR INJUNCTIVE RELIEF

Plaintiff Juan A. Rivera submits this complaint in support of his request that the Court enter an injunction or order directing defendant to conduct a keyboard search of a DNA profile as requested in Plaintiff's August 8, 2008 subpoena *duces tecum* served on Robert D. Grant, Special Agent-in-Charge, Federal Bureau of Investigation (FBI), Chicago Division, attached as Exhibit 1.

JURISDICTION AND VENUE

1. This action involves review of final federal agency action under 5 U.S.C. §§ 702 and 704. This Court has jurisdiction to review final agency decisions pursuant to 28 U.S.C. § 1331.

2. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e)(1)(2)(3), because a substantial part of the events giving rise to Plaintiff's claim occurred in this District, and because Plaintiff resides in this District.

3. Plaintiff is a resident of Illinois and resides within the Northern District of Illinois. He is currently in custody at the Lake County Adult Correctional Facility in Waukegan, Illinois, awaiting trial for rape and murder of Holly Staker, which occurred in 1992. The trial

is scheduled to begin February 9, 2009.

4. Defendant Robert S. Mueller is sued in his official capacity as the Director of the FBI. He is the federal official responsible for ensuring the FBI's compliance with 42 U.S.C. §§ 14131 *et seq.,* a statute requiring the promulgation of standards for the collection and storage of DNA profiles, and mandating the creation of the National DNA Index System (NDIS). He is also responsible for promulgating procedures governing FBI keyboard searches of NDIS, and ensuring that those procedures are followed.

5. The DNA profile keyboard search that Plaintiff seeks this Court to order the FBI to conduct may provide evidence crucial to Plaintiff's defense in his forthcoming trial, and information as to the person who raped and killed Holly Staker.

6. The relief requested may be granted under 28 U.S.C. § 2202 and 5 U.S.C. §§ 701-706 (APA).

FACTUAL BACKGROUND

7. On August 17, 1992, eleven-year-old Holly Staker was raped and murdered in Waukegan, Illinois. Plaintiff was convicted by a Lake County jury of these crimes in 1993. The Illinois Appellate Court vacated that conviction and remanded for a new trial in 1996. (*People v. Rivera*, No. 2-94-0075, Nov. 19, 1996, unpublished order.) Plaintiff was tried and convicted at the second trial in 1998. The Illinois Appellate Court affirmed the conviction in 2001. (*People v. Rivera*, No. 2-98-1662, Dec. 5, 2001, unpublished order.)

8. In March, 2005, Dr. Edward Blake, a nationally renowned forensic scientist, of Forensic Science Associates (FSA), was able to isolate a male DNA profile from semen remaining on vaginal swabs used in the examination of Holly Staker's body at the time of the crime. The profile conclusively excluded Plaintiff as the source of the semen, and produced a full genetic profile of the person who deposited semen inside Ms. Staker.

9. The Office of the Lake County State's Attorney has confirmed and accepted Dr. Blake's credentials, and the results of his DNA testing showing that Plaintiff was not the source of the semen.

10. In April and October 2005, the Lake County Assistant State's Attorney in charge of the prosecution of Plaintiff requested the Division of Forensic Services (DFS) of the Illinois State Police (ISP) to search the Illinois State DNA Index database for the DNA profile isolated by Dr. Blake. On April 8 and October 25, 2005, ISP DFS personnel responded that the searches were done, but did not detect a match to the profile isolated by Dr. Blake. *See* Exhibits 2 and 3. The ISP DFS was and is an accredited laboratory within the meaning of the federal DNA Identification Act (42 U.S.C. §14131, et seq).

11. On December 2, 2005, the Assistant State's Attorney sent an email to Dan J. Haase, the Unit Leader of the DNA Databank Unit of the Wisconsin Department of Justice, requesting that a keyboard search be done of the DNA profile obtained by Dr. Blake, to determine whether there was a matching profile in the Wisconsin DNA Databank. On December 6, 2005, Mr. Haase responded that the keyboard search was done, but did not detect a match. *See* Exhibit 4 (irrelevant matter redacted). The Wisconsin forensic laboratory is accredited within the meaning of the federal DNA Identification Act.

12. On June 4, 2008, at the request of Plaintiff's lawyers and the Lake County Assistant State's Attorney, the Presiding Judge entered an order directing the ISP DFS to once against search its databases for any genetic profile matching the sperm profile isolated by Dr. Blake. *See* Exhibit 5. On July 10, 2008, Donald R. Parker, Forensic Scientist I, of the ISP DFS, sent a letter to the Presiding Judge stating that the search had been done, but did not detect a match. *See* Exhibit 6.

13. The prosecution's case against Plaintiff in the first two trials was sparse and tenuous:

(a) The evidence focused in large part on a confession which was obtained from Plaintiff, who at the time was an intellectually impaired teenager with a marginal Intelligence Quotient, who had recently attempted suicide. The interrogations spanned approximately 39 hours, conducted by teams of experienced police interrogators. During the questioning, Plaintiff became sleep deprived; he was falsely told he had failed a polygraph test. Before Plaintiff signed the typewritten confession, he became agitated, began to cry and hit his head against the walls of the interview room. As a result, he was transferred to a padded cell, where he was observed by jail medical personnel, who reported that he appeared to be incoherent, unresponsive, and in a psychotic condition. All of the matters contained in the written confession were known to the police interrogators. The confession contained words and phrases attributed to Plaintiff that were far beyond his limited vocabulary. The confession was obtained from Plaintiff several months after the crime was committed. The police had been unable to connect any other person to the crime, and were subject to pressure to identify the perpetrator.

(b) A thorough search, conducted at the scene of the crime within hours of the murder, revealed no blood stains, skin tissue, hairs, or fingerprints, or any other evidence connecting Plaintiff to the crime.

14. In light of the DNA profile obtained by Dr. Blake, and the questionable evidence of Plaintiff's guilt of the crimes charged, the Presiding Judge, who presided at both prior trials, granted Plaintiff's motion for a new trial on August 29, 2006. The Presiding Judge stated: "The Court is of the opinion based on the presentation and the availability of this new evidence [sperm found in the vaginal area of Ms. Staker] that Mr. Rivera should be entitled to a new trial."

People v. Rivera, No. 92 CF 2751, Report of Proceedings, August 29, 2006.

15. On July 24, 2008, Plaintiff's lawyers and the Lake County Assistant State's Attorney entered into a Stipulated and Agreed Order, which was adopted by the Presiding Judge, attached as Exhibit 7, which states in part:

> "2. Dr. Edward T. Blake of Forensic Science Associates, 3053 Research Dr., Richmond, CA 94806, conducted a PCR-based analysis of STR genes extracted from sperm found in the victim's vagina (the 'Sperm'). Dr. Blake found, as detailed in his report attached as Exhibit A, that the Sperm is not that of the Defendant.
>
> "3. Personnel at the Illinois State Police Research and Development Laboratory have reviewed Dr. Blake's work for quality control purposes and have confirmed that the DNA profile he obtained excludes Defendant as a source for the Sperm. Furthermore, they developed a 'low level' 'corroborating' genetic profile of the Sperm donor based on nearly identical biological material from the crime scene that had remained in the possession of the Illinois State Police Lab. That 'low level' profile also excluded Defendant as a possible source for the Sperm.
>
> "4. The parties dispute whether the exclusionary spermatozoid profile is from a source unrelated to the murder or whether it truly excludes the defendant as the killer. The interests of justice would be advanced if the identity of the person whose genetic profile matches that of the Sperm were known, and a retrial might be avoided. This information, in conjunction with other forensic facts previously established, may isolate the individual responsible for the murder and rape of an eleven year old child. At a minimum, the identity of the Sperm donor may lead to his prosecution for violating certain other sexual assault criminal statutes.
>
> "5. At the request of the State's Attorney for Lake County, the DNA profile that Dr. Blake generated was searched against the Illinois State DNA Index and the Wisconsin State NDA Index; no matches were found. The 'low level' profile that the Illinois State Police obtained cannot be searched against those databases, because that type of profile is only suitable to determine whether a person can be excluded as a possible donor for the genetic material, not whether the person has a genetic profile that matches that of the 'low level' profile.
>
> * * *
>
> "8. Officials of the FBI have informed Defendants' lawyers that they decline to search the profile that Dr. Blake obtained against

> CODIS, because Dr. Blake's laboratory has not submitted itself for accreditation pursuant to 42 U.S.C. § 14132(b)(2), which requires that DNA profiles submitted for storage into CODIS be obtained from laboratories that 'are accredited by a nonprofit professional association of persons actively involved in forensic science that is nationally recognized within the forensic science community. . .and undergo external audits, not less than one every 2 years, that demonstrate compliance with standards established within the forensic science community.
>
> "9. Although the statute establishing CODIS prevents genetic profiles obtained from unaccredited laboratories from being stored in it, the statute does not prevent the FBI from searching genetic profiles obtained from those laboratories against CODIS. 42 U.S.C. § 14132(b).
>
> "10. Both the State's Attorney of Lake County and Defendant's lawyers believe it is in the interests of justice that FBI personnel search the genetic profile described in Exhibit A against CODIS."

At the end of the Stipulated and Agreed Order, the Presiding Judge entered the following order:

"In light of the facts stipulated above, the Court orders the Director of the FBI [Defendant Mueller] and appropriate FBI personnel to search the genetic profile described in Exhibit A against CODIS, and to notify the Court in writing of the result."

16. Pursuant to the Presiding Judge's order, on August 8, 2008, Plaintiff's lawyers caused the subpoena *duces tecum* to be served on Robert D. Grant, Special Agent-in-Charge of the FBI, Chicago Division (Exhibit 1), which requested that the FBI conduct a keyboard search against NDIS of the single DNA profile obtained by Dr. Blake, as directed by the order of July 24, 2007.

17. Plaintiff has not requested that the FBI upload and store this profile into the NDIS. He seeks only a keyboard search of NDIS for comparison purposes. This is a routine process that is not costly or time consuming. The search will compare the DNA profile obtained by Dr. Blake from the sperm of the semen recovered from Ms. Staker's body,

to the large number of DNA profiles already stored in NDIS. Plaintiff and his lawyers believe that if a match is found, it probably will identify the man who raped and murdered Holly Staker, and lead to the apprehension of the criminal, and dismissal of the pending charges against Plaintiff.

18. The request contained in the subpoena (Exhibit 1) was denied in a letter to Plaintiff's lawyers dated August 28, 2008, from the Director of the FBI Laboratory, Washington, D.C. *See* Exhibit 8. Two reasons were advanced for the denial:

> "The FBI is unable to honor your request. [First reason:] Under procedures established by the National DNA Index Systems (NDIS) Board, requests for searches of profiles that are not maintained in the database, also known as keyboard searches, must be submitted through the appropriate Combined DNA Index System (CODIS) State Administrator. [Second reason:] However, even if a request such as yours was forwarded by a CODIS administrator, the FBI would still be unable to honor it. The DNA Identification Act, [42 U.S.C. Section 14131 *et. seq.*,] which established NDIS, requires that the index only include information on DNA analyses that are prepared by laboratories that are accredited and which undergo external audits that demonstrate compliance with the quality assurance standard established by the Director of the Federal Bureau of Investigation. [Citing "Quality Assurance Standards for Forensic DNA Testing Laboratories."] The profile which you are requesting the FBI to search was developed by a laboratory which does not submit to external audits designed to assess compliance with these mandated quality assurance standards." (Bracketed material added.)

19. On September 19, 2008, in a phone conversation between Ms. Amanda Choi, Assistant General Counsel of the FBI Laboratory Division, and an assistant to Plaintiff's attorneys, Ms. Choi denied a request for the "procedures established by the National DNA Index System (NDIS) Board" referred to in the FBI letter (Exhibit 8), on the ground that the procedures are unpublished and not publicly available. *See* affidavit of Steven Art, attached as Exhibit 9.

THE NATIONAL DNA INDEX SYSTEM (NDIS)
AND THE COMBINED DNA INDEX SYSTEM (CODIS)

20. The National DNA Index System (NDIS) is an index of DNA records maintained by the FBI. NDIS indexes DNA records from criminal and missing person investigations. These records come from federal, state, and local criminal justice agencies. They can be searched to identify associations between DNA obtained in criminal or missing person investigations, and DNA records in the system. *See* FBI NDIS, *available at* http://foi.a.fbi.gov/dna552.htm.

21. The Combined DNA Index System (CODIS) is the FBI's software for maintaining and searching DNA databases. CODIS allows indexing of DNA from convicted offenders, crime-scene evidence, persons arrested, missing persons, unidentified human remains, and relatives of missing persons. The NDIS allows forensic laboratories throughout the country, both public and private, to compare DNA specimens to a nationwide database. There are also state DNA Index Systems (SDIS) that allow comparison at the state level. DNA records customarily originate in local DNA index systems, and then are indexed into the state and national indexes. *See* FBI CODIS Brochure, *available at* http://www.fbi.gov/hq/lab/html/codisbrochure_text.htm.

22. Each CODIS laboratory has an Administrator who is responsible for that laboratory's CODIS data. Each state has a State Administrator who coordinates all CODIS Administrators within that state. *See* NDIS Procedures and Administration, DNA.gov, *available at* http://www.dna.gov/uses/database/ndis.

23. In 1994, a federal law was enacted regarding standards for accreditation of DNA laboratories, and establishing a national FBI index of DNA samples. 42 U.S.C. § 14131 *et. seq.* The statute also provides that the FBI may establish an index of DNA identification records, in order to facilitate law enforcement exchange of DNA identification information,

which would include DNA samples collected from various persons and places. 42 U.S.C. § 14132(a). That section - quoted in part in the FBI letter to Plaintiff's lawyers (Exhibit 8) - provides that the index "shall *include* [emphasis added] only information on DNA identification records and DNA analyses" that are: (1) performed by a criminal justice agency in accordance with the guidelines under § 14131; (2) prepared by laboratories that have been accredited by a nonprofit professional association and that undergo external audits to show compliance with standards established by the FBI; or (3) maintained by Federal, State, and local criminal justice agencies pursuant to rules that allow for the disclosure of stored DNA samples and DNA analyses. *Id.* § 14132(b).

THE REQUESTED COMPARISON IS
AUTHORIZED BY THE APPLICABLE STATUTE

24. Section 14131 does not preclude the keyboard DNA search requested by Plaintiff, ordered by the Presiding Judge (Exhibit 7), and specified in the subpoena served on Special Agent Grant (Exhibit 1), because:

(a) The requested search will not ***add*** the DNA profile obtained by Dr. Blake, or ***include*** that profile, in the CODIS system. Rather, it will ***compare*** the DNA profile obtained by Dr. Blake with DNA profiles that are already in the CODIS system. The keyboard search requested by Plaintiff will not affect the content or integrity of the FBI's DNA database.

(b) The DNA keyboard search requested by Plaintiff is based on a DNA sample that was collected by Lake County Law Enforcement, and turned over to the Illinois State Police (ISP), as part of the investigation of Ms. Staker's rape and murder. The sample was sent to Dr. Blake by an ISP forensic laboratory, which is an accredited laboratory.

(c) Dr. Blake and his laboratory are known and respected in the forensic scientific community throughout the United States. Dr. Blake's laboratory is not accredited; Dr. Blake has declined to apply for accreditation based on principle and cost.

(d) The lawyers for the parties have stipulated, and the Presiding Judge has adopted their factual stipulation, regarding the Illinois State Police Research and Development Laboratory's work on the profile obtained by Dr. Blake, as stated in the Stipulated and Agreed Order, Exhibit 7, paragraph 3:

> "3. Personnel at the Illinois State Police Research and Development Laboratory have reviewed Dr. Blake's work for quality control purposes and have confirmed that the DNA profile he obtained excludes Defendant as a source for the Sperm. Furthermore, they developed a 'low level' 'corroborating' genetic profile of the Sperm donor based on nearly identical biological material from the crime scene that had remained in the possession of the Illinois State Police Lab. That 'low level' profile also excluded Defendant as a possible source for the Sperm.

(e) The DNA profile extracted by Dr. Blake has been verified as accurate by the accredited Wisconsin forensic laboratory, as explained in paragraph 11 above.

(f) Accordingly, the requested keyboard search falls within the statutory requirements cited in the FBI's letter (Exhibit 8), and will accomplish a lawful criminal justice purpose within the meaning of the Section 14131.

APPLICABLE PROVISIONS OF THE ADMINISTRATIVE PROCEDURE ACT

25. The APA, 5 U.S.C. §§ 701-706, provides the standard for judicial review of final agency determinations. Under the authority of the APA, the reviewing court "shall ... hold unlawful and set aside agency action, findings, and conclusions" found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), or "contrary to constitutional right, power, privilege, or immunity," § 706(2)(B), or

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"without observance of procedure required by law," *id.* § 706(2)(D), or "unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court," *id.* § 706(2)(F). In addition, a reviewing court must compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1).

26. Plaintiff's constitutional rights to due process of law and equal protection of law will be violated if the keyboard search is not performed.

27. There is no provision in 42 U.S.C. § 14131 *et. seq,* or any other federal statute, that forecloses the keyboard search sought by Plaintiff.

CLAIMS FOR RELIEF

28. The denial of Plaintiff's request for a keyboard search is a final agency action for which there is no other adequate remedy in court and is accordingly subject to judicial review in this Court. 5 U.S.C. § 704.

29. Defendant's refusal to perform a keyboard search of Dr. Blake's DNA profile against NDIS causes irreparable injury to Plaintiff. Defendant's decision has denied Plaintiff the opportunity to gain access to valuable evidence that may exonerate him. That refusal has also denied the prosecutors and investigators a potential opportunity to investigate and capture the perpetrator of the rape and murder of Ms. Staker, thus putting the people of this country at risk that the perpetrator is still at liberty, able to commit further violent criminal acts.

30. The denial of Plaintiff's request for a keyboard search was arbitrary, capricious, an abuse of discretion, and not in accordance with law within the meaning of 5 U.S.C.§ 706(2)(A). Further, the denial was based on regulations that are not publicly available.

31. The refusal of Plaintiff's request was arbitrary capricious, an abuse of discretion, or otherwise not in accordance with law within the meaning of 5 U.S.C. § 706(2)(A), because the FBI's alternative justification offered for denial was that the index could "only

include information on DNA analyses that are prepared by laboratories that are accredited ...." *See* Exhibit 8. Plaintiff's request for a keyboard search does not offer the DNA profile created by Dr. Blake's for inclusion in NDIS. The search will not include the profile in or add it to the FBI's database. To the contrary, the Presiding Judge has ordered, and Plaintiff requests, a search of the DNA profile ***against*** NDIS. Thus the statute cited to justify refusal of Plaintiff's request does not apply to the situation at hand.

32. Defendant's arbitrary denial of Plaintiff's request for a keyboard search in this case is agency action unlawfully withheld under 5 U.S.C. § 706(1). Accordingly, this Court should compel Defendant to run the keyboard search directed by Judge Starck and requested by Plaintiff.

33. The FBI's denial of Plaintiff's request for a keyboard search is arbitrary. There is no competing interest at stake that argues against the compelling need for this comparison. The action sought by Plaintiff is neither burdensome, nor costly. No risk is posed to the integrity of the FBI's data, or to any security interest of this country or state. Law enforcement will not be impaired by the requested keyboard search. To the contrary, conducting the keyboard search in this case may aid law enforcement officials in their duties.

34. The interests of justice will be served by this Court directing the FBI to perform the keyboard search requested in this case.

PRAYERS FOR RELIEF

Wherefore, Plaintiff respectfully requests that the Court enter judgment providing for the following relief:

(1) Order Defendant to promptly perform the keyboard search of the DNA profile obtained by Dr. Blake and provided by Plaintiff in the subpoena (Exhibit 1) against NDIS,

and

(2) Grant Plaintiff such other relief as the Court may deem just and proper.

Respectfully submitted,

JUAN A. RIVERA

By: s/Thomas P. Sullivan
One of Their Attorneys

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Attorneys for Plaintiff

Dated: October 28, 2008

Exhibits to Complaint

1. Subpoena issued to FBI Special Agent Grant, Aug. 8, 2008.
2. Letter from Assistant Laboratory Director of the ISP DFS, Apr. 8, 2005.
3. Letter from Forensic Scientist, ISP CODIS Administrator, Oct. 25, 2005.
4. Email from Assistant State's Attorney, Dec. 2, 2005, and response email from Wisconsin DOJ, Dec. 6, 2005.
5. Agreed Order for Illinois DNA Database Search, June 4, 2008.
6. Letter from Forensic Scientist I, of the ISP DFS to Presiding Judge, July 10, 2008.
7. Stipulated and Agreed Order, July 24, 2007.
8. Letter from Director, FBI Laboratory to Plaintiff's lawyers, Aug. 28, 2008.
9. Affidavit of Stephen Art, Oct. 27, 2008.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

JUAN A. RIVERA, JR.,	)	
	)	
Plaintiff,	)	
	)	Case No. 12 C
v.	)	
	)	
LAKE COUNTY, Illinois, LUCIAN TESSMAN, CHARLES FAGAN, MICHAEL MALEY, DONALD MEADIE, MICHAEL BLAZINCIC, JAMES HELD, FERNANDO SHIPLEY, HOWARD PRATT, RICHARD DAVIS, DAVID OSTERTAG, JAMES GENTILCORE, PHILLIP STEVENSON, ROBERT BOONE, GARY DEL RE, ESTATE OF CLINTON GRINNELL, MARK CURRAN, Lake County Sheriff, in his official capacity, CITY OF WAUKEGAN, CITY OF LAKE FOREST, VILLAGE OF BUFFALO GROVE, LAKE COUNTY MAJOR CRIMES TASK FORCE, UNKNOWN POLICE OFFICERS, UNKNOWN MUNICIPALITIES OF THE LAKE COUNTY MAJOR CRIMES TASK FORCE, JOHN REID & ASSOCIATES, INC., MICHAEL MASOKAS, UNKNOWN EMPLOYEES OF JOHN REID & ASSOCIATES, MICHAEL WALLER, JEFFREY PAVLETIC, MATTHEW CHANCEY, STEVEN McCOLLUM, and MICHAEL MERMEL,	)	
	)	JURY TRIAL DEMANDED
Defendants.	)	

COMPLAINT

NOW COMES Plaintiff, JUAN A. RIVERA, JR., by his attorneys LOEVY & LOEVY and the RODERICK MACARTHUR JUSTICE CENTER, and complaining of Defendants LAKE COUNTY, Illinois, LUCIAN TESSMAN, CHARLES FAGAN, MICHAEL MALEY, DONALD MEADIE, MICHAEL BLAZINCIC, JAMES HELD, FERNANDO SHIPLEY,

HOWARD PRATT, RICHARD DAVIS, DAVID OSTERTAG, JAMES GENTILCORE, PHILIP STEVENSON, ROBERT BOONE, GARY DEL RE, ESTATE OF CLINTON GRINNELL, MARK CURRAN, Lake County Sheriff, in his official capacity, CITY OF WAUKEGAN, CITY OF LAKE FOREST, VILLAGE OF BUFFALO GROVE, the LAKE COUNTY MAJOR CRIMES TASK FORCE, UNKNOWN POLICE OFFICERS, UNKNOWN MUNICIPALITIES OF THE LAKE COUNTY MAJOR CRIMES TASK FORCE, JOHN REID & ASSOCIATES, INC., MICHAEL MASOKAS, UNKNOWN EMPLOYEES OF JOHN REID & ASSOCIATES, MICHAEL WALLER, JEFFREY PAVLETIC, MATTHEW CHANCEY, STEVEN McCOLLUM, and MICHAEL MERMEL states as follows:

INTRODUCTION

1. Plaintiff Juan Rivera was wrongfully convicted of the brutal rape and murder of an 11-year-old girl named Holly Staker. The crime occurred in Waukegan, Illinois, in 1992.

2. Plaintiff did not commit the crime and there was not one piece of physical evidence connecting him to the killing. The evidence that tied Plaintiff to the Staker murder was a false confession concocted and coerced by the Defendants over the course of four days of intensive and abusive interrogation.

3. So abusive was the Defendants' interrogation that Plaintiff suffered a psychological breakdown during the third night of questioning. As he was experiencing this mental collapse, the Defendants "hog tied" Plaintiff and placed him in a padded room. Medical personnel who observed Plaintiff soon thereafter diagnosed him with acute psychosis and observed that he had torn out pieces of his scalp. Nevertheless, the Defendants continued to interrogate Plaintiff, and they claimed that, in the midst of this psychological break and on the fourth day of their interrogation, Plaintiff confessed to killing Holly Staker.

4. Plaintiff's "confession" was demonstrably false. Ample evidence, including an electronic monitoring system that tracked Plaintiff's every move at the time, established that Plaintiff had been at home during the murder and could not have been involved.

5. Nonetheless, based on the force of Plaintiff's coerced confession and the Defendants' false statements that Plaintiff had confessed voluntarily and without being fed details of the crime, Plaintiff was wrongfully convicted. He was sentenced to life in prison without parole, having narrowly avoided the death penalty.

6. Following Plaintiff's conviction, new DNA testing of semen found inside of the victim excluded Plaintiff and showed that a different man had raped and killed Holly Staker. After 20 years of wrongful incarceration, the Illinois Appellate Court reversed Plaintiff's conviction, finding that no rational jury could ever find him guilty, and entered judgment of acquittal in his favor. The State declined to appeal.

7. On January 6, 2012, Plaintiff walked out of prison a free man, having served half of his life behind bars for a crime he did not commit.

8. Plaintiff now seeks justice for the harm that the Defendants have caused and redress for the loss of liberty and the terrible hardship that Plaintiff has endured and continues to suffer as a result of the Defendants' misconduct.

JURISDICTION AND VENUE

9. This action is brought pursuant to 42 U.S.C. § 1983 and Illinois law to redress the Defendants' tortious conduct and their deprivation of Plaintiff's rights secured by the U.S. Constitution.

10. This Court has jurisdiction of Plaintiff's federal claims pursuant to 28 U.S.C. § 1331 and supplemental jurisdiction of his state-law claims pursuant to 28 U.S.C. § 1367.

11. Venue is proper under 28 U.S.C. § 1391(b). Plaintiff resides in this judicial district, the majority of the Defendants reside in this judicial district, and the events and omissions giving rise to Plaintiff's claims occurred within this judicial district.

PARTIES

12. Plaintiff Juan Rivera is a Latino man who spent 20 years in prison for a crime he did not commit.

13. Defendants Lucian Tessman, Donald Meadie, Fernando Shipley, Howard Pratt, and Richard Davis are former officers of the Waukegan Police Department and the Lake County Major Crimes Task Force.

14. Defendants Charles Fagan and Michael Blazincic are former officers of the Lake County Sheriff's Department and the Lake County Major Crimes Task Force.

15. Defendants Michael Maley and James Gentilcore are former officers of the Illinois State Police and the Lake County Major Crimes Task Force.

16. Defendant James Held is the current Chief of Police of the Lake Forest Police Department and a former officer of the Lake Forest Police Department and the Lake County Major Crimes Task Force.

17. Defendant David Ostertag is a former officer of the Waukegan Police Department and the Lake County Major Crimes Task Force and a former investigator for the Lake County State's Attorney's Office.

18. Defendant Phillip Stevenson is the former Police Chief of the Waukegan Police Department and a former member of the Lake County Major Crimes Task Force. Defendant Stevenson was responsible for supervising officers of the Waukegan Police Department and the Lake County Major Crimes Task Force.

19. Defendant Robert Boone is the former Police Chief of the Lake Forest Police Department and a former member of the Lake County Major Crimes Task Force. Defendant Boone was responsible for supervising officers of the Lake Forest Police Department and the Lake County Major Crimes Task Force.

20. Defendant Gary Del Re is a former officer of the Buffalo Grove Police Department, a former commander of the Lake County Major Crimes Task Force, and a former Sheriff of Lake County. Defendant Del Re was responsible for supervising officers of the Buffalo Grove Police Department, the Lake County Sheriff's Department, and the Lake County Major Crimes Task Force.

21. Defendant Estate of Clinton Grinnell (hereinafter "Defendant Grinnell") is joined as the successor in interest to Clinton Grinnell, who is the former Sheriff of Lake County and a former officer of the Lake County Sheriff's Department and the Lake County Major Crimes Task Force. Grinnell was responsible for supervising officers of the Lake County Sheriff's Department and the Lake County Major Crimes Task Force.

22. Defendant Mark Curran is the current Sheriff of Lake County, Illinois. He is sued in his official capacity. As Sheriff, Defendant Curran oversees the Lake County Sheriff's Department, which was the employer of Defendants Fagan, Blazincic, Del Re, Grinnell, and Unknown Police Officers of the Lake County Sheriff's Department. In addition, each of the other Police Officer Defendants acted as an agent of the Lake County Sheriff's Department while conducting investigations with the Lake County Major Crimes Task Force. The Lake County Sheriff is liable for all torts committed by the Police Officer Defendants while employed by the Lake County Sheriff's Department and the Lake County Major Crimes Task Force pursuant to the doctrine of *respondeat superior*. The Lake County Sheriff is additionally responsible for the

policies and practices of the Lake County Sheriff's Department and the Lake County Major Crimes Task Force.

23. Defendant Lake County is a county of the State of Illinois, which oversees the Lake County Sheriff's Department. Lake County is obligated by Illinois statute to pay any judgment entered against Defendant Curran in his official capacity. In addition, each of the other Police Officer Defendants acted as an agent of Lake County while conducting investigations with the Lake County Major Crimes Task Force. Lake County is liable for all torts committed by the Police Officer Defendants while employed by the Lake County Major Crimes Task Force pursuant to the doctrine of *respondeat superior*. Lake County is additionally responsible for the policies and practices of Lake County, the Lake County Sheriff's Department, and the Lake County Major Crimes Task Force.

24. Defendant City of Waukegan is an Illinois municipal corporation that is or was the employer of Defendants Tessman, Meadie, Shipley, Davis, Ostertag, Pratt, Stevenson, and Unknown Police Officers of the Waukegan Police Department. In addition, each of the other Police Officer Defendants acted as an agent of the City of Waukegan while conducting investigations with the Lake County Major Crimes Task Force. The City of Waukegan is liable for all torts committed by the Police Officer Defendants while employed by the City of Waukegan and the Lake County Major Crimes Task Force pursuant to the doctrine of *respondeat superior*. Defendant City of Waukegan is additionally responsible for the policies and practices of the Waukegan Police Department and the Lake County Major Crimes Task Force.

25. Defendant City of Lake Forest is an Illinois municipal corporation that is or was the employer of Defendants Held, Boone, and Unknown Police Officers of the Lake Forest Police Department. In addition, each of the other Police Officer Defendants acted as an agent of

the City of Lake Forest while conducting investigations with the Lake County Major Crimes Task Force. The City of Lake Forest is liable for all torts committed by the Police Officer Defendants while employed by the City of Lake Forest and the Lake County Major Crimes Task Force pursuant to the doctrine of *respondeat superior*. Defendant City of Lake Forest is additionally responsible for the policies and practices of the Lake Forest Police Department and the Lake County Major Crimes Task Force.

26. Defendant Village of Buffalo Grove is an Illinois municipal corporation that is or was the employer of Defendants Gary Del Re and Unknown Police Officers of the Buffalo Grove Police Department. In addition, each of the other Police Officer Defendants acted as an agent of the Village of Buffalo Grove while conducting investigations with the Lake County Major Crimes Task Force. The Village of Buffalo Grove is liable for all torts committed by the Police Officer Defendants while employed by the Village of Buffalo Grove and the Lake County Major Crimes Task Force pursuant to the doctrine of *respondeat superior*. Defendant Village of Buffalo Grove is additionally responsible for the policies and practices of the Buffalo Grove Police Department and the Lake County Major Crimes Task Force.

27. Defendants Unknown Municipalities of the Lake County Major Crimes Task Force formed, constituted, or provided resources or officers to the Lake County Major Crimes Task Force. These Unknown Municipalities of the Lake County Major Crimes Task Force are all Illinois municipal corporations that were or are the employers of police officers who were employees, members, and agents of the Lake County Major Crimes Task Force. In addition, each of the Police Officer Defendants acted as agents of the Unknown Municipalities of the Lake County Major Crimes Task Force while conducting investigations with the Lake County Major Crimes Task Force. The Unknown Municipalities of the Lake County Major Crimes Task Force

are liable for all torts committed by the Police Officer Defendants while employed by the Lake County Major Crimes Task Force pursuant to the doctrine of *respondeat superior*. The Unknown Municipalities of the Lake County Major Crimes Task Force are additionally responsible for the policies and practices of the Lake County Major Crimes Task Force.

28. On information and belief, Defendant Lake County Major Crimes Task Force is an inter-agency law-enforcement organization formed in or around February 1992 by, *inter alia*, the Lake County Sheriff's Office, the Lake County Chiefs of Police Association, the Lake County State's Attorney's Office, Defendants City of Waukegan, City of Lake Forest, Village of Buffalo Grove, and Unknown Municipalities of the Lake County Major Crimes Task Force. At all times relevant to the events described in this Complaint, the Lake County Major Crimes Task Force investigated certain crimes that occurred in Lake County, Illinois. In this capacity, the Lake County Major Crimes Task Force was and is an extension of Lake County, the Lake County Sheriff's Department, the City of Waukegan, the City of Lake Forest, the Village of Buffalo Grove, and the Unknown Municipalities of the Lake County Major Crimes Task Force. The Lake County Major Crimes Task Force is and was governed by officials of these offices, agencies, and municipalities, who acted at all times as policymakers for the Lake County Major Crimes Task Force. In addition, these offices, agencies, and municipalities each provided training, facilities, and equipment to the officers of the Lake County Major Crimes Task Force. The Lake County Major Crimes Task Force is or was the employer of Defendants Tessman, Fagan, Maley, Meadie, Blazincic, Held, Shipley, Pratt, Davis, Ostertag, Gentilcore, Stevenson, Boone, Del Re, and Grinnell. Defendant Lake County Major Crimes Task Force is liable, by Lake County, the Lake County Sheriff's Department, the City of Waukegan, the City of Lake Forest, the Village of Buffalo Grove, and the Unknown Municipalities of the Lake County Major

Crimes Task Force, for all torts committed by the Police Officer Defendants while employed by the Lake County Major Crimes Task Force pursuant to the doctrine of *respondeat superior*. Defendant Lake County Major Crimes Task Force is additionally responsible for the policies and practices of that organization.

29. Defendant Unknown Police Officers of the Lake County Major Crimes Task Force, Unknown Police Officers of the Lake County Sheriff's Department, Unknown Police Officers of the Waukegan Police Department, Unknown Police Officers of the Lake Forest Police Department, Unknown Police Officers of the Buffalo Grove Police Department, Unknown Police Officers of the Illinois State Police, and Unknown Police Officers of Unknown Law Enforcement Agencies participated in the misconduct alleged in this Complaint (collectively "Unknown Police Officers"). At all times relevant to the events described in this Complaint, these Unknown Police Officers were acting under color of law and within the scope of their employment with their respective law enforcement agencies and the Lake County Major Crimes Task Force.

30. Defendant John Reid & Associates, Inc., is a for-profit Illinois corporation with its principal place of business at 250 South Wacker Drive, Chicago, Illinois 60606. At all times relevant to the events described in this Complaint, Defendant John Reid & Associates reached agreements to provide the Lake County Major Crimes Task Force and its constituent law enforcement agencies and officers with training, advice, and consultation in connection with the interrogation of individuals suspected of criminal activity. Defendant John Reid & Associates, in fact, routinely provided that training, advice, and consultation pursuant to those agreements. In addition Defendant John Reid & Associates and its employees and agents conducted, participated in, collaborated with, and encouraged the interrogation of individuals suspected of

criminal activity by the Lake County Major Crimes Task Force, its constituent law enforcement agencies, and its officers. Many interrogations, including that at issue in this Complaint, occurred in whole or in part at the Chicago office of Defendant John Reid & Associates, and employees of Defendant John Reid & Associates, including Defendant Michael Masokas and Unknown Employees of John Reid & Associates, participated in investigations alongside officers of the Lake County Major Crimes Task Force. The Lake County Major Crimes Task Force and its constituent law-enforcement agencies and officers regularly delegated to Defendant John Reid & Associates and its employees the responsibilities of interrogating, testing, and eliciting testimony from persons suspected of criminal activity. Defendant John Reid & Associates is liable for all torts committed by its employees pursuant to the doctrine of *respondeat superior*.

31. Defendant Michael Masokas is the Director of the Services Division of John Reid & Associates. At all times relevant to the events described in this Complaint, Defendant Masokas was an employee of Defendant John Reid & Associates who directed, conducted, and participated in the police interrogation of Plaintiff and the investigation conducted by the Lake County Major Crimes Task Force. As such, Defendant Masokas was acting at all times under color of law and within the scope of his employment with John Reid & Associates.

