

# STATEMENT OF FACTS

VANESSA PLACE

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Statement of Facts

Vanessa Place

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### Prosecution Case

#### Counts 1, 2, 3 and 4: Jane Doe #1: Dorothy C.

On January 17, 1997, Dorothy C. was living alone on Vista Avenue, in Long Beach; she went into her bedroom between 11:00 and 12:00 p.m., without giving anyone permission to enter her home. As she was preparing for bed, a man came up from behind, grabbed her arms, and told her to cooperate and she wouldn't get hurt. The man, wearing a navy blue ski mask, forced her onto her bed, removed her underwear and orally copulated her, stopping periodically to talk. If Dorothy C. began crying, the man would threaten her again; at some point, he put his mouth on Dorothy C.'s breasts and neck, and asked her to put his penis in her mouth. She orally copulated him, a minute later, he turned her over and put his penis in her vagina, ejaculating outside the vagina one to five minutes later. (RT 798-801, 803-804)

After ejaculating, the man retrieved his underwear, wiped Dorothy C.'s back, and told her he had broken in, waiting while she left the house and returned a video. The man said he walked through her home while she was gone, looking at her things; he asked Dorothy C. if she had a boyfriend. She said she did; she told him she went to church. He mentioned things he'd noticed in the house, like a light that needed repair, and asked her when she was to get up the next morning, and if she'd set the alarm. The man did not say anything about himself, or identify himself by name. After twenty minutes, the man dressed and left. Before leaving, he told Dorothy C. not to do anything for twenty minutes; after he was gone, Dorothy C. called the rape hotline, then the police. The man was in Dorothy C.'s home for at least two hours. (RT 800-802)

The police arrived; Dorothy C. was subsequently interviewed by detectives and examined by a forensic nurse specialist<sup>1</sup>; an external

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<sup>1</sup> Malinda Waddell, director of Forensic Nurse Specialists, Inc., was the forensic nurse specialist who examined Dorothy C..

genital swab, a breast swab, and a reference sample was taken and transported to the police department and then to the Los Angeles Sheriff's Department Scientific Services Bureau Crime Laboratory. Approximately two and a half years later, a detective took an oral reference sample from Dorothy C. and booked it to the crime lab. (RT 802, 1153-1161, 1418-1420, 1432) Dorothy C. described her assailant to the nurse and to the attending officer as 5'6" or less, 140 to 150 lbs., and Hispanic. (RT 811, 1423)

At trial, Dorothy C. testified she did not know appellant, but recognized "the shape of his eyelids," "the hair under his lip," and the color of his skin as belonging to the man who raped her. She also thought she would probably recognize his voice if he spoke: Dorothy C. told police she believed her attacker was Hispanic because he had a slight accent. She told police she was "almost positive" the man was 5'6" "or less," that he was of average build, about 140 pounds, and had a scar on his upper right thigh.<sup>2</sup> She tried to be as accurate as possible in her post-attack description to police; she was once shown three composite sketches of a suspect, and told the officer she could not eliminate the person represented in the drawing, saying her attacker had the same hooded eyelids, and "could be" the same mouth. (RT 803-804, 813-821, 1423-1424) On January 23, 1997, Dorothy C. was shown two photographic lineups; at the first, she indicated one of the individuals "might be" the rapist; the person selected was not appellant,

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She also hired and trained Toyetta Beukes, Jan Hare, and Sue Gorba. (RT 1153-1155)

<sup>2</sup> On cross-examination, Dorothy C. testified she "might have said" the man was between 5'6" and 5'10, he "might have been" Hispanic, it "might have been" a scar on his thigh, and she "may have" said he was 140 pounds. She also testified she might not be a very good judge of height, and that the scar could have been semen. She said her description to police the night of her attack was as accurate and truthful as she could be "under the circumstances." (RT 804-806, 809-810, 812-813)

but a Hispanic man named Jesus Soto. At the second, Dorothy C. again identified someone other than appellant as possibly being her assailant. She again told police she was “almost positive” her attacker was 5'6" “or less.” (RT 823-827, 1424-1426)

At trial, Dorothy C. testified she’d seen appellant’s picture and read about his prosecution in the newspapers, and believes he is guilty. (RT 808, 821, 830) Defense counsel was 5'6 \_"; when counsel asked appellant to stand at trial, and asked Dorothy C. if her attacker was closer to counsel’s height or appellant’s height,<sup>3</sup> Dorothy C. testified her attacker was “probably” appellant’s height. (RT 809-811) When appellant was asked at trial to repeat some of the things said during the attack, Dorothy C. identified his voice as sounding like the person who assaulted her; appellant did not sound like he had a Hispanic accent. (RT 828-829)

Counts 5, 6, 7, 8 and 9: Jane Doe #2: Barbara B.

On May 13, 1998, Barbara B. was fifty-eight years old, living alone on Elliot Lane, in Long Beach. By about 10:30 p.m., Barbara B. had fallen asleep with the television and light on; she woke feeling a weight on the bed, then a hand over her mouth. A man said, “I don’t want to hurt you.” Barbara B. testified he spoke in a whispery voice she “probably wouldn’t recognize again.” (RT 913-915) The man had Barbara B. roll onto her stomach, she said she had a bad back, he had her roll onto her back, her nightgown pulled over her head. She could not see, “and didn’t want to.” Barbara B. felt the man against her; it felt as if he was naked. The man kept saying things like, “I don’t want to hurt you; I just want to make love to you.” Barbara B. thought she’d try to cry, but the man’s voice got harsh, and he told her to stop it; she decided it was best to “get it over with as soon as possible.” (RT 915-917, 925, 1490)

The man fumbled, touching Barbara B.’s breasts with his hands and mouth, then put his penis in her vagina. She could not tell if

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<sup>3</sup> According to appellant’s Penal Code section 969, subdivision (b) packet, appellant is 5'8". (CT 1372)

he ejaculated or withdrew, but he put his penis in her vagina a second time; he also orally copulated her. Barbara B. did not feel a glove on the man's hand. Throughout, the man continued to tell Barbara B. he only wanted to make love to her and not to hurt her. After, the man told Barbara B. he was going to leave and she should count to fifty. She started counting to herself, he told her to count out loud. As Barbara B. heard the man leave, she asked him to close the door so her cats wouldn't get out; she heard him go through the kitchen and close the sliding glass door as he left. Barbara B. then called police. (RT 917-920, 925)

The police arrived, Barbara B. was taken to the hospital and examined by a forensic nurse specialist, who took swabs from Barbara B.'s body, including an external genital swab, and swabs from Barbara B.'s breasts, and her right buttock. A reference blood sample and oral sample were collected at later dates. The samples were transported to the Long Beach police and then to the Los Angeles County Sheriff's Department Scientific Services Division. There were multiple bruises on Barbara B.'s leg; she had genital tears and a hematoma to her genitalia, indicative of sexual assault. The police kept Barbara B.'s nightgown. (RT 921, 1345-1352, 1403-1404, 1442-1444, 14866-1489) Barbara B. told police and the nurse specialist she believed the man was white, in his 20s, with no body hair. At trial, Barbara B. was unable to identify her assailant. She could only describe him as "fairly young" based on the timber of his whisper. She could not recall why she had said he was white. (RT 921-924, 1490)

Counts 10, 11, 12 and 14: Jane Doe #3: Marion J.

Marion J. was living alone in a house on Colorado Street in Long Beach on July 31, 1998; around 1:30 or 2:00 a.m., she returned home with a friend from Ralphs. The friend left without coming inside the house, and when Marion J. went in, she noticed her five cats were under the bed and her back door was open. She closed and locked the door, and took a shower. Her friend called around 2:15 or 2:30 to let Marion J. know she'd arrived home safely; Marion J., who had been laying on her bed waiting for the call, then fell asleep. (RT 866-868) She woke about 3:15 a.m. because someone's hand was around her throat. The person took Marion J.'s glasses and told her if she

screamed, he'd snap her neck. Marion J. said she wouldn't scream, the man pulled her nightgown over her head and told her to open her legs, she did, and he put his penis in her vagina. The man then took his penis out of Marion J., lifted her leg and reinserted his penis. Next, the man turned Marion J. over and put his penis in her vagina a third time while pulling her hair back. Marion J. was bleeding; the man got a towel from the bathroom, wiped her, laid on the bed, and told Marion J. to get on top of him because it would be easier for her to "control it." Marion J. did, and the man's penis again went into her vagina. (RT 868-870, 875)

Afterwards, the man laid next to Marion J.; he told her "it was a date" and to think of him as a lover. The man said she was "really tight" and that he had chosen her because she was a little overweight and "looked like Suzie Homemaker." He said he liked her breasts, and bit and licked them. Marion J. said her back hurt, and the man rubbed her back. He told her again she was a little bit overweight; he knew she had a bicycle because he had stood outside her door where she kept her bicycle: he told her he'd meet her on the bike path. The man said he "wanted to come," climbed on Marion J. again, and reinserted his penis in her vagina. Marion J. thought he may have ejaculated. She told him he was hurting her, that she'd had enough. He said he would leave, but laid back down again, asked what her name was and where she worked and if she wanted him to come back and see her again. Marion J. said no. The man told Marion J. he would send her a guardian angel to watch over her, looked at the angel tattooed on her ankle, and said he liked her angel. He asked if she had a guardian angel watching over her, and she said she didn't think so. The man told Marion J., "You didn't die tonight." He asked again if she wanted him to return, she said no, and he said he wouldn't be back. He said he knew she was going to call the police, but to wait twenty minutes after he left; he also told her to take a self-defense class "so this wouldn't happen again." (RT 870-872)

The man left; Marion J. immediately locked her door and called her friend and the police. The police arrived, and took Marion J. to be examined by a forensic nurse specialist. Swabs were taken from Marion J.'s breasts, vagina, and mouth; a Long Beach detective took an

oral reference sample from Marion J. in 1999. All samples were transported to the Los Angeles County Sheriff's Department Scientific Services Division. Marion J. had bruises on her arms and legs, multiple tears to her vaginal walls outside the vaginal area, and tears outside her anal area. (RT 872-873, 1352-1355, 1406, 1420-1422)

The assault lasted a hour; at the time of her attack, Marion J. was a virgin. (RT 873, 875, 897) Marion J. described her assailant to police as between 5'9" and 6' tall, with hazel eyes and dark hair "like little dreads or curls, but more like dreads," and was thin, but had well-defined arms. The man had a thin moustache, freckles on his shoulder, and wore bicycle gloves on his hands. The fingers were cut from the gloves. He was naked during the assault; he told Marion J. that his name was "Tino." (RT 873-875, 887, 896) During the assault, Marion J. peered under her arm to look at her assailant's face. The man saw her do this, and moved the nightgown to block her view. (RT 875)

On August 21, 1998, a few weeks after the attack, Marion J. saw someone whom she recognized as her attacker parked in an orange truck near her house. The man was wearing a painter's hat; he turned, looked at her, smiled, and slowly drove away. She called the police, telling them she was "almost certain" the person parked in the pickup was the person who assaulted her; a detective subsequently showed her a composite drawing, and Marion J. said she was "absolutely certain" the suspect was her rapist. Marion J. saw another composite of the same suspect on another occasion,<sup>4</sup> again identified that suspect as the rapist, and called police. (RT 876-878, 888-895, 1427-1431) Marion J. testified she told police the man had hazel eyes; at trial, she said they were light hazel to brown. Marion J. also told police the man's hair was brown, and he had a moustache. Marion J. could not recall if he had a goatee. Marion J. testified she "never said" the man was white, possibly Greek or Puerto Rican. She did not recall telling the officer that her

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<sup>4</sup> Marion J. testified she saw this composite on a store front in Belmont Shore, where it had been posted by Long Beach police. (RT 893, 1430) Marion J. did not identify any of the suspects in a six-pack shown her by detectives. (RT 895)

assailant had “lots of freckles,” or that there were freckles all over the man’s body. She described the man to police as “well-tanned”; at trial, she said “olive-colored.” (RT 880-888, 894-897) Marion J. told the forensic nurse specialist the man had freckles on his arm, a thin mustache, and brown, chin-length dreadlocks. (RT 1386)

At trial, Marion J. believed if she heard her attacker’s voice, she would recognize it: when appellant repeated “Don’t scream. I’ll snap your neck,” Marion J. said it was the rapist’s voice, and identified appellant as the man who raped her. (RT 875-876, 878) Marion J. said she had “not really” followed appellant’s story in the newspapers, though she had read some articles about the case, and on the evidence against appellant, including reports that DNA evidence “conclusively proved” appellant was the rapist, and had seen appellant’s photograph in those articles. Marion J. wanted to see appellant convicted. (RT 878-880)

Counts 15 and 16: Jane Doe #4: Carol R.

On September 18, 1998, Carol R. was fifty-four years old, living on Covina Avenue in Long Beach; Carol R. was living with her adult daughter and eleven-month-old grandson; that evening, her daughter was not home. Carol R. went to sleep around 10:00 p.m., her grandson was asleep in his crib in another room in the house. Around 11:00 p.m., Carol R. woke to find a man standing beside her bed with his hand over her mouth. The man was wearing a glove, but his fingers were exposed, like a bicycle glove.<sup>5</sup> Carol R. noticed the man had something covering his face, but could not tell what it was. There was a struggle as the man turned Carol R. over, face down into her pillow. (RT 1105-1108) It was difficult to breathe; the man told Carol R., “Stop screaming. Don’t make me hurt you.” He asked her name, Carol R. didn’t respond, he asked again, she didn’t respond, he asked a third time, she told him her name, and he repeated his admonition, calling her by name. Carol R. stopped struggling, and the man touched her bare breast and put his penis in her anus. After

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<sup>5</sup> No fingerprints were found.

withdrawing his penis, the man pushed Carol R. down flat, covered her with a blanket, and left. (RT 1108-1109)

The bathroom window had been closed, but unlocked before Carol R.'s attack; afterwards, Carol R. noticed it was open. Carol R. discovered the telephone by her bed was disconnected, and called police from another telephone. They arrived, and Carol R. was taken to be examined by a forensic nurse specialist. (RT 1109-1110) An identification technician observed what appeared to be feces on the center of Carol R.'s bathroom window sill. Forensic samples were collected, taken to the laboratory, air dried, then frozen and transferred to the crime laboratory. (RT 1143-1152, 1410-1411)

Carol R. told police she thought her assailant was white or Hispanic, had a slight ethnic accent, was of average build, and not of large stature. (RT 1111) Prior to the assault, there was no feces under the bathroom window. (RT 1109)

Counts 17, 18, 19, 20, 21, 22, and 23: Jane Doe #5: Esther R.

