

**IN THE CIRCUIT COURT FOR THE NINETEENTH JUDICIAL CIRCUIT  
LAKE COUNTY, ILLINOIS**

People of the State of Illinois,	)	
	)	
Plaintiff,	)	No. 92 CF 2751
	)	
vs.	)	Judge Christopher Starck
	)	
Juan A. Rivera,	)	
	)	
Defendant.	)	

**MOTION FOR ENTRY OF A  
JUDGMENT NOTWITHSTANDING THE VERDICT, OR FOR A NEW TRIAL**

Defendant Juan A. Rivera respectfully moves this Court for entry of a judgment of acquittal notwithstanding the verdict, or in the alternative for a new trial.

**I. Mr. Rivera is entitled to a judgment of acquittal notwithstanding the verdict.**

1. Mr. Rivera demonstrated through un rebutted testimony of experts employed by both the State and defense that he was excluded as the source of the sperm recovered from Ms. Staker's vagina during the autopsy, because his DNA profile does not match the profile from the sperm. Therefore, the jury had to conclude that that sperm came from someone other than Ms. Staker's killer to have found Mr. Rivera guilty. Yet the State offered *no* evidence to support the conclusion that Ms. Staker ever had vaginal intercourse, much less that she had intercourse during the limited time period in which the sperm recovered at her autopsy could have been deposited. Further, the State produced no evidence that the DNA profile from the vaginal swab was contaminated. Thus, the State put forth no evidence from which the jury could have concluded that the sperm found inside Ms. Staker's vagina came from any person other than the person who raped and killed her. Further, Mr. Rivera's allegedly inculpatory statements are unreliable and involuntary as a matter of law. For instance, contrary to the State's argument at trial, every fact contained in Mr. Rivera's purported confessions was uncovered by the Task

Force prior to October 30, 1992, when Mr. Rivera allegedly gave his final inculpatory statement. (See, e.g., Appendix A: compiled investigate documents of the Task Force showing facts contained in Mr. Rivera's statements; Defense Exs. 96 and 97: newspaper articles (and summary thereof) showing facts contained in Mr. Rivera's statements.<sup>1</sup>) Those statements, therefore, cannot support Mr. Rivera's convictions, especially in light of the DNA evidence. Mr. Rivera requests that this Court enter a judgment of acquittal in his favor because the State failed to produce evidence sufficient to support any inference that Mr. Rivera is guilty of Ms. Staker's rape and murder, much less evidence sufficient to find him guilty beyond a reasonable doubt. Allowing his conviction to stand would violate both 720 ILCS 5/3-1 and the Due Process Clauses of Article I, Section 2 of the Illinois Constitution and the Fifth and Fourteenth Amendments to the United States Constitution, as both the statute and due process required the State to put forth evidence that, considered in light of all the evidence presented at trial, was sufficient for the jury to find Mr. Rivera guilty beyond a reasonable doubt. That did not happen.

2. The Court erred by denying Mr. Rivera's motion for a directed verdict at the close of the State's case-in-chief. (4/24/2008 PM Tr. at 8-10.) The Court ruled that Mr. Rivera waived his right to a directed verdict by offering evidence during the State's case-in-chief, but that, even if Mr. Rivera had not waived that right, the Court would deny the motion because "there is sufficient evidence that a jury could in fact find him guilty." (4/24/2009 PM Tr. at 9.) First, Mr. Rivera did not waive his right to a directed verdict by putting in evidence during the State's case-in-chief. Second, the evidence the State introduced during its case-in-chief was insufficient to find Mr. Rivera guilty beyond a reasonable doubt because Mr. Rivera's allegedly inculpatory statements are unreliable and involuntary as a matter of law, and the State offered no

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<sup>1</sup> As discussed in Paragraph 35, below, Defense Exhibits 96 and 97 were improperly excluded from evidence.

other evidence from which the jury could have found Mr. Rivera guilty. The Court's denial of Mr. Rivera's motion for a directed verdict violated Mr. Rivera's rights under 720 ILCS 5/3-1 and to due process of law under Article I, Section 2 of the Illinois Constitution and the Fifth and Fourteenth Amendments to the United States Constitution, because both the statute and due process required that the State to put forth evidence during its case-in-chief sufficient for the jury to find Mr. Rivera guilty beyond a reasonable doubt. That did not happen.

3. The Court erred in denying Mr. Rivera's motion for a judgment of acquittal at the close of the all the evidence. (5/4/2009 PM Tr. at 28.) The Court erred because there was no evidence from which the jury could have concluded that the DNA profile from the sperm taken from Ms. Staker's vagina came from anyone other than the killer, as discussed in Paragraph 1 above. Without that evidence, there was no evidence from which the jury could have based its decision to find Mr. Rivera guilty beyond a reasonable doubt. As discussed in Paragraphs 1 and 2 above, Mr. Rivera's allegedly inculpatory statements are insufficient to support his convictions, particularly in light of the DNA evidence exonerating him. The Court's denial of Mr. Rivera's motion for a judgment of acquittal after the close of all the evidence, therefore, violated Mr. Rivera's rights under 720 ILCS 5/3-1 and to due process of law under Article I, Section 2 of the Illinois Constitution and the Fifth and Fourteenth Amendments to the United States Constitution, because both the statute and due process required the State to put forth evidence that, considered in light of all the evidence presented at trial, was sufficient for the jury to find Mr. Rivera guilty beyond a reasonable doubt. That did not happen.

**II. In the alternative, Mr. Rivera is entitled to a new trial based on numerous errors that deprived Mr. Rivera of a fair trial.**

4. At the very least, Mr. Rivera is entitled to a new trial based on numerous errors made before, during, and after the trial which deprived Mr. Rivera of a fair trial. No error was

harmless, and thus each error serves as a separate basis for overturning Mr. Rivera's convictions. In addition, the cumulative effect of the errors listed below violated Mr. Rivera's right to due process of law under both Article I, Section 2 of the Illinois Constitution and the Fifth and Fourteenth Amendments to the United States Constitution, and requires the Court to grant Mr. Rivera a new trial.

**A. The Court committed reversible error in numerous evidentiary rulings regarding the DNA evidence and the source of the sperm found in Ms. Staker's vagina.**

5. On February 5, 2009, the Court erred in denying Mr. Rivera's Motion in Limine to Exclude all Evidence of Holly Staker's Sexual Activity and Reputation. (2/5/2009 Hr'g Tr. at 89-96.) Any evidence of Ms. Staker's prior sexual activity or reputation was inadmissible for the reasons stated in Mr. Rivera's motion and in Paragraphs 6 and 7, below. In addition, the admission of the evidence discussed in this paragraph rendered Mr. Rivera's trial fundamentally unfair, and thus violated his right to due process of law under both Article I, Section 2 of the Illinois Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

6. At trial, the Court erred in allowing the State to repeatedly refer to and elicit testimony about the "red lace panties" Ms. Staker wore on the day of her murder. (*See, e.g.*, 4/15/2009 AM Tr. at 36-37; 4/22/2009 AM Tr. at 65.)<sup>2</sup> The repeated references to those panties—in particular, that they were "red" and "lace"—were irrelevant and were presented only to draw the inference that Ms. Staker was sexually active. (*See* 4/15/2009 PM Tr. at 168-70

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<sup>2</sup> Where Mr. Rivera cites a particular portion of the record, he means only that the record citations that follow are *examples* of the asserted error, and thus those citations may not exhaust all instances where the Court erred in the manner alleged. By citing only to those examples, Mr. Rivera does not waive or forfeit his right to challenge other instances in the record as further examples of the asserted error.

Where Mr. Rivera cites legal authority, he means only that those authorities are *examples* of authorities that support his contention that a particular action or decision was error. By citing only to those examples, Mr. Rivera does not waive or forfeit his right to use other authority to show that the asserted errors were in fact errors.

(sidebar.) The Rape Shield Act, 725 ILCS 5/115-7, bars evidence of provocative attire offered to prove the sexual reputation of a rape victim. Further, the additional reasons stated in Mr. Rivera's motion *in limine* also barred the admission of the evidence regarding the "red lace panties" Ms. Staker wore. (See Mr. Rivera's Motion in Limine to Exclude all Evidence of Holly Staker's Sexual Activity and Reputation (filed 1/27/2009).) In addition, the admission of the evidence discussed in this paragraph rendered Mr. Rivera's trial fundamentally unfair, and thus violated his right to due process of law under both Article I, Section 2 of the Illinois Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

7. At trial, the Court erred in allowing the testimony of Ms. Staker's twin sister, Heather, about the fact that the victim was forced to perform oral sex once when in the third grade, and that she had also masturbated. (4/22/09 AM Tr. at 68-71.) That evidence was irrelevant. It was also barred by the Illinois Rape Shield Act, 725 ILCS 5/115-7, and for the additional reasons stated in Mr. Rivera's motion *in limine*. (See Mr. Rivera's Motion in Limine to Exclude all Evidence of Holly Staker's Sexual Activity and Reputation (filed 1/27/2009).) This error was compounded when the Court refused, despite the repeated requests of defense counsel, to require the prosecutor's proffer about the nature of the anticipated testimony regarding the victim's sexual activity, so the Court could ensure that inadmissible, and highly prejudicial, testimony never reached the jury. (4/22/2009 AM Tr. at 13-35.) The testimony discussed in this paragraph was designed to mislead the jury into believing that the victim was engaged in sexual intercourse prior to her rape and murder. This leap is illustrated by the newspaper coverage of Heather Staker's testimony: one article stated that "Holly Staker had a sexual experience three years before" the crime, and quoted Assistant State's Attorney Mermel as stating that evidence of prior sexual activity by Ms. Staker along with the expert's statement

about the DNA could be presented to allow the jury to consider that there could be a reasonable explanation for the fact that DNA other than Mr. Rivera's was found in Ms. Staker's vagina. (See Tony Gordon, *Sister says Staker had sexual encounter years before murder*, Daily Herald, April 22, 2009, <http://www.dailyherald.com/story/print/?id=288411>, attached as Appendix B.) Another article reported that Mr. Rivera's defense team sought to discredit the confession with DNA evidence that showed Mr. Rivera was not the source of the sperm found in Ms. Staker's body and that prosecutors countered with evidence that Ms. Staker and her sister had their first sexual experience when they were molested by a neighbor when they were 8 years old. (See Tony Gordon, *Rivera guilty in 1992 murder; appeal promised*, Daily Herald, May 8, 2009, <http://67.151.102.2/story/print?id=-292371>, attached as Appendix C.) For additional articles describing Heather Staker's testimony, see Appendix D. Thus, the evidence discussed in this paragraph was highly prejudicial to Mr. Rivera. The admission of that evidence rendered Mr. Rivera's trial fundamentally unfair, and thus violated his right to due process of law under both Article I, Section 2 of the Illinois Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

8. At trial, the Court erred in denying Mr. Rivera's motion for a mistrial based upon the improper admission of the evidence discussed in Paragraphs 6 and 7, above. (4/22/2009 AM Tr. at 75.) That evidence was so prejudicial to Mr. Rivera's right to a fair trial that declaring a mistrial was the only appropriate remedy to the improper admission of that evidence. Thus, the failure to declare a mistrial violated Mr. Rivera's right to due process of law under both Article I, Section 2 of the Illinois Constitution and the Fifth and Fourteenth Amendments to the United States Constitution because the evidence discussed in this paragraph, and admitted at trial, was so prejudicial that it rendered Mr. Rivera's trial fundamentally unfair.

9. The Court erred in denying Mr. Rivera's Motion in Limine to Preclude the State from Offering Evidence or Commenting Upon Brian Wraxall's 1993 DQ Alpha Testing of Slide Created from Vaginal Swab. (*See, e.g.*, 3/25/2009 Hr'g Tr. at 37-39; 4/21/2009 PM Tr. at 83.) That evidence was inadmissible, for the reasons stated in Mr. Rivera's motion, and as discussed in Paragraph 10, below. In addition, the admission of that evidence rendered Mr. Rivera's trial fundamentally unfair, and thus violated his right to due process of law under both Article I, Section 2 of the Illinois Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

10. At trial, the Court erred in admitting evidence regarding Brian Wraxall's 1993 DQ Alpha DNA testing of a microscopic slide prepared from one of the vaginal swabs taken at Ms. Staker's autopsy. (*See, e.g.*, 4/21/2009 PM Tr. at 83, 93, 101-08.) The defense offered no evidence regarding Mr. Wraxall's testing of that slide, and the DNA profile excluding Mr. Rivera did not come from that slide. The State offered evidence of Mr. Wraxall's testing of the slide to suggest that Mr. Wraxall may have contaminated the slide during testing, and therefore that he may have contaminated anything he ever handled in his laboratory, including the vaginal swabs and the containers in which they were stored. That evidence was irrelevant, and should not have been admitted. Under Illinois law, evidence of a person's prior acts is not admissible to prove that person's character to establish that that person acted in conformity with that character on a particular occasion. In addition, the admission of the evidence discussed in this paragraph rendered Mr. Rivera's trial fundamentally unfair, and thus violated his right to due process of law under both Article I, Section 2 of the Illinois Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

11. On February 26, 2009, the Court erred in denying Mr. Rivera's Motion for Entry of Order Declaring That State Police Crime Lab Exhibits 3, 3B, 5A and 5B Have Been Authenticated, and to Prohibit the State from Arguing That Those Exhibits Were Contaminated. (2/26/2009 Hr'g Tr. at 46.) As asserted in that motion, the State was collaterally estopped from challenging the authenticity of the vaginal swab exhibits from which the sperm excluding Mr. Rivera was identified, or from arguing that those exhibits may have been contaminated, because the State conceded and the Court found during Mr. Rivera's post-conviction proceeding that "the sperm that was found in the vaginal areas" of Mr. Staker contained "DNA belonging to someone other than Mr. Rivera." (8/29/2006 Hr'g Tr. at 14.) Also, the Court erred in denying Mr. Rivera's motion because the State had no admissible evidence that the vaginal swab exhibits could have been contaminated, and the State should have been prohibited from arguing to the jury a theory for which it had no evidence. Finally, the refusal to grant the motion discussed in this paragraph violated Mr. Rivera's right to due process of law under both Article I, Section 2 of the Illinois Constitution and the Fifth and Fourteenth Amendments to the United States Constitution because it rendered Mr. Rivera's trial fundamentally unfair.