32. Defendant Unknown Employees of John Reid & Associates participated in the misconduct alleged in this Complaint. At all times relevant to the events described in this Complaint, these Unknown Employees of John Reid & Associates directed, conducted, and participated in the police interrogation of Plaintiff and the investigation conducted by the Lake County Major Crimes Task Force. As such, Defendant Unknown Employees of John Reid & Associates were acting at all times under color of law and within the scope of their employment with John Reid & Associates.

33. Defendants Tessman, Fagan, Maley, Meadie, Blazincic, Held, Shipley, Pratt, Davis, Ostertag, Gentilcore, Stevenson, Boone, Del Re, Grinnell, Masokas, Unknown Police Officers, and Unknown Employees of John Reid & Associates are referred to collectively as the "Police Officer Defendants" throughout this Complaint.

34. Defendant Michael Waller is the State's Attorney of Lake County and a member of the Lake County Major Crimes Task Force.

35. Defendant Jeffrey Pavletic is Chief Deputy State's Attorney for the Lake County State's Attorney's Office and a member of the Lake County Major Crimes Task Force.

36. Defendant Steven McCollum is a former Chief Deputy State's Attorney for the Lake County State's Attorney's Office and a former member of the Lake County Major Crimes Task Force.

37. Defendants Matthew Chancey and Michael Mermel are former Assistant State's Attorneys for the Lake County State's Attorney's Office and former members of the Lake County Major Crimes Task Force.

38. Defendants Waller, Pavletic, Chancey, McCollum, and Mermel are referred to collectively as the "Prosecutor Defendants" throughout this Complaint.

39. With the exception of the defamation of Plaintiff by Defendants Tessman, Maley, and Mermel, described below, each of the individual Defendants acted under color of law and within the scope of his employment. Each of the individual Defendants is sued in his individual capacity unless otherwise noted.

FACTS

The Rape and Murder of Holly Staker

40. Holly Staker and her twin sister Heather Staker were 11 years old in the summer of 1992. They lived with their mother and step-father in Waukegan, Illinois, and they shared a job babysitting the two young children of Dawn Engelbrecht, a friend of their family.

41. On the evening of August 17, 1992, while Holly watched the children in Dawn Engelbrecht's Waukegan apartment, a man broke in and brutally raped and murdered Holly, stabbing her dozens of times with a knife. It was a high-profile crime that drew significant media attention in the Chicago area.

42. Law enforcement officers and other individuals associated with the inter-agency Lake County Major Crimes Task Force investigated the crime. Over the course of several weeks, they gathered hundreds of pieces of physical evidence from the scene, developed and investigated hundreds of leads, and questioned suspects. Despite this initial effort, the investigators could not find the person who had committed the crime.

43. To this day, the crime remains unsolved. By focusing exclusively on the wrong man, the Lake County Major Crimes Task Force and the Defendants have let the real killer remain at large for two decades.

Juan Rivera

44. In the summer of 1992, Plaintiff Juan Rivera was 19 years old. His family had moved to Waukegan from Puerto Rico a couple of years earlier. He lived with his mother, father, and sister.

45. On the night of Holly Staker's murder, Plaintiff was home with his girlfriend. That evening, he talked on the telephone with his mother, who was at the time visiting relatives in Puerto Rico. Plaintiff's telephone records reflect this phone conversation.

46. Other records, too, showed that Plaintiff was at home on the night of the murder. Plaintiff had been arrested in Waukegan earlier in 1992 for a non-violent offense involving theft of property. While he was awaiting his court date on that charge and as a condition of his release on bond, Plaintiff was placed on house arrest and was required to wear an electronic transmitter around his ankle. That electronic monitor tracked Plaintiff's every move, and alarms were set off whenever Plaintiff left his family's home. Records of the electronic monitor from the night of the Staker murder show that Plaintiff was at home the entire night.

The Defendants' Tunnel Vision

47. For over two months following the murder—from mid-August till late October—the Defendants were unable to solve the case. In that time, the killer's trail had gone cold and the Defendants were under tremendous pressure to solve a crime that had terrorized the community. Moreover, Defendant Waller was up for election for the office of State's Attorney of Lake County for the first time on November 3, 1992.

48. Plaintiff's 1992 arrest, referenced above, resulted in a guilty plea. While Plaintiff was detained at the Lake County Jail following that plea, he repeated to fellow detainees a story that his friend had told him about a party on the night of Holly Staker's murder and a partygoer who had acted suspiciously and might have been involved in the crime. Soon thereafter, Plaintiff was transferred to Hill Correctional Center in Galesburg, Illinois.

49. Purportedly acting on a tip from a known jailhouse informant, two of the Police Officer Defendants went to visit Plaintiff at Hill Correctional Center on October 2, 1992. Plaintiff was determined to help the police and to provide them information that Plaintiff thought might help them solve the crime. He told them what he had heard, and he readily provided them with samples of his own blood and hair so that he could be eliminated as a suspect.

50. Three weeks later, under the guise that they needed Plaintiff to testify before a Grand Jury (testimony he was never asked to give), the Defendants had Plaintiff transferred from Hill Correctional Center to the Lake County Jail on a writ of *habeas corpus ad testificandum*. Plaintiff arrived at the Lake County Jail in the early morning hours of October 27, 1992.

The Interrogation of Juan Rivera

51. The Defendants' interrogation of Plaintiff, which took place over the following days, was an extreme and alarming abuse of police power. It was a wholly illegal effort to secure a false confession from Plaintiff in violation of his constitutional rights, by means of physical and psychological coercion.

52. The interrogation began shortly after Plaintiff arrived at the Lake County Jail, and the questioning and accusation of Plaintiff continued on and off over a period of four days, culminating in more than 24 hours of near constant interrogation at the offices of the Lake County Major Crimes Task Force and the interrogation rooms of John Reid & Associates.

53. The Defendants knew at all points during their interrogation that Plaintiff was a mere teenager who suffered from intellectual deficits and that he had a history of pronounced emotional problems that would render him especially vulnerable to their coercive techniques. During their interrogation, the Defendants observed that he had great trouble understanding spoken English and had almost no ability to write or read English. After the interrogation, Plaintiff's I.Q. was scored and placed him within the lower 10 percent of the population. In addition, Plaintiff had a well-documented history of psychological and emotional problems, including previous suicide attempts, and he had received psychiatric care and medications to manage those problems.

54. Plaintiff reported these problems to the Defendants during the interrogation and, as set out below, the Defendants had ample opportunity to observe the severe symptoms and consequences of these psychological problems throughout the course of their interrogation. The Defendants took no steps to limit or to adapt their questioning of Plaintiff in response to these known vulnerabilities. Instead, they did the opposite: they agreed among themselves and acted to exploit Plaintiff's intellectual and emotional weaknesses to secure a confession regardless of whether it was true or false.

55. Compounding these problems, the Defendants intentionally deprived Plaintiff of sleep throughout the interrogation. At the time that questioning of Plaintiff began on the morning of October 27, 1992, Plaintiff had just been transferred to the Lake County Jail from Hill Correctional Center in western Illinois. Over the night of October 26-27, Plaintiff had been driven more than four hours across the state; he had spent the early morning hours after he arrived at the jail being processed and waiting in a booking cell with many other detainees; and he had not slept.

56. Plaintiff was not given any opportunity to sleep as the interrogation progressed over the days that followed. As of the morning of October 29, when the Defendants began their uninterrupted, 24-hour-plus marathon of interrogation, Plaintiff had slept at most four hours since he had been in the Defendants' custody. And because the Defendants interrogated Plaintiff for more than 24 hours straight between the morning of October 29 and the afternoon of October 30, when the interrogation finally came to an end, Plaintiff did not sleep at all during the final night of the interrogation. The sleep deprivation heightened the already impermissibly coercive nature of the interrogation.

57. In addition, in an effort to exhaust and disorient Plaintiff, the interrogation took place in multiple locations at different facilities, and the Defendants employed a substantial team of interrogators. They divided their time between the interrogation rooms of the Lake County Major Crimes Task Force and those of John Reid & Associates in downtown Chicago.

58. At John Reid & Associates, Plaintiff was interrogated for many hours, subjected to multiple polygraph tests, questioned, and was repeatedly accused of committing the rape and murder of Holly Staker. Defendants John Reid & Associates and Masokas participated closely with the Lake County Major Crimes Task Force's investigation of the Staker murder and helped to interrogate a number of individuals, including Plaintiff.

59. At points during the interrogation, Defendant Masokas took the lead in interrogating Plaintiff in order to coerce a false confession. In addition, as part of their plan to coerce Plaintiff into implicating himself in the crime, the Defendants lied to Plaintiff and told him that he had failed multiple polygraph exams that had been performed at John Reid & Associates, even though the test results indicated that Plaintiff had been entirely truthful when he denied being involved in the Staker murder.

60. Whether at the offices of John Reid & Associates or in the interrogation rooms of the Lake County Major Crimes Task Force, the Defendants acted in violation of the Constitution in their effort to implicate Plaintiff in a crime that he had not committed. In addition to their unjustified decision to question Plaintiff over four days (on one occasion without pause for more than 24 hours), to exploit Plaintiff's intellectual and emotional deficiencies, and to deprive Plaintiff of sleep, the Defendants used additional physically and psychologically abusive techniques.

61. The Defendants repeatedly and strenuously accused Plaintiff of the Staker murder over the course of the interrogation, despite Plaintiff's consistent denials of any involvement in the crime. They screamed at Plaintiff for hours at the top of their lungs and often within inches of his face. These strong accusations of guilt were joined with physical violence and threats of violence, which the Defendants used intentionally to intimidate and frighten Plaintiff.

62. The rooms in which the interrogation took place were closed and locked, and the Defendants made clear to Plaintiff that he was not allowed to leave at any point. At times, the Defendants physically barred Plaintiff from standing up or trying to leave the room as he became desperate to avoid their false accusations of guilt.

63. In addition, because the Defendants worked in rotating interrogation teams of two or three, with each team questioning Plaintiff for discrete periods of time, the Defendants were able to continue their interrogation of Plaintiff without pause, even when individual Defendants were too exhausted to continue. The Defendants made it perfectly clear to Plaintiff that the interrogation would never end unless he confessed.

64. The Defendants also failed to give Plaintiff any effective *Miranda* warnings. Further ensuring that Plaintiff's constitutional rights were violated, the Defendants engaged in coercive, deceptive, and diversionary tactics that would have deprived *Miranda* warnings of any force, even if effective warnings had been given. At no point did Plaintiff knowingly or voluntarily waive his right to remain silent or his right to have counsel present at the interrogation.

65. In fact, the opposite is true: Plaintiff repeatedly invoked his right to remain silent and his right to counsel, only to be ignored by the Defendants. Repeatedly, Plaintiff asked the Defendants to stop their questioning and false accusations and to provide him with a lawyer.

Plaintiff persisted in his requests to remain silent and to have a lawyer present during the days-long interrogation, but his requests repeatedly fell on deaf ears.

66. At no point did the Defendants heed Plaintiff's request and stop their physically and psychologically abusive questioning; at no point did the Defendants permit Plaintiff to terminate the questioning; and at no point was Plaintiff ever provided with a lawyer. The Defendants' uninterrupted accusations and questioning continued as if Plaintiff had said nothing at all.

67. In the face of the extreme physical and psychological abuse and coercion described above, Plaintiff steadfastly maintained his innocence. Plaintiff told the Defendants over and over that he was innocent and had no connection to Holly Staker's murder. The Defendants ignored Plaintiff and brushed to the side evidence that corroborated Plaintiff's claims of innocence.

68. After days of interrogation, the Defendants' misconduct finally broke Plaintiff down. In the middle of the night of October 29-30, 1992, approximately 60 hours after his interrogation had begun, Plaintiff suffered a complete psychological collapse. The acute psychosis that Plaintiff suffered was so extreme that he has no recollection of what occurred after his mental breakdown began.

69. Still the Defendants' illegal and unconstitutional interrogation of Plaintiff did not stop. They continued to question him. At some point that night, the Defendants decided to "hog tie" Plaintiff, cuffing his hands together around one of his legs and wrapping the chain that ran between his leg shackles around the center of his handcuffs, so that Plaintiff could not move at all. After that, they put Plaintiff in a padded "rubber room," which is designated for disturbed detainees who present an obvious risk to themselves.

70. Jail personnel observed Plaintiff there in a catatonic state – eyes open but entirely unresponsive; they noticed that he had wounds on his head; and they saw that Plaintiff had ripped pieces of his own scalp from his skull. That night, the medical professionals at the jail diagnosed Plaintiff as suffering from acute psychosis, and they prescribed him anti-psychotic and other medications (which Plaintiff never had the opportunity to take). The Defendants' extreme interrogation had driven Plaintiff out of his mind.

71. On the morning of October 30, 1992, only after all the events described above, the Defendants forced Plaintiff to sign a statement that they had written and that implicated him in Holly Staker's murder. The statement signed on the morning of October 30, 1992, was the first of two fabricated confessions that the Defendants would ultimately force Plaintiff to sign that day. The entire time, Plaintiff was in a psychotic stupor; he has no memory of signing either statement.

Waller's Further Involvement

72. Defendant Waller was at the time of the investigation running for the office of Lake County State's Attorney. On October 30, he was just four days away from that election. Defendant Waller, the other Prosecutor Defendants who worked in his office, and the Police Officer Defendants had failed to find Holly Staker's killer during their months-long investigation. Under pressure from the community they were desperate to tell the public before the November election that they had solved the crime.

73. The Prosecutor Defendants and the Police Officer Defendants had been in constant contact during Plaintiff's interrogation. Together, these Defendants made arrangements to ensure that the interrogation could continue uninterrupted over a period of days. They advised one another on what steps should be taken in the interrogation and what techniques should be

used to force Plaintiff to confess, and they kept one another up to speed on their progress toward implicating Plaintiff in the crime at all times during the interrogation.

74. With respect to Plaintiff's interrogation, the Prosecutor Defendants acted as investigators of the Lake County Major Crimes Task Force, and they repeatedly advised, urged, and ordered the Police Officer Defendants to continue the abusive and coercive interrogation of Plaintiff even though it was plain to all involved that the interrogation was highly improper and that Plaintiff was innocent.

75. On information and belief, the Prosecutor Defendants also participated personally in the interrogation and the drafting of the false statements incriminating Plaintiff, which Plaintiff was later forced to sign.

76. After the Defendants forced Plaintiff to sign their first false statement on the morning of October 30, the Police Officer Defendants and the Prosecutor Defendants held a joint meeting in Defendant Waller's office. Copies of the first statement were distributed to all involved.

77. The Defendants immediately concluded that the statement was so factually inaccurate that it could never be used to connect Plaintiff to the Staker murder. The Defendants discussed every sentence of the statement, pointing out to one another just how dramatically the facts of the statement diverged from and contradicted the evidence they had gathered during their investigation of the Staker murder. In performing this analysis of the fabricated first statement, the Defendants concluded that it could not support any charge of criminal conduct against Plaintiff.

78. Prior to the time that Plaintiff signed either of the false confessions, all of the Defendants knew that there was no evidence connecting Plaintiff to the rape and murder of Holly

Staker. In addition, they knew of the strong evidence that put Plaintiff at home on the night of the crime. Knowing that they lacked probable cause to charge Plaintiff with Holly Staker's rape or murder, the Defendants decided to get another signed statement from Plaintiff, again by any means.

79. The interrogators who had secured the first statement from Plaintiff were by their own admission so exhausted by the prior interrogation sessions that they could not continue any longer. The Defendants decided that a fresh interrogation team would be sent to continue the interrogation and to have Plaintiff sign a more accurate "confession." The Defendants briefed one another on the changes that needed to be made to the statement and they continued their interrogation of Plaintiff.

80. Even as the interrogation continued, the Defendants called a press conference to announce that they had caught Holly Staker's killer. Later in the afternoon of October 30 and shortly before their press conference was set to begin, the Defendants emerged from the interrogation with a second false statement. Again, the Defendants had written the statement and had forced Plaintiff to sign. The Defendants sat down before the local media and proclaimed that Plaintiff had confessed to the crime.

81. At no point did the Defendants have any probable cause whatsoever to suspect that Plaintiff had raped or killed Holly Staker. The manufactured and entirely false statements, which the Defendants wrote and forced Plaintiff to sign only after days of physical and psychological abuse and uninterrupted interrogation, are the only "evidence" that connected Plaintiff to the Staker murder, and they were insufficient to establish probable cause.

82. Without these false and coerced confessions there was nothing to support a criminal proceeding against Plaintiff. In the absence of the misconduct described above, Plaintiff would not have stood trial and never would have been convicted of the murder of Holly Staker.

Evidence of Plaintiff's Innocence Ignored

83. In the midst of the misconduct described in this Complaint, the Defendants willfully ignored and acted to undermine a tremendous volume of evidence that showed conclusively that Plaintiff had nothing to do with Holly Staker's horrible death.

84. Defendants disregarded the fact that investigators had collected hundreds of pieces of physical evidence from the scene of crime and not a single piece connected Plaintiff to the killing. In fact, the only conclusion that can possibly be drawn from the physical evidence discovered at the scene of Holly Staker's death is that Plaintiff could not have had anything to do with the crime.

85. In addition, Plaintiff had a verifiable alibi. He had two independent electronic records that placed him at home the entire evening of the crime. First, Plaintiff had been speaking on the phone to his mother in Puerto Rico at the time of Holly Staker's murder, and he had the phone records to prove it. Second, Plaintiff was on house arrest. The electronic monitor around his ankle, which he could not and did not remove, recorded his whereabouts on the night of the crime, and pre-trial services records showed that he had not left his home on the night Holly Staker was killed. Plaintiff's family and girlfriend corroborated these electronic records.

86. Chief among the physical evidence pointing away from Plaintiff was DNA recovered from semen found inside of Holly Staker's vagina after she was murdered. Following the coerced confession of Plaintiff, testing of that genetic evidence demonstrated with absolute and unquestionable scientific certainty that Plaintiff was not the source of the semen. The DNA

evidence shows that another man raped and killed Holly Staker. Notwithstanding the new DNA evidence, the Police Officer Defendants took further steps to implicate Plaintiff in the crime because, by the time the DNA evidence was developed, they had already elicited Plaintiff's false confession and were determined to conceal their wrongdoing.

Further Steps to Frame Juan Rivera

87. Independent of the serious misconduct that led Plaintiff to falsely implicate himself in the rape and murder of Holly Staker, the Police Officer Defendants repeatedly and deliberately withheld evidence that further demonstrated Plaintiff's innocence. In addition, the Police Officer Defendants manufactured false evidence in an effort to frame Plaintiff for rape and murder, while concealing the fact that their manufactured evidence was false. And the Police Officer Defendants improperly coerced, encouraged, and manipulated witnesses to falsely implicate Plaintiff in the crime, without disclosing anything about their actions to procure this false testimony.

88. The Police Officer Defendants took one or more photographs of Plaintiff over the course of their interrogation, which depicted Plaintiff's poor condition and showed the physical and emotional state caused by the Defendants' misconduct in the course of their abusive and coercive questioning of Plaintiff. The Police Officer Defendants acknowledged that they took these photographs, but they concealed or destroyed them to cover up their investigative malfeasance.

89. Portions of the Defendants' interrogation of Plaintiff, including those portions conducted in the interrogation rooms of Defendant John Reid & Associates, were recorded on video or audio recording devices. These contemporaneous recordings of the interrogation of Plaintiff are critical, objective evidence that corroborated the Defendants' misconduct in the

course of their interrogation, Plaintiff's steadfast denials of any involvement in the death of Holly Staker, and his repeated invocation of his right to remain silent and his right to counsel. These recordings, too, have been concealed or destroyed. Though Plaintiff knew what had occurred in the portion of the interrogation before he suffered acute psychosis, he could not definitively prove what had happened during the interrogation without these recordings.

90. The Police Officer Defendants also hid important physical evidence central to the crime at issue, including but not limited to the murder weapon and fingerprint and footprint evidence suggesting that someone other than Plaintiff committed the crime.

91. In the aftermath of the crime, the Police Officer Defendants conducted interviews and investigations of suspects, some of whom admitted or suggested their direct involvement in the crime. Reports of those investigations and statements that those suspects made to the Police Officer Defendants were suppressed or destroyed. Similarly, the Police Officer Defendants withheld numerous tips, leads, and information given to them by individuals with direct knowledge of the crime, which pointed away from Plaintiff and showed that he had not committed the Staker murder.

92. The Police Officer Defendants recruited individuals, including known jailhouse snitches, and elicited false testimony from these individuals implicating Plaintiff in the Staker murder. Some of these individuals gave false statements and testified that Plaintiff had suggested and even confessed to them that he had been involved in the crime, when, in fact, no such conversations ever took place. Others provided false statements and evidence that the Police Officer Defendants used to undermine the clear evidence of Plaintiff's innocence, such as the fact that Plaintiff was on electronic monitoring and at home on the night of the Staker murder.

93. The Police Officer Defendants recruited these individuals and jailhouse snitches and caused them to provide false evidence implicating Plaintiff in the crime, all the while knowing that these statements were entirely false.

94. To procure this false testimony, the Police Officer Defendants made improper, undisclosed promises and offered impermissible incentives to these individuals, and they coerced others to tell lies. The entire time, the Police Officer Defendants concealed information about the improper promises that they had made and their course of misconduct in securing false statements from these individuals and jailhouse snitches.

95. The Police Officer Defendants also pressured and manipulated witnesses, including people victimized by the crime, to identify Plaintiff as someone they had seen at the crime scene. The Police Officer Defendants accomplished this task by using suggestive photo identification techniques and by conducting unreliable in-person "line ups." They forced witnesses to agree to identify Plaintiff even though those witnesses had already told the Police Officer Defendants that they could not identify Plaintiff as someone connected to the crime, and they made improper promises to witnesses in exchange for their identification of Plaintiff. The Police Officer Defendants concealed the improper conduct by which they secured these false identifications.

96. If Plaintiff had been given access to this information about witnesses, it would have been powerful evidence of his innocence and critical evidence by which he could have impeached both the individuals who testified falsely against him and also the Police Officer Defendants who testified that the evidence they had gathered in their investigation pointed toward Plaintiff.

97. After Plaintiff was forced to implicate himself in Holly Staker's rape and murder, the Police Officer Defendants produced a series of false and fraudulent police reports and related memoranda, which they inserted into their case file. These documents, which were evidence used to show Plaintiff's purported connection to the crime, contained statements and described events that were fabricated and that the Police Officer Defendants knew to be false. The Police Officer Defendants signed these reports, both as investigators and as supervisors, despite their knowledge that the information contained in those reports was entirely false.

98. The Police Officer Defendants concealed the misconduct described above from Plaintiff, his criminal defense attorneys, and the prosecutors involved in his criminal case, including the Prosecutor Defendants. Indeed, the Police Officer Defendants continue to this day to conceal evidence in their possession demonstrating Plaintiff's innocence; and they continue to hide their own fabrication of evidence and their improper manipulation of witnesses.

99. Supervisors of the Police Officer Defendants knew full well of the Police Officer Defendants' misconduct and their fabrication of a case against Plaintiff. These supervisors nevertheless intentionally ignored the Police Officer Defendants' misconduct, and decided to make Plaintiff responsible for a crime he did not commit, rather than directing the officers to go out and find the person who had raped and killed Holly Staker.

100. The Police Officer Defendants' misconduct deprived Plaintiff of evidence that would have established further that he had no connection to Holly Staker's rape and murder and that would have pointed toward the person who had actually committed the crime.

Plaintiff's Wrongful Conviction and Imprisonment

101. As a result of the Defendants' misconduct, Plaintiff was tried in November 1993 on charges of rape and murder in the Circuit Court of Lake County. A jury convicted Plaintiff of first-degree murder. The jury could not agree unanimously on the death penalty, and so the trial judge sentenced Plaintiff to life in prison without the possibility of parole. Plaintiff might otherwise have been put to death.

102. Without the Defendants' false and fabricated confessions, secured by the extreme misconduct described herein, Plaintiff would never have been convicted.

103. Plaintiff turned 20 years old on the day he learned that he was being charged with raping and murdering a young child. He would spend most of the next 20 years of his life imprisoned in maximum-security facilities within the Illinois Department of Corrections.

104. Plaintiff's whole life was turned upside down without any warning. His young adulthood – a full half of his life as of the date of this Complaint – has been consumed by the horror of his wrongful imprisonment.

105. Plaintiff was taken away from his mother and father, from his siblings and other relatives, and from his friends. Because of the Defendants' misconduct, Plaintiff has missed out on the lives of his family and friends. He has returned home to aging parents and to relationships changed or lost by years away.

106. Plaintiff was stripped of his young adulthood; he was deprived of opportunities to gain an education, to engage in meaningful labor, to develop a career, and to pursue his interests and passions; he was forced to delay starting a family of his own. Plaintiff has been deprived of all of the basic pleasures of human experience, which all free people enjoy as a matter of right, including the freedom to live one's life as an autonomous human being.

107. During his 20 years of wrongful imprisonment, Plaintiff was detained in harsh and dangerous conditions in maximum security prisons.

108. Plaintiff had been convicted of violently raping and murdering a young girl, and the prison culture in which Plaintiff was detained infamously exacts its own retribution for this sort of crime. Plaintiff was stabbed twice in prison because of the crime he had been falsely accused of committing. On three other occasions, inmates attempted to rape Plaintiff.

109. Because Plaintiff had been sentenced to life in prison without parole, he feared that he would die alone inside the prison walls.

110. In addition to the severe trauma of wrongful imprisonment and Plaintiff's loss of liberty, the Defendants' misconduct continues to cause Plaintiff extreme physical and psychological pain and suffering, humiliation, constant fear, anxiety, deep depression, despair, rage, and other physical and psychological effects.

Plaintiff's Exoneration

111. On December 9, 2011, the Illinois Appellate Court held in a unanimous opinion that Plaintiff's conviction could not stand. The court held that a rational jury could never have convicted Plaintiff, and it reversed his conviction and entered judgment of acquittal in his favor.

112. Defendant Waller declined to appeal this decision and, on January 6, 2012, after nearly 20 years in prison, Plaintiff walked out of prison a free man for the first time since his teenage years.

COUNT I

42 U.S.C. § 1983 – Coerced and False Confession (Fifth Amendment)

113. Plaintiff incorporates each paragraph of this Complaint as if fully restated here.

114. In the manner described more fully above, the Police Officer Defendants and the Prosecutor Defendants, acting as investigators, individually, jointly, and in conspiracy with one another, as well as under color of law and within the scope of their employment, forced Plaintiff to incriminate himself falsely and against his will, in violation of his rights secured by the Fifth and Fourteenth Amendments.

115. As described more fully above, the Police Officer Defendants and the Prosecutor Defendants participated in, encouraged, advised, and ordered an unconstitutional, multi-day interrogation of Plaintiff, which caused Plaintiff to make involuntary statements implicating himself in the rape and murder of Holly Staker.

116. The false statements written by the Defendants and attributed to Plaintiff were used against Plaintiff to his detriment in a criminal case. These statements were the only reason that Plaintiff was prosecuted and convicted of the Staker murder.

117. The misconduct described in this Count was objectively unreasonable and was undertaken intentionally, with malice, with reckless indifference to the rights of others, and in total disregard of the truth and Plaintiff's clear innocence.

118. As a result of Defendants' misconduct described in this Count, Plaintiff suffered loss of liberty, great mental anguish, humiliation, degradation, physical and emotional pain and suffering, and other grievous and continuing injuries and damages as set forth above.

119. Plaintiff's injuries were caused by the policies, practices, and customs of Defendants Lake County Major Crimes Task Force, Lake County, the Lake County Sheriff's

Department, the City of Waukegan, the City of Lake Forest, the Village of Buffalo Grove, and the Unknown Municipalities of the Lake County Major Crimes Task Force.

120. At all times relevant to the events described in this Complaint and for a period of time prior thereto, the agencies and municipalities referenced in the preceding paragraph promulgated rules, regulations, policies, and procedures for the conduct of interrogation, testing, and questioning of criminal suspects by officers and agents of the Lake County Major Crimes Task Force and its constituent agencies and municipalities. In addition, the agencies and municipalities referenced in the preceding paragraph promulgated rules, regulations, policies, and procedures for the training and supervision of officers and agents of the Lake County Major Crimes Task Force and its constituent agencies and municipalities, with respect to the conduct of interrogations and the techniques to be used when questioning criminal suspects. Moreover, the agencies and municipalities referenced in the preceding paragraph provided training and training materials to members of the Lake Country Major Crimes Task Force on the subject of criminal interrogations. The Lake County Major Crimes Task Force, and its constituent agencies and municipalities, adopted these rules, regulations, policies and procedures, such that they became the policies and procedures of the Lake County Major Crimes Task Force and its constituent agencies and municipalities.

121. These rules, regulations, policies, and procedures were implemented by officers and agents of the Lake County Major Crimes Task Force and its constituent agencies and municipalities, including the Defendants, who were responsible for conducting interrogations of individuals suspected of criminal wrongdoing by the Lake County Major Crimes Task Force.

122. In addition, at all times relevant to the events described in this Complaint and for a period of time prior thereto, Defendants Lake County Major Crimes Task Force, Lake County,

the Lake County Sheriff's Department, the City of Waukegan, the City of Lake Forest, the Village of Buffalo Grove, and the Unknown Municipalities of the Lake County Major Crimes Task Force had notice of a widespread practice by officers and agents of the Lake County Major Crimes Task Force and its constituent agencies and municipalities under which individuals suspected of criminal activity, such as Plaintiff, were routinely coerced against their will to implicate themselves in crimes that they had not committed. It was common that suspects interrogated in connection with investigations within the jurisdiction of the Lake County Major Crimes Task Force falsely confessed, under extreme duress and after suffering abuse, to committing crimes to which they had no connection and for which there was scant evidence to suggest that they were involved.

123. Specifically, at all relevant times and for a period of time prior thereto, there existed a widespread practice among officers, employees, and agents of the Lake County Major Crimes Task Force and its constituent agencies and municipalities under which criminal suspects were coerced to involuntarily implicate themselves by various means, including but not limited to the following: (1) individuals, including minors and individuals with mental disabilities and psychiatric conditions, were subjected to unreasonably long and uninterrupted interrogations, often lasting for many hours and even days; (2) individuals were subjected to actual and threatened physical and psychological violence; (3) individuals were interrogated at length without proper protection of their constitutional right to have an attorney present or to remain silent; (4) individuals were forced to sign false statements fabricated by the police; (5) officers and employees were permitted to lead or participate in interrogations without proper training and without knowledge of the safeguards necessary to ensure that individuals were not subjected to abusive conditions and did not confess involuntarily or falsely; and (6) supervisors with

knowledge of permissible and impermissible interrogation techniques did not properly supervise or discipline police officers and employees such that the coercive interrogations continued unchecked.

124. These widespread practices were allowed to flourish because the leaders, supervisors, and policymakers of Defendants Lake County Major Crimes Task Force, Lake County, the Lake County Sheriff's Department, the City of Waukegan, the City of Lake Forest, the Village of Buffalo Grove, and the Unknown Municipalities of the Lake County Major Crimes Task Force directly encouraged and were thereby the moving force behind the very type of misconduct at issue by failing to adequately train, supervise, and control their officers, agents, and employees on proper interrogation techniques and by failing to adequately punish and discipline prior instances of similar misconduct, thus directly encouraging future abuses such as those affecting Plaintiff.

125. The above widespread practices, so well settled as to constitute *de facto* policy of the Lake County Major Crimes Task Force and its constituent agencies and municipalities, were able to exist and thrive because policymakers with authority over the same exhibited deliberate indifference to the problem, thereby effectively ratifying it.

126. In addition, the misconduct described in this Count was undertaken pursuant to the policy and practice of Defendants Lake County Major Crimes Task Force, Lake County, the Lake County Sheriff's Department, the City of Waukegan, the City of Lake Forest, the Village of Buffalo Grove, and the Unknown Municipalities of the Lake County Major Crimes Task Force in that the constitutional violations committed against Plaintiff were committed with the knowledge or approval of persons with final policymaking authority for the Lake County Major

Crimes Task Force and its constituent agencies and municipalities or were actually committed by persons with such final policymaking authority.

127. The policies, practices, and customs set forth above have resulted in numerous well-publicized false confessions, including the false confession at issue in this Complaint, in which individuals were convicted of crimes that they did not commit after being subjected to abusive interrogation techniques.

128. Plaintiff's injuries were caused by officers, agents, and employees of the Lake County Major Crimes Task Force and its constituent agencies and municipalities, including but not limited to the individually named Defendants, who acted pursuant to the policies, practices, and customs set forth above in engaging in the misconduct described in this Count.

COUNT II

42 U.S.C. § 1983 – Coerced and False Confession (Fourteenth Amendment)

129. Plaintiff incorporates each paragraph of this Complaint as if fully restated here.

130. In the manner described more fully above, the Police Officer Defendants and the Prosecutor Defendants, acting as investigators, individually, jointly, and in conspiracy with one another, as well as under color of law and within the scope of their employment, forced Plaintiff to incriminate himself falsely and against his will, in violation of his right to due process secured by the Fourteenth Amendment.

131. As described in detail above, the misconduct described in this Count was done using extreme techniques of physical and psychological coercion and torture. This misconduct was so severe as to shock the conscience, it was designed to injure Plaintiff, and it was not supported by any conceivable governmental interest.

132. The misconduct described in this Count was objectively unreasonable and was undertaken intentionally, with malice, with reckless indifference to the rights of others, and in total disregard of the truth and Plaintiff's clear innocence.

133. As a result of Defendants' misconduct described in this Count, Plaintiff suffered loss of liberty, great mental anguish, humiliation, degradation, physical and emotional pain and suffering, and other grievous and continuing injuries and damages as set forth above.

134. Plaintiff's injuries were caused by the policies, practices, and customs of Defendants Lake County Major Crimes Task Force, Lake County, the Lake County Sheriff's Department, the City of Waukegan, the City of Lake Forest, the Village of Buffalo Grove, and the Unknown Municipalities of the Lake County Major Crimes Task Force, as set out in Count I, above, which were implemented by officers, agents, and employees of these entities, including but not limited to the individually named Defendants, who acted pursuant to these policies, practices, and customs set forth above in engaging in the misconduct described in this Count.

COUNT III
42 U.S.C. § 1983 –Federal Malicious Prosecution[1]

135. Plaintiff incorporates each paragraph of this Complaint as if fully restated here.

136. In the manner described above, the Police Officer Defendants and the Prosecutor Defendants, acting as investigators, individually, jointly, and in conspiracy with one another, as well as under color of law and within the scope of their employment, accused Plaintiff of criminal activity and exerted influence to initiate, continue, and perpetuate judicial proceedings against Plaintiff without any probable cause for doing so and in spite of the fact that they knew

[1] Plaintiff recognizes that this Circuit currently holds that malicious prosecution is not actionable under 42 U.S.C. § 1983. Other Courts of Appeals have taken the opposite position. Plaintiff pleads the claim here under the Fourth and Fourteenth Amendments to preserve the issue for reconsideration in the U.S. Court of Appeals for the Seventh Circuit or review in the Supreme Court of the United States.

Plaintiff was innocent, in violation of his rights secured by the Fourth and Fourteenth Amendments.

137. In so doing, these Defendants caused Plaintiff to be subjected improperly to judicial proceedings for which there was no probable cause. These judicial proceedings were instituted and continued maliciously, resulting in injury.

138. The misconduct described in this Count was objectively unreasonable and was undertaken intentionally, with malice, with reckless indifference to the rights of others, and in total disregard of the truth and Plaintiff's clear innocence.

139. As a result of Defendants' misconduct described in this Count, Plaintiff suffered loss of liberty, great mental anguish, humiliation, degradation, physical and emotional pain and suffering, and other grievous and continuing injuries and damages as set forth above.

COUNT IV
42 U.S.C. § 1983 – Due Process

140. Plaintiff incorporates each paragraph of this Complaint as if fully restated here.

141. As described in detail above, the Police Officer Defendants, while acting individually, jointly, and in conspiracy with one another, as well as under color of law and within the scope of their employment, deprived Plaintiff of his constitutional right to a fair trial.

142. In the manner described more fully above, the Police Officer Defendants deliberately withheld exculpatory evidence from Plaintiff and from the Prosecutor Defendants, among others, thereby misleading and misdirecting the criminal prosecution of Plaintiff.

143. In addition, the Police Officer Defendants fabricated and solicited false evidence, including testimony that they knew to be false and perjured and fabricated police reports, implicating Plaintiff in the crime, obtained Plaintiff's conviction using that false evidence, and

failed to correct fabricated evidence that they knew to be false when it was used against Plaintiff at his criminal trial.

144. In addition, the Police Officer Defendants concealed and fabricated additional evidence that is not yet known to Plaintiff.

