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Dept.: C29

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ORANGE, CENTRAL JUSTICE CENTER

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

vs.

LYNN DEAN JOHNSON,

Defendant.

Case No.: M-17196

MOTION TO COMPEL DISCOVERY AND TO PERMIT INSPECTION AND COPYING OF RECORDS

TO: THE HONORABLE JULIAN W. BAILEY, JUDGE OF THE SUPERIOR COURT; AVERY HARRISON, DEPUTY ORANGE COUNTY DISTRICT ATTORNEY:

NOTICE IS HEREBY GIVEN that on July 15, 2020, in Department C29 of the above-entitled court, Defendant Lynn Dean Johnson, by and through his attorney, will request an order compelling the Orange County District Attorney's Office ("OCDA") to provide the discovery requested on June 10, 2020, as well as to facilitate the inspection and copying outlined in the same request.

SUMMARY OF BACKGOUND AND ISSUES

Defendant is currently serving the sixteenth year of a life without possibility of parole sentence. This motion seeks post-conviction discovery in expectation of the defense filing a writ of habeas corpus to the California Supreme Court seeking a new trial.

In 2017, Defendant detailed a series of extraordinary events leading to the discovery that the key forensic expert in his case, former Orange County Crime Lab criminalist Mary Hong, flip-flopped on the critical issue in his 2008 trial, providing irreconcilably inconsistent testimony about her ability to estimate the *timing* of *semen deposited* in a victim or found at a crime scene, henceforth referred to as "TSD." In 1985, before Johnson was connected through DNA as the source of semen found in a murder victim Bridgett Lamon, a second criminalist named Daniel Gammie wrote a report in which he concluded that testing indicated that collected semen was "not deposited at or near the time of death." However, at the guilt phase of Johnson's 2008 death penalty trial, Hong and Gammie repudiated Gammie's earlier opinion, claiming that such findings were no longer considered scientifically valid—clearing the way for Johnson's conviction. Unbeknownst to the Johnson team, one year later Hong testified in a case heard in the very same courtroom, arising from another cold-hit homicide, committed in the same city, also occuring in 1985, and in which Gammie also concluded that the collected semen was "not deposited at or near the time of death." In Wendell Lemond's trial, Hong's testimony supported Gammie's 1985 opinion (who was not a witness this time around), and she embraced the same science she and Gammie repudiated as invalid just one year earlier. Her opinion exculpated a third party, who may have otherwise been responsible, clearing the way for Lemond's conviction.

Based upon these revelations, Defendant requested that the prosecution turn over reports beginning in 1980 in which members of the Crime Lab provided estimates of the TSD. This was logical. In view of the conflict, the reliability of the science and the opinions could be studied by looking at other cases in which TSD opinions like those of Gammie's had been rendered. Additionally, if the science was purportedly invalid and the Crime Lab never bothered to locate reports in which these opinions were rendered, it would support an inference of a Crime Lab wholly indifferent to the implications of failing to locate and reveal erroneous scientific opinions, even though reliance on invalid science could obvisouly support wrongful convictions.

This Court appeared to agree with Defendant's logic, ordering in 2018 that the prosecution turn over all reports with TSD opinions between 1980 and the date of Johnson's 2008 conviction. However, the prosecution fought back, principally through an affidavit by Crime Lab Director Bruce Houlihan. Houlihan seemingly would have wanted to locate invalid scientific reports as much as anyone. Instead, he desired nothing of the sort—and in the process inadvertently revealed that in the decade after Hong and Gammie's testimony in *Johnson* the lab never looked for "erroneous" reports. Moreover, because the Crime Lab purportedly had no clue where it might find TSD reports, Houlihan swore it would require a hugely burdensome hand-search of approximately 3,500 boxes containing between 70,000 and 140,000 files. The Court accepted the sworn affidavit of Houlihan and modified the time span to a period when all parties believed TSD reports were likely no longer being created, and indeed none were provided.

He almost got away with it, and would have perhaps if not for the nation's most famous citizen-sleuth. To be clear, the late Michelle McNamara knew nothing about Lynn Dean Johnson's case—though her role in this case and in illuminating issues surrounding the disparity in access to evidence could not be more important. McNamara's singular focus was on capturing the Golden State Killer,[1] a passion shared by members of the OCSD and its Crime Lab, including Mary Hong—one of the heroes of of McNamara's posthumously published book, *I'll Be Gone in the Dark*. And while Houlihan and Hong refused to speak a word to the defense once the above-described issues surfaced, Hong had fortunately been an open book to McNamara. She regaled McNamara with stories of tireless Crime Lab workers, like herself, tearing through old boxes beginning in 1996 as they saw a path to solving crimes through rapidly advancing DNA technology—creating a **list** of unsolved murders involving sexual assault for DNA comparisons. Houlihan had been working in the department for nearly a decade in 1996 and became a supervisor in 1997. He certainly had not forgotten the Crime Lab's list of

[1] McNamara is actually credited with rebranding the Original Night Stalker/East Area Rapist as the Golden State Killer in 2013

unsolved cases—and knew that none would be more likely to supply names for investigation files that included TSD reports.