12. The Court erred in refusing to prohibit the prosecutor from stating during his opening statement his belief that the evidence would show that the DNA profiles came from contamination, because the prosecutor had no admissible evidence on which to base that assertion, and it is error for a prosecutor to assert something in opening statement for which he has no evidence. (*See, e.g.*, 4/15/2009 AM Tr. at 12.) The Court also erred in refusing to prohibit the prosecutor from arguing during his closing argument that the DNA profiles may have come from contamination, as the State never offered admissible evidence to support that argument. (*See, e.g.*, 5/5/2009 PM Tr. at 112-18.) Further, the refusal to preclude the State from making the



unsupported, and highly prejudicial, statements discussed in this paragraph rendered Mr. Rivera's trial fundamentally unfair, and thus violated his right to due process of law under both Article I, Section 2 of the Illinois Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

13. On April 29, 2009, this Court erred in refusing to admit Defense Exhibits 191 and 192, copies of reports that William Frank prepared during the course of his work on this case. (4/29/09 PM Pt. 2 Tr. 29-34, 53.) Those reports described Mr. Frank's review of Blake and Keel's testing, as well as the results of Mr. Frank's own DNA testing. Those reports were business records and admissions by an agent of the State, and thus were admissible. In addition, the refusal to admit the evidence discussed in this paragraph rendered Mr. Rivera's trial fundamentally unfair, and thus violated his right to due process of law under both Article I, Section 2 of the Illinois Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

14. At trial, the Court erred in refusing to admit certain statements of the Court and of the State that suggested the DNA results were reliable (Defense Exs. 130-136) (5/4/2007 AM Pt. 1 Tr. at 20-29):

- Defense Exhibit 130: The State's Motion to Dismiss 735 ILCS 2/1401 [sic] Petition, in which the prosecution stated: "The State does not dispute that current day STR DNA testing revealed a profile from the sperm fraction of the vaginal swab that does not match the defendant."
- Defense Exhibit 131: Letter from Assistant States Attorney Michael G. Mermel to Sandra Brown, Director of the Illinois State Police's Springfield Laboratory, in which Mr. Mermel stated that the DNA profile excluding Mr. Rivera came from sperm: "Recent retesting has resulted in a distinct STR/PCR profile from a sperm fraction that was not able to be developed for use at the first trial."
- Defense Exhibit 132: Letter from Michael G. Mermel to Karen Kucharik, Illinois CODIS Administrator, in which Mr. Mermel (1) conceded that the DNA sample did not appear to come from contamination; and (2) explained that a match to that profile would be significant, suggesting that the State believed the DNA profile

came from the killer: “The report of testing has been received by William Frank, and he has advised that the testing protocol appears properly conducted, and the results appear to be internally consistent, (good separation of the sperm fraction, decrease in peak heights as expected, and “whispers” where they should be) . . . . The new STR profile developed does not match the individual convicted of the murder and has understandably created a firestorm of interest in the case. A ‘hit’ would be significant in this case to say the least.”

- Defense Exhibit 133: Email from Michael G. Mermel to Dan Haase, of the Wisconsin State Police, in which Mr. Mermel conceded the DNA profile came from the victim’s vagina, and thus did not come from contamination of the vaginal swabs after they were taken from the victim: “I was advised that you might be able to do a ‘keyboard search’ of our unknown profile from the murder victim’s vaginal swab. If you were to get a hit it would be an understatement to say it would be helpful.”
- Defense Exhibit 134: June 4, 2008 Agreed Order for Illinois DNA Database Search, in which the prosecution agreed that the “Defendant previously conducted PCR-based DNA testing of the spermatozoa found inside the eleven-year-old victim, Holly Staker” and that the “DNA testing conclusively proves that the sperm collected from the victim at the time of the crime does not belong to Defendant.”
- Defense Exhibit 135: July 24, 2007 Stipulated and Agreed Order for FBI Keyboard Search of CODIS, in which the prosecution agreed that the DNA profiles excluding Mr. Rivera came from sperm found in the victim’s vagina: “Dr. Edward T. Blake . . . conducted PCR-based analysis of STR genes extracted from sperm found in the victim’s vagina (the ‘Sperm’). Dr. Blake found . . . that the Sperm is not that of the Defendant . . . . Personnel at the Illinois State Police Research and Development Laboratory have reviewed Dr. Blake’s work for quality control purposes and have confirmed that the DNA profile he obtained excludes Defendant as a source for the Sperm. Furthermore, they developed a ‘low level’ ‘corroborating’ genetic profile of the Sperm donor based on nearly identical biological material from the crime scene that had remained in the possession of the Illinois State Police Lab. The ‘low level’ profile also excluded Defendant as a possible source for the Sperm.”
- Defense Exhibit 136: The State’s Motion in Limine - Dion Markadonis, in which the prosecution conceded that a person who does not match the DNA profiles could not have killed Ms. Staker: “DNA testing by the Defense Expert has excluded Dion Markadonis as a suspect in the case.”

Those statements were relevant to show that the State’s theory at trial was inconsistent with the State’s prior theory as to the source of the DNA profiles excluding Mr. Rivera. They were

statements of a party opponent, statements of an agent of a party opponent, or statements about which a party opponent adopted a belief, and thus were not hearsay. In addition, the refusal to admit the evidence discussed in this paragraph rendered Mr. Rivera's trial fundamentally unfair, and thus violated his right to due process of law under both Article I, Section 2 of the Illinois Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

15. On April 29, 2009, the Court erred in permitting the State, over defense objection, to pose the following question to Mr. Rivera's DNA expert, Alan Keel: "One of the reasons why sperm might be old and degraded when it's collected and then tested by you is that it was deposited at an earlier time to another sexual act; isn't that correct?" (4/29/09 PM Pt. 1 Tr. at 47.) There was no evidence that the sperm at issue was old or degraded. Thus, the question assumed facts not in evidence. Testimony given in response to that question was irrelevant and should not have been admitted. Further, the evidence was inadmissible under the Rape Shield Act, 725 ILCS 5/115-7, because it inferentially suggested that Ms. Staker had sexual intercourse prior to her rape and murder. Lastly, allowing the State to pose the question discussed in this paragraph rendered Mr. Rivera's trial fundamentally unfair, and thus violated his right to due process of law under both Article I, Section 2 of the Illinois Constitution and the Fifth and Fourteenth Amendments to the United States Constitution, because the question asked was highly prejudicial to Mr. Rivera.

**B. The Court committed reversible error by admitting Mr. Rivera's two inculpatory statements, and by making numerous erroneous evidentiary rulings regarding the circumstances surrounding the making of those statements.**

16. The Court erred in denying Mr. Rivera's Motion to Suppress Confession, and in ultimately admitting People's Exhibits 157 and 160—the allegedly inculpatory statements signed by Mr. Rivera on October 29 and 30, 1992. (11/3/2008 Hr'g Tr. at 19-23.) Those

statements were involuntary as a matter of law, and the law of the case doctrine did not bar the Court from considering the merits of Mr. Rivera's motion. Further, the refusal to grant the motion discussed in this paragraph violated Mr. Rivera's right to due process of law under both Article I, Section 2 of the Illinois Constitution and the Fifth and Fourteenth Amendments to the United States Constitution because it rendered Mr. Rivera's trial fundamentally unfair. The refusal to grant Mr. Rivera's motion to suppress also violated his right under Article I, Section 10 of the Illinois Constitution and the Fifth and Fourteenth Amendments to the United States Constitution not be compelled to be a witness against himself. In addition, the refusal to grant Mr. Rivera's motion to suppress violated Mr. Rivera's right under Article I, Section 10 of the Illinois Constitution, and the Fifth and Fourteenth Amendments to the United States Constitution, because Mr. Rivera was in custody at the time he gave the statements that were the subject of his motion to suppress, and he did not execute a voluntary, knowing waiver of his *Miranda* rights prior to speaking to members of the Task Force. *See, e.g., Miranda v. Arizona*, 384 U.S. 436 (1966). Lastly, the Court's decision violated Mr. Rivera's right to counsel under both Article I, Section 8 of the Illinois Constitution, and the Sixth Amendment to the United States Constitution, because Mr. Rivera was not represented by counsel during his questioning, Mr. Rivera did not knowingly waive his right to counsel, and/or the questioning that resulted in Mr. Rivera allegedly signing People's Exhibits 157 and 160 was initiated, and the statements elicited, by the Task Force.

17. The Court erred in refusing to allow Mr. Rivera to call Dr. Saul Kassin to give expert testimony regarding the circumstances that often lead individuals to admit to crimes those individuals did not commit. (*See, e.g., 4/9/2009 Hr'g Tr. at 59-60; 2/5/2009 Hr'g Tr. at 57-70.*) That testimony was admissible because it was relevant to show that Mr. Rivera's interrogation

involved many of those circumstances, and Dr. Kassin's proffered testimony met the *Frye* test. Further, courts have accepted that expert testimony about the social science around false confession is useful to the jury because it helps the jury understand the phenomenon and evaluate whether commonly held beliefs about false confessions are in error. *See, e.g., U.S. v. Hall*, 93 F.3d 1337, 1341-45 (7th Cir. 1996) (holding that "[p]roperly conducted social science research often shows that commonly held beliefs are in error" and that it was reversible error to not admit expert testimony on false confessions); *People v. Wood*, 341 Ill. App. 3d 599, 608-09 (1st Dist. 2003) (granting that expert testimony about false confessions may be admissible when the defendant has a diagnosed personality disorder); *see also* Defendant's Report To The Court Regarding Saul Kassin's Proposed Testimony (filed 4/7/2009) (citing cases allowing false confession testimony). Further, the law of the case doctrine did not bar the Court from allowing Dr. Kassin's testimony because increasing acceptance in the scientific community about the science surrounding false confessions makes the previous ruling erroneous. *See, e.g., People v. Sutton*, 375 Ill. App. 3d 889 (1st Dist. 2007) (granting that when a previous decision is palpably erroneous, the law of the case doctrine does not apply.) Denying Mr. Rivera his right to call Dr. Kassin violated Article I, Section 8 of the Illinois Constitution and the Sixth Amendment to the United States Constitution, which guarantee a criminal defendant to compel the attendance of witnesses on his behalf. The Court's decision to exclude Dr. Kassin's testimony also violated Mr. Rivera's constitutional right, under the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Section 2 of the Illinois Constitution, to introduce evidence regarding the circumstances of his alleged confessions to attack their reliability. *See, e.g., Crane v. Kentucky*, 476 U.S. 683, 689 (1986); *People v. Melock*, 149 Ill. 2d 423, 465 (1992). The Court's decision further violated Mr. Rivera's right, under the

Fifth Amendment to the United States Constitution, and Article I, Section 10 of the Illinois Constitution, not to be compelled to be a witness against himself. Refusing to allow Mr. Rivera to call Dr. Kassin also violated Mr. Rivera's rights under Article I, Section 8 of the Illinois Constitution and the Sixth Amendment to the United States Constitution to secure the attendance of witnesses on his behalf. The refusal to admit the evidence discussed in this paragraph rendered Mr. Rivera's trial fundamentally unfair, and thus violated his right to due process of law under both Article I, Section 2 of the Illinois Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

18. The Court erred in prohibiting Mr. Rivera's counsel from commenting during opening statement as to the state of the law regarding recording custodial interrogation techniques. (4/15/2009 AM Tr. at 106.) Mr. Rivera's counsel was entitled to comment on what admissible evidence would show at trial, and evidence of the state of the law regarding custodial interrogations was relevant to show the jury that recording equipment was available and could lawfully have been used to record Mr. Rivera's statements, but was not. The Court's decision to prohibit Mr. Rivera's counsel from making the comments that are the subject of this paragraph violated Mr. Rivera's constitutional right, under the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Section 2 of the Illinois Constitution, to introduce and comment upon evidence regarding the circumstances of his alleged confessions to attack their reliability. *See, e.g., Crane v. Kentucky*, 476 U.S. 683, 689 (1986); *People v. Melock*, 149 Ill. 2d 423, 465 (1992). The Court's decision further violated Mr. Rivera's right, under the Fifth Amendment to the United States Constitution, and Article I, Section 10 of the Illinois Constitution, not to be compelled to be a witness against himself. In addition, the refusal to allow Mr. Rivera's counsel to discuss the state of the law in 1992

regarding recording custodial interrogation techniques rendered Mr. Rivera's trial fundamentally unfair, and thus violated his right to due process of law under both Article I, Section 2 of the Illinois Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