145. The Police Officer Defendants' misconduct directly resulted in the unjust criminal conviction of Plaintiff, thereby denying his constitutional right to a fair trial guaranteed by the Fifth and Fourteenth Amendments. Absent this misconduct, the prosecution of Plaintiff could not have and would not have been pursued.

146. The misconduct described in this Count was objectively unreasonable and was undertaken intentionally, with malice, with reckless indifference to the rights of others, and in total disregard of the truth and Plaintiff's clear innocence.

147. As a result of Defendants' misconduct described in this Count, Plaintiff suffered loss of liberty, great mental anguish, humiliation, degradation, physical and emotional pain and suffering, and other grievous and continuing injuries and damages as set forth above.

148. Plaintiff's injuries were caused by the policies, practices, and customs of Defendants Lake County Major Crimes Task Force, Lake County, the Lake County Sheriff's Department, the City of Waukegan, the City of Lake Forest, the Village of Buffalo Grove, and the Unknown Municipalities of the Lake County Major Crimes Task Force, in that employees and agents of the Lake County Major Crimes Task Force and its constituent agencies and municipalities regularly failed to disclose exculpatory evidence to criminal defendants, fabricated false evidence implicating criminal defendants in criminal conduct, elicited false and coerced witness testimony, pursued wrongful convictions through profoundly flawed investigations, and otherwise violated due process in a similar manner to that alleged herein.

149. The above-described widespread practices, which were so well-settled as to constitute the *de facto* policy of the Lake County Major Crimes Task Force and its constituent agencies and municipalities, were allowed to exist because municipal policymakers with authority over the same exhibited deliberate indifference to the problem, thereby effectively ratifying it. Furthermore, the widespread practices described in the preceding paragraphs were allowed to flourish because the Lake County Major Crimes Task Force and its constituent agencies and municipalities declined to implement sufficient training or any legitimate mechanism for oversight or punishment of officers and agents who withheld material evidence, fabricated false evidence and witness testimony, and pursued wrongful convictions.

150. The misconduct described in this Count was undertaken pursuant to the policy and practices of the Lake County Major Crimes Task Force and its constituent agencies and municipalities in that the constitutional violations committed against Plaintiff were committed with the knowledge or approval of persons with final policymaking authority for the Lake County Major Crimes Task Force and its constituent agencies and municipalities, or were actually committed by persons with such final policymaking authority.

151. The policies, practices, and customs set forth above were the moving force behind the numerous constitutional violations in this case and directly and proximately caused Plaintiff to suffer the grievous and permanent injuries and damages set forth above.

COUNT V

42 U.S.C. § 1983 – Conspiracy to Deprive Constitutional Rights

152. Plaintiff incorporates each paragraph of this Complaint as if fully restated here.

153. After the murder of Holly Staker, the Police Officer Defendants, acting in concert with other co-conspirators, known and unknown, reached an agreement among themselves to

frame Plaintiff for a crime he did not commit and thereby to deprive him of his constitutional rights, all as described in the various paragraphs of this Complaint.

154. In so doing, these co-conspirators conspired to accomplish an unlawful purpose by an unlawful means. In addition, these co-conspirators agreed among themselves to protect one another from liability for depriving Plaintiff of these rights.

155. In furtherance of their conspiracy, each of these co-conspirators committed overt acts and were otherwise willful participants in joint activity.

156. The misconduct described in this Count was objectively unreasonable and was undertaken intentionally, with malice, with reckless indifference to the rights of others, and in total disregard of the truth and Plaintiff's clear innocence.

157. As a result of Defendants' misconduct described in this Count, Plaintiff suffered loss of liberty, great mental anguish, humiliation, degradation, physical and emotional pain and suffering, and other grievous and continuing injuries and damages as set forth above.

COUNT VI
42 U.S.C. § 1983 – Failure to Intervene

158. Plaintiff incorporates each paragraph of this Complaint as if fully restated here.

159. In the manner described above, during the constitutional violations described herein, one or more of the individual Defendants stood by without intervening to prevent the violation of Plaintiff's constitutional rights, even though they had the opportunity to do so.

160. As a result of the Defendants' failure to intervene to prevent the violation of Plaintiff's constitutional rights, Plaintiff suffered pain and injury, as well as emotional distress. These Defendants had ample, reasonable opportunities to prevent this harm but failed to do so.

161. The misconduct described in this Count was objectively unreasonable and was undertaken intentionally, with malice, reckless indifference to the rights of others, and in total disregard of the truth and Plaintiff's clear innocence.

162. As a result of Defendants' misconduct described in this Count, Plaintiff suffered loss of liberty, great mental anguish, humiliation, degradation, physical and emotional pain and suffering, and other grievous and continuing injuries and damages as set forth above.

COUNT VII

State Law Claim – Malicious Prosecution

163. Plaintiff incorporates each paragraph of this Complaint as if fully restated here.

164. In the manner described above, the Police Officer Defendants and the Prosecutor Defendants, acting as investigators, individually, jointly, or in conspiracy with one another, as well as within the scope of their employment, accused Plaintiff of criminal activity and exerted influence to initiate and to continue and perpetuate judicial proceedings against Plaintiff without any probable cause for doing so and in spite of the fact that they knew Plaintiff was innocent.

165. In so doing, these Defendants caused Plaintiff to be subjected improperly to judicial proceedings for which there was no probable cause. These judicial proceedings were instituted and continued maliciously, resulting in injury.

166. The misconduct described in this Count was objectively unreasonable and was undertaken intentionally, with malice, with reckless indifference to the rights of others, and in total disregard of the truth and Plaintiff's clear innocence.

167. As a result of the Defendants' misconduct described in this Count, Plaintiff suffered loss of liberty, great mental anguish, humiliation, degradation, physical and emotional pain and suffering, and other grievous and continuing injuries and damages as set forth above.

COUNT VIII

State Law Claim – Intentional Infliction of Emotional Distress

168. Plaintiff incorporates each paragraph of this Complaint as if fully restated here.

169. The actions, omissions, and conduct of the Police Officer Defendants and the Prosecutor Defendants as set forth above were extreme and outrageous. These actions were rooted in an abuse of power and authority and were undertaken with the intent to cause, or were in reckless disregard of the probability that their conduct would cause, severe emotional distress to Plaintiff, as is more fully alleged above.

170. As a direct and proximate result of the Defendant Officers' actions, Plaintiff suffered and continues to suffer emotional distress and other grievous and continuing injuries and damages as set forth above.

COUNT IX

State Law Claim – Civil Conspiracy

171. Plaintiff incorporates each paragraph of this Complaint as if fully restated here.

172. As described more fully in the preceding paragraphs, the Police Officer Defendants, acting in concert with other co-conspirators, known and unknown, reached an agreement among themselves to frame Plaintiff for a crime he did not commit and conspired by concerted action to accomplish an unlawful purpose by an unlawful means. In addition, these co-conspirators agreed among themselves to protect one another from liability for depriving Plaintiff of these rights.

173. In furtherance of their conspiracy, each of these co-conspirators committed overt acts and were otherwise willful participants in joint activity.

174. The misconduct described in this Count was objectively unreasonable and was undertaken intentionally, with malice, with reckless indifference to the rights of others, and in total disregard of the truth and Plaintiff's clear innocence.

175. As a result of the Defendants' misconduct described in this Count, Plaintiff suffered loss of liberty, great mental anguish, humiliation, degradation, physical and emotional pain and suffering, and other grievous and continuing injuries and damages as set forth above.

COUNT X
State Law Claim – Defamation

176. Plaintiff incorporates each paragraph of this Complaint as if fully restated here.

177. Defendants Mermel, Tessman, and Maley each waged campaigns against Plaintiff, in which they advanced and caused to be published intentionally false and misleading statements and lies about or concerning Plaintiff that they knew to be false, including repeatedly accusing Plaintiff falsely of rape and murder, and in so doing committed defamation *per se*.

178. Defendant Mermel issued a great number of defamatory statements concerning Plaintiff. Some of these statements were published in November 2011 in the *New York Times*, where Defendant Mermel is quoted as saying that 11-year-old Holly Staker and her twin sister, Heather, had been sexually active before Holly was killed, and that Holly had sex with someone else on the day of her murder, after which Plaintiff came along and raped (but didn't ejaculate) and murdered Staker.

179. These defamatory statements of or concerning Plaintiff were Defendant Mermel's nonsensical explanation of how Plaintiff raped and killed Holly Staker even though semen and DNA found inside of the victim after her murder conclusively excluded Plaintiff.

180. In a separate statement of or concerning Plaintiff, in which Mermel attempted to impugn the exculpatory DNA evidence that proved that Plaintiff had not been involved in the

crime, Defendant Mermel stated: "We don't fold our tents and run . . . we don't quaver because somebody holds up three letters: DNA."

181. Defendant Mermel supported his offensive and defamatory statements that Plaintiff was a rapist and murderer and that his victim had been sexually promiscuous at age 11 by analogizing the DNA found inside of Holly Staker to genetic materials that one might find on a hotel room television remote control. "The example I like to give people," said Defendant Mermel, "is next time you go to a motel room, bring a plastic bag, because the dirtiest thing in the room is the remote control. Everybody has sex and then rolls over and goes, 'I wonder what's on?' . . . . O.K., so you can find DNA in the form of sperm from 10 different people in that room from that remote control or even on a person who has touched it. And that woman gets murdered in that room tonight and you are going to have a lot of DNA. Is it all going to be forensically significant?" In this statement of or concerning Plaintiff, Mermel was telling the world that the DNA found inside of Holly Staker was insignificant because Plaintiff was the person who actually had violently raped and killed Holly Staker.

182. Defendant Mermel's defamatory statements about Plaintiff were made after his involvement in the criminal case against Plaintiff had ended. In addition, his statements were not made in connection with his employment with the Lake County State's Attorney Office. In fact, Defendant Mermel's comments rightfully brought his career as a prosecutor in that office to a close.

183. Shortly after his comments were made, Defendant Curran, the Lake County Sheriff and chief law-enforcement officer in Lake County, called for Defendant Mermel's resignation, saying that he was disgusted by Defendant Mermel's comments. Defendant Waller issued a public apology for Defendant Mermel's comments, proclaiming, "The comments

attributed to Mike Mermel do not reflect my views on the role of the Lake County State's Attorney's Office. Nor do they reflect the manner in which my staff has conducted themselves over the last 21 years." In no uncertain terms, Defendant Mermel's office disavowed and disowned his defamatory statements of or concerning Plaintiff.

184. In the end, Defendant Mermel was forced to resign his job as a prosecutor because of his comments, and he did so just a couple of weeks after they had been published.

185. Defendants Tessman and Maley also defamed Plaintiff long after their involvement in Plaintiff's unjust criminal prosecution had come to an end. In the same *New York Times* article mentioned above, Defendants Tessman and Maley each stated falsely that Plaintiff had committed murder and rape.

186. When Defendant Tessman was asked about Plaintiff's case, he discussed his belief that Plaintiff was a rapist and murderer and proclaimed, "[Plaintiff is guilty as the day is long."

187. Defendant Maley joined in Defendant Tessman's statement, saying bluntly: "I can tell you 100 percent that Juan Rivera did the murder."

188. By engaging in the misconduct described in this Count, Defendants Mermel, Tessman, and Maley made demonstrably false statements about and concerning Plaintiff, and they caused those statements to be widely published in major public newspapers distributed throughout the entire world. The things these Defendants said about or concerning Plaintiff were malicious, shocking, outrageous, and offensive, and these Defendants made these statements knowing that they were entirely false.

189. The statements made by Defendants Mermel, Tessman, and Maley described above are wholly untrue accusations of rape and murder, which constitute defamation *per se* in Illinois.

190. Defendants Mermel, Tessman, and Maley were angered by the fact that Plaintiff's case had become a poster child of official misconduct and that their actions had been subject to intense scrutiny and criticism in local and national media and in the law enforcement and legal communities. As a result, these Defendants were determined to advance their own agendas and to counter-attack Plaintiff by falsely asserting that he was a rapist and murderer. In doing so, Defendants Mermel, Tessman, and Maley acted with actual malice, reckless intent and gross indifference to the false and misleading nature of their statements about and concerning Plaintiff when they made them to national media outlets.

191. These defamatory falsehoods were made with actual malice by Defendants inasmuch as they knew of their falsity or recklessly disregarded their truth or falsity.

192. As a result of Defendants' misconduct described in this Count, Plaintiff suffered injuries, including but not limited to reputational damages, great mental anguish, humiliation, degradation, physical and emotional pain and suffering, and other grievous and continuing injuries and damages.

193. In particular, the Defendants' defamatory falsehoods have and continue to injure Plaintiff in the following ways, among others: (a) by impugning Plaintiff's personal reputation in the community such that individuals who Plaintiff interacts with question whether he is a rapist and murderer; (b) by limiting Plaintiff's employment options and his future career prospects; and (c) by subjecting Plaintiff to harassment and additional persecution for a crime he did not commit.

194. The actions and omissions of Defendants Mermel, Tessman, and Maley set forth in this Count demonstrate malice, egregious defamation, and insult. These Defendants' actions and omissions were undertaken either with malice, spite, ill will, vengeance, or deliberate intent to harm Plaintiff, or with reckless disregard to the falsity of the speech and its effect on Plaintiff. Accordingly, Plaintiff is entitled to punitive damages and attorneys' fees beyond those damages, described above, that will compensate Plaintiff for injuries resulting from the Defendants' conduct.

COUNT XI
State Law Claim – Respondeat Superior

195. Plaintiff incorporates each paragraph of this Complaint as if fully restated here.

196. While committing the misconduct alleged in the preceding paragraphs, the Defendants were employees, members, and agents of the Lake County Major Crimes Task Force, the Lake County Sheriff's Department, the City of Waukegan, the City of Lake Forest, the Illinois State Police, the Lake County State's Attorney's Office, and John Reid & Associates, acting at all relevant times within the scope of their employment.

197. Defendant Lake County Major Crimes Task Force, by Lake County, the Lake County Sheriff's Department, the City of Waukegan, the City of Lake Forest, the Village of Buffalo Grove, and the Unknown Municipalities of the Lake County Major Crimes Task Force, is liable as principal for all torts committed by its agents.

198. Defendant Sheriff of Lake County is liable as principal for all torts committed by his agents. Defendant City of Waukegan is liable as principal for all torts committed by its agents. Defendant City of Lake Forest is liable as principal for all torts committed by its agents. Defendant John Reid & Associates is liable as principal for all torts committed by its agents.

COUNT XII
State Law Claim – Indemnification

199. Plaintiff incorporates each paragraph of this Complaint as if fully restated here.

200. Illinois law provides that public entities are directed to pay any tort judgment for compensatory damages for which employees are liable within the scope of their employment activities.

201. The Defendants were employees, members, and agents of the Lake County Major Crimes Task Force, the Lake County Sheriff's Department, the City of Waukegan, the City of Lake Forest, the Village of Buffalo Grove, the Illinois State Police, the Lake County State's Attorney's Office, and John Reid & Associates, acting at all relevant times within the scope of their employment in committing the misconduct described herein.

202. Lake County is obligated by Illinois statute to pay any judgment entered against the Sheriff of Lake County in his official capacity.

203. Lake County is obligated by Illinois statute to pay any judgment entered against the Prosecutor Defendants.

WHEREFORE, Plaintiff JUAN A. RIVERA, JR., respectfully requests that this Court enter a judgment in his favor and against Defendants LAKE COUNTY, Illinois, LUCIAN TESSMAN, CHARLES FAGAN, MICHAEL MALEY, DONALD MEADIE, MICHAEL BLAZINCIC, JAMES HELD, FERNANDO SHIPLEY, HOWARD PRATT, RICHARD DAVIS, DAVID OSTERTAG, JAMES GENTILCORE, PHILIP STEVENSON, ROBERT BOONE, GARY DEL RE, ESTATE OF CLINTON GRINNELL, MARK CURRAN, Lake County Sheriff, in his official capacity, CITY OF WAUKEGAN, CITY OF LAKE FOREST, VILLAGE OF BUFFALO GROVE, the LAKE COUNTY MAJOR CRIMES TASK FORCE, UNKNOWN POLICE OFFICERS, UNKNOWN MUNICIPALITIES OF THE LAKE

COUNTY MAJOR CRIMES TASK FORCE, JOHN REID & ASSOCIATES, INC., MICHAEL MASOKAS, UNKNOWN EMPLOYEES OF JOHN REID & ASSOCIATES, MICHAEL WALLER, JEFFREY PAVLETIC, MATTHEW CHANCEY, STEVEN McCOLLUM, and MICHAEL MERMEL, awarding compensatory damages, attorneys' fees and costs against each Defendant, punitive damages against each of the individual Defendants, and any other relief this Court deems just and appropriate.

JURY DEMAND

Plaintiff, JUAN A. RIVERA, JR., hereby demands a trial by jury pursuant to Federal Rule of Civil Procedure 38(b) on all issues so triable.

Respectfully submitted,

JUAN A. RIVERA, JR.

BY: /s/ Steven Art
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2011 IL App (2d) 091060
No. 2-09-1060
Opinion filed December 9, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JUAN A. RIVERA, JR., Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Lake County. No. 92-CF-2751 Honorable Christopher C. Starck, Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court, with opinion.
Justices McLaren and Bowman concurred in the judgment and opinion.

OPINION

¶ 1 In May 2009, following a jury trial, defendant, Juan A. Rivera, Jr., was convicted of first-degree murder for the 1992 killing of 11-year-old Holly Staker, the victim. The trial court sentenced defendant to life imprisonment without the possibility of parole. Thereafter the trial court denied defendant's posttrial motions, and defendant filed a timely notice of appeal. Defendant presents seven issues for review: (1) whether the State presented sufficient evidence to prove his guilt beyond a reasonable doubt; (2) whether his constitutional rights were violated when the trial court excluded certain expert witness testimony relating to the effects his psychiatric and psychological conditions were apt to have had on him and on the reliability of his statements during questioning using

particular interrogative techniques; (3) whether evidence relating to the victim's sexual history violated the Illinois rape shield statute and the rules of evidence; (4) whether defendant should have been allowed to examine a witness regarding polygraph examinations; (5) whether the trial court violated this court's earlier mandate and Illinois evidence law when it allowed the State to present evidence regarding malfunctions in electronic monitoring units other than the one assigned to defendant; (6) whether defendant was denied the right to present a defense when the trial court excluded defense evidence rebutting the State's claim that defendant knew facts that only the perpetrator could have known; and (7) whether defendant's statements should have been suppressed as involuntary. Because the State's evidence was insufficient to sustain the jury's verdict, we reverse. Accordingly, we do not reach the remaining issues.

¶ 2 On August 17, 1992, police responded to a call in Waukegan after a woman living there, Dawn Engelbrecht, reported that her babysitter, Holly Staker, was missing. The back door to Engelbrecht's apartment had been kicked in. The police found the victim's partially clothed body on the floor of the children's bedroom. The victim had been stabbed multiple times and was pronounced dead at the scene. An investigation led police to question defendant, who purportedly gave incriminating responses to the officers' questions. Defendant later signed a statement in which he confessed to killing the victim.

¶ 3 On November 12, 1992, a grand jury indicted defendant on four counts of first-degree murder (720 ILCS 5/9-1(a)(1), (a)(2), (a)(3) (West 1992)). Defendant was convicted in a November 1993 jury trial, but on appeal this court reversed and remanded for a new trial. See *People v. Rivera*, No. 2-94-0075 (1996) (unpublished order under Supreme Court Rule 23). Defendant was retried in 1998 and was convicted in a jury trial. The jury found defendant not guilty of one count of intentional

murder, but guilty of the other three counts of murder: knowledge of great bodily harm (720 ILCS 5/9-1(a)(2) (West 1992)); in the course of an aggravated criminal sexual assault with a weapon (720 ILCS 5/9-1(a)(3), 12-14(a)(1) (West 1992)); and in the course of an aggravated criminal sexual assault of a victim under the age of 13 (720 ILCS 5/9-1(a)(3), 12-14(b)(1) (West 1992)). On appeal, this court affirmed defendant's conviction. See *People v. Rivera*, 333 Ill. App. 3d 1092 (2001).

¶ 4 In 2004, the trial court granted defendant's motion for DNA testing of material from vaginal swabs taken at the victim's autopsy. In 2005, a forensic testing company tested sperm from a swab stick, and the vial in which it had been held, and made a finding that defendant was "excluded as the source of the DNA obtained from the swab and vial." Both the State and the defense accept the conclusion and no challenge is made to it. The DNA results have been run in the federal and state databases, but no match has been found to date. In 2006, based on the forensic testing company's finding, the trial court granted defendant's petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2006)).

¶ 5 In May 2009, defendant's present jury trial commenced. In its opening statement, the State claimed that the evidence would show that, on August 17, 1992, defendant sexually assaulted the victim by penetrating her vagina and anus, and then defendant stabbed the victim 27 times, including in the neck, the throat, 5 clusters around the heart, and the vagina. The State presented evidence pertaining to the crime scene and the analysis of the physical evidence collected. Evidence technicians took samples of blood found in the bedroom and near the kitchen sink, where it appeared that someone had washed bloodied hands. Technicians lifted fingerprints from the apartment and removed the damaged back door for forensic analysis. They took photographs and samples of

bloody streaks near the banister on the front staircase. Investigators discovered a knife broken into two pieces in a neighbor's yard.

¶ 6 Dr. Nancy Jones testified that she performed the autopsy of the victim. Jones testified that the victim had suffered 27 stab wounds, had been strangled, and had incurred massive injuries as a result of having been sexually assaulted vaginally and anally prior to her death. Jones took vaginal and anal swabs, which were sent to the Northern Illinois Police Crime Laboratory (the Crime Lab). The Crime Lab determined that the vaginal swabs tested positive for semen, and spermatozoa were found on slides generated from the swabs.

¶ 7 William Wilson, a forensic scientist with the Crime Lab, testified that he analyzed the damaged back door and determined that some of the damage was caused by a blue object approximately one inch in diameter. Following an investigation, Wilson determined that the handle from a blue mop found on the back porch was consistent in size and color with some of the damage to the door. Deputy Bert Foster reported on a towel found next to the mop.

¶ 8 The State presented evidence of the Lake County police department's investigation and interrogation of defendant. On October 2, 1992, defendant met with officers and agreed to provide samples of his blood and hair. Defendant signed a statement for the officers, reflecting that, on the night of August 17, he had been at a party at Shanita Craig's house, close to where the victim's murder occurred. In the statement, defendant described a male individual, who came and left the party repeatedly, and who later returned sweaty, out of breath, and with a fresh scratch. Defendant indicated that the male individual might have been on "coke" because he was acting paranoid. Following an investigation by the police, it was revealed that there was no party at the Craig residence on August 17.

¶ 9 On October 27, 1992, defendant was transferred to the Lake County jail. Defendant took a polygraph test, which yielded no results. On October 28, 1992, at approximately 9:30 a.m., the police began their interrogation of defendant. In the hours that followed, defendant gave various accounts, including a statement substantively similar to the one he gave police on October 2. On October 29, 1992, Detective James Held and Detective Richard Davis continued the interrogation of defendant and requested that he undergo another polygraph test. Throughout the day and night, defendant continued to give the interrogating police officers, who also included Corporal Michael Blazincic, Detective Meadie, Sergeant Fernando Shipley, and Sergeant Charles Fagan, varying accounts of his whereabouts and activities on August 17. At approximately 3 a.m. on October 30, 1992, Meadie and Fagan left the interrogation to prepare and type a statement summarizing defendant's new version of the events. In that statement, defendant explained that the victim was attired in "a sleeveless shirt and a pair of tight shorts." Defendant stated that he went to the bathroom, and when he returned to the living room, the victim "must have changed clothes, because she was wearing a nightgown or similar type garment." Defendant stated that he and the victim engaged in consensual vaginal and anal intercourse and that he did not use any "protection" during intercourse; defendant stated that he did not think he ejaculated. Defendant stated that the victim left the bedroom and returned with a knife and began striking him. Defendant stated that they continued fighting "and that was when [he] started punching [the victim] not realizing [he] had the knife in [his] hand." At approximately 8:10 a.m., Meadie and Fagan entered defendant's cell with the prepared statement. Fagan read aloud the statement, and defendant signed each page they had drafted. Fagan and Meadie left the cell.

¶ 10 The interrogation continued, and the detectives told defendant that two other investigators wished to interview him, and Sergeant Lou Tessmann and Sergeant Michael Maley joined them. Following further interrogation, Tessmann and Maley left to prepare an investigative report with another version of events; Sergeant David Ostertag continued with the interrogation. At approximately 1:15 p.m., Maley and Tessmann returned and read aloud a statement they had prepared for defendant, again incriminating him in the victim's murder. In this statement, defendant saw the victim "standing at the Mexican lady's front door," and she asked him into the apartment. Defendant stated that he did "not remember what the little kids were wearing, but [the victim] had on some black stretch pants with stirrups on the bottoms and a multi-colored shirt." Defendant stated that the victim was teasing him, which angered him. Defendant stated that he took a knife from the kitchen and they began fighting; the victim "was getting cut by the knife." Defendant stated that he pushed the victim onto the bed and had vaginal and anal intercourse with her. Defendant stated that he could not recall whether he ejaculated on the victim or whether he ejaculated at all. Defendant went to the kitchen sink and washed the knife and his hands. Defendant stated that he left the apartment "through the back door," which he closed behind him. Defendant stated that he "wanted to make it look like a burlgary [*sic*] break in, so I grabbed a mop that was leaning outside this door in the hallway." Defendant stated that he "then grabbed a towel, that was laying on the floor and wiped any fingerprints off the mop because [he] did not wear gloves." Defendant signed the three-page statement, and he was thereafter charged with the victim's murder.

¶ 11 At trial, Tessmann admitted that he might have asked questions that contained facts of the murder, such as "She had a multi-colored shirt on, right?" Maley admitted that, during the interrogation, he questioned defendant as to whether the victim was really wearing a nightgown.

Maley testified that Tessmann asked questions "about facts in the previous statement that he believed were untrue."

¶ 12 The State called two witnesses, Michael Jackson and Maurice Craig, who both testified that there was no party at the Craig house on August 17, 1992. Jackson further testified that, while defendant was in the Lake County jail, defendant asked him to provide an alibi for him because the police were railroading him for a crime he did not commit. Dawn Engelbrecht testified that, on August 17, 1992, while the police were at her home collecting evidence, a crowd gathered in the street and someone approached her. Engelbrecht testified that, although she later identified defendant as that person, she did so only because the police had shown her photos of him and told her that he had admitted being the person who approached her in the street.

¶ 13 The State called Heather Staker, the victim's twin sister, to challenge the DNA evidence. Staker testified that, when she and the victim were eight years of age, a friend's brother molested them by forcing them to perform oral sex. Staker also testified regarding an incident in which she and the victim once showed each other how they masturbated.

¶ 14 The State also presented testimony from three informants from the Lake County jail regarding claims that defendant allegedly made to each of them in the jail. Edward Martin, who had been convicted of aggravated criminal sexual assault of his stepdaughter, informed the police that defendant might have some information as a witness. The 1993 trial testimony of Frank McDonald, now deceased, was presented as evidence. According to McDonald, defendant had asked him to read the discovery materials to him, and upon reading the materials, he accused defendant of killing the victim. According to McDonald, defendant admitted that he had. McDonald admitted that he had attempted to sell defendant's discovery materials to a reporter for the Chicago Tribune. The 1998

trial testimony of David Crespo was read to the jury. According to Crespo, he and defendant attended a Spanish Bible study class together; after one class, defendant admitted that he killed the victim. Crespo admitted that, when he left the jail, defendant's family took him in and that he came forward with his claim about defendant only after defendant's family made him leave their residence for using drugs while living there. The State rested.

¶ 15 Defendant presented two theories of defense: (1) he did not commit the crime as claimed by the State; and (2) his incriminating statements during the police interrogation were false and inaccurate. Defendant relied on testimony regarding the DNA results; electronic monitoring system records; the absence of any physical evidence linking defendant to the crime; defendant's condition during the police interrogation; defendant's mental health and its impact on his statements; inconsistencies and inaccuracies between defendant's statements and the circumstances of the crime; and the lack of information from defendant to the police that was unknown to the police or the general public.

¶ 16 Defendant presented the testimony of Alan Keel, of Forensic Science Associates, who conducted DNA testing on evidence from the rape kit taken at the victim's autopsy, *i.e.*, one of two vaginal swabs and the vial in which the swab had been stored. Keel performed a "differential extraction" to separate the sperm cells from the epithelial cells and determined that the epithelial cells all matched the victim and that the sperm was from a single male profile, which he labeled as "Unidentified Male #1." Keel tested the profile against that of defendant and determined conclusively that defendant was not the source of the sperm.

¶ 17 The State asked Keel whether some initial difficulties in performing the differential extraction, or the state of the tails on the sperm cells, suggested that the sperm may have been old

and degraded by having been in the vagina for several days before the autopsy. Keel disagreed and testified that the opposite was true, *i.e.*, the high ratio of sperm cells to epithelial cells indicated that the sperm was deposited shortly before the victim died. Keel explained that the "high ratio of sperm DNA to epithelial cell DNA demonstrat[ed] that the semen had not been in the vagina long" and "[i]t had not had time to dissipate"; and he opined that the sperm had been "recently deposited in the vagina." Other expert witnesses testified that they could not rule out the State's degradation theory but testified that it was not likely. Brian Wraxall testified that it was a possibility but it was misleading. Elizabeth Benzinger testified that it was a possibility but she did not have any data that really described that. The expert witnesses confirmed that semen in the vagina tends to drain onto the underwear during the normal course of activity after intercourse; no semen was found on the victim's underwear.

¶ 18 William Frank, the senior DNA analyst for the Illinois State Police crime laboratory, testified that, at the joint request of the parties, the police crime lab conducted a quality control review of the results of Keel's testing. Frank agreed with Keel's conclusion that the profile was a single-source male DNA profile and that "there was no indication that the sample was mixed with DNA from more than one male." At the State's request, the police crime lab conducted independent testing of the evidence and found that defendant was absolutely excluded. Frank agreed with Keel that there was no evidence reflecting contamination in any manner.

¶ 19 On cross-examination, the State asked Frank whether he could rule out the possibility that the swab or vial was improperly handled in such a manner that created "a contact transfer with some other sperm from some other case." Frank responded that, because the degradation levels of the victim's epithelial cells and the sperm from "Unidentified Male #1" were similar, any such

contamination would have had to occur by the evidence coming in contact with someone else's sperm from another case early on. Frank testified that the DNA testing revealed a "single source profile," and there was no evidence to reflect that the epithelial cells and the sperm were not deposited at the same time.

¶ 20 Defendant presented stipulations regarding the fingerprints found at the crime scene and examined by Robert Wilson of the Crime Lab and Donald Verbeke of the Lake County State's Attorney's office. Wilson and Verbeke compared the lifted prints with prints from known sources, including defendant, the victim, Dawn Engelbrecht, Engelbrecht's children, the victim's sister, and the victim's mother. Many of the prints belonged to the residents of the apartment, the victim, and the victim's sister. None of the prints analyzed by Wilson or Verbeke matched those of defendant. Some prints could not be matched to any known prints and were referred to as "open." Kenneth Moses, a crime scene investigator and director of an independent forensics laboratory in San Francisco, testified regarding his review of the physical evidence, including approximately 70 images of finger and palm prints. Moses testified that an unidentified print was referred to as an "open" print. Moses concluded that all of the open prints excluded defendant; that is, the prints were not defendant's.

¶ 21 Defendant also presented testimony from witnesses regarding the home electronic monitoring system and records related to defendant's use of the monitoring system. Lake County jail employees testified regarding defendant's mental and physical condition during the night and morning he gave police the incriminating statements. Defendant called expert witnesses to testify regarding his mental health; his IQ of 79; and his third-grade reading level. Defendant called other witnesses,

including police officers, who testified regarding the inconsistencies between defendant's statements to the police and the true facts of the crime.

¶ 22 After defendant rested, the State presented its rebuttal. The parties presented their closing arguments, and the trial court instructed the jury. Following deliberations, the jury found defendant not guilty of first-degree murder based on the knowledge that his acts created a strong probability of death or great bodily harm (720 ILCS 5/9-1(a)(2) (West 1992)), but found him guilty of the two other counts of first-degree murder based on the underlying aggravated criminal sexual assault charges (720 ILCS 5/9-1(a)(3), 12-14(a)(1), (b)(1) (West 1992)). The trial court entered judgment on the jury's verdict. On June 25, 2009, the trial court denied defendant's motion for judgment notwithstanding the verdict or, alternatively, for a new trial. The trial court thereafter sentenced defendant to life imprisonment without the possibility of parole. Defendant timely appeals.

¶ 23 Defendant contends that the State's evidence was insufficient to prove his guilt beyond a reasonable doubt. Defendant argues that the undisputed DNA testing excludes him as the source of the sperm on the vaginal swab taken at the victim's autopsy; the State's response to this exculpatory evidence was to offer unproved and speculative scenarios "so unreasonable, improbable or unsatisfactory" as to compel reasonable doubt of defendant's guilt; and the inculpatory evidence was so wanting that no reasonable trier of fact could conclude that it trumped the force of the exculpatory DNA evidence and other evidence excluding defendant. In short, defendant claims that DNA trumps all other evidence.

¶ 24 When a court reviews the sufficiency of the evidence, the relevant question is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (Emphasis in original.)

Jackson v. Virginia, 443 U.S. 307, 318-19 (1979). Reviewing courts apply this standard regardless of whether the evidence is direct or circumstantial, and circumstantial evidence meeting this standard is sufficient to sustain a criminal conviction. *People v. Hall*, 194 Ill. 2d 305, 330 (2000). This standard of review does not allow the reviewing court to substitute its judgment for that of the fact finder on questions involving the weight of the evidence or the credibility of the witnesses. *People v. Sutherland*, 155 Ill. 2d 1, 17 (1992). Thus, the standard of review gives "full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson*, 443 U.S. at 319.

¶ 25 While credibility of witnesses is within the province of the trier of fact, and the finding of the jury on such matters is entitled to great weight, the jury's determination is not conclusive. *People v. Smith*, 185 Ill. 2d 532, 542 (1999). It is our duty to carefully examine the evidence while giving due consideration to the fact that the jury saw and heard the witnesses. See *Smith*, 185 Ill. 2d at 541 (citing *People v. Bartall*, 98 Ill. 2d 294, 306 (1983)). If after such consideration we are of the opinion that the evidence is insufficient to establish the defendant's guilt beyond a reasonable doubt, we must reverse the conviction. *Smith*, 185 Ill. 2d at 541 (citing *Bartall*, 98 Ill. 2d at 306). Insufficient evidence is that which is "unreasonable, improbable, or so unsatisfactory as to justify a reasonable doubt of the defendant's guilt." *People v. Campbell*, 146 Ill. 2d 363, 375 (1992).

¶ 26 As noted above, a jury convicted defendant of two counts of first-degree murder based on the underlying aggravated criminal sexual assault charges. "When a defendant is charged with first-degree murder, the State is required to prove death, causation and intent (or knowledge)." *People v. Jerome*, 206 Ill. App. 3d 428, 436 (1990); see also 720 ILCS 5/9-1(a) (West 1992). A person commits first-degree murder when he or she kills an individual without lawful justification during

the attempt or commission of a forcible felony other than second-degree murder. 720 ILCS 5/9-1(a)(3) (West 1992). One such "forcible felony" is the offense of aggravated criminal sexual assault. See 720 ILCS 5/2-8 (West 1992). A person commits aggravated criminal sexual assault when he or she commits criminal sexual assault—that is, sexual penetration by the use of force—accompanied by a statutorily enumerated aggravating factor. 720 ILCS 5/12-14(a) (West 1992). Here, the statutorily enumerated aggravating factors included the use of a dangerous weapon (720 ILCS 5/12-14(a)(1) (West 1992)) and the ages of the parties at the time of the offense: defendant, who was over the age of 17 years, and the victim, who was under the age of 13 years (720 ILCS 5/12-14(b)(1) (West 1992)).

¶ 27 Due process requires that, to sustain a conviction of a criminal offense, the State must prove beyond a reasonable doubt the existence of every element of the offense. *People v. Lucas*, 231 Ill. 2d 169, 178 (2008) (citing *Jackson*, 443 U.S. at 316). Therefore, to sustain the guilty verdicts, the State was required to establish beyond a reasonable doubt the victim's age; defendant's age; defendant's use of a dangerous weapon; defendant's sexual penetration of the victim by the use of force; and the victim's death during the attempt or commission of the aggravated criminal sexual assault. Defendant does not challenge the State's evidence with respect to his age or the age of the victim.