He certainly had not forgotten his department's willingness to tear through every last box in the department if it meant solving a single crime. That same hunger certainly still prevails today. Quite clearly, though, the energy to look through a single box, or to share the existence of its lists(s) quickly dissolves when it also carries a risk of revealing wrongful convictions, embarrassment, and a loss of credibility for the Crime Lab. As Houlihan stated in 2018, in a piece in which he insisted that Hong got it right in both cases: "I spend a lot of time avoiding the perception of bias." (Saavedra, *Experts: Crime Labs come with Built-in Bias, Shifting Science*, OC Register, February 23, 2018.) And what could possibly be more important than perception?

Nonetheless, defense team took the torch from McNamara, spending hundreds of hours (unnecessarily if the truth had been told two years ago) looking for solved and unsolved cases where semen was likely collected, as well as additional lists and databases that may have been hidden by the prosecution—cognizant that Houlihan had refused to answer questions from the defense previously and certainly was not going to admit material omissions based upon the word of a deceased author. The proof that those omissions were intended to deceive should cost Houlihan his job and support his prosecution.[2]

The defense returns to this Court having located the existence of lists and databases that were well known to prosecution team members, including Houlihan: 1) the Orange County Crime Lab's Internal List of Unsolved Crimes, which originated in 1996; 2) the OCDA's

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[2] Defense counsel first learned via a story in the OC Weekly published on August 14, 2018, that Houlihan likely omitted critical information from his declaration based upon a story in the OCWeekly. (Moxley, *Golden State Killer Book Reveals OC Crime Lab's Deception in Murder Cases*, OC Weekly (Aug. 14, 2018), attached herein as Exhibit C.) However, based on the repeated instances of apparent deception, the defense team lacked any confidence that Houlihan would admit the accuracy of the book—and his failure to come forward and correct himself in the subsequent two years confirms this instinct was correct.

TracKRS, which originated in 1995; 3) the Countywide Law Enforcment Unsolved Element (CLUE), which originated in 1997; and 4) the Orange County Cold Case Homicide Tack Force ("OCHTF"), which originated in 2014. As will be discussed, members of Houlihan's department used these lists on a daily basis.

Johnson now requests that the OCDA and the Orange County Sheriff's Department ("OCSD") be ordered to provide copies of lists, databases and reports, as well as to facilitate the inspection of files as detailed in the informal request dated June 10, 2020, which is attached herein as Exhibit A. Based upon the Court's previous ruling and the reasons for its earlier modification, it is anticipated that this Court will order compliance consistent with the request. The request seeks access to a dramatically reduced quantity of files, focusing on those that are among those most likely to contain TSD reports. Defendant has identified the names of several dozen prosecuted defendants and victims, as well as lists and databases of unsolved cases where TSD reports were likely created.

In light of the limited scope of the request and the ability of the prosecution to comply, the Court should focus on ensuring that any claim about the non-existence of TSD reports in identified cases found via lists and databases is truthful, and, therefore, grant Defendant's request to permit inspection of files in instances where the prosecution denies the report's existence. Considering the material omissions and deception that have plagued this litigation, this request is reasonable and appropriate.

It is likely that 1,000 or less files can be quickly identified from the lists and databases and then searched for TSD reports. It is an amount that could fit into perhaps 25 to 50 boxes, based upon Houlihan's previously provided calculations. Again, the Defendant is only seeking inspection of files—based upon the identified defendants and victims in the discovery request, and unsolved cases involving sexual assault located in lists or databases—if the prosecution fails to produce a TSD report and denies one was created. Even if the defense inexplicably needed to review 1,000 files, it would require a study of perhaps 37 boxes, if one were to use the median number. Of course the Defendant is not asking that the original files be handed over

to defense counsel, or that he be permitted to peruse them in office for months or years. It would likely require a matter of days to complete the task. It also goes without saying that despite the enormous frustration and loss of time created by the deception, the defense has never attempted to break the rules to gain access to these materials—for instance, by somehow convincing OCSD investigators to turn over files without revealing the breach to the OCSD administration or this Court. (Had any such effort been undertaken, one would reasonably expect that Sheriff Don Barnes would have promptly initiated criminal and internal investigations, immediately demanded that reports be generated so future charged defendants would fully understand what occurred, and at once fired the investigators involved.) Rather, the defense has played by the rules in the face of opponents who do not. Our request is a reasonable one designed to ensure compliance—understanding, of course, that reports could still be removed and hidden prior to inspection—though we proceed with the hope that the court's attention and the criminal act required will serve as a deterrent. This process simply allows for members of the defense team to look at files in the OCSD's Property Room or another location within the department, while investigators watch like hawks.

The larger question in this motion is why two years of Johnson's life passed only to find himself in the same spot, and how this could possibly be deemed justice. The story is an excruciating one of outrageously disparate treatment. The reoccurring lesson—corroborated, as well, by what has been learned from the current Evidence Booking Scandal and the Jailhouse Informant Scandal—is that Orange County's justice system is too often a place where disclosure of evidence is disconnected from fundamental rights, and instead dependent upon whether the potential recipient of that evidence is perceived as an enemy (the accused or convicted) or a "friendly" (a law enforcement partner or ally.) In this particular case, it is absolutely clear that the discovery process would have looked far different if the OCSD and its Crime Lab had simply imagined counsel, not as someone representing a defendant convicted of serious crimes, but rather as a citizen-sleuth, who was married to a celebrity husband and working on a book sure to cast the OCSD and its Crime Lab in a favorable light.