On November 21, 1998, Esther R. was thirty-two years old, and living in a duplex on Markita Street in Long Beach; that night, she came home alone around 10:00 p.m., and went to bed at 10:30 p.m. (RT 926-927) About 2:00 a.m., Esther R.'s cat made a sound which woke her; she got up to look for the cat, turned on the light, and found a man in the bedroom doorway, wearing pants, gloves, and a white-hooded pullover jacket with stripes on the chest. Esther R. could not see his face clearly because she is nearsighted, was not wearing her glasses, and was half-asleep. (RT 928-929)

Esther R. screamed; the man put his hands over her mouth; they struggled, and fell to the floor. The man was on top of Esther R., holding her down; he asked why she bit him, and said that if she hadn't bitten him, he wouldn't have had to hurt her and that she should not have "done that." Esther R. did not recall biting the man. The man told Esther R. to go close a living room window that had been closed when she went to bed, then to go to the kitchen and close the door and the security door. Afterwards, the man had Esther R. sit in a director's chair in the living room; he told her he wanted to give her an orgasm,

and moved her legs apart. The chair was not sturdy, so the man took Esther R. to her bedroom and had her lie on her back on the bed. (RT 928-932) He orally copulated Esther R. for ten to fifteen minutes, then cuddled her and asked if she was married, what her sex life was like, what her name was, did she have children, where she lived, and where she was from. At some point, Esther R. told the man she was thirsty, and he went to the kitchen; returning with a cup of Pepsi, the man said he intended to “make love” to Esther R.. Esther R. tried to dissuade him by saying she had Hepatitis B and C and was afraid to take the AIDS test because her “fictional ex-husband lover” had tested positive for HIV. She asked the man to use a condom, and gave him a box she’d received as a gag gift from a friend. (RT 932-933)

There was another struggle, which Esther R. again lost. After putting on two condoms, the man put his penis in Esther R.’s vagina while Esther R. laid on her back, begging him not to do so. About five minutes after the initial penetration, the top condom broke; the man removed his penis from Esther R., replaced the condoms with two new condoms, and re-inserted his penis. Another five minutes later, the man removed his penis, put Esther R. on her hands and knees, and entered her from behind. (RT 934-935) At some point, the man took out his penis and repositioned Esther R. on her side, again entering her from behind; the man then put Esther R. on her back and “hands over the head to grab the headboard.” During these repositionings, the top condom kept breaking, and the man would pull out his penis to replace the condom, then resume penetration. The man also kissed, fondled, and sucked Esther R.’s breasts. (RT 935-936, 939)

The sexual activity ended when Esther R., “torn up badly,” couldn’t stifle her cries of pain, which stopped the man. He cuddled Esther R. for hours, telling her that he had never “done it” before, was sorry, wanted her to forgive him, and wanted her address so he could send her flowers. Esther R. asked the man’s name; he said “Max.” During their conversation, the man spoke in a deliberate whisper,<sup>6</sup> and

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<sup>6</sup> Esther R. testified that as the man became sleepy during their conversation, his voice would progress from a whisper to a

appeared drowsy, but not enough to drop his head. Esther R. lied to the man, saying she was from Poulsbo, Washington; he seemed familiar with the Washington and Oregon area, particularly Seattle, Portland, Puget Sound and the Oregon waterfront.<sup>7</sup> (RT 936-938, 946) The man said he would leave before dawn, and did; he told Esther R. to wait ten minutes before doing anything, and that the next time this happened, she should kick the person, fight him off. (RT 938) Esther R. called police as soon as the back door closed; they arrived within two minutes, and Esther R. was subsequently examined by a forensic nurse specialist, who took an external genital, nipple and breast swabs from Esther R.. An oral reference sample was later taken by a detective. All samples were transported to the Los Angeles County Sheriff's Department Scientific Services Division. Esther R. had multiple abrasions and lacerations in her labia. (RT 939, 1394-1399, 1406-1407, 1432-1433)

The encounter lasted about three hours. Esther R. did not see the man's face clearly, and could not identify him. She told police he'd pulled her nightshirt up so she could not see him, but had touched his head once and felt small braids or dreadlocks. She thought the man was 5'8" or 5'9" tall, based on a comparison with her own height, and described him to police as "mocha," possibly a light-skinned Hispanic, with a wiry, muscular build, about 160 lbs.. The man was not fat: he had muscle tone "without a body builder's muscle tone." She felt "a small amount" of hair on his chest. Esther R. was not able to identify the man from either a photographic lineup or a composite drawing. (RT 939-945, 1435-1436)

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normal speaking voice; he would then "remember" and return to whispering. (RT 940)

<sup>7</sup> On the sexual victim assault questionnaire Esther R. filled out for police, she indicated her assailant appeared familiar with Portland, Oregon, and did not mention Washington. (RT 945-946)

Counts 27, 28, 29 and 30: Jane Doe #6: Gloria C. <sup>8</sup>

On August 21, 1999, Gloria C. lived alone on Prospect Avenue in Long Beach; she had fallen asleep in her chair in the front room and was awakened by a hand on top of her head. She said, “not you again.”<sup>9</sup> The man answered, but Gloria C. was not sure what he said or if he remembered the previous incident because the man did not know what her colostomy bag was. The man’s voice sounded “very similar” to the man’s voice in the earlier episode. Gloria C. asked the man how he’d gotten inside, he said he’d climbed through a window. The man told Gloria C. to shut up, took her to the divan, pushed her down, then moved her to a wider window seat. The man digitally penetrated Gloria C.’s vagina, then put his penis in her vagina. (RT D-16-D-19, D-24-D-26-D-27) Gloria C. could not see the man’s face because he’d covered her face with a pair of her shorts. The man’s penis slipped in and out of Gloria C.’s vagina, though she could not recall how many times. The man referred to himself as a “hot cock,” and said, “Relax and you will enjoy it.” Gloria C. thought he ejaculated. Afterwards, the man put a pillow over Gloria C.’s face and told her not to move for ten minutes. Gloria C. got up as soon as she heard the floorboards stop squeaking; she went into the kitchen, found the door she had locked was now wide open, the window screen and

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<sup>8</sup> Testimony of Jane Does #6, #7, and #13 was videotaped before trial pursuant to a Penal Code section 1336 stipulation. (RT D-3-D-5) Gloria C. was approximately 82 years old at the time of her testimony (RT D-10); Francine J. was 80 years old (RT D-34); Vicky Sue B. was scheduled to be out of state at the time scheduled for trial (RT D-58-D-61). The jury was advised before watching the tapes that they were to consider the testimony as trial testimony, and transcripts of the tapes were provided. (RT 900, 902-903)

<sup>9</sup> This referred to Gloria C.’s account of a prior rape on August 3, 1999, charged as counts 24, 25 and 26; again, the jury acquitted appellant on those counts.

some of the glass louvered window panes gone. (RT D-20-D-23)  
Gloria C. called the emergency number; police arrived, and took the  
plaid throw from the divan. Gloria C. was taken to the hospital,  
examined by a forensic nurse specialist, samples taken, given to police,  
then transported to the Los Angeles County Sheriff's Department  
Scientific Services Division. (RT D-23, 1407-1409, 1444-1446)

Gloria C. only saw the man's right hand, and three or four  
inches of arm above his wrist. According to Gloria C., she told the  
police either the man was white or "wasn't black." The bottom of the  
man's hand was uncallused, and he had "bristly," or coarse, hair on his  
inner thighs. She told police the truth about the incident, including her  
description of her assailant. (RT D-27-D-33) According to one of the  
officers at the scene, Gloria C. identified her attacker as white. (RT  
1409)

Counts 31, 32, 33, 34, 35, 36, 37 and 38 : Jane Doe #7: Francine J.

On April 2, 2000, Francine J. was living alone on Marakita, in  
Long Beach; by 6:00 or 7:00 p.m., she had showered and gone to sleep,  
wearing an old short nightgown. As was her habit, Francine J. had  
locked all doors: she also had sticks behind the doors and windows  
except for the bathroom window, which she kept partially open for  
ventilation. Francine J. woke to find a hall light on which she never  
used, and then someone "pounced" on her. A gloved hand was put  
over her face, a finger into her mouth; Francine J. bit down hard. The  
glove felt rough, like a work glove. A man rolled up Francine J.'s  
nightgown and used it to cover her eyes and ears, tying it in the back,  
and putting her hands behind her. He told Francine J., "Do as I say  
and I won't hurt you." Francine J. said she would, and asked him  
please not to hurt her. The man asked Francine J. what her name was,  
and if she was alone; Francine J. told him her name, and said she had a  
friend who occasionally came in after midnight to sleep at the house.  
Francine J. lied about the friend. (RT D-35-D-39, D-49)

The man asked how long it had been since Francine J.'d been  
sexually active, she said it had been many years. The man put his penis  
in Francine J.'s vagina, removed his penis, and told Francine J. to put  
his penis in her mouth. As she did, she noticed the man had a "metal

ring” around his penis. At some point, the man took his penis from Francine J.’s mouth and put it back into her vagina; periodically, he had her change positions from her back to her side, removing his penis to do so. Francine J. didn’t remember how many times this happened, though it was more than twice. The man told Francine J. to lie face down; Francine J. became worried he would anally penetrate her, and asked him not to, because she had hemorrhoids. He did not. The man had Francine J. orally copulate him again. Francine J. could not recall if she orally copulated him two or three times. During the encounter, the man left and went to the bathroom more than once. After the second oral copulation, he went to the bathroom, returned, and put his penis in Francine J.’s vagina again. At some point, Francine J. asked the man for a drink of water; he gave her the bottle she kept on her bed stand. Francine J. could not remember if the man touched her breasts. Francine J. was in a lot of pain as the attack happened shortly before she had hip replacement surgery; she told the man about her discomfort, and he put a pillow on the night stand to support her leg. (RT D-39-D-42, D-46-D-49)

After a while, Francine J. told the man she was in a great deal of pain; he asked her for five more minutes, and after five minutes, left, telling her not to move for twenty minutes. She didn’t hear him, and he repeated the instruction. About ten minutes later, Francine J. went into her dining room, found the sliding glass door open, then called the emergency number. (RT D-44-D-45) The police arrived, and took Francine J. to be examined by a forensic nurse specialist. Francine J. had bruises on her body, and one breast was reddened, in addition to “pinpoint” bruises and multiple tears around her labia and outside her genitalia. Swabs were taken from Francine J.’s right shoulder, left breast, right breast and mouth, transported to the police station and then to the crime laboratory; a reference swab was taken at a subsequent date and transported to the crime lab. (RT D-45, 1355-1358, 1411-1412, 1437-1439, 1441, 1444-1445)

During the assault, Francine J.’s nightgown periodically “slipped a little” so she would catch “glimpses” of her assailant’s face. The man’s hair was either dark blonde or light brown, “loose curls” on top and short on the sides, a “neat haircut.” She thought his eyes

slanted a little on the outside, and noted he had “quite a bit” of body hair, but not dark or black body hair. Francine J. told police he had a medium build, “not a real big heavy guy”; she testified he seemed “not real tall,” with more of a slender build. The room was lit by a light from outside Francine J.’s bedroom window, the small nightlight in the base of her night stand lamp, at one point, the light from the television after the man asked Francine J. to turn it on. Francine J. said her attacker did not look dark, and described him to police as white. (RT D-43-D-44, D-49-D-53, 1440)

On May 1, 2000, Francine J. called Detective Kriskovic and told her she’d received a telephone call from a man; after the caller hung up, Francine J. recognized his voice as her attacker’s. Francine J. testified she wasn’t “100 percent sure” it was the same man, but it was a voice that was similar. (RT D-57-D-58)

Counts 39, 40, 41, 42, 43, 44, 45, 46 and 47: Jane Doe # 8: Rosalie M.

On June 11, 2000, Rosalie M. was sixty-one years old, living alone in a mobile home park in Huntington Beach, California. That night, Rosalie M. went to bed at eight or nine o’clock. (RT 839-841) Around 1:10 a.m., she woke and saw a nude man standing between her bed and the door; the television was on, and was the only light source in the room. Rosalie M. could not see the man’s face because he covered her eyes with his hands right away, putting her down on the bed and saying that if she did what he said, she would not be hurt. Rosalie M. thought she began screaming; keeping her eyes covered, the man led her around the room, looking for something to blindfold her with. The man asked for a pair of nylons, Rosalie M. said she didn’t have any, the man told her to undress, took her shirt, tied it around her head, and led her back to bed. He asked Rosalie M. her name, she told him, he said she wouldn’t be hurt, just to do what was asked. The man had Rosalie M. lubricate herself with her fingers, put his fingers in her vagina, laid her down, put his penis in her vagina, had her orally copulate him, then reinserted his penis in her vagina. Rosalie M. also thought the man may have orally copulated her, and that he put his penis in her vagina “at least four” times. (RT 841-846, 848) At some point, Rosalie M. told the man she was hurting “a little.” Rosalie M. was scared, and did not think she was going to survive. (RT 844-845)

The encounter took half an hour or forty-five minutes. The man talked to Rosalie M. throughout: he was “nice.” He told Rosalie M. nicely what to do, asked how many children she had, if she would like a drink of water; Rosalie M. said yes, and he gave Rosalie M. a drink from the water by the side of her bed. When he was finished, the man tucked Rosalie M. in and told her to stay there for five or fifteen minutes, “one of the two,” so he could have time to get away; he left, still naked. Rosalie M. tried to call the emergency number, but discovered the telephone was disconnected. She dressed, went to a neighbor’s house, and police were called. (RT 845-846, 1663)

Rosalie M. was examined by a forensic nurse specialist, who took a swab from Rosalie M.’s vagina. No sperm was detected in the sample.<sup>10</sup> Rosalie M. described her vagina as “really ripped.” According to the nurse, Rosalie M. had a large tear along the side of the urethra, two tears above the urethra, two hymenal tears, a red mass inside her cervix, and a periurethral edema: she was swollen around the urethra. (RT 847, 1400-1404) Later, Rosalie M. discovered the man got into her home through a small sliding window, about 48" high and 12" wide: the screen had been ripped out, and outside motion lights disconnected. (RT 847, 849-850)

Counts 48, 49, 50 and 51: Jane Doe #9: Margaret G.

On May 11, 2002, Margaret G. was seventy-one years old, living alone in a mobile home park on Oak Street, in Los Alamitos. The night before, Margaret G. fell asleep on the couch, woke at 12:35 a.m., and went to bed. She woke again because she felt someone on her back, a gloved hand over her mouth, choking her and yanking back her head, repeating, “Don’t scream. I don’t want to hurt you.” (RT 958-961) The man removed his hands from Margaret G.’s mouth, took off her shorty pajama bottoms, and poured something cold down Margaret G.’s back and into the buttocks area. He then entered her vagina. Margaret G. told the man he was killing her, that she needed

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<sup>10</sup> A former Huntington Beach crime laboratory forensic scientist testified he detected over 120 sperm on one of the vaginal slides. (RT 1663-1670)

water. She reached for a bottle of water on the night stand, took a drink, and dropped the bottle on the floor. Margaret G. couldn't catch her breath; she repeated the man was killing her and she needed more water; he got up and took Margaret G. to the kitchen, walking behind her. After Margaret G. drank a glass of water, the man drank from the same glass, and took Margaret G. and what was left of the water back to the bedroom, setting the glass on the headboard. (RT 960-962)

The man next took Margaret G. to the bathroom and stood her on one leg while stretching the other on the counter; he put a washcloth over the nightlight, then entered her vagina, pulled out and took her back to bed. (RT 962-963) There, the man piled pillows behind Margaret G. and put his penis into her vagina for a third time as he sucked on her breast. Margaret G. testified she kept whining, "you're killing me," and asked how long he was going to stay. The man took Margaret G. by the arm back to the bathroom, and told her to give him ten minutes, to take a shower, and he would be gone. When Margaret G. left the bathroom, she noticed the front door was deadlocked, indicating her attacker had used the back door. After finding her telephone disconnected, Margaret G. retrieved a second telephone, and called police. (RT 963-964)

The police arrived, and Margaret G. was taken to the hospital; she was bleeding down her legs, and was kept in the hospital for three days for congestive heart failure. When the forensic nurse specialist first saw Margaret G., Margaret G. was having a heart attack, so the nurse examined Louise H. first. Swabs were subsequently taken from Margaret G.'s breasts, and a reference sample was taken; the samples were delivered to the Los Alamitos Police Department, then transported to the Sheriff's crime lab. When examined, Margaret G. had multiple bruises on her chest, abrasions over her face, there was blood over the inner aspect of her legs and thighs, and she had what appeared to be dried blood in her hair; there was redness, swelling and tears to the genitals. (RT 964-965, 967, 1358, 1362-1363, 1447-1448)

Margaret G. only saw her assailant in the dark. He was wearing white gloves, and his skin was dark. His hair was curly, looked like "a bird's nest," wild, parted in the middle, with bangs coming across the forehead from the sides, and very short on the sides. At trial,

Margaret G. said she could not tell how tall he was; she described him to police as clean-shaven, 5'6" to 5'7", 160 to 170 lbs., with buzzed or faded, "very short" and tapered upwards, hair, parted in the middle; the man had a thin, muscular build. Margaret G. told the forensic nurse specialist the man was a "thin, wiry" white male in his 20's, not hairy. (RT 965, 968-971, 1385-1386, 1449-1450) Some months later, Margaret G. met another woman, Louise H., who lived in the same mobile home complex and was also assaulted that night; previously, Margaret G. never met, or had any physical contact with, Louise H.. (RT 966-967)

Counts 52 and 53: Jane Doe #10: Louise H.

