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 1

JURISDICTION 1

ISSUES PRESENTED FOR REVIEW 1

STATEMENT OF FACTS 2

I. CRIME SCENE INVESTIGATION AND ANALYSIS OF PHYSICAL EVIDENCE 2

II. THE FOCUS ON JUAN RIVERA 4

A. October 27 & 28 Questioning 4

B. October 29 & 30 Questioning 6

1. The Trip to Chicago 6

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

3. The Questioning from 11:30 p.m. to 3:00 a.m. 8

4. Rivera's Condition from 3:00 a.m. to 8:10 a.m. 11

5. Continued Questioning from 8:10 a.m. to 9:00 a.m. 12

6. The Meeting in the State's Attorney's Office 13

7. Rivera's Condition in the Jail from 9:15 a.m. to 10:30 a.m. 13

8. The Final Round of Interrogations from 10:30 a.m. to 2:30 p.m. 14

III. THE EARLIER TRIALS, APPEALS AND NEW TRIAL BASED ON NEW DNA RESULTS 17

IV. THE RECENT TRIAL 18

A. The Prosecution's Case 18

1. The Crime Scene & Rivera's Statements 18

2. Other Witnesses 18

3. Jailhouse Informants 20

B. The Defense Case 22

1. Evidence Affirmatively Excluding Rivera 22

a. DNA and Other Physical Evidence 22

b. Electronic Monitoring Records & Other Evidence Rivera Was At Home 25

2. Defense Evidence Relating to the Confessions 26

a. Rivera's Condition During the Interrogations and Confessions 26

b. Rivera's Mental Health and Capacity and Its Impact on the Confessions 26
c. Inconsistencies Between Confession and Facts of the Crime 27
d. The Absence of Any Information in Rivera's Statements Not Known to the Police 28
V. DELIBERATIONS, VERDICT, AND SENTENCING 29
SUMMARY OF THE ARGUMENT 30
ARGUMENT 32
I. THE EVIDENCE IS INSUFFICIENT TO PROVE GUILT BEYOND A REASONABLE DOUBT. 32
A. The DNA Evidence 33
B. The Role of the Confessions in the Analysis 38
C. The In-Custody Informants 45
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. 46
A. The Barred Evidence 47
1. Dr. Galatzer-Levy's Testimony Concerning Rivera's Psychiatric State During the Interrogation 47
2. Dr. Kassin's Testimony Regarding the Impact of Specific Interrogation Techniques on Individuals with Particular Mental Disorders 48
B. The Trial Court Erred in Precluding Drs. Galatzer-Levy and Kassin from Testifying on These Matters. 49
1. The Law of the Case 49
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. 52
a. Knowledge and Qualifications Uncommon to Lay Persons 52
b. The Barred Testimony Would Have Aided the Trier of Fact. 52
c. Dr. Galatzer-Levy's Testimony Reflects Accepted Scientific Principles 55
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. 56
a. Knowledge and Qualifications Uncommon to Lay Persons 56

b. The Barred Testimony Would Have Aided the Trier of Fact. 57

c. Dr. Kassin's Testimony Reflected Generally Accepted Scientific Principles. 61

4. The Exclusion of Expert Testimony Violated Rivera's Constitutional Right to Present a Meaningful Defense. 65

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. 65

A. The Evidence 67

B. The Admission of the Evidence About Prior Sexual Activity Violated the Rape Shield Statute. 68

C. In Addition to Violating the Rape Shield Statute, the Prior-Sexual-Activity Evidence was Irrelevant. 72

D. Even When Admissible, Character Must be Proved Through Reputation Evidence, Not Particular Acts. 73

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. 75

A. The Polygraph Examination 76

B. The Polygraph Evidence Introduced at Trial 78

C. The Trial Court's Ruling..... 79

D. Rivera Was Entitled to Inform the Jury That No Polygraph Results Indicated He Had Lied in Denying Involvement in the Crime. 80

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. 83

A. Background 83

1. The First Trial and Appeal 85

2. The Recent Trial 85

B. This Evidence Directly Contravened this Court's Mandate and Was Inadmissible. 87

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. 92

A. The Barred Evidence 93

1. The Press Release and The Newspaper Articles 93

2. The Letter from Mr. Masokas and The Foster Report 94

B. All Of This Evidence Was Admissible. 96

1. None of This Evidence Was Hearsay. 96

2. There Were No Authentication Problems With Any of the Evidence. 97

3. All The Evidence Was Relevant. 97

VII. RIVERA'S STATEMENTS SHOULD HAVE BEEN SUPPRESSED AS INVOLUNTARY. 99

CONCLUSION 100

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

[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.

[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;

[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

[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

[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

[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 E. 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

[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

[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

[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).

[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); S*tate 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

[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

[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.

* * * * *

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.

[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

[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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