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.	)	

REPLY BRIEF OF DEFENDANT-APPELLANT
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ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

REPLY ARGUMENT

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

A person unschooled in American law could read the State's brief and assume our system places the burden on a criminal defendant to prove his innocence beyond any reasonable doubt. For example, the State writes, "although Defendant presented evidence suggesting he had not sexually assaulted and murdered Holly Staker, that conclusion was not compelled in light of the People's evidence." SB28.[1] As we will show, though, the evidence did compel a finding that the doubts about Rivera's guilt are reasonable ones, and the State's efforts to avoid that conclusion are more strained today than ever.

A. The DNA Evidence and the EMS Evidence

A prime example of the State's strained argument is the State's effort to salvage its reckless "contamination" theory to explain away the DNA exclusion of Rivera. As we explained (OB35), this theory is not simply wildly speculative, it is conclusively refuted by the facts. Following the 1992 autopsy, the swab from the rape kit was found to have a mixture of Holly Staker's cells and a *single sperm profile*. In 2005, during the DNA tests leading to Rivera's exclusion, the swabs again showed a mixture of Holly Staker's cells and a *single sperm profile*. It is impossible, therefore, that a second sperm sample contaminated the first sample during the intervening years, as that would have resulted in two male profiles being found in the 2005 tests.

The State's new answer to how its contamination theory may still be viable is to concoct a scenario so far-fetched it borders on the bizarre. According to the State, the original examination of the swab after the autopsy focused on the *cotton* part of the stick,

[1] Citations to the State's Brief are to "SB," and citations to Rivera's Opening Brief are to "OB."

but by the time of the recent testing, the cotton had disintegrated, so the 2005 tests looked at the wood portion of the swabs. Thus, the State suggests, "it is possible that the single profile on the stick was different than, and added after, any sperm on the cotton portions of the swab." SB22-23. What the State is suggesting is that the original swabs contained (a) cells from Holly Staker and sperm from the rapist on the cotton portions; and (b) cells from Holly Staker but no sperm from the rapist on the wood portions; but (c) at some later time sperm from an unrelated case accidentally made its way onto the wood portions of the two separate swabs.

As if this were not unreasonable enough, the State's new contamination theory also requires one to assume that somehow only the material from the wood portion, not the cotton, ever came into contact with the vials in which the swabs were continuously held—for the 2005 testing involved the residue left on the inside of the vials as well as the residue on the sticks. R16778-79, 16926, 16960, 17068-69. Worse still, all these phenomena would have to have occurred with two separate swabs and two separate vials, both of which were tested independently and excluded Rivera. See OB22-23 (one set of testing was done by Alan Keel in California and one by William Frank in Illinois).

According to the State, although this "contamination of the sample may have been unlikely, it was not ruled out." SB23.[2] This argument is in keeping with the State's implicit theme that Rivera carried the burden of proving his innocence beyond any reasonable doubt. This sort of unfounded "contamination" argument also threatens to

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[2] The State (SB22) cites witnesses for the uncontroversial proposition that contamination is a possibility in any scientific enterprise, but none of them saw anything in this case suggesting contamination had occurred. See OB23-24. As we have explained, the common presence of a single male profile proves it did not.

nullify the wonderful progress DNA analysis has facilitated in convicting the guilty and exonerating the innocent. See OB36.

The State also points to evidence that "the victim might have been sexually active in the days before the murder," arguing that because Holly Staker was molested as an eight-year old and masturbated as an eleven-year old, it stands to reason she was a girl who was apt to have been sexually active. This is wild (and offensive) speculation, not evidence. In fact, the only evidence relevant to whether the semen found in the victim's vagina may have come from recent unrelated sexual activity is the undisputed fact that there was no semen on her underpants. See OB37. The State posits that it is always "possible" that this was one of those cases in which, despite the presence of sperm from earlier sex in the victim's vagina, none of it had leaked onto the underpants she had been wearing that entire day. SB23. According to the State, so long as it is "possible" that the DNA does not exclude Rivera, no matter how unlikely, Rivera's conviction may be sustained. This is a gross distortion of the guilty-beyond-a-reasonable-doubt standard.

The Electronic Monitoring System ("EMS") evidence provides yet another instance in which the State distorts powerful exculpatory evidence by playing fast and loose with the facts. There is no question that Rivera sometimes left his house despite the EMS and that this routinely triggered the alarm system and created a permanent record of his violations. See OB25. This fact is, of course, quite exculpatory of Rivera because it shows his unit and the system worked properly, thus adding further force to the undisputed fact that there was no record of any violation on August 17, 1992. Faced with this problem in its case, the State claims there was "testimony that Defendant would often leave his house and either disconnect the EMS monitor unit *or remove the ankle unit by*

softening its plastic band in hot water and stretching it over his foot." SB26 (emphasis added).

The State cites eight passages of transcripts to support this statement, but seven of them are about his leaving the house with the monitor *on*—something we all agree occurred on some occasions and created a recorded EMS violation each time. The lone passage that deals with Rivera slipping the band off his ankle is from the testimony of Detective Ostertag, who had testified in the 1998 trial that Rivera told him that he stretched the band with hot water and slipped out of it. But the State fails to disclose that Detective Ostertag admitted on the witness stand at both the 1998 trial and the recent trial that he was completely *mistaken* about Rivera having told him that. R15876, R10490. Instead, he claimed he had heard this piece of information from Rivera's girlfriend, although he had failed to document it in any police report. R15876-89. Regardless of what the girlfriend did or did not tell the detective during an interview, however, it was rank hearsay never admitted as substantive evidence at any trial. It is a sign of the State's desperation that it now relies on this point (for which there was no evidence admitted) to minimize the implications of the EMS evidence and to defend the conviction.

These theories of how Rivera could be guilty despite the DNA and EMS evidence to the contrary are precisely the sort of "unreasonable, improbable, or unsatisfactory" suppositions that constitute reasonable doubt. *People v. Smith*, 185 Ill. 2d 532, 542 (1999). Cases built on this kind of conjecture are rare, and generate those rare occurrences in which appellate reversal based on insufficiency of the evidence is necessary. There are unquestionably doubts about Rivera's guilt, and these doubts are unquestionably reasonable.

B. The Role of the Confessions in the Analysis

Perhaps there might be some case in which a confession is so powerfully self-corroborating that a jury reasonably could rely upon far-fetched theories and speculation to reconcile contrary DNA evidence. The confessions in this case are light years away from that.

Most critically, there is *not one piece of accurate information attributed to Rivera that the police did not already know.* To the contrary, as we have described, each and every "new fact" that Rivera provided was either recognized by the authorities as affirmatively false or unsubstantiated. OB41-44. Indeed, even with regard to facts that the police already knew, there are many inaccuracies in the narratives attributed to Rivera (such as the claim that the young boy was in the house or that the girl was in diapers). OB13, 27, 41. Notwithstanding the State's speculation, (SB24), none of these errors can be explained as matters about which Rivera might lie to cast himself in a better light. It is also noteworthy that the State says nothing in its Brief about the inconsistency between Rivera's confession and the presence of bloody streaks on the front staircase (that were not present before that night), or the straight, clean-edged cut on the back door. See OB3, 19, 28. Instead of taking the statements as a whole and recognizing they are replete with inaccuracies, the State plucks out facts that are accurate and offers them as evidence of guilt, then dismisses all of the inaccuracies as inconsequential.

The evidence regarding Rivera's psychotic breakdown and the prolonged nature and method of the interrogation further diminishes the force a reasonable jury could give to the confession in light of the DNA. OB26-27. Even the prosecution's account of the interrogation puts Rivera in a psychotic state, banging his head against the window, and pulling out pieces of his scalp, before one of the interrogators got on the floor of the

rubber room next to him in order to secure his signature on the statement the investigators had prepared. OB11-14. In addition, the force of the statements attributed to Rivera is further eroded by the great divide between the investigators' accounts of Rivera's relaxed condition during the periods of questioning (to the point of his correcting misspellings in the statement they prepared) and the consistent testimony of the jail personnel that Rivera was decompensating and uncommunicative at those very times. OB11-15.

Nonetheless, the State contends that none of this makes any difference because Rivera knew some facts only the police knew.[3] According to the State, Rivera's knowledge of these facts made it reasonable for the jury to adopt remote and speculative theories that marginalize the DNA (and other exculpatory evidence) in order to reconcile the DNA exclusion with the sure "evidence" of guilt reflected in the statements attributed to Rivera. That argument might hold water were this a meaningfully self-corroborating confession—one in which the defendant disclosed some important information (such as location of a body or a weapon) unknown to the police. But nothing even close to that was involved here.