Yet, ironically, despite the fact that the OCSD and the Crime Lab never saw counsel in this vein, it is Johnson (and the justice system) who are the greatest benefactors of the relationship between the OCSD, its Crime Lab and McNamara. Two months after McNamara's book was published in February 2018, charges were filed against Joseph James DeAngelo. DeAngelo is expected to plead guilty on June 29, 2020 to thirteen murders, including four committed in Orange County in 1989, 1981 and 1986, as well as numerous rapes. The fact that DeAngelo's case has become central to this litigation can seemingly only be attributable to OCSD's terrible and well-earned karma.

The truth is that members of the Orange County prosecution team on this case and DeAngelo's have been holding their breath since well before his arrest. Logic also suggests that many, if not all of the DeAngelo team from Orange County desperately want his case to resolve, principally in hopes that the OCSD's actions related to McNamara would never be understood by victims and the public. It is difficult to believe, as well, that those from the prosecution side who agreed to the resolution were not mindful of an HBO docuseries about McNamara's book. The first episode in the series airs one day before DeAngelo is scheduled to plead guilty, though the prosecution—and particularly the members from Orange County, including Sheriff Barnes—are focused on Episode 4: "The Motherlode." **"The Motherlode" should become the new symbol for what disparate treatment looks like in Orange County.**

The following are just a few of the case-specific and more global considerations relevant to the defense request: 1) the prosecution's previous challenge to more expansive requests in 2017, which included misleading representations and omissions[3]—most notably those made in

[3] The prosecution stated at page 1 of its March 8, 2018 response to Defendant's Motion to Compel that "[t]he People do not possess a database or any searchable method to determine the cases where these opinions were given…" This representation may have been a matter of negligence, but is a type that has a devastating impact on a defendant's case and the justice system. Representations like these cannot be reflexively given. The defense team has spent hundreds of hours unnecessarily researching and studying these issues when members of the OCDA unquestionably would have known about databases of unsolved cases that would have

a sworn declaration by Crime Lab Director Bruce Houlihan in which he hid his knowledge of databases and lists that would have enabled identification of hundreds of unsolved cases where TSD reports were highly likely to be found; 2) the shockingly different response by the OCSD to requests for evidence made by Johnson, who will die in prison without a new trial, and those made one year earlier by McNamara, who also sought evidence in unsolved crimes, even though she was never an investigator nor a charged defendant; 3) evidence of the stunningly disparate treatment extended to Johnson versus McNamara, as OCSD investigators assisted her in carrying out a pre-planned "heist" of evidence from the OCSD, with investigators helping McNamara and her co-worker sneak 37 boxes and two bins of Golden State Killer evidence past Sheriff Don Barnes and out of the department in a scene so surreal that it will be recreated for the aforementioned HBO docuseries (Keene, *I'll be Gone in the Dark A Difficult but Mesmerizing Exploration of Crime, Obsession, and Loss*, Paste Magazine, June 22, 2020); 4) the fact that the prosecution argued that it was unduly burdensome to search for Crime Lab Reports, when one year earlier[4] several files likely containing responsive TSD reports were sitting in the **playroom** of a home owned by McNamara and Patton Oswalt—a playroom that was home to more than half of the original reports and evidence possessed by Orange County[5] law enforcement related to the investigation of the Golden State Killer, including materials from throughout the state[6]; 5) corroboration that the chain of custody disaster described above—

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allowed quick identification of sexual assault cases where semen had been collected, and thus cases where many requested reports were likely to be found.

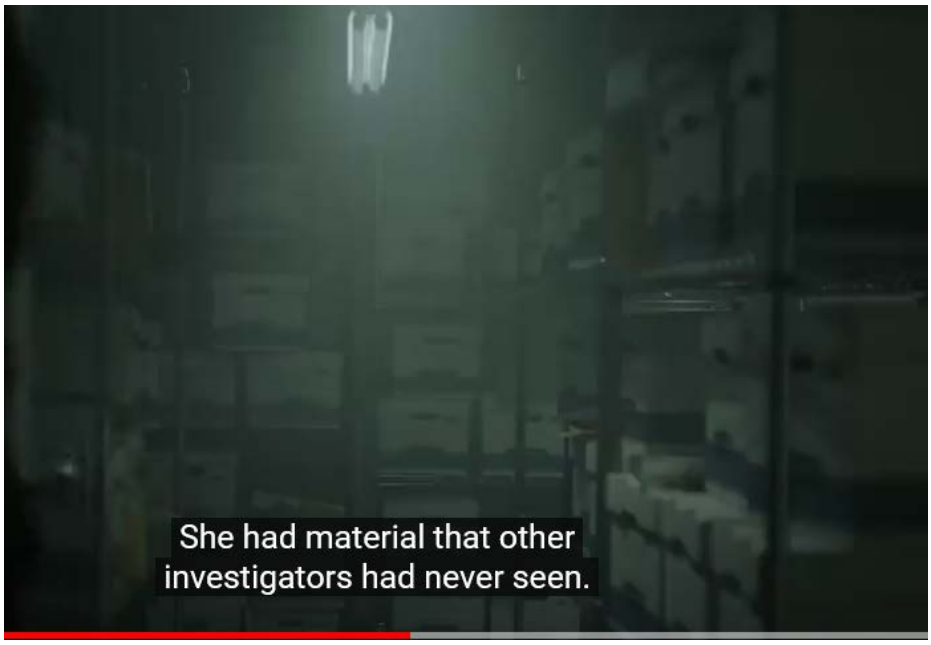
[4] In an interview conducted by Attorney Scott Sanders with Paul Haynes—a second citizen-sleuth and author who helped complete the book after McNamara's death—Haynes stated that he returned the boxes and bins to an OCSD investigator at the end of 2016. He declined to name the investigator involved in removing the materials from the department and to whom he returned them. (Exhibit B.)