On May 11, 2002, Louise H. was sixty-eight years old, living alone in the same trailer park as Margaret Margaret G.. She fell asleep on her couch; she woke to find gloved<sup>11</sup> hands pulling at her face from behind her, covering her nose and mouth. It was difficult to breathe; Louise H. screamed and struggled, a man told her to shut up and put a small sofa pillow over her face. (RT 972-974) The man took Louise H. down the hallway, she asked where they were going, he said he was taking her to the bathroom because she was going to call the police. At the bedroom door, the man hit Louise H. on the right cheek with his fist, knocking her on top of her bed. He took her to the bathroom, threw her face down on the floor and removed her pants. He stopped, and after some period of time, Louise H. realized he had left. She started kicking the bathroom safety door, hoping to attract a neighbor, getting no response, she returned the way the man brought her; as she went past the service porch, Louise H. realized her car was missing. (RT 975-977)

Louise H. called police; she was subsequently examined by a forensic nurse specialist; a blood sample and fingernail scrapings were taken. Louise H.'s nose and chin were swabbed, and there were swabs taken from her left face, the outside of her mouth, her neck, and her

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<sup>11</sup> Louise H. testified the gloves felt like they had "steel wool" in them: "they were just tearing my face up and my arms..." (RT 975)

right and left hands. The samples were booked to the Los Alamitos Police Department and transferred to the crime lab. Louise H. had abrasions on both sides of her face and back and bruises on her body. Louise H. did not see Margaret G. the night she was assaulted, and had no prior contact with Margaret G.. (RT 977-978, 1358-1362, 1364, 1447-1448) Louise H. did not see the face of her assailant, and could not identify him; she thought he was a small person based on her height: she is 4'11 \_". She felt one of the man's forearms, which seemed smooth, or hairless. (RT 973, 978-980)

Counts 54, 55, 56, 57 and 58: Jane Doe # 11: Marilla M.

On June 26, 2002, sixty-one year old Marilla M. was living on Roslow in Long Beach; she spent the evening alone, degrouting a counter, and went to bed around midnight. At around 2:35 a.m., Marilla M. woke to the sound of the dining room floor creaking. She sat up, turned on the lights to find her glasses, picked up the telephone, and started to dial the emergency number. (RT 763-764) A man jumped into the door, hands up and feet sprawled, naked except for socks on his hands and feet, and a T-shirt over his head. He flew at Marilla M., hit her in the jaw, knocked the telephone across the room, and jumped on top of her. Marilla M. began screaming, he turned off the overhead light, she started struggling, he told her to be quiet. Marilla M. realized her neighbors were out of the area, and calmed down. The man began orally copulating Marilla M., keeping one sock-covered hand over her face as he did so; she bit his hand through the sock, and he jerked his hand back, dislocating her jaw. The man told Marilla M. not to fight him. (RT 764-767, 771)

After orally copulating Marilla M. a couple of times, the man put his penis in her vagina. She continued to struggle, he pushed her against the wall, cocking her head to one side. His penis slipped from her vagina; he continued pushing against her until she complained that he was breaking her neck or hurting her. Marilla M. believed the man reinserted his penis at some point. Marilla M. told the man he must have hated his mother or his grandmother, then began reciting the Lord's Prayer. She thought the man started to hesitate, and put her hand up inside the shirt over his face; he had flipped her shirt over her face during the assault. Marilla M. felt chin whiskers. When she first

felt his scalp, she thought the man was bald, then felt something “sticking out” that felt like “dry ends of hair” “sticking straight out in front of him.” (RT 767-770, 772)

When Marilla M. reached the line “deliver us from evil,” the man backed off, removed his penis from her vagina and tried to turn Marilla M. over; thinking he was going to anally attack her, Marilla M. said, “No, not this. Please, not this,” and grabbed the man’s penis. The man told Marilla M. to turn over, she said no more, and he stopped, rolling her over and putting her sheet over her. He rubbed her back and told her it would be “fine.” (RT 770-771) The man told Marilla M. to give him ten minutes before calling the police and not to tell people at her work. She laid face down until he left, then tried to find her bedroom telephone. Unable to do so, Marilla M. went into another room to use the telephone. The line was still open from her earlier dialing attempt, so Marilla M. went to one of her tenant’s houses and asked her to call the emergency number. The assault lasted between twenty minutes and one hour. (RT 772-773, 786)

Police arrived, Marilla M. was taken to be examined by a forensic nurse specialist. A vaginal swab was taken, as well as a reference sample, and clothing collected; police transferred the samples to the crime lab. Sperm was detected on the vaginal sample. Marilla M. had multiple contusions and abrasions on her face, and complained of facial pain. She had abrasions to her forchette area, which was Toluidine positive, indicating fresh injury. (RT 773, 775, 1371-1379, 1381-1383, 1434-1435, 1742-1745) Marilla M. told police she could not identify her assailant. (RT 775) Someone had broken into her home once before, in 1997; she told the officers she thought it might have been the same man.<sup>12</sup> During the assault, she couldn’t see

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<sup>12</sup> In 1997, Marilla M. and her partner were in bed when a man came into their room; as soon as the man saw her companion, he turned and ran. The police caught a man fitting the intruder’s description riding a bicycle nearby, and asked Marilla M. and her partner to identify him. Marilla M. said she could not identify the man “for certain,” but that his silhouette “looked like this guy.” It was not appellant. (RT 789-790) In

anything more than “smooth skin,” though wondered if he was wearing “a body suit or something,” as it seemed gauzy and she did not see the man’s penis when he first leapt into the room.<sup>13</sup> She told police he had no body hair because she could not feel any body hair. Marilla M. also said the man had curly hair on his head, though the police report indicates she said he had straight hair. She noted he had a 3"-long wisp of hair hanging over his forehead. She did not recall telling police the man was either White or Hispanic: she thought she said he was tan, but had no tan lines; the officer testified Marilla M. said the man was 5'8", olive-skinned, with no apparent tattoos or body hair. At a subsequent interview, Marilla M. said he was olive-complected. Marilla M. said the man was a little taller than she is: Marilla M. is 5'6", and guessed her assailant was 5'7" or 5'8". She described him as bigger than her, heavy, but not defined or muscular. He had a goatee, but she did not feel a mustache. (RT 776-780, 782-785, 787-788, 1436-1437) Marilla M. told the forensic nurse specialist she could not determine her assailant’s ethnicity, but said he had a curly goatee, a scarf tied around his head, and wore a white T-shirt. (RT 1380-1381)

Marilla M. did not recognize appellant as her attacker. (RT 773-774) She had seen photographs of appellant in the newspaper, and believes he is guilty based on those reports and what she’d been told by the prosecution. (RT 777-778, 781)

Counts 59 and 60: Jane Doe #12: Betty W.

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1998 or 1999, police showed Marilla M. a composite sketch, but Marilla M. could not identify that individual as her attacker. Marilla M. was shown more than one photographic lineup, but was unable to make an identification. (RT 791, 796-797)

<sup>13</sup> Marilla M. added the body suit hypothesis on cross-examination; later, she said the man was naked, but might have been wearing “something” because otherwise she couldn’t figure out why she didn’t see his penis when he first came into the room. (RT 786)

On August 13, 2002, Betty W. was seventy-four years old, living in a large house in Huntington Beach; she lives with her grandson, but was home alone that evening. At 11:30 p.m., Betty W. was in bed, crocheting and watching a baseball game. She heard a noise, got up, and went down the hall, turning on all lights along the way. Seeing nothing amiss, she returned to her crocheting, and began watching the news. She heard a thud, thought she had a prowler, and called 911. Betty W. was standing in her back room; as she dialed, she heard him “come on the phone,” and she was grabbed from behind, sending her glasses and the telephone “flying.” Betty W. yelled, “He’s in my house and he’s attacking me,” turned, and saw a naked man with a towel over his head. She tried to attack his eyes, but couldn’t, then tried to remove the towel to see who it was, and couldn’t. The man knocked Betty W.’s arm away, she grabbed his penis, finding what she thought was mesh underwear. (RT 851-853, 855, 859) The man pushed Betty W. to the floor and got on her back; the telephone rang and the man got off Betty W. and ran down the hall. He was naked except for the towel and a black G-string. The towel was rough, “the kind that you have at a car wash”; Betty W. thought the man was wearing something like a gardener’s glove on the hand he had pressed against her face. (RT 853-855, 859, 861)

The police arrived; Betty W. was subsequently examined, her clothes collected, and swabs taken from her body, including her cheeks and hands. A control sample was also taken and ultimately delivered to the Orange County Sheriff Department crime laboratory.<sup>14</sup> (RT 858,

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<sup>14</sup> The criminalist testified the procedure followed in taking samples was: put on a pair of fresh latex gloves, remove and dampen one of the kit’s sterile cotton swabs with distilled water, swab the location to be tested, place the swab in one of the kit’s plastic test tubes, and put the sealed tube into a marked manila coin envelope. After collection, envelopes are taken to a drying box at the police station, into which swabs are placed in small circles. A fan circulates warm air throughout the box; once dry, the swabs are returned to their containers and booked into

1128-1131, 1553-1555) Betty W. told police her assailant had “very smooth,” hairless buttocks, and a “fairly light olive” complexion: he wasn’t white or black. (RT 860-862)

Betty W. did not identify appellant as her attacker. As a result of the assault, Betty W. had some temporary red marks on her left ear and the left side of her face. (RT 855-858)

Counts 61 and 62: Jane Doe #13: Vicky Sue B.:

On August 15, 2002, Vicky Sue B. was living on Sandia in Long Beach,<sup>15</sup> a guest house behind a larger house occupied by her landlords. The night before, Vicky Sue B. had gone out with her parents, and did not return home until about 1:00 a.m.; she collected her mail, got ready for bed, angled the television towards the bed, turned it on, and fell asleep. Vicky Sue B. was wakened by a gloved hand over her mouth and a voice saying, “Don’t fight me.” The cloth-back glove had plastic bumps or beading on the front, “like to grip... a BMX bike,” or gardening gloves. (Peo. Exh. 8, pp. 65-69, 87-88.)

Vicky Sue B. first played “possum,” but the person shook her, apparently wanting her to wake. Vicky Sue B. woke, and fought. She yelled, and the man shook her head up and down, telling her to shut up, not to yell; she began to move left, making a circle as she fought. She tried to slide off the bed, but the man yanked her back. The man got on top of her, Vicky Sue B. realized he was nude.<sup>16</sup> He tried talking to her, telling her not to yell or fight, asking her name, but she

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evidence. Drying protects the integrity of the evidence. (RT 1131-1136, 1138-1142)

<sup>15</sup> In the transcript of her taped testimony, Vicky Sue B.’s street is referred to as “Sandia”; the street is referred to as “Zandia” at trial. (Peo. Exh. 8, p. 65.)

<sup>16</sup> Vicky Sue B.’s face was covered at times. (Peo. Exh. 8, p. 91.)

continued fighting. She bit his hand, but did not know if she broke the skin. Vicky Sue B. was on her back; the man told her to turn over; she resisted, knowing she would be weaker on her stomach. Vicky Sue B. said her name was Joanna, and asked his name: he said Tito. Vicky Sue B. said she was H.I.V. positive. There was a “slight hesitation,” then the man said he didn’t care. Vicky Sue B. asked him to use a condom, saying she had one. (Peo. Exh. 8, pp. 69-74, 89.)

The man picked Vicky Sue B. up in a “wrestling move” and threw her on the bed; Vicky Sue B. began moving to the right, but her head became caught between the bed and dresser. Vicky Sue B. told the man he was “tweaking” her neck, the man said he didn’t care, and continued choking her between the furniture. Throughout, Vicky Sue B. was scratching her attacker: she had “real long” acrylic nails, “hard and strong.” She scratched his chest, his arms, his groin. She stuck her fingers in his left eye, scratching it, and stuck her pinkie up his nose and started yanking and ripping, to “get blood.” She grabbed his penis and squeezed “hard.” She hit him. She repeatedly kneed him in the groin with her right knee, then slid off the bed head first and saw that the man’s face was covered by a shirt knotted over his head. (Peo. Exh. 8, pp. 73-76, 83-86.)

The man was sweating profusely: Vicky Sue B.’s hands slipped on his skin, and he smelt “musty.” Vicky Sue B. described his physique as “soft,” the sort that might have “been buff, but now it just let itself go.” Because of the sweat, Vicky Sue B. testified she could not gauge the amount of his body hair; she told the detective he had some chest hair and hair around his nipples, but not a lot. She felt hair when she grabbed his groin. Vicky Sue B. told the detective she thought the man was 5'9" to 5'10" but not more than 6"; Vicky Sue B. is 5'4" and weighs 120 lbs.: given the man could not overpower her, Vicky Sue B. did not think he was very strong. She thought he was in his 20's to 30's, of average build. His hair was dark, and seemed loosely curly or wavy, “messy.” His penis was soft, and Vicky Sue B. told police she thought it was very small. Vicky Sue B. told the detective that when the man said his name was Tito, he said it with an authentic Latino accent; Vicky Sue B. is Latina. (Peo. Exh. 8, pp. 76, 89-98, 102-105.)

Vicky Sue B. ran to her bedroom door and opened it; the man said “wait,” Vicky Sue B. turned and saw the man’s body was olive-colored. She ran out the door and on through the front door away from her house; she went to the landlord’s, hammering on the door and screaming there was a guy in her house, and a young girl who lived there called the emergency number. (Peo. Exh. 8, pp. 76-77, 83, 100-101.)

The police arrived, and Vicky Sue B. was subsequently transported to the station, interviewed, then examined by a forensic nurse specialist. Samples were taken from her palms and fingers, and cuttings from her fingernails; a reference sample was collected, as were Vicky Sue B.’s clothes; these were transported to the Sheriff’s Department crime laboratory. Vicky Sue B. had abrasions on her upper lip and abrasions and bruises with redness on her body. When Vicky Sue B. returned to her home, there was “blood everywhere,” on the pillowcases and bedding, blood which had not been there before the assault, and was not Vicky Sue B.’s. (Peo. Exh. 8, pp. 77-83, 86; RT 1364-1368, 1413-1414)

Vicky Sue B. could not “100%” identify her assailant; when asked on direct examination if anyone in the courtroom looked like the person who assaulted her, Vicky Sue B. identified appellant. When asked on cross-examination if she could identify her assailant, Vicky Sue B. said, “I cannot.” (Peo. Exh. 8, pp. 79-81.)