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[3] The State concedes that 15 of the facts contained in Rivera's statements had all been published in newspapers. SB16. The State acknowledges, moreover, that Rivera's father testified that he read the newspapers regularly and discussed the Holly Staker case with Rivera. *Ibid.* But, once again distorting the burden of proof, the State discounts the importance of these articles by arguing there was no testimony about which specific details of the newspapers' accounts of the crime Rivera's father discussed with him. *Ibid.* It is significant that, although the State recognizes its duty to inform this Court that all these facts were published in newspapers, the prosecution successfully barred the jury from knowing about the content of those newspaper articles, thus leading the jury to believe that even these 15 facts were within the realm of secret evidence only the police knew. The trial error in excluding these articles is addressed in Argument VI of our briefs. See OB92-99; *infra* 35-40.

A reasonable jury would have had to recognize that during Rivera's exposure to more than a dozen officers over the course of days of heated questioning, various facts the police knew were inevitably disclosed to him—intentionally or inadvertently. This is far from unfounded speculation. Some of the interrogators testified that they asked Rivera leading questions that revealed various facts.[4] The State could have asked—but did not—each witness who had questioned Rivera to list which facts they may have revealed to him. Instead, the State asserts it was incumbent upon the defense to establish which specific information was disclosed to Rivera by various officers and that, in the absence of the defense presenting that evidence about each of the facts, the jury was somehow justified in assuming that officers did not disclose any information to him. SB21.[5]

The State's approach once again flips the burden of proof on its head. The State's argument boils down to the claim that the conclusive DNA exclusion can reasonably be ignored because the confessions included some secret facts only known to the police. And the reason we know that the police never disclosed these facts to Rivera, according to the State, is that the *defense never proved that these specific facts* were revealed. If the

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[4] The State ignores this fact when it writes that Rivera "now recalled that the victim was wearing black stirrup pants and a multi-colored shirt." SB11. Sergeant Tessmann admitted he might have asked questions that contained facts, such as "she had a multi-colored shirt on, right?" R14956. Sergeant Fagan recalled asking specifically whether Rivera remembered eating a pizza. R15478-79. Indeed, Lieutenant Maley specifically testified that had he known about the straight line cut on the door, "I would have questioned him about it." R16055.

[5] A recent exhaustive study of 250 DNA exonerations found that in 40 of those cases the defendant had actually confessed (falsely, it turned out) and in 95% of those cases (38 of the 40) it was reported that the defendant knew secret information that no one other than the police knew. See BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 19 (Harvard U. Press 2011). This does not mean all these interrogators were necessarily lying. In the absence of videotaped interrogations it is unrealistic to expect that interrogators (who are often themselves exhausted) will be capable of remembering precisely which facts may have come out during extensive questioning of a suspect. *Id.* at 42-44.

State wants to put such heavy weight on the secrecy of these particular facts, *it* must bear the burden of proving the facts were indeed kept secret. Especially in light of the evidence from the investigators that they may have revealed some facts through leading questions, it is not enough for the State to say, "in the absence of contrary evidence, the jury could reasonably believe that the investigators withheld" various facts. SB20.[6]

The State also argues that Dawn Engelbrecht's initial identification of Rivera as having approached her that evening is sufficiently persuasive evidence of guilt to defeat

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[6] The State (SB19-20) places great stock in Rivera's mention of the blue mop, but any examination of whether information about the blue mop was, in fact, kept secret must take account of the circumstances through which this fact was elicited from Rivera. After Rivera gave his initial confession in the middle of the night, Detective Meadie and Sergeant Fagan asked him one final question: "When you left the apartment through the back door, did you do anything to the door before leaving?" Rivera answered that he had no memory of doing anything to the door. OB10. Then, after the 9:00 a.m. meeting in the State's Attorney's office, at which this statement was reviewed and a decision was made to send in a new team of questioners to clear up "inconsistencies," (R15922), Rivera was questioned again. The detectives who interviewed him admit that they asked about specific issues in the earlier statement they knew were untrue, and even suggested answers to some questions. *Supra* 7 n.4. Given all of this, there are grave reasons to doubt that Rivera spontaneously mentioned damaging the back door without any prompting.

One possibility, of course, is that (despite their denials) at least one of the two interrogating officers did know about the mop. This certainly would have been expected given the sharing of information among all members of the task force and given that the two investigators were specifically sent in to interview Rivera to "clear up inconsistencies," a glaring one of which was his claim to have done nothing to the back door. Despite ordinary deference to credibility questions, there are instances in which "'flaws in the testimony ma[ke] it impossible for any fact finder reasonably to accept any part of it.'" *People v. Herman*, 407 Ill. App. 3d 688, 945 N.E.2d 54, 67 (1st Dist. 2011) (quoting *People v. Cunningham*, 212 Ill. 2d 274, 283 (2004)). In *Cunningham*, the Court went out of its way to "reaffirm that the fact finder's decision to accept testimony is entitled to great deference but is not conclusive and does not bind the reviewing court." *Ibid.* (citing *People v. Smith*, 185 Ill. 2d 542, 542 (1999)).

But even if the Court feels bound to accept the denials of the officers, that by no means proves that the blue mop information was a secret fact. The blue mop is an issue that naturally would have been brought up by other investigators during the extensive series of interrogations. In this regard, it is significant that the investigators generally were quite lackadaisical about maintaining the secrecy of facts related to the crime scene. See OB93-94; *infra* 36, 38 (discussing press release).

the force of the DNA exclusion. It is remarkable that the State asks the Court to attach such weight to an initial identification; one that Ms. Engelbrecht has repudiated at each and every trial, and that her sister confirms was tentative even at the time it was made.[7] OB19. Furthermore, as we have explained, there were scores of people, including many of Rivera's friends gathered in the crowd that evening, so the fact that someone approached Ms. Engelbrecht was hardly a secret only the killer would know. OB43-44. Once again, the State puts the burden on Rivera to prove that he learned about someone's encounter with Engelbrecht from some friend. SB18-19. But the question is not whether there was actual evidence about how Rivera might have heard about the encounter; the question is whether the State can satisfy its burden of showing that knowledge of the encounter is so damning of Rivera that it overcomes the powerful DNA exclusion and erases reasonable doubt.[8]

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[7] Ms. Engelbrecht has consistently testified that she identified Rivera only after the police showed her Rivera—and only Rivera—through a one-way mirror, and only after the police told her that Rivera had admitted approaching her. See OB19. The detective admitted that he showed her Rivera alone (not a lineup), and that Rivera was wearing jail clothes at the time, but denied being otherwise suggestive. R15376-79, 15381-83. As we have noted (OB44), it is implausible that Rivera actually was in the crowd that day and approached Ms. Engelbrecht, yet not one witness from the large crowd ever saw him. In any event, this is not a situation in which an eyewitness's initial identification (later repudiated) actually identifies a suspect as the perpetrator. Even if one assumes, *arguendo*, that Rivera approached Ms. Engelbrecht, so doing would not implicate him in any crime or cast any doubt on the DNA exclusion. See OB44 n.18.

[8] In our Opening Brief (OB43 n.17), we described how the notes the police made during their October 2 interview with Rivera made no reference to his saying anything about Dawn Engelbrecht. The State takes us to task (SB17 n.3) for noting this, given the general rule that a reviewing court is to assume the trier of fact found the prosecution's witnesses credible, even in the face of such irregularities. But the question here is not only whether the Court should assume the evidence is credible, but whether it is compelling enough to overcome the power of the DNA exclusion. In addition, at some point, courts are allowed to recognize that no reasonable trier of fact could accept testimony when it is replete with flaws and inconsistencies. See *supra* 8 n.6. Finally, as we pointed out in our Opening Brief, in the event that the Court declines to reverse based

C. The In-Custody Informants

The jailhouse informants cannot possibly carry this case over the beyond-a-reasonable-doubt threshold. The State admits that one of them, Edward Martin (whom the prosecution called a "whack job" (OB45)), was thoroughly impeached with reference to his claim that Rivera made incriminating comments to him. SB27. As for the other two, the State makes no effort to show any indicia of reliability in their testimony or to rebut the various ways in which their integrity and motives were attacked. OB45-46. Instead, the State asks the Court to defer to the jury's credibility determinations, which it assumes were all made in favor of these witnesses. SB28. Even if one indulges the fiction that the jury credited this testimony, though, they are no more compelling than the dubious confessions; they only would show that Rivera (with his long history of psychiatric trouble) made incriminating statements to various people. We know he was prone to do that, as established, for example, by his demonstrably false claim that he wrote about Holly Staker in his jailhouse Bible or his wild claims about having tattoos in memory of his grandmother (who was still alive) and a twin brother (who never existed). OB17.