[5] As will be discussed, the OCSD was holding evidence that related to crimes in Contra Costa believed to be committed by the Golden State Killer, and likely other counties.

[6] Paul Haynes told Sanders that the 37 boxes were of evidence pertaining to the Golden State Killer from throughout the state. (Declaration of Scott Sanders, dated June 24, 2020, and attached herein as Exhibit B.)

perhaps among the most signficant breaches in California history—is not an isolated event but representative of a deeply encultured devaluing of defendants' rights when considered alongside the Evidence Booking Scandal, which involves the concealment of two previously hidden audits revealing OCSD's knowledge of systemic mishandling of evidence[7] and the creation of false reports.

Image from McNamara's House in HBO's Teaser for *I'll Be Gone in the Dark*[8]



[7] Once the OCSD audits were uncovered the OCSD's own spokesperson, Carrie Braun, had no choice but to admit that these were "systemic problems." (City News Service, *4 OC Deputies Fired After Allegations of Systemic Problems With Booking Evidence*, NBC Los Angeles (Nov. 18, 2019) <https://www.nbclosangeles.com/news/orange-county-deputies-fired-allegations-systemic-problems-with-booking-evidence/2223853/>.)

[8] The recreation is apparently designed depict the "motherlode" of evidence from the OCSD, stored in the playroom. **It goes without saying that the justice system does not work as it should when a citizen-sleuth has evidence that neither the prosecution or defense "had ever seen."**

Of course, prosecution need not contest this vastly narrowed motion, and can rather seize the opportunity to treat Johnson with just a fraction of the dignity and respect extended to those with nothing at stake.

Brief History of Johnson's Case and Relevant Post-Conviction Issues

In 1985, Bridgett Lamon was found raped and killed in Anaheim, California. In 2004, Johnson was arrested for the crime after DNA from semen left in Bridgett Lamon was linked to him. At Johnson's 2008 trial, Hong and criminalist Daniel Gammie repudiated Gammie's exculpatory opinion rendered in 1985 that semen was not deposited "at or near the time of death," claiming that the prevailing scientific opinion had since changed to a consensus that any estimated window of time must begin at the time of collection. Johnson was convicted of special circumstances murder. Jurors, however, rejected the prosecution's request for the death penalty, apparently adopting the defense contention that questions about the 1) credibility of Orange County Crime Lab witnesses and 2) evidence that an unidentified third party handled the free end of one of the knots of a sheet wrapped around victim's body, left a "lingering doubt" about his guilt. (Evidence of two separate admissions to the crime by another suspect were excluded by the trial court, and that ruling was upheld on appeal.) Jurors were apparently convinced that the testimony of Crime Lab witnesses raised insufficient doubts about their credibility to prevent a conviction but enough to stop an execution.

In a county where luck is too often a defendant's only real hope for justice, Johnson has admittedly been on the receiving side of significant fortune twice since his conviction—with the second break delivered via McNamara's book, *I'll be Gone in the Dark*. The first instance occurred after his conviction, when a family member of convicted murderer Wendell Lemond reached out to Johnson's counsel. The family member initiated contact, not because he hoped to speak to Johnson's counsel, but because he wished to ask questions of the defense attorney litigating jailhouse informant issues in *People v. Dekraai* (2016) 5 Cal. App. 4th 1110. The individual wanted to discuss suspicions of wrongdoing by the prosecutor in Lemond's case, who also was part of the Dekraai prosecution team. A search of court minutes did not give any

indication of an informant's involvement, but it did list Hong as having testfied in Lemond's 2009 trial.

A review of Lemond's case suggested it was a mirror image of Johnson's. Just one day before writing the 1985 report related to Bridgett Lamon's death, Gammie wrote another report that included an identical opinion in another Anaheim murder: semen found in a victim (Catherine Tameny) was not left "at or near the time of death." As in Johnson's case, an arrest in Tameny's murder was not made until a DNA comparison linked Lemond to the victim. Lemond was arrested for the crime in 2007 after a sample of his DNA was found to be consistent with DNA found in saliva located on Tameny's breast. Lemond, however, was determined not to be the source of the semen found in the victim's vagina.

Incredibly, Lemond's trial would be held in the very same courtroom and Hong would sit in the very same witness stand. But when she started speaking, she was unrecognizable from the witness who testified in Johnson's case: the science, and the identical Gammie opinion that Hong repudiated one year earlier returned to life in Lemond's case, and in full force. The estimated window of time suddenly no longer needed to begin with the time of collection, as Hong had insisted in *Johnson*. In Lemond's case, Hong opined that the semen was deposited more than 12-24 hours earlier before the collection. This testimony was also entirely consistent with the opinion of Gammie, who was not called by the defense to repudiate his opinion because the defense was unaware of Gammie's testimony in Johnson's case. Hong's testimony effectively eliminated from responsibility the third party whose semen was found in Tameny's vagina, and in doing so cleared the path to Lemond's conviction. Lemond has been in prison ever since.