¶ 28 The State asserts that, under the applicable standard of review, its evidence was sufficient. The State acknowledges that there was no eyewitness testimony or forensic evidence positively connecting defendant with the crime. The State responds, however, that defendant's confession and the circumstances under which it occurred were sufficient for a reasonable jury to find him guilty beyond a reasonable doubt. The State additionally claims that defendant knew details of the crime

and that there was no evidence that defendant was "fed" any details of the crime to support his confession.

¶ 29 First, we discuss the physical evidence linking defendant to the offense. There was none. The State and defendant presented a stipulation that, although there were many fingerprints lifted from the Engelbrecht residence that were suitable for comparison, no fingerprints were matched to defendant. Further, Moses concluded that the open prints, those which had not been identified, excluded defendant. The blood found in the bedroom was not matched to defendant. The physical evidence with respect to the damaged back door was not matched to defendant. The bloody streaks near the banister on the front staircase were not matched to defendant. The knife, which was broken into two pieces and found in a neighbor's yard, was not matched to defendant. The blue mop handle and towel were not matched to defendant.

¶ 30 With respect to the DNA evidence linking defendant to the offense, there was none. Keel, who conducted DNA testing on evidence from the rape kit taken at the victim's autopsy, *i.e.*, one of two vaginal swabs and the vial in which the swab had been stored, determined that the epithelial cells all matched the victim and that the sperm was from a single male profile, which he labeled as "Unidentified Male #1." Keel determined conclusively that defendant was not the source of the sperm. Keel also testified that the high ratio of sperm cells to epithelial cells indicated that the sperm was deposited shortly before the victim died.

¶ 31 We recognize that DNA, in and of itself, does not confirm the commission of a crime; rather, it confirms an individual's identity. *People v. Edwards*, 353 Ill. App. 3d 475, 486 (2004). Defendant was positively excluded as the source of the sperm found in the victim. However, that the DNA evidence does not match defendant's DNA does not exonerate defendant. See, *e.g.*, *People*

v. Allen, 377 Ill. App. 3d 938, 944 (2007) (positive eyewitness testimony linked the defendant to an offense despite the lack of DNA evidence). In other words, and contrary to defendant's claim, DNA does not trump all other evidence. DNA evidence, while not completely exculpatory, is significantly important nonetheless in that it may raise a reasonable doubt as to the identity of the perpetrator. In the present case, the DNA evidence established that "Unidentified Male #1" engaged in some sort of sexual relations with the victim shortly before she died, which supported defendant's theory that he did not sexually penetrate the victim by the use of force nor did he cause the victim's death during the attempt or commission of an aggravated criminal sexual assault. In other words, the DNA evidence provides no support to the State's theory that defendant was the individual who committed the offense beyond a reasonable doubt; rather, the DNA evidence embedded reasonable doubt deep into the State's theory.

¶ 32 To counter the DNA evidence, the State presented two alternative theories: (1) the vaginal swab stick had been contaminated, or (2) the victim had previously engaged in sexual activity with another male. The State acknowledges that contamination of the sample may have been unlikely; however, it argues that contamination was not ruled out. The State also argues that it presented evidence to "suggest" that the victim might have been sexually active in the days before the murder. The State's evidence included anecdotal testimony from the victim's sister recounting a masturbation experience and an alleged sexual molestation three years prior by a neighborhood friend's brother.

¶ 33 In light of all the evidence, the State's theories are highly improbable. First, the scientific evidence does not support the State's contamination theory. Second, according to the State in its opening statement, defendant sexually penetrated the victim both vaginally and anally; he stabbed her 27 times in the neck, throat, vagina, and 5 clusters around her heart. Convicting defendant

required the jury to be convinced beyond a reasonable doubt that (1) the victim engaged in some sort of sexual relations with "Unidentified Male #1" shortly before (2) defendant, without using a condom or some other prophylactic contrivance, violently perpetrated an aggravated criminal sexual assault upon the victim and murdered her, without leaving any physical trace of his presence at the Engelbrecht residence, on the victim, or in the surrounding area, yet (3) leaving intact the sperm from "Unidentified Male #1" in the victim's body. The State's attempt seems to have been to separate the DNA evidence in a dimension of time from the sexual assault and murder, so that the evidence tending to exonerate defendant would not be relevant.

¶ 34 In the abstract, the State's theories might not be physically impossible, but on the present record, a reasonable fact finder could not credit them beyond a reasonable doubt. See *People v. Herman*, 407 Ill. App. 3d 688 (2011) (finding the victim's changing time line of events an important inconsistency that helped cast a reasonable doubt as to the defendant's guilt). The State presented anecdotal testimony supporting its theory that contamination was possible, but even so, it still was not likely. The State's theories distort to an absurd degree the real and undisputed testimony that the sperm was deposited shortly before the victim died. Simply put, the State's rationalizations of how the DNA from "Unidentified Male #1" came to be found in the victim's body ("as unlikely as it seems, this young girl apparently had sex with someone else") and why none of defendant's DNA appeared in or around the victim or anywhere at the crime scene cannot save a conviction obtained on a theory of a violent sexual assault and murder. The State did not present any evidence that the victim was in a relationship with anyone. The undisputed evidence from the trial reflects that there was only one male whose bodily fluids were found on the victim; this male was not defendant but rather "Unidentified Male #1." The most reasonable explanation of the DNA evidence is not

defendant but rather "Unidentified Male #1." The most reasonable explanation of who sexually penetrated the victim, based on the DNA evidence, is not defendant but rather "Unidentified Male #1." The most reasonable explanation, therefore, of who murdered the victim is not defendant but rather someone who, unfortunately, has not yet been identified.

¶ 35 Although the DNA evidence does not completely exonerate defendant, it significantly impeaches the theory of the State's case, that defendant committed murder while perpetrating a sexual assault. However, despite the absence of any DNA or physical evidence linking defendant to the offense, we recognize that, under Illinois law, "medical evidence is not necessary to prove a defendant guilty of aggravated criminal sexual assault." *People v. York,* 312 Ill. App. 3d 434, 440 (2000) (citing *People v. Fryer*, 247 Ill. App. 3d 1051, 1058 (1993)). We, therefore, turn to the State's anecdotal evidence, that is, the testimony from the jailhouse informants, and defendant's confession to the police to determine whether that evidence was sufficient to prove defendant's guilt beyond a reasonable doubt.

¶ 36 A jailhouse informant is someone who is purporting to testify about admissions made to him or her by an accused while incarcerated in a penal institution contemporaneously. See 725 ILCS 5/115-21(a) (West 2010). The credibility of informant testimony is a matter for a jury and can be the basis for a guilty verdict. *People v. Manning*, 182 Ill. 2d 193, 210-11 (1998). However, such testimony should be treated with caution. *People v. Williams*, 65 Ill. 2d 258, 267 (1976); see also *People v. Mertz*, 218 Ill. 2d 1, 60 (2005) (contrasting the reliability and admissibility of statements made by an accused and those made by jailhouse informants, suggesting that jailhouse informants are not inherently reliable).

¶ 37 As we stated earlier, the State presented the testimony of Edward Martin, who had been convicted of aggravated criminal sexual assault of his stepdaughter. Martin informed the police that defendant might have some information as a witness. The 1993 trial testimony of Frank McDonald, now deceased, reflected that defendant had asked McDonald to read the discovery materials to him, and upon reading the materials, he accused defendant of killing the victim. According to McDonald, defendant admitted that he had. However, McDonald admitted that he had attempted to sell defendant's discovery materials to a reporter for the Chicago Tribune. According to David Crespo's 1998 trial testimony, he and defendant attended a Spanish Bible study class together; after one class, defendant admitted that he killed the victim. However, Crespo admitted that, when he left the jail, defendant's family took him in and that he came forward with his claim about defendant only after defendant's family made him leave their residence for using drugs while living there.

¶ 38 Although the testimony of a single witness is sufficient to convict if positive and credible (*People v. Flores*, 406 Ill. App. 3d 566, 577 (2010) (citing *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009))), given the effective cross-examination by defense counsel to expose the clear motivations of McDonald and Crespo to testify, we find that no reasonable trier of fact could have found the jailhouse informants' testimony credible beyond a reasonable doubt. Unlike in capital cases, where the trial court must conduct a hearing on the reliability and admissibility of jailhouse informant testimony (see 725 ILCS 5/115-21(a) (West 2010)), there was no such pretrial safeguard in place here. The record contains no information as to the prosecutor's procedures, administrative or otherwise, to ascertain the reliability of the claims made by Martin, McDonald, or Crespo or their veracity. See Barry Scheck, Closing Remarks, 23 Cardozo L. Rev. 899 (2002) (analyzing 62 postconviction DNA cases to determine the extent of perjurious jailhouse informants and finding 15

such cases where snitches provided false testimony). Therefore, it was left to adversarial examination by defense counsel to test the truthfulness of and the motivations behind the jailhouse informants' testimony. McDonald's testimony was questioned by his attempt to sell discovery materials to a reporter. When a witness has hopes of a reward from the prosecution, the testimony should not be accepted unless it carries with it an absolute conviction of its truth. *People v. Hermens*, 5 Ill. 2d 277, 285-86 (1955). Similarly here, because defense counsel exposed McDonald's motivation to profit financially by involving himself in the case, his testimony should be subject to suspicion, viewed with distrust, scrutinized carefully, and acted upon with caution. See *Hermens*, 5 Ill. 2d at 285. Crespo was exposed as a drug user, who came forward only after defendant's family turned their backs on him for using drugs while staying at their house. Our supreme court has plainly stated that "the testimony of a narcotics addict is subject to suspicion due to the fact that habitual users of narcotics become notorious liars." *People v. Lewis*, 25 Ill. 2d 396, 399 (1962) (citing *People v. Boyd*, 17 Ill. 2d 321, 326 (1959)).

¶ 39 A fact finder's acceptance of certain testimony does not guarantee its reasonableness. See *Smith*, 185 Ill. 2d at 545. "[A] reviewing court may find, after considering the whole record, that flaws in the testimony made it impossible for any fact finder reasonably to accept any part of it." *People v. Cunningham*, 212 Ill. 2d 274, 283 (2004). Inasmuch as the testimony from Martin, McDonald, and Crespo provided crucial support to the State's case, given McDonald's and Crespo's blatant motivations as well as the DNA evidence, it is simply unreasonable to sustain the finding of guilt beyond a reasonable doubt.

¶ 40 We are left with defendant's confession to the police. When an individual has been charged with a crime and confesses to that crime, the "corroboration rule requires that the *corpus delicti* be

proved by some evidence *aliunde* admission of a defendant." *People v. Dalton*, 91 Ill. 2d 22, 29 (1982). That is, the State must introduce evidence, outside of the confession, that tends to prove that the offense occurred. *People v. Lambert*, 104 Ill. 2d 375, 380-81 (1984). The basis for this requirement stems from a long-standing mistrust of extrajudicial confessions. *People v. Furby*, 138 Ill. 2d 434, 447 (1990) (citing *Dalton*, 91 Ill. 2d at 29). The *Dalton* court cited two reasons for this mistrust: "confessions are unreliable if coerced; and, for various psychological reasons persons 'confess' to crimes that either have never occurred or for which they are not legally responsible." *Dalton*, 91 Ill. 2d at 29. Moreover, " '[e]xperience has shown that untrue confessions may be given to gain publicity, to shield another, to avoid apparent peril, or for other reasons, and because of this, the law demands corroborating proof that a crime did in fact occur before the individual is punished therefor.' " *Lambert*, 104 Ill. 2d at 380 (quoting *People v. O'Neil*, 18 Ill. 2d 461, 464 (1960)). Innocent people do confess to crimes they did not commit. See Saul M. Kassin, *Inside Interrogation: Why Innocent People Confess*, 32 Am. J. Trial Advoc. 525 (2009). Some people confess from fatigue, stress, and being worn down through relentless questioning and sleep deprivation; some people confess out of fear; some people confess with the expectation of future exoneration; some people confess due to coercive or suggestive methods of interrogation. *Id.* Some people confess because they are guilty. See *People v. Stanton*, 16 Ill. 2d 459, 466 (1959) ("A confession is a voluntary acknowledgment of guilt after the perpetration of an offense ***.").

¶ 41 In this case, the State was required to prove two concepts to prove an offense: first, that a crime occurred, or the *corpus delicti*, and second, that it was committed by the person charged. See *People v. Ehlert*, 211 Ill. 2d 192, 202 (2004) (citing *People v. Cloutier*, 156 Ill. 2d 483, 503 (1993)). Proof of *corpus delicti* requires both proof of injury or loss and proof of criminal agency. *Lambert*,

104 Ill. 2d at 379. *Corpus delicti* cannot be proved by the defendant's confession alone. *Id.* When the defendant's confession is relied upon to prove the offense, independent or corroborating evidence must be present. *Id.* The independent evidence and details of the confession are not required to correspond in every particular. *Furby*, 138 Ill. 2d at 451. However, the State's independent evidence must inspire belief in the defendant's confession. *Cloutier*, 156 Ill. 2d at 503; *People v. Curry*, 296 Ill. App. 3d 559, 565 (1998).

¶ 42 The State asserts that defendant's earliest statement, "while not confessing the crime," was nonetheless inculpatory in light of the circumstances and its "dishonest nature." The State asserts that the later statements included a "damning knowledge of the facts," including many that he "would not have known unless he had been involved." The State further asserts that there was no evidence that defendant was "fed" any details of the crime. At oral argument, the State conceded that Detective Martin "embellished" his testimony at trial, but argued that he was still credible. At oral argument, the State conceded that defendant lied many times during police questioning and gave many stories; however, at oral argument and in its brief, the State recounted the "correct" facts from his statements: he seemed to be familiar with the layout of Engelbrecht's living room; the Engelbrecht residence was messy; the children's room had two beds and a dresser; the victim was attired in a multi-colored blouse and dark stirrup pants; the murder weapon was a knife; he illustrated a stabbing; he stated that the knife was broken before it was discarded; and the victim was just beginning to develop pubic hair.

¶ 43 On our review of the record, the State's independent evidence does not inspire belief in defendant's candid acknowledgment of guilt. The State acknowledges that 15 of the 54 "facts" contained in defendant's statements had all been published in newspapers, and it acknowledges that

defendant's father had learned about the crime in the newspapers and on television and discussed it with defendant. Although the State argues that no evidence reflected that defendant had read the newspapers or which specific details of the crime defendant's father had discussed with defendant, this does not establish defendant's independent knowledge of the facts beyond a reasonable doubt. See *Lucas*, 231 Ill. 2d at 178 (citing *Jackson*, 443 U.S. at 316) (noting that due process requires the State to prove beyond a reasonable doubt the existence of every element of the offense). It was the State's burden to establish that defendant had not read the newspapers or was not otherwise privy to these details. It was the State's burden to establish that defendant's father had not discussed with defendant the media coverage of the murder.

¶ 44 Contrary to the State's argument that there was no evidence that the police fed information to defendant, the record reflects that officers used leading questions during their interrogation of defendant. Both Maley and Tessmann interrogated defendant using facts of the case. Maley testified that, during the interrogation, he questioned defendant as to whether the victim was really wearing a nightgown. Tessmann admitted using leading questions regarding the victim's attire, asking "She had a multi-colored shirt on, right?" Maley's testimony reflected that Tessmann asked defendant questions "about facts in the previous statement that he believed were untrue." Following this session of interrogation, defendant's new statement reflected the victim's correct attire, that was "black stretch pants with stirrups on the bottoms and a multi-colored shirt." *Cf. People v. Nelson*, 235 Ill. 2d 386, 432 (2009) (noting that the defendant's confession and videotaped statement disclosed facts of murder, home invasion, and aggravated arson that could not have been suggested to him because the autopsy had not yet been performed and the police had been unable to enter parts of the crime scene). Moreover, Engelbrecht testified that she identified defendant only because the

police had shown her photos of him and told her that he had admitted being the person who approached her in the street. The evidence belies the State's argument and supports an inference that details of the crime were provided to defendant, intentionally or unintentionally, during the investigative process. The evidence further supports an inference that the details that defendant provided were the result of psychological suggestion or linguistic manipulation. See, *e.g.*, Kathryn C. Donoghue, Comment, *"You Think He Got Shot? Did You Maybe Shoot Him by Accident?": Linguistic Manipulation of the Communicatively Immature During Police Interrogations*, 13 Rich. J.L. & Pub. Int. 143 (2009) (examining linguistic strategies of police interrogators used to extract confessions from vulnerable populations, such as juveniles and people who are mentally challenged). Given the circumstances surrounding the interrogation of defendant, we are left with the impression that the details of defendant's confession were procured "piecemeal" and not as a result of a candid acknowledgment of guilt. Over the course of four days, there were no fewer than 10 law enforcement personnel discussing the crime with defendant or interrogating him. It was the State's burden to establish that defendant was not plied with factual information of the crime to which he finally confessed.

¶ 45 Because defendant's confession was the only remaining evidence connecting him to the victim's sexual assault and murder, the State was required to present evidence *aliunde* the confession to prove the offense. See *Ehlert*, 211 Ill. 2d at 202; *Dalton*, 91 Ill. 2d at 29. The State failed to provide sufficient independent evidence to corroborate defendant's confession, especially in light of the DNA evidence. The State failed to provide corroboration for defendant's use of a dangerous weapon; defendant's sexual penetration of the victim by the use of force; and the victim's death during the attempt or commission of the aggravated criminal sexual assault. The only evidence of

defendant's commission of the offense came from the statements that the police prepared for defendant to sign. Because the State failed to establish the offense *aliunde* the confession, defendant's conviction was unjustified and cannot stand.

¶ 46 After viewing the evidence in the light most favorable to the prosecution, we hold that *no* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Because the State's evidence was insufficient to establish guilt beyond a reasonable doubt, we must reverse the conviction of Juan A. Rivera, Jr. See *Smith*, 185 Ill. 2d at 541 (citing *Bartall*, 98 Ill. 2d at 306).

¶ 47 In so holding, this court is cognizant of the impact this decision will have upon Holly Staker's family, Mr. Rivera and his family, and their friends. Throughout the years, the Stakers have invariably suffered unspeakable anguish and frustration resulting from Holly's tragic murder and the legal proceedings that followed. Mr. Rivera, too, has suffered the nightmare of wrongful incarceration. Each time this matter was before this court, our duty was to examine the legal issues raised and the evidence that was presented at trial and to uphold the standard of reasonable doubt. This court did so each time. See *People v. Rivera*, 333 Ill. App. 3d 1092 (2001); *People v. Rivera*, No. 2-94-0075 (1996) (unpublished order under Supreme Court Rule 23). This court has done so again now.

¶ 48 For the foregoing reasons, we reverse the judgment of the circuit court of Lake County.

¶ 49 Reversed.

No. 09-1060

In the Appellate Court of Illinois
Second District

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee,	)	**Appeal from the**
	)	**Nineteenth Judicial**
	)	**Circuit Court**
	)	
v.	)	**Case. No. 92 CF 2751**
	)	
JUAN A. RIVERA, JR.,	)	**Hon. Christopher C. Starck**
	)	**Judge Presiding.**
Defendant-Appellant.	)	

BRIEF OF DEFENDANT-APPELLANT
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ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

NATURE OF THE CASE

Juan Rivera was convicted of first degree murder by a jury in Lake County, Illinois. He was sentenced to life in prison without the possibility of parole. C6208. This was Rivera's third trial. The first trial, in 1993, resulted in a conviction that this Court overturned. *People v. Rivera*, No. 2-94-0075 (Nov. 19, 1996). The second trial, in 1998, also resulted in a conviction, which this Court affirmed. *People v. Rivera*, 2-98-1662 (Dec. 5, 2001). In August 2006, the Circuit Court of Lake County granted Rivera a new trial based on newly developed DNA testing that excluded him as the source of the sperm on the vaginal swab taken at the 11-year-old victim's autopsy. R11577. No question is raised concerning the pleadings.

JURISDICTION

On May 8, 2009, the jury returned a verdict finding Rivera guilty of first degree murder. C5622-25. On June 25, the trial court denied Rivera's Motion for Entry of Judgment Notwithstanding the Verdict or for a New Trial, and sentenced him to life imprisonment without possibility of parole. C6208-10. On September 9, 2009, the court denied Rivera's Motion to Reconsider Sentence. R18406. Notice of appeal was filed on October 7, 2009. C6225.

ISSUES PRESENTED FOR REVIEW

I. Whether the evidence was sufficient to prove Rivera's guilt beyond a reasonable doubt under the United States and Illinois Constitutions.

II. Whether Rivera's United States and Illinois constitutional rights, and rights under Illinois law, were violated by the trial court's exclusion of expert testimony relating to the effects his psychiatric and psychological conditions were apt to have had on him, and on the reliability of his statements during questioning using particular interrogative techniques.

III. Whether the admission of evidence about the 11-year-old victim's having been molested in the past and having masturbated violated the Illinois Rape Shield Statute and the rules of evidence.

IV. Whether Rivera should have been allowed to ask questions of a witness to inform the jury that the polygraph examinations about which the jury heard had not yielded any results on whether he was deceptive in denying having committed the crime.

V. Whether the trial court violated this Court's earlier mandate and Illinois evidence law when it allowed the prosecution to present evidence about unrelated malfunctions in electronic monitoring units other than the one assigned to Rivera.

VI. Whether Rivera's right to present a defense under the United States and Illinois Constitutions, and his rights under Illinois law, were violated by the trial court's exclusion of defense evidence rebutting the prosecution's claim that Rivera knew facts only the perpetrator could have known.

VII. Whether Rivera's statements should have been suppressed as involuntary under the United States and Illinois Constitutions.

STATEMENT OF FACTS

On the evening of August 17, 1992, police were called to 442 Hickory Street in Waukegan after the woman living there, Dawn Engelbrecht, reported that her babysitter, 11-year-old Holly Staker, was missing. R13863, 14482. Ms. Engelbrecht told the police the back door to her apartment had been kicked in. R13864. The police found Holly Staker's partially clothed body on the floor of the children's bedroom. R13867-68. She had been stabbed multiple times and was pronounced dead on the scene. R13869-70.

I. Crime Scene Investigation and Analysis of Physical Evidence

Evidence technicians from the Lake County Major Crimes Task Force converged on the scene and took samples of the blood found in the bedroom and near the kitchen sink, where it appeared someone had washed bloody hands. R13894, R13914. The technicians lifted scores of fingerprints from around the apartment and removed the damaged back door for forensic analysis. R16223, 16257, 16262. They also took samples

of, and photographed, bloody streaks near the banister on the front staircase. R16259. The police issued a press release that night reporting the murder and including many details about the nature of the crime and physical evidence the police had found. DX22.

Dr. Nancy Jones performed the autopsy the next day and determined Holly Staker had suffered 27 stab wounds, had been strangled, and had incurred massive injuries as a result of having been sexually assaulted vaginally and anally prior to her death. R15770-812. Dr. Jones took vaginal and anal swabs, which were sent to the Northern Illinois Crime Laboratory ("Crime Lab"). R15818-20. The Crime Lab found that the vaginal swabs tested positive for semen, and spermatozoa were found on slides generated from the swabs. R16457-59. That same day, investigators searching a neighbor's yard found a knife broken into two pieces. R16235-36.

Crime Lab forensic scientist William Wilson spent three days analyzing the damaged back door and determined some of the damage was caused by a blue object about one inch in diameter. R14436, 14441. At his request, Task Force members searched the crime scene and found a blue mop on the back porch. R16237-39, R17203-04. Pictures were taken (DX26) of the mop and still photos were produced from the original crime scene video. DX29. Mr. Wilson determined the mop handle was consistent in size and color with some of the damage to the door and reported this to the Task Force on August 21. R14441, 14446. Deputy Bert Foster prepared reports on this significant finding (DX26), and also reported on a towel lying next to the mop. R16253, DX69. Generally, all members of the Task Force attended briefings on a daily basis to discuss developments and leads, including the physical evidence. R13987.

II. The Focus on Juan Rivera

On September 29, 1992, Edward Martin, an inmate at the Lake County Jail, reported to the police that a fellow inmate had told him he had an idea about who killed Holly Staker. R14367. According to Martin, the inmate told him he was at a party that night near the crime scene and saw someone acting mysteriously. The police identified Juan Rivera as the inmate to whom Martin was referring, and on October 2, two officers went to Hill Correctional Center and interviewed Rivera (who had begun serving a sentence for an unrelated burglary). Rivera was friendly and cooperative and agreed to provide samples of his blood and hair. R13985-86, 13991. Rivera signed a statement telling these officers that on the night of August 17 he had been at a party at Shanita Craig's house, close to where the murder occurred. Rivera said that a man, whom he identified as Robert Hurley, repeatedly left the party, and later returned sweaty, out-of-breath, and with a fresh scratch. R13980-81, PX150. Although not contained in the statement Rivera signed, an officer reported that Rivera also mentioned having gone with other partygoers to watch the police activity and having spoken to the woman for whom Holly Staker had been babysitting (describing her as the "Mexican lady" who bartended at Cheers).[1] R13969. Follow-up investigation revealed there was no party at the Craig residence on August 17, triggering an interest in interviewing Rivera further. R9372.

A. October 27 & 28 Questioning

On October 27, police secured Rivera's transfer from Hill Correctional to the Lake County Jail, and that day, Corporal Michael Blazincic, Sergeant Lou Tessmann, and Detective Meadie transported Rivera to John Reid and Associates for the purposes of

[1] Dawn Engelbrecht, the mother for whom Holly Staker was babysitting the night of the crime is not Mexican and does not appear to be Mexican. R13994.

interrogation and polygraph testing. R14038. Before the polygraph, Rivera filled out a Medical Data Sheet indicating he had been treated in the past for nervous, psychological, and emotional problems, including suicide attempts. R14234-38, 14244, DX6.

When polygrapher Michael Masokas questioned Rivera twice that day, Rivera made no incriminating statements. R14186-87, 14199. Instead, he repeated his story about being at the Craig house and witnessing suspicious behavior by a man named Robert. R14194-96. Rivera was given a polygraph test on whether he was involved in the Staker murder and on his whereabouts on the night of the crime. R9710-11. Mr. Masokas told the investigators that the polygraph tests yielded no results. R14046, 14235.

On the next day, October 28, Corporal Blazincic began questioning Rivera at 9:30 a.m. and asked him to write out a statement. R14054-60. The statement Rivera wrote about the events at the Craig party is remarkable for its simple wording and many misspellings. For example, the beginning of the statement reads:

> ON Ogust 17, of 1992 I whent to the house of the Kraigs to a party at about 3 p.m. of the after noon. I was drinking a couple of beer in that house and then at about 4 ockloc to 4:15, a person by Robert came to the house and stude around awill and Mikcle in troduse the person to me * * *. PX 154.

When Rivera finished writing out this statement, Corporal Blazincic put him into a room alone with Michael Jackson (one of the persons Rivera had claimed was at the Craig party). R14066. Rivera, who was visibly upset by this time, told Jackson the police were "trying to railroad" him for something and "I didn't do it." R14182. Jackson refused Rivera's request that he provide an alibi for him. R14176-77. Corporal Blazincic and Sergeant Tessmann then took Rivera on a "ride around" near the crime scene, during which Rivera provided no new information of any significance. R14073-80.

B. October 29 & 30 Questioning

1. The Trip to Chicago

On October 29, at 11:30 a.m., Detectives James Held and Richard Davis took Rivera back to Reid & Associates for more questioning and another polygraph. R14304. Rivera related the same basic story about the Craig party. He was asked three questions during the polygraph examination: whether he was present when Holly Staker was stabbed (he answered, "no"); did he see or talk to Michael Jackson on August 17 (he answered, "yes"); and did he lie to the police about what he did and where he was on August 17 (he answered, "no"). C3641-42. It was Mr. Masokas's opinion that Rivera displayed deception in at least one answer, but he could not determine which. *Ibid,* R9712 (testimony from 1998 trial, introduced as offer of proof at the current trial. R14268). See *infra* 75-78.

When Mr. Masokas expressed disbelief of Rivera's account, Rivera admitted he had been lying about the party, saying he did so to get the police off his back. R14208-09. Rivera then claimed he had not been at any party and had actually approached the Mexican lady the next morning. *Id.* After conferring with investigators, Mr. Masokas told Rivera this could not be true because Ms. Engelbrecht had identified Rivera as having approached her on the evening of August 17.[2] R14211. Rivera responded with a new account, saying he rode his bike to the Craig's house at 5:00 p.m. on August 17, and waited several hours for a party, saw flashing lights, and then walked over and approached the lady to ask what was going on. R14212-13. Rivera had been on electronic

[2] On October 29, Dawn Engelbrecht had identified Rivera as the person who approached her, but she later testified she did so because police told her Rivera claimed to have done so. See *infra* 18-19.

monitoring at the time (on the unrelated burglary charge), but told Mr. Masokas he unplugged his monitor before leaving home.

At this point, approximately 3:30 p.m., Detectives Held and Davis joined Mr. Masokas in questioning Rivera. R14215, 14315. They told Rivera there was no way he could have seen a reflection of police lights from the Craig's house. R14215. Rivera then changed his story yet again, now saying that he waited outside the Craig house, walked in the neighborhood, bought and smoked marijuana, and then broke into a car near a church in order to steal speakers. R14322-24. He stated that he took the speakers home and placed them in his basement (where he believed they still were), and then walked the two or three miles back to the Craig house. R14216, 14326. Rivera said that when he got close to the Craig house, he saw reflections of police lights and went over to learn what was happening. He later approached the woman because he knew that Holly Staker was babysitting for her that evening. R14218, 14328.

Mr. Masokas and Detective Davis left the interview room (it was now 5:00 p.m.), leaving Detective Held to question Rivera alone. R14324. Rivera continued to provide an ever-changing account. For example, when Detective Held told Rivera it made no sense that Rivera made up the party story to get police off his back because the police had not questioned him about the party until after he told fellow inmate Martin about it, Rivera responded he never had said that to Martin. When Detective Held told Rivera that Rivera had given the same account to Detective Held and his colleague on October 2 at Hill Correctional, Rivera denied that as well. R14317.

At about 5:30 p.m., Mr. Masokas discussed next steps with two Task Force leaders and it was decided that Mr. Masokas—the polygrapher—would accuse Rivera of

having committed the rape and murder. R14219-21, 14329. Mr. Masokas and Detective Davis reentered the room and, with what he conceded was a raised voice and aggressive, accusatory tone, Mr. Masokas reported to Rivera that "at this point in time the investigation indicated that he did, in fact, cause the death of Holly." R14221, 14330. Rivera became agitated and denied any involvement in the murder, but Mr. Masokas continued to tell him, "the investigation indicated that he caused the death." R14221-22.

The questioning at Reid & Associates concluded at about 6:20 p.m., whereupon Detectives Held and David drove Rivera back to the Lake County Jail. R14333. When they arrived back in Waukegan between 7:45 and 8:00 p.m., Rivera was brought to an interrogation room for further questioning. R14349-50.

2. The Questioning from 8:00 p.m. to 11:30 p.m.

At 8:00 p.m., back at the jail, Corporal Blazincic resumed the interrogation of Rivera, confronting him with inconsistencies and inaccuracies in his statements. R15389, 16178-80. At 8:45 p.m., Officer Fernando Shipley entered the room and told Rivera that his story about stealing speakers did not hold up because no one had reported any car burglary the night of the crime. R16184. At this point (about 10:30 p.m.), Corporal Blazincic turned the questioning over to Detective Meadie and Sergeant Shipley, who continued confronting Rivera with his inconsistencies. R14603-05. Rivera responded by saying that "everything he told Sergeant Shipley was a lie." R14607. Sergeant Shipley left the room and Detective Meadie continued questioning Rivera. R14607-08. By this time, close to 12 hours had passed since the questioning had begun earlier that day.

3. The Questioning from 11:30 p.m. to 3:00 a.m..

Sergeant Charles Fagan joined Detective Meadie in the interrogation room around 11:30 p.m. R14608-10, 15465. The officers told Rivera that every story he had told them

was a lie. R15468. Rivera became increasingly agitated and kept asking if he was going to a maximum-security prison. *Id.* Sergeant Fagan responded that he could make no promises, but was looking for Rivera's cooperation, which he would bring to the attention of the State's Attorney's Office. R15468-69.

Shortly after midnight, Sergeant Fagan accused Rivera saying, "Juan, you were in that apartment with Holly Staker, weren't you?" R15471. Rivera broke down and started sobbing uncontrollably—so intensely that he soaked his clothes. R14613, 15474, 15629. He did not respond verbally but nodded affirmatively. R14611-13, 15471. As the questioning continued, Rivera said he would kill himself before he went back to a maximum security prison. R14615, 14632, 15468, 15642.

During the hours that followed, Rivera told the investigators a new story about his activities on August 17—an account that Detective Meadie and Sergeant Fagan knew to be rife with falsehoods. R15523, 17425. Rivera now said he was walking on Hickory Street when Holly Staker, who was wearing a sleeveless shirt and a pair of tight shorts, invited him up to the apartment. Rivera said it was dark in the apartment and a little boy and girl were playing inside. *Id.* At one point, Holly Staker changed the little girl's diaper. Rivera stated that Holly Staker then changed into a nightgown and tried to seduce him, but he resisted her advances. At this point, the little boy went outside to play. Rivera continued that Holly Staker persisted in her sexual advances and they had intercourse, although he did not think he ejaculated because he was concerned about pregnancy. The sexual activity was interrupted when the little girl cried in the next room, and Rivera decided he did not want to continue. At this point, according to Rivera's statement, Holly Staker got angry that he refused to continue having sex and brandished a knife, which she

began swinging at Rivera. Rivera said he grabbed her arms and started punching her without realizing the knife was cutting her. He did not know how many times he cut her, but it was more than twice. Rivera stated that he washed the knife and his hands near the kitchen sink and ran out the back door of the apartment. He threw the knife, which he had broken into two pieces, to the ground. Rivera said he then went home and burned his clothes in the dumpster behind his house, after which he walked back to Hickory Street and saw the police and the woman for whom Holly Staker was babysitting. R14617-25, 15475-84, PX157.

At the end of the statement, the detectives asked Rivera a final question: "When you left the apartment through the backdoor, did you do anything to the door before leaving?" He answered, "Not that I could remember, because the only thing that was going through my mind was to get out of there." R14626-27, 15485.

Detective Meadie and Sergeant Fagan listened to Rivera's new account and asked follow-up questions for about an hour. R14627. They then asked Rivera to repeat the story again so Detective Meadie could take notes. R14628-29, 15487. According to the officers, there were video and audio recorders readily available nearby, but Rivera declined their invitation to have his statement taped or to write it out himself. R14629-31, 15487-8, 14709, 15605. At 3:00 a.m., Detective Meadie and Sergeant Fagan left the room to prepare a written statement for Rivera to sign. R14631-32, 15489. As they left, they asked Detective Held to keep an eye on Rivera, because they were concerned about his suicide threats. R14632-33, 15489-90. At this time, more than 14 hours had passed since the beginning of the questioning.

4. Rivera's Condition from 3:00 a.m. to 8:10 a.m.

Left alone, Rivera began hitting his head against the wall of the interrogation room. R15701. Detective Held and Sergeant Shipley tried to stop him and then summoned two other officers to help. R15702-04. When Rivera began to hit his head more vigorously, they forcibly restrained him. R15705, 15727-29. At this point, Rivera's muscles tensed up and he went into a fetal position on the floor. R15705-06, 15727. One officer held Rivera's head and another held his legs as they struggled to handcuff him. R15634-35. Sergeant Fagan was summoned and tried to calm Rivera (who was hyperventilating), by lying down on the floor with him. R15631, 15731-32. The officers then succeeded in handcuffing Rivera, at which time Rivera stopped hyperventilating enough to say he was asthmatic and needed his inhaler. R15493, 15707.

When the jailer arrived to take Rivera to be medicated, Rivera was "staring straight ahead" and non-responsive. R15736. He had a contusion on his forehead from hitting it against the wall. R15495, 15709. Rivera was put in the padded cell, or "rubber room," used for inmates on suicide watch. R15709.

At 4:00 a.m., Toi Coleman, a psychiatric nurse with a decade of experience, was called to the padded cell, where she observed Rivera pacing quickly back and forth and banging his head against the wall. R17263. When she tried to examine the hematoma on his head, Rivera was "tactile defensive" and would not let her draw near. R17267. She asked Rivera questions in English and Spanish to ascertain his sense of reality, but he did not answer coherently. R17265-66. Rather, as she described it, he "sounded like the people who talk in tongues." R17265. Nurse Coleman observed that Rivera was sweating, "his eyebrows were furled," his nostrils were flared, and his "eyes were really big and looking straight through me." R17266-67. She determined that Rivera was in an

acute psychotic state, and was "not in touch with the reality of what was going on around him." R17268.