19. At trial, and in response to the State's motion *in limine*, the Court erred in refusing to allow Mr. Rivera to question the witnesses who interrogated Mr. Rivera about false confession cases generally, and about their knowledge as to the coercive nature of certain interrogation techniques. The Court likewise erred when it prohibited Mr. Rivera from questioning those witnesses about their knowledge that the following are known factors in causing false confessions: (1) the suspect's youth; (2) the length of the interrogation; and (3) the mental condition—especially the low I.Q.—of the suspect. (*See, e.g.*, 4/16/2009 PM Tr. at 59-60; 4/23/2009 AM Tr. at 53-54, 92-93, 93-97.) That evidence was relevant to show the officers' knowledge regarding the coercive nature of the interrogation techniques they used with Mr. Rivera. The Court's decision to bar Mr. Rivera from questioning the officers about the topics discussed in this paragraph also violated Mr. Rivera's constitutional right, under the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Section 2 of the Illinois Constitution, to introduce evidence regarding the circumstances of his alleged confessions to attack their reliability. *See, e.g., Crane v. Kentucky*, 476 U.S. 683, 689 (1986); *People v. Melock*, 149 Ill. 2d 423, 465 (1992). The Court's decision further violated Mr. Rivera's right, under the Fifth Amendment to the United States Constitution, and Article I, Section 10 of the Illinois Constitution, not to be compelled to be a witness against himself. Also, the Court's refusal to allow Mr. Rivera to question the officers who interrogated him about the topics discussed in this paragraph violated Mr. Rivera's right under both Article I, Section 8 of the Illinois Constitution and the Sixth Amendment to the United States Constitution to confront

the witnesses against him. In addition, the refusal to admit the evidence discussed in this paragraph rendered Mr. Rivera's trial fundamentally unfair, and thus violated his right to due process of law under both Article I, Section 2 of the Illinois Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

20. At trial, the Court erred in refusing to allow Mr. Rivera to offer into evidence, and to question witnesses about, the interrogation manual that outlines the "Reid technique" (Inbau, et al., *Criminal Interrogations and Confessions*, Defense Exhibit 206). (See, e.g., 4/16/2009 PM Tr. 60-65; 4/20/2009 AM Tr. at 95.) That evidence was admissible to show that the officers knowingly violated the guidelines they were trained in regarding proper interrogation technique in ways that made the environment in which Mr. Rivera confessed inherently coercive, and to show that Mr. Rivera acted in ways that Defense Exhibit 206 suggests are indicative of innocence. The Court's decision to bar Mr. Rivera from introducing Defense Exhibit 206, and from questioning the officers about the topics discussed in this paragraph, also violated Mr. Rivera's constitutional right, under the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Section 2 of the Illinois Constitution, to introduce evidence regarding the circumstances of his alleged confessions to attack their reliability. See, e.g., *Crane v. Kentucky*, 476 U.S. 683, 689 (1986); *People v. Melock*, 149 Ill. 2d 423, 465 (1992). The Court's decision further violated Mr. Rivera's right, under the Fifth Amendment to the United States Constitution, and Article I, Section 10 of the Illinois Constitution, not to be compelled to be a witness against himself. Also, the Court's refusal to allow Mr. Rivera to question the officers who interrogated him about the "Reid technique" violated Mr. Rivera's right under both Article I, Section 8 of the Illinois Constitution and the Sixth Amendment to the United States Constitution to confront the witnesses against him. In



addition, the refusal to admit the evidence discussed in this paragraph rendered Mr. Rivera's trial fundamentally unfair, and thus violated his right to due process of law under both Article I, Section 2 of the Illinois Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

21. The Court erred in refusing to allow Mr. Rivera to offer the testimony of Dr. Charles Honts. (2/5/2009 Hr'g Tr. at 17-52.) That testimony was admissible (1) to show that Mr. Rivera faced deceptive interrogation techniques when his interrogators suggested to Mr. Rivera that he failed the polygraph when in fact the results of Mr. Rivera's polygraph indicated he was truthful when he denied involvement in Ms. Staker's murder; (2) to show the circumstances surrounding the confession, namely the fact that Mr. Rivera only confessed after he was informed, falsely, that he had failed a polygraph; and (3) to rebut the clear implication to the jury that Mr. Rivera failed his polygraph due to the State's putting on evidence that Mr. Rivera was taken to John Reid & Associates for two polygraphs prior to the State accusing Mr. Rivera of murdering Ms. Staker. Dr. Honts' testimony was admissible under *People v. Melock*, 149 Ill. 2d 423 (1992), where the Court held that information about a polygraph test is relevant and admissible to show the circumstances surrounding the confession, and *People v. Anderson*, 237 Ill. App. 3d 621 (5th Dist. 1992), where the Court held that each party is permitted to rebut false implications about the results of a polygraph test introduced by the other. In this case, the evidence of the polygraph test and Dr. Honts' testimony (1) would have established the circumstances surrounding Mr. Rivera's confession since Mr. Rivera confessed only after the State clearly implied to Mr. Rivera that he failed the polygraph; and (2) would have rebutted the State's evidence, which falsely implied that Mr. Rivera failed the polygraph test. The Court's decision to bar Mr. Rivera from calling Dr. Honts' violated Mr. Rivera's constitutional right,

under the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Section 2 of the Illinois Constitution, to introduce evidence regarding the circumstances of his alleged confessions to attack their reliability. *See, e.g., Crane v. Kentucky*, 476 U.S. 683, 689 (1986); *People v. Melock*, 149 Ill. 2d 423, 465 (1992). The Court's decision further violated Mr. Rivera's right, under the Fifth Amendment to the United States Constitution, and Article I, Section 10 of the Illinois Constitution, not to be compelled to be a witness against himself. Denying Mr. Rivera his right to call Dr. Honts violated Article I, Section 8 of the Illinois Constitution and the Sixth Amendment to the United States Constitution, which guarantee a criminal defendant the right to compel the attendance of witnesses on his behalf. In addition, the refusal to admit the evidence discussed in this paragraph rendered Mr. Rivera's trial fundamentally unfair, and thus violated his right to due process of law under both Article I, Section 2 of the Illinois Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

22. At trial, the Court erred in refusing to allow Mr. Rivera to question Task Force members, as well as Michael Masokas, who conducted Mr. Rivera's polygraph examination, about the results of Mr. Rivera's polygraph. (*See, e.g., 4/16/2009 AM Tr. at 66; 4/16/2009 PM Tr. at 81-99.*) The Court erred for the same reasons it erred in refusing to allow Dr. Honts' testimony. (*See ¶ 21, above.*) The Court's decision to bar Mr. Rivera from questioning Mr. Masokas about the results of Mr. Rivera's polygraph examinations also violated Mr. Rivera's constitutional right, under the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Section 2 of the Illinois Constitution, to introduce evidence regarding the circumstances of his alleged confessions to attack their reliability. *See, e.g., Crane v. Kentucky*, 476 U.S. 683, 689 (1986); *People v. Melock*, 149 Ill. 2d 423, 465

(1992). The Court's decision further violated Mr. Rivera's right, under the Fifth Amendment to the United States Constitution, and Article I, Section 10 of the Illinois Constitution, not to be compelled to be a witness against himself. Further, the Court's refusal to allow Mr. Rivera to question Mr. Masokas about the topics discussed in this paragraph violated Mr. Rivera's right under both Article I, Section 8 of the Illinois Constitution and the Sixth Amendment to the United States Constitution to confront the witnesses against him. In addition, the refusal to admit the evidence discussed in this paragraph rendered Mr. Rivera's trial fundamentally unfair, and thus violated his right to due process of law under both Article I, Section 2 of the Illinois Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

23. The Court erred in granting the State's motion *in limine* to bar Mr. Rivera from mentioning that Mr. Rivera was taken from Hill Correctional Facility to the Lake County Jail for his interrogation through the improper use of a writ of habeas corpus *ad testificandum* (the "writ") for the ostensible purpose of Mr. Rivera testifying before the grand jury. (3/25/2009 Hr'g Tr. at 111-12.) The evidence was relevant because it made it more probable that interrogating officers subjected Mr. Rivera to psychological stress and placed him in an environment more conducive to producing a confession, regardless of the veracity of that confession. Evidence of the improper use of the writ would have helped Mr. Rivera establish that the State engaged in a concerted effort to place Mr. Rivera in circumstances that would produce a false confession. The law of the case doctrine did not bar the Court from allowing Mr. Rivera to put on evidence of the improper use of the writ. The Court's decision to bar Mr. Rivera from offering evidence about the improper use of the writ also violated Mr. Rivera's constitutional right, under the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Section 2 of the Illinois Constitution, to introduce

evidence regarding the circumstances of his alleged confessions to attack their reliability. *See, e.g., Crane v. Kentucky*, 476 U.S. 683, 689 (1986); *People v. Melock*, 149 Ill. 2d 423, 465 (1992). The Court's decision further violated Mr. Rivera's right, under the Fifth Amendment to the United States Constitution, and Article I, Section 10 of the Illinois Constitution, not to be compelled to be a witness against himself. Further, the Court's refusal to allow Mr. Rivera to question the State's witnesses regarding the topic discussed in this paragraph violated Mr. Rivera's right under both Article I, Section 8 of the Illinois Constitution and the Sixth Amendment to the United States Constitution to confront the witnesses against him. The refusal to admit the evidence discussed in this paragraph rendered Mr. Rivera's trial fundamentally unfair, and thus violated his right to due process of law under both Article I, Section 2 of the Illinois Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

24. The Court erred in sustaining seven objections to the testimony of Dr. Robert Galatzer-Levy. (4/30/2009 PM Pt. 2 Tr. at 75-76; 4/30/2009 PM Pt. 2 Tr. at 81-82; 4/30/2009 PM Pt. 2 Tr. at 85-86; 5/1/2009 AM Pt. 1 Tr. at 15-16.) Dr. Galatzer-Levy, an expert in adult and child psychiatry, was prohibited from testifying about: (1) how a pre-existing mental condition affected Mr. Rivera's behavior during his interrogation; (2) how an acute psychotic disorder affected Mr. Rivera's behavior during his interrogation; (3) how the physical conditions of Mr. Rivera's interrogation affected his psychological state and his behavior; (4) the basis of his opinion that Mr. Rivera was suffering from a stress-induced psychotic episode during and around the time when Mr. Rivera signed two purported confessions; and (5) his ultimate opinion as to Mr. Rivera's mental condition at the time of the interrogation. Dr. Galatzer-Levy's testimony should have been admitted because he was qualified to give an expert opinion on Mr. Rivera's psychological condition at the time of the interrogation and the purported confessions.

Additionally, evidence about Mr. Rivera's psychological condition and its effect on his behavior, comprehension, and cognitive ability is a relevant circumstance bearing on the reliability of Mr. Rivera's purported confessions. The Court's decision to bar Dr. Galatzer-Levy from giving the expert opinions discussed in this paragraph violated Mr. Rivera's constitutional right, under the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Section 2 of the Illinois Constitution, to introduce evidence regarding the circumstances of his alleged confessions to attack their reliability. *See, e.g., Crane v. Kentucky*, 476 U.S. 683, 689 (1986) (holding that the "psychological environment that yielded the confession" is relevant for the determination of the credibility of a confession and must be submitted to the jury); *People v. Melock*, 149 Ill. 2d 423, 465 (1992). The Court's decision further violated Mr. Rivera's right, under the Fifth Amendment to the United States Constitution, and Article I, Section 10 of the Illinois Constitution, not to be compelled to be a witness against himself. In addition, the refusal to admit the evidence discussed in this paragraph rendered Mr. Rivera's trial fundamentally unfair, and thus violated his right to due process of law under both Article I, Section 2 of the Illinois Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

25. On April 30, 2009, this Court erred in excluding from evidence Defense Exhibit 161,<sup>3</sup> intervention notes written by the psychiatric nurses at the Lake County Jail who observed and treated Mr. Rivera on the night of October 29, 1992 and the early morning of October 30, 1992. (*See, e.g.,* 4/30/2009 PM Pt. 1 Tr. at 28-29, 69, 73.) Defense Exhibit 161 was relevant because those notes recorded the information that formed the basis of the nurses' opinions that Mr. Rivera was in a state of psychosis during the period in which he signed the purported

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<sup>3</sup> At one point during the trial, defense counsel erroneously referred to the intervention notes as Defense Exhibit 101. (*See* 4/30/2009 PM Pt. 1 Tr. at 28.) The correct number is Defense Exhibit 161.

confessions. The notes were admissible under exceptions to the general ban on hearsay evidence for present sense impressions and business records. The Court's decision to exclude Defense Exhibit 161 violated Mr. Rivera's constitutional right, under the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Section 2 of the Illinois Constitution, to introduce evidence regarding the circumstances of his alleged confessions to attack their reliability. *See, e.g., Crane v. Kentucky*, 476 U.S. 683, 689 (1986); *People v. Melock*, 149 Ill. 2d 423, 465 (1992). The Court's decision further violated Mr. Rivera's right, under the Fifth Amendment to the United States Constitution, and Article I, Section 10 of the Illinois Constitution, not to be compelled to be a witness against himself. In addition, the refusal to admit the evidence discussed in this paragraph rendered Mr. Rivera's trial fundamentally unfair, and thus violated his right to due process of law under both Article I, Section 2 of the Illinois Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

26. On May 1, 2009, this Court erred in excluding from evidence the testimony of Juan Rivera, Sr., the defendant's father, concerning his son's prior suicide attempt. (5/1/2009 PM Pt. 2 Tr. at 35.) That testimony should have been admitted because it was relevant to show that Juan Rivera, Jr. suffered from a major depressive disorder, which would have corroborated Dr. Robert Galatzer-Levy's testimony concerning Mr. Rivera's major psychotic episode during the interrogation. The Court's decision to exclude Juan Rivera, Sr.'s testimony about his son's prior suicide attempt violated Mr. Rivera's constitutional right, under the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Section 2 of the Illinois Constitution, to introduce evidence regarding the circumstances of his alleged confessions to attack their reliability. *See, e.g., Crane v. Kentucky*, 476 U.S. 683, 689 (1986);