In 2017, the defense presented this stunning flip-flop in a request for post-conviction evidence. This Court ruled in Defendant's favor in 2018, ordering the prosecution team to turn over Crime Lab reports written beginning in 1980 that included opinions about TSD. However, the OCSD, its Crime Lab, and the OCDA fought back, claiming they lacked any databases or direction to even start the search for responsive reports. The presentation included a sworn

declaration of Crime Lab Director Bruce Houlihan, who described the directionless, months-long and resource devouring search of 3,500 boxes containing 70,000 to 140,000 files that would be required if forced to comply with the court's order. The Court responded by modifying the order, and in doing so, effectively limited disclosures to a time period when no reports would have have been created. Indeed, none were provided.

While Houlihan's assertion closed the door at that moment on deserved defense discovery, it also included an unintended revelation. As discussed above, Hong and Gammie had claimed in 2008 that scientific opinions rendered by the Crime Lab were scientifically invalid. Thus, it would have seemed that no quantity of boxes would have been too many to prevent Houlihan and his team from finding every last "erroneous" report and disclosing them to defendants and prosecutors to correct and prevent false convictions. However, Houlihan's affidavit amounted to an admission that in the previous ten years no search had been done and they were opposed to ever doing one. Quite clearly Hong and Gammie had lied in Johnson's case, and as a result there was no compelling need to search for prior erroneous reports—because Gammie's reports were not erroneous and the science had not become invalid. Or, alternatively, members of the Crime Lab care so much about winning, preserving convictions and protecting their reputations that the possibility of wrongful convictions was comparatively meaningless.

The Impediments to Access and a Second Stroke of Luck – Access to Information via McNamara's Book

Getting to the truth in the criminal justice system far too often comes down to access. These are stories of haves and have nots. Without access to relevant evidence, it can be nearly impossible to prove that someone like Houlihan or Hong is lying—particularly because in places like Orange County, the Crime Labs sits on the thin blue line right next to law enforcement.

This is not to say that members of the OCSD and its Crime Lab would not speak with oustsiders, share critical information, or even shockingly turn over evidence in a case. The

determination for them, though, is one of a risk assessment: whether the recipient of their "generosity" is perceived as an enemy, and how much personal, professional and institutional benefit is to be gained from cooperation. As this Court recalls, Houlihan told the press in 2017 that Hong was correct in her conclusions about both murder cases, but then refused to answer a single question from the defense orally or in writing about what his opinion was based upon and when he formed it. Hong, herself, has spoken to the press numerous times, even re-enacting her role in the investigation of the Golden State Killer's crimes for a 2013 Dateline program.

Hong Re-Enacting Golden State Killer Discoveries for Dateline

However, Hong also refused to answer questions from the defense about her flip-flop in the trials of Johnson and Lemond.

With Houlihan sucessfully blocking the doors to his department by providing representations that only those in the Crime Lab could contradict, it would come down to whether a member of the Crime Lab would speak up. Of course, crossing the thin blue line, is most unlikely to occur when to do so also means crossing the boss. Therefore, the only chance for the defense was that 1) the content of the contradictory material would actually be flattering to the Crime Lab and the source, and 2) that it was shared at time before the speaker knew it was inconsistent with what Houlihan swore to in his affidavit.

What Johnson needed desperately, therefore, was for one or more members of the OCSD and its Crime Lab to open up to someone they trusted who might memorialize what they said in a future book. The best choice was someone whom they believed would view them as heroes and was likely to portray them as such—an outsider who likely was not well-studied in the agency's tattered history of violating rights and concealing evidence. McNamara was perfect. She viewed the book narrowly: It was the story of victims and the unrelenting quest—by her, members of law enforcement, and Crime Lab personnel—to bring the Golden State Killer to justice.

In the aftermath of DeAngelo's arrest, opinions have differed about McNamara's responsibility for his arrest, though there seems to consensus that she created renewed interest in the subect matter. A reviewer of the upcoming docuseries wrote, "*I'll Be Gone in the Dark* never quite persuades that the killer couldn't have been caught without the author's contributions, making the connection between them, despite her book, ultimately feel somewhat tenuous." (Kang, *I'll Be Gone in the Dark: TV Review*, Hollywood Reporter, 6/22/20.) In contrast, for those who study her book alongside this case, there will be no room for reasonable debate about McNamara's value to exposing both deception and disparate treatment in the local justice system. Of course, McNamara never knew that by documenting her extraordinary access to witnesses and evidence from the Orange County Sheriff's Deparatment "OCSD" Crime Lab she would a) provide crucial access to facts and witnesses to Johnson that otherwise seemed destined to never receive; and b) deliver devastating blows to the OCSD and the Crime Lab.

The Unforeseen Impeachment of Crime Lab Director Houlihan: A Hidden Database and the Thrill of Searching Boxes <u>for Evidence of Guilt</u>

Houlihan swore in a 2018 affidavit supporting the prosecution's oppositon to the order for comprehensive discovery to the defense:

> As to hard copy files pre-dating the year 2000, there are approximately 3500 bankerboxes of files. Because the records are not maintained by subject area and are not otherwise searchable, the records will need to be examined one-by-one by hand to determine if they contain potentially responsive records. I anticipate that this process could take many months to complete.

(Status Report, *People v. Johnson*, M-171916, Declaration of Bruce Houlihan, filed May 17, 2018.)