Thirty minutes later, at 4:30 a.m., Nurse Coleman found Rivera bent over in a semi-fetal position in the corner of the rubber room. R17272-73. She observed a new injury to his scalp and saw a tuft of hair on the floor with pieces of skin and tissue from the scalp. R17274. As before, she was unable to approach Rivera or elicit responses from him. R17275-76. She checked on Rivera for a third and final time at about 6:45 a.m., and found he was still in a semi-fetal position, "crouched up in a ball." R17276-77. He was not asleep; his body was rigid and his muscles were tensed. R17278.

5. Continued Questioning from 8:10 a.m. to 9:00 a.m.

At 8:10 a.m., Detective Meadie and Sergeant Fagan entered the rubber room, where they found Rivera lying on the floor, handcuffed, with shackles on his legs. R14640-46, 15499-501, 14721, 15598. They reported Rivera looked like he had just awakened and seemed perfectly fine and coherent, telling them he had slept "off and on." R14646-47, 14725, 15501, 15507, 15649-50. Pursuant to Sergeant Fagan's directions, Rivera sat up on the floor with his back against the wall of the rubber room, and Sergeant Fagan sat next to him. R14648, 15502. Sergeant Fagan then read aloud the statement that he and Detective Meadie had drafted, and Rivera signed each page. R14648-50, 15503-06. The statement was a summary account of what Rivera had said—it was not verbatim. R14638-39, 15497. Detective Meadie took a picture of Rivera to document his physical condition when he signed the statement. (Detective Meadie would later explain that this picture had been lost.) R14790. See R12422-34, 12595-604, 12700-04.

6. The Meeting in the State's Attorney's Office

At 9:00 a.m., Sergeant Fagan and Detective Meadie proceeded directly from the rubber room to a meeting in the State's Attorney Office, at which copies of the statement Rivera signed were distributed. R14661-62, 15921. There was a consensus at the meeting that the statement was inconsistent with many facts of the crime and generally was not credible. R14661-62, 14767-75, 15509, 15922, 15987. The group recognized, for example, that the description of Holly Staker's clothing was completely wrong, that Holly Staker never put on a nightgown, and that the 2-year-old girl in the apartment was not in diapers. R14528, 14642, 15498, 16028. They completely rejected, moreover, the idea that Holly Staker was the sexual aggressor and that she brandished a knife. R15987-88. It was decided that two other members of the Task Force would re-interview Rivera to try and clear up these "inconsistencies." R14662, 15657-58, 15922.

Sergeant Fagan and Detective Meadie told the group that they were too exhausted to conduct any further interrogations. R14787-88, 15923, 15668. Sergeant Fagan asked Sergeant Michael Maley—who had been at the meeting—to take the next crack at interrogating Rivera, together with Sergeant Tessmann. R15923.[3]

7. Rivera's Condition in the Jail from 9:15 a.m. to 10:30 a.m.

During this meeting in the State's Attorney's Office, Rivera remained shackled in the rubber room. At about 9:30 a.m., he was observed rocking back and forth and hitting his head on the glass window. R17138-39, C5266. Sergeant Bruce Alter placed Rivera in

[3] There was conflicting testimony from the prosecution's witnesses about how much Sgt. Tessmann knew about Rivera's first statement and the inconsistencies. Sergeant Fagan reported that he gave Sergeant Tessmann a copy of Rivera's signed statement before Sergeant Tessmann began to interrogate Rivera, although he denied having briefed Sergeant Tessmann on the "inconsistencies" that needed to be addressed. R15533-36. Sergeant Tessmann denied having ever seen that statement beforehand and denied that he even knew Rivera had made a statement. R14810, 15015.

handcuffs and shackles to prevent him from further harming himself, but could elicit no response. C5267-68. Correctional Officer James Meal saw Rivera that morning in a "hogtied" position—on the floor with his legs pulled up and shackled behind his back, his hands cuffed behind him through the shackles. R17184.

The next medical professional who checked on Rivera was Nurse Pamela Enyeart, the supervisor of health services for the jail. R17295, 17298. She tried to speak with Rivera, who lay shackled and expressionless on the floor, but got no response. R17301. Nurse Enyeart contacted the jail's psychiatrist who prescribed Haldol, Cogentin, and Ativan, to be administered as needed. R17306-08. These drugs treat psychosis, anxiety, aggression and suicidal behaviors. R17309-10. When Nurse Enyeart checked on Rivera again at about 10:30 a.m., she saw no change. R17312-13. Because he was shackled and had no ability to injure himself at this point, the medications were not administered. R17316.

8. The Final Round of Interrogations from 10:30 a.m. to 2:30 p.m.

At approximately 10:30 a.m., Sergeant Fagan and Detective Meadie retrieved Rivera from the rubber room and brought him to an interrogation room for further questioning. R14663-64. It was now more than 21 hours since the questioning began. They reported that they noticed nothing irregular about his demeanor. R14782, 15513. Rivera read aloud the statement they had prepared and indicated that only one sentence on the second page "bothered him." R14668, 14789, 15514-15. The sentence stated that he had put his penis into "both her vagina and anus during intercourse," but Rivera wanted the word "both" omitted. R14669, 14790, 15515. After he crossed out that single word and initialized the change, Rivera made no further changes. R14670, 15516. Sergeant Fagan and Detective Meadie then told Rivera that "we still have some

inconsistencies" to be clarified and that there were two other investigators who wished to interview him. *Id.*

Sergeants Tessmann and Maley entered the room and have reported finding Rivera "comfortable" and "relaxed." R14811, 15929-30. He signed a rights waiver and the interrogation resumed. R14815-20. Sergeant Tessmann told Rivera that "there were a lot of questions concerning * * * facts in the previous statement that he believed were untrue and that he wanted to give Mr. Rivera an opportunity to tell the truth on some of those issues." R14822-23, 15932. Neither Sergeant Tessmann nor Sergeant Maley took any notes during this interrogation session, nor did they ask Rivera if he would be willing to have the session videotaped or audiotaped. R14840-42.

In narrative and in response to questions from the sergeants, Rivera changed a number of facts from his earlier statement—including many of the key facts that the participants in the meeting had considered problematic and wished to "clarify." R14824-25, 14955, 15085-6. Sergeant Tessmann testified he may have suggested answers to some questions, such as asking "She had a multi-colored shirt on, right, Juan?" R14956. Sergeant Maley reported that Sergeant Tessmann asked a lot of questions "about facts in the previous statement that he believed were untrue."[4] R15932. Sergeant Maley also remembered asking some pointed questions, including ones about whether Holly Staker really was wearing a nightgown. R15947-48. During the session, Rivera used a pen as a prop to demonstrate how he had held and broken the knife and what he had done with the mop he used on the back door. R14844-47, 15938-45.

[4] This testimony stood in contrast to Sergeant Tessmann's testimony that he had no idea that there had even been any earlier statement, much less what facts it contained.

The new statement indicated Rivera was walking past the house on Hickory Street when he saw Holly Staker, who invited him to come upstairs because she was lonely. She was wearing "black stretch pants with stirrups on the bottoms and a multi-colored shirt." They proceeded to have sex, but Rivera could not maintain an erection and became enraged when Holly Staker mocked his sexual performance. Rivera then went to the kitchen and grabbed a knife. When Holly Staker saw the knife, she grabbed it and a struggle ensued, during which she was cut many times. According to the statement, Rivera then had vaginal and anal sex with Holly but did not remember if he ejaculated in her, on her, or at all. After washing his hands and the knife, the statement continued, Rivera wanted to make it look like a break-in, so he broke the back door with a mop from the porch. He then ran home, dropping the knife on the way. After showering and burning his clothes in a dumpster, he returned to the scene and saw "the Mexican lady standing out in front and she was very upset." R15932-48, PX160. Rivera stated that he could not get any response from the Mexican lady when he approached her. R15946.

Sergeants Maley and Tessmann left to prepare a report at this point and Sergeant David Ostertag continued the questioning. R15859, 15950. Sergeant Ostertag asked Rivera if he would ever go out despite his electronic monitor, and Rivera said that he would sometimes "go out and play basketball with friends or just go around the neighborhood with friends and then come back in." R15861. Sergeant Ostertag also asked Rivera about a teardrop tattoo under his right eye, and Rivera told him that he had put the tattoo on himself while at Hill Correctional and that it "was for his dead grandmother, for

his dead twin brother, and for Holly Staker." R15862. In addition, Rivera stated that he had written some passages in his Bible about Holly Staker.[5] R15882.

At about 1:15 that afternoon, Sergeant Tessmann and Maley returned and had Rivera read aloud the statement they had prepared (which was not a verbatim report of Rivera's statement). R14852, 14935. According to the sergeants, Rivera made several changes, some stylistic and some spelling corrections. For example, the sergeants reported that Rivera corrected the spelling of the word "behind," which had been misspelled as "bhehind") and the word "off" (which had been misspelled as "offf"). PX160. R14884-85, 14888, 15964-65. (The sergeants later testified that they included some mistakes in the statement intentionally to show that Rivera reviewed it. R14859-88). Once Rivera signed the three-page statement, he was returned to the "rubber room" at the jail and shortly thereafter charged with the murder of Holly Staker. R14889-92, 15966-67.

III. The Earlier Trials, Appeals and New Trial Based on New DNA Results

On November 12, 1992, Rivera was indicted on four counts of first-degree murder. C36-39. He was convicted in a November 1993 jury trial, but the jury declined to impose a death sentence. C894-97, 964. On appeal, this Court reversed and remanded for a new trial based on four errors the Court identified. Rivera was retried in 1998 and, after four days of deliberation, the jury found him not guilty of intentional murder, but guilty of the other three murder counts (knowledge of great bodily harm, in the course of an aggravated criminal sexual assault with a weapon, and in the course of an aggravated

[5] It is undisputed that Rivera's grandmothers were both alive and that he did not have a twin brother. R17695, 17710. It is also undisputed that a search of Rivera's Bible found no such writing. R15882.

criminal sexual assault with a victim under age 13). C1603-06. This Court affirmed the conviction. *People v. Rivera*, No. 2-98-1662, Dec. 5, 2001.

In late 2004, the trial court granted Rivera's motion for DNA testing of the material from the vaginal swabs taken at the autopsy. In early 2005, Forensic Science Associates in California, tested the sperm from a swab stick (and the vial in which it had been held) and made a finding that is fully accepted by both the prosecution and defense: *Juan Rivera is excluded as the source of the DNA obtained from the swab and vial.* (The DNA results have been run in the federal and state databases, but no match has been found yet.) Based on these results, the trial court granted Rivera's Petition for Relief from Judgment Pursuant to 735 ILCS 5/2-1401 in August 2006. R11577.

IV. The Recent Trial

A. The Prosecution's Case

1. The Crime Scene & Rivera's Statements

The prosecution presented evidence about the crime scene and preliminary investigation that the Task Force conducted. This evidence has been set forth in detail above. See *supra* 2-4. The prosecution's case was built primarily on police testimony about the statements Rivera made, particularly on October 29 and 30, 1992. This evidence has been set forth in detail above. See *supra* 4-17.

2. Other Witnesses

The prosecution called two witnesses—Michael Jackson and Maurice Craig—who confirmed that there was no party at the Craig house. R14173, 14429. Mr. Jackson also testified about Rivera having asked Mr. Jackson to provide an alibi for him, and telling him he was being railroaded for a crime he did not commit. See *supra* 5.

Dawn Engelbrecht testified that someone had approached her as she stood with the crowd that had gathered on the street on August 17, and she had responded by throwing down her purse and exclaiming, "You can't raise your kids anywhere." R14485-86. Ms. Engelbrecht testified that she was unable to identify that person. R14489. She acknowledged she took part in a show-up prior to the initial trial at which she had identified Rivera, saying she recognized him from the bar at which she worked. R15376-79. But Ms. Engelbrecht testified (as she had at the earlier trials) that she was never sure of the identification and only identified Rivera because the police had shown her photos of him and told her Rivera had admitted being the person who approached her.[6] R14544-45. In contrast, Corporal Blazincic testified that Ms. Engelbrecht had made an unequivocal identification, without his making any suggestions. R15378-79.

Ms. Engelbrecht also testified that bloody streaks the police found adjacent to the front hallway stairs had not been there prior to the murder and there was no possibility that either of her children made those marks when they left the apartment. R14523, 14562-67. Ms. Engelbrecht also testified that nothing was missing from her apartment in the aftermath of the murder except for one item: a photograph of Ms. Engelbrecht that was kept on the mantle. R14525.

The prosecution also called Heather Staker, Holly's twin sister. In her testimony, which is discussed in detail below, the prosecution asked Heather Staker to describe an incident that took place when she and Holly Staker were eight years old and a friend's brothers molested them by forcing them to perform oral sex. R15405-06. Heather was

[6] The defense called Ms. Engelbrecht's sister, who confirmed she was there on October 5, 1992, when the police originally asked Ms. Engelbrecht to identify a photo of Rivera, and that Ms. Engelbrecht always expressed uncertainty that Rivera was the person who had approached her. R16529-31.

also asked to testify about an incident in which Holly and her sister once showed each other how they masturbated. R15406-07. The defense objected strenuously to this evidence, but the prosecution successfully secured its admission on the ground that "the fact that she is sexually active could explain away the DNA." R15349-71.

3. Jailhouse Informants

The prosecution presented three jailhouse informants who testified about statements they claimed that Rivera had made to them in the Lake County Jail.

Edward Martin, who had initially told the police that Rivera said he might know who killed Holly Staker, changed his story for trial, stating that Rivera also said he would walk Holly Staker to babysitting jobs on occasions. R14372. Martin claimed that Rivera said Holly Staker was "fine" and a "very hot young lady" who was a "little tease," a "little bitch" and who deserved all 27 stab wounds she received. *Ibid.* According to Martin, Rivera also said the police were so stupid they would never figure out that the person who did it was in jail and on his way to prison, a description that fit Rivera. R14372-73.[7] On cross-examination, Martin, who had been convicted of aggravated sexual assault of his stepdaughter, denied he had sought a reward for his information about Rivera.[8] R14376-79. The defense sought unsuccessfully to introduce voicemails in which Martin claimed that he had "special powers" and that he controlled the State's Attorney's office because they needed his testimony. R14390, 14392-417. The prosecution acknowledged to the court that it viewed Martin as a "whack job," and that

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[7] Detective Blazincic was recalled by the defense and testified that Martin never told him anything about these other comments. R16167-75.

[8] Martin's probation officer testified in the defense case that Martin told her he was entitled to a reward, and she spoke about the reward on Martin's behalf with Lake County detectives in June 1993. R16414-15. Martin also told her that he was meeting with an attorney to pursue the reward. R16416.

"the only evidence we brought before the jury is that he told the task force that Juan Rivera might have some information as a witness." R14398.

An edited transcript of the 1993 trial testimony of Frank McDonald, another jailhouse informant who had since died, was read to the jury. McDonald, who had been convicted twice of deceptive practices and several DUIs, was with Rivera in the Lake County Jail from November 1992 to February 1993. R9788, 9790. McDonald testified that Rivera asked him to read his discovery to find information on another suspect, Dion Markadonis. R9796. McDonald testified that, after reviewing the material, he told Rivera "you're in a lot of trouble. You killed Holly." R9799. According to McDonald, Rivera's head went down and he said, "Yeah, I did." *Id.* McDonald admitted that he had tried to sell Rivera's discovery materials to a reporter for the *Chicago Tribune*. R9809-12.

The final jailhouse informant, whose 1998 testimony was read to the jury, was David Crespo, who was facing his sixth felony charge at the time of his testimony. R9595. Crespo testified that when he and Rivera were in the Lake County Jail in May 1997, they attended Spanish Bible Study class together three or four times. R9597, 9601-04. (A jail official corroborated that jail records showed the two of them did attend the class. R15847-49.) On one occasion, according to Crespo, Rivera was sobbing as they returned from class and told Crespo, "I killed the little girl." R9607. An hour later, Crespo testified, Rivera told him not to repeat what he had told him or he "would send a kite" (get others in prison to hurt him). R9608. Crespo also claimed that Rivera once told him that electronic monitoring was a joke and that he would go to his backyard beyond the 50-foot radius. R9615. Crespo acknowledged that when he left the jail, Rivera's family took him in and that he came forward with his claim about Rivera only after the

Riveras threw him out for using drugs while living there. R9609-11, 9640. He admitted it was possible he might get a better deal in return for his testimony. R9639-40. There was evidence that Crespo had been found mentally unfit for trial without medications. R9649.

B. The Defense Case

The defense case had two central themes. First, the defense presented evidence to affirmatively prove that Rivera did not commit the crime. This evidence included testimony about (a) the DNA results showing Rivera was not the source of the semen found in the victim, (b) the Electronic Monitoring System Records showing Rivera did not leave his home on August 17, 1992, and (c) the lack of any physical evidence tying Rivera to the crime. Second, the defense presented evidence to prove the confessions were false. This evidence included testimony about (a) Rivera's condition at the time of the interrogations; (b) Rivera's mental health and its impact on his confessions (although this was limited by the judge, as discussed below); (c) inconsistencies between Rivera's statements and many established facts regarding the crime; and (d) the absence of any information in Rivera's statements that was not known to the police, and in many cases, the public (although the trial judge limited evidence on this point, as discussed below).

1. Evidence Affirmatively Excluding Rivera

a. DNA and Other Physical Evidence

Alan Keel, of Forensic Science Associates, testified that he conducted DNA testing on evidence from the rape kit taken at Holly Staker's autopsy (one of two vaginal swabs and the vial in which the swab had been stored).[9] R16752-78. He did a "differential extraction" to separate the sperm cells from epithelial cells (cells from the

[9] A series of witnesses testified to establish the chain of custody of the items that Mr. Keel tested, from the time of the autopsy until the time of the testing.

victim's vagina) and found that the epithelial cells all matched Holly Staker and the sperm was from a *single male profile*, which he labeled "unidentified male #1." R16778-79, 16810-41. He tested this profile against that of Juan Rivera and determined conclusively that *Juan Rivera is not the source of the sperm.* R16844-46.

William Frank, the senior DNA analyst for the Illinois State Police Laboratory, testified that, at the joint request of the prosecution and defense, the State Police Crime Lab conducted a quality control review of the results of Forensic Science Associates' testing. R17053-54. He agreed with the conclusion that the profile was that of a single source male DNA profile, and that "there was no indication that the sample was mixed with DNA from more than one male." R17064. Further, at the request of the State's Attorney's Office, the State Police Crime Lab conducted independent testing of evidence (the second swab stick and vial in which it had been stored) and found that *Rivera was absolutely excluded.* R17066-79, DX191. Mr. Frank agreed with Mr. Keel that there was no evidence that the evidence had been contaminated in any manner. R17065-66, 17085, 16489. See *infra* 35.

On cross-examination, the prosecution asked Mr. Frank whether he could rule out the possibility that the swab or vial were improperly handled in such a manner that created "a contact transfer with some other sperm from some other case." R17094. Mr. Frank explained that because the degradation levels of Holly Staker's epithelial cells and the sperm from "unidentified male #1" were similar, any conceivable contamination would have had to occur by the evidence coming into contact with someone else's sperm from another case early on. R17095. He reiterated, though, that DNA testing revealed a "single source profile," (not a combination of multiple profiles as is the case when

contamination occurs) and there was no evidence suggesting the epithelial cells and the sperm were not deposited at the same time. R17098-99.

The prosecution asked the testifying DNA experts whether some initial difficulties in performing the differential extraction, or the state of the tails on the sperm cells, suggested that the sperm may have been "old and degraded" by having been in the vagina for several days before the autopsy. R15259-60, 15273-74, 16935, 17008. None of the witnesses believed this was a likely scenario. Mr. Keel testified this was not a "possible explanation" in this case. R16935, 16948-49. He testified the exact opposite was true: the high ratio of sperm cells to epithelial cells indicated the sperm was deposited shortly before the victim died. R16775, 16809, 16835-36. The other experts said they could not rule out the theoretical possibility that the sperm had been deposited earlier but it was not a likely explanation. See R15274 (Testimony of Brian Wraxall) ("that's one possibility, but I think it's misleading"); R17008 (testimony of Doctor Elizabeth Benzinger) ("it's a possibility [but] I don't have any data in my head that really described that").

These experts also confirmed that semen in the vagina tends to drain onto the underpants during the normal course of activity. R15270, 16809-10, 16895-96, 16970. No semen was found on the underpants that Holly Staker wore that day. R16964.

In addition to the DNA evidence affirmatively excluding Rivera, the defense also presented testimony and highlighted for the jury the agreed stipulations that, although there were many fingerprints around the apartment, none matched Rivera's. R17803-09.

A defense expert agreed with the conclusion of the Northern Illinois Crime Lab that even the fingerprints near the blood by the sink excluded Rivera. R16365, 17804.[10]

b. Electronic Monitoring Records & Other Evidence Rivera Was At Home

Judy Kerby, the former Supervisor of the Lake County Pretrial Services Unit ("PTS"), testified that Rivera was placed on the home electronic monitoring system ("EMS") from July 31, 1992 to September 1992, while pending trial on the unrelated charge. R17572-81, 17616. Anytime he strayed more than 100-150 feet from the monitor box, the system would alert PTS. R17586. Although PTS was notified on several other dates that Rivera committed a violation by leaving his residence, that did not occur on August 17. R17605, 17608, 17613-14. Indeed, the system conducted its randomized checks three times that day and found the monitor working and Rivera within range. R17597-601. The prosecution asked Ms. Kerby a series of questions about the functioning of some EMS units other than Rivera's, to which the defense objected unsuccessfully on the ground that this Court had held squarely in its 1996 decision that any such evidence was inadmissible. R17628, 17684-89. See *infra* 82-91.

The 1993 trial testimony of David Sams, who had supervised Rivera on home monitoring, was read to the jury. Mr. Sams testified that when he checked on Rivera on August 19, 1992, his ankle bracelet had not been tampered with. Mr. Sams did decide to replace it, however, because it had been put on a bit too loose. C5335-44. In its rebuttal case, the prosecution called Anthony Edwards, a neighbor of Rivera's who testified that he saw Rivera leave his house several times with his ankle bracelet on. R17938-39. Mr. Edwards also noticed that Rivera's ankle bracelet was a little looser than others he

[10] In the prosecution's rebuttal case, the 1993 testimony of Investigator Donald Verbeke was read to the jury. Investigator Verbeke had concluded that the fingerprints near the kitchen sink had insufficient detail to be suitable for comparison. C5376-78.

had seen, but he never saw Rivera without the ankle bracelet during the period in which Rivera was under home monitoring. R17940, 17942.

The defense also presented the testimony of Rivera's father and mother who testified that Rivera was home on August 17, testimony corroborated by a telephone bill (DX189) showing a 20-minute phone call to Puerto Rico at 7:17 p.m. Mr. Rivera, Sr., explained that his wife and daughter were in Puerto Rico tending to a sick relative and that he and his son took part in the conversation. R17706. The 1998 testimony of Rivera's mother was read to the jury; she confirmed that Rivera and his father called her in Puerto Rico that evening. R5429, 5433-34.

2. Defense Evidence Relating to the Confessions

a. Rivera's Condition During the Interrogations and Confessions

Five Lake County Jail employees testified about Rivera's condition during the night and morning of the confessions. These witnesses related the information described above (see *supra* 10-14) about Rivera's acute psychotic breakdown.

b. Rivera's Mental Health and Capacity and Its Impact on the Confessions

Dr. Robert Galatzer-Levy, a clinical and forensic psychologist, testified that Rivera suffered from a major depressive disorder (among other mental illnesses), as evidenced by, among other things, prior suicide attempts. R17395, 17405-07. Rivera's depression was being treated with Mellaril, a psychotropic medication, but he had not been given his medication since he had arrived at the Lake County Jail in September 1992. R17407-08. Dr. Galatzer-Levy explained that the withdrawal of the drug leads to intensification of depression and processing difficulties. R17408. He also described Rivera's intellectual deficits, as evidenced by an IQ score of 79, his third-grade reading level, and his having been placed in various special education programs during his school

years. R17395-405. Dr. Galatzer-Levy explained that Rivera had experienced an acute psychotic episode that began during the interrogations on the night of October 29. R17410, 17414-23. Although Dr. Galatzer-Levy was allowed to testify about some general manifestations of acute psychosis, the trial court barred the defense from asking Dr. Galatzer-Levy how these conditions would have affected Rivera's susceptibility to pressure and suggestion, *e.g.,* his agreeing to say and sign anything the police wanted to hear in order to end the interrogation. The defense also sought to call psychologist Dr. Saul Kassin, a leading expert on how specific interrogation techniques and conditions influence suspects' confessions, particularly on vulnerable suspects with mental illnesses and intellectual deficits. The trial judge barred this testimony. See *infra* 46-64.

c. Inconsistencies Between Confession and Facts of the Crime

During the prosecution's case-in-chief, the defense established through cross-examinations that the police knew many of the facts in Rivera's confession to Sergeant Fagan and Detective Meadie were false. For example, the police knew Rivera was wrong about Holly Staker's clothing, about Holly Staker having changed into a nightgown, about the little girl being in diapers, about the little boy having been in the apartment when the perpetrator was there, and about never having done any damage to the back door. See *supra* 9, 12-15. During the 9:00 a.m. meeting at the State's Attorney's Office, the group recognized that these factual errors needed to be corrected and thus Sergeants Tessmann and Maley were sent in to conduct further interrogation in order to "clarify inconsistencies." The confession they ultimately secured contained strikingly different accounts of what Holly Staker was wearing, about the state of the apartment, and about the back door. It also omitted several facts from the initial statement, such as the little girl having been in diapers. See *supra* 13, 15-17.

The defense presented evidence that even the "clarified" confession still contained several inaccuracies. Specifically, the second confession still maintained that the little boy was in the apartment and that Dawn Engelbrecht was a Mexican Lady. The confession, moreover, said nothing about Holly Staker having been strangled, as the coroner had found. In addition, the account of how the back door was damaged was inconsistent with the physical evidence. Kenneth Moses, who ran the San Francisco Police Department's Crime Scene Investigation Unit for 15 years, testified that, in addition to the damage caused by the mop, there was a straight clean-edged cut on the door that must have been made by a sharp item such as a knife or box cutter. R16303-04.

Mr. Moses also testified that the blood marks in the front hallway were made by contact with a wound of some kind. R16322-26. See also R16259 (describing blood near stairs). This contradicted Rivera's confession that he left through the back door because such a departure would not account for the blood marks on the front staircase. The defense also recalled Sergeant John Yegicic, who testified that after Rivera's confessions he went to the dumpster in which Rivera had claimed to have burned his clothes, but there was no evidence that there had ever been any fire in the dumpster. R16148-51.

d. The Absence of Any Information in Rivera's Statements Not Known to the Police

The prosecution's primary claim throughout the case was that one key fact—the use of the blue mop to damage the back door—demonstrated Rivera's true guilt because neither of the two interrogators who elicited that fact from him—Sergeants Tessmann or Maley—knew anything about the mop. Indeed, Sergeant Tessmann had testified that after the confession he went and watched a videotape of the crime scene and said, "Oh my god, there's the mop." R15065. The defense called a series of witnesses to establish that

members of the Task Force, of which Sergeant Tessmann was a team leader, had considered the blue mop a very important part of the case since it was determined, three days after the crime, that it had been used on the back door. R16164-65; R16237-48 (testimony of Deputy Foster). Commander Gary Del Re, who had led the Task Force, testified that information developed by evidence technicians was discussed with the rest of the Task Force at daily meetings. R17341-48. Thus, the defense contended, even were one to credit the sergeants' claims that they did not know about the blue mop until Rivera mentioned it, Rivera obviously could have heard this information from one of many other Task Force members who interrogated him over the course of four days.

The defense also sought to present evidence, in the form of local newspapers, showing that virtually all of the facts contained in Rivera's confessions were public knowledge, having been published widely between the time of the murder and the confessions.[11] R17755-70. The trial judge barred all evidence showing that facts of the crime had been widely disseminated in the media. R17767-68. See *infra* at 91-98.

V. Deliberations, Verdict, and Sentencing

After deliberating for four days, the jury returned a verdict finding Rivera not guilty of first-degree murder based on knowledge that his acts created a strong probability of death or great bodily harm, but finding him guilty of two other counts of first-degree murder based on the underlying sexual assault charges. R18301. On June 25, 2009, the trial court denied Rivera's Motion for Entry of Judgment Notwithstanding the Verdict or For a New Trial, and sentenced him to life imprisonment without possibility of parole. C6208-10. This appeal follows.

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[11] Rivera's father testified that he had read about the murder and that he and Rivera had chatted about what he read. R17711-12, 17730.

SUMMARY OF THE ARGUMENT

It is natural for a court reviewing this case to question how, after three separate convictions, the question of Juan Rivera's guilt remains so intensely contested. We set out in our Argument to answer that question. Although Rivera had been convicted twice before, those two trials predated the most significant development in the history of the case: the DNA results conclusively proving that it was not Rivera's sperm in Holly Staker. Rivera's DNA exclusion renders the earlier convictions meaningless, making this a case about one trial and one jury. As we will demonstrate, that jury made a profound mistake and convicted Rivera despite the existence of, at the very least, a reasonable doubt of his guilt. This Court is charged with the role of correcting such mistakes and ensuring that the concept of reasonable doubt, although not susceptible to precise definition, is nonetheless given real meaning. See *infra* 32-45.

The short answer for how a jury came to convict Rivera is that the jury was given a partial and distorted picture of the case. Not only was the jury precluded from hearing the defense's most vital evidence, but it also was allowed to hear about several matters that were irrelevant, inadmissible, and greatly prejudicial to its ability to render a just verdict. This Brief addresses five of those trial errors, any one of which requires reversal of the conviction.

Despite scores of cases in which DNA and other indisputable exculpatory evidence have proven people sometimes confess to crimes they did not commit, it remains very difficult for most of us to imagine how that could ever occur. The defense had an answer which turned on informing the jury through highly qualified experts about the particular ways that Rivera's mental illness and intellectual limitations, in conjunction with the long and intense interrogations, precipitated a mental breakdown in which he

was apt to say anything, even to falsely confess, to end what seemed torturous to him. The trial judge was mistaken to bar this evidence. See *infra* 46-64.

The defense was also prepared to present vital evidence supporting its position that the confessions Rivera signed contained only facts that the police already knew, and that, in many instances, had been widely disseminated publicly. This evidence would have rebutted the prosecution's theme that the guilty knowledge revealed in the statements demanded that the jury convict Rivera, despite the excluding DNA, the nature of the interrogations and Rivera's condition at the time he signed the statements. Yet, the trial court barred the defense from presenting four specific pieces of relevant evidence on this essential point. See *infra* 91-98.

The defense also was barred from asking a question that would have let the jury know that, contrary to the clear message it was getting from testimony relating to Rivera's polygraph examination, the polygraph in fact yielded no results on whether he was being deceptive in denying killing Holly Staker. It is no wonder that a jury left with the false impression that Rivera failed the polygraph on that ultimate question would have convicted him. The defense was entitled to ensure the jury knew there were no such results (as it was allowed to do at the 1998 trial). See *infra* at 74-82.

Although the jury was not allowed to hear this vital testimony, it was allowed to hear improper prosecution evidence in two distinct areas. First, in violation of the Illinois Rape Shield Statute and the general rules of evidence, the trial court allowed the prosecution to present improper evidence to suggest that 11-year-old Holly Staker was the kind of girl who might have had consensual sex with some unidentified man within 72 hours of her being raped and murdered (thus explaining the presence of sperm that

was not Rivera's). The prosecution's "proof" of this contention was that Holly Staker had once been molested as an eight-year-old and had masturbated at some point. The judge's rulings on this issue misapplied Illinois law to Rivera's great detriment. See *infra* 65-74.

Finally, despite this Court's explicit 1996 ruling on the issue, the trial court allowed the prosecution to present evidence that some other electronic monitoring units used by other individuals had malfunctioned. This evidence was irrelevant not only because it involved units other than Rivera's, but also because it involved malfunctions unrelated to the prosecution's theory that the records might have mistakenly shown Rivera to have been at home at the time. See *infra* 82-91.

A jury is only as good as the information it is allowed to hear. It is understandable, given the errors that occurred, that the jury's view of the case was skewed, leading it to convict Rivera despite what was, as a matter of law, reasonable doubt. This Court has no such limitation and should reverse Rivera's conviction outright on the grounds that the evidence was insufficient to overcome reasonable doubt, as properly applied. If the Court declines to take that action, it should grant Rivera a new and fair trial so that, once and for all, there can be confidence that justice has been done.

ARGUMENT

I. THE EVIDENCE IS INSUFFICIENT TO PROVE GUILT BEYOND A REASONABLE DOUBT.

Although a rare occurrence, "a properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 317 (1979). On such occasions, it is the solemn duty of the reviewing court to reverse the conviction. As much as our judicial system ordinarily defers to juries, "the application of the beyond-a-reasonable-doubt

standard to the evidence is not irretrievably committed to jury discretion." *Id.* at 317 n.10. As the Illinois Supreme Court has declared, "the jury's determination is not conclusive. Rather, we will reverse a conviction where the evidence is so unreasonable, improbable or unsatisfactory as to justify a reasonable doubt of defendant's guilt." *People v. Smith*, 185 Ill. 2d 532, 542 (1999) (reversing murder conviction).

Some judges may never confront such a case, but extraordinary cases do arise in which judges are called upon to declare that faithful adherence to the requirement that guilt be proved *beyond a reasonable doubt* demands acquittal.[12] This is such a case because: (1) undisputed DNA testing excludes the defendant as the source of the sperm on the vaginal swab taken at the 11-year-old rape/murder victim's autopsy; (2) the prosecution's response to this evidence is to offer unproven and speculative scenarios "so *unreasonable*, *improbable* or *unsatisfactory*" as to compel reasonable doubt of defendant's guilt; and (3) the allegedly inculpatory evidence is so wanting that no reasonable trier of fact could conclude that it trumps the force of the DNA evidence and other evidence excluding Rivera.

A. The DNA Evidence

The prosecution concedes that the tested sperm on the vaginal swabs (and accompanying vials and slides) from Holly Staker's autopsy does not belong to Juan Rivera. C4638. The importance of this fact—first discovered in 2005—cannot be

[12] Illinois courts have not shied away from reversing convictions in the past where the evidence required it. *See, e.g.*, *People v. Schott*, 145 Ill. 2d 188 (1991) (aggravated indecent liberties with a child); *People v. Natal*, 368 Ill. App. 3d 262 (1st Dist. 2006) (burglary); *People v. Hampton*, 358 Ill. App. 3d 1029 (2nd Dist. 2005) (gun possession); *People v. Brown*, 303 Ill. App. 3d 949 (1st Dist. 1999) (murder); *People v. Williams*, 244 Ill. App. 3d 669 (1st Dist. 1993) (threatening a public official); *People v. Jakes*, 207 Ill. App. 3d 762 (1st Dist. 1990) (aggravated battery); *People v. Pecina*, 132 Ill. App. 3d 948 (3rd Dist. 1985) (felony murder); *People v. White*, 56 Ill. App. 3d 757 (2nd Dist. 1978) (armed robbery); *People v. Villalobos*, 53 Ill. App. 3d 234 (1st Dist. 1977) (murder).

overstated. DNA is the strongest forensic evidence science has ever yielded. See UNITED STATES DEPARTMENT OF JUSTICE, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL (1996). It is a powerful tool in the search for truth, whether that aids the prosecution or defense. As one court has written, "DNA testing—with its capacity to 'exonerat[e] defendants (or those wrongly convicted) *to a practical certainty*,' and to identify the guilty—promises to render, in some cases, both sides of Blackstone's maxim [that it is 'better that ten guilty persons escape, than one innocent suffer'] obsolete." *McKithen v. Brown*, 481 F.3d 89, 92 n.3 (2d Cir. 2007) (emphasis added) (citations omitted). In sponsoring the bill creating a right to post-conviction DNA testing, Senator Edward Petka stated, "We believe that trials and the criminal process is a search for the truth and that DNA evidence permit[s] the truth to come free." *Illinois Senate Transcript*, 92d Gen. Assemb., 71st Legis. Day 15 (Feb. 22, 2002). This hope has been borne out as prosecutors across the country have used DNA both to secure convictions and dismiss cases when appropriate—including many predicated on confessions—when DNA excludes a defendant. See Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. LAW REV. 891 (2004).

The DNA results here are powerful evidence of Rivera's factual innocence. They do far more than create mere "reasonable doubt" about Rivera's guilt. The question, then, is whether the prosecution presented sufficient evidence—as opposed to guesswork, conjecture, and innuendo—to establish beyond a reasonable doubt that Rivera was guilty despite the existence of compelling exculpatory DNA evidence. It did not. Indeed, in order to reconcile its case with the DNA evidence, the State depended on those very

"unreasonable, improbable or unsatisfactory" assertions that are the antithesis of proof beyond a reasonable doubt.