But, legal fictions aside, there is no cause here for substantial deference because the jury never saw these witnesses testify. The jury simply heard their testimony read from the same transcripts available to this Court. In *People v. Jose Rivera*, 2011 WL 1366369 (1st Dist. April 7, 2011), the court recently reversed a conviction based on insufficiency of the evidence after reviewing the same video clip available to the jury. The court explained that the jury was "in no better position to view" that evidence than

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on insufficiency of the evidence, all the weaknesses in the prosecution's case (including reasons to doubt credibility) must be considered in assessing the harmfulness of errors we have advanced. OB46 n.19.

the reviewing court and that "where certain evidence does not involve credibility determinations or observations of demeanor, the deference afforded is logically less." *Id.* at *13. Such is the case here. Deference is never absolute and the law most certainly does not support the idea that any time the prosecution throws a jailhouse informant into a case, appellate review for sufficiency of the evidence is unavailable on the assumption that the jury necessarily credited that testimony. The question always remains whether a jury could conclude based on the prosecution's evidence that any doubts about a defendant's guilt are simply unreasonable.

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Our system is committed to the concept of trial by jury, but it is equally committed to meaningful judicial review to weed out those rare cases in which juries have convicted in the absence of proof beyond a reasonable doubt. There are times when the sheer heinousness of a crime can blind juries and lead to a conviction despite the presence of what any objective observer would recognize as reasonable doubt. See *Cunningham*, 212 Ill. 2d at 280 ("Reasonable people may on occasion act unreasonably."). When that occurs, the system relies on the sober assessments of reviewing courts to ensure against dilution of that bedrock principle. That sober assessment in this case, we submit, can yield only one answer. Now that the DNA evidence excluding Rivera has emerged, it is untenable to conclude that the myriad doubts about Rivera's guilt are unreasonable ones. Accordingly, his conviction must be reversed.

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 our Opening Brief, we explained that the trial court made two independent reversible errors in its treatment of the experts Rivera proffered. First, with regard to Dr. Galatzer-Levy, the trial court ignored the law of the case and basic principles about a party's right to have a psychiatrist explain to a jury how various psychiatric and mental conditions operate and how they may affect behavior. OB52-56. Second, with regard to Dr. Kassin, the trial court erred in not recognizing that a defendant diagnosed with psychiatric disorders is entitled to present expert testimony about the ways in which those disorders may interact with various interrogation practices and techniques. OB56-65. In its response, the State lumps the two experts together and relies almost exclusively on its contention that *People v. Becker*, 293 Ill. 2d 215 (2010), defeats both of Rivera's claims. As we will show, there is no merit to this position. First, *Becker* has nothing whatsoever to say about Dr. Galatzer-Levy. Second, although *Becker* speaks to the general structure of inquiry about the admissibility of an expert such as Dr. Kassin, *Becker* reaffirms the approach set forth in our Opening Brief—that the inquiry is a case-sensitive one into whether the expert has specialized knowledge outside the knowledge of the average juror. In *Becker*, the answer to that question was no. In Rivera's case, the answer is yes.

A. The Limitations on Dr. Galatzer-Levy

A striking aspect of the State's Brief is its refusal to address what the State itself and this Court said in the prior appeal about the proper scope of the psychiatric testimony. As we have set forth in detail (OB49-51), in Rivera's last appeal in this case the State explicitly justified the rejection of Rivera's proffered false-confession expert

(Dr. Ofshe) by arguing that the psychiatrist, Dr. Heinrich, had been allowed to testify about the ways in which Rivera's psychiatric conditions may have caused him to react during the interrogation. This Court relied explicitly on this premise, explaining that the defense had been allowed to present the psychiatrist's testimony that "decompensation" can lead someone to have "said anything to conclude the situation with which he was faced." *People v. Rivera*, No. 2-98-1662, slip op. at 15 (2nd Dist. Dec. 5, 2001).

Now, in a dramatic about-face, the State contends Rivera had no right to have a psychiatrist testify on this subject. The entirety of the State's response to our claim that the law of the case required admission of the psychiatrist's testimony on this point is the State's opaque and conclusory declaration that, "The People submit that just because Dr. Heinrich was allowed to testify to something in the second trial does not make the admissibility of that testimony 'law of the case.'" SB31. The State offers no explanation for why that is so. It is not so. The law of the case compelled admission of the psychiatric testimony about the ways in which decompensation can lead a person to say "anything to conclude the situation with which he was faced."[9]

To be clear, the State takes no issue (and could not possibly take issue) with Rivera's right to have Dr. Galatzer-Levy testify to Rivera's suffering from various psychiatric conditions—such as depression, psychosis, and decompensation. But the State contends that, so long as the jury heard those diagnoses, Rivera had no right to have Dr.

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[9] The State does not disagree with the general proposition that a reviewing court conducts *de novo* review over claims that the trial court misapplied the law of the case doctrine. See SB30. With regard to Rivera's claim on the scope of Dr. Galatzer-Levy's testimony, therefore, *de novo* review is appropriate because Rivera is explicitly advancing a law-of-the-case argument as one of his claims on that issue. Only if the court rejects that law of the case claim, does the abuse of discretion standard come into play. Under either standard, though, Rivera prevails on this claim.

Galatzer-Levy testify (as Dr. Heinrich was allowed to at the last trial) about how these psychiatric conditions are apt to affect behavior. As we have explained (OB52-55), throwing labels of diagnoses at a jury is useless unless the jury is provided with accurate and comprehensible explanations about what those labels mean in terms of how they may affect an individual. It would be unthinkable, for example, to restrict a psychiatrist in an insanity case to simply testify that the defendant had schizophrenia, while precluding an explanation of how schizophrenia might affect his ability to appreciate the criminality of his conduct. See OB54 n.23. A great value of psychiatric testimony is that it "can translate a medical diagnosis into language that will assist the trier of fact, and therefore offer evidence in a form that has meaning for the task at hand." *Ake v. Oklahoma*, 470 U.S. 68, 80 (1985).

The State's list of various matters about which Dr. Galatzer-Levy was allowed to testify misses the point of our claim. See SB37-38. It is true the jury heard words like "major depressive disorder," "acute psychotic disorder," and "decompensation." And the jury heard that these conditions, especially combined with low intelligence and fatigue, can lead a person to become incomprehensible, can make a person incapable of understanding things, can interfere with his ability to reason and to respond, and can lead a person to lose his sense of reality. *Ibid.* But the defense's goal was not to explain Rivera's babbling; it was to explain how a person who was babbling and incoherent—a person who was decompensating in the midst of an acute psychotic episode—could still be capable of reasoning that a way to secure short-term relief from his ordeal was to say anything those around him wanted to hear. Without that vital piece of information about decompensation, all of the evidence the jury heard about Rivera's conditions actually

tended to *cut against* the defense's explanation of why a person in Rivera's condition might have confessed to a crime he did not commit.

That is why it was so critical to allow Dr. Galatzer-Levy to inform the jury (to quote Dr. Heinrich's admitted testimony from the last trial) that a person who is "decompensating" might well respond, "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." R10871-72. Had the jury heard that critical evidence, it would have been able to meaningfully assess Rivera's claim that his psychiatric conditions led him to falsely confess; without that evidence, the jury had every reason to reject the idea that someone with Rivera's conditions and symptoms was capable of deciding to tell the police what they wanted to hear in order to end the ordeal.

The decision in *Becker* has nothing to do with any of this. It does not touch in any way on how a testifying psychiatrist may explain to a lay jury what various technical diagnoses actually mean and how they manifest behaviorally.

B. The Barring of Dr. Kassin

Whether Rivera had a right to present the expert testimony of Dr. Kassin boils down to one question: does the average juror have accurate knowledge of how interrogation techniques and conditions interact with psychiatric and mental conditions in heightening the incidence of false confessions? As our Opening Brief (at 54-55, 57-59) and the *amicus curiae* briefs of the American Psychological Association and the Innocence Network explain, every piece of available data confirms what many courts have said: there is no reason to believe that a typical juror has life experience (*i.e.*, experience outside of fictional television dramas) with these issues. Juan Rivera's

freedom turned on the jury's having accurate knowledge about these specialized issues—knowledge the jury could only obtain through highly qualified expert testimony.