Houlihan, who has been with the agency since approximately 1987 and a supervisor since 1997, knew that his agency would not have the slightest reticence to scour thousands of boxes—if it would lead to arrests—and that the agency actually possessed a database of those case files most likely to contain TSD reports. It was likely Hong and others who regaled McNamara with their insatiable appetite for solving cases through DNA analysis, and described to her how they all started by tearing through boxes in 1996:

> The Orange County Sheriff's Department and Crime Lab staff was stunned. The first time they submit DNA to the fledgling state database, they solve six murders! **It seemed that the weather in the Property Room, always an oppressive gray, had lifted and light beamed down on the monotony of cardboard boxes**. Old evidence had languished there for decades undisturbed. Each box was a time capsule. Fringed purse. Embroidered tunic. Items from lives defined by violent death. The unsolved section of a Property Room is tainted with disappointment. It's the to-do list that's never done.
>
> **Now everyone basked in the possibilities**. It was a heady feeling, the idea that one could conjure a man from a stain on a calico patchwork quilt from 1978, that one could reverse the flow of power. If you commit murder and then vanish, what you leave behind isn't just pain but absence, a supreme blankness that triumphs over everything else. The unidentified murderer is always twisting a doorknob behind a door that never opens. But his power evaporates the moment we know him. We learn his banal secrets. We watch as he'd led, shackled and

sweaty, into a brightly lit courtroom as someone seated several feet higher peers down unsmiling, raps a gavel, and speaks, at long last, every syllable of his birth name.

Names. The Sheriff's Department needed names. **The abandoned boxes in the Property Room were packed tight with stuff**. Q-tip swabs preserved in tubes. Underwear. Cheap white sheets. Every inch of fabric and millimeter of cotton tip held promise. There were other possibilities besides making immediate arrests. DNA profiles that were developed from evidence might not match a known felon in the database, but profiles from different cases might match each other, uncovering a serial killer. That information could focus an investigation. Energize it. They had to get going.

The crime lab staff crunched the numbers. Between 1972 and 1994, Orange County investigated 2,479 homicides and cleared 1,591, leaving nearly **900 unsolved cold cases. A strategy was developed for reexamining cold cases. Homicides involving sexual assaults would be prioritized, as those killers tend to be repeat offenders and leave behind the kind of biological material that lends itself to DNA typing**.

Mary Hong was one of the criminalists tasked with concentrating on cold cases. Jim White took her aside. Fifteen years later, he hadn't forgotten his old suspicion.

(McNamara, *I'll Be Gone in the Dark, 2018*, pp. 122-123; bolding added.)

It was almost as if McNamara had a secret mission to prevent Houlihan from getting away with a future act of deception. Houlihan, Hong and dozens of others who were following this litigation in 2018 in the local press[9] knew what Houlihan was hiding. Lynn Dean Johnson needed names, just as the Crime Lab "needed names" 22 years earlier—when they obtained

[9] Houlihan does not stand alone in terms of responsibility. The OC Weekly published series of articles about the Crime Lab's efforts to prevent Johnson's access to the requested records, including a piece near the end of that litigation discussing this section of Houlihan's book. In a scene reminiscent of the county's jailhouse informant scandal, when deputies hid the TRED record database and the Special Handling Log and their colleagues remained silent, the Crime Lab staff did the same as their boss misled. (Moxley, *OC Crime-Log Boss Dodges Inquiry About Forensic Science Flip-Flops in Murder Cases*, OC Weekly (March 28, 2018), attached herein as Exhibit D); (Moxley, *Sheriff's Orange County Crime Lab Murder Scandal Unfolds in Courts*, OC Weekly (May 17, 2018), attached herein as Exhibit E), (Moxley, Crime Lab Director Says Too Busy to Search for Forensic Errors, OC Weekly, (July 11, 2018), attached herein as Exhibit F.)

those names through hard work and diligence. That work did not need to be repeated when Johnson made the request. **The list already existed, and the files could have likely been found in hours, not months.** Those files, related to sexual assault crimes, were exactly those most likely to include TSD reports, and Houlihan knew this. Houlihan's declaration was the very definition of a material omission. It may have been correct that it would have taken months to look through every solved and unsolved case filed over 30 plus years, **but what he intentionally hid was that his department possessed lists and files in the time frame that was among most likely to contain TSD reports**.

Houlihan's efforts simultaneously corroborated the deep-seated fear that he and others have about what Johnson's defense team would learn if they gained access to TSD reports. With this information in hand, the defendant initiated a new study and uncovered additional databases in the County used by the OCDA and OCSD, further contradicting representations made in this case.

OCSD Turns Over to McNamara Three Dozen Boxes of Records Related to the then-Unsolved Golden State Killer Investigation but Fights Disclosures to Defendant and Makes Misleading Claims to Persuade the Court

While members of the OCSD and its Crime Lab unhesitatingly used deception to block the Defendant's attempts to obtain access to evidence to unsolved cases during the previous years they literally swung open the doors to the department for McNamara:

> The collection of official case materials continued to grow. The culmination was a stunning acquisition of physical case materials in January 2016, when Michelle and Paul [Haynes] were led to a narrow closet at the Orange County Sheriff's Department that housed sixty-five Bankers Boxes full of EAR-ONS case files. Remarkably, they were permitted to look through them—under supervision—and borrow what they wanted.
>
> This was the Mother Lode.
>
> **They set aside thirty-five of the boxes along with two large plastic bins to take back to L.A**.
>
> Michelle had thought ahead. Instead of sharing a day trip in one vehicle, they motorcaded into Santa Ana in dual SUVs. **They stacked the Bankers Boxes**

> **onto dollies and wheeled them down to the loading dock behind OCSD headquarters, where they stuffed them into the two vehicles while the undersheriff, unaware of what they were doing, emerged from the building and luckily didn't seem to notice what was going down**. They moved as quickly as physically possible, lest people at OCSD changed their mind.
>
> They returned to L.A. and the boxes were moved to the second floor of Michelle's house. What had been her daughter's **playroom** would now become the Box Room.