Counts 63 and 64: Jane Doe #14: Julie A.

On November 7, 2002, Julie A. was thirty-six years old, living alone on Euclid Avenue, in Long Beach. The night before, she went to sleep around 11:00 p.m., she woke sometime in the early morning, and sat up in bed, unable to breathe, then realized there was a latex-gloved hand around her nose and mouth. She panicked, trying to move the hand; a man said, gruffly, “Don’t say anything.” She kept struggling to remove the man’s hand; when he finally moved his hand away, she said she would do whatever he wanted, that she didn’t want to get hurt. The man put his hand back over her mouth and told her to be quiet and not do anything; the television was on, and the man covered it with a blanket. Julie A. reached around in the sheets, trying to find her

telephone, but the man came up behind her; she said she'd do whatever he wanted, and asked if she could move her small, elderly dog out of the bed. The man indicated she could, she picked up the dog, went to the living room, was about to open the front door, but the man said, "no." (RT 982-985, 987)

Julie A. asked if she could let the dog "go to the bathroom," and put the dog on the couch; the man wanted to return to the bedroom, Julie A. said she needed to use the bathroom, and the man accompanied her; while in the bathroom, Julie A. asked the man to turn off the bedroom heater. After initially refusing, the man agreed. As soon as he left, Julie A. locked the bathroom door and opened the window. She noticed the screen was off, realized this was the point of entry, put her head half out the window and began screaming. (RT 985-986) The man appeared outside the window; Julie A. tried to escape by the door, but the man caught her in the doorway. They struggled, she fell in the hall, kicking and pushing him as he tried to put his hand over her mouth. At some point, his index finger slid into her mouth and she bit him.<sup>17</sup> She then ran out the front door and pounded at a neighbor's door, there was no immediate response; as she turned to another house, the first neighbor opened her door. (RT 986-988, 990-993, 999-1000)

Julie A.'s neighbor called police; they arrived, took oral swabs from Julie A., and booked them into evidence. There was some blood on Julie A.'s lips: she was not sure if it was her blood, or her assailant's. Julie A. was examined by a forensic nurse specialist, who took swabs from Julie A.'s body. (RT 988, 1068-1075) Julie A.'s leg was bruised in the assault. (RT 998-999) Police officers searching the alley behind Julie A.'s house found latex gloves in a trash can behind a house about three houses away from Julie A., and booked them into evidence. The gloves were layered, one glove inside another, so there was more than

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<sup>17</sup> On cross-examination, Julie A. testified she believed she bit the man "sideways," *i.e.*, across the mouth, running the length of the finger, perhaps close to the knuckle. She did not feel the glove tear from her bite. (RT 991, 994-995)

one glove per hand. There was no blood on the gloves. (RT 1057-1066)

Julie A. never saw her assailant's face: he kept a dark-colored shirt over his face and head. She told police she thought he was wearing nylon jogging pants because of the sound they made. The pants were dark. Julie A. is 5'11"; the man was "possibly" two to three inches shorter: 5'8" to 5'9". He had a medium build, and appeared younger than she. The man asked Julie A. her name once or twice; she asked his, but he did not answer. (RT 988-990, 996-997, 1001)

#### Appellant's November 7, 2002 arrest

At about 1:01 a.m. on November 7, 2002, Long Beach patrol officer Kevin Delorto received a call about an assault on Euclid Avenue. Delorto was half a mile away, and as he drove towards the location, he saw appellant riding a bicycle in the center of 23<sup>rd</sup> Street, just east of Euclid, three blocks from the site of the assault. (RT 1023-1027) Delorto jumped out of his car, pointed his gun at appellant and told him to stop. Appellant "looked surprised," and stopped. Delorto asked appellant to get off his bicycle, and told appellant he was being stopped because he didn't have a light on the bicycle and there had been an incident in the area he wanted to question appellant about. Delorto asked appellant who he was, where he was going, and where he had been; appellant gave his name, said he was coming from visiting a friend, John Bracco, who lived near the Java Lanes Bowling Area, on Pacific Coast Highway and Redondo, and was going to his home at 238 Ximeno. (RT 1028-1029)

At the time of his arrest, appellant was wearing blue jeans, a baseball cap, had arm warmers in his pockets, and a beanie cap in the back waistband of his pants. He had a white long-sleeved shirt with a black T-shirt underneath; the black shirt had large lettering across the top. Delorto did a custody search, lifting appellant's shirt to see underneath. There were no bruises on appellant's body or face. (RT 1031-1038, 1040) Delorto noticed appellant had a small bleeding cut below the knuckle on his right index finger, and a second small cut on the corresponding area on the back of the finger. The cut ran around the finger, not the length of the finger; Delorto described the bleeding

as a “trickle of blood,” and did not recall any smearing. Appellant said he hurt himself on the gear shifter level while dismounting from the bicycle. (RT 1029-1030, 1036, 1039-1040)

Another officer arrived, took a saliva swab from appellant to be used as a DNA reference sample, and subsequently booked the sample. The officer had received ten minutes training on how to take a DNA field sample two weeks earlier; he wore a pair of gloves while handling the swab, which he believed was sterile. The officer did not have to break a seal to get to the kit, and the swabs were not sealed. The officer removed the swabs, took the sample, then put the swabs in a small cardboard box inside the kit. The officer testified he was “very careful” not to contaminate the swabs, but could not remember if he touched his pen or face with his gloved hand. The officer did not take a swab from appellant’s cut. (RT 1042-1056) A methamphetamine pipe was recovered from appellant; in response to the officer’s questions, appellant said he was just out for a bike ride. (RT 1045)

The latex gloves found in the alley and appellant’s saliva swab were transferred to the Los Angeles County Sheriff’s crime laboratory and given to a criminalist for testing. (RT 1077-1082) On November 12, 2002, a reference blood sample was taken from appellant and given to Long Beach police. (RT 1162-1166, 1173-1178)

On November 10, 2002, police followed appellant to a residence in Oxnard. About 8:00 p.m., appellant was arrested, and driven back to Long Beach. (RT 1201-1203, 1211-1212) The Long Beach Police Department created had a task force to catch the Belmont Shore rapist: at least five detectives in the Sexual Assault Unit were involved. Kriskovic was the lead investigator; a composite drawing of the suspect was prepared in 1998 and posted throughout the Belmont Shore area at her direction. The description given the public was of a man with light brown hair, and light brown or hazel eyes. Appellant was darker complected when arrested than he was at trial. (RT 1323-1324, 1326, 1332-1334)

#### Appellant’s Admissions

Appellant's mother was born in the Philippines, as was her son. Appellant's father was Samoan, a member of the United States Navy who died in Vietnam. Mrs. Rathbun is half Filipino and half white. (RT 1113-1114, 1117-1118) On November 7, 2002, Mrs. Rathbun went to the police station to talk to appellant: they met privately for fifteen to thirty minutes. During their meeting, appellant told his mother, "I will pay for my sins." One of the detectives told Mrs. Rathbun beforehand appellant was guilty. Mrs. Rathbun asked how could they prove it, did he see it; the detective said he hadn't seen it, but appellant would "answer for it" because DNA would prove him guilty. (RT 1114, 1119-1122, 1124)

Mrs. Rathbun told a detective what her son said about paying for his sins, but did not say appellant said he was responsible for these crimes, or that when she asked where she had gone wrong, that he said it was his fault, not hers, because he was the one who did it. Mrs. Rathbun testified she did not say to the detective that she didn't know what went wrong because her son went to church and confession and she had taught him to fear God. (RT 1114-1115) She was very upset when she talked to appellant, and both she and appellant were crying.<sup>18</sup>

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<sup>18</sup> The detective who escorted Mrs. Rathbun to her meeting testified the two talked for seventeen or eighteen minutes; afterwards, the detective told appellant his mother was very concerned about his situation and if he "had got right with his mother." According to the detective, appellant said he told his mother he was the one responsible for the rapes, "he was the one in the news," and that it was his fault, not hers. The detective told appellant his mother would probably be approached by the media; appellant asked the detective to tell his mother not to talk to the press. Mrs. Rathbun told the detective what appellant had said, and that she didn't know what went wrong with appellant, because he went to church and confession, and she had always taught him to fear God. On cross-examination, the detective said he "never noticed" whether Mrs. Rathbun or her son had been crying. (RT 1193-1200)

(RT 1123-1125) Appellant learned to speak English when he was four or five years old. He does not speak Spanish. Appellant is a surfer, spending a lot of time at the beach: his normal complexion is darker than he appeared in court. He has worn his hair in dreadlocks for many years. (RT 1118-1119, 1123) Between August and November, 2002, appellant lived with a girlfriend and another friend, and visited his mother each week. Mrs. Rathbun never saw appellant with an eye injury or deep scratches on his body during that time. (RT 1126-1127)

Mrs. Rathbun was interviewed by Tracy Manzer, a Long Beach Press Telegram reporter; the interview was published on November 13, 2002. In the article, Mrs. Rathbun was credited with saying that appellant told her, "I'm sorry I did it, Mom. I'm going to have to pay for my sins." According to the report, Mrs. Rathbun asked appellant why he did it, why he would hurt her like this, and appellant's "eyes just flooded with tears and he shook his head. He could not say anything." Mrs. Rathbun testified she did not tell this story to Manzer. (RT 1114-1115) Mrs. Rathbun was also interviewed by Michele Geely of Channel Nine News; in her on-camera interview, Mrs. Rathbun said she asked appellant, "Why did you do this?" to which appellant responded, "Mom, I'm going to pay for what I did." Mrs. Rathbun testified she and appellant did not have "that kind of conversation." (RT 1115-1117)

Tracy Manzer testified that when she interviewed Mrs. Rathbun in November, 2002, Mrs. Rathbun told her appellant said, "I'm sorry I did it, Mom. I'm going to have to pay for my sins," and when Mrs. Rathbun asked her son why he did it, why he would hurt her "like this," "his eyes just flooded with tears and he shook his head. He couldn't say anything." (RT 1187-1189) Mrs. Rathbun cried during her interview. (RT 1190)

During the November 10<sup>th</sup> drive from Oxnard to Long Beach, the transporting officer advised appellant of his *Miranda* rights, appellant nodded, and said yes when asked if he understood his rights and wished to waive them. The officer asked appellant if he understood what was happening; appellant asked why he was being arrested, and the officer indicated it was for sexual assault. Appellant told the officer he had graduated from Poly High School in 1988, was

of Hawaiian descent, had come from Hawaii when younger, had traveled to the Seattle area and returned to Long Beach. There was some discussion about the Navy, ships, and current events: appellant "took a real interest in the Afghanistan situation." The officer described appellant as alert and "pretty intelligent." The transporting officer told detectives he had advised appellant of his rights, and appellant had waived those rights. (RT 1201-1209)

The officer who moved appellant to and from his interrogation by the detectives testified that while driving back to the jail, he asked appellant about an incident on Zandia Street: the officer had been off duty on August 15, 2002, and was curious about the suspect's escape route. Appellant indicated he remembered the Zandia episode; the officer asked if appellant had been on a bicycle or on foot; appellant said on foot; the officer asked if appellant had gone over the back fence through the house behind Zandia; appellant said he had; the officer asked if he had used a nearby pedestrian walkway to get to Lakewood Boulevard; appellant said he had; the officer asked if appellant had gone across Lakewood Boulevard, or gone northbound; appellant said he went northbound. The officer said he'd thought appellant had gone to a parking lot and gotten into a car; appellant said no, he went to the Spires Restaurant, and used a pay phone to call a female friend, who picked him up eight minutes later. Appellant couldn't remember the woman's name, but said she didn't know what had happened. Appellant did not volunteer any information about being injured that evening. Appellant did not appear to be tired during the 1:00 a.m. drive. (RT 1213-1223)

#### Appellant's Interrogation/Confession: Untaped

Detective Katherine Kriskovic started interrogating appellant about 9:40 p.m. on November 10, 2002, readvising appellant of his *Miranda* rights although the transporting officer indicated appellant had already been advised, and waived, those rights. Appellant signed a waiver form, which was then witnessed by Kriskovic and Detective Collette. Kriskovic had prepared a flow chart of various rapes,

indicating who the victims were,<sup>19</sup> and whether there was DNA evidence. The chart listed thirty-one rapes, those with DNA evidence were highlighted. Kriskovic told appellant his DNA sample “came back” to DNA taken from Gloria C., assaulted in August, 1999. Kriskovic showed appellant all the points on the chart involving DNA evidence, and how those cases had been linked to the DNA evidence on the Gloria C. case, and thus, to appellant. Appellant told the detectives he could not undo what had been done, and sincerely owed a debt to everybody, listing the city, the State, the detective, “the cops, and all of the residents and all of those people who hated him.” According to the detective, appellant “admitted he had a problem.” On direct examination, Kriskovic testified she asked if appellant was aware that he had been labeled The Belmont Shore Rapist; appellant said he had, and that again, he owed a debt for the bad and hideous things he had

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<sup>19</sup> The flow chart listed the following incidents as connected via DNA evidence: January 1, 1997– Dorothy Dorothy C., East Vista (Jane Doe #1); May 13, 1998 – Barbara B., Elliott Lane (Jane Doe #2); July 31, 1998 – Marion J., Colorado (Jane Doe #3); September 18, 1998 – Carol R., Covina (Jane Doe #4); November 22, 1998 – Esther R., Mariquita (Jane Doe #5); August 21, 1999 – Gloria C., Prospect (Jane Doe #6); April 2, 2000 – Francine J., Mariquita (Jane Doe #7); June 1, 2000 – Rosalie M., Huntington Beach (Jane Doe #8); May 11, 2002 – Margaret G. and Marie H., Los Alamitos (Jane Doe ## 9 and 10); June 26, 2002 – Marilla M., Rosewell (Jane Doe #11); August 13, 2002 – Betty W., Huntington Beach (Jane Doe #12); August 15, 2002 – Vicky B., Zandia (Jane Doe #13). The November 7<sup>th</sup> incident (Jane Doe #14) was not noted because the DNA results were not then available. Jane Doe #10 was not highlighted as there was no DNA link at the time the chart was prepared. The chart was redacted for trial purposes to eliminate those cases where no DNA evidence linked appellant to the alleged assault, with the exception of the Gloria C. case. (RT 1233-1234, 1256-1257)

done. On cross-examination, Kriskovic testified she omitted from her report that when asked if he was the Belmont Shore Rapist, appellant answered, "You tell me." According to Kriskovic, when appellant was asked whether one of his victims had a colostomy bag, he stated he remembered her, but did not know the reason for the colostomy bag, or "why she had it."<sup>20</sup> (RT 1224-1234, 1256, 1282, 1287-1289, 1308, 1330-1331, 1334-1341)