The State never addresses this core issue. It never contends that juries are somehow aware of the specific issues (see OB57-59) about which Dr. Kassin was prepared to testify. Instead, the State puts all of its eggs in the basket of arguing that the decision in *Becker* forecloses Rivera's claim. In doing so, the State seeks to paint *Becker* as a revolutionary decision that bars expert testimony across a wide spectrum of cases. But *Becker* does nothing of the sort. Rather, *Becker* ratifies the well-established principle that in deciding whether to admit expert testimony on a subject, the judge must "balance its probative value against its prejudicial effect." *Becker*, 239 Ill. 2d at 235. And *Becker* confirms that, in so doing, a court must "carefully consider the necessity and relevance of the expert testimony in light of the facts in the case." *Ibid.*

In *Becker* itself, this balancing counseled against admitting the testimony. On the "prejudice" side, the Court recognized the general disfavor of having one witness invade the province of the jury by commenting directly on the credibility of another testifying witness. And on the "probative value" side of the scale, the Court found little or no value because "it is a matter of common understanding that children are subject to suggestion, that they often answer in a way they believe will please adults, and that they are inclined to integrate fictional notions with realities as we know it." *Id.* at 238. Thus, the Court in *Becker* concluded that "given the facts of this case," the expert was inadmissible because "the limited probative value of [the expert's] testimony—limited, that is, in light of the jurors' common knowledge in this area—was outweighed by the prejudice she would

have interjected into the trial—commenting extensively and directly on circumstances purportedly affecting the mental processes and credibility of another witness." *Id.* at 239.

The particular facts of Rivera's case are very different, and the approach described in *Becker* compels the admission of Dr. Kassin's testimony.[10] As we have explained (OB61), well before *Becker* the law was clear that experts were not permitted on subjects within average jurors' life experiences and common sense. In *People v. Gilliam*, 172 Ill. 2d 484, 513 (1996), for example, the Court held that jurors need no expert to appreciate that someone might confess falsely to protect his family against threats. There was nothing specialized about the concept of someone loving his family and being willing to expose himself to risk to protect them. See also *People v. Slago*, 58 Ill. App. 3d 1009, 1016 (2nd Dist. 1978) (no expert testimony is needed for jury to assess claim that a person might confess to avoid retaliation from the real murderer). *Becker* adds another general subject—the suggestibility of children—to the list of what an average juror is expected to understand from life experience. This conclusion finds support, of course, in the fact that every juror was once a child, and virtually every juror has had meaningful exposure to children in adulthood—as a parent, sibling, uncle, aunt, neighbor, or friend.

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[10]We have explained that *de novo* review is appropriate in examining the ruling relating to Dr. Kassin because the trial judge mistakenly considered itself bound by the law of the case doctrine on this issue and thus never independently exercised discretion. OB51. The State disagrees, contending the trial court did not consider itself bound by the law of the case. SB30. The record powerfully refutes the State's claim. During the argument on whether Dr. Kassin would be allowed to testify, the prosecution invoked the law of the case doctrine no less than five separate times (R12528-32), telling the Court there "could not be a clearer example of the law of the case." R12529. In ruling, the trial court stated that the "issue was addressed in full by the Appellate Court." R12534-35. In fact, though, this was a misapplication of the law of the case doctrine, as explained in our Opening Brief (at 49-51).

The subject of Dr. Kassin's proposed testimony stands in sharp contrast. The typical juror has no foundation in life experience from which to draw in assessing how individuals with psychiatric conditions and mental disorders are apt to react to highly specialized interrogation techniques. It is for this reason that even decisions rejecting experts on interrogations and false confessions have recognized consistently how different the situation is when the subject of the testimony is the intersection of personality disorders with interrogations and false confessions. See, *e.g.*, *People v. Polk*, 407 Ill. App. 3d 80, 105-06 (1st Dist. 2011) (no need for an expert witness on false confessions where "defendant was not diagnosed with a personality disorder"); *People v. Bennett*, 376 Ill. App. 3d 554, 573 (1st Dist. 2007) (false confession expert not needed in cases in which the defendant had not been "diagnosed with a personality disorder"); *People v. Wood*, 341 Ill. App. 3d 599, 609 (1st Dist. 2003) (no expert needed because suspect was not "diagnosed with a personality disorder"). Here, Rivera most certainly *was diagnosed with a personality disorder*. This is the very type of case these decisions have identified as one in which expert testimony is vital. [11]

[11]The State is misguided in suggesting our claim relies primarily upon *People v. Cardamone*, 381 Ill. App. 3d 462 (2nd Dist. 2008), which arguably was called into question in *Becker*. Our position is that the need for expert testimony on the issue of interrogations of people with mental health and personality disorders is well-established in the law and is, in fact, far more compelling than in some other contexts, including *Cardamone,* in which courts have allowed expert testimony. In our Opening Brief, we argued Rivera's entitlement to relief followed *a fortiori* from *Cardamone*. It is only that specific argument (*i.e*, that "*a fortiori*" argument) that is now undercut by *Becker*. Otherwise, for reasons explained in the text, the analytical framework of *Becker* fortifies Rivera's claim for relief. Indeed, *Becker*'s extensive discussion of particularized balancing ratified the rule we attributed to *Cardamone* as confirming that "the propriety of admitting expert testimony turns on the particulars of testimony as they relate to issues specific to the case." OB61.

Thus, unlike in *Becker*, there was tremendous "probative value" in the proposed testimony here. The ability to argue some general points in closing (which the State suggests cures the problem of excluding the expert) in no way obviated the need for an expert who could provide vital facts to the jury to help explain a subject outside its normal life experience. See R18193 (instructing jury that "any statement or argument made by the attorneys which is not based upon the evidence should be disregarded").

The "probative value" side of the scale, therefore, weighs heavily in favor of allowing Dr. Kassin to testify. This, in and of itself, leads to a different outcome in the balancing. In addition, though, the "prejudice" side of the scale here is considerably lighter than that described in *Becker*. In *Becker*, the expert witness was opining on the credibility of the victim who was actually testifying in the case. The Court explained, therefore, that the expert's testimony implicated the concern of asking one witness "to comment directly on the credibility of another witness" whom the jury had the opportunity to observe. *Becker*, 239 Ill. 2d at 236. Here, by contrast, the issue was not the credibility of any witness who testified, but the significance that should be attributed to out-of-court statements attributed to Rivera, which were not videotaped and were therefore not subject to the jury's direct observation. Contrast *Polk*, 407 Ill. App. 3d at 104 (stressing, as a reason an expert was not needed, that "the jury viewed defendant's videotaped statement and could assess the format in which the questions were presented and answers were provided"); *Becker*, 293 Ill. 2d at 227 (jury viewed videotape of victim's out-of-court statement in addition to observing her in-court testimony).

In the end, then, the balancing required by *Becker* and earlier cases compels the conclusion that Rivera was entitled to present the testimony of Dr. Kassin. The decision

to bar that testimony, on the particular facts of this case involving a defendant with a diagnosed mental disorder who was in the throes of an acute psychotic episode, violated Rivera's rights under the United States and Illinois Constitutions, as well as under the Illinois law of evidence. The jury that convicted Rivera must have believed that confessions are the "gold standard" of evidence, strong enough even to trump DNA. Justice demands that if Rivera is to be convicted on that basis, the jury needs to have had every opportunity to fully understand the reasons that cast doubt on the value of the particular confessions in this case.

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.

In our Opening Brief, we explained that admission of the State's inflammatory evidence about Holly Staker having been molested and having masturbated violated (a) the Rape Shield Statute; (b) classic relevancy principles; and (c) rules on the proper method of introducing character evidence when it is admissible. The State has offered nothing of substance to undercut our showing that the admission of the evidence violated each of these three principles.

A. The Rape Shield Statute

There are some key areas of agreement between Rivera and the State with regard to the Rape Shield Statute. For example, the State agrees that the evidence at issue qualifies as the kind of evidence of "prior sexual activity" governed generally by the Rape Shield Statute. SB42. The State also agrees that a prosecution for felony murder based on the predicate felony of a sexual offense qualifies under the Rape Shield statute

as a prosecution for the predicate felony as well. SB44. The State nonetheless advances two untenable arguments as to why the Rape Shield Statute was not violated.