(McNamara, *I'll Be Gone in the Dark, 2018*, pp. 310-311; bolding added.)

Of course, the prosecution in this case never offered a "mother lode" of unsolved murder evidence to Johnson, or even a single page. And certainly, the defense would have never thought to ask if evidence from three Orange County murder scenes connected with the Golden State Killer—crimes occurring in the time period where TSD reports were likely to have been created—might have been found somewhere in Patton Oswalt's home. It is Johnson's time to at least see all of the evidence to which he is entitled, including that related to Orange County murder by DeAngelo. With access to the Golden State Killer files given to McNamara four years ago, and DeAngelo set to plead guilty on June 29, 2020, it should be at long last Johnson's turn. Of course, Johnson will not request that the files be moved to a spare room in the Orange County Public Defender's Office. The request is that the TSD reports be provided, and that if it is not disclosed, that inspection be permitted.

OCSD's Stunning Breach of the Chain of Custody in *People v. Joseph Jame DeAngelo*, Its Implications for *Johnson*, and the Perfect Test for Sheriff Barnes and OCSD

Considering that the OCSD was the repository of Golden State Killer evidence from this county, Contra Costa,[10] and other counties, the decision to turn over this quantity of original evidence and reports to a citizen in a case of this magnitude, particularly when contrasted with the OCSD's attempts to prevent Johnson from obtaining a single piece of the requested items of evidence, is demonstrative of a disparate level of treatment that further supports the order

[10] McNamara wrote: "Paul Holes can still hear the sound of his filing cabinet drawer slamming shut. He'd emptied out everything pertaining to EAR, boxed it up, and FedEx'ed it to Larry Pool in Orange County." (McNamara, *I'll Be Gone in the Dark*, pp. 102-103)

sought at this time. (Interestingly, OCSD was punished on a karmic level when the person who was needed to describe the chain of custody died two months after receiving the evidence—and there is no indication that the slightest lesson was learned.)

Sheriff Barnes learned what happened in January 2016, though the exact date of when McNamara took the "mother lode" is presently unknown. Whether law enforcement, and particularly its leaders, stand up to those who brazenly violate key practices that protect defendants' rights speaks to the institutional mindset and the trustworthiness of those who work in the institution.

It is certainly probable that what McNamara described above was in the back of the minds of prosecutors who agreed to resolve DeAngelo's cases for life without possibility of parole. The actions of the OCSD would have created unwanted questions at trial about whether all evidence was accounted for and disclosed. Logically, what occurred has certainly been an ongoing cause for concern by an OCSD already plagued by scandal.

Trial testimony about how investigators concealed the transfer of evidence to McNamara while undersheriff-turned-sheriff was nearby would have been humiliating. Of course, Barnes would have himself likely had to face a series of uncomfortable questions, as well. When did he learn of the incident? What investigative actions did he direct? Did he demand a report explaining what occurred to ensure that the prosecution team and any future defendant receive a full and complete accounting of what occurred? What steps did he take to trace the chain of custody? Were investigators fired or severely punished?[11] These questions are particularly appropriate in this moment, and would have been at a trial. It was only six months ago that it was discovered that Barnes and his predecessor had attempted to hide two audits revealing systemic evidence handling issues. (Romo, *Orange County Sheriff's Dept. Mishandled*

[11] Notwithstanding the fact that Barnes almost certainly did not take any disciplinary action even a year after he found out—the same investigator who allowed the breach of custody remained at OCSD by the end of 2016, when Haynes returned the materials McNamara had snuck out in January underneath Barnes' nose . (Exhibit B.)

Evidence; Kept It Quiet For Nearly 2 Years, NPR Dec. 5, 2019) Those audits examined all deputy reports filed between February 1, 2016 and February 1, 2018—personnel at all ranks above the deputy were inexplicably excluded. Sometime in January 2016, investigators helped members of the public hide from Barnes that she was driving out of the department with vast quantities of evidence related to one of the largest serial murder investigations in the state's history. It would be difficult to justify anything other than their prompt removal from the case and termination—but again, the past practices tend to suggest this did not happen.

There is little question McNamara's book has become a nightmare for members of the OCSD and its Crime Lab, as well as the prosecution team in *People v. Joseph James DeAngelo*. **There is also little question that Orange County members of the DeAngelo prosecution are hoping with every fiber of their being that DeAngelo pleads guilty, as is anticipated next week, so that a humiliating trial can be avoided.**

PROCEDURAL HISTORY

In 2008, Petitioner Johnson was convicted of first-degree murder, and rape. The charged special circumstance was found to be true. Jurors voted to sentence the defendant to life without possibility of parole, and the court imposed that sentence. In 2010, the Fourth District Court of Appeal affirmed his conviction.

On September 22, 2017, petitioner filed a writ of habeas corpus in the Orange County Superior Court challenging the validity of a judgment of conviction. On October 11, 2017, petitioner filed an amended version of the initial petition. On November 20, 2017, the Honorable Cheri T. Pham issued a summary denial of the petition, finding 1) a failure to "explain and justify with specificity the more than eight year delay in seeking post-conviction collateral review of his claims[,]" and 2) "[t]he claims of error as presented also do not amount to a potential fundamental miscarriage of justice sufficient to overcome the procedural bar against untimely requests for habeas corpus relief" because "petitioner has not provided an adequate record."