*People v. Melock*, 149 Ill. 2d 423, 465 (1992). The Court's decision further violated Mr. Rivera's right, under the Fifth Amendment to the United States Constitution, and Article I, Section 10 of the Illinois Constitution, not to be compelled to be a witness against himself. The Court also violated Mr. Rivera's right under the Sixth Amendment to the United States Constitution and Article I, Section 8 of the Illinois Constitution, to secure the attendance of witnesses to testify on his behalf. In addition, the refusal to admit the evidence discussed in this paragraph rendered Mr. Rivera's trial fundamentally unfair, and thus violated his right to due process of law under both Article I, Section 2 of the Illinois Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

27. The Court erred in improperly limiting Mr. Rivera's examination of every Task Force member about the circumstances surrounding Mr. Rivera's interrogation. By way of example only, the Court prohibited Mr. Rivera from questioning officers regarding whether they would have continued to interrogate Mr. Rivera if they had known of Mr. Rivera's psychotic state, and whether continued questioning, in light of Mr. Rivera's psychiatric condition would have violated jail policy regarding the treatment of prisoners. (*See, e.g.*, 4/20/2009 AM Tr. at 133-34; 4/20/2009 PM Tr. at 24; 4/23/2009 AM Tr. at 20, 22-23, 23-28.) That testimony was relevant to show that interrogating officers themselves knew that interrogating a young man undergoing a psychotic episode was improper. Similarly, the numerous other limitations on Mr. Rivera's examination of Task Force officers improperly prevented Mr. Rivera from establishing the unreliability of Mr. Rivera's purported confessions. The Court's decision to improperly limit Mr. Rivera's examinations of Task Force officers violated Mr. Rivera's constitutional right, under the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Section 2 of the Illinois Constitution, to introduce evidence regarding

the circumstances of his alleged confessions to attack their reliability. *See, e.g., Crane v. Kentucky*, 476 U.S. 683, 689 (1986); *People v. Melock*, 149 Ill. 2d 423, 465 (1992). The Court's decision further violated Mr. Rivera's right, under the Fifth Amendment to the United States Constitution, and Article I, Section 10 of the Illinois Constitution, not to be compelled to be a witness against himself. The limitations placed on Mr. Rivera's examinations of the Task Force officers also violated Mr. Rivera's right under both Article I, Section 8 of the Illinois Constitution and the Sixth Amendment to the United States Constitution to confront the witnesses against him. In addition, the limitations discussed in this paragraph rendered Mr. Rivera's trial fundamentally unfair, and thus violated his right to due process of law under both Article I, Section 2 of the Illinois Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

28. On April 30, 2009, this Court erred in excluding from evidence testimony by Officer James Meal concerning his response to observing Mr. Rivera hogtied in the rubber room. (4/30/2009 AM Pt. 2 Tr. at 14-16.) Officer Meal's reaction to the "hog-tying" was relevant: (1) to explain the intensity of the interrogation because it would have established that the conduct of the interrogating officers was viewed as extreme and inhumane by a corrections officer with many years of experience observing detainees in the Lake County Jail; and (2) to explain why Officer Meal requested that his superiors unshackle Mr. Rivera from the "hog-tied" position. The Court's decision to exclude the testimony discussed in this paragraph violated Mr. Rivera's constitutional right, under the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Section 2 of the Illinois Constitution, to introduce evidence regarding the circumstances of his alleged confessions to attack their reliability. *See, e.g., Crane v. Kentucky*, 476 U.S. 683, 689 (1986); *People v. Melock*, 149 Ill. 2d 423, 465



(1992). The Court's decision further violated Mr. Rivera's right, under the Fifth Amendment to the United States Constitution, and Article I, Section 10 of the Illinois Constitution, not to be compelled to be a witness against himself. In addition, the refusal to admit the evidence discussed in this paragraph rendered Mr. Rivera's trial fundamentally unfair, and thus violated his right to due process of law under both Article I, Section 2 of the Illinois Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

29. At trial, the Court erred in quashing the trial subpoena to Michael J. Waller, the Lake County State's Attorney, and precluding Mr. Rivera from calling Mr. Waller to testify. Mr. Waller was present at the meeting where officers were directed to attempt to elicit a second statement from Mr. Rivera because his first statement was inconsistent in many respects with the known facts of the crime. (*See, e.g.*, 4/22/2008 AM Tr. at 3-12.) Mr. Waller was a crucial fact witness who had unique knowledge why he decided to instruct the Task Force to continue to interrogate Mr. Rivera. The Court's decision to prohibit Mr. Rivera from calling Mr. Waller to testify violated Mr. Rivera's constitutional right, under the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Section 2 of the Illinois Constitution, to introduce evidence regarding the circumstances of his alleged confessions to attack their reliability. *See, e.g.*, *Crane v. Kentucky*, 476 U.S. 683, 689 (1986); *People v. Melock*, 149 Ill. 2d 423, 465 (1992). The Court's decision further violated Mr. Rivera's right, under the Fifth Amendment to the United States Constitution, and Article I, Section 10 of the Illinois Constitution, not to be compelled to be a witness against himself. In addition, the refusal to admit the evidence discussed in this paragraph rendered Mr. Rivera's trial fundamentally unfair, and thus violated his right to due process of law under both Article I, Section 2 of the Illinois Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

Quashing the subpoena to Mr. Waller also violated Mr. Rivera's rights under Article I, Section 8 of the Illinois Constitution and the Sixth Amendment to the United States Constitution to compulsory process to secure the attendance of witnesses on his behalf.

30. The Court erred in excluding Defense Exhibit 46, which lists the leads the Task Force pursued during the investigation into the murder. (4/23/2009 AM Tr. at 62-65.) The exhibit was relevant, and crucial to Mr. Rivera's defense, because it showed that the Task Force knew of the hole in the door, *and that the mop may have been used to create that hole*, well before the Task Force officers ever spoke to Mr. Rivera. Thus, Defense Exhibit 46 shows that information concerning the blue mop's relation to the damaged door was not, as the State argued, original information provided by Mr. Rivera during his purported confession. The Court's decision to exclude Defense Exhibit 46 violated Mr. Rivera's constitutional right, under the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Section 2 of the Illinois Constitution, to introduce evidence regarding the circumstances of his alleged confessions to attack their reliability. *See, e.g., Crane v. Kentucky*, 476 U.S. 683, 689 (1986); *People v. Melock*, 149 Ill. 2d 423, 465 (1992). The Court's decision further violated Mr. Rivera's right, under the Fifth Amendment to the United States Constitution, and Article I, Section 10 of the Illinois Constitution, not to be compelled to be a witness against himself. In addition, the refusal to admit the evidence discussed in this paragraph rendered Mr. Rivera's trial fundamentally unfair, and thus violated his right to due process of law under both Article I, Section 2 of the Illinois Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

31. The Court erred in prohibiting Mr. Rivera from questioning experienced police officers, including but not limited to Messrs. Fagan and Maley, about whether, in light of their

years of experience in investigating crimes, it was their opinion that slamming a mop through the back door could have produced the straight line that formed the bottom of the hole in the back door recovered from the murder scene. (*See, e.g.*, 4/22/2009 PM Pt. 2 Tr. at 11-12; 4/23/2009 AM Tr. at 43; 4/24/2009 AM Tr. at 141). That testimony was admissible because of the officers' expertise and because it was relevant to the jury's determining whether the hole in the door could have been created in the manner described in Mr. Rivera's purported second confession. The Court's decision to limit Mr. Rivera's examinations of police officers in the manner discussed in this paragraph violated Mr. Rivera's constitutional right, under the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Section 2 of the Illinois Constitution, to introduce evidence regarding the circumstances of his alleged confessions to attack their reliability. *See, e.g., Crane v. Kentucky*, 476 U.S. 683, 689 (1986); *People v. Melock*, 149 Ill. 2d 423, 465 (1992). The Court's decision further violated Mr. Rivera's right, under the Fifth Amendment to the United States Constitution, and Article I, Section 10 of the Illinois Constitution, not to be compelled to be a witness against himself. In addition, the refusal to allow questioning regarding the subjects discussed in this paragraph rendered Mr. Rivera's trial fundamentally unfair, and thus violated his right to due process of law under both Article I, Section 2 of the Illinois Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

32. At trial, the Court erred in excluding from evidence, and prohibiting questioning about, a letter written from Mr. Masokas to Sergeant Lou Tessmann (Defense Exhibit 8) which recounted the information Mr. Tessmann and other officers told Mr. Masokas about Ms. Staker's murder prior to Mr. Rivera's interrogation. (*See, e.g.*, 4/16/2009 PM Tr. at 110-12; 5/4/2009 AM Pt. 1 Tr. at 49-50.) Among other things, that letter stated that Mr. Masokas was told that the

back door to the apartment where Ms. Staker was murdered had a hole in it, and 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 letter was not hearsay because it was being offered only to show Mr. Tessmann’s knowledge regarding the existence and source of the hole found in the door to the crime scene, as well as the Task Force’s theory as to how that hole was created, and not to prove the truth of the matters asserted in the letter. Evidence that the officers who interrogated Mr. Rivera knew about the damage to the back door and had developed a theory regarding how that damage was created before speaking to Mr. Rivera was relevant and crucial to Mr. Rivera’s defense because the State argued at trial that those officers were unaware of the hole in the door, or of the blue mop’s connection to the damage on the door, prior to Mr. Rivera revealing that information to them. The Court’s decision to exclude Defense Exhibit 8 also violated Mr. Rivera’s constitutional right, under the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Section 2 of the Illinois Constitution, to introduce evidence regarding the circumstances of his alleged confessions to attack their reliability. *See, e.g., Crane v. Kentucky*, 476 U.S. 683, 689 (1986); *People v. Melock*, 149 Ill. 2d 423, 465 (1992). The Court’s decision further violated Mr. Rivera’s right, under the Fifth Amendment to the United States Constitution, and Article I, Section 10 of the Illinois Constitution, not to be compelled to be a witness against himself. In addition, the refusal to admit the evidence discussed in this paragraph rendered Mr. Rivera’s trial fundamentally unfair, and thus violated his right to due process of law under both Article I, Section 2 of the Illinois Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

33. On April 30, 2009, this Court erred by refusing to allow Officer Thomas Reed to consult a police report that Officer Bert Foster prepared regarding the investigative activities of

Mr. Reed and Mr. Foster on August 24, 1992. (4/30/2009 AM Pt. 2 Tr. at 31-32.) Officer Reed should have been permitted to testify concerning the contents of that report because the creation of a report about the collection of the mop that caused the damage to the back door of 442 Hickory was relevant to show that members of the Task Force were aware of the mop and that information regarding the mop and its apparent significance to the crime scene was shared among the Task Force members prior to Mr. Rivera's interrogation. The Court's decision to limit Mr. Rivera's examination of Officer Reed violated Mr. Rivera's constitutional right, under the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Section 2 of the Illinois Constitution, to introduce evidence regarding the circumstances of his alleged confessions to attack their reliability. *See, e.g., Crane v. Kentucky*, 476 U.S. 683, 689 (1986); *People v. Melock*, 149 Ill. 2d 423, 465 (1992). The Court's decision further violated Mr. Rivera's right, under the Fifth Amendment to the United States Constitution, and Article I, Section 10 of the Illinois Constitution, not to be compelled to be a witness against himself. In addition, the refusal to admit the evidence discussed in this paragraph rendered Mr. Rivera's trial fundamentally unfair, and thus violated his right to due process of law under both Article I, Section 2 of the Illinois Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

34. At trial, the Court erred in excluding from evidence the press release issued by the Waukegan Police Department concerning the Holly Staker homicide (Defense Ex. 22). (*See, e.g.,* 4/22/2009 PM Pt. 2Tr. at 9-10; 4/28/2009 AM Pt. 1 Tr. at 21-22; 4/30/2009 AM Pt. 1 Tr. at 8-10; 5/4/2009 PM Tr. at 23-24.) That press release was crucial to show that facts in the confession the State claimed were known only to the killer were in fact known to the police, and announced to the public, as early as the night of the crime. The press release was properly

authenticated, and was not hearsay because it was not being offered for the truth of the information it contained, but instead to show the public knowledge of the information contained in the press release. The Court's decision to exclude Defense Exhibit 22 also violated Mr. Rivera's constitutional right, under the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Section 2 of the Illinois Constitution, to introduce evidence regarding the circumstances of his alleged confessions to attack their reliability. *See, e.g., Crane v. Kentucky*, 476 U.S. 683, 689 (1986); *People v. Melock*, 149 Ill. 2d 423, 465 (1992). The Court's decision further violated Mr. Rivera's right, under the Fifth Amendment to the United States Constitution, and Article I, Section 10 of the Illinois Constitution, not to be compelled to be a witness against himself. In addition, the refusal to admit the evidence discussed in this paragraph rendered Mr. Rivera's trial fundamentally unfair, and thus violated his right to due process of law under both Article I, Section 2 of the Illinois Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