The State's first argument is the wholly unprecedented claim that the Rape Shield Statute only bars admission of evidence when the *sole* charge against the defendant is a sexual assault charge.[12] According to the State, whenever a defendant is also being tried for any other offense not listed in the Rape Shield Statute, the evidence is admissible (subject to a possible limiting instruction) by either the prosecution or the defense. SB44-46. It is difficult to exaggerate how radical this argument is—it defies scores of precedents and would decimate the Rape Shield Statute in a huge swath of cases.

There are a great many decisions, a small sampling of which we list in the margin, in which Illinois courts have applied the Rape Shield Statute to trials for a combination of sexual assault and other charges.[13] These cases make it plain that the Rape Shield Statute applies whenever a prosecution includes a sexual assault charge (as is the case here). No court in the more than 30-year history of the Statute has ever hinted otherwise.

The reason for this is obvious: it is very common for a sexual assault prosecution to include an array of other charges as well, such as unlawful restraint, breaking and entering, aggravated battery, or attempt murder. See *supra* 21 n.13. Yet, according to the

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[12] This claim is not the one the prosecution advanced in the trial court, where it argued that a felony murder prosecution based on sexual assault is not a prosecution for sexual assault. R12547. The State has now conceded that that argument is wrong. See SB44.

[13] See, *e.g.*, *People v. Sandoval*, 135 Ill. 2d 159 (1990) (defendant also charged with battery and unlawful restraint); *People v. Harris*, 297 Ill. App. 3d 1073 (1st Dist. 1998) (defendant also charged with armed violence and aggravated kidnapping); *People v. Ellison*, 23 Ill. App. 3d 615 (2nd Dist. 1984) (defendant also charged with home invasion); *People v. Dorff*, 77 Ill. App. 3d 882 (3d Dist. 1979) (defendant also charged with attempt murder); *People v. Cornes*, 80 Ill. App. 3d 166 (5th Dist. 1980) (defendant also charged with intimidation).

astonishing position the State now advances, when those charges are part of a case, either because so charged or as lesser included offenses of charged offenses, either side is entitled to introduce all of the evidence that the Rape Shield Statute would prohibit had the trial been for sexual offenses alone. To understand how outlandish this position is, consider a classic fact pattern of a man charged with sexual assault and unlawful restraint based on a woman's complaint that during a date at his home he refused to let her leave and raped her. Prior to the passage of the Rape Shield Statute, such a defendant would have been allowed to introduce evidence of the victim's sexual history or "promiscuity" under the theory that because she consented to sexual encounters with others in the past, it was somewhat more probable she consented on this occasion as well. The Rape Shield Statute, of course, emphatically rejects such evidence. Yet, according to the position the State now advances, that very evidence of prior consensual sex with others would be admissible because the defendant was also charged with "unlawful restraint," thereby rendering the trial more than just a sexual assault prosecution.

This is an extraordinarily pernicious position. The goals of protecting victims' privacy, encouraging victims to come forward as complainants, and keeping the jury focused on only the most relevant issues do not turn on whether the prosecution has charged the defendant with additional charges beyond the sexual assault charge. It makes no difference to a victim that she is being humiliated and having her reputation and privacy destroyed with reference to the unlawful restraint or armed violence charge in a case, as opposed to the sexual assault charge in the case. This obvious truth is fully consistent with the plain language of the Rape Shield Statute that speaks of

"prosecutions" and "trials," and does not limit its application to a particular charge within the trial. 725 ILCS 5/115-7.

Unsurprisingly, no court in the United States has ever held that evidence otherwise barred by a rape shield statute is admissible on the ground that other non-sexual-assault charges were also part of the trial. Like Illinois, all other states have routinely applied their statutes to trials with combined sexual assault and other charges. Indeed, we have found only one case in the country in which a party even dared to advance a contrary suggestion. In *State v. Redford*, 750 P.2d 1013 (Kan. 1988), the defendant argued that because he was charged with aggravated kidnapping in addition to rape, he was entitled to introduce evidence which the Rape Shield Statute would have barred had he been prosecuted exclusively for rape. He suggested that the jury be given a limiting instruction that it should consider that evidence only when deliberating on the non-rape charge. The Court summarily rejected the suggestion, explaining:

> It would be naive to pretend the jury would consider evidence of [the victim's] prior sexual activities only for the purpose of determining if she had been kidnapped and not to determine if she had been raped and sodomized. The enactment of [the Rape Shield Statute] was prompted in part by the realization that the admission of evidence of prior sexual activity destroys the victim's testimony. It would violate public policy to permit [the defendant] to present evidence of the victim's prior sexual activity merely because he was charged with other crimes in addition to rape and sodomy.

Id. at 1024.[14] With all due respect to the State, it is truly astonishing that in its zeal to defend Rivera's conviction, it is advancing a position so fundamentally at odds with the

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[14] In *Abdulkadir v. State*, 610 S.E.2d 50, 53-54 (Ga. 2005), the defendant made a variant on the argument, contending that because he had been acquitted of the rape charges, but convicted on different counts, he was entitled to a new trial at which the Rape Shield Statute did not govern. The court rejected the argument, holding that the statute governs a trial that involves "any prosecution for rape," meaning there was no error in applying it to a case with rape and non-rape charges.

Rape Shield Statute and the State's general interests in effectively prosecuting rape cases and protecting the privacy and dignity of rape victims.

The State's second claim is that the evidence was admissible because the court was "constitutionally required" to admit it to protect the State's right to a fair trial. Here, too, the State's claim is fundamentally at odds with settled precedent and basic legal principles. To say that an exception to a statute is "constitutionally required" is to say that a court is bound by the doctrine of judicial supremacy, as first set forth in *Marbury v. Madison*, 5 U.S. 1 (1803), to invalidate any statute that fails to create that exception. In other words, to say that an exception is "constitutionally required" is to say that even had the Illinois legislature passed a statute stating that "under no circumstances may the prosecution ever introduce evidence of a victim's prior sexual activity," a court would be compelled to invalidate it as a violation of the State's "constitutional right" to a fair trial.

No case we have found in the history of American law has ever held such a thing. See OB71. A legislature is allowed to restrict the prosecution's rights to present evidence without any inquiry into whether this violates some non-existent "constitutional right" of the State to a fair trial. The legislature is the voice of the State, so it cannot possibly violate any "constitutional right" of the State itself.

The State cites five cases for the proposition that a state "also has a right to a fair trial." SB47. We take no issue with that principle when it is applied, as it was in each of those cases, to recognize that evidentiary and procedural rules that require the balancing of the competing interests of the prosecution and defense must give cognizance to the

State's legitimate interests.[15] But that is a far cry from the claim that the State has a "*constitutional* right," which is the only inquiry relevant under the explicit language of the Rape Shield Statute. See 725 ILCS 5/115-7(a)(2). The State simply ignores the word "constitutional" in the statute, treating it as equivalent to an adjective such as "important" or "significant." But the term "constitutional right" is a very precise one and speaks to specific rights set forth in the Constitution—not to general aspirations and goals of government set forth in the Preamble.[16] Whatever *important* interests the State may have, it most certainly does not possess any "*constitutional* right" to a fair trial. Those belong exclusively to a defendant.[17]

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[15] See *People v. Holmes*, 141 Ill. 2d 204, 273-78 (1984) (State has legitimate interest in ensuring that a defendant's Sixth Amendment rights are protected and that the defense not take advantage of a conflict of interest to impair the prosecution); *People v. Barner*, 374 Ill. App. 3d 963, 971 (1st Dist. 2007) (when balancing prejudice and relevance of admitting evidence to impeach the defendant, a court must take account of State's right to impeach credibility); *People v. Meisenhelter*, 381 Ill. 378, 388 (1942) (decision on whether to grant severance must take heed of State's rights as well as defendant's when there is no prejudice to the defendant in a joint trial); *People v. Roy*, 172 Ill. App. 3d 16, 24 (4th Dist. 1988) (in defining scope of defendant's right to impeach a witness a court must respect the State's right to a fair trial as well); *People v. Dilger*, 125 Ill. App. 3d 277, 280 (2nd Dist. 1984) (reversing judge's acquittal of a defendant in the absence of a trial as not protecting the State's right to present its evidence).

[16] See generally *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905) ("Although that Preamble indicates the general purposes for which the people ordained and established the Constitution, it has never been regarded as the source of any substantive power * * *."); *Irving v. J. L. Marsh, Inc.*, 46 Ill. App. 3d 162, 165 (1st Dist. 1977) ("Like a preamble, such a provision is not an operative part of the Constitution. It is included to serve a teaching purpose, to state an ideal or principle to guide the conduct of government and individual citizens."). The State also cites the Tenth Amendment to the United States Constitution, but that Amendment protects states' rights vis-à-vis the federal government; it creates no states' rights vis-à-vis their own citizens.