To counter the DNA exclusion, the prosecution posited two (mutually exclusive) theories—a "contamination" theory and an "earlier sex partner" theory—to argue that the sperm on the rape kit evidence taken from the 11-year-old victim's vagina was unrelated to her murder and rape. There was absolutely no evidence to support either of these hypotheses, which were indispensable to the prosecution's case.

First, the scientific evidence makes clear that the "contamination" theory is a red herring. Dr. Jones generated the swabs at the August 18 autopsy, and, *on the following day*, Mr. Wilson of the Northern Illinois Crime Laboratory examined the swabs and *found sperm*. R15768, 15818, 16457-59. When Forensic Science Associates ("FSA") and the Illinois State Police Crime Laboratory ("State Police") conducted the conclusive DNA testing years later, each found a *single unknown male source profile* (in addition to Holly Staker's DNA profile). R16827, 16881, 17064, 17073. There is no doubt, therefore, that the tested sperm excluding Rivera was the same sperm that Mr. Wilson had examined the day after the murder: Had there been any contamination after Mr. Wilson's examination, FSA and the State Police would have discovered *two* male DNA profiles—one from the sperm Wilson observed and one from any sperm that subsequently had contaminated the sample. Thus, the prosecution's contamination theory could only be supported by the following claims: (a) the autopsy vaginal swab failed to recover sperm; and (b) another individual's sperm came into contact with the swab within a day of the autopsy.

To say that this theory is "unreasonable, improbable or unsatisfactory" gives it far too much credit. DNA's remarkable utility as a forensic tool would be nullified if biological evidence could always, by *ipse dixit*, be rendered irrelevant by an unsubstantiated claim that it was contaminated. This would establish a dangerous precedent threatening both prosecutors' and defendants' use of DNA to expose the truth. The contamination theory is entitled to no weight whatsoever. See *State v. Hammond*, 604 A.2d 793, 803 (Conn. 1992) (reviewing evidence and concluding that "the state's theory of post[-]assault contamination is untenable").

The second theory advanced by the prosecution (which is inconsistent with the first) is that the tested sperm was, in fact, taken from Holly Staker's vagina at the autopsy, but it had been deposited prior to the murder by someone with whom 11-year-old Holly Staker was having willing sex—not by the person who violently raped and murdered her. Once again, there is absolutely no evidence to support this wild and offensive speculation. No witness claimed this 11-year-old was sexually active. Thus, the State made a desperate effort to bolster its reckless claim by informing the jury that she had once been *molested* as an 8-year-old girl and that she may have masturbated at least once in her life.[13] R15405-07. But that "evidence" does not even come close to establishing that this child ever had intercourse with a man (other than the murderer), much less that she had sex with someone other than the rapist/murderer within a short time before her murder. No DNA exclusion in a rape would ever be possible were

[13] That evidence was patently inadmissible for reasons we describe below. See *infra* 65-74. For purposes of the sufficiency-of-the-evidence argument, though, we will treat the evidence as if it had been properly admitted.

prosecutors able to dismiss it with unsupported conjecture that the victim had casual sex with an unidentified person other than the attacker.

In this case, moreover, the physical evidence further rebuts the "earlier sex partner" theory. The experts at trial agreed that, by virtue of gravity, semen remaining in the vagina after intercourse drains onto underwear during the course of daily activity. R15270, 16809-10, 16895-96, 16970. Thus, if the tested sperm was from an earlier sexual encounter, there most likely would have been sperm on the underpants the victim was wearing. It is undisputed that those underpants, which she had been wearing since that morning, tested negative for semen. R16964. Thus, the prosecution's case against Rivera depended not only (a) on the entirely unsupported allegation that 11-year-old Holly Staker was having sex but also (b) that this was an unusual instance in which her unidentified partner's semen was still left inside her vagina but had not drained at all onto the underpants she had been wearing that entire day. "[L]ike so much else in this case, [this] is conjecture camouflaged as evidence." *Piaskowski v. Bett*, 256 F.3d 687, 693 (7th Cir. 2001) (granting habeas relief in a murder case on the grounds of insufficient evidence).

As the Illinois Supreme Court held in *Smith*, it is not enough for the prosecution to merely advance unsupported theories about how its evidence can be reconciled with the facts of the case—it must present *evidence*. In *Smith*, the Court reversed a murder conviction[14] that was based on the account of an eyewitness who testified she was outside a bar when she saw the victim leave the bar alone, saw the defendant follow, and then saw the defendant shoot the victim. The testimony was inconsistent with other evidence

[14] The defendant in *Smith* had been convicted of murder in an earlier trial as well, which had been reversed based on trial error. See *People v. Smith*, 141 Ill. 2d 40 (1990).

that the victim had walked out of the bar with others several minutes after the defendant walked out. With regard to this latter point, the Court held, "Although the State attempted at trial to reconcile these conflicting accounts by suggesting that defendant could have waited in a vestibule between the two doors leading from the bar to the street, *it presented no direct evidence of this.*" *Smith*, 185 Ill. 2d at 543 (emphasis added). In the absence of such evidence, the Court found the State's suggested inference unreasonable, and held that, despite deference to the trier of fact, the evidence was insufficient.

B. The Role of the Confessions in the Analysis

Despite a great amount of physical evidence at the crime scene—including fingerprints, hair, and semen—no physical evidence implicated Rivera. See *supra* 21-24. No eyewitness put him anywhere but home that day, and the EMS records confirmed that. The case against Rivera rested, then, exclusively on statements attributed to him.

In contrast to DNA, often labeled the "gold standard" of evidence, the law has long been concerned about overreliance on confessions in determining guilt. Even before the advent of DNA testing, the Supreme Court wrote, "We have learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses, than a system which depends on extrinsic evidence independently secured through skillful investigation." *Escobedo v. Illinois*, 378 U.S. 478, 488-89 (1964).

The concern about confessions is based, in large part, on the longstanding recognition that people sometimes confess to crimes they did not commit. For example, the *corpus delicti* rule, which demands the introduction of some evidence other than a defendant's confession to sustain a conviction, is premised on the recognition that just because a defendant says "I did it," does not mean he actually did. As the Illinois

Supreme Court has explained, the *corpus delicti* rule "recognizes that the reliability of a confession 'may be suspect if it is extracted from one who is under the pressure of a police investigation—whose words may reflect the strain and confusion attending his predicament rather than a clear reflection of his past.'" *People v. Willingham*, 89 Ill. 2d 352, 359 (1982) (quoting *Smith v. United States*, 348 U.S. 147, 153 (1954)). In addition, the rule recognizes the risk that some people will falsely confess for "various psychological reasons." *People v. Furby,* 138 Ill. 2d 434, 447 (1990) (quotation omitted).

The significant number of cases in which DNA evidence has exonerated people who previously had confessed has confirmed that although a confession is evidence of guilt, it is just one piece of evidence that must be considered in light of all the other evidence in the case. See generally Brandon Garrett, *The Substance of False Confessions*, 62 STAN. LAW REV. 1051 (2010) (analyzing 42 cases in which a defendant was exonerated by DNA after having confessed to the crime).[15]

As a consequence, any jury evaluating confession evidence has two very distinct functions to perform. First, it must determine whether the defendant in fact confessed. This is often a classic credibility question about which a jury is given very significant deference. Second, if a jury decides that a defendant did confess, it must decide what inferences to draw from that fact. The jury must decide whether the particular confession—in light of all the circumstances surrounding it and the other evidence in the case—should be regarded as a confession that actually reflects guilt or whether it should be regarded as a false confession. This latter decision is not a credibility determination;

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[15] Of course, DNA evidence is only available in a small minority of cases, and there are many other non-DNA cases in which defendants have been exonerated despite having confessed. See ROBERT WARDEN AND STEVEN A. DRIZIN, TRUE STORIES OF FALSE CONFESSIONS (2009).

the police who interrogated a suspect can tell the jury what they said and what the defendant said, but they are not omniscient and thus cannot determine whether it is a truthful or a false confession. Rather, the jury's determination about whether a confession reflects actual guilt requires it to make inferences from various facts that are in evidence. Such inferences command deference when they are reasonable, but it is a reviewing court's responsibility to reverse any conviction in which a finding of proof beyond a reasonable doubt necessarily depends on unreasonable inferences in light of the record. See *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004).

In light of the DNA evidence (as well as other exculpatory evidence, including the EMS evidence), it was unreasonable for the jury to conclude that statements attributed to Rivera establish proof beyond a reasonable doubt. This Court need not decide whether any confession could be sufficiently powerful to overcome the reasonable doubt generated by a DNA exclusion. All the Court need recognize is that *the confessions in this case* are far too weak to justify an inference that they (rather than DNA) reflect truth beyond a reasonable doubt. It is one thing to say that the confessions were sufficient to sustain convictions in 1992 or 1998, before the DNA results; it is quite another to say that a reasonable jury could credit the confessions over exclusionary DNA evidence.

Moreover, Rivera's confessions contain a great many documented indicia of untrustworthiness. See C3656-78 (Report of Dr. Kassin). As discussed above (see *supra* 6-17), they were extracted from a teenager suffering from mental disorders and cognitive limitations during the course of extraordinarily lengthy and intense interrogations. The final stages of the interrogations spanned over 26 hours, during which time at least ten separate investigators questioned Rivera. About half-way through the ordeal, Rivera

experienced an acute psychotic breakdown (indeed, one of the interrogators had to get down on the floor of the rubber room in order to obtain his signature on a statement). R14648, 15502.[16] Surely, nothing about the *process* attendant these interrogations inspires trust that the ensuing confession must have been accurate.

Examining the *content* of the confessions further intensifies the grave doubts about their reliability. The first confession contained a significant number of stark factual errors that belie a conclusion that Rivera was recounting events he actually observed. See *supra* 12-13. Some of these errors were corrected in the second confession, after (as acknowledged by the investigators), two interrogators were tasked with securing corrections to the first confession. Some corrections were secured by asking leading questions on points they knew to be inaccurate. R14956, 15932. Even the second statement, though, remains inaccurate with regard to several core details, which the true perpetrator would certainly know. For instance, it is undisputed that the 5-year-old boy was never inside the crime scene with the perpetrator. R14641. Additionally, although the second statement describes the nature of the assault in detail, there is no mention of choking or strangling, even though the Medical Examiner determined that Holly Staker had been strangled. R15794. Of further note, within the second statement Rivera continued to describe Dawn Engelbrecht as a "Mexican lady"—an obviously erroneous description of this woman of German descent. R13994. Nor is there any mention of the cut that was made with a sharp object (*i.e.*, not the mop) on the back door. These

[16] Although, in keeping with practice, the police took a picture of Rivera toward the end of the interrogation, the picture has gone missing from the file without explanation. R12422-34, 12595-604, 12700-04, 14790-92.

persistent factual errors further belie any claim that the confessions are sufficiently compelling to trump the DNA exclusion.

One can imagine a case where concerns about the nature of the interrogations, the psychological condition of the suspect, and factual errors in a confession are reasonably overcome because the confession is inherently self-corroborating in particularly powerful ways. See *People v. Nelson*, 235 Ill. 2d 386, 432 (2009) (defendant disclosed facts that the "detectives could not have suggested" to him because the autopsy had not yet been performed and the police had been unable to enter parts of the crime scene). In contrast, none of Rivera's statements is of that sort. Indeed, each time the police attempted to verify information shared by Rivera that was previously unknown to members of the Task Force, the information proved to be either false or unverifiable. For example, Rivera's account of burning his clothes in the dumpster behind his house was a new fact, and, had it proven true, would have been powerfully corroborative of his confession. But when the police sought to verify it, they found no evidence that anything had ever been burned in the dumpster. R16148-51. In addition, Rivera claimed he had written about Holly Staker in his jailhouse Bible—information to which the police could not previously have had access. Yet, when the police searched his Bible, they determined it contained no such writing. R15882. Along these same lines, Rivera's account of having walked around Waukegan from about noon on August 17 until he saw Holly Staker in the evening was new information unknown to the police. Yet, despite the intense efforts to corroborate Rivera's account, the police were unable to locate even one witness who saw him that day (except for his father who testified Rivera was at home (R17706)). Thus, in sharp

contrast to a self-corroborating confession, this was a self-refuting confession—every effort to corroborate a piece of new information further weakened the confession's force.

This case bears similarity, in this regard, to *People v. Lindsey*, 73 Ill. App. 3d 436 (1st Dist. 1979), in which the defendant had, after initially denying involvement in the crime, given a lengthy and detailed confession. Many of these details, however, were "conclusively refuted" by the facts. *Id.* at 443. Thus, with due regard for the "sanctity of the jury verdict," the appellate court reversed the conviction without remand, holding that, where many confession details were wrong and others simply "parroted the initial reports" to which the defendant had been privy, the evidence in the case was "so improbable or unsatisfactory as to raise a serious doubt of defendant's guilt." *Id.* at 447.

Faced with all this evidence casting doubt on the reliability of Rivera's confession, the prosecution contended that Rivera knew two facts that overcame all doubts generated by the conditions and content of the confessions. First, the prosecution argued that Rivera's statement to investigators that he had walked up to the "Mexican" lady outside her house was the first indication that anyone had approached Ms. Engelbrecht. Assuming, *arguendo*, that Rivera was actually the original source of this information,[17] it was hardly some "secret fact" that only the killer could know. By all accounts, a significant crowd, including many of Rivera's friends, gathered on Hickory Street that evening, and easily would have observed someone approach Dawn

[17] Because courts assess sufficiency-of-the-evidence claims by viewing the evidence in the light most favorable to the prosecution, none of Rivera's arguments depend on the court concluding that any prosecution witnesses were not credible. Nonetheless, it bears noting that the statement Rivera signed on October 2 makes no mention of his approaching Dawn Engelbrecht, even though the investigator later included that "fact" in his report. R13994. According to the investigator, he forgot to include this fact in the statement he prepared for Rivera to sign. R14003.

Engelbrecht in plain view in the middle of the street. R16681-82, 16697. So Rivera's knowledge proves only that the public was speaking about that evening's events; this knowledge is consistent with the defense position that Rivera strung together publicly available information to concoct a story placing him somewhere he had not been. Indeed, had Rivera actually been there, he would not have described Dawn Engelbrecht as a "Mexican lady," and he would have known that she had thrown her bag on the ground, something he never mentioned.[18] Also, had Rivera actually been there, surely one of the scores of people in the crowd would have seen him and have so informed the authorities.

The second piece of "secret" information upon which the prosecution relied is that Rivera's ultimate statement contained information indicating that the blue mop was used to damage the back door. PX160. But, again, this information was not secret. Even if one accepts the claim that neither of the sergeants who conducted the final phase of the interrogation knew anything about the blue mop—the Task Force's major investigative finding—there is no doubt that other members of the Task Force—many of whom had extensive contact with Rivera during the marathon interrogation sessions—knew about it. R14279, 14671-72, 14775, 15529, 15942-43, 16163-64, 16238-40, 16247-48. So, far from a truly secret fact as in *Nelson*—where the suspect's exclusive knowledge of a fact is proof positive of guilt—the information about the blue mop was widely known among the Task Force members who questioned Rivera extensively.

None of this is to say that, in the absence of the DNA exclusion, a court would find the confession so wanting as to require reversal of the conviction. But as we have

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[18] Ultimately, though, even if one were to assume, *arguendo*, that Rivera approached Ms. Engelbrecht, or personally saw someone else approach her, that would not corroborate his confession or inculpate him. There is no reason to believe that the person who approached Ms. Engelbrecht was connected to the crime.

explained above, this is no longer an ordinary confession case. Instead, the question here is whether the confession is so overpowering that it was reasonable for a jury to reject the solid DNA evidence because it is certain that the confession was accurate, and thus all other evidence, including the DNA, must be reconciled to it. It was not.

C. The In-Custody Informants

The jailhouse informants' testimonies do not add to the reasonableness of crediting Rivera's statements despite the DNA. The State cannot immunize its case from sufficiency review by calling a jailhouse informant or two, and then arguing a reviewing court must assume the jury credited the informants' testimony. See *Cunningham*, 212 Ill. 2d at 280 ("[T]he fact finder's decision to accept testimony is entitled to great deference but it is not conclusive and does not bind the reviewing court.").

The prosecution itself characterized Edward Martin as a "whack job" who was unworthy of belief. R14398. The testimony of the other informants, each of whom had an obvious motive to fabricate testimony, contained *no* indicia of trustworthiness—no details, no secrets, and nothing beyond the most cursory of admissions. See *supra* 19-21. Absent such indicia of trustworthiness, it is unreasonable to credit their testimony. This is not an instance where a credibility determination is entitled to significant deference on the ground that the jury saw the witnesses and assessed their demeanor. See generally *Best v. Best*, 223 Ill. 2d 342, 352 (2006) (deference is afforded to the trier of fact "because it is in the best position to observe the conduct of the * * * witnesses"). Neither McDonald nor Crespo testified at this trial; instead, their prior testimony was read. R14283, 15413. In any event, even were one to assume, *arguendo*, that these witnesses are reliable, it would only mean that Rivera, a teenager with documented mental illness, uttered the words, "I did it." No reasonable jury could credit such words over the DNA

exclusion to the degree required to erase the reasonable doubt that permeates this prosecution. See generally *Willingham*, 89 Ill. 2d at 359. [19]

II. RIVERA'S CONSTITUTIONAL RIGHT TO PRESENT A MEANINGFUL DEFENSE WAS VIOLATED WHEN HE WAS BARRED FROM PRESENTING EXPERT TESTIMONY CRITICAL TO THE JURY'S ASSESSMENT OF THE RELIABILITY OF HIS CONFESSION.

In describing a defendant's fundamental constitutional right to introduce evidence supporting his claim that he confessed falsely, the Supreme Court has explained that "stripped of the power to describe to the jury the circumstances that prompted his confession, the defendant is effectively disabled from answering the one question every rational juror needs answered: If the defendant is innocent, why did he previously admit his guilt?" *Crane v. Kentucky*, 476 U.S. 683, 689 (1986). Rivera was prepared to answer this question with testimony of two experts: First, he sought to have a psychiatrist explain that an individual with Rivera's particular psychiatric disorders would be apt to react to the pressure he was experiencing by saying anything that would put an end to the interrogation. Second, he sought to have a social psychologist testify that the incidence of false confessions increases when an individual with Rivera's specific cognitive deficiencies and emotional disorders is subjected to particular interrogation techniques. The trial court barred testimony related to either of these subjects. These rulings crippled the defense, and violated Rivera's constitutional rights and rights under Illinois law.

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[19] In the event the Court declines to reverse the convictions for insufficiency of the evidence, we ask that it accept all of the arguments advanced here as establishing that the evidence in this case was "closely balanced" and that none of the errors we identify in the remaining portions of this brief can be dismissed as harmless. Of course, in looking at the evidence for purposes of harmless error inquiry, the court does not consider the evidence in the light most favorable to the prosecution, but instead makes a reasonable assessment about the nature of the State's case. See *People v. Pizzi*, 94 Ill. App. 3d 415, 421-22 (1st Dist. 1981) (examining witness credibility to determine whether evidence was close).

A. The Barred Evidence

1. Dr. Galatzer-Levy's Testimony Concerning Rivera's Psychiatric State During the Interrogation

During a pre-trial offer of proof, Dr. Galatzer-Levy, an eminently qualified clinical and forensic psychiatrist, testified that a person with Rivera's particular psychiatric disorders would be apt to react to high stress environments, such as prolonged interrogations, by responding in any manner—including falsely confessing—that would put an end to the questioning. According to Dr. Galatzer-Levy,

> [I]n the situation of Mr. Rivera *the only thing he could probably think of as this interrogation progressed is how do I get this to stop, how do I get out of this?* The question of what will be the consequences in terms of my life * * * would simply not be part of his awareness. R12385 (emphasis added).

This testimony was identical to what the jury heard at the 1998 trial when, without objection, psychologist Dr. Larry Heinrich testified that a person with Rivera's psychological disorders was likely to have "decompensated" during the interrogation, so "his response would be I have to get out of here, I'll do anything, I'll say anything, it doesn't make any difference what it is because I need to – I need to get out of this stress which has been going on."[20] R10871-72. Dr. Heinrich testified that Rivera would have believed that "his only alternative to avoid further questioning was to either make up or agree with everything that had been said and they wanted him to say." R10873.

Despite the fact that the jury at the 1998 trial was allowed to hear this very evidence, prior to the most recent trial the judge barred all testimony relating to Rivera's psychological state during the interrogations. See R12395 ("whoever you want to bring in, * * * it's the subject matter that's troubling the Court"); see also R12393. During the

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[20] Dr. Heinrich passed away in 2007. Thus the defense retained Dr. Galatzer-Levy to testify on the subject matters that Dr. Heinrich had covered in the 1998 trial.

trial itself, the prosecution successfully urged the judge—over defense counsel's repeated objections—to preclude any testimony about Rivera's "mental state at the time he gave a statement," or that "go over into suggestibility." R17384, 17391. Thus, although Dr. Galatzer-Levy was allowed to identify and define Rivera's various psychiatric diagnoses (R17395-414), he was not permitted to explain how these conditions were apt to have affected Rivera during the interrogation. For example, the judge struck Dr. Galatzer-Levy's testimony concerning "Mr. Rivera's mental state * * * at the time when he signed the various statements," and his testimony that Rivera's acute psychotic state during the interrogation indicated "he was unable to understand things clearly." R17376, 17410. In addition, the jury was prevented from hearing Dr. Galatzer-Levy's opinion that Rivera's psychiatric disorders would have rendered him incapable of understanding the confession statement. R12387. After the judge sustained the prosecution's repeated objections to any questions about Rivera's mental state during the interrogations (see, *e.g.*, R17374, 17376, 17377), defense counsel told the judge she would limit her questions in accordance with the judge's rulings. R17391 ("we understand your ruling"). The judge acknowledged that the defense was making a standing objection to the limitations he was imposing. *Ibid.*

2. Dr. Kassin's Testimony Regarding the Impact of Specific Interrogation Techniques on Individuals with Particular Mental Disorders

The defense also sought to call Dr. Saul Kassin, a renowned social psychologist, to testify about the documented impact particular conditions of interrogation have on subjects who are psychologically and cognitively impaired, and thus apt to be unusually compliant and suggestible. In a pre-trial offer of proof, Dr. Kassin explained:

> People who are cognitively impaired, mentally retarded, borderline mentally retarded are more acquiescent and more compliant, which means, for example,

> they are more likely to say yes even to sometimes absurd questions. They are more suggestible when asked leading and misleading questions and that these tendencies lead people sometimes in other contexts to confess to things they did not do. R12320-21.

Dr. Kassin was also prepared to describe a robust body of scientific data identifying various relevant interrogation circumstances—*e.g.*, prolonged interrogation, sleep deprivation, multiple interrogators—that have been shown to correlate strongly with false confessions, particularly among cognitively and psychologically impaired suspects like Rivera. See *infra* 61-64; C4012-21. Prior to trial, however, the court barred Dr. Kassin from testifying about these subjects. R12534-36, 12891-93.

B. The Trial Court Erred in Precluding Drs. Galatzer-Levy and Kassin from Testifying on These Matters.

1. The Law of the Case

The trial court barred the expert testimony at issue because it believed the "law of the case" so required. C4088-89. In truth, the law of the case mandated admission of Dr. Galatzer-Levy's testimony, and was silent with regard to Dr. Kassin's testimony.

Prior to the 1998 trial, defense counsel sought funding to hire Dr. Richard Ofshe to opine on "whether the [interrogation] techniques used in this case were coercive" and "the phenomenon which would result in a false confession." C1142. Dr. Ofshe was not going to testify regarding Rivera's psychiatric disorders or cognitive deficiencies, or their interplay with the conditions of the interrogation. The trial court refused to provide funding, reasoning that Dr. Ofshe's *general* assessment of the existence of coercion and his ultimate opinion on the confession's reliability were inadmissible because (1) they would "invad[e] the province of the jury" and were "within the common province of any trier of fact," and (2) they did not satisfy the *Frye* standard. R7433, C1181.

Thus, the second trial proceeded without testimony from Dr. Ofshe. By contrast, Dr. Heinrich testified—without objection—to the ways in which Rivera's particular psychiatric and cognitive condition were apt to have affected him during the interrogation. This included the fact that Rivera decompensated and was likely to say anything to the police that would relieve the pressure of the interrogations. R10871-72.

On appeal, one of the State's primary points in defending the exclusion of Dr. Ofshe was that Dr. Heinrich had testified about Rivera's mental state during the interrogations. See State's Br. in *People v. Rivera*, No. 2-98-1662 at 10 ("[T]he defendant was able to present specific testimony from [Dr. Heinrich] who * * * stated explicitly that the defendant would 'make up or agree with everything that had been said and they wanted him to say.'"); see also *id.* at 17 ("Dr. Heinrich's testimony, which could establish exactly what had occurred to the defendant psychologically, was far more effective [than Dr. Ofshe's would have been] in attempting to show that the defendant confessed only because of the intensity of the questioning.").

In 2001, this Court—adopting the State's reasoning—affirmed the exclusion of Dr. Ofshe's testimony, noting that "[t]he jury was allowed to hear Dr. Heinrich, who opined that defendant was decompensated at the time of his confession and would have said anything to conclude the situation with which he was faced." *Id.* at 15. Regarding the more general topics that Dr. Ofshe would have covered, the Court wrote, "that people in stressful situations sometimes falsely confess is not a concept beyond the understanding of ordinary citizens and is well within the comprehension of the trier of fact." *Ibid.*[21]

[21] This Court did not address in 2001 whether Dr. Ofshe's field of inquiry had attained general acceptance in the scientific community pursuant to *Frye*. *Id.* at 14.

Thus, the 1998 trial and the 2001 appeal established the following: first, Rivera *was* entitled to present expert testimony that his psychiatric disorders were apt to have led him to say anything during the interrogation that would relieve the pressure. Accordingly, *the law of the case affirmatively compelled the admission of Dr. Galatzer-Levy's testimony* at the most recent trial. Second, the 2001 appeal established that the trial court had not abused its discretion in concluding that Dr. Ofshe's testimony concerning general coercion and the ultimate reliability of Rivera's particular confession was inadmissible. This latter determination, for reasons we will explain, neither compelled nor barred the admission of Dr. Kassin's testimony at the most recent trial.

Generally, a trial court's decision to exclude expert testimony is reviewed for abuse of discretion. *People v. Eyler*, 133 Ill. 2d 173, 211-12 (1989). In this case, however, the trial court considered itself bound by the "law of the case" and thus exercised no independent discretion. Accordingly, this Court should review the trial court's decision *de novo*. See *In re Christopher K.*, 217 Ill. 2d 348, 363-64 (2005) (application of the "law of the case" doctrine is a legal issue reviewed *de novo).* Under either standard of review, though, the exclusion of this vital testimony constitutes reversible error. Expert testimony is to be admitted when (1) the proffered expert's experience and "qualifications display knowledge that is not common to laypersons;" and (b) "the testimony will aid the trier of fact in reaching its conclusion." *People v. Cardamone*, 381 Ill. App. 3d 462, 500 (2nd Dist. 2008). The barred testimony of the two experts here satisfied each of these elements and should have been admitted.

2. *Rivera Was Entitled to Present Testimony from Dr. Galatzer-Levy Explaining How His Psychiatric and Psychological Disorders Were Apt to Have Affected Statements He Made in the Course of the Interrogations.*

a. Knowledge and Qualifications Uncommon to Lay Persons

Dr. Galatzer-Levy, a clinical and forensic psychiatrist, qualifies as an expert. During the course of his 40-year career, he has taught at leading universities, served as President of the Chicago Psychoanalytical Association, published in the field, and testified widely. The trial court recognized that he was "clearly" qualified to testify as an expert (R12397), and he was accepted as an expert without objection. R17373.

b. The Barred Testimony Would Have Aided the Trier of Fact.

The defense sought to have Dr. Galatzer-Levy inform the jury about scientific knowledge that provided the foundation for a core defense claim: that Rivera's particular combination of psychiatric and psychological conditions led him to say *anything*—even to confess falsely—to relieve the pressures of interrogation. Without such expert testimony, Rivera was at the mercy of whatever non-scientific, potentially mistaken, intuitions the jurors may have possessed concerning particular mental health disorders. The point of expert testimony is to ensure that juries are exposed to actual knowledge in a field, and not left to rely on uniformed speculation. As the Supreme Court has noted, "psychiatrists ideally assist lay jurors, who generally have no training in psychiatric matters, to make a sensible and educated determination about the mental condition of the defendant." *Ake v. Oklahoma,* 470 U.S. 68, 80-81 (1985).

Dr. Galatzer-Levy's testimony on this point was especially critical because the defense claim is quite counterintuitive. The jurors knew Rivera had suffered a psychiatric breakdown, as reflected by his banging his head against the wall, pulling out parts of his scalp, and withdrawing into a non-responsive fetal position. See *supra* 10-12, 13-14. And

the jury knew that Rivera was in "acute psychosis," which can manifest in a lack of "capacity to think in an orderly way in a sequential fashion, to reason even on a very elementary level." R17412, 17417. The vital point to the defense, however, was that "acute psychosis" not only leads to bizarre and random behaviors, but also that it can lead someone to become suggestible, compliant, and cooperative in a calculated attempt to stop the external pressure.[22] Without expert testimony on this point, a juror might well *assume* just the opposite. A juror might *assume* that a person in the condition Rivera was in would be incapable of figuring out that he could put a stop to the interrogation by saying whatever the police wanted to hear. The juror certainly would never have *understood* that it is precisely a person with Rivera's deficiencies who "would have said anything to conclude the situation with which he was faced." 2001 Op. at 15. *Cf. People v. Nelson*, 203 Ill. App. 3d 1038, 1042 (5th Dist. 1990) ("[T]he behavior exhibited by sexually abused children is often contrary to what most adults would expect.").

Clearly, then, Dr. Galatzer-Levy's testimony would have "aided the trier of fact in reaching its conclusion." It was not enough for him to identify Rivera's conditions in general terms; it was essential that he describe how they would have affected Rivera during the interrogation—which Dr. Galatzer-Levy was not permitted to do. As the Supreme Court has recognized, psychiatric testimony can be "crucial to the defendant's

[22] Were this a claim about physical torture, anyone would understand that a suspect might say anything to stop the pain. In the absence of expert testimony, however, it would not be obvious that a person in Rivera's condition could experience the interrogation as psychological torture and thus be willing to say anything to stop the pain.

ability to marshal his defense" by offering "opinions about how the defendant's mental condition might have affected his behavior at the time in question." *Ake,* 470 U.S. at 80.[23]

Even courts that have upheld the exclusion of expert testimony on the general subject of false confessions have recognized that a different rule applies when a suspect's particular mental health conditions are implicated. For example, in *People v. Bennett*, 376 Ill. App. 3d 554 (1st Dist. 2007), the court upheld the exclusion of an expert on suggestibility, but observed that a different result might follow had the defendant been "diagnosed with a personality disorder." *Id.* at 573; see also *People v. Wood*, 341 Ill. App. 3d 599, 609 (1st Dist. 2003) (affirming exclusion of expert testimony because this was not a suspect "diagnosed with a personality syndrome").

These courts acknowledged the force of *United States v. Hall,* 93 F.3d 1337 (7th Cir. 1996), which held a defendant is entitled to present expert testimony supporting his claim that a mental disorder made him particularly susceptible to falsely confessing. The court in *Hall* explained that although jurors might have capacity to understand *general* concepts of suggestibility, "the very fact that a layperson will not always be aware of [a] disorder, its symptoms, or its consequences, means that expert testimony may be particularly important when the facts suggest a person is suffering from a psychological disorder." *Id.* at 1343. See also *United States v. Shay*, 57 F.3d 126, 133 (1st Cir. 1995) ("whether or not the jury had the capacity to *generally* assess the reliability of [the confession] * * * it plainly was unqualified to determine without [expert] assistance the

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[23] Courts recognize this principle every day. For example, psychiatrists testifying in relation to a "guilty but mentally ill" defense do far more than simply name a diagnosis or explain generally how a mental disease works. Rather, they describe in detail how the particular mental illness affected behavior in ways that are relevant to a jury's assessment of the defendant's capacity to appreciate the criminality of his acts. See, *e.g., People v. Urdiales*, 225 Ill. 2d 354, 378-79 (2007) (describing such testimony).

particular issue of whether [defendant] may have made false statements against his own interests because he suffered from a mental disorder") (emphasis in original).

c. Dr. Galatzer-Levy's Testimony Reflects Accepted Scientific Principles.

In Illinois, specialized "scientific evidence is admissible at trial only if the methodology or scientific principle upon which the opinion is based is 'sufficiently established to have gained general acceptance in the particular field in which it belongs.'" *In re Commitment of Simons*, 213 Ill. 2d 523, 529-30 (2004) (quoting *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923)). The law is clear that "general acceptance does not mean universal acceptance, and it does not require that the methodology in question be accepted by unanimity, consensus, or even a majority of experts. Instead, it is sufficient that the underlying method used to generate an expert's opinion is reasonably relied upon by experts in the relevant field." *Id.* at 530 (quotation omitted). The law is also clear that a *Frye* inquiry is appropriate only if the scientific principle, technique, or test is "new" or "novel." Generally, this means that the test or technique is "original or striking or does not resemble something formerly known or used." *Ibid.*

There was nothing novel about the nature of Dr. Galatzer-Levy's proffered testimony. He was barred from describing how universally accepted psychiatric and psychological conditions, such as Mental Retardation, Severe Depression, and Acute Psychosis, affect reasoning and behavior in various settings, including interrogations. These conditions are catalogued in the Diagnostic and Statistical Manual of Mental Disorders and in countless articles published by the most widely-respected, peer-

reviewed journals.[24] C4051-53. No question was raised, or reasonably can be raised, about the generally accepted scientific basis of Dr. Galatzer-Levy's discipline and testimony.

3. Rivera Was Entitled to Present Testimony from Dr. Kassin Concerning Specific Psychological Attributes and Interrogation Techniques that Can Increase the Risk of False Confessions.

Rivera was also entitled to have Dr. Saul Kassin, a world renowned social psychologist, educate the jury on the state of scientific knowledge regarding: (a) specific psychological attributes that make some individuals more susceptible to confess falsely; and (b) the psychological effects of particular interrogation techniques that have been shown, through extensive social science research, to increase the likelihood of triggering false confessions (particularly among the most susceptible groups). Some Illinois appellate courts—including this Court—have not in the past demanded that trial courts admit *general* testimony regarding false confessions. Rivera does not question those precedents, but none involved the sort of testimony Dr. Kassin was prepared to provide. By contrast, several recent decisions strongly support admission of his testimony. Applying the accepted test for admissibility of expert testimony (see *supra* 61-64), an established expert in this field can certainly provide vital information to assist the jury.

a. Knowledge and Qualifications Uncommon to Lay Persons

Dr. Kassin is a nationally acclaimed expert in psychology. He holds two prestigious faculty appointments at leading institutions, has authored more than two dozen articles in the field, has served as President of the American Psychology-Law Society, and has testified frequently about interrogations. R12304-07. The trial court

[24] See, *e.g.*, William H. Anderson, et al., *Rapid Treatment of Acute Psychosis*, 133 AM. J. PSYCHIATRY 1076 (1976); Philippa A. Garety et. al, *Reasoning, Emotions, and Delusional Conviction in Psychosis*, 114 J. ABNORMAL PSYCHOLOGY 373 (2005).

acknowledged his general qualifications as an expert (R12397), and there is no question that he possesses "knowledge and qualifications uncommon to laypersons."

b. The Barred Testimony Would Have Aided the Trier of Fact.

The Illinois courts' general skepticism toward false-confession experts is based on the belief that the information these experts would present—that false confessions can occur—is within the common knowledge of jurors. See 2001 Op. at 15. This conclusion may remain accurate with regard to a witness who simply informs jurors that some individuals falsely confess. And courts are rightly unwilling to allow an expert to declare a particular confession to be false, as that would invade the province of the jury. But Dr. Kassin would not have spoken in general terms regarding false confessions, nor would he have offered an ultimate conclusion as to whether Rivera's confession was reliable.[25] Rather, Dr. Kassin would have presented scientific evidence of *very specific circumstances* (*i.e.*, certain psychological profiles of suspects and interrogation techniques used by the police) that are correlated with false confessions.

It is inconceivable that the average juror would be aware—absent expert testimony—that specific tactics and psychological conditions (documented in scientific studies and scholarly articles) are correlated with a heightened incidence of false confessions.[26] For example, the average juror would not have any knowledge of the following extensively-documented findings that Dr. Kassin was prepared to present:

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[25] The defense was clear that Dr. Kassin would not express any view on the ultimate question of whether the confession was reliable; he would simply provide important information that would aid the jury in making that assessment. See, *e.g.*, C3922 ("it is not our intention to have Dr. Kassin offer his opinion about the reliability, truth or falsity of Mr. Rivera's statements"); C5124-25 (same).