35. At trial, the Court erred in excluding newspaper articles published before Mr. Rivera allegedly confessed regarding Ms. Staker's murders (Defense Ex. 97); those articles contained facts regarding the crime. The Court also erred in refusing to admit a summary of the facts contained in those articles (Defense Ex. 96), and testimony regarding their publication and collection. (5/4/2009 AM Pt. 1 Tr. at 17-20.) The articles were relevant to show that many of the facts in the confession, including facts the State claimed were known only to the killer, were in fact disseminated to the public in newspaper articles published prior to Mr. Rivera's interrogation and supposed confession. The articles were self-authenticating, and were not hearsay because they were not being offered for the truth, but instead to show the publication of the information contained in the articles. The Court's decision to exclude Defense Exhibits 96

and 97, and testimony about those exhibits, violated Mr. Rivera's constitutional right, under the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Section 2 of the Illinois Constitution, to introduce evidence regarding the circumstances of his alleged confessions to attack their reliability. *See, e.g., Crane v. Kentucky*, 476 U.S. 683, 689 (1986); *People v. Melock*, 149 Ill. 2d 423, 465 (1992). The Court's decision further violated Mr. Rivera's right, under the Fifth Amendment to the United States Constitution, and Article I, Section 10 of the Illinois Constitution, not to be compelled to be a witness against himself. In addition, the refusal to admit the evidence discussed in this paragraph rendered Mr. Rivera's trial fundamentally unfair, and thus violated his right to due process of law under both Article I, Section 2 of the Illinois Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

36. Each time the Court restricted Mr. Rivera's examinations about the Task Force documents contained in Appendix A, the Court erred. Mr. Rivera did not question any witnesses about those reports for the purpose of proving the truth of the matters asserted in the reports. Instead, Mr. Rivera questioned witnesses about those reports for the purpose of showing that the witnesses knew the information in those reports before ever speaking to Mr. Rivera. Their knowledge of that information was relevant to support Mr. Rivera's theory that the police could have "fed" the facts to Mr. Rivera when questioning him, and thus that the existence of those facts in the purported confessions is not evidence of Mr. Rivera's guilt. The Court's decision to bar Mr. Rivera from questioning witnesses about the reports in Appendix A also violated Mr. Rivera's constitutional right, under the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Section 2 of the Illinois Constitution, to introduce evidence regarding the circumstances of his alleged confessions to

attack their reliability. *See, e.g., Crane v. Kentucky*, 476 U.S. 683, 689 (1986); *People v. Melock*, 149 Ill. 2d 423, 465 (1992). The Court's decision further violated Mr. Rivera's right, under the Fifth Amendment to the United States Constitution, and Article I, Section 10 of the Illinois Constitution, not to be compelled to be a witness against himself. Further, the Court's refusal to allow Mr. Rivera to question witnesses about the reports in Appendix A violated Mr. Rivera's right under both Article I, Section 8 of the Illinois Constitution and the Sixth Amendment to the United States Constitution to confront the witnesses against him. In addition, the refusal to admit the evidence discussed in this paragraph rendered Mr. Rivera's trial fundamentally unfair, and thus violated his right to due process of law under both Article I, Section 2 of the Illinois Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

37. At trial, the Court erred in prohibiting Mr. Rivera from offering the testimony of John Lynch regarding the fact that Mr. Lynch was told by Taylor Arena that the killer placed Taylor on Blake Arena's bed. (4/28/2009 PM Pt. 1 Tr. at 2-21.) Mr. Rivera was also prohibited from questioning Mr. Lynch about the fact that Mr. Lynch reported to members of the Task Force what Taylor told him. (*Id.*) That evidence was admissible because it was not offered for the truth, but to show that another fact in Mr. Rivera's statements was known to the Task Force prior to Task Force officers ever speaking to Mr. Rivera. Mr. Rivera would have used that evidence to rebut the State's argument that the detailed facts in the confession could only have been known to the killer and thus evidenced Mr. Rivera's guilt. The Court's decision to prohibit Mr. Lynch's testimony violated Mr. Rivera's constitutional right, under the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Section 2 of the Illinois Constitution, to introduce evidence regarding the circumstances of his alleged confessions to attack their reliability. *See, e.g., Crane v. Kentucky*, 476 U.S. 683, 689 (1986);



*People v. Melock*, 149 Ill. 2d 423, 465 (1992). The Court's decision further violated Mr. Rivera's right, under the Fifth Amendment to the United States Constitution, and Article I, Section 10 of the Illinois Constitution, not to be compelled to be a witness against himself. In addition, the refusal to admit the evidence discussed in this paragraph rendered Mr. Rivera's trial fundamentally unfair, and thus violated his right to due process of law under both Article I, Section 2 of the Illinois Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

38. At trial, the Court erred by prohibiting Mr. Rivera from impeaching the credibility of Lou Tessmann, one of the two interrogators who wrote Mr. Rivera's second allegedly inculpatory statement, with evidence of Mr. Tessmann's past acts of dishonesty. Among other things, Mr. Rivera sought to impeach Mr. Tessmann with evidence regarding a civil judgment entered against Mr. Tessmann for his use of false evidence to convict another person of a crime, as well as Mr. Tessmann's having lied regarding his educational background on his application to the Waukegan Police Department and on the website for the private company for which Mr. Tessmann now works. (4/20/2009 PM Tr. at 141-45.) Tessmann's college transcript, his redacted police employment application, and an excerpt from his biography included in his current employer's website, are attached as Appendix E. The Court ruled that the evidence was only impeaching as to a collateral matter, and therefore was inadmissible. (4/20/2009 PM Tr. at 150.) Credibility, however, is *never* a collateral issue, so the Court erred in excluding the evidence of Mr. Tessmann's history of dishonesty. The Court's decision to prohibit Mr. Rivera from impeaching Mr. Tessmann with the information contained in this paragraph violated Mr. Rivera's constitutional right, under the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Section 2 of the Illinois

Constitution, to introduce evidence regarding the circumstances of his alleged confessions to attack their reliability. *See, e.g., Crane v. Kentucky*, 476 U.S. 683, 689 (1986); *People v. Melock*, 149 Ill. 2d 423, 465 (1992). The Court's decision further violated Mr. Rivera's right, under the Fifth Amendment to the United States Constitution, and Article I, Section 10 of the Illinois Constitution, not to be compelled to be a witness against himself. In addition, the refusal to admit the evidence discussed in this paragraph rendered Mr. Rivera's trial fundamentally unfair, and thus violated his right to due process of law under both Article I, Section 2 of the Illinois Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

39. Before trial, the Court erred in granting the State's motion *in limine* to preclude Mr. Rivera from offering evidence of the press conference that was scheduled to announce Mr. Rivera's arrest *before* he gave his second statement. (3/25/2009 Hr'g Tr. at 51.) That evidence was relevant to show that the officers who interrogated Mr. Rivera the final time on October 30, 1992, immediately before the previously-scheduled press conference and despite his by-then diagnosed psychiatric condition, had a motive to coerce a statement from him so they could announce to the public a statement that was more "consistent" with the known facts of the case. The law of the case doctrine did not bar the Court from allowing Mr. Rivera to offer that evidence. The Court's decision to bar evidence of the press conference violated Mr. Rivera's constitutional right, under the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Section 2 of the Illinois Constitution, to introduce evidence regarding the circumstances of his alleged confessions to attack their reliability. *See, e.g., Crane v. Kentucky*, 476 U.S. 683, 689 (1986); *People v. Melock*, 149 Ill. 2d 423, 465 (1992). The Court's decision further violated Mr. Rivera's right, under the Fifth Amendment to the United States Constitution, and Article I, Section 10 of the Illinois Constitution, not to be

compelled to be a witness against himself. In addition, the refusal to admit the evidence discussed in this paragraph rendered Mr. Rivera's trial fundamentally unfair, and thus violated his right to due process of law under both Article I, Section 2 of the Illinois Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

40. Before trial, the Court erred in granting the State's motion *in limine* to preclude Mr. Rivera from offering evidence of the general election for Lake County State's Attorney in which Michael J. Waller, the then-acting State's Attorney, was a candidate. (3/25/2009 Hr'g Tr. at 45.) The election was scheduled for only four days after the police obtained Mr. Rivera's statements. Evidence of the election was crucial to show that Mr. Waller—the most senior law enforcement official overseeing the investigation into Ms. Staker's murder—had a vested interest in announcing to the public that his office had found the person who killed Ms. Staker so that Mr. Waller could use that fact to increase his chances of being elected. The law of the case doctrine did not bar the Court from allowing Mr. Rivera to offer that evidence. The Court's decision to bar evidence of the general election violated Mr. Rivera's constitutional right, under the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Section 2 of the Illinois Constitution, to introduce evidence regarding the circumstances of his alleged confessions to attack their reliability. *See, e.g., Crane v. Kentucky*, 476 U.S. 683, 689 (1986); *People v. Melock*, 149 Ill. 2d 423, 465 (1992). The Court's decision further violated Mr. Rivera's right, under the Fifth Amendment to the United States Constitution, and Article I, Section 10 of the Illinois Constitution, not to be compelled to be a witness against himself. In addition, the refusal to admit the evidence discussed in this paragraph rendered Mr. Rivera's trial fundamentally unfair, and thus violated his right to due

process of law under both Article I, Section 2 of the Illinois Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

**C. The Court committed reversible error in making numerous rulings regarding the Electronic Monitoring System, which showed that Mr. Rivera was home at the time of the murder.**

41. At trial, the Court erred in permitting the State to elicit evidence regarding general problems with the Electronic Monitoring System (EMS) used by the Lake County Probation Department, and about problems with specific pieces of EMS equipment that were not assigned to Mr. Rivera. (*See, e.g.*, 5/1/2009 PM Pt. 1 Tr. at 61-81; 5/1/2009 PM Pt. 2 Tr. at 1-27.) The State offered that evidence for the purpose of attacking the credibility of the State's own EMS records, generated by the transmitter and monitor assigned to Mr. Rivera, which clearly show that Mr. Rivera was home when Ms. Staker was killed. The Appellate Court held in 1996 that any evidence regarding problems with EMS that did not show that the particular equipment assigned to Mr. Rivera was faulty was irrelevant to show that the equipment assigned to Mr. Rivera may not have been working properly when Ms. Staker was killed. Specifically, the Appellate Court held that it was error for the Court to admit several memoranda regarding general problems with the EMS system and EMS equipment. *People v. Rivera*, No. 2—94—0075 at 7-10 (Ill. App. Ct. 2d Dist. 1996) (Rule 23 Order). The Appellate Court held that the Court erred in admitting these memoranda for two separate and independent reasons: (1) the contents of the memoranda were irrelevant because evidence of the EMS system's general problems did not make it more or less probable that Mr. Rivera's equipment malfunctioned; and (2) the memoranda themselves were hearsay documents and did not meet the business records exception. *Id.* The Appellate Court also specifically rejected the State's argument that evidence of other EMS devices malfunctioning is relevant because it goes to the reliability of the system

or the veracity of information provided by Mr. Rivera's EMS device. *Id.* at 9-10. Despite the Appellate Court's ruling, the Court admitted evidence of general EMS problems. The State was permitted to read from the *very same memoranda* the Appellate Court held were admitted in error at the first trial. (See Appendix F: Memoranda erroneously admitted at first trial, and testimony from first trial where memoranda were admitted.) This evidence was irrelevant and its admission violated the clear command of the Appellate Court. As the Appellate Court stated, "the appropriate question here is whether the specific equipment assigned to defendant was working properly." The admission of the evidence discussed in this paragraph rendered Mr. Rivera's trial fundamentally unfair, and thus violated his right to due process of law under both Article I, Section 2 of the Illinois Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

42. Before trial, the Court erred in denying Mr. Rivera's Motion in Limine Regarding Complaints About Electronic Monitoring System That Do Not Apply to Devices Assigned to Juan Rivera, for the same reasons the court erred in admitting the evidence discussed in Paragraph 41, above. (4/15/2009 AM Tr. at 8-10.) In addition, the refusal to grant Mr. Rivera's motion *in limine* rendered Mr. Rivera's trial fundamentally unfair, and thus violated his right to due process of law under both Article I, Section 2 of the Illinois Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

43. On May 1, 2009, the Court erred in allowing the State to question Judy Kerby, the former head of Pretrial bond services, regarding a letter allegedly written by David Sams, whom Ms. Kerby supervised, that purported to describe general problems with the EMS system and problems with specific equipment assigned to clients other than Mr. Rivera. (5/1/2009 PM Pt. 1 Tr. at 57-60.) That letter was inadmissible for the reasons described in Paragraph 41, above, as

well because it was not properly authenticated and was hearsay. Further, the admission of the letter violated Mr. Rivera's right under both Article I, Section 8 of the Illinois Constitution and the Sixth Amendment to the United States Constitution to be confronted with the witnesses against him, because Mr. Rivera did not have the opportunity to cross-examine the declarant, Mr. Sams. Lastly, the admission of the evidence discussed in this paragraph rendered Mr. Rivera's trial fundamentally unfair, and thus violated his right to due process of law under both Article I, Section 2 of the Illinois Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

44. On May 1, 2009, the Court erred in excluding from evidence Defendant's Exhibit 184, an electronically generated Pretrial Bond Services daily activity log annotated by Mr. Rivera's probation officer, David Sams. (5/1/2009 PM Pt. 1 Tr. at 37-39.) Defendant's Exhibit 184 should have been admitted because the testimony of Ms. Kerby adequately established that Defendant's Exhibit 184 was authentic and a business record. Defendant's Exhibit 184 was relevant because it tended to show that Pretrial Bond Services routinely received notice of violations, and dutifully followed up on those violation notices. In addition, the refusal to admit the evidence discussed in this paragraph rendered Mr. Rivera's trial fundamentally unfair, and thus violated his right to due process of law under both Article I, Section 2 of the Illinois Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

**D. Mr. Rivera was denied his right to a fair trial as a result of numerous errors during trial and erroneous rulings by the Court.**

45. The Court's refusal to recuse itself, on motion of Mr. Rivera, rendered Mr. Rivera's trial fundamentally unfair, and thus violated his right to due process of law under both Article I, Section 2 of the Illinois Constitution and the Fifth and Fourteenth Amendments to the United States Constitution, because of the Court's manifest bias against Mr. Rivera both before

and during the trial. (The transcript of the hearing on the recusal motion where the Court denied Mr. Rivera's motion was sealed by the Court.) That bias was further evidenced by:

(a) the Court's refusal to compel the State to make known the order of witnesses the State planned to call during its case-in-chief, which prejudiced Mr. Rivera by making it difficult for his attorneys to adequately prepare his defense. (*See, e.g.*, 4/15/2009 PM Tr. at 174-75.)