[17] There are, of course, many asymmetries between the powers and rights of the State and those of defendants. For example, the State may compel testimony through grants of testimonial immunity, a power unavailable to a defendant. Compare 725 ILCS 5/106-1 (State's right to have court grant immunity) with *People v. Peters*, 144 Ill. App. 3d 310, 318 (2nd Dist. 1986) ("a defendant cannot require the State to grant immunity to a defense witness so that the defense may obtain testimony which it deems relevant").

Similarly, the State misses the point when it claims that the plain language of the Rape Shield Statute does not limit the "constitutionally required" exception to the defense. SB48-49. By limiting the exception to what is "constitutionally required," the legislature was explicitly—in plain language—limiting it to the defendant's right to present evidence.[18] It is plain, then, that the admission of the evidence in question violated the Rape Shield Statute and compels reversal.

B. General Relevancy Principles

Even apart from the Rape Shield Statute, the evidence of Holly Staker having been molested three years earlier and having masturbated was inadmissible because it was thoroughly irrelevant. In our Opening Brief (at 73) we explained how outrageous it would be for a defense lawyer to put on evidence that a woman or girl had been molested or masturbated in order to show that she consented to sex at a later date.

The State has no response to this, except to rely on wholly inapposite cases in which the victim's prior sexual conduct was clearly relevant to the matter at hand. See SB50. In one of those cases, the evidence of prior sexual intercourse rebutted the

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Similarly, the State may entice informants to testify by providing them with material benefits, conduct which constitutes a felony if undertaken by the defendant. Compare *People v. Bannister*, 236 Ill. 2d 1 (2009) (State may "bargain" with witnesses to secure their testimony) with 720 ILCS 5/33-1 (a person providing benefits to witnesses that are not authorized by law is guilty of bribery). On the other hand, defendants have certain rights that States do not—including individual constitutional rights that entitle them to exceptions from statutes that would otherwise violate those rights.

[18] There was, therefore, no reason to include the words "by the defense" in the statute. It would have been perfectly acceptable to do that, as Federal Rule of Evidence 412(b)(1)(c) later did, but the Illinois legislature accomplished precisely the same result through the words it used. Significantly, at the time the Illinois legislature acted (P.A. 88-411, enacted on August 20, 1993), the Federal Rule simply created an exception when "constitutionally required." The later amendment (103 P.L. 322, enacted on September 13, 1994) of the Federal Rule did not change the meaning of the provision in any way. See Advisory Committee Notes to 1993 Amendment of Federal Rule of Evidence 412. See also *Amicus Curiae* Brief of the Illinois Coalition Against Sexual Assault, *et al.*, at 17.

prosecution's contention that the young victim's torn hymen helped prove the defendant had molested her. See *People v. Anthony Roy W.*, 324 Ill. App. 3d 181 (3rd Dist. 2001). In the other, the evidence of the victim's prior sexual activity was plainly relevant to rebut the prosecution's claim that the young victim's knowledge of how sexual intercourse takes place helped prove the defendant had molested her. See *People v. Hill*, 289 Ill. App. 3d 859 (5th Dist. 1997). These obvious instances of relevance stand in stark contrast to the State's offensive declaration that a girl having been molested earlier and having masturbated is relevant to assessing whether she willingly engaged in sexual intercourse at a later time. The irrelevance of this highly inflammatory evidence is an independent ground for reversal.

C. Improper Method of Introducing Character Evidence

The final—but no less consequential—reason the admission of the prior sexual activity evidence compels reversal of Rivera's conviction is that it violated the principle that character evidence, even when admissible, must be proven through reputation evidence, not specific prior acts. See OB73-75. The State again has no meaningful response. Instead, it makes the bizarre claim that the passage of the Rape Shield Statute—which severely *restricts* evidence of prior sexual acts—somehow *expanded* the admissibility of evidence of specific prior sexual acts to prove character. Again, the State cites cases that have no bearing on how the character trait of propensity to engage in sex is proven. Instead, it relies upon cases (SB51) in which the prior sexual activity was introduced for some reason having nothing to do with character and propensity (such as an explanation for the absence of a hymen). Here, as the State concedes, (*ibid.*), the prosecution's only conceivable purpose in introducing the prior sexual act evidence was

to show that Holly Staker was the kind of girl who was prone to be sexually active.[19] The law has a phrase for this kind of evidence: it calls it "character evidence" and demands that it be proven through reputation, not specific prior acts. See generally *People v. Fuller*, 117 Ill. App. 3d 1026, 1038 (1st Dist. 1983) ("Even prior to the enactment of the rape shield law, however, evidence of complainant's prior specific sexual acts was inadmissible and defendant was limited to proving only complainant's general reputation for immorality and unchastity."). This is yet another ground for reversal.

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.

It would have been very simple to avoid allowing the jury to infer (inaccurately) that the polygraph showed Rivera raped and murdered Holly Staker. All the trial court had to do was allow the defense to ask Mr. Masokas, "were you able to determine whether or not Mr. Rivera was being deceptive when he denied involvement in Holly Staker's murder." R14266. At Rivera's second trial, the defense was allowed to ask this question and Mr. Masokas simply (and accurately) testified there were *no results* on that issue. R9712-13. Yet, despite the law of the case doctrine, the court refused to allow that very question in this trial. The issue now presented is whether refusing to allow that brief question—refusing to allow the defense to show there were *no results* from the polygraph—demands reversal. It does.

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[19] In the pre-trial arguments on admissibility of this evidence, the prosecutor explained that this case was "a very bizarre and phenomenal situation where the State would want to put in prior reputation and prior sexual acts of the victim not with the defendant in their own case to dirty her up." R12551. This effort to "dirty her up" went directly to character, and had to be proven accordingly—assuming it was admissible at all, which we vehemently deny.

One of the State's primary responses is to fault Rivera (accusing him of "inviting error") for having inserted the subject of the polygraph examination into the trial. See, *e.g.,* SB65 ("Defendant was attempting to himself raise the impermissible inference that he was led to believe he had failed his polygraph on October 29"). As the trial court recognized, however, there was nothing the least bit "impermissible" about the defense raising this issue because doing so was his inalienable right under the Sixth Amendment. Rivera was constitutionally entitled to inform the jury about all the pressures leading to his breakdown and statements—including that he was polygraphed, and including his contention that he was led to believe that the polygraph implicated him as the murderer. This is the clear holding of *People v. Melock*, 149 Ill. 2d 423 (1992).[20] A party does not "invite error" by exercising his fundamental constitutional rights.

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[20] For this reason, it makes no sense to suggest (SB61-62) that the defense should have sanitized its examination to remove the word polygraph. As recognized in *Melock*, the defense's interest (and right) is to seek to persuade the jury that the polygraph and the resulting confrontation of the defendant helped lead to his false confession. There is, likewise, no merit to the State's argument that Rivera had no right to present evidence about being accused by the polygrapher because there was no evidence that the polygrapher misled him about the results. The theory of the defense—supported by evidence admitted at trial—was that Rivera was misled precisely because it was the *polygrapher* who accused him of the murder and told him the investigation indicated he "in fact, caused the death of Holly Staker." R14221. Just as this accusation by the polygrapher led Rivera to (falsely) believe the polygraph implicated him, it also could easily have led the jury to (falsely) believe that. To refute this conclusion, the State cites a line in a report by Mr. Masokas stating that Rivera was "advised of the results of the polygraph." C3642. The State argues that this one line proves Rivera was never misled. The sentence in question, however, says nothing about what Rivera was told beyond being accused of murder by the polygrapher (which we know was done in a loud and angry manner (OB8)). Most critically, though, the document was not allowed into evidence (because of the State's objection) and thus could not possibly have played any role in disabusing the jury of the sense that the polygraph results showed Rivera committed the rape and murder.