Kriskovic asked why appellant had committed his crimes; he said he had made "a lot of bad choices." At about 10:45 p.m., Kriskovic asked if appellant needed anything; he requested a glass of water and some gummy bears, which were provided. Kriskovic asked appellant if he had ever lived in Seattle, and if he had returned to Long Beach in January 1997, before the first assault. Appellant said he had been in Seattle in 1993, 1995 and 1996, spending six months each year on a commercial fishing ship, and had returned in January 1997, possibly the same week as the first assault. Kriskovic asked if appellant committed the crimes represented on the flow chart, or if the detectives were "off base." Appellant said they were not off base, judging by the facts. (RT 1231, 1292-1301)

Kriskovic asked whether appellant remembered his November 7<sup>th</sup> arrest; he said he did, he had been arrested for paraphernalia and no light, and he was the one the police were looking for that evening. (RT 1230) Appellant was questioned about various odd jobs he had, and about wearing gloves. Appellant said he got gloves wherever he found them, none of them were his, he used whatever was available, from gardening gloves to socks worn on the hands. Appellant wore

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<sup>20</sup> On cross-examination, Kriskovic acknowledged appellant said, in response to her questions about the colostomy bag, "You were the one that said that to me the whole time. You brought that to my attention the whole time," and when Collette said to appellant that he remembered the "girl" with the colostomy bag, appellant said, "That's what she said earlier." (RT 1308-1309) According to Kriskovic's notes, appellant remembered the bag. (RT 1309)

gloves to prevent his victims from injuring him, not to avoid leaving fingerprints. In response to questioning, appellant said he did not wear masks, but wore beanies which he could exchange with friends: appellant would cut two slits in the top of the beanie, then pull the beanie down so the slits became eye-holes. Appellant said sometimes he did not wear beanies, and would use a T-shirt to hide his face by pulling it over his head. (RT 1234-1235)

When asked about the assault on Vicky Sue B., appellant remembered her as being “tenacious,” saying as much as he attacked her, she attacked him. Appellant denied being scratched or bitten.<sup>21</sup> Appellant was asked if he remembered breaking a pot en route to the back of her home: appellant said he did, when asked if he remembered kicking the pot, appellant said no, when asked how he broke it, appellant said, “it just happened to be there,” when Collette asked if he had knocked it over, appellant said, “yeah.”<sup>22</sup> Appellant also said he entered through the bathroom window, having picked up a pair of latex gloves from some trash bins behind a nearby grocery store. Appellant said Vicky Sue B. struggled with him, locking him out of her bathroom, that he tried to reach her through the bathroom window from the outside, and that when they fought, Vicky Sue B. bit his finger through

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<sup>21</sup> Kriskovic had received a telephone call from Vicky Sue B., who said there was blood on her sheets which was not hers; the sheets were subsequently collected by a forensic technician. Vicky Sue B. told Kriskovic she’d scratched her assailant severely, particularly in the chest, and poked one of her fingers in his eye, and ripped inside his nostril: Vicky Sue B.’s acrylic nails were horizontally cracked, and Kriskovic collected the nails for genetic material. Pubic-like hair was also gathered from the sheets; Vicky Sue B. shaves her pubic area. (RT 1317-1322)

<sup>22</sup> The pot was on the ground, covering a sprinkler head. (RT 1313-1316)

the glove.<sup>23</sup> Appellant showed Kriskovic a quarter-inch horizontal cut on his right index finger about a quarter of an inch above his knuckle; on the other side of his hand, appellant had a small blood bruise. Appellant told Kriskovic that Vicky Sue B. had a very old dog, “close to death.” Appellant said he had been staying with a friend who lived on Campo Walk in Long Beach, and was helping the friend move to Oxnard when he was arrested. (RT 1235-1237, 1311-1317, 1325)

At 12:15 a.m., appellant had a restroom break, and was questioned for another twenty-five minutes after his return. Kriskovic asked appellant if he’d told anybody about the assaults; appellant said he hadn’t. With regard to the assaults of Margaret G. and Louise H., appellant said he’d been dropped off by a friend named Scott that night to go to an event at the Los Alamitos football field, but had gotten “sidetracked” into a trailer park.<sup>24</sup> Inside the park, he found a trailer with an open door, went inside and sexually assaulted an elderly woman; within five minutes, appellant was in another trailer, attacking a second elderly woman, whom he did not completely sexually assault, took that woman’s car from her carport, and left.<sup>25</sup> Appellant said he

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<sup>23</sup> At the time appellant was interviewed, Kriskovic did not know about the victim’s description of the bite as being horizontal. (RT 1330)

<sup>24</sup> The trailer park was a block and a half to two blocks from the Los Alamitos police station on one side, flanked by the 605 freeway and an empty river bed on the other, with residential apartments and a small business district on the remaining sides. There was only one access point to the park, which was otherwise surrounded by a wall, partially made of blocks, partially of chain link. (RT 1275-1277, 1450-1451)

<sup>25</sup> Louise H. told Los Alamitos police she was not sexually assaulted. (RT 1280-1283)

drove to a small business on 4801 East Anaheim, where he parked and left the car, but there was no particular reason to leave the car in that location. Appellant walked into Recreation Park, an 18-hole golf course, went through "Little Rec," a 9-hole course, and slept nearby at the Colorado Lagoon. (RT 1237-1240, 1243-1244, 1275-1279, 1311) Appellant then indicated he was getting sleepy, and the interview was stopped and appellant transported back to jail. (RT 1240-1241)

The interrogation resumed the next morning at 9:45 a.m.; appellant was asked if he remembered his rights, appellant said he did, and agreed to continue. Kriskovic told appellant he would be charged with all the DNA cases and, if convicted, would face a long prison term, possibly life. Appellant said he wished none of it had happened, and that he knew what he was doing was wrong when he was doing it; Kriskovic asked him what he meant by that, appellant said wasn't it obvious he was making all of the bad decisions and wrong choices. Kriskovic asked if raping women was wrong; appellant said he knew it was wrong. Kriskovic asked if doing these things was contrary to the way his mother had raised him; appellant said yes. Kriskovic asked how appellant prepared himself when he entered his victims' homes; appellant said sometimes he would enter the home, then undress, and would usually ask the victims to give him ten minutes to dress inside the house and leave. Appellant said he never stole anything from his victims. (RT 1241-1243, 1282, 1289) Kriskovic asked appellant about the attack on Rosalie M.: appellant said a friend named Donovan Seeks or Sikes dropped him off near the Hilton in Huntington Beach, where he planned to meet other friends. Instead, appellant walked into the nearby trailer park, and broke into Rosalie M.'s trailer through her window; Rosalie M.'s trailer was located near the rear of the park. (RT 1244-1245)

According to Kriskovic, when questioned about the Gloria C. attack, appellant said it was possible he'd taken some of the louvered panes from her kitchen window, but if he did, it was not because of fingerprints. When asked about the attack on Francine J., appellant said he had never worn a "cock ring." When asked if he orally copulated his victims, appellant said he hadn't; when asked if he'd forced his victims to orally copulate him, appellant said he hadn't; later,

appellant said maybe he had. He then indicated he had worn a cock ring once, and that the ring had been given him by an acquaintance. When asked if he'd ever identified himself to his victims, appellant said he didn't remember, asked what names the victims recalled, then denied identifying himself as Max or Tito to any of the victims. (RT 1244-1246, 1309-1310)

Appellant was asked if he had ever come across dogs during these attacks; appellant said he had sometimes, was afraid of the dogs, but would continue and try not to let the dogs bother him. Appellant remembered a large dog on the back porch of the home where the back door was open (Carol R.); Kriskovic asked appellant if that's why he left by the bathroom window rather than the back door, and appellant said yes. (RT 1247) When asked about the Betty W. assault, appellant said he'd been dropped off in Huntington Beach by friends, found a home, went through a window, undressed, and attacked the woman: her telephone went flying out of her hands and her glasses fell from her face. Appellant said he did not rape the woman, and, in response to the detective's question, said he was not wearing a G-string. Appellant said generally he wore shoes, hiking boots, thongs, or tennis shoes, and was not necessarily always naked. (RT 1247-1249) Appellant covered the women's faces with anything handy, whether it was their nightgown or a sock. Sometimes appellant would unscrew sensor lights. There was a break at 11:21 a.m., the interview resumed at 11:40 a.m., now with a tape recorder present, for purposes of summarizing the previous interrogation. Appellant can be heard on the audiotaped confession responding to something Kriskovic is doing by saying, "So you're saying to say yes?" (RT 1249, 1258, 1262-1263, 1289-1291, 1303-1304)

During questioning, appellant asked if he could speak to his mother personally because he did not want her to find out about his arrest from the media. Mrs. Rathbun was brought to the station, and met with her son for fifteen minutes. Afterwards, Kriskovic spoke to Mrs. Rathbun, who was crying, visibly upset and shaken. Kriskovic gave her a drink of water; Mrs. Rathbun said appellant would have to pay for what he had done. (RT 1249-1250, 1342)

Appellant's Interrogation/Confession: Taped

In the transcribed portion of appellant's interrogation,<sup>26</sup> Kriskovic reviews appellant's arrest and transportation from Oxnard to Long Beach, indicating appellant was advised of his rights during the drive, and again by Kriskovic, and had waived his rights. Appellant acknowledges the waiver. Kriskovic states that they "talked" for a few hours "into this morning," and that appellant was brought back and "talked to" for a few more hours, and that now she wants to summarize "a bit" of what was discussed: there are thirty-one incidents the police believe appellant is responsible for, and thirteen cases where he has been "matched on DNA positively." Kriskovic reminds appellant he is facing a lot of prison time, but notes appellant has been "a gentleman" in talking to the detectives. (CT 906-908)

Kriskovic asks appellant if he was in Seattle in 1996, and if he returned to Long Beach "probably the first or that same week of January 17, 1997." Appellant indicates he was, and did; appellant agrees with Kriskovic's statement that he does not remember specifics about the January 1997 case, or of the "following four" cases, or of the May 1998 case, or of the "four more incidents leading up to" the "next DNA case" on July 31, 1998, or of that case. (CT 908-909) With regard to the September 18, 1998 "DNA case," Kriskovic states appellant remembered and told the detectives a German Shepherd or large dog was on the porch, just outside the door "that you were exiting from inside her residence... and that dog scared you, to where you altered your route and you went out in the same manner that you entered [...] through an open window," but that appellant doesn't remember any other specifics. Appellant agrees. (CT 909-910)

Appellant also agrees with Kriskovic's statement that he does not remember specifics of the November 33, 1998 DNA case; Kriskovic notes there were "a couple more, two," then another DNA case on August 21, 1999, about which Kriskovic said appellant had remembered involved an elderly woman with a colostomy bag. Appellant did not respond; Kriskovic prompted appellant again, and appellant said, "You, you were the one that said that to me, the whole time. You brought that to my attention, the whole time." When

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<sup>26</sup> As redacted for the jury. (CT 906- 934; RT 1091-1101)

Kriskovic asked if appellant remembered her having a colostomy bag, appellant said no, when Kriskovic asked if appellant knew what a colostomy bag was, appellant said he had no idea. (CT 910)

Kriskovic noted appellant could give no details on the April 2, 2000 DNA case, despite the fact “you understand that you’re [sic] DNA profile is an exact match.” The same was true for a June 11, 2000 DNA case out of Huntington Beach. (CT 911) Collette said of the August 21, 1999 case that appellant said he remembered taking the louvers out of the windows; when appellant didn’t answer, Collette asked if appellant was “playing games” with the detectives; appellant said “maybe,” Collette asked if appellant didn’t want to tell them what he’d said before, given appellant had said he remembered “the girl” with the colostomy bag. Appellant responded, “I... That’s what she said earlier.... No, I don’t remember.” When Collette said he’d written the prior statement down, appellant said, “Then why, why don’t you guys read your notes. Your guys already read, you guys asked me the questions.... Read your notes then. You’ll see the answer.” (CT 911) Appellant confirmed that in the Huntington Beach incident, his friend dropped him off at the Hilton, he walked to the rear of the trailer park, entered a trailer and attacked a woman. Appellant acknowledged he unscrewed her outside lights. When Collette returned to the louvers on Prospect, appellant said these were the same questions previously asked, and Collette noted appellant had never answered. Appellant sighed. Collette asked if it was possible appellant took the louvers, and appellant then said, “O, yes, yes.” Kriskovic said “And uh,” and appellant answered, “Yes, yes.” Kriskovic said appellant was asked if he took them, and had said he left them on the property; Kriskovic noted appellant said it was a possibility he’d taken them because the officers couldn’t find them; when asked if that was correct, appellant said, “Maybe... May, maybe.” Appellant said he remembered saying he wore a cock ring on April 2, 2000, and that was the only incident in which he wore a cock ring. (CT 911-914)

Kriskovic said the “next DNA hit” was one of the Los Alamitos victims, and outlined appellant’s previous account of being dropped off in Los Alamitos by a friend around nine or ten o’clock p.m., intending to go to a school football field, getting “sidetracked” to

the trailer park, going through an unlocked door, attacking an elderly woman, and “within five minutes,” making his way to another trailer belonging to another elderly woman, attempting to assault her, leaving her trailer and taking her car; appellant said “yes” to each of these statements. Kriskovic noted appellant drove to and abandoned the car at 4801 E. Anaheim Street in Long Beach, but that appellant does not otherwise frequent the area or know anyone who lives there, and was able to pass police cars on the way without incident. When asked by Kriskovic what kind of car it was, appellant said he had “no idea. It’s been awhile.” Asked if it was a big or small car, appellant said, “Small car, I guess.” Appellant could not remember if the woman gave him the keys or if he found the keys, if it was a single key or a ring of keys. (CT 914-916)

Collette asked if appellant walked through the golf course to Colorado, Kriskovic paraphrased, indicating appellant had showed them a route on the map going through the Long Beach Recreation Golf Course area, crossing over 7<sup>th</sup> Street onto the smaller, “little rec” course, “bunker[ing] down” near the lagoon; appellant confirmed this. (RT 917) “Number 28” on the flow chart was June 2002; Kriskovic said appellant said he wore white socks on his hand, appellant confirmed; “number 29,” a DNA case, was in Huntington Beach: Kriskovic said appellant said a friend dropped him off on PCH near Maine Street, where he met with friends who took him to Bolsa Chica and McFadden, appellant confirmed; Kriskovic said appellant said he entered a home through a window, attacked a woman, sending her telephone and glasses flying, appellant confirmed. “Number 30,” another DNA case, involved a young lady: appellant said he remembered breaking a pot as he was walking through her yard towards the rear of her guesthouse. Collette asked appellant if he kicked it with his foot; appellant said no; Collette asked how it happened; appellant said, “It just happened to be there. I just...”; Collette interrupted, “Knocked it over?”; appellant said, “yeah”; Kriskovic offered, “Or stepped on it?” Appellant said, “Possibly.” (RT 917-919)

Kriskovic asked if appellant went through the kitchen window, appellant said yes, Kriskovic asked if appellant remembered hearing

people in the front house come out after he broke the pot, but before he went into the house, appellant paused, and said yes. Appellant confirmed he attacked the young woman; Kriskovic said, "And I believe you, you said that....," and Collette interjected, "She was tenacious? She attacked you. Correct?" Appellant said yes. Kriskovic said appellant described the woman as tenacious, that she scratched and bit appellant; appellant said no. Kriskovic said that the woman "obviously" fought appellant; appellant said, "Supposedly." Kriskovic indicated appellant denied having scratch marks, and asked if that was because he had a T-shirt over his head; appellant said no. Kriskovic said, "She just didn't scratch you? O.K." Appellant said, "No." (CT 919-920)