(b) The Court's improper evidentiary rulings in favor the State. Most egregiously, the Court ignored the Appellate Court's holding after the first trial in this case that evidence of general problems concerning EMS that did not shed any light on whether the particular equipment assigned to Mr. Rivera was working when Ms. Staker was killed was irrelevant and inadmissible. (*See* ¶¶ 41-43, above.) Indeed, the Court allowed Mr. Mermel to question Ms. Kerby about the content of the *very same memoranda* which the Appellate Court held could not properly be admitted. The Appellate Court's ruling was undoubtedly law of the case, which this Court had no power to ignore. Further, the Court's decision to ignore a holding of the Appellate Court issued in this case when asked to abide by that ruling by Mr. Rivera stands in stark contrast to the Court's decisions to preclude Mr. Rivera from pursuing certain issues on law of the case grounds when asked to do so by the State. For instance, the Court held that Mr. Rivera could not introduce evidence of the impending press conference and general election on law of the case grounds, despite the fact that *neither* this Court *nor* the Appellate Court ever held that Mr. Rivera could not introduce that evidence. The Court's expansive view of the law of the case doctrine when asked by the State to apply it against Mr. Rivera cannot be reconciled with the Court's cramped and narrow view of that doctrine when asked to apply it by Mr. Rivera against the State, except on the ground that the true determining factor was not the merits of the legal argument as to the doctrine's applicability, but simply which party was making the request.

(c) The Court's improper adoption of the State's characterization of defense counsel's actions. For instance, the Court stated that Ms. Raley's actions in interviewing Heather Staker prior to trial were improper, when in fact Ms. Raley was ethically obligated to conduct herself in the manner she did. (Those comments were made when the court reporter was not present to record them). The memorandum describing Ms. Raley's interview of Heather Staker is attached as Appendix G.

(d) The Court's refusal to admonish the prosecutor for obviously improper conduct. For instance, the Court refused to sanction Mr. Mermel for intimidating Dawn Engelbrecht immediately prior to her taking the stand the testify. The Court distorted the facts of what happened by stating that "It appears to the Court that basically she [sic] encouraged her to be truthful and that he knew about things that weren't truthful in the past and had witnesses about that." (4/28/2009 PM Pt. 1 Tr. at 26.) The Court made this remark without hearing from the witnesses proffered by Mr. Rivera regarding their observations of Mr. Mermel's conduct. As another example, the Court did not instruct the prosecution to stop improperly asking the Court to "admonish" defense counsel in front of the jury, despite the Court's repeated admonition to defense counsel that "speaking objections" were improper. (*See, e.g.*, 4/15/2009 AM Tr. at 110; 4/15/2009 PM Tr. at 165; 4/17/2009 PM Tr. at 148; 4/20/2009 AM Tr. at 120; 4/24/2009 AM Tr. at 64; 4/29/2009 PM Pt. 1 Tr. at 53; 4/30/2009 PM Pt. 2 Tr. at 27; 5/5/2009 PM Tr. at 74.) That is another example of the Court holding defense counsel to a different standard than the prosecution. And the Court's decision to allow the State's repeated improper calls for defense counsel to be admonished prejudiced Mr. Rivera by making defense counsel appear to be acting improperly in front of the jury.



(e) The Court further demonstrated its bias with its repeated attempts to induce Mr. Rivera to avoid trial by pleading guilty. On at least three occasions, the Court initiated off-the-record discussions with counsel for Mr. Rivera and the State seeking to resolve this case with a negotiated plea. (See Urdangen Affidavit, attached as Appendix H). The Court's efforts to induce a plea from Mr. Rivera continued notwithstanding counsel's repeated statements to the Court that Mr. Rivera had no interest or intention of pleading guilty to a crime which he did not commit. The Court characterized its efforts as being in Mr. Rivera's interest given the risk he faced. Counsel assert, nonetheless, that this is evidence of the Court's inability or unwillingness to presume Mr. Rivera innocent. *See, e.g., People v. Darnell*, 190 Ill. App. 3d 587 (2d Dist. 1989).

(f) The Court's manifest bias against Mr. Rivera rendered his trial fundamentally unfair, and thus violated his right to due process of law under both Article I, Section 2 of the Illinois Constitution and the Fifth and Fourteenth Amendments to the United States Constitution, by depriving Mr. Rivera of his constitutional right to a trial before an impartial judge.

46. The prosecution's improper conduct deprived Mr. Rivera of a fair trial. For instance, the State repeatedly questioned witnesses about the age of Veronica Diaz in 1992, who was Mr. Rivera's girlfriend at the time, despite being precluded from eliciting that testimony by order of the Court in response to a motion *in limine* filed by Mr. Rivera. (*See, e.g.,* 5/1/2009 PM Pt. 2 Tr. at 56; 4/28/2009 PM Pt. 1 Tr. at 68-69.) Further, Michael J. Waller described Mr. Rivera's attorneys as "rabid dogs" to the press prior to trial, tainting the jury pool and prejudicing Mr. Rivera. *See* Rob Wildeboer, *Convicted Rapist and Murderer Begins Third Trial*, April 13, 2009, <http://www.wbez.org/Content.aspx?audioID=33454>, attached as Appendix I. The State also violated due process by not turning over to the defense tapes of voicemails Ed

Martin left for Anthony Brown that clearly impeach Mr. Martin's credibility. (*See* ¶ 53, below); *Giglio v. United States*, 405 U.S. 150 (1972); *Brady v. Maryland*, 373 U.S. 83 (1963).) For other examples of the prosecution's improper conduct, see Paragraph 45(d), above, Paragraph 50, below, and Part II.E, below. The prosecution's improper conduct rendered Mr. Rivera's trial fundamentally unfair, and thus violated his right to due process of law under both Article I, Section 2 of the Illinois Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

47. Mr. Rivera was denied an impartial jury of his peers, in violation of his right to due process of law under both Article I, Section 2 of the Illinois Constitution and the Fifth and Fourteenth Amendments to the United States Constitution, and to an impartial jury under Article I, Section 8 of the Illinois Constitution and the Sixth Amendment to the United States Constitution. The jury pool from which Mr. Rivera was selected did not contain a fair representation of the racial composition of Lake County, given the paucity of African-American, Hispanic, Asian, and other non-Caucasian jurors.

48. The Court erred by striking the only Latina juror from the venire, and for failing to conduct a *Batson* hearing regarding the State's improper use of the juror's race as a reason for striking the juror, as requested by defense counsel.<sup>4</sup> That decision denied Mr. Rivera his right to due process of law under both Article I, Section 2 of the Illinois Constitution and the Fifth and Fourteenth Amendments to the United States Constitution, and to an impartial jury under Article I, Section 8 of the Illinois Constitution and the Sixth Amendment to the United States

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<sup>4</sup> Mr. Rivera does not yet have the transcripts of jury selection. The court reporters who transcribed jury selection have informed Mr. Rivera's counsel that they will be unable to complete those transcripts until after Mr. Rivera's post-trial motion is due. Therefore, all of the asserted errors regarding jury selection are from defense counsel's memory and/or notes. (*See* ¶¶ 47-50.) Mr. Rivera asserts those errors without waiving his right to later assert errors that are discovered after Mr. Rivera's counsel has the opportunity to review the transcripts of jury selection.

Constitution. That decision further violated both Mr. Rivera's, and the stricken juror's, right to the equal protection of the laws under both Article I, Section 2 of the Illinois Constitution, and the Fourteenth Amendment to the United States Constitution.

49. The Court erred by striking for cause, over defense objection, all jurors from the venire the Court struck at the request of the State. Those decisions denied Mr. Rivera his right to due process of law under both Article I, Section 2 of the Illinois Constitution and the Fifth and Fourteenth Amendments to the United States Constitution, and to an impartial jury under Article I, Section 8 of the Illinois Constitution and the Sixth Amendment to the United States Constitution.

50. The prosecutor denied Mr. Rivera a fair trial by "baiting" a juror whom the prosecutor perceived as favorable to the defense into making a statement the prosecutor could then use to strike the juror for cause. The Court denied Mr. Rivera a fair trial by striking that juror for cause despite the fact that her supposed "bias" against the State manifested itself only in response to Mr. Mermel's improper attempt to cause the juror to make a statement he could then use to have that juror stricken. The actions and decisions described in this paragraph denied Mr. Rivera his right to due process of law under both Article I, Section 2 of the Illinois Constitution and the Fifth and Fourteenth Amendments to the United States Constitution, and to an impartial jury under Article I, Section 8 of the Illinois Constitution and the Sixth Amendment to the United States Constitution.

51. The Court erred by refusing to admit the testimony of all of the experts offered by Mr. Rivera as expert testimony. (4/21/2009 PM Tr. at 14; 4/27/2009 AM Pt. 2 Tr. at 15; 4/28/2009 PM Pt. 2 Tr. at 12-20; 4/29/2009 PM Pt. 1 Tr. at 70; 4/29/2009 PM Pt. 2 Tr. at 26-27; 4/30/2009 PM Pt. 2 Tr. at 39.) The Court is obligated to screen expert testimony, and can only

admit that testimony after finding that the witness is qualified to testify about the topic at issue. *See O'Brien v. Meyer*, 196 Ill. App. 3d 457 (1st Dist. 1989). Here, however, the Court erroneously refused to make the required finding that Mr. Rivera's experts were qualified on the improper ground that that it was for the jury to determine if the experts were qualified. *See id.* That was prejudicial error. The actions and decisions described in this paragraph denied Mr. Rivera his right to due process of law under both Article I, Section 2 of the Illinois Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

52. The Court erred by barring Mr. Rivera from using certain statements made by two witnesses, Anthony Edwards and James Martin, on the ground that Mr. Rivera disclosed the statements to the State too late. (4/15/2009 AM Tr. at 6.) Memoranda recording those statements are attached as Appendix J. Anthony Edwards was a witness the *State* added to its list before trial, and James Martin is Ed Martin's brother, and would have testified only regarding Ed Martin's credibility. The Court erred in excluding Mr. Edwards' and James Martin's statements because Mr. Rivera was under no obligation to disclose those statements because the State never filed a written motion for discovery that covered the statements at issue in this paragraph. Further, the Court's refusal to allow Mr. Rivera to use the statements discussed in this paragraph violated Mr. Rivera's right under both Article I, Section 8 of the Illinois Constitution and the Sixth Amendment to the United States Constitution to confront the witnesses against him. Further, the exclusion of the statements discussed in this paragraph rendered Mr. Rivera's trial fundamentally unfair, and thus violated his right to due process of law under both Article I, Section 2 of the Illinois Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

53. The Court erred by barring Mr. Rivera from impeaching the credibility of Ed Martin with authentic tapes of voicemails Mr. Martin left on the telephone of another individual (Anthony Brown). On the tapes, Mr. Martin stated, among other relevant things, that “[t]he reason I sit by the judge and the state’s attorneys is because I run the show” when in court, “the state’s attorneys . . . work for me,” that Mr. Martin thinks he “run[s]” the Court, and that he helped another individual “beat her case” because Mr. Martin “run[s]” the court. And, in the tapes Mr. Martin expressed his desire to not testify in Mr. Rivera’s case, stating that “I have to leave the area February 12 because of this murder trial.” At the time Mr. Martin made that statement, Mr. Rivera’s trial was scheduled to begin on February 9. In addition, on the tapes Mr. Martin counseled another person as to how best commit perjury while testifying in court: “When you go to court next time, have her go straight to the officer and ask for [Assistant State’s Attorney] Paul Bishop . . . And what she’s going to say is all I want is truth and justice. And what she’s going to admit to is that while her and Stephanie were fighting, her bracelet hit Stephanie’s mouth. While Stephanie was biting her, she bit the bracelet and your case will be dismissed.” Those are just a few of the statements from the voicemail tapes that Mr. Rivera could have used to impeach Mr. Martin’s credibility. (See Appendix K: Transcript of Ed Martin Voicemails; see also Offer of Proof Regarding Ed Martin’s Taped Voice Messages (filed 5/5/2009); 5/5/2009 PM Tr. at 151-52.) The Court excluded that evidence because Mr. Rivera never disclosed it to the State and the voicemails, the Court held, were not impeaching. (4/17/2009 AM Tr. at 107-17.) That was error because the State already had the voicemails in its possession, and arguably violated due process by not turning the tapes over to the *defense*. (4/17/2009 AM Tr. at 99-101); see also, e.g., *Giglio v. United States*, 405 U.S. 150 (1972); *Brady v. Maryland*, 373 U.S. 83 (1963). Further, the tapes were proper impeachment because

they showed Mr. Martin's bias in favor of the State, and his admitted disregard for his obligation to tell the truth when testifying in court. The Court's refusal to allow Mr. Rivera to impeach Mr. Martin with the voicemail messages discussed in this paragraph violated Mr. Rivera's right under both Article I, Section 8 of the Illinois Constitution and the Sixth Amendment to the United States Constitution to confront the witnesses against him. The exclusion of the Mr. Martin's voicemails rendered Mr. Rivera's trial fundamentally unfair, and thus violated his right to due process of law under both Article I, Section 2 of the Illinois Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