The State's other main response is to proclaim that there is no risk the jury inferred the polygraph implicated Rivera. According to the State, because there had been additional interviews during the four hours between the polygraph examination and the accusation by the polygrapher, it was obvious that the accusation "had nothing whatsoever to do with the polygraph." SB60. It is difficult to fathom this argument. Any reasonable juror would logically conclude that the reason the *polygrapher* made the accusation was that the *polygraph* implicated Rivera in the murder. Otherwise, the juror would naturally reason, the accusation would have been made by one of the several detectives who were taking part in the questioning. Imagine a patient being evaluated for suspected cancer who is given a CT Scan by a radiologist, a blood test by an internist, and an EKG by a neurologist. If at the end of the day the radiologist comes to see the patient and tells her she has cancer, one could certainly understand why the patient might reasonably conclude that it was the CT Scan that pointed to that conclusion. The State has offered nothing to rebut this compelling inference. As we explained in our Opening Brief (at 81-82), many Illinois courts have recognized the likelihood that jurors would understand evidence of a polygrapher's accusation in this way.

The decision in *Melock* holds two things: (a) it allows the defendant to inform the jury that he was polygraphed and then accused by the polygrapher; and (b) it recognizes the criticality of making sure the jury is told there were, in fact, no relevant results on the ultimate question. Just as in *Melock*, Mr. Masokas claimed here that he saw generalized evidence of deception in the polygraph, but could not pinpoint any specific areas of deception. Just as in *Melock*, the defense was entitled here to let the jury know of the non-existence of any results on any specific matters. See *Melock*, 149 Ill. 2d at 466 (party

is allowed to present evidence of nonexistence of results). Without that information, there is a grave risk that the jury allowed its (false) assumptions about polygraph results to color its deliberations and affect its verdict. It is difficult to imagine something more damaging to the jury's ability to assess the evidence. See OB82 (discussing law's great fear that a jury will rely on the polygraph and not assess the actual evidence in the case).

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.

Despite the State's strained arguments to evade the governing mandate, the trial court plainly violated the mandate of this Court's 1996 decision by allowing the prosecution to attack the Electronic Monitoring System ("EMS") with evidence of generalized grievances unrelated to Rivera's unit. The State's main contention is that its behavior at this trial was different than the first trial because it focused its attacks here on the "same generation of equipment defendant was using," and attacked the entire system—including the computers, software crashes, and phone lines. SB 72-73. There are two fundamental flaws in this argument.

First, the focus of the evidence at issue here was no different from that which this Court held inadmissible in 1996. The State's claim then—as now—was that the evidence was "relevant to attack the scientific reliability of the entire electronic monitoring system." *People v. Rivera*, No. 2-94-0075, slip. op. at 9 (2nd Dist. Nov. 19, 1996) ("1996 Op."). In its 1996 decision, this Court explained that the prosecution had no right to introduce evidence about "general difficulties with the equipment and the EMS itself." *Id.*

at 8. The Court's rejection of that claim constitutes the law of the case, law that the trial court was required to—but did not—obey.

Second, as we explained in our Opening Brief (at 89-91), efforts to show problems with the general computer system, software or phone lines had no conceivable relevance to any contested matter in this case. There is no dispute about the integrity and functionality of those systems on Monday, August 17, 1992. The actual computer-generated report for Lake County's EMS system from that day was introduced into evidence. DX181. It shows that from 11:30 Monday morning until 6:30 Tuesday morning there were 96 recorded events. Forty-eight of these (including four calls to Rivera's home) were "routine calls," *i.e.,* calls in which the monitored unit was found to be within the allowed range of the base. The other 48 events included 11 instances of individuals leaving the allowed range, 10 instances of individuals not having returned home in time to comply with curfew, and 10 instances of individuals returning early from curfew. None of the irregular events involved Rivera's unit. Focusing on the two hours between 6:00 p.m. and 8:00 p.m. that evening—the time period in which the murder appears to have occurred—the EMS records reflect ten events, including five routine calls and three violations (not involving Rivera). There was, then, no issue in this case about any computer crash, software crash or faulty phone line.[21]

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[21] *People v. Robinson*, 349 Ill. App. 3d 622 (1st Dist. 2004) is, therefore, directly on point. The State seeks to distinguish *Robinson* by arguing that the evidence of earlier and later malfunctions in the breathalyzer there was inadmissible because "other evidence showed the machine was working properly on the day it was used on the defendant." SB74. This is precisely true here: regardless of whether there were some computer crashes or phone problems on other days, those systems were definitively up and running properly on August 17, 1992.

It is clear, then, that the only way the State could possibly attack the accuracy of the EMS records was to suggest that there was some flaw in Rivera's particular unit that failed to report his violation, even though other units were reporting violations accurately on that day. As this Court has already held, the prosecution certainly would have been entitled to introduce any evidence about defects in the specific unit assigned to Rivera. But there is no such evidence. What the prosecution was not entitled to do—but did—was to introduce evidence about "general shortcomings of the equipment used in the EMS." 1996 Op. at 8. The State's mantra that it was challenging the "system" and not the "unit" is a smoke screen: the State's effort at both the first and most recent trial was to attack Rivera's unit with evidence unrelated to that unit. No other attack was plausible.

In addition, as we explained in our Opening Brief (at 89-90), evidence about defects in the system could be relevant here only were there evidence of some other instances in which a unit both (a) functioned properly in reporting violations on earlier days and (b) affirmatively continued to transmit signals reflecting proper operation during all routine calls on the day in question, yet (c) spontaneously malfunctioned for a short period of time during the day, and then (d) spontaneously began to function properly again. This is what would have had to occur to explain any flaw in Rivera's unit (or the system). None of the prosecution's evidence supports any such occurrence. It is telling that the State has failed even to try to address this vital point in its Brief.

The State's arguments that any error in admitting this evidence was harmless are misguided. This trial was a battle between (a) the prosecution's claim that statements attributed to Rivera were accurate and (b) the defense's claim that those statements were not truthful (and some of them were never even made), as demonstrated conclusively,

among other ways, by the EMS evidence. It is the ultimate Catch-22 for the State to suggest, therefore, that the prosecution's improper undercutting of the EMS evidence was harmless because the prosecution alleges that Rivera made certain statements about unplugging the monitor. The very point of the defense's EMS evidence was to show that Rivera's statements were meaningless and were contradicted by the plain facts—including the fact that he was at home, as proven by the EMS records.

It is similarly baseless for the State to claim that the error was harmless because Dawn Engelbrecht once told the police she saw Rivera outside her home late in the evening when the crowd gathered. Ms. Engelbrecht testified, as she has at every trial, that she was *not* able to identify Rivera as that person and told the police she could identify Rivera only because the police told her that Rivera had already admitted having approached her. OB19; *supra* 9-10 n.8. The harmless-error inquiry does not allow the State to simply assume Ms. Engelbrecht is lying and then declare that her earlier pre-trial statement renders the EMS issue meaningless and errors surrounding it harmless. See OB46 n.19 (in conducting harmless-error inquiry a court does not indulge in the fiction that a jury must have found every claim of the prosecution to be credible).

There is a reason the prosecution pushed so vehemently (in defiance of this Court's decision) to introduce its inadmissible evidence attacking the EMS. Without that evidence, its case against Rivera turned on its ability to persuade a jury that Rivera had removed the bracelet from his ankle and left his home on August 17, 1992. There are several major problems with such a claim. First, it is undisputed that Rivera had in fact triggered the EMS detection system on other occasions—before and after August 17—when he left his home with the ankle bracelet on. As this Court explained in its 1996

decision, "No one ever saw defendant without his monitor secured to his leg." 1996 Op. at 6. Indeed, one of the prosecution witnesses testified that he once saw Rivera playing basketball outside the permissible range *with* the EMS unit on his ankle (even though the bracelet appeared somewhat loose). R17938-40. The prosecution had no answer as to why Rivera would ever leave home with the bracelet on (thus triggering the alarm system) if he had the option of simply taking it off. Second, there was not one iota of evidence that he ever removed the bracelet from his ankle. See *supra* 4. Finally, the evidence was clear that stretching the band to remove it leaves permanent crinkling. R17590. Yet, there was no such crinkling here.

For these reasons, the prosecution rightly understood its need to find some way (despite this Court's earlier ruling) to attack the EMS evidence, and capitalized on the trial judge's erroneous rulings when it opened its rebuttal closing argument by asking the jury to conclude (from the inadmissible evidence) that "people were actually seen out and about, and * * * there was no paper record of them being gone." R18175. Indeed, this was the sole way through which the prosecution sought to undercut the otherwise thoroughly exculpatory EMS evidence. The impact of this message has nothing to do with how many words of the closing were spent on it. What matters is the critical nature of the argument to the case. This error was anything but harmless.

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.