Regarding "number 31... the one that was Thursday morning," Kriskovic asked if appellant remembered being stopped and arrested for drug paraphernalia and riding a bicycle without a headlight, and telling the detectives he had attacked a woman in her home wearing a pair of latex gloves he'd found in a trash bin by the Vons/Pavillions near Milikan High School. Appellant agreed he'd entered through a window, and the woman locked herself into the bathroom. Appellant said, "Mmhmm" when asked if he went outside and attempted to reach her through the window, and did not respond to the question whether he then returned inside and attacked her as she was exiting the bathroom. Appellant confirmed there was a struggle; to Kriskovic's question, "And during that struggle, you did not sexually assault her. Is that correct," appellant said, "No." He confirmed she bit his finger, and showed the injury, and confirmed he fled the scene and disposed of the gloves in an alley trash can a few houses away from the woman's home. Appellant acknowledged he signed a waiver form permitting a detective to take a field saliva sample for DNA. (CT 920-923)

When asked if he was aware he was labeled the Belmont Shore Rapist, appellant nodded and said yes. Kriskovic asked appellant if he knew how serious the case was and that he was going to prison for "a long time," yet cooperated anyway, and appellant said yes. Collette asked why, appellant said, "It's the truth," Collette said, "'Cause it's the truth and I think you said you were very sorry for, to the community,

the victims. Remember that?" Appellant said yes. Collette said, "I mean you are very remorseful... And you've apologized to us for all these victims..." appellant said, "Yes, sir," Collette said appellant was on the verge of crying, "cause you feel bad," appellant said, "Yes, sir." Appellant confirmed he had "good intelligence," no mental health problems, and was not on any medication. Collette said appellant said he had "just been making bad decisions and doing hideous things to all these women," appellant said, "Yes, sir." Kriskovic said appellant said he owed a "Great debt," appellant said, "Yes, ma'am." (CT 923-925)

Kriskovic asked appellant about a search warrant which had been executed: appellant confirmed he'd asked the detectives not to bother the couple living at the Ximeno address, that there was just a cardboard box with his belongings in the garage. (CT 925) Appellant acknowledged that he'd found his victims by chance, the detectives' supposition that he'd committed the crimes was not "off base," he "probably did all these" though he could not remember specifics, and wore gloves to protect his hands against scratches or "bits [sic]" from the victims, not to "hide fingerprints." Collette urged appellant to say whatever he felt like saying, reminding appellant that he'd earlier expressed remorse, said he'd made "a lot of bad decisions," and the assaults were "just about sex." Kriskovic reminded appellant she'd asked what sort of statement he would make to his victims, adding, "I don't want to read from what I have in my notes. I want you to speak from the heart." Appellant said, "I said I can't undo what I have done and I sincerely regret and I wish that it had never happened." (CT 925-927)

Appellant confirmed he'd said he did not wear masks, but cut eye holes in beanies and pulled them down over his face, and he'd been stopped by police several times over the past five years, but never after a rape. Collette said appellant said this was although appellant had been close enough to the scenes to see the helicopter and "police activity," appellant didn't respond, Collette asked him if he didn't want to answer, and appellant said, "Well, I'm here now." Kriskovic said appellant said he'd not used drugs during the rapes, except for the one Thursday morning, appellant confirmed; Kriskovic said appellant said he'd just had a "small hit... from the pipe you had in your pocket,"

which was “Speed,” appellant confirmed. Kriskovic said appellant admitted having used Ecstasy, “mushrooms acid,” and marijuana and beer, though not in conjunction with an attack, appellant confirmed. Collette reminded appellant he had been asked why he never hit “those girls who attacked you,” and asked appellant if he remembered his answer; when Collette asked if appellant wanted Collette to refresh his memory, appellant said, “Please do.” Collette said appellant said, “Well, I’ve hurt them enough. I was already doing a bad thing. It was needless to hit them back.” Appellant said, “Yes, sir.” Appellant confirmed he’d never hit anyone. He also confirmed the detectives had explained that he was facing several hundred years in prison and still chose to speak with the authorities, and that they had not threatened him with anything. (CT 927-930)

Appellant asked if his mother knew, and asked if he could have a chance to tell her personally that “I might be gone for a very, very long time.” Collette told appellant they could arrange this, adding that appellant’s mother was “a victim of this too”; appellant responded, “Cause, ‘cause of my wrongdoing, yes.” Collette said appellant’s mother was losing her son; appellant said yes; Collette said, “Isn’t that true,” appellant said, “Yes, sir.” Collette said appellant’s mother was elderly and had cancer, and asked appellant if he loved his mother, and if they got along, appellant said they did. Appellant asked when he would go to court and if he would be defended, and the detectives told him he’d go to court in two days, and an attorney would be appointed. Appellant asked why the recording and “jotting”; Collette said for accuracy, so no one could misunderstand what was said. Appellant asked if the people he offended would be in court, and Collette told him that if the case went to trial, “every girl” would be called to testify. (CT 930-932)

Appellant then said, “Mr. Collette. No BS aside personally.... What do you think of me personally? As yourself, not your job, not your..,” next asking, “Ms. Christine [Kriskovic], in all the cases you’ve seen, BS aside, what do you think of me personally? Meaning honest.” Kriskovic’s answer was redacted; appellant’s subsequent question was, “What do you think of me personally besides that?” Collette said, “Even though my partner Katherine says she has not a whole lot of

regard for you, she has treated you professional, has she not? [] We've had no problems between the three of us whatsoever? Is that true?" Appellant twice answered, "Yes sir." (CT 932-934)

### Trial DNA Evidence

#### Thomas Fedor

Thomas Fedor is a forensic serologist at the Serological Research Institute, a private sector crime laboratory accredited in 1999. Fedor has a B.S. in chemistry and an M.S. in cellular and molecular biology, both from the University of Michigan; he has a diploma in criminalistics from, and is a biochemistry/molecular biology fellow with, the American Board of Criminalistics. He began doing forensic DNA work in 1990, and joined SERI in 1996. Once a year, Fedor attends one or two days of a week-long meeting of the California Association of Criminalists; he keeps abreast of current developments and relevant literature through subscriptions to forensic science journals. (RT 1451-1453, 1555-1558) Fedor testified DNA is the chemical containing inherited genetic information; it is possible to determine how many people in the population at large would have a certain DNA profile, calculated from a collection of population surveys. (RT 1453-1454) In PCR/STR analysis, the numbers assigned to a particular allele refer to the number of times an area of DNA is repeated in that location. (RT 1563-1564) If DNA comes from a single source, the peak heights of a genetic type at any given location should be about the same height: some individuals have genetic mutations which result in peak height imbalances, though typically such imbalances are due to a degraded or improperly stored specimen. (RT 1568-1569, 1619-1620)

SERI's primary precaution against evidence contamination is for analysts to only work on one item of evidence at a time; analysts wear latex gloves and surgical masks when working, and change gloves after handling any piece of evidence. Fedor may change gloves while working to minimize the possibility of DNA transfer, and uses new scalpel blades to cut the samples. Different testing phases are done in different locations to further reduce the possibility of transfer, and evidence moves in a single direction from initial examination to

subsequent examination to disposal. The most common cause of analyst contamination occurs in transferring samples; the mask and gloves are to keep the sample free of analyst DNA. There are extraction samples which act as controls by going through the entire testing process free of DNA, but these would not indicate sample contamination. (RT 1454-1455, 1506-1510, 1545-1547) In 1997, SERI was performing PCR (polymerase chain reaction) analysis, which is a method of copying DNA so very small samples may be multiplied for testing. In 1998, the PCR method used by Fedor was DQ Alpha or DQA1: the DQA1 refers to a particular testing location where individual DNA differs. Five additional markers were tested in subsequent kits which could be subject to amplification. At the time of appellant's trial, there were fifteen different DNA locations which may be tested using Identifiler, a STR (short tandem repeats) system. (RT 1455-1457, 1541-1542, 1582)

SERI received evidence from Dorothy C. on November 5, 1999; Fedor tested that evidence using the DQA1 and Polymarker system in January, 2000: Fedor was able to determine the DNA taken from the breast swab sample did not come from Dorothy C., and generated a profile of the unknown donor. (RT 1457-1458) On January 8, 1999, Fedor tested the Barbara B. right buttocks swab using the DQA1 and Polymarker systems, obtained sperm cells, and generated a DNA profile which was not Barbara B.'s. This profile matched the profile generated from the Dorothy C. sample. (RT 1458-1459) Fedor recovered a mixed sample from Marion J.: the minor components of the mixture appeared to be Marion J.'s, and the major components from another donor whose profile matched the donor in the Dorothy C.-Barbara B. samples. (RT 1459) Using the DQA1 and Polymarker systems, Fedor tested the DNA extract from the Carol R. bathroom window swab and found the same unknown donor. At the time, Fedor did not calculate the statistical chance of two individuals having this same profile. (RT 1459-1460) Fedor also tested Esther R.'s nipple breast swab and discerned a mixture, the major components of which matched the previously-profiled unknown donor.<sup>27</sup> (RT 1460-

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<sup>27</sup> The Barbara B. and Carol R. evidence was received largely in one batch on November 10, 1998, with another two

1461) The remainder of the evidence was returned to the LASD laboratory; in 2003, Fedor re-examined the swabs using PCR-STR technology, as well as examining appellant's blood sample. (RT 1460-1463, 1467)

According to Fedor's analysis, appellant's standard genetic profile at the thirteen tested loci included, at the D3S1358 marker, 16 and 17 alleles, at the VWA marker, a 14, 16, and at D18S51, 14, 14. (RT 1463-1466) As retested, Dorothy C.'s breast swab was a mixture: a mixture can be discerned if there are more than two genetic traits at any one genetic marker.<sup>28</sup> The presence of a Y chromosome indicated the other donor was a male; once Dorothy C.'s profile was deemed the minor donor, due to the relative degree of intensity, the remainder created the major donor profile. The chance a man unrelated to appellant could have been the major donor was one in forty-seven sextillion. There are six billion people on earth. (RT 1467-1471, 1569-1570)

Retesting the Barbara B. sample, Fedor determined the DNA profile from the sperm cells taken from the right buttocks swab matched appellant's; the chance of a coincidental match was one in eight hundred forty-four septillion. Barbara B.'s right and left breast swabs also included appellant's profile, with the same one in eight hundred forty-four septillion chance of a coincidental match. Appellant's random match probability on Barbara B.'s external genital swab was one in seven trillion. Fedor assumed two contributors to the mix. (RT 1471-1475, 1491, 1503, 1605-1607-1608) The Marion J. breast swab

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samples arriving in January; the Esther R., Dorothy C. and Marion J. samples were received on November 5, 1999. (RT 1503-1506)

<sup>28</sup> If a component is less than 10% of the mix, the reaction may not detect that component. Because PCR only amplifies what it detects, small quantities of certain alleles may not be discerned; the analyst would be unaware of this. (RT 1576-1577, 1582-1584, 1591-1592)

was a mixture; appellant's random match probability was one in nine septillion. The Marion J. external genital sample did not test positive for male DNA, and there was foreign female DNA in the sample: at the VWA marker, Marion J. was a 14, 18, and the mixture shows a 14, 18 and a 16, 23. At D21S11, Marion J. was 29, 32.2; there was also 31.2 and 30. Sometimes, with some ethnicities, the Y chromosome does not amplify properly. (RT 1475-1477, 1597-1601) Appellant's random match probability for a portion of the prepared DNA from the fecal material taken from Carol R.'s window was one in eight hundred forty-five septillion, and his match for another portion one in eight hundred forty-four septillion. (RT 1477-1479, 1491-1492, 1502-1503, 1514-1515) The Esther R. nipple swab was a mixture, Esther R.'s DNA was subtracted, and the remaining profile matched to appellant with a one in nine septillion probability ratio. At VWA on Esther R.'s external genital swab, there was a 23 marker which belonged to neither appellant (14, 16) nor Esther R. (14, 15): the sample does not contain sperm, and the male components appear in the mixture to a lesser degree than the female: Fedor could not determine whether the male donor left the 23 allele, or how many people contributed to the mixture. Fedor still matched appellant to the external genital swab sample at a probability of one in nine septillion. (RT 1479-1482) In both the Marion J. and Esther R. genital swabs, there were unaccounted-for 16, 23 alleles at VWA. (RT 1601-1603)

Fedor uses the product rule in making his calculations, which looks to population surveys in determining frequency of genetic types at particular locations. For example, at the D3S1358 location, appellant is a 16, 17, and at VWA, a 14, 16. Assuming five percent of the population has a 16, 17 at D-3 and ten percent have a 14, 16 at VWA, then ten percent of five percent will have both results.<sup>29</sup> As all thirteen markers are included in the calculation, the percentage of inclusion becomes very small. The product rule was recommended by the 1996 National Research Committee, a committee of DNA experts appointed by the National Science Foundation; the rule has been implemented

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<sup>29</sup> Some people have three alleles at certain markers. (RT 1567-1568)

and approved by courts, and Fedor believes it generates accurate statistics. (RT 1492-1494, 1539) The population survey used to calculate the percentages was composed of 200 people. At each test locus, there are typically about ten different possible allele combinations. Appellant and most of the victims share a number of alleles at various genetic markers. (RT 1495-1500, 1614, 1618) The statistical analysis Fedor performed assumes unrelated individuals; the databases are racially grouped. (RT 1525-1528)

Fedor is aware of the Promega Conferences on forensic DNA evidence, though he has not attended any: Promega is a testing kit manufacturer. Attendees include the head of the F.B.I., as well as reputable forensic scientists from around the world. Fedor was unaware of a Promega Conference poster entitled, "A nine STR locus match between two apparently unrelated individuals using AMPFESTR Profiler Plus and CoFiler," though he would not be surprised by such a coincidence. Fedor is aware testing tubes can be contaminated with typable DNA, but indicated he could not have contaminated the tubes here with appellant's DNA prior to its receipt. (RT 1510-1513, 1528-1530, 1534, 1542-1545, 1555)

When the reagent batch controls/extractions were received by Fedor from the LASD laboratory in January 1999, they were contaminated with DNA from an unknown source or sources. It is possible the testing was inadequate to contain all the results for the batch controls, given that the DQ Alpha tested positive and the Polymarker negative. These were not retested with the PCR/STR technology because Fedor established the amount of DNA detected was "of no concern." (RT 1515-1520) The extraction blank on the 2003 Esther R.-Dorothy C. samples was also contaminated: there was a 15 allele at the D-8 marker, a 30 allele at D-2, and an 11 at D-16: none of the individuals tested had alleles at that location. Again, Fedor did not retest or check his list of laboratory analyst profiles as possible sources of this contamination because he felt the amount was insignificant. Extraction tubes are tested last, so any contamination could be potentially diminished by the time the batch controls are processed, however, the possibility of intra-sample contamination is increased. (RT 1521-1524)

If there is a single allele difference between profiles, they come from different sources, absent a technical account of the difference. (RT 1540-1541) The final test results are computer-generated, the product of three different programs that apply various macros to the raw data. All macros are preset; Fedor did not know what the preset analysis was, or how the macros were applied. (RT 1560-1561) According to NRC Guidelines, laboratories should perform validation studies on the testing kits used, and SERI has done such studies on the Identifiler kit, but Fedor has not looked at the studies. He did not know that no mixture study had been done, or the minimum amount of DNA necessary for a reliable result. He was aware that since his testing in this case, the manufacturer of Identifiler had redesigned the kit to eliminate testing artifacts. He did not retest the evidence using the improved kit. (RT 1558-1560, 1565-1567)