54. The Court erred in refusing to admit Defense Exhibit 10, Mr. Martin's official sex offender registry sheet. (4/17/2009 PM Tr. at 6.) That evidence was admissible to further impeach Mr. Martin with his prior conviction for sexual abuse of a child and to show Mr. Martin's bias in favor of the State, in that he had a vested interest in testifying in the State's favor because Mr. Martin was subject to the continued supervision and monitoring of the State as a registered sex offender. The Court's refusal to allow Mr. Rivera to impeach Mr. Martin with the fact that he is a registered sex offender violated Mr. Rivera's right under both Article I, Section 8 of the Illinois Constitution and the Sixth Amendment to the United States Constitution to confront the witnesses against him. Further, the exclusion of Defense Exhibit 10 rendered Mr. Rivera's trial fundamentally unfair, and thus violated his right to due process of law under both Article I, Section 2 of the Illinois Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

55. The Court erred in allowing the State to examine Dawn Engelbrecht regarding prior statements she made in earlier trials of this case that were entirely consistent with her testimony in Mr. Rivera's third trial. (4/17/2009 PM Tr. at 89-91.) Those statements dealt with

whether or not Mr. Rivera was the person who walked up to Ms. Engelbrecht on the night of the crime. Both at the present trial, and in the earlier statements the State tried to examine Ms. Engelbrecht about, Ms. Engelbrecht said she could not identify the man who walked up to her on the street on the night of the crime. The prior statement was therefore not impeaching, and was inadmissible. Further, the admission of the evidence regarding that prior statement rendered Mr. Rivera's trial fundamentally unfair, and thus violated his right to due process of law under both Article I, Section 2 of the Illinois Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

56. The Court erred by refusing to allow Mr. Rivera to question Ms. Engelbrecht about the fact that her children—who were present at or around the scene when the murder occurred—had no reaction to seeing Mr. Rivera when brought to the police station with Ms. Engelbrecht in 1992. (4/17/2009 PM Tr. at 94-96.) That testimony was relevant and admissible to show that Mr. Rivera was not one of the people the children saw at or near the scene of the crime on August 17, 1992. The fact that Ms. Engelbrecht's children did not react to seeing Mr. Rivera—which suggests they had never seen him before—was not non-verbal hearsay because the children's non-reaction was not intended as an assertion. *See, e.g., People v. Jackson*, 203 Ill. App. 3d 1 (1st Dist. 1990). The Court's refusal to allow Mr. Rivera to question Ms. Engelbrecht regarding the topics discussed in this paragraph violated Mr. Rivera's right under both Article I, Section 8 of the Illinois Constitution and the Sixth Amendment to the United States Constitution to confront the witnesses against him. Further, the exclusion of the testimony discussed in this paragraph rendered Mr. Rivera's trial fundamentally unfair, and thus violated his right to due process of law under both Article I, Section 2 of the Illinois Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

57. The Court erred by (1) denying Mr. Rivera's Motion *In Limine* to Exclude Post-Mortem Photographs of Holly Staker; (2) ultimately admitting the gruesome autopsy photos of Ms. Staker that were the subject of Mr. Rivera's motion; and (3) allowing them to be published to the jury. (*See, e.g.*, 2/26/2009 Hr'g Tr. at 82-83; 4/23/2009 PM Tr. at 3-4, 43, 44-58.) Those photographs were inadmissible for at least two reasons: (1) they were irrelevant, and (2) the prejudicial effect of the photos to Mr. Rivera far outweighed the photos' probative value. In addition, the admission of the photographs discussed in this paragraph rendered Mr. Rivera's trial fundamentally unfair, and thus violated his right to due process of law under both Article I, Section 2 of the Illinois Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

58. The Court erred in denying Mr. Rivera's Motion for Sanctions Pursuant to Illinois Supreme Court Rule 415. (6/4/2008 Hr'g Tr. at 41-46.) The State's repeated violations of its discovery obligations warranted the relief Mr. Rivera sought in that motion, and the Court abused its discretion in failing to sanction the State for its conduct. In addition, the Court's failure to sanction the State for its discovery violations rendered Mr. Rivera's trial fundamentally unfair, and thus violated his right to due process of law under both Article I, Section 2 of the Illinois Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

59. The Court erred by concluding that Mr. Rivera could not offer evidence that Dion Markadonis confessed to Ms. Staker's murder until after Mr. Markadonis testified. (*See, e.g.*, 4/22/2009 PM Pt. 2 Tr. at 48-51; 4/24/2009 AM Tr. at 62, 64-65; 4/28/2009 PM Pt. 1 Tr. at 37; 4/30/2009 PM Pt. 2 Tr. at 26-27.) Police reports and other documents recounting Mr. Markadonis' confessions are attached as Appendix L. First, under the *Chambers/Bowell* line of cases, Mr. Markadonis only needed to be *available* to testify, and he was. *See, e.g., Chambers*



*v. Mississippi*, 410 U.S. 284 (1973); *People v. Bowell*, 111 Ill. 2d 58 (1986). There is no legal requirement that Mr. Markadonis had to actually testify before evidence of his confessions could properly be admitted for their truth. Second, Mr. Rivera did not offer Mr. Markadonis' statements for their truth. Indeed, the purpose for which Mr. Rivera introduced Mr. Markadonis' statements depended on those statements *not* being true: Mr. Rivera introduced the statements to show that a different person, who, like Mr. Rivera, was excluded by the DNA evidence, gave a false confession in this case. Further, the fact that Mr. Markadonis had confessed was also relevant in that a number of the claims made in his confession bear a striking similarity to claims that later appeared in Juan Rivera's alleged confessions. Those claims are contained in statements in Appendix M. In other words, one might hypothesize that the police had used Mr. Markadonis's confession as an outline for what they thought should be included in Mr. Rivera's confession. The refusal to admit the evidence discussed in this paragraph rendered Mr. Rivera's trial fundamentally unfair, and thus violated his right to due process of law under both Article I, Section 2 of the Illinois Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

60. The Court erred in prohibiting Mr. Rivera's counsel from arguing, during closing argument, that Mr. Markadonis confessed to the crime. Mr. Rivera properly admitted evidence of those confessions at trial through the testimony of Mr. Fagan. (4/22/2009 PM Pt. 2 Tr. at 39.) Mr. Rivera's counsel was entitled to argue to the jury based on the evidence introduced at trial, so the Court's decision to preclude Mr. Rivera's counsel from stating during closing argument that Mr. Markadonis confessed was error. The refusal to allow the argument discussed in this paragraph rendered Mr. Rivera's trial fundamentally unfair, and thus violated his right to due

process of law under both Article I, Section 2 of the Illinois Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

61. The Court erred when it refused to allow Mr. Rivera to question Kenneth Moses, Mr. Rivera's crime scene analysis expert, about certain hairs found on Ms. Staker's body because Mr. Rivera did not disclose, before trial, any reports of analysis Mr. Moses performed on those hairs. (4/27/2009 AM Pt. 2 Tr. at 45-47.) Mr. Rivera was entitled to question Mr. Moses about that topic because Mr. Moses was qualified as an expert in crime scene analysis, including the analysis of trace evidence like hairs, and Mr. Rivera disclosed to the State all reports Mr. Moses performed for this case. Mr. Rivera therefore complied with his discovery obligations. There is no requirement that a party disclose the substance of every opinion an expert will offer, as the Court improperly held. In addition, the refusal to allow questioning regarding the subjects discussed in this paragraph rendered Mr. Rivera's trial fundamentally unfair, and thus violated his right to due process of law under both Article I, Section 2 of the Illinois Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

62. On May 1, 2009, this Court erred when it excluded from evidence testimony by Juan Rivera, Sr., the Defendant's father, concerning his understanding of the grand jury process. (5/1/2009 PM Pt. 2 Tr. at 65.) The State extensively cross-examined Juan Rivera, Sr. about the fact that he never testified before the grand jury about a phone call that he and Juan Rivera, Jr. made to their family in Puerto Rico on the night of the crime. His testimony on re-direct examination concerning his lack of understanding about the import of the grand jury process was relevant to explain his prior testimony before the grand jury and should have been admitted. In addition, the refusal to admit the evidence discussed in this paragraph rendered Mr. Rivera's trial fundamentally unfair, and thus violated his right to due process of law under both Article I,

Section 2 of the Illinois Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

63. The Court erred in giving the jury a special verdict form for the purpose of allowing the jury to make a finding regarding two aggravating factors for sentencing purposes (based upon I.P.I. 28.05 and 28.06). (*See, e.g.*, 5/5/2009 AM Tr. at 4; 20-25, 27-29; 5/5/2009 PM Tr. at 137-40.) The special verdict form pertained to issues that were relevant only for sentencing and was highly prejudicial to Mr. Rivera. The Court's stated rationale for the special verdict form—that post-*Apprendi v. New Jersey*, 530 U.S. 466 (2000), the jury's finding regarding those factors was necessary to sentence Mr. Rivera to life in prison—was irrelevant because the crime for which Mr. Rivera was charged occurred prior to *Apprendi*. The use of the special verdict form violated Mr. Rivera's right to a trial by jury under Article I, Section 8 of the Illinois Constitution and the Sixth Amendment to the United States Constitution, and rendered Mr. Rivera's trial fundamentally unfair in violation of Mr. Rivera's right to due process of law under both Article I, Section 2 of the Illinois Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

64. The Court erred in using the State's proposed verdict form, which was based in part on I.P.I. 26.02 and 26.05, instead of Mr. Rivera's proposed instructions No. 1 and 2. (5/5/2009 AM Tr. at 13; 5/5/2009 PM Tr. at 136-37.) The verdict forms that were used did not conform to the indictment or the evidence adduced at trial. In addition, using the verdict forms discussed in this paragraph rendered Mr. Rivera's trial fundamentally unfair, and thus violated his right to due process of law under both Article I, Section 2 of the Illinois Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

65. The Court erred in instructing the jury regarding the bracketed portion of I.P.I. 11.65E. The Court's instruction read (asserted error in *italics*): "The term sexual penetration means any intrusion however slight of any part of the body of one person into the sex organ or anus of another person. *Evidence of emission of sperm is not required to prove sexual penetration.*" (5/5/2009 Tr. at 134.) The Court erred by instructing the jury with the italicized portion of the above instruction because Mr. Rivera never argued to the jury that the State was required to show that Mr. Rivera emitted sperm to find that he sexually assaulted Ms. Staker. Mr. Rivera only argued that the presence of *someone else's* sperm in Ms. Staker's vagina, combined with the fact that there was no evidence—and the State never even argued—that more than one person raped Ms. Staker shows that Mr. Rivera did not rape her. The improper instruction noted in this paragraph, therefore, was unnecessary and improper in light of the facts adduced at trial, and prejudiced Mr. Rivera by improperly suggesting to the jury that they should discount the fact that Mr. Rivera's semen was not found in Ms. Staker's body. In addition, instructing the jury as discussed in this paragraph rendered Mr. Rivera's trial fundamentally unfair, and thus violated his right to due process of law under both Article I, Section 2 of the Illinois Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

66. The Court erred by infringing upon Mr. Rivera's right, under both Article I, Section 8 of the Illinois Constitution and the Sixth Amendment to the United States Constitution to counsel of his choice by arbitrarily prohibiting a number of Mr. Rivera's attorneys from sitting near, and conferring with, Mr. Rivera at trial. (*See, e.g.,* 4/20/2009 AM Tr. at 5.) Further, the Court denied Mr. Rivera those same rights during the jury selection by allowing only three of Mr. Rivera's eight attorneys to be present during *voir dire*. The Court's decision to prohibit Mr. Rivera from having unfettered access to his attorneys during the trial rendered Mr. Rivera's trial

fundamentally unfair, and thus violated his right to due process of law under both Article I, Section 2 of the Illinois Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

67. The Court erred by ordering Lake County to pay only \$5,000 for the testing of Forensic Science Associates in response to Mr. Rivera's Ex Parte Motion for the State to Pay Dr. Blake's DNA Testing Fees, (8/29/2008 Hr'g Tr. at 5), and by denying Mr. Rivera the full amount of the reimbursement he sought for Dr. Galatzer-Levy's work on this case, as outlined in Mr. Rivera's Ex Parte Motion for State Payment of Expert Fees. Mr. Rivera only incurred the fees regarding Dr. Blake's testing due to the State's improper refusal to conducting the testing at issue at the Illinois State Police's laboratory. Further, as an indigent defendant, Mr. Rivera is entitled to all of the fees he requested in the motions discussed in this paragraph, under (1) the Due Process Clauses of Article I, Section 2 of the Illinois Constitution and the Fifth and Fourteenth Amendments to the United States Constitution; and (2) the right to compulsory process to secure the attendance of witnesses, under Article I, Section 8 of the Illinois Constitution and the Sixth Amendment to the United States Constitution. *See, e.g., Ake v. Oklahoma*, 470 U.S. 68, 74, 76-77 (1985); *People v. Watson*, 36 Ill. 2d 228, 233 (1996).

68. The Court erred by refusing to order the State to conduct the testing performed by Dr. Blake, and discussed in Paragraph 67 above, at the Illinois State Police Laboratory. By statute, Mr. Rivera was entitled to that testing, at State expense. *See* 725 ILCS 5/116-3. Further, the State's refusal to conduct the testing improperly shifted the expense to Mr. Rivera, as outlined in Paragraph 67 above.