[26] In considering this issue, it is imperative that courts, which are exposed to these issues regularly, not impute *their* degree of knowledge to *lay jurors*. When medical issues are involved, for example, courts appreciate the need for expert testimony. To the lay

- Suspects who have low IQs—like Rivera—"exhibit a high need for approval, particularly in relation to authority figures" and are disproportionately represented among the data set of documented false confessions (C3661, R12320-21);

- Suspects who have psychological disorders—like Rivera—confess falsely at a rate far higher than the general population (C3662, R12322);

- Interrogations lasting more than 6 hours—as did Rivera's—are disproportionally likely to elicit false confessions (C3665, R12325);

- Interrogations conducted by multiple interrogators—as were Rivera's—are disproportionally prone to elicit false confessions (C3665, R12325-26);

- One of the particular ways in which sleep deprivation—to which Rivera was subjected—affects judgment is to "heighten[] susceptibility to influence and to leading questions" in the context of interrogations (C3665, R12329-30);

- Informing a subject that he has failed a polygraph—as was Rivera—is correlated with an increased risk of false confession (C3667-68, R12331-33); and

- Circumstances under which a suspect first provides an obviously inaccurate confession and is then interrogated further to secure a more accurate account—as was Rivera—present a heightened risk that the ultimate confession is false (C3673, R12338-40).

Perhaps some jurors might have a vague sense about some of these factors (although research suggests otherwise), and *perhaps* some of these jurors' intuitions might be accurate, but the balance of Rivera's life must not turn on that fortuity. See *Hall*, 93 F.3d at 1345 ("Properly conducted social science research often shows that commonly held beliefs are in error."). Even were one to assume jurors know that *some interrogation*

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juror, though, the impact of particular interrogation techniques on suspects with specific psychological deficiency is as foreign as the operation of the pituitary gland. Indeed, several recent studies have determined that average citizens lack any refined awareness of factors that impact the risk of false confessions. See, *e.g.*, Danielle F. Chojnacki, et al., *An Empirical Basis for the Admission of Expert Testimony on False Confessions*, 40 ARIZ. ST. L. J. 1 (2008); Mark Costanzo, et al., *Juror Beliefs About Police Interrogations, False Confessions, and Expert Testimony,* 7 J. OF EMPIRICAL LEGAL STUD. 231 (2010).

techniques and psychological conditions increase the likelihood of false confessions, that knowledge does not obviate the need for expert testimony to help them assess whether the *particular interrogation techniques and psychological conditions* at issue have been shown to increase the incidence of false confessions.[27]

This Court has recently recognized as much in *People v. Cardamone*, 381 Ill. App. 3d 462 (2nd Dist. 2008), which is controlling here. In *Cardamone*, the trial court had barred the defense from presenting expert psychological testimony about factors that decrease the reliability of sexual abuse claims. The excluded experts in *Cardamone* had been prepared to describe particular factors that rendered the complainants' statements less reliable, including the impact of suggestive questioning, the extent to which inconsistency can be indicative of false accusations, and the impact of "improper interview techniques." *Id.* at 501. This Court held the psychologists' evidence should have been admitted as relevant to the jury's determination of "whether the investigative techniques and the circumstances surrounding the allegations" rendered them unreliable. *Id.* at 507. In words that apply fully here, the court explained:

> We do not agree that all areas of the experts' proposed testimony either are within the common knowledge of an average juror or could have been addressed through cross-examination. It is highly doubtful that psychological concepts such as reconstructive retrieval, infantile amnesia, mass suggestion, and even forensic interviewing techniques for child victims of sexual abuse are within common knowledge. * * * In our opinion, cross-examination was not a substitute for the experts' testimony, because it merely elicited facts without helping the jury understand how those facts impacted the reliability of memory and, therefore, the complainants' statements. * * * The testimony here was relevant to whether the

[27] A simple example illustrates the point. A jury in a tort case might have generalized knowledge that *exposure to some kinds of chemicals* has been shown to increase the likelihood of cancer, but that would not obviate the need for expert testimony so the jury could assess whether the *particular chemicals* to which a particular plaintiff was exposed have been shown to increase the incidence of cancer. The same is true here.

> investigative techniques and the circumstances surrounding the allegations created distorted memories or misconceptions.

Id. at 506-07. Accordingly, the court ordered a new trial.[28]

There is no basis to distinguish the exclusion of Dr. Kassin from the exclusion of the experts in *Cardamone.* In both instances, expert psychological testimony was sought to provide knowledge critical to jurors tasked with determining whether the reliability of critical statements "could have been impacted by the circumstances surrounding [the] statements and the forensic interviewing techniques." *Id.* at 507.

Of course, the principles reflected in Cardamone do not aid the defense alone. For example, in *People v. Butler*, 377 Ill. App. 3d 1050 (4th Dist. 2007), two teenagers alleging sexual abuse had delayed in reporting the offenses and had then made their accusations in piecemeal fashion. The defendant argued that this indicated falsehood, but the prosecution called an expert psychologist who testified, based on "clinical experience and research," that teenagers reporting abuse often delay in their reporting and then do so in a gradual manner. The Appellate Court held that the prosecution was entitled to call the experts because their testimony "aided the trier of fact, while leaving that trier of fact to determine the issue of credibility." *Id.* at 1065.

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[28] The *Cardamone* Court explained that some Illinois decisions have been misinterpreted as adopting *per se* rules against admission of expert witnesses in similar contexts. For example, the Court explained that in *People v. Enis*, 139 Ill. 2d 264 (1990), the eyewitness identification expert was excluded because none of the misconceptions the expert was prepared to describe were relevant to the eyewitnesses in the case. See *Cardamone,* 381 Ill. App. 3d at 504. Consistent with *Cardamone*, the court in *People v. Allen*, 376 Ill. App. 3d 511, 526 (1st Dist. 2007), reversed the trial court's exclusion of expert testimony on eyewitness identification, and instructed the trial court to conduct a meaningful inquiry into whether the testimony was relevant. The *Allen* court explained that expert testimony is valuable because it "dispels myths [and] attacks commonsense misconceptions about eyewitness identification." *Id.* at 525. (quotation omitted).

As these cases make clear, the propriety of admitting expert testimony turns on the particulars of testimony as they relate to issues specific to the case—not on broad rules of inadmissibility (which was the approach adopted by the trial court below). Thus, recognizing Rivera's right to call Dr. Kassin is consistent with cases that have barred other experts under different circumstances. For example, in *People v. Gilliam*, 172 Ill. 2d 484 (1996), the defendant claimed he had falsely confessed to a murder because the police threatened otherwise to arrest his sister and girlfriend and to place their children in foster care. The Supreme Court affirmed the exclusion, holding that there was nothing "difficult to explain" about the desire to protect a family, and thus an expert lacked insight "beyond the common knowledge of ordinary citizens." *Id.* at 513. Similarly, in *People v. Slago*, 58 Ill. App. 3d 1009, 1016 (2nd Dist. 1978), the defendant claimed he confessed falsely because he had been threatened with retaliation if he implicated the true killers. This Court held that an "expert opinion that [a] hypothetical defendant could have confessed falsely out of fear of the alleged real murderers does not present a concept beyond the understanding of the average person." Ibid.

Those cases do not govern the specialized testimony that Dr. Kassin had to offer. As in *Cardamone* and *Allen*, the information Dr. Kassin was prepared to convey was entirely distinct from the kind of ordinary-motivation evidence excluded in *Gilliam* and *Slago* (or, with respect to Dr. Ofshe, in Rivera's earlier trial).

c. Dr. Kassin's Testimony Reflected Generally Accepted Scientific Principles.

Having predicated its decision to exclude Dr. Kassin on its belief that jurors would not benefit from an expert in this area, the trial court found no need for a *Frye* inquiry "because it's not necessarily the witness. It's the subject matter that's troubling

the Court." R12395. Although the trial court erred in its resolution of the ultimate issue, it was correct that there was no need for a *Frye* inquiry.

As mentioned above (*supra* 55), a *Frye* inquiry is appropriate only if the scientific principle, technique, or test is "new" or "novel." *Simons*, 213 Ill. 2d at 530. Nothing about Dr. Kassin's work fits this definition. Dr. Kassin and the scores of others who labor and publish in this area apply conventional social psychology methodologies to the subjects of interrogations and confessions. They analyze case studies, conduct empirical analysis, use survey methodologies, and derive information from controlled experiments. C3656-3749. These methodologies are by no means "new" or "novel." Nor do they depend upon a "test or technique [that] is original or striking."[29]

Dr. Kassin and the many others who study interrogations and confessions utilize the same general methodology and are part of the same discipline as the psychologists in other cases who have been deemed qualified. See, *e.g., Cardamone*, 381 Ill. App. 3d at 500 (witness "conducted extensive research on false memories and proper techniques for interviewing children who allege sexual abuse"); *Allen*, 376 Ill. App. 3d at 524-25 (expert on eyewitness accuracy); *Butler,* 377 Ill. App. 3d at 1065 (expert on teenager's accusations of abuse). In none of those cases did the courts suggest that a *Frye* inquiry

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[29] The distinction between using *novel methodologies* versus using accepted methodologies to examine *novel subjects* is essential in applying *Frye*, as the following example illustrates. In the seventeenth century, magnification through a microscope was a new and novel technique, and had *Frye* been in place, a court would have needed to conduct a *Frye* inquiry on whether the use of a microscope had become generally accepted in the scientific community. That does not mean, of course, that a *Frye* inquiry is now required each time a microscope is used to examine some new object. The microscope's *method* of inquiry remains constant, even as the subject it magnifies varies. See generally *Nelson*, 203 Ill. App. 3d at 1044 n.1 (noting that testimony regarding seemingly novel scientific research "obtained through the application of traditional research methods is not applying new scientific techniques").

was necessary because in each case long-accepted *methodologies* of inquiry simply were being applied to new *subjects* of inquiry.

In the event that the Court decides a *Frye* inquiry into the application of these approaches to the study of interrogations and confessions is appropriate, the evidence shows this area of inquiry is widely accepted within the field. In applying the *Frye* standard, courts are only to focus on the general acceptance of the methods the expert uses, not on whether the court itself finds these methods "reliable," or even on whether there is widespread professional acceptance of the conclusions the expert has reached. *See Petre v. Kucich*, 331 Ill. App. 3d 935, 945 (1st Dist. 2002) (quoting *Donaldson*, 199 Ill. 2d at 77) ("[G]eneral acceptance does not concern the [expert's] ultimate conclusion. Rather, the proper focus of the general acceptance test is on the underlying methodology used to generate the conclusion. If the underlying method used to generate an expert's opinion [is] reasonably relied upon by the experts in the field, the fact finder may consider the opinion—despite the novelty of the conclusion rendered by the expert.").

As the extensive materials the defense submitted in the trial court demonstrate, and as confirmed by the body of scholarly literature, the methods and principles that Dr. Kassin uses in his study of interrogations and confessions are unquestionably accepted in the relevant scientific community. This work—which indicates, *inter alia*, that the mentally retarded, depressed, and psychologically disordered are prone to confess falsely, and that various specific interrogation techniques are associated with an increased risk of eliciting false confessions—has been widely published by prominent academic

presses and peer-reviewed journals and has been included in standard psychological text books.[30]

Significantly, the leading professional organization in psychology—the American Psychological Association ("APA")—has recognized the degree to which the methodology employed by Dr. Kassin and others in their study of interrogations and confessions is accepted within the field of social psychology:

> Over the years, psychologists, other social scientists, and legal scholars have examined the causes, characteristics, and consequences of false confessions. This empirical literature is broadly grounded in three types of research: (1) individual and aggregated case studies of wrongful convictions involving known innocent suspects who had confessed; (2) basic research on core principles of human behavior established across a range of non-forensic domains of psychology; and (3) laboratory and field experiments, naturalistic observation studies, and self-report surveys that specifically focus on the processes of interviewing, interrogation, and the elicitation of confessions. Collectively, this literature provides a strong empirical foundation concerning the phenomenon of false confessions.

C4228-30 (Brief filed by the APA in *Wright v. Pennsylvania*, No. 21 EAP 2008 (Pa. Supreme Ct. 2008)). For purposes of *Frye* it is also notable that the United States

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[30] The materials submitted below include hundreds of references to literature wherein methodologies identical to those utilized by Dr. Kassin are employed. See C3674-78, 4182-88. For general reference works on the subject, see RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE (Harvard University Press 2008) (listing hundreds of published works on the topic); GISLI H. GUDJONNSON, THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS: A HANDBOOK (Wiley Press 1993) (citing nearly 800 articles in areas relating to interrogations and confessions). In 2004, the American Psychological Society published a work, co-authored by Dr. Kassin, titled *The Psychology of Confessions: A Review of the Literature & Issues*, 5 PSYCHOLOGICAL SCIENCE IN THE PUBLIC INTEREST 35 (Nov. 2004) (submitted below at C3830), which also includes an extensive list of literature in this area. Most recently, the peer-reviewed journal, *Law and Human Behavior*, has published an article that surveys some of the work that has been done in this field. Saul Kassin, et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3 (2010).

Supreme Court has relied on the very body of work Dr. Kassin sought to present.[31] See generally *Ruffin v. Boler*, 384 Ill. App. 3d 7, 24 (1st Dist. 2008).

4. The Exclusion of Expert Testimony Violated Rivera's Constitutional Right to Present a Meaningful Defense.

The trial court's severe limitations on Rivera's defense not only violated Illinois law, they violated Rivera's constitutional right to challenge the reliability of his confession as clearly established by the Supreme Court of the United States. An entire case "may stand or fall" on the jury's assessment of a confession. *Crane*, 476 U.S. at 689. This is particularly so where there is "no physical evidence to link [defendant] to the crime." *Id.* at 691. Accordingly, a defendant is entitled to present "competent, reliable" evidence challenging the reliability of his own incriminating statements. *Id.* at 690. The trial court's rulings deprived Rivera of this fundamental right. See also *Ake*, 470 U.S. 79-82 (recognizing essential role of expert in presenting a defense).

III. RIVERA IS ENTITLED TO A NEW TRIAL BECAUSE OF THE IMPROPER ADMISSION OF EVIDENCE PURPORTING TO EXPLAIN THE DNA EVIDENCE BY CLAIMING THAT HOLLY STAKER WAS THE KIND OF GIRL WHO WOULD HAVE WILLINGLY HAD SEXUAL INTERCOURSE WITH SOMEONE OTHER THAN THE ATTACKER WITHIN 72 HOURS OF HER MURDER.

The 2005 DNA results proved that Juan Rivera was not the source of the sperm tested on the swab recovered from Holly Staker's vagina during the autopsy. R16844-46, 17064, 17066-79. This is compelling evidence that Rivera was not the person who raped

[31] See, *e.g.*, *Corley v. United States*, 129 S. Ct. 1558, 1570 (2009) (citing, as but one example, S. Drizin & R. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 906-907 (2004), for the proposition that there exists "mounting *empirical evidence* that [interrogation] pressures can induce a frighteningly high percentage of people to confess to crimes they never committed") (emphasis added); *Atkins v. Virginia*, 536 U.S. 304, 320-21 & n.25 (2002) (citing C. Everington & S. Fulero, *Competence to Confess: Measuring Understanding and Suggestibility of Defendants with Mental Retardation*, 37 MENTAL RETARDATION 212, 213, (1999), for the proposition that mentally retarded suspects are particularly prone to confess falsely).

and murdered Holly Staker. Instead of acknowledging this and dropping the case, though, the prosecution scrambled to concoct some theory to explain how Rivera could conceivably be guilty despite the DNA. The primary road it chose was to argue that 11-year-old Holly Staker must have been sexually active and that the sperm found in her had nothing to do with the rape and murder, but was connected to some willing sexual intercourse she must have had with some unidentified man sometime in the two to three days leading up to the rape and murder.[32] R18173.

There was no evidence whatsoever to support this theory.[33] The prosecution could identify no male with whom Holly Staker had had sexual intercourse at any other point in her life, let alone during the relevant time frame. Instead, to advance its unsubstantiated theory, the prosecution presented evidence that Holly Staker had been molested by having been forced to perform oral sex on a boy three years earlier when she was eight years old, and that she and her sister had shown each other how they masturbated. This evidence was introduced to paint a picture of Holly Staker as the *kind of girl* who was unchaste and thus prone to have had sexual intercourse with some man other than the rapist/murderer within those several days. As we will explain, the admission of this evidence, over defense objection, requires reversal of Rivera's conviction for three

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[32] The prosecution also speculated, as an alternative explanation, that the swabs taken at the autopsy could conceivably have become contaminated by coming into contact with some other man's semen in the laboratory. As explained above, this reckless claim is entitled to no weight. See *supra* 35.

[33] The prosecution suggested that some of the initial difficulties in separating the sperm cells from the victim's cells for DNA testing could conceivably have been caused by the sperm having been deposited one to three days prior to the rape and murder. Although some of the experts agreed that this was a theoretical possibility, *none of the experts opined this was a likely explanation*, and one of the experts empathically rejected it was even a possibility. See *supra* 22-24. The absence of any drained sperm on Holly Staker's underpants was further evidence cutting against the idea that the sperm was the product of earlier intercourse. See *supra* 24.

independent reasons: (a) it was barred by the Rape Shield Statute; (b) it was in no way probative of whether Holly Staker ever had sexual intercourse with someone other than the rapist/murderer, much less whether she did so within the 72-hour window; and (c) it violated elementary principles about the manner in which character evidence, even when admissible, must be introduced.

A. The Evidence

The prosecution called Heather Staker, Holly's twin sister, to the stand and instructed her, over defense objection, to describe an incident that occurred at a neighbor's house when they were eight years old—some three years before the murder.

> Q. Can you tell us about a particular occasion where you and your sister were forced to perform a sexual act at Moddie's house?
>
> * * * * *
>
> A. Her older brothers had forced us to have oral sex—have, you know, perform oral sex on them.
>
> Q. Just give us a little bit more detail. What happened? Exactly how did this occur?
>
> A. Well, they told us that it would taste like popsicles. And we were like, "What?" You know, and we didn't really believe it, and they kind of pushed our heads down and made us do it." Tr. 15405-06.

The prosecution also asked Heather the following:

> Q. Can you tell the ladies and gentlemen of the jury whether you and your sister—I'm sorry, would masturbate in front of each other?
>
> A. I believe on one occasion we did just to find out that we did it differently. Just, you know, to kind of show each other that, you know, we both were curious about the same things around the same time, you know. We shared everything together, even underwear, so. R15406-07.[34]

[34] The prosecution also asked Heather Staker a series of questions about Holly Staker's having worn red lace underwear. R15401-03. This fact was emphasized with other witnesses as well, and in the prosecution's opening statement (R13738-40), prompting the defense to protest that the prosecution was dwelling on these red lace

B. The Admission of the Evidence About Prior Sexual Activity Violated the Rape Shield Statute.

The Illinois Rape Shield Statute bars the sexually charged testimony the prosecution presented about Holly Staker. The statute provides that in prosecutions of aggravated criminal sexual assault and other enumerated sexual offenses, "the prior sexual activity or the reputation of the alleged victim * * * is inadmissible * * *." 725 ILCS 5/115-7(a). The Statute recognizes only two exceptions, neither of which applies here. First, the Statute allows evidence about the defendant's own past sexual activity with the victim when that evidence speaks to the issue of the victim's consent. 725 ILCS 5/115-7(a)(1). Second, the Statute allows evidence to be introduced "when constitutionally required to be admitted." 725 ILCS 115-7(a)(2).

The Rape Shield Statute recognizes that it is unreasonable and offensive to draw inferences that a woman or girl who once engaged in sexual conduct is the kind of woman or girl who is "loose" and, therefore, more likely to have subsequently engaged in willing sexual activity. The legislature determined that a victim's "past sexual activity is irrelevant for determining her likelihood to consent to sex on a subsequent occasion." David Ellis, *Toward a Consistent Recognition of the Forbidden Inference: The Illinois Rape Shield Statute*, 83 J. CRIM. L. & CRIMINOLOGY 395, 398 (1992). By excluding such evidence, the Statute "keeps the jury's attention focused only on issues relevant to the controversy at hand." *People v. Ellison*, 123 Ill. App. 3d 615, 626 (2nd Dist. 1984); see

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underpants as a way of further suggesting that Holly Staker was promiscuous. R14011-14, 14025-27. It is unnecessary to focus on that issue, however, given the improper introduction of the evidence that unambiguously focused on prior sexual activity.

also *People v. Hill*, 289 Ill. App. 3d 859, 863 (5th Dist. 1997) (evidence about prior sexual conduct "obscures truth").[35]

There is no doubt the evidence the prosecution introduced about forced oral sex and masturbation fits the statutory definition of evidence of "prior sexual activity." It is plain, then, that the Rape Shield Statute applies here and was violated.

The posture of this case, to be sure, is different from the typical setting in which the Rape Shield Statute comes into play. Usually, the prosecution invokes the Statute to bar the defendant from introducing evidence about a victim's past sexuality. Illinois law is thoroughly settled, however, that the Statute applies to evidence presented by either the defense or the prosecution. It prohibits "*anyone* from introducing evidence of the victim's sexual history * * *." *People v. Sandoval*, 135 Ill. 2d 159, 171 (1990) (emphasis in original) (prosecutor may not present evidence about a victim's sexual history). See also *People v. Kopczick,* 312 Ill. App. 3d 843, 850 (3rd Dist. 2000) ("our Supreme Court has held that neither defendant nor the State may introduce evidence of a victim's past sexual history"); *People v. Kemblowski*, 201 Ill. App. 3d 824, 829 (1st Dist. 1990) (reversible error to allow prosecution to introduce evidence of the victim's sexual history).

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[35] The statute also serves other important interests by protecting the dignity of rape victims and removing disincentives for victims to report crimes and participate in prosecutions. Both these policies apply in full force despite the fact that the victim is deceased. "A deceased rape victim's life is entitled to the same privacy as a surviving victim's." *State v. Clowney*, 690 A.2d 612, 619 (N.J. Super. 1997). See also *Kansas v. Lackey*, 120 P.2d 332, 356 (Kan. 2005); *Jenkins v. State*, 627 N.E.2d 789, 795 (Ind. 1993). And, with regard to chilling future victims from reporting sexual assault, there is an obvious risk of this even though the particular victim in the case is deceased. Many future sexual assault victims who learn that Holly Staker's most personal facts, such as her having masturbated, were paraded before the public, will be chilled from reporting sexual assaults for fear that their most private matters will be similarly disrespected. See *Amicus Curiae* Brief of the Illinois Coalition Against Sexual Assault, et al.

There is also no doubt that the statute applies when, as here, a defendant is being prosecuted for felony murder based on the predicate felony of aggravated criminal sexual assault. "According to Illinois law, the predicate felony underlying a charge of felony murder is a lesser-included offense of felony murder." *People v. Smith,* 233 Ill. 2d 1, 17 (2009). As the Illinois Supreme Court has explained, when a charging instrument charges a crime that includes all elements of a lesser-included offense, "the defendant is considered to be charged by implication with the lesser crime." *People v. Knaff*, 196 Ill. 2d 460, 472-73 (2001). Rivera thus stood charged with aggravated criminal sexual assault; the jury could have found him guilty of that offense, even were it to have acquitted him of murder. *Id.* at 472. For these reasons, courts in other jurisdictions have universally held that rape shield statutes govern felony murder prosecutions based on the predicate felony of sexual assault. See, *e.g., People v. Story*, 204 P.3d 306, 313 (Cal. 2009); *Commonwealth v. Gentile*, 773 N.E.2d 428, 441 (Mass. 2002); *State v. Friend*, 493 N.W.2d 540, 545 (Minn. 1992). Indeed, Rivera was convicted of murder in this case exclusively because of the sexual assault predicates. C5622-25.

Despite the dictates of the Statute, the trial court allowed the prosecution to present the prior-sexual-activity evidence to the jury on the ground that the Statute contains an exception when the evidence is "constitutionally required to be admitted." Although the defense explained that this provision deals exclusively with defendants' constitutional rights, the trial court declared, "[t]he victim and the People of the State of Illinois also have constitutional rights." R12557. See also R12563.

The trial court was profoundly wrong on this point.[36] As the Illinois Supreme Court has recognized, rights in the constitution protect people, not sovereigns. *People v. Williams*, 87 Ill.2d 161, 166 (1981). See also *South Carolina v. Katzenbach*, 383 U.S. 301, 323-24 (1966) (individual rights given to "persons" in the Constitution "cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union, and to our knowledge this has never been done by any court").

In *People v. Darby*, 302 Ill. App. 3d 866 (1st Dist 1999), the court explained the history and function of the "constitutionally required to be admitted" language, added to the statute in 1993 after the Illinois Supreme Court's 1990 decision in *Sandoval*:

> In 1990, when *Sandoval* was decided, the rape shield statute did not contain the term, "constitutionally required to be admitted." Yet our supreme court recognized the statute, to pass constitutional muster, could not be interpreted in a way that denied a defendant his right to confront witnesses against him or prevent the defendant from presenting his theory of the case. * * * Following the decision in *Sandoval*, the legislature acted on the court's recognition that a defendant's constitutional right to confront witnesses must, in certain instances, supersede the statutory exclusion. The statute was amended to provide for admission of evidence of prior sexual activity or reputation "when constitutionally required to be admitted."

Darby, 302 Ill. App. 3d at 874. As Representative Currie explained in promoting the amendment, its purpose was to reserve "the right to a defense based on constitutional grounds." Transcription Debate, 88th General Assembly, May 25, 1993, at 46. Similarly, Senator Hawkinson noted that the amendment would bring the statute into alignment with the Federal Rules of Evidence. Illinois Senate Transcript, 88th General Assembly, May 15, 1993, at 48. The Federal Rule creates an exception from the rape shield provision for "evidence the exclusion of which would violate the constitutional rights of the defendant." Federal Rule of Evidence 412(b)(1)(c). See generally *People v. Starks*,

[36] The victim does have some rights that are relevant to the inquiry, those being rights under the Rape Shield Statute that were violated here.

365 Ill. App. 3d 592, 600 (2nd Dist. 2006) (exception assures that statute "yields to constitutional rights that assure a full and fair defense").

None of this, of course, supports the notion that the prosecution is entitled to an exception from the Rape Shield Statute under the "constitutionally required to be admitted" provision. There is no scenario in which the constitution requires a court to strike down a statute because it impairs the prosecution's right to a fair trial.[37]

C. In Addition to Violating the Rape Shield Statute, the Prior-Sexual-Activity Evidence was Irrelevant.

Quite apart from the dictates of the Rape Shield Statute, the evidence the prosecution presented was inadmissible because it was completely irrelevant. The evidence had no probative value regarding whether Holly Staker had willing sex with some man other than the murderer on the days leading up to her murder. The evidence that Holly Staker was forced to perform oral sex as an eight-year-old or masturbated on one or more occasion did not have the "tendency to make the existence of any fact that is of consequence to the determination of [this] action either more or less probable than it would be without the evidence." *People v. Morgan*, 197 Ill. 2d 404, 455 (2001). See generally *People v. Wheeler*, 226 Ill. 2d 92, 132 (2007) ("if the evidence is too remote in time or too speculative to shed light on the fact to be found, it should be excluded"). It is particularly horrifying that the prosecution argued that Holly Staker's having been forced to perform oral sex as an eight-year-old is indicative of her looseness. It is also

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[37] Even when "constitutionally required" exception does apply, it requires that the evidence be particularly probative in a manner that goes well beyond the basic evidentiary requirement of minimal relevance. See *People v. Summers*, 353 Ill. App. 3d 367, 374 (4th Dist. 2004); *People v. Darby*, 302 Ill. App. 3d 866, 874 (1st Dist. 1999). In this case, as we will now explain, the evidence does not even satisfy a standard demanding minimal relevance.

outrageous to argue that an 11-year-old girl having masturbated is relevant to whether she was having sexual intercourse.

To appreciate how thoroughly irrelevant this evidence is, it is helpful to consider what would happen had a defendant in a rape case tried to prove that a victim was a willing sex partner by showing she had been raped by someone three years earlier or had masturbated in the past. No court would need the Rape Shield Statute to bar that evidence as irrelevant (and no court would ever allow a defendant to introduce such evidence as "constitutionally required"). Indeed, it seems fair to say that a defense lawyer who sought to present that kind of evidence would be rightly attacked as acting in bad faith.

Thus, even if the Rape Shield Statute did not exist or did not apply, this evidence was inadmissible on relevancy grounds. A trial court is given broad deference in its relevancy rulings and review is under the abuse of discretion standard, but deference is not absolute. See *People v. Howard*, 305 Ill. App. 3d 300, 310 (2nd Dist. 1999). Admitting the evidence in this case was an abuse of discretion that requires reversal on the ground of irrelevancy, among other grounds, not to mention common decency.

D. Even When Admissible, Character Must be Proved Through Reputation Evidence, Not Particular Acts.

The prior-sexual-activity evidence was presented to show that Holly Staker had an unchaste and promiscuous character, and that she acted in accordance with that character within three days of her being raped and murdered. The law seldom allows any party to present such character evidence, given the general rule that "character evidence is not admissible for the purpose of showing that a person acted in conformity therewith on a particular occasion." MICHAEL H. GRAHAM, CLEARY & GRAHAM'S HANDBOOK ON ILLINOIS EVIDENCE §404.1, at 208 (9th ed. 2009). This case was no exception.

Even were the evidence not otherwise barred, it was inadmissible because it sought to prove the victim's character through evidence of specific acts, not through reputation. This is categorically prohibited. As the Supreme Court has explained, even before the Rape Shield Statute was passed, admissible evidence of this sort "was strictly limited by the courts to the victim's general reputation for immorality and unchastity." *Sandoval*, 135 Ill. 2d at 167-68. Critically, "specific acts of immorality or promiscuity" are never admissible. *Ibid.* See also *Ellison*, 123 Ill. App. 3d at 624. This is a pure issue of law subject to *de novo* review. See *People v. Learn*, 396 Ill. App. 3d 891, 897 (2nd Dist. 2009) ("[E]videntiary rulings involving questions of law are reviewed *de novo*.").

The rule requiring that character evidence, when admissible, be presented only through reputation, as opposed to specific acts, is designed to avoid collateral issues about specific prior acts and to avoid the unfairness of allowing particular isolated acts to define a person's general character and proclivities. See CLEARY & GRAHAM, § 404.4 at 212. These rationales apply with great force here. For example, it would be absurd to have Rivera's trial devolve into a contest over whether Holly Staker was or was not molested as an 8-year-old or whether she did or did not masturbate. And these acts say nothing at all about whether Holly Staker had sexual intercourse with someone other than her attacker in the 2-3 days prior to the rape and murder.[38] Thus, even putting aside the

[38] The vice and unfairness of allowing individual acts to be introduced to prove character traits is glaring in the context of this case. One of Rivera's defense counsel interviewed Heather Staker, in the presence of a witness, on May 15, 2006, and drafted a Memorandum that was made part of the Record during the post-trial proceedings. C5952-60. The Memorandum reports that Heather said, "no way," when asked whether Holly was sexually active. C5957. The Memorandum further describes how Heather repeatedly expressed anger that the prosecution was seeking to portray Holly as someone who was having sex. C5953-57. Heather said they "had just started masturbating, they had done that, but not sex, not Holly." *Ibid.* Thus the very witness who was impermissibly used by

Rape Shield Statute and basic relevancy principles, the rules governing the manner of establishing character render inadmissible the prosecution's evidence about specific instances of prior sexual activity.

IV. JUAN RIVERA'S CONVICTION MUST BE REVERSED BECAUSE THE TRIAL COURT DID NOT ALLOW THE DEFENSE TO DISABUSE THE JURY OF THE INACCURATE IMPRESSION THAT POLYGRAPH RESULTS IMPLICATED RIVERA IN THE CRIME.

There is a grave risk the jury that convicted Rivera did so with the inaccurate belief that polygraph results implicated him in the rape and murder of Holly Staker. It is impossible to overstate the magnitude of the prejudice Rivera suffered as a result. There can be no confidence in a verdict so likely tainted by such a mistaken belief.

The Illinois Supreme Court's decision in *People v. Melock,* 149 Ill. 2d 423 (1992), spells out the process the trial court was required to follow here. As *Melock* explains, a defendant challenging the truth of his confession is entitled under the Constitution to present to the jury "every circumstance attendant to the State's obtention of his confession," for the purpose of attacking its reliability. *Id.* at 465 (quoting *Lego v. Twomey*, 404 U.S. 477, 485-86 (1972)). These "circumstances" include Rivera's having been polygraphed and then having been led to believe—falsely—that the test proved him guilty of the crime. R14221-22, 14330, 14342-43. The Court explained, "stripped of the power to describe to the jury the circumstances that prompted his confession, the defendant is effectively disabled from answering the one question every rational juror

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the prosecution to support the idea that Holly Staker was sexually active would have said just the opposite had she been asked whether Holly Staker was actually having sexual intercourse. The defense had no way of asking that question, of course, because of the hearsay rules. This is precisely why the law insists that character be proven through reputation, not specific acts. Had Heather testified as to reputation, the message would have been precisely the opposite of what the prosecution conveyed.

needs answered: If the defendant is innocent, why did he previously admit his guilt?" *Melock*, 149 Ill. 2d at 458 (quoting *Crane v. Kentucky*, 476 U.S. 683, 689 (1986)).

The Court in *Melock* was also precise in demanding that a defendant exercising his right to present evidence of the circumstances attending a confession be permitted to inform the jury, in no uncertain terms, if the polygraph test failed to yield results on the ultimate question of guilt (as was the case here). *Melock*, 149 Ill. 2d at 465-66. The trial judge prohibited Rivera from doing this. R12517-23, 14249-68. This misapplication of *Melock* almost certainly left the jury with the false impression that those results indicated Rivera's guilt, an error that compels reversal of the conviction.[39]

A. The Polygraph Examination

To understand the magnitude of the error and prejudice, it is necessary to revisit Rivera's polygraph examinations. On October 27, Michael Masokas of John Reid & Associates, administered two polygraph examinations to Rivera. R14186-87, 14199. During these examinations, Masokas questioned Rivera about his activities on August 17. Rivera claimed to have attended a party at the Craig home that day and denied he had anything to do with Holly Staker's death. C3639 (Masokas Report). According to

[39] Paradoxically, the trial court allowed the jury to hear misleading information suggesting the polygraph implicated Rivera in the rape and murder, but barred the defense from calling Dr. Charles Robert Honts, a professor and noted polygraph expert, who concluded that the polygraph results from both October 27 and October 29 *conclusively showed no deception* in Rivera's denial that he killed Holly Staker, or in Rivera's denial that he was present when Holly Staker was killed. R12288-89. Rivera is not challenging the trial court's exclusion of Dr. Honts, but it bears noting there is expert evidence that the polygraph actually cleared Rivera. In addition, Dr. Honts was prepared to testify that Masokas's claim that he saw some *generalized* evidence of deception on the October 29 test was illogical. See R12289 ("[I]n some 32 years of involvement in the polygraph profession I have never seen an opinion like that. * * * [I]t's impossible for the polygraph examiner to not be able to localize deception if deception is shown. It will appear on specific questions and not as some amorphous general quality to the charts."). Of course, none of this would have mattered had the jury simply been allowed to hear there were no results on whether Rivera had been deceptive in denying the murder.

Mr. Masokas, the October 27 polygraphs yielded no results due to the "absence of any emotional responses on the relevant, irrelevant or control questions." C3640. Thus, Mr. Masokas recommended that the police bring Rivera back for additional testing on a subsequent day. R14199-200. Neither Mr. Masokas nor any investigator accused Rivera of the murder following the polygraph on that day. R14200, 14047.

Two days later, Rivera was brought back for another polygraph examination. R14200. In response to Masokas's questioning, Rivera stated—as he had on October 27—that he had spent August 17 at the Craig residence, and that he had not been present when Holly Staker was murdered. C3641, R14205. Mr. Masokas concluded that the polygraph yielded *no results* on the ultimate question of whether Rivera had been truthful in denying involvement in the murder. C3642. Mr. Masokas did conclude, however, that there was some evidence of deception to at least one other question. *Ibid.* (This was, of course, not surprising because Rivera was unquestionably lying about having attended a party at the Craig home. Indeed, shortly after the polygraph, Rivera admitted to Mr. Masokas that he lied about attending a party at the Craig home. R14208.)

Even though the results did not indicate that Rivera had been deceptive in denying involvement in the crime, Mr. Masokas and the investigators decided that Mr. Masokas, the polygrapher, would be the one to "accuse [Rivera] directly of causing the death of Holly." R14220. Accordingly, Masokas returned to the interview room, and informed Rivera that "at this point in time the investigation indicate[s] that [you] did, in fact, cause[] the death of Holly." R14221.