On Marion J.'s mixed breast swab sample, there are six peaks (11, 12, 13, 15, 16, 17) at D-8; Fedor's handwritten notes indicate two of the peaks (11, 15) are possible stutter. (Defense Exhibit Y; RT 1570-1571) Stutter is a PCR artifact, and does not represent actual DNA in the sample. Fedor wrote "possible" because those peaks could be DNA, but did not report them as because he did not think they were reliably present, *i.e.*, he thought they were stutter rather than additional DNA. His conclusion was based on the position of the alleles, and their shorter peaks; another analyst could conclude they were real. The Identifiler software has a Kazam macro which is to filter out stutter based on the manufacturer's research; the macro did not identify 11 and 15 as stutter. Fedor did not know what the stutter limit is for D-8; there is no fixed laboratory standard. The Identifiler user manual indicates the limit at D-8 is 8.2 percent. (RT 1571-1575, 1577-1578, 1593-1594) Similarly, at D-21, the computer recognized an allele, meaning there was an allele present of at least 150 RFU intensity. (RT 1579-1580)

Appellant was excluded as a donor from Marion J.'s mixed source external genital swab; Fedor did not report alleles at that location which he deemed stutter, though the peaks were not in what he'd called a stutter position, and certain peaks were the same height as peaks identified as reliable. In that sample, Fedor thought the peaks

were dye blobs or stutter. He also did not report an off-the-ladder allele because he felt it was not reliably-sized, though it was the same size as the alleles he identified as real, which were the same height, on the ladder, and not dye blobs or baseline noise. As a general rule, peaks from the same donor will be within roughly 70% of the same size of one another. However, degradation, amplification, and DNA quantity, as well as number of contributors and the possibility of genetic mutation, all affect peak height ratios, and the individual analyst makes the final assessment, which can vary between analysts and laboratories. (RT 1585-1597, 1615-1616, 1619-1621) In the Barbara B. right buttock swab, the 8 peak identified as appellant's allele at CSF was about 30% of the 11 peak also attributed to appellant; again, Fedor assumed two contributors, though there is no way of telling how many contributors there are to any mixture on the basis of the mixture itself. (RT 1608-1614, 1617-1618) Fedor analyzed appellant's profile before testing the Marion J. sample. (RT 1579)

SERI analysts perform regular proficiency tests, monitored by an outside agency. The laboratory does not keep records of its error rate, or of individual analyst error rate. Once, Fedor switched tubes in a proficiency test, testing the same sample twice; the error was brought to Fedor's attention via defense cross-examination in another case; such an error could not be detected in evidence testing, as the results would not be subject to verification. (RT 1622-1626)

#### Dr. Paul Coleman

Dr. Paul Coleman is a criminalist at the Los Angeles Sheriff's Crime Laboratory, assigned to the forensic biology section; his primary job responsibility is performing DNA analysis. He has worked at the laboratory since 1989, becoming a DNA analyst in 1991. In 1968, Dr. Coleman received a B.S. in biochemistry from the University of California, Berkeley, and his Ph.D. in biochemistry from the State University of New York, Buffalo, in 1972. From 1972 to 1976, he performed post-graduate research at Columbia University, and currently has a faculty appointment in the Pathology Department at the University of Southern California Medical School. Dr. Coleman took the F.B.I.'s month-long forensic DNA class, has participated in numerous seminars and performed many validation studies at the

LASD laboratory. (RT 1629-1631) Precautions taken by the LASD laboratory to avoid contamination include analyst latex gloves, face masks, lab coats, and laminar flow hoods, which direct air flow back towards the analyst. (RT 1631)

In 1999/2000, using the Profiler Plus and CoFiler kits, Dr. Coleman identified a genetic profile from the DNA extracted by Renteria from what was labeled a "carpet" sample in the Gloria C. case; on February 4, 2000, Dr. Coleman issued his report, which indicated a male donor, and profiled that donor. Dr. Coleman testified the profile was identical to appellant's profile. (RT 1631-1639, 1645-1646) There was no yellow carpet or rug taken in the Gloria C. case: the property report indicates a plaid blanket was seized. (RT 1640-1641) On item 1-E, both Dr. Coleman and another analyst identified an allele at D-21, which both later discarded as unfiltered stutter; on item 2-E (the carpet/blanket), Dr. Coleman initially identified five alleles, striking out one; the other analyst also struck one, but Dr. Coleman could not recall how or why those decisions were reached. If it was an allele, it would have come from a minor contributor, though other alleles also came from minor donors. (RT 1642-1653)

Dr. Coleman takes biannual proficiency examinations; he does not know if anyone at the laboratory has made an error, and believes the laboratory error rate (instances of incorrect genotyping) is zero. (RT 1653-1658) If there was some reason to suspect testing error, such as DNA manifesting in the reagent/control batch, the test would be invalidated and rerun. (RT 1659-1661)

#### Edward Buse

Edward Buse is a forensic scientist with the Orange County Sheriff's Department Crime laboratory, where he has worked since 1990. Buse has a B.S. in chemistry and a 1995 master's in biology from UCLA, and attended the F.B.I. training classes. (RT 1672) The OSCD crime laboratory takes various precautions against contamination, including sterile gloves, and use of a single-flow model in testing. (RT 1673-1674) The OCSD laboratory performs proficiency tests, but has no error rate. Base was unaware of any false matches. (RT 1739)

Using a Profiler Plus kit with an AB 310 Genetic Analyzer, the laboratory tested the male DNA extracted from vaginal swabs taken from Rosalie M.<sup>30</sup> A single source profile was generated, and, according to Buse's July 26, 2000 report, this profile was identical to the profile generated from the Gloria C. carpet/rug stain sample. (RT 1675-1679, 1682) Using the F.B.I. database, Buse calculated the random match probability in the Caucasian population was one in some quadrillion: the laboratory does not perform exact calculations past the trillion mark. (RT 1681, 1684-1685) In 2003, Buse compared the Rosalie M. sperm sample profile to appellant's profile, and the match statistic was one in 100 quintillion in the African-American and Southeast Hispanic databases, and one in one septillion in the Southwest Hispanic Database. (RT 1683, 1700-1701)

In August 2003, Base also analyzed the Betty W. samples; the right palm sample was a mixed source sample: Base examined the mixture, determining which were true alleles, decided there were two potential donors, then determined those profiles. One donor was male; the female/major donor profile was consistent with Betty W.'s, the minor donor profile consistent with appellant. At VWA, there is a 15, 16: Betty W. is 15, 15, appellant 16, 14: there was some 14 present, but fell in the stutter position.<sup>31</sup> Neither analyst who initially reviewed the data indicated the 14 was a true allele. (RT 1685-1692, 1708-1710, 1712-1717) Base accounted for the VWA ambiguity by calculating all possible allelic combinations at that locus, finding the chance someone other than appellant was the donor was one in 626 trillion in the Black database, one in 18 quadrillion in the Caucasian database, and one in 13 quintillion in the Southwest Hispanic database; someone of mixed ethnicity would fall somewhere between these frequencies. Base justified inclusion of the VWA marker because although the 14 stutter

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<sup>30</sup> Another analyst tested the sample in September/October 2002, and yet another later tested the sample using the CoFiler kit. (RT 1682, 1707, 1709-1714, 1726-1727)

<sup>31</sup> Base testified stutter was present "greater than 95 percent of the time." (RT 1706)

peak was smaller than what the laboratory deems an allele, it was “a very large peak,” “barely below” the stutter cutoff, and a masked or minor peak might lie beneath. The laboratory does not use a stutter filter, using its own guidelines for determining stutter. If the VWA marker were disregarded, the frequency would still be rarer than one in one trillion, but the practice of the laboratory is to include an allele for statistical purposes which would not be designated an allele for allele-identification purposes. (RT 1693-1694, 1701-1706, 1716-1722, 1730-1731) The same sort of calculation was done at FGA, D-18, D-5, and D-13: for example, at FGA, the unknown donor was a 22, and there was a visible 25 peak: had the analyst determined the donor profile at FGA was 22, 25, appellant (22, 21) would have been excluded. (RT 1722-1725)

Before appellant’s arrest, the OCSD laboratory had concluded the same male donor had contributed to the Betty W. and Rosalie M. samples, but there was not a match at the VWA marker on the Betty W. sample. (RT 1699, 1701-1714) There are testing overlaps between the Profiler Plus and CoFiler systems: at D-7, there were two different alleles reported in the two tests. The allele reported by the Profiler Plus and used to declare a match was below the laboratory’s 100 RFU cutoff value, designed to remedy things like background electronic noise in the AB 310, which can look like peaks. (RT 1726-1729) Using the OCSD laboratory’s statistics, the Promega Conference’s nine marker match abstract would have a match likelihood of one in 100 billion, even though the individuals were unrelated, and of different races. The black and white donors sampled also shared an allele at three of the remaining four loci. Base did not think this was relevant to the accuracy of his statistical analysis. (RT 1733-1738)

#### Richard Gustillo

Richard Gustillo is a forensic scientist with the Orange County Sheriff’s Department Crime laboratory; at the time of trial, he had been so employed for five years, performing DNA analysis for three. Gustillo has a B.S. in molecular cell biology and a master’s in public health from the University of California, Berkeley, and has had intra-laboratory DNA training. Gustillo follows the same anti-contamination procedures as Base. (RT 1746-1748)

On May 11, 2002, Gustillo analyzed the Margaret G. samples using the Profiler Plus and CoFiler tests; a male donor was detected in the mixed right breast sample. Margaret G.'s profile was deduced out, and a minor donor profile generated. Gustillo compared that profile to appellant's and could not exclude him as a potential donor. The match statistics were one in one trillion, indicating the laboratory limit. (RT 1748-1752, 1756)

Gustillo examined the data from the Louise H. samples; there was a minor profile on a neck sample in which some alleles matched Margaret G.'s alleles: Margaret G. also could not be excluded as a possible donor, suggesting a secondary DNA transfer. The match statistic was one in 11,000, a "very insignificant" number. Because the sample was an intimate sample, Gustillo used Louise H.'s profile to deduce out the major donor profile. (RT 1752-1756, 1765, 1767-1770) Louise H.'s reference sample FGA was reported to be a 22, 22, but her neck swab major donor profile was 22, 24. At D-3, the deduced minor profile was 16, 16 or 16, 17, or 15, 16. There were at least twelve, and probably over one hundred, different genetic variations which could have been created from the deduced minor profile. (RT 1756-1763) The laboratory submitted the results of the breast swab to CODIS, resulting a possible match to a vaginal swab sample from Huntington Beach. (RT 1771-1772) Gustillo reviewed the data for Rosalie M., determining there was enough material left for retesting. (RT 1754)

#### John Bockrath

John Bockrath is a senior criminalist with the LASD Scientific Services Bureau, assigned to the forensic biology section of the crime laboratory; he has a bachelor's degree in physiology from the University of California, San Diego, received intra- and inter-agency training, and has worked for LASD for about eight years. Bockrath follows the LASD laboratory's anti-contamination procedures. (RT 1773-1776, 1853-1854)

In 1999, Bockrath screened the Dorothy C., Barbara B., Marion J., Carol R., Esther R. (Does #1 through #5) evidence samples received from Long Beach police, testing for the presence of biological fluids, then transferred those samples to SERI for DNA analysis.

Semen was detected in the Carol R. window sill sample, and DNA extracted. Post-testing, SERI returned the samples to the LASD laboratory, which sent the samples back for retesting in 2003, with appellant's reference sample. (RT 1776-1782, 1813) All items of evidence were delivered to Technical Associates, the defense-appointed laboratory, for retesting in August, 2003. (RT 1817-1819)

Bockrath analyzed evidence from Gloria C.: single source male DNA was extracted from the item listed as a carpet stain, and matched to appellant. The match frequency was one and 204 quintillion to 9.7 sextillion. (RT 1783-1788, 1790, 1792, 1809, 1820, 1822-1825) Mixed source DNA was extracted from the vaginal swab samples and another carpet sample; Bockrath examined the analyses results: appellant was not excluded as a donor, though no match frequencies were calculated. (RT 1792-1794, 1842-1843)

Bockrath analyzed the Francine J. right shoulder sample was a female sample, the breast samples were mixed male-female samples, and a male donor profile was generated based on comparison of Francine J.'s profile to those mixtures. Appellant was identified as the major donor of the breast swab samples; the match frequencies were one in 204 quintillion to 9.7 sextillion. The laboratory does not consider this a mixed sample because the male sample is extracted. (RT 1794-1798, 1843-1847, 1854-1861) Bockrath testified an exclusion is defined as "the absence of information showing the individual is present in the sample entirely." (RT 1850)

A male donor was detected in the Marilla M. vaginal swab sample, appellant identified as the donor, and the match frequency calculated at one in 204 quintillion to 9.7 sextillion. The female DNA was the victim's. Blood stain samples were taken from a sock and pillowcase, mixtures detected, and appellant identified as a potential donor. No match statistics were calculated. (RT 1798-1801) The Vicky Sue B. nail cuttings, finger swabs, and pajama bottom and top blood stain samples were screened: a single-source male donor profile was generated from the pajama bottom blood stain sample, matching appellant at a frequency of one in 204 quintillion to 9.7 sextillion. The other samples were analyzed; appellant was not excluded as a donor in any of them. Bockrath did not write the Vicky Sue B. report; if he had,

he would have excluded appellant as not all of the genetic markers are present: from the palm sample, appellant is a 28, 31 at D-21, and the sample shows a 30. Four loci have no information; there are multiple interpretations of the sample inconsistent with appellant. (RT 1801-1804, 1848-1853) Four latex gloves, one pair inside another, from the Adler case were screened, and a single source profile generated from the index finger blood stain sample on one glove which matched appellant. A middle finger blood stain sample on another glove matched Julie A. Bockrath did not know which hand either glove came from; the gloves were also generally swabbed and tested, and mixed source samples found: it is a possibility that in swabbing the gloves, the mixture was created. (RT 1805-1807, 1825-1829)

The laboratory generally does not calculate match statistics from mixtures, though TWGDAM guidelines recommends doing so. (RT 1845-1846) All calculations were done using the FBI database. (RT 1808-1809) The Gloria C. sample was used as the male donor profile sample for comparison purposes. Bockrath did not report a male donor profile, or a statistical report, in the Gloria C. case until after looking at data from the Francine J. case. (RT 1856-1861)

#### Defense Case

#### DNA Evidence

#### Dr. Elizabeth Johnson

Dr. Elizabeth Johnson is a consultant in forensic biology/forensic DNA; she has worked in forensics for thirteen years, including as a senior forensic scientist at Technical Associates, a private laboratory, and as director of the Harris County Medical Examiner's DNA laboratory in Houston, Texas. Dr. Johnson has a B.S. in chemistry from Wallford College, and a Ph.D. in immunology from the Medical University of South Carolina, and did four years post-graduate work in molecular biology/gene expression. She has performed many thousands of DNA tests, and is familiar with the various PCR/STR tests used in appellant's case. Dr. Johnson is a member of the American Academy of Forensic Sciences, and regularly attends national meetings of DNA scientists and the Promega international symposium.