69. The Court erred in prohibiting Mr. Rivera's counsel from interviewing the jurors who sat on both of Mr. Rivera's first two trials. (11/13/2008 Hr'g Tr. at 161.) No statute,

regulation, or rule prohibited Mr. Rivera's counsel from contacting those jurors, and the Court exceeded its authority in refusing the request. The Court's decision to prohibit Mr. Rivera from interviewing the jurors from the first two trials rendered Mr. Rivera's third trial fundamentally unfair, and thus violated his right to due process of law under both Article I, Section 2 of the Illinois Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

70. The Court erred in denying Mr. Rivera's Motion to Compel Disclosure Of The Substance Of Brian Wraxall's Rebuttal Testimony. (7/23/2008 Hr'g Tr. at 23-25.) That disclosure was required by Illinois Supreme Court Rule 412. The Court denial of Mr. Rivera's motion rendered Mr. Rivera's trial fundamentally unfair, and thus violated his right to due process of law under both Article I, Section 2 of the Illinois Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

71. The Court erred in denying Mr. Rivera's Motion for Pretrial Evidentiary Hearing Regarding The Admissibility Of (1) Holly Staker's Prior Sexual Activity And (2) Evidence Of Contamination Of DNA Profile From Vaginal Swab Exhibits. (4/9/2009 Hr'g Tr. at 47, 55.) As to the evidence of Ms. Staker's prior sexual activity, the Rape Shield Act required the Court to hold the hearing Mr. Rivera requested. *See* 725 ILCS 5/115-7(b). And as to all of the evidence about which the motion sought a pretrial hearing, that hearing was necessary to ensure that the State did not assert during its opening statement an argument for which it could not later produce admissible evidence. At trial, that in fact happened: (1) the State suggested that Ms. Staker may have had vaginal intercourse prior to her rape and murder through the inadmissible testimony of Ms. Staker's twin sister regarding the forced oral sex the twins suffered when they were in third grade and the fact that they masturbated; and (2) the State expressly argued to the jury, in its opening statement and closing argument, that the DNA profiles may have resulted from

contamination, even though the State never offered any admissible evidence to support that theory. (*See, e.g.,* 5/5/2009 PM Tr. at 112-18.) Thus, the Court's refusal to conduct a pretrial evidentiary hearing regarding any evidence of Ms. Staker's prior sexual activity or contamination prejudiced Mr. Rivera by allowing the State to assert an argument to the jury for which it had no evidence. The Court's refusal to conduct the pretrial evidentiary hearing rendered Mr. Rivera's trial fundamentally unfair, and thus violated his right to due process of law under both Article I, Section 2 of the Illinois Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

72. The Court erred in denying Mr. Rivera's Motion for Hearing Regarding Jailhouse Informants. That hearing was necessary to determine the reliability of the statements of Messrs. Crespo, Martin, and McDonald, as the recently enacted reforms in Illinois regarding the reliability of jailhouse "snitch" testimony confirms. The Court abused its discretion in denying Mr. Rivera's motion. The Court's refusal to conduct the pretrial evidentiary hearing rendered Mr. Rivera's trial fundamentally unfair, and thus violated his right to due process of law under both Article I, Section 2 of the Illinois Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

73. The Court erred in denying Mr. Rivera's Motion to Reconsider Prior Evidentiary Rulings. (4/9/2009 Hr'g Tr. at 47-76.) The Court erred in not granting that motion for the reasons stated in the motion, and for the reasons discussed in the paragraphs in this motion that address the issues presented in Mr. Rivera's motion to reconsider. The Court's refusal to grant the motion rendered Mr. Rivera's trial fundamentally unfair, and thus violated his right to due process of law under both Article I, Section 2 of the Illinois Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

**E. The State's closing argument contained numerous factual errors on key points, and those errors denied Mr. Rivera his right to a fair trial.**

74. On May 5, 2009, the State made a large number of factually incorrect assertions in its closing argument. Mr. Mermel said: "[T]hey [Mr. Rivera's attorneys] said if only Heather knew who it was who she [the victim] might have had sex with or, I'm paraphrasing, but once again, only if, what if, I wish." (5/05/2009 PM Tr. at 95). This was incorrect since the defense attorneys never said if only Heather knew who her sister might have had sex with since it was the defense position that the victim was not engaging in sexual intercourse and that there was no evidence of any such intercourse. This misstatement was apparently designed to bolster the State's theory (for which no evidence was presented) that the victim had engaged in sexual intercourse prior to her rape and murder.

75. Mr. Mermel also stated as follows: "And didn't the defense promise you that they would show you Markadonis was the real killer?" (5/05/2009 PM Tr. at 100.) In fact, Mr. Sullivan's opening statement pointed out that the police had more evidence against Dion Markadonis than they had about Juan Rivera, but Markadonis was likewise excluded by the DNA and therefore the actual perpetrator of this crime has not been identified. (4/15/2009 AM Tr. at 75.) When an objection was made that that misstated the opening statement, Mr. Mermel claimed he was "summarizing the opening statement." (5/05/2009 PM Tr. at 101.) This misstatement gave the jury the false impression that the defense's theory was that Dion Markadonis was the real killer, which the defense never argued.

76. When belittling Ken Moses' testimony, Mr. Mermel stated that "[the] door wasn't forced, there was no damage to the lock. You heard experienced evidence technicians tell you about that." (5/05/2009 AM Tr. at 104). Mr. Moses testified that, as to the upper lock, he reviewed an evidence technician report that said that the upper lock was not engaged when he



arrived at the scene and that the lock did not appear to have been forcefully defeated. (4/27/09 AM Tr. at 23). The evidence technician, Burt Foster, testified that his report said that the evidence showed that when the door was forced open that the dead bolt was in the unlocked position because of no damage to the jam (referring to the upper latch). (4/27/09 AM Tr. at 24). As to the *lower* lock, however, Mr. Foster didn't recall what he observed in connection with it, but Mr. Moses pointed out on the actual door which was showed to the jury at trial, that the lower latch was "splintered as reported by the first officers on the scene so that is kind of brute force attack is to beat the locks." (4/27/09 AM Tr. at 26). Mr. Moses also testified as to Defense Exhibit 74, a photograph taken of the doorknob area of the door and pointed out visible damage to the plate on the edge of the door as well as a screwdriver mark and damage to the casement (4/27/2009 AM Tr. at 33-36). Since one of the important aspects to the State's theory of prosecution was that the defendant "staged" a break-in, this misstatement was particularly significant in its impact to the jury.

77. In another misstatement intended to discredit Mr. Moses' testimony, Mr. Mermel stated that concerning the two palm prints found on the kitchen sink (a highly significant part of the crime scene since both sides agree the killer used that sink after the killing and transferred the victim's blood to the sink area): "Our experts say that the other two [prints from the sink area] were not suitable for comparison. There was insufficient ridge detail." (5/05/2009 PM Tr. at 104). This was not correct because the parties stipulated as to the fingerprint reports of Robert Wilson and Donald Verbeke (state fingerprint examiners) and Verbeke did not think these prints were suitable for comparison while Robert Wilson did think they were suitable for comparison. Mr. Moses agreed with Mr. Wilson's evaluation as to the suitability, and it was therefore false for Mr. Mermel to state that the State's experts said they were not suitable for comparison. Since

this is an area the killer may likely have touched following the murder, as evidenced by the victim's blood found mixed with water in the sink area, this was an important point for the defense.

78. As to defense witness Judy Kerby's testimony concerning Mr. Rivera's alibi, in that he was wearing an electronic monitoring device on the date of the murder, Mr. Mermel described her testimony as follows: "Oh, and we can only monitor people like 9:00 to 5:00. After that we have people at the jail or at the juvenile center wear a pager and do double duty. Maybe the pager gets a signal and maybe they do some —oh, no wait, when they get a signal, they don't even do anything about it." (5/05/2009 PM Tr. at 109-110). This would clearly cause the jury to doubt whether Mr. Rivera was in fact monitored. In fact, however, Ms. Kerby testified that individuals on the EMS system were monitored 24 hours a day, seven days a week, and that Pre-trial Bond Services noted and followed up on every violation (5/01/2009 PM Tr. at 8-12, 26).

79. Mr. Mermel also stated in the closing argument that there were some things "not dependent on anyone's credibility." He then made the statement that the defendant was the first one to mention the bartender lady from Cheers (Dawn Engelbrecht) on October 3, 1992. In fact, the first person to mention that Juan said he had talked to this person was Ed Martin, in his Task Force interview on September 29, 1992. Mr. Martin, an admitted pedophile who knew he was a suspect in the Staker murder, has definite credibility issues as Mr. Mermel conceded in his opening statement. So it is unclear that Mr. Rivera was the first person to state that he talked to the lady from Cheers since the police heard it first from Ed Martin. Secondly, as to the Dawn Engelbrecht issue, Mr. Mermel claimed that Mr. Rivera's former attorney had purchased Ms. Engelbrecht's change in testimony through baseball games, sleepovers, dinners and petting zoo trips for her children. (5/05/2009 PM Tr. at 108.) Ms. Engelbrecht agreed that her children had

participated in these outings with Juan Rivera's former attorney, Henry Lazzaro, and Mr. Lazzaro's children but emphatically denied that this had affected her testimony. In fact, Ms. Engelbrecht testified that the police had caused her to make an identification she was not comfortable with that she later realized she needed to retract. (4/17/2009 PM Tr. at 125-127, 137-139.)

80. Mr. Mermel's closing arguments contained a number of statements relating to the State's theory that the DNA sample which excluded Juan Rivera may have been contaminated: "we may never know whether either profile is from contamination" (5/05/2009 AM Tr. at 109), "Mr. Wraxall's lab was a DNA cesspool," (*id.* at 111), or "that's evidence that this is from some other source or it's from some other contamination somewhere along the line unrelated to Holly Staker," (*id.* at 115). There was *no* evidence of contamination or that Mr. Wraxall's lab was a DNA cesspool. In fact, the only testimony on this point was that the DNA evidence was demonstrably *not* contaminated. This testimony was from both Alan Keel, the dense experts who tested the sperm, and William Frank, the Illinois State Police Forensic Scientist who confirmed Mr. Keel's results. (4/20/2009 AM Tr. at 48-51, 4/29/2009, PM Tr. at 72-73.)

81. Mr. Mermel also argued that the fact that Mr. Wraxall's lab only found a small number of sperm while Mr. Keel found a large number was evidence of contamination and that Mr. Keel admitted that he did not find enough sperm on the vaginal swab to get a profile. (5/05/2009 AM Tr. at 114-115). This misstates Mr. Keel's testimony, in which he described how he combined sperm from one of the vaginal swab sticks with sperm from the vial in which the sticks had been stored and that the vial had the larger number of sperm. (4/29/2009 PM Tr. at 66-67.) Mr. Mermel also argued that because Mr. Wraxall did not find sperm with tails, and Mr. Wraxall said tails would usually be present for 24 hours, that meant the sperm was from some

other source or from contamination. (5/05/2009 AM at 115-116.) That statement was misleading since Mr. Keel found some sperm with tails, which he photographed and described in his testimony. (4/28/2009 PM Hr'g at 54-59.) Mr. Mermel also argued that the fact that Mr. Wraxall was unable to get a differential extraction from the DNA could be explained if the sperm were old and degraded. (*Id.* at 116-117). That statement was also misleading since Mr. Keel had no difficulties in performing the differential extraction from the DNA. (4/28/2009 AM Tr. at 66-67).

82. A final point about the vaginal swab evidence that Mr. Mermel made was when he characterized Mr. Keel's testimony about the ratio of sperm to epithelial cells as "this ridiculous stuff about an absence of epithelial cells relative to the ratio of the sperm shows it was recent. Was he contending that Holly Staker stopped secreting her own epithelial cells, they stopped and then the sperm was just large in the sample? No, it's just silly. But once again, you pay \$40,000 for an opinion, they'll shade it for you." (5/05/2009 PM Tr. at 117-118.) Mr. Keel explained the significance of the ratio of sperm to epithelial cells in terms of how recently the sperm was deposited. (4/28/2009 AM Tr. at 62-65.) It was improper of Mr. Mermel, who could have called an expert witness to testify about the significance of the ratio of sperm to epithelial cells but did not, to characterize this expert testimony as "silly" and suggest this opinion was "shaded" for a price.

83. The state's closing argument listed certain items that were in Mr. Rivera's alleged confessions, apparently to argue that only the killer would have known these facts. One of those alleged facts is that the knife was found north of the crime scene because the fence prevented the defendant from going south towards his house. (5/05/2009 PM Tr. at 122). This was a false

statement because Dawn Engelbrecht testified that the fence was about waist high to her and would not have been a barrier to someone running south. (4/17/2009 PM Tr. 106-107).

84. As to the description of the snitch testimony in the closing argument, Mr. Mermel said that these witnesses had no motive to lie. (5/05/2009 PM Tr. at 123-125.) What he did not mention was that Frank McDonald was forced to admit that he tried to sell a story about Mr. Rivera to the Chicago Tribune, David Crespo admitted to being mentally ill (bipolar condition) and even the State conceded that Ed Martin did not have good credibility in its opening statement.

85. These numerous misstatements of critical facts in the case rendered Mr. Rivera's trial fundamentally unfair, and thus violated his right to due process of law under both Article I, Section 2 of the Illinois Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

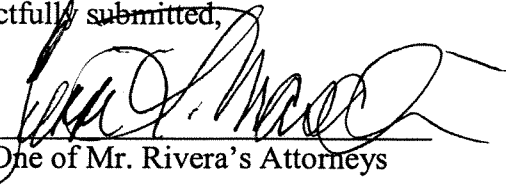
### **CONCLUSION**

For the foregoing reasons, Mr. Rivera respectfully requests that the Court enter a judgment of not guilty in his favor, notwithstanding the verdict. In the alternative, Mr. Rivera requests that the Court grant him a new trial.

Dated: June 5, 2009

Respectfully submitted,

By:

  
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