Because the accusation was made by the polygrapher following his review of the polygraph results, there can be no doubt that Rivera was led to understand that the

polygraph implicated him in the murder. The sequence of events sent the message loud and clear. In truth, the accusation was not based on the polygraph indicating that Rivera was deceptive in denying involvement in the crime—there were no results on that question. C3642. But Rivera was never told that (and there was no legal duty to tell him that). Rather, Rivera was made to understand the polygraph had indeed implicated him because the polygraph results were the only new development from before the polygraph when he was not being accused and following the polygraph when the polygrapher told him the investigation now showed he was guilty. [40]

B. The Polygraph Evidence Introduced at Trial

Had the jury been exposed to an account of the polygraph that included the absence of any result on the ultimate question of Rivera's guilt, the jury could not have inferred that the polygraph indicated Rivera lied when he denied involvement in the crime. Instead, the jury was left with the completely opposite—and inaccurate—impression. First, the jury heard that Rivera was polygraphed on October 27, that he answered "no" when asked "if he had any involvement in causing the death of Holly Staker," and that no accusation was made following that test. R14194. The jury then

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[40] The tactic of implicitly suggesting (or explicitly telling) a suspect that he has failed a polygraph is a widely used interrogation device. It has also been cited as a technique particularly prone to extract false confessions. See Julia K. Craig, *The Presidential Polygraph Order and the Fourth Amendment*, 69 CORN. L. REV. 896, 924 n.49 (1984) (quoting DAVID T. LYKKEN, A TREMOR IN THE BLOOD 210-214 (1981) ("Confronted with a hard-nosed interrogator who emphatically asserts that the machine indicates the subject is lying, the innocent subject's faith in the machine may actually lead him to doubt his own memory and conclude that 'it really looks like I did it.'")); see also Brandon Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051, 1098-99 (2010) (examining 40 cases in which post-conviction DNA testing exonerated a convict who had falsely confessed prior to trial; noting that in at least seven of the 40 cases, the false confession followed an admonishment that the defendant failed a polygraph exam). This, of course, is the reason the Court in *Melock* recognized a defendant's right to introduce evidence of the circumstances leading to a confession.

heard that another polygraph exam was administered two days later, after which the *polygrapher* himself told Rivera it was clear he was guilty. R14221. Mr. Masokas told Rivera after the exam that "in [his] mind" he was convinced of his guilt. R14329.[41]

Having been exposed to testimony indicating that accusations do not automatically follow polygraph examinations (Rivera was not accused on October 27), "the jury would have to be off on some other spinning planet to miss" the inference that Rivera failed the final polygraph exam. *See People v. Daniels*, 272 Ill. App. 3d 325, 343(1st Dist. 1994) (explaining that a polygraph exam followed by an accusation "perversely create[s]" an "inference" that the defendant failed the polygraph).

C. The Trial Court's Ruling

The defense repeatedly asked the trial court to allow it to cure this problem by asking a simple question that would correct any impression that there were results on the ultimate query on Rivera's guilt. Despite the fact that this is precisely the procedure *Melock* requires, the judge refused, opining repeatedly that there was no possible way for the jury to have inferred from the evidence that Rivera failed the polygraph exam. *See* R14251 ("Mr. Masokas didn't say [Rivera] took the lie test and he failed."); R14254 ("the jury had no idea that he failed a polygraph because no one said he failed a polygraph"); R14259 ("there is no testimony, no evidence that the jury could consider or that a reasonable jury would consider that Mr. Rivera failed the polygraph test"). Recognizing at one point the risk that the jury would misperceive the situation, the trial

[41] Mr. Masokas was asked at trial whether he had any evidence—aside from Rivera's "equivocations about his whereabouts on the night of August 17"—of Rivera's guilt when he made the accusation. R14274. He answered that he "had no physical evidence," suggesting that there was some "other evidence" (which the jury was likely to interpret as referring to the polygraph result). *Ibid.*

judge also noted, "[I]t doesn't matter what the jury thinks about the polygraph test because the polygraph doesn't go in for the juror's consideration at all." R12454-55.

After the judge sustained repeated objections to the defense's efforts to have Masokas clarify that there were no results on the critical question, defense counsel asked the trial court the following:

> Your honor, may I just ask the witness a simple single question: "as a result of these three examinations, were you able to determine whether or not Mr. Rivera was being deceptive when he denied involvement in the Holly Staker murder." R14266.

The trial court refused to allow this question, ruling:

> No, you can't, because that focuses on to an area that he really can't say one way or the other. I think his testimony has been in the past and I think it would be again that he found that . . . the results were inconclusive. R14266.

Of course, what the judge understood—there were no results on the ultimate question—was precisely what the defense was entitled, under *Melock*, to put before the jury.

Indeed, this is precisely what had occurred at Rivera's second trial, without objection. At that trial, defense counsel asked Mr. Masokas, "So you couldn't tell at that time regardless of what the results were whether he was deceptive about whether he was present when Holly died? You couldn't tell that? Correct?" R9712. Mr. Masokas answered, "Correct." *Id.* The trial court accepted the offer of proof that Mr. Masokas would have given the same response had the defense been allowed to ask the same question at the most recent trial. R14268.

D. Rivera Was Entitled to Inform the Jury That No Polygraph Results Indicated He Had Lied in Denying Involvement in the Crime.

The trial court determined that, in the absence of an explicit statement that Rivera failed the polygraph, there was no fear the jury could interpret the testimony and

sequence of events to mean that the polygraph indicated Rivera had lied in denying having committed the crime. This ruling was inconsistent with *Melock* and with cases from the Illinois courts of appeals.

In *Melock*, the Court recognized that even absent an explicit statement that a suspect failed a polygraph, an accusation immediately following a polygraph creates an inference that the subject failed. In *Melock*, which involved many of the same investigators in this case (Michael Masokas, Lou Tessmann, and Michael Maley), Mr. Masokas polygraphed Robert Melock and found no conclusive results as to whether he was being deceptive in denying involvement in a murder. Mr. Masokas did conclude, though, that the absence of any registered response likely "mean[t] that the suspect lied during the examination." *Melock*, 149 Ill. 2d at 449. Mr. Masokas then accused Melock of having committed the murder, telling him (in language quite similar to what he said to Rivera) that he was "150 percent sure" that Melock was guilty. *Id.* at 444. On review, the Illinois Supreme Court explained that "Masokas' care in not expressly telling defendant that he lied on the polygraph exam did not diminish any inference to be drawn from his (Masokas') statements." *Id.* at 450. This is the very same inference any reasonable juror would have taken from the same basic fact pattern presented in Rivera's trial.

Other courts have reached the identical conclusion. In *Daniels*, for example, the court found that "the pernicious inference" that the polygraph implicated the defendant in the murder was "plainly and unmistakably before" the jury, even though "there was no explicit or direct evidence regarding the results of defendant's polygraph exam." 272 Ill. App. 3d at 342. Similarly, in *People v. Mason*, 274 Ill. App. 3d 715 (1st Dist. 1995), the Appellate Court held that "even though the prosecutor and witnesses never said the words

'polygraph' or 'lie detector,' the State successfully signaled to the jury that the defendant had failed a polygraph examination." *Id.* at 725.

It was for this reason that the Court in *Melock* was so steadfast in its insistence that when a defendant is allowed to introduce the fact of a polygraph examination as part of his attack on the reliability of an ensuing confession, he is also entitled to introduce "*the fact of the nonexistence of any results from that examination.*" *Melock*, 149 Ill. 2d at 465-66 (emphasis added). As in *Melock*, Mr. Masokas concluded here that there was generalized deception, but had no results on specific questions. C3642. This is precisely the scenario in which the Supreme Court demanded that a defendant be allowed to inform the jury of the absence of conclusive results on the ultimate question of guilt.

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As the Illinois Supreme Court has explained, "no other form of evidence is as likely to be considered as completely determinative of guilt or innocence as a polygraph examination. * * * Because the results of polygraph examinations appear to be quasi-scientific, jurors are likely to give such results undue weight." *People v. Gard*, 158 Ill. 2d 191, 201 (1994) (quoting *People v. Baynes*, 88 Ill. 2d 225, 244 (1981), and *People v. Taylor*, 19 Ill. 2d 377, 391-93 (1982)). Courts have held that allowing a jury to hear even accurate polygraph results is plain error because it "compromis[es] the integrity and tarnish[es] the reputation of the judicial process itself." *Gard*, 158 Ill. 2d at 205. See also *People v. Rosemond*, 339 Ill. App. 3d 51, 60 (1st Dist. 2003) ("there are no scenarios in which the potential for prejudice would not exist"). The need for reversal follows *a fortiori* here, where the jury was led to infer inaccurate conclusions. Rivera had a constitutional right to defend himself by presenting to the jury the circumstances surrounding his confession. He was entitled to exercise this right without having to suffer

the massive prejudice of the jury making an inference that he failed the polygraph exam. This is what *Melock* required. This is what basic fairness demanded.

V. THE TRIAL COURT VIOLATED THIS COURT'S MANDATE WHEN IT ALLOWED THE STATE TO INTRODUCE GENERALIZED CRITICISMS OF THE ELECTRONIC MONITORING SYSTEM WHOLLY UNRELATED TO THE PARTICULAR EQUIPMENT ASSIGNED TO RIVERA OR TO ANY CONCEIVABLE MALFUNCTION RELEVANT TO RIVERA'S ABILITY TO LEAVE HIS HOME UNDETECTED ON AUGUST 17, 1992.

This Court reversed Rivera's initial conviction in significant part because the trial court erred in admitting irrelevant evidence generally attacking the Lake County Electronic Monitoring System (EMS). 1996 Op. at 7-10. Yet, the trial court ignored this Court's mandate at Rivera's most recent trial and once again permitted the prosecution to introduce this same evidence of generalized grievances that had no connection to the EMS unit worn by Rivera or to any defect that could have cast doubt on the accuracy of EMS records indicating that Rivera did not leave his home on August 17, 1992. Consequently, this Court again must reverse.

A. Background

From July 15, 1992 through September 14, 1992, Rivera was under home confinement (on an unrelated burglary charge) under the surveillance of Lake County's EMS. R17578-79, 17616. He was assigned a particular transmitter, which was secured to his leg through an ankle bracelet, and an electronic monitor, which was connected to a landline in his home. R17577-78. If the transmitter traveled outside the monitor's 150-foot radius, Pretrial Services (PTS) received immediate notification. R17586-87, 17592. PTS also was alerted if the transmitter battery became low, if the monitor was unplugged, or if the power source to the monitor failed or was restored. R17592-94. In addition, the system conducted a self-authenticating check several times each day. So long as the

equipment worked properly and the transmitter remained within range, PTS received an automated call every six hours to indicate that the system was functioning properly and that no violation had occurred. R17591.

The EMS records show that Rivera did not leave his home on the day Holly Staker was murdered. No violations were reported for Rivera that day—meaning that he remained within 150 feet of his home (more than a mile away from the crime scene). R17594-17601. Moreover, automated EMS phone calls—at 11:48 a.m., 5:49 p.m., and 11:50 p.m.—demonstrated that Rivera's equipment was functioning properly and that Rivera was at home. R17594-17601, DX181. Significantly, the evidence showed that the EMS equipment assigned to Rivera was capable of reporting violations; on July 27, and August 20, 21, and 29, Rivera's EMS unit recognized that he left his house, and in each instance immediately alerted PTS to the violation. R17604-09. There was absolutely no evidence of any violation on August 17.

In an effort to undermine the significance of this compelling evidence of Rivera's innocence, the prosecution speculated that Rivera's EMS unit somehow was not working properly. R18174-75. The prosecution, of course, would be entitled to advance such a claim through evidence that the specific equipment assigned to Rivera was malfunctioning. But the State has no such evidence. Rather, every piece of evidence indicates that Rivera's monitor was functioning properly on August 17. Thus, the State sought instead to challenge the general functionality of other EMS equipment assigned to other individuals. R17628, 17684-89. This Court found that very approach impermissible in 1996. Reversal was appropriate then and is even more appropriate now.

1. The First Trial and Appeal

At the first trial the prosecution was permitted to introduce testimonial and documentary evidence—the latter consisting of memos exchanged among Lake County officials—criticizing the EMS, and describing alleged malfunctions with other individuals' equipment. R5969-6008. On appeal, this Court identified that error as one of four that, in the aggregate, required reversal. This Court held that because the evidence did not concern Rivera's specific EMS equipment, it was "irrelevant to the issue of whether it was properly functioning." 1996 Op. at 10 (the 1996 Opinion is in the Record at R.1042). As this Court explained:

> [G]eneral difficulties with the equipment and the EMS itself are raised in the memos. Moreover, none of the memos are directly connected to this case. They simply document the general shortcomings of the equipment used in the EMS. These general memos do nothing to make it more likely that defendant's personal monitor was malfunctioning or otherwise improperly registering his proximity to the monitor on August 17.

Id. at 8-9. As a secondary and independent reason for reversal, this Court also held the memos were hearsay that did not qualify as business records. *Id.* at 10.

2. The Recent Trial

Prior to Rivera's most recent trial, the trial court reserved ruling on Rivera's motion *in limine*, brought pursuant to this Court's 1996 decision, to bar the prosecution from introducing evidence concerning problems with EMS equipment other than Rivera's. C4761-3, R12878-79. Accordingly, the prosecution pursued the same course it had at the first trial: lodging an attack on the EMS in general in an attempt to impeach the accuracy of Rivera's particular unit. The trial court allowed this evidence, explaining that it would allow the State to test the "credibility of the [EMS] evidence." R17649. Accordingly, the State was permitted to ask—over defense counsel's repeated

objections—about failures with other equipment, even though the evidence did not involve the unit assigned to Rivera. R17684-89. Nor did the evidence demonstrate that any unit experienced the *only* type of malfunction that could have supported the prosecution's EMS theory (*i.e.,* that the unit assigned to Rivera functioned properly before and after the crime, but nevertheless failed to record the violation that *must* have occurred were Rivera to have committed the crime).[42]

For example, the prosecution was allowed to question Judy Kerby (the former Supervisor of PTS) about two unidentified incidents—neither of which involved Rivera or his EMS equipment—in which two EMS clients left their houses undetected. When Ms. Kerby responded that she had no memory of any such incidents, the prosecution instructed Ms. Kerby to read one of the very memos (PX205) that this Court had explicitly held irrelevant. R17685. The State also elicited evidence—again over objection—about incidents unrelated to Rivera in which some unspecified clients' records had disappeared temporarily "from the documentation of the department." R17686-87. Additionally, the prosecution was permitted to introduce evidence that some other units had been sent back to the manufacturer for repair or replacement. R17687.

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[42] The ankle bracelet was made of heavy plastic and attached in a manner that prevented it from being removed. Moreover, it was designed to become "wavy and crinkly" if stretched, which made it easy to determine whether tampering had occurred. R17590. Rivera's EMS supervisor saw no evidence of tampering when he examined the strap on August 19. Tr. 6195-6 (as reflected in R17574, the witness's testimony from the first trial was read to the jury because the witness was unavailable). Although the supervisor eventually replaced the strap because it had been attached slightly looser than was optimal, there was no suggestion that it was loose enough for Rivera to remove. R6195. Indeed, the fact that Rivera's EMS unit reported several violations after he departed from his home on other days confirms that he was not able to remove the bracelet. R17604-09.

As at the first trial, the prosecution emphasized this evidence in closing argument, noting that "people were actually seen out and about, and that there was no paper record of them being gone. * * * Now I ask you if you don't know when people are gone because there's no record of it, how can you say because you got no record of it they weren't home?" R18175.

B. This Evidence Directly Contravened this Court's Mandate and Was Inadmissible.

In reversing Rivera's first conviction, this Court was explicit in holding that evidence of problems with EMS equipment other than "the specific equipment assigned to defendant" is irrelevant and inadmissible. 1996 Op. at 8. The trial court ignored that mandate, and once again admitted the very evidence that this Court had condemned. Of course, a trial court has no authority to overrule an appellate court's mandate. See *People v. Bosley*, 233 Ill. App. 3d 132, 137 (2d Dist. 1992); *see also People ex rel. Daley v. Schreier*, 92 Ill. 2d 271, 276 (1982) ("A trial court must obey the clear and unambiguous directions in a mandate issued by a reviewing court."). This Court reviews *de novo* the question whether a lower court has followed an appellate court mandate. *In re Christopher K*, 217 Ill. 2d 348, 363-64 (2005).

The trial court offered the following rationale for its decision:

> I think what the Court is faced with in this particular instance is the credibility of testimony. Not necessarily the credibility of Miss Kerby's testimony, *but the credibility of the evidence* before the jury now that by this electronic process the defense will argue that Mr. Rivera never left his home, he was home the entire time and there is conclusive proof that he was home. *I think that that evidence can be impeached.*

R17649 (emphasis added). This is the precise argument rejected by this Court in the initial appeal. As this Court explained:

> The State also contends that it was treating the EMS as a witness who lied. *The memos, according to the State, merely attempted to 'impeach the veracity of the non-testifying computer.' However, this argument is flawed on its own terms.* The memos purport to establish the unreliability of the entire system. And yet, as the State recognizes, it is only the 'veracity of the non-testifying computer' which is at issue. While the memos establish the existence of various problems with the equipment used by the EMS, they do not link defendant's 'non-testifying computer' to any of those problems. Indeed, defendant's unit appears to have functioned properly during the time it was assigned to him. 1996 Op. at 9-10 (emphasis supplied).

That the trial court ignored this Court's decision and mandate is clear. Although the prosecution argued that this Court's 1996 decision was premised only on the hearsay nature of the particular memos that had been introduced at the first trial (R17636-44) this contention is plainly erroneous. This Court introduced its EMS discussion by observing that Rivera "makes two contentions on this issue. First, he argues that the memos were not relevant to the issue of whether *his* monitor was functioning properly on August 17, and second, he argues that all of the memos constituted improper hearsay. We agree with both contentions." 1996 Op. at 8 (emphasis in the original). The Court then ruled in Rivera's favor on relevance grounds, after which it wrote, "because of our disposition of this issue on grounds of relevance, we briefly address defendant's argument that the memos are all improper hearsay." *Id.* at 10 (emphasis added).

This Court explained in its 1996 decision that a party may not challenge a particular piece of equipment by presenting evidence that other equipment was defective. 1996 Op. at 8-10. This conclusion is consistent with settled law. For example, this Court has recognized that a defendant wishing to cast aspersions on the accuracy of breathalyzer results may not introduce evidence that other units experienced problems,

but rather is limited to challenging the operation of the particular "machine in question." *People v. Davis*, 180 Ill. App. 3d 749, 752 (2nd Dist. 1989).[43]

In this case, the evidence that the prosecution elicited was irrelevant not only because it related to problems with other units, but also because it was unrelated to any possible malfunction that could have cast doubt on the accuracy of the EMS records indicating that Rivera did not leave his home on August 17, 1992. To support its hypothesis with regard to Rivera's unit, the prosecution would have had to establish that (a) even though Rivera's unit functioned properly by detecting his absences both before and after August 17; and (b) even though the evidence indicates that Rivera's unit was functioning properly on August 17—by virtue of the fact that three automated calls were placed that day; (c) Rivera's unit nonetheless spontaneously malfunctioned for a short period on August 17—coinciding with Holly Staker's murder—and then spontaneously resumed proper functioning. Only this combination of events could possibly reconcile the evidence about the proper functioning of Rivera's unit with any argument that Rivera was able to leave his home undetected on August 17.

There is not a shred of evidence that any other unit had ever performed in that manner, *i.e.,* ever registered violations properly, thereafter stopped functioning such that a client could leave his house undetected, and then began working again spontaneously such that subsequent violations were reported. Nor was there evidence that *any* EMS unit that had malfunctioned had nonetheless reported proper functionality in the automated calls to the monitoring system. Thus, evidence of other defects was irrelevant not simply

[43] It bears noting that despite the prosecution's attacks on the EMS equipment in this case, EMS records of probation violations were routinely used by these prosecutors in court to prove that defendants had violated their probation conditions. See generally R17592-94, 17612-15.

because it involved different units, but also because it was not shown to involve the only type of malfunction relevant to the State's defective-EMS theory. "[I]t is settled that in order to establish the evidentiary relevancy of a 'similar' occurrence, the party seeking to admit the 'similar' occurrence must establish a sufficient degree of similarity between the 'similar' occurrence and the one in question." *Malawy v. Richards Mfg. Co.*, 150 Ill. App. 3d 549, 564 (5th Dist. 1986) (citing CLEARY & GRAHAM, HANDBOOK OF ILLINOIS EVIDENCE § 401.14 at 139 (4th ed. 1984)).

The decision in *People v. Robinson*, 349 Ill. App. 3d 622 (1st Dist. 2004), is instructive on this point. The defendant there sought to attack the reliability of his breathalyzer results through evidence the particular breathalyzer unit had malfunctioned two months prior to, and two weeks after, his test. The court held this evidence irrelevant because "all of the evidence," including the machine's self-diagnostic test, demonstrated that on the day of the defendant's test "the machine was properly tested and certified * * *, was in proper working condition, and that any prior and subsequent malfunctions in no way affected or concerned the accuracy of defendant's test results." *Id.* at 629. If evidence that the defendant's very machine malfunctioned before and after his test is inadmissible, then certainly evidence of *other* machines' malfunctions is inadmissible to show that Rivera's unit malfunctioned in a unique (and unreported) way on the day at issue. This is especially true when the EMS self-diagnostic test confirmed it was working properly on August 17. Thus, as in *Robinson*, any discussion of irrelevant malfunctions "only served to confuse the issues and mislead the jury." *Id.*

The same fundamental flaw applies to evidence the prosecution elicited that the EMS had experienced software crashes—at unspecified times—that caused some clients'

records to "disappear" temporarily from the EMS computers. R17686-87. Such evidence has absolutely no bearing on this case. First, there is no evidence indicating that the system software crashed on August 17, 1992. Second, even if there were, such a software crash would be irrelevant because routine phone calls were made from Rivera's unit and recorded. DX181. Those records were preserved and, thus, it cannot be claimed that Rivera "disappeared" from the County records on August 17, 1992. The fact that there was no general software crash that day is proven not only by the presence of records regarding Rivera, but also by EMS records reflecting that *other clients did violate that day*. R17602-03, DX181. Again, as in *Robinson*, any discussion about software crashes and disappearing records was a red herring that "only served to confuse the issues and mislead the jury." *Robinson*, 349 Ill. App. 3d at 629.

Although the evidence the prosecution presented had no actual probative value on any relevant issue, it may well have caused the jury reflexively to reject the EMS data that was compelling evidence of Rivera's innocence. Irrelevant evidence can cause jurors to become distracted or confused in a manner that distorts their decision-making process. *Ibid.* It goes without saying that Rivera "is entitled to have his guilt or innocence determined by the jury without improper and prejudicial matters being erroneously interjected." *People v. Graham*, 179 Ill. App. 3d 496, 509 (2nd Dist. 1989).

* * * * *

The trial court's error in admitting the State's EMS evidence necessitates reversal of Rivera's conviction. In deciding whether the erroneous admission of evidence requires reversal, a court must assess the strength of the competent evidence otherwise presented to determine whether the error may have affected the outcome of the trial. *See People v. McKown*, 226 Ill. 2d 245, 276 (2007). Reversal is required unless "'it can be concluded

that retrial without the erroneous admission of the challenged evidence would produce no different result.'" *Ibid.* (quoting *People v. Arman*, 131 Ill. 2d 115, 124 (1989)). In its 1996 decision, this Court concluded, based on the balance of the evidence presented at trial, that the error in admitting the evidence in question did not independently require reversal (although it did when combined with the other errors the Court identified). 1996 Op. at 10, 33-34. With regard to the instant trial, however, the error was more consequential and requires reversal even standing alone.

The evidence supporting conviction in the most recent trial was far weaker than at the first trial. The conclusive DNA evidence, showing that Rivera was not the source of the sperm, was not available until this most recent trial. See *supra* 17. Had the EMS not been improperly attacked with inadmissible evidence, the jury would have been left with conclusive DNA and EMS evidence exculpating Rivera. That the prosecution highlighted its EMS claims in its closing argument, that the jury deliberated for four days before reaching a verdict, and that the jury reported it was deadlocked is further evidence of how any one change in the mix of evidence could well have affected the outcome. Hence, even were the introduction of irrelevant evidence about other EMS units the only error in the case (and it was not), it would be independent ground for reversal given the weakness of the prosecution's case at this trial.

VI. JUAN RIVERA'S CONVICTION MUST BE REVERSED BECAUSE THE TRIAL COURT IMPROPERLY EXCLUDED EVIDENCE THAT WOULD HAVE REBUTTED THE PROSECUTION'S CLAIM THAT RIVERA TOLD POLICE FACTS THAT ONLY THE KILLER COULD KNOW.

Despite the extraordinary circumstances surrounding the interrogations, despite the DNA results, despite the EMS records, and despite the absence of any other evidence linking Rivera to the crime, the prosecution asked the jury to convict Rivera because his

statements contained facts only the perpetrator could know. R13732, 13759, 18036, 18053. The defense was prepared to demonstrate that the information contained in the confessions attributed to Rivera was either (a) public knowledge, or (b) already known to police. Thus, Rivera did no more than repeat details reported in the media, or parrot back or agree to facts police related to him during interrogation. R18093-94, R18119. A series of erroneous rulings blocked the defense efforts to introduce four key pieces of evidence regarding what the public and Rivera's interrogators knew. These rulings violated Rivera's constitutional right to present evidence in his defense. See generally *Holmes v. South Carolina*, 547 U.S. 39 (2006); *Crane v. Kentucky*, 476 U.S. 683 (1986).

A. The Barred Evidence

1. The Press Release and The Newspaper Articles

First, the defense sought to present an Official Press Release (DX22) that the Waukegan Police issued within hours of discovering the crime. R15051-52, 15526, 16535, 17117. This press release includes extensive detail about the crime, including that Holly Staker had been babysitting for two young children (a 2-year-old-girl and a 5-year-old boy), that her body was discovered partially clad and concealed behind the door of a bedroom, that she had suffered multiple stab wounds, that there were signs of a struggle, and that the offender apparently "entered the apartment through the rear wooden door." DX22. Although the prosecution stipulated to its authenticity (R16797, 17114), the trial judge refused to admit the exhibit on the ground that it was hearsay. R17118-20.

Second, the defense sought to introduce a series of newspaper articles that contained the facts from the press release, plus dozens of other facts about the crime. DX96, 97; R17755-76. These newspapers, published prior to Rivera's interrogation. disclosed, inter alia, that a kitchen knife believed to be the murder weapon was found in

the back yard where the murderer had fled. The newspapers also disclosed that Holly Staker had been stabbed 27 times (a fact appearing in 17 separate news stories). DX96, 97. The trial court ruled the newspapers were hearsay, were not authenticated, and were not relevant. R17767-68.

2. The Letter from Mr. Masokas and The Foster Report

The remaining two pieces of evidence would have rebutted the prosecution's contention that the two officers who conducted the final interrogation of Rivera, Sergeants Tessmann and Maley, were not previously aware of a key fact contained in the final statement that Rivera signed.[44] The prosecution contended Sergeants Tessmann and Maley did not know the assailant had damaged the back door to the apartment with a blue mop police found on the landing at the back entrance to the apartment. R13760, 18053. The prosecution argued the mop was the key example of Rivera disclosing facts "that only the killer would know and that were even unknown to the investigators themselves." R13732.[45] Given the emphasis the prosecution placed upon the blue mop, it was critical

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[44] The previous statement signed by Rivera contained many "facts" inconsistent with the facts known to the police. When that statement was reviewed at the meeting in the prosecutors' office, two new interrogators, Sergeants Tessmann and Maley, were sent in to try again. The final statement, signed by Rivera after their ensuing interrogation, was much more consistent with the facts known to the police. See *supra* 15-16.

[45] Rivera had been interrogated over the of course four days by at least eight other investigators, all of whom were part of the Task Force. See *supra* 4-16. At trial, the prosecution never asked the other interrogators whether they had mentioned anything about the blue mop to Rivera during their sessions with him. Throughout this investigation, law enforcement violated the cardinal rule that to facilitate proper corroboration in the event a suspect eventually confesses, "information about the crime [must be] purposefully withheld from all suspects *and the media*. In other words the only people who should know this information are the investigators and the guilty suspect." FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 432 (emphasis added). Given the recklessness about this concern, there is no reason to believe caution was exercised during the great many hours that investigators were questioning Rivera.

for the defense to show that Sergeants Tessmann and Maley knew about the mop before interrogating Rivera.

The circumstantial evidence strongly supported the defense's position that Sergeants Tessmann and Maley knew about the Task Force's major finding that the mop had been used to damage the door. (Sergeant Tessmann was a team leader within the Task Force and both he and Sergeant Maley attended briefings with all members of the Task Force at least daily. R15040.) Earlier that day, when Rivera was asked by Sergeant Fagan and Detective Meadie whether he did anything to the door as he left, Rivera said he had not. R14774-75, 15485. Then, in the ensuing interrogation with Sergeants Tessmann and Maley, Rivera suddenly added a new narrative about the mop and the back door that was perfectly consistent with the Task Force's theory. This suggests that Rivera changed his account at the behest of the interrogators, as they acknowledge he may have done with some other facts, such as his description of Holly Staker's clothing. R14956. How was it conceivable, the defense asked, that these investigators could somehow have remained ignorant of one of Task Force's most important evidentiary "findings"? R18102. And how was it plausible, the defense asked, that with no prodding by Sergeants Tessmann or Maley, Rivera spontaneously decided to change his prior account in which he disclaimed having done anything to the door?

The defense position that Sergeant Tessmann knew about the blue mop was fortified, it seemed, when the polygrapher, Michael Masokas, testified that when he met with Sergeant Tessmann on October 27 (three days before Sergeant Tessmann interrogated Rivera), Sergeant Tessmann told him that a blue mop was used to break in

the back door. R14279. But Sergeant Tessmann denied this when he took the stand, turning the issue into a swearing contest between the two. R14802-03.

It is in this context of a contested debate over the credibility of Rivera's interrogators that the court must consider the two other excluded pieces of evidence. First, the trial judge refused to admit a letter Mr. Masokas had written to Sergeant Tessmann on November 5, 1992, reviewing the work Reid & Associates had performed. In detailing the facts about which Mr. Masokas had been briefed, the letter states he had been told that "it appears as though someone used a mop handle to break through the back door in order for it to look like a break in. The mop, however, was neatly placed back in the corner where it came from. Wood splinters from the door were in such a location that the door may have been open when the hole was made." DX31. The trial judge ruled the letter irrelevant. R17799-18000.

The final item of excluded evidence was a police report in which Evidence Technician Bert Foster described and documented the recovery of the blue mop on August 21. The Foster report had been generated by the Task Force and had been distributed through its normal channels of communication. The trial court barred the report on hearsay and relevance grounds. R15548-51.

B. All Of This Evidence Was Admissible.

1. None of This Evidence Was Hearsay.

The trial court's ruling that the press release, newspaper articles, and Foster report were hearsay is a pure question of law, subject to *de novo* review. See *Halleck v. Coastal Bldg. Main. Co.*, 269 Ill. App. 3d 887, 891 (2nd Dist. 1995). The rulings were unquestionably wrong. None of the items was introduced for the truth of the matters asserted therein; each was introduced for the classic non-hearsay purpose of proving the

facts, true or not, had been disseminated to relevant recipients—here, the public and the police. See *Deer Hake v. Duquesne State Fair Asps', Inc.*, 185 Ill. App. 3d 374, 381 (5th Dist. 1989); *People v. Poe*, 121 Ill. App. 3d 457, 461 (2nd Dist. 1984).

2. There Were No Authentication Problems With Any of the Evidence.

The trial court held the newspapers inadmissible on the additional ground that they were not authenticated. This, too, is a legal issue subject to *de novo* review, and this, too, was error. See *Halleck*, 269 Ill. App. 3d at 891 (pure questions of law are subject to *de novo* review). Printed materials purporting to be newspapers are self-authenticating. CLEARY & GRAHAM'S HANDBOOK ON ILLINOIS EVIDENCE § 902.5 at 936 (9th ed. 2009); *see Animisms v. Nanas*, 171 Ill. App. 3d 1005, 1010 (1st Dist. 1988).

3. All The Evidence Was Relevant.

The trial court ruled that the newspapers, the Masokas letter, and the Foster report were irrelevant. Relevancy rulings are reviewed for abuse of discretion. *People v. Ward*, 101 Ill. 2d 443, 455-56 (2004). These rulings were just that.

Given the prosecution's repeated mantra that Rivera's knowledge of so many unpublicized facts was proof of his guilt, evidence that many of these facts appeared in newspapers was highly relevant. And given the prosecution's emphasis on Sergeants Tessmann and Malay's supposed ignorance of the mop, evidence undercutting that claim was critical. Each of the excluded pieces of evidence met the definition of relevance: having the "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *People v. Buck*, 361 Ill. App. 3d 923, 938 (2nd Dist. 2005).

The trial court was wrong in ruling that the newspaper evidence was irrelevant because "there has been no testimony that the defendant read the articles." R17767. First,

there was evidence that Rivera had discussed the contents of the articles with his father (unsurprising with a local crime of this magnitude). R17711-12. Second, the significance of the information being in the public domain is not that the defendant necessarily *read* those particular documents, but that the information was public, and therefore was not known only to the murderer, as the prosecution contended. The Nevada Supreme Court addressed a similar situation in *Woods v. State*, 696 P.2d 464, 470 (Nev. 1985), holding:

> [T]he record shows that the district court based its ruling on the fact that there was no evidence that appellant, who did not testify, had read any of the news accounts. This factor need not have been determinative. Since the State argued that information provided by appellant could have been known only by the murderer, the newspaper articles could have been properly used to show that the details provided by appellant were public knowledge.

The Masokas letter was also relevant. The jury was asked to decide between Mr. Masokas's account and Sergeant Tessmann's denial that Sergeant Tessmann knew about the mop before questioning Rivera. Any evidence that tended to corroborate Mr. Masokas's account was very significant. The letter did just that. Although written after the confession, it describes the briefings Mr. Masokas received about the case—which all happened *before* Rivera's confession closed the investigation. DX31. And Mr. Masokas testified that Sergeant Tessmann was the person who briefed him. Other witnesses confirmed that Sergeant Tessmann met with Mr. Masokas on October 27. R14278, 15063. In addition, the Masokas letter also drove home the extent to which those interrogating Rivera—even someone outside the Task Force—knew about the blue mop.

The Foster report was relevant for the same reason—it drove home the improbability that Sergeants Tessmann and Maley were unaware of the blue mop prior to Rivera's confession. There was testimony that members of the Task Force met daily and reviewed police reports that were filed, and this report bolstered the defense position that

Sergeants Tessmann and Maley were exposed to facts about the blue mop. R14957, 15040, 15542, 16046-7, 16139, 16154, 17342. It also helped establish that many of the other officers who interrogated Rivera (and who could well have disclosed this fact to him) knew about the mop.

VII. RIVERA'S STATEMENTS SHOULD HAVE BEEN SUPPRESSED AS INVOLUNTARY.

In its 1996 decision, this Court rejected Rivera's claim that the various statements he made should have been suppressed as involuntary. 1996 Op. at 28-31. Prior to the recent trial, the defense raised this issue again, asserting that Rivera's constitutional rights were violated by introduction of the statements. C3484. The trial court denied the motion, holing that the "law of the case" precluded relitigating of the issue. R12260-64. Rivera raises this issue now once again, asking the Court to reconsider its decision in light of the evidence set forth in the Brief and in the record below. See *supra* 4-17. Rivera's age, his intelligence, the presence of police deception, the level of coercion, and the suggestions of leniency all lead to the conclusion that the confession was involuntary under the Due Process Clause of the Fourteenth Amendment to the United States Constitution and under the Illinois Constitution. See *Scheckloth v. Bustamonte*, 412 U.S. 218, 226 (1973). Rivera recognizes that the Court has already passed on this claim, but raises it here again to provide the Court the opportunity to revisit its decision and to preserve it for possible future review, should that ever prove necessary.

CONCLUSION

For the reasons stated in Argument I, this Court should reverse the conviction and order that the Constitution's Double Jeopardy Clause precludes retrial.

As a less preferred alternative, for the reasons stated in Arguments II through VII, this Court should reverse the conviction and remand for a possible new trial.

Respectfully submitted,

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JULY 12, 2010

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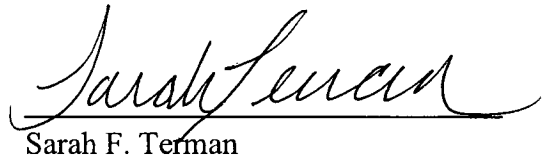
CERTIFICATE OF COMPLIANCE

On July 2, 2010, the Court granted Mr. Rivera's motion to file a brief not in excess of one-hundred (100) pages. On that basis, the below certification is made.

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is one hundred (100) pages.



Sarah F. Terman