(RT 1889-1892) Dr. Johnson did not review the testing in appellant's case. (RT 1892)

Dr. Johnson explained the basic double helix structure of DNA, its inherited composition, and how DNA tests sample genetic regions, which are composed out of a few thousand base pairs from the three billion base pairs which make up one person's entire DNA strand. Most of the DNA molecule is the same among individuals; those small regions of variance is what forensics examines. DNA from the same gene pool is even more similar. DNA is located in the cell nucleus; dead cells have no nucleus, and red blood cells no nucleus containing DNA. (RT 1892-1895) PCR is a method of DNA copying: the two-strand DNA molecule is unzipped, a chemical introduced which binds to each strand, this strand copied by a thermocycler, and the process repeated until the sample amount of DNA is multiplied billions of times, enabling testing. A laboratory can use as few as ten to twenty cells to detect DNA: this low detection level makes the system very sensitive to contamination, especially contamination by other evidence, either in the laboratory or at the crime scene. (RT 1895-1897) STR refers to the repetition of base codes in sequence, which shows up in DNA charts as a peak, measured by the number of times the sequence is repeated. There is a difference between length and sequence, so someone could have the same length or number of repeats, but in a different order than another person; this is not detected by Profiler Plus/CoFiler or Identifiler. (RT 1897-1900)

No one knows what causes stutter: as the polymerase copies the strand Stutter is an artifactual peak, but the only way of knowing a particular peak is an artifact is if there is a single source sample which can be used as a reference sample. If it is not an artifact, then a mixture is indicated. There are guidelines based on validation studies used in determining stutter, such as peak height that is ten percent of a primary peak. As primary peaks get higher, more stutter is expected. (RT 1900-1903) Mixtures are preliminarily detected by the presence of more than two peaks at any locus; once a mixture is determined, stutter needs to be identified. A minimum of two contributors to the mix can be assumed, but there can be no certain maximum. It is usually safe to assume an intimate sample will contain DNA from the person it was

collected from, but this does not mean that profile should be subtracted out to see what remains. Depending on the relative contributions to the mixture, it may not be possible to subtract one donor type: a 50/50 or 70/30 mix will not produce enough difference in peak height to warrant assigning peaks to a particular profile which can then be subtracted. The best way to deduce mixture profiles is to analyze them in the absence of a reference sample, as such samples lead to examiner bias: it is “very easy” for an analyst, knowing the reference profile, to read that profile into the evidence. Potentially correct interpretations are discarded in favor of identifying the victim or suspect profile. (RT 1904-1909)

The practice of designating major/minor profiles varies between laboratories; the notion someone cannot be excluded as a contributor simply means the analyst cannot tell if the person is included in the mixture, though there are indications against inclusion. (RT 1909-1911) Nor can profiles be accurately deduced from three- or four-allele mixture locus, even taken from an intimate source sample: if, for example, the sample was 7, 8, 9, and victim a 7, 9, the perpetrator could be any combination including an 8: 7, 8 or 8, 8 or 8, 9. If there was a suspect who was a 8, 9, you would not be able to tell if that suspect was really the perpetrator. If the sample showed four alleles not drastically different in height, it would be impossible to tell which pairs went together: if there was a 10, 11, 12, and 13, it could be 10, 11 and 12, 13, or 10, 13 and 11, 12. Peak height is not an indication that alleles are pairs because as DNA is amplified, the predicted ratio of equal peaks falls apart, creating peak imbalance. This is sometimes due to one allele amplifying more efficiently than another, sometimes due to genetic mutation. (RT 1913-1916)

In one mixture interpretation study by Margaret Klein of the National Institute of Standards and Technology, which produces standard reference material for DNA testing and controls, mixed source samples were sent to forty-five different laboratories, and various interpretive errors reported; another mixture interpretation error study was done by Drs. Carl Ladd and Henry Lee, both reputable forensic scientists with the Connecticut State Police Crime Laboratory, published in the Croatian Medical Journal, and one published at the

American Academy meeting. The Orange County crime laboratory was one of the study participants. (RT 1919-1923) Laboratory errors, such as incidents of contamination, are published via conference posters/presentations and inter-laboratory discovery throughout the forensic community so such errors can be recognized and avoided by other laboratories. Some errors are impossible to detect, including errors which are not reviewable by an overseer because they do not appear in the laboratory reports, such as mislabeling or sample switching, and errors due to prior contamination of evidence, as when a lab tests evidence contaminated at a crime scene, or retests evidence contaminated at another lab. Contamination may be present even if the blank is not contaminated; evidence been contaminated by the presence of other evidence a week earlier. (RT 1938-1942) The Promega Conference poster concerned a thirteen-locus test in which unrelated donors matched at nine STR loci, and one allele at four remaining loci. The significance of this match was both donors were incarcerated in the Arizona prison system, meaning the involved database was relatively small, and the statistical probability of such a match remote – somewhere around one in seventy-five million. (Def. Exh. WW) A subsequent study found three more pairs of inmates who matched at nine loci; again, the statistical probability of this would be in the billions (the Hispanic match was one in 110 billion, another match one in 2.1 billion). The study demonstrates the gap between mathematical computations and reality, as well as suggesting a problem with the random match probability equation relative to a small database. (RT 1943-1951, 1956-1957) Following correct laboratory protocols does not necessarily lead to accurate separation of mixed samples. DNA evidence can be retested; Dr. Johnson did not retest the evidence in this case, or review reports relating to that evidence. (RT 1953-1955)

#### Dr. Laurence Mueller

Dr. Laurence Mueller is a professor in the Department of Ecology and Evolutionary Biology at the University of California, Irvine; his research focuses on population genetics and evolutionary biology. Population genetics studies the genetic variation within groups of individuals, and trying to understand the forces that cause different

populations in different locations to become different, and why individual populations change relevant proportion of genetic variations over time. Forensic DNA typing uses principles and techniques from molecular genetics with regard to extraction, typing and comparison of DNA samples, and tools of population genetics to understand the statistical chance of another random person sharing that genetic pattern, or the value of the match. (RT 1976-1977) Dr. Mueller received his B.S. in chemistry and a master's degree in biology from Stanford University, and a Ph.D. in ecology from the University of California, Davis; he is a member of the Society for the Study of Evolution and the Ecological Society of America. Among Dr. Mueller's publications are two chapters in books on forensic DNA typing, one in an ecological theory book, around seventy-five articles in peer-reviewed journals, five in the area of population genetics and statistics; he is editor of the journal Population Ecology, and reviews publications for approximately two dozen journals, including Science Proceedings of the National Academy of Sciences and Genetics, American Journal of Human Genetics, Genetica, and Theoretical Population Biology, and has acted as a study evaluator for a number of granting agencies, including the National Institute of Health and the National Science Foundation. He was invited to both National Research Councils to speak on DNA typing, has testified as an expert in forensic DNA statistical and interpretation analysis over one hundred times. As a population geneticist, Dr. Mueller uses the same sort of calculations and statistics used in forensic DNA analysis. (RT 1978-1982)

Dr. Mueller was familiar with DQ Alpha Polymarker, Profiler Plus and CoFiler kits. He reviewed the reports on the evidentiary samples from the three testing laboratories, including supporting documents indicating how calculations were performed, proficiency tests and laboratory protocols contained in the laboratory manuals. He did not examine the electropherograms. The focal point of Dr. Mueller's review was to see if proper statistics were calculated based on the samples as analyzed by each laboratory. Laboratories should establish formal criteria for determining allelic matches because those criteria will be relied upon in assigning reliable match statistics(RT 1982-1987)

None of the crime laboratories in this case had protocol which would provide sufficient detail for analyzing mixtures to prescribe match criteria in all cases. A mixed sample definitionally contains at least two people; there is no definitive way for telling what the maximum number of contributors could be, given the possibility of allelic overlap. There are several proposed calculations other than random match probability for generating a statistic that would account for all possible mix contributors, each proposal assuming that all alleles appear in the mixed sample. (RT 1987-1990) In appellant's case, a number of genetic markers indicated at least two alleles in were known to be mixed samples. The difficulty then lies in determining which allele or combination of alleles came from which person: each person might have two copies of different alleles, though usually there is overlap. For example, if a mixed sample shows a 16, 17, and the victim is a 16, 17, then the other donor could be a 16, 16, or a 17, 17, or a 16, 17: statistically, all possible types, including the victim's, would have to be included. It is not scientifically valid to pick out major and minor profiles in a forensic setting and perform a statistical analysis of either profile in isolation because of the high error rate: mistakes are made in identifying minor donors up to 30% of the time, and the certainty of the analyst in the accuracy of the test is not an indicator of the actual accuracy of the test. (RT 1990-1993)

None of the testing laboratories performed accurate calculations in appellant's case: the match definition used by SERI was not sufficiently precise to allow an unambiguous definition of what constitutes inclusion. OCSD has the same problem, as demonstrated by samples where analysts use "novel" match criteria, applied inconsistently in the statistical analysis. For example, in the Betty W. case, the VWA locus did not have a recognizable allele that appellant has; the normal genetic definition of a match is that all of a person's alleles, *i.e.*, his entire genetic profile, must be present in the evidence sample. The OCSD analyst continued to include appellant as a possible contributor even though one of his alleles was not present; the statistical modification the laboratory then used was improper because it did not modify the equation for all genetic markers. If a more flexible definition for a match is to be used, it must be used at all loci, not just those needed to match a particular defendant. Additionally, the x-

factor equation used did not account for all possible types which the laboratory might call inclusions: if the sample was 15, 16, and appellant was 14, 16, and was not excluded though the 14 allele could not be reliably counted, a consistent statistical approach would be to also include 15, 14, or 15, x in the overall calculation. Failing to do this renders the match statistic too rare. (RT 1993-1998) Allelic overlap is expected in mixtures because human beings share a great deal of genetic information, and some alleles tested are quite common. The LASD laboratory did not generate statistics for the mixed samples, which is inappropriate in a court case. Simply indicating there are two genetic samples and that a defendant can't be excluded as a possible donor is not helpful unless there is some indication how many other people might be excluded. The existence of a single source sample does not affect the statistical inadequacy because each sample must be analyzed separately: single source samples don't ameliorate mixed sample issues. Dr. Mueller did not recall the LASD laboratory having a written protocol to the effect that statistics should only be calculated for single source samples. Some other laboratories will extract a minor donor profile and assign a statistical significance, though there is a laboratory in Connecticut which refuses to do such calculations because they cannot be done reliably. (RT 1998-2000)

The nine-loci match phenomenon implies that other small database calculations are not necessarily as reliable as previously thought, and that in interpreting DNA patterns, analysts must look at each locus individually and not be swayed by previously matching loci. There is nothing in thirteen-loci testing that would make it more immune to the same sorts of discoveries. (RT 2000-2003) Error rates, or false positive matches, can be calculated for forensic laboratories based on proficiency testing conducted by an outside agency. Dr. Coleman's statement that the LASD lab had a zero error rate was inaccurate because it did not reflect how error rates are computed: the zero needs to be a zero of another number. As zero usually means less than one, the laboratory would have to indicate whether it was less than one in one hundred, or less than one in a quadrillion. For a lab error rate to be wholly negligible, it would have to be less than one in a quadrillion. This would give the correct confidence interval (*e.g.*, 99% accuracy) for the type of proficiency test done. (RT 2003-2006)

According to standard statistical calculations, the LASD analysts could have made 360 errors in their proficiency tests; none were made, leading to a confidence interval of 95% that there are fewer than one error in 120 chances, or samples tested. For the Orange County laboratory, there was a 95% certainty the error rate was less than one in 89 samples tested. For Tom Fedor at SERI, approximately one in 68, as there was one false match made: the exact error rate could be as high as one in 13 or as low as one in 2700.<sup>32</sup> For court purposes, the type of error is less significant than the fact of error, and the error rates here are typical of the industry. An error rate of one-in-hundreds/thousands of tests affects the random match probability statistic insofar as that statistic may be a product of either computational error (someone other than the defendant was the donor) or technical error (the samples were erroneously processed/interpreted). False matches are rare, but do occur. The random match probability statistic does not mean there is only one person in 844 septillion who has this profile, but rather reflects the chance that an unrelated person randomly selected from the population would share this profile. (RT 2006-2012) NRCII rejected the combination of error rate with match probabilities, and recommended retesting as the best error protection. Dr. Mueller did not combine the error rate with the match probability, but rather calculated them separately and indicated the relationship between the two numbers needed to be considered in context. NRC recommendations are followed to varying degrees by the forensic community; a number of reputable forensic scientists disagree with NRCII about error rate calculation. (RT 2012-2014, 2017-2020)

Based on the analysts' interpretation of the evidentiary samples, the Barbara B. right buttocks sperm, Gloria C. carpet stain, Rosalie M. vaginal swab sperm, Marilla M. vaginal swab/male

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<sup>32</sup> Dr. Mueller analogized the error rates shown by periodic proficiency tests to a batter who gets a hit at each of his first ten at bats: he is batting a thousand, but the more games played, protection statistics (and real-life experience) demonstrate his batting average will drop. (RT 2013, 2020-2022)

fraction, Vicky Sue B. pajama blood stain, and Adler index finger blood stain samples provided matched appellant's reference sample. The random match probability calculation on the Julie A. sample was accurate using the standard formula and data base. (RT 2014-2017) These matches, and their statistical significance, do not alter the importance of either lab error rates or the protocol for interpreting mixtures. (RT 2022)

#### Non-DNA evidence

The sexual assault nurse examiner who examined Julie A. on November 7, 2002, prepared a report based on that examination and on the police officer's contemporaneous interview with Julie A. (RT 1967-1970) At that time, Julie A. described her attacker as a thirty-year-old Hispanic male, and said she'd locked herself in the bathroom, he'd kicked the door in, and they'd struggled: she bit the knuckle of his index finger and kicked him. Julie A. also said when she tried to escape out the bathroom window, she saw her attacker's face there. Julie A. told the officer and the nurse that during the assault, she kept trying to turn and see what the assailant looked like. Julie A. described the man as wearing a black shirt tied over his head, and black pants. (RT 1970-1975)

The officer who swabbed appellant when he was detained on November 7, 2002 told appellant he was being swabbed because of sexual assaults in the Long Beach area: appellant was cooperative, signing a consent form after it was read to him. There were two other men in the area also interviewed by police that evening. (RT 2034-2039) Appellant did not attempt to flee the area during his surveillance. (RT 2040-2041)

It was stipulated Margaret G. told police her attacker was a man, 5'6" to 5'7", 160 to 170 pounds, dark hair, "muscular," with a thin build, "very powerful." She described his hair as "a bird's nest with a part in the center of his head, and the rest combed back." (RT 2042) It was also stipulated that when police asked Louise H. if she was sexually assaulted, she said no. (RT 2042-2043)

Detective Kriskovic testified the protocol for responding to a sexual assault report includes a forensic team going to the scene, looking for trace samples at the relevant locations, such as fibers and hairs, and dusting for fingerprints. Any other items which might contain evidentiary material might be collected and sent to the laboratory for further examination. (RT 2043-2051) The laboratory return on the Dorothy C. case indicates hairs and fibers were collected from her clothing; in each of the charged cases, this sort of evidence would be sought. Nothing like this was introduced. Depending on the case, either members of the Long Beach police or the Los Angeles Sheriff's Department would be responsible for collecting and preserving such evidence. Two locations linked to appellant were searched, and 83 oral swabs taken from other possible suspects, one of whom was also named Rathbun. According to the reports received by the detective, those suspects were excluded. (RT 2051-2056)

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