According to the State, the prosecution was properly permitted to argue over and over that the key evidence against Rivera was that his statements contained knowledge of various "secret" facts about the crime, but Rivera was not allowed to present

documentary evidence showing that those facts were by no means "secret"—that they were either in the public domain or were known to his interrogators. The State seeks to support this unreasonable conclusion by arguing (a) the evidence in question was hearsay, (b) was irrelevant, and (c) that any error in its exclusion was harmless. Each of these contentions is without merit.

The State recognizes, as it must, that the defense's purpose in seeking to introduce the documents in question—the newspaper articles, the press release, the Masokas letter, and the police report—was the non-hearsay purpose of proving Rivera had access to the information from a number of sources. This is classic non-hearsay—the issue was not the truth of the matters asserted, but that certain information had been disseminated so that it was in the public domain or known to some or all of the interrogators. See OB96-97.

The State argues, nonetheless, that "a statement not technically offered to prove the truth of the matter asserted can still be inadmissible when the *ultimate focus is on that truth.*" SB80 (emphasis added). This principle has nothing to do with this case. There was no focus at all, much less ultimate focus, on the truth of the matters contained in any of these documents. For example, with regard to the newspaper articles and the press release, virtually all of the facts in those documents were uncontroverted. To the extent, though, that they were open to any controversy, the defense certainly had no interest in proving the truth of the matters asserted. The interest of the defense would have been far better advanced had the facts in the articles and press release been proven incorrect—thus bolstering the defense claim that Rivera was parroting what he had heard from various sources, be it his father, people in the neighborhood, or the police. The point, of course, is that the focus was not on the truth of the supposedly "secret" information, but rather on

the non-hearsay purpose of proving that the police accounts of the investigation—true or otherwise—had been widely disseminated. The trial court was mistaken as a matter of law to rule otherwise, under any standard of review.[22]

As for the letter from Mr. Masokas, again the defense had no desire to prove via the letter that the blue mop was actually used. That proposition was never disputed. The key was simply to show Mr. Masokas had *knowledge* of the police theory on the issue and that his knowledge may well have come from Sergeant Tessmann—the person who briefed him. The fact that Mr. Masokas discussed the mop in his letter tended to corroborate Mr. Masokas's testimony that Sergeant Tessmann did, in fact, know about the mop before interrogating Rivera. R14279. The same is true for the police report—it was being introduced simply to support the defense claim that Sergeant Tessmann and many others must have had *knowledge* about the task force's key finding that the blue mop had been used on the back door. These were all non-hearsay purposes and had nothing to do with the truth of the matters asserted—which was not at issue.

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[22] The two cases the State cites (SB80) demonstrate the essential difference between instances in which the purpose of introducing evidence is (at least in part) to prove the truth of the matter asserted, as opposed to cases—like this one—where it is not. In *People v. Thomas*, 178 Ill. 2d 215 (1997), the jury heard testimony from a woman named Rhonda that one of the other participants in the crime had become angry at the defendant for having told Rhonda about the murder. The Court held the statement was hearsay "because its purpose is to prove the implicit assertion that defendant told Rhonda about the murder." *Id.* at 237. Similarly, in *People v. Roman*, 323 Ill. App. 3d 988 (1st Dist. 2001), the case turned on the testimony of a police officer who had shot the defendant after claiming he saw the defendant pointing a gun at the officer. In support of the officer's testimony, the prosecution presented testimony that the police department gave the officer an award for valor based on the incident. The Court held this evidence constituted hearsay because the honoring of the officer "for his conduct in this case was an out-of-court statement that was introduced for the purpose of proving that he had acted correctly in shooting the defendant." *Id.* at 998.

The State also contends the documents were properly excludable as irrelevant. With regard to the newspapers, the State argues they were inadmissible to prove possible notice of the information contained therein unless there was "at least some reason to believe that the party in question had received the notice admitted into evidence." SB81. Even accepting this standard, the State's argument about the newspapers fails totally. There was explicit testimony at trial that Rivera's father read the newspapers daily and that he discussed the content of what he read about the Holly Staker case with Rivera frequently. R17711-12, 17730. This testimony more than shows "at least some reason to believe that the party in question had received the notice admitted into evidence." Of course, even without the testimony from Rivera's father, there was more than just "some reason to believe" many of Rivera's acquaintances were keeping up with the coverage of this case, which was of enormous interest in the neighborhood. The defense's point was that Rivera *could have* learned the facts either directly from the newspapers or from others who knew the facts, including the police officers who interrogated him. The newspapers and press release unquestionably satisfied the standard of relevance: their existence made it more probable Rivera could have learned this information than would be the case had the newspapers and press release never existed.[23]

The letter from Mr. Masokas was similarly relevant. The prosecution had a compelling need to prove Mr. Masokas was wrong when he testified Sergeant Tessmann told him about the blue mop on October 27. Without the letter, the dispute came down to

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[23] The newspapers and press release were also relevant to show how sloppy the police were in unnecessarily disclosing facts about the case. This bolstered the defense's contentions by enhancing the likelihood that the police were not cautious in guarding against disclosing information to Rivera during the course of the extended interrogations. This was highly relevant to Rivera's defense.

a swearing contest between Mr. Masokas and Sergeant Tessmann. The letter from Mr. Masokas was highly relevant because it tended to bolster Mr. Masokas's account. The State is correct that the letter does not *conclusively prove* Mr. Masokas was accurate. It was possible Mr. Masokas heard this fact from someone else or later (although there was no evidence of any briefing on details other Sergeant Tessmann's October 27 briefing). But *relevance* does not require that evidence be conclusive. The prosecution was entitled to argue the *weight* of the evidence to the jury, but *admissibility* turns simply on whether the evidence offers *any* support for a party's contention. The letter from Mr. Masokas definitely did. Indeed, the letter was relevant regardless of whether Sergeant Tessmann was the source of Mr. Masokas's knowledge of the blue mop, because it supported the defense claim that Mr. Masokas (among other interrogators) knew of the blue mop and could have (intentionally or inadvertently) transmitted that information to Rivera. See *supra* 7 n.4.

The State also contends any error in rejecting all the evidence at issue was harmless. SB82-83. This claim ignores the centrality of the role the prosecution's repeated claims about Rivera's knowledge played in the case. The claim that Rivera knew about the blue mop—and Sergeant Tessmann did not—was the most crucial of these claims, but the prosecution also focused extensively on the sheer number of other facts it contended only the killer would know. Many of these facts, it turns out, were in the newspapers, yet the jury was barred from knowing that. It borders on the frivolous to suggest that in a case as closely balanced as this one, it is harmless to allow the jury to deliberate without access to such vital evidence. It is similarly untenable to assert that it was harmless to keep from the jury evidence supporting the defense claim that Sergeant

Tessmann, like many others, knew about the blue mop at the time he entered the interrogation room to "clarify inconsistencies" between the known facts of the case and the earlier statement attributed to Rivera.

The State contends that "[a]bsent allegations of a complete conspiracy between all of the many investigating officers, Defendant cannot explain how he knew" several matters that were not in the excluded newspapers or reports. SB83. The defense theory, though, was that through a combination of police sloppiness, leading questions, and public availability of information, Rivera never revealed any secret fact. Indeed, as we explained in our Opening Brief (at 41-43), each and every fact that Rivera offered that did not restate what the police already knew proved to be either false or non-verifiable. The judge's ruling, which crippled the defense's ability to support these contentions, cannot possibly be dismissed as harmless.

VII. RIVERA'S STATEMENTS SHOULD HAVE BEEN SUPPRESSED AS INVOLUNTARY.

Appellant rests on his Opening Brief on this issue. See OB99.

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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JUNE 2, 2011

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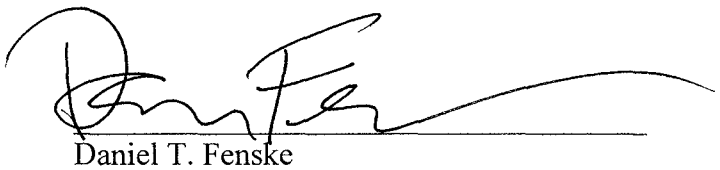
CERTIFICATE OF COMPLIANCE

On May 31, 2011, Rivera filed an unopposed motion for leave to file a reply brief not in excess of forty (40) pages. On June 1, 2011, the Clerk of the Appellate Court informed counsel for Rivera that Rivera could submit a brief in compliance with the 40-page limit he requested in his motion, and that the Clerk would file the brief if the Court grants the motion. On that basis, the below certification is made.

I certify that this reply 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 reply brief under Rule 342(a), is forty (40) pages.



Daniel T. Fenske