On October 18, 2017, petitioner filed an informal request for discovery upon the OCDA seeking several categories of evidence including the following:

1) Any and all reports written between January 1, 1982 and December 31, 1995, in which former Orange County Crime Lab criminalist Daniel Gammie provided an opinion about the timing of when semen was deposited pertaining to a criminal investigation.

2) Any and all reports written between January 1, 1983 and June 1, 2016, in which former Orange County Crime Lab criminalist Mary Hong provided an opinion about the timing of when semen was deposited pertaining to a criminal investigation.

3) Any and all reports by members of the Orange County Crime Lab between January 1, 1980 and January 1, 2004, in which an opinion was rendered regarding the timing of when semen was deposited pertaining to a criminal investigation.

On October 31, 2017, Deputy District Attorney Seton Hunt responded in writing to petitioner's request. Instead of addressing the substantive merits of the request, Mr. Hunt asserted that a) petitioner is not entitled to counsel; b) if Johnson has counsel during the instant litigation, he should not be represented by his trial attorney, Scott Sanders; and c) there is no evidence that attorney Sanders has been appointed as counsel. On November 22, 2017, petitioner filed a motion for post-conviction discovery, pursuant to Penal Code Section 1054.9.

On December 15, 2017, the Honorable Julian W. Bailey granted petitioner's request for discovery. He also granted the prosecution's request for a discovery hearing on February 23, 2018, to resolve any disputed issues.

On January 18, 2018, petitioner filed a writ of habeas corpus in the Fourth District Court of Appeal.

On March 23, 2018, the OCDA filed an opposition to the motion to compel discovery and asked that this Court deny discovery for each and every category of materials requested by the petitioner. The OCDA repeatedly described the requests as overly burdensome, although no declarations were attached regarding why the term was being employed.

April 9, 2018, petitioner issued a subpoena to Director Houlihan for his appearance and for Crime Lab records.

On April 16, 2018, the California Attorney General ("CAG") filed an informal reply brief at the request of the Court of Appeal.

On April 19, 2018, the petitioner withdrew his subpoena for Crime Lab records. On the same date, this Court ordered, pursuant to Penal Code Section 1054.9, that the OCSD provide all criminalist reports in which there was an analysis of semen and an opinion rendered as to the timing of the deposit of the semen, for samples collected at the scene of the crime and the autopsy, between May 26, 1985 and September 26, 2008.

Between April 19, 2018, no responsive discovery was provided to the petitioner.

On May 3, 2018, petitioner filed an informal response to the CAG's reply brief filed in the Fourth District Court of Appeal.

On May 17, 2018, three court days before the scheduled hearing in this case, the OCSD filed a Status Report and Motion to Modify Court Order, in which Director Houlihan described the records search that would need to be undertaken in order to comply with the court order. The OCSD brief requests that this Court modify the court order such that, if Crime Lab Director Bruce Houlihan's declaration is accurate, the Crime Lab would not need to disclose any documents.

On June 8, 2018, the Court made the following ruling as reflected in the minutes in this case:

> Discovery shall be provided to the Defense of reports generated by the Orange County Crime Lab where semen analysis was involved and where an opinion regarding timing of a semen deposit was rendered, limited to: - Reports written by Mary Hong or Dan Gammie - Reports for 5 years prior to the date Mary Hong rendered her opinion in this case - Reports that resulted in charges against a Defendant and Mary Hong or Dan Gammie's reports were admitted as evidence and they testified - Cases where a sexual assault or rape was charged

On June 10, 2020, Defendant served an informal discovery request upon the OCDA requesting the following:

I. Any and all reports, notes, and/or other writings by members of the Orange County Sheriff's Department's ("OCSD") Crime Lab related to the timing of when semen was deposited, which are found within case/investigative files of the Orange County District Attorney's Office ("OCDA") and are associated with the cases and investigations listed and/or described below:

a. The following cases (in which a trial and/or conviction occurred) in which a member of the OCSD Crime Lab report was reasonably likely to have documented an opinion about when collected semen had been deposited:

1. *People v. Larry Clark Stephens*[12] (Mar. 6, 2018) Case No. 15NF1464; Patricia "Annie" Ross (victim) in La Palma on or about December 11, 1974;
2. *People v. William Lee Evins* (Nov. 13, 1987) G004342, G003175 Super. Ct. No. C-57087; Joan Anderson (victim) in Fountain Valley on or about March 7, 1979;
3. *People v. Robert Sellers* (Aug. 15, 1988) 203 Cal.App.3d 1042; Savannah Leigh Anderson (victim) in Irvine on or about May 14, 1979;
4. *People v. Gerald Parker* (Jun. 5, 2017) 2 Cal.5th 1184; Sandra Kay Fry in Anaheim on or about December 1, 1978, Kimberly Rawlins in Costa Mesa on or about March 31, 1979, Marolyn Carleton in Costa Mesa on or about September 14, 1979, Chantal Green in Tustin on or about September 30, 1979, Debora Jean Kennedy in Tustin on or about

[12] Defendant attempts to include the most accurate and complete information available to assist the OCDA and the OCSD to locate responsive records. Any questions about whether records are responsive to the request should be brought to the attention of court and counsel.

October 6, 1979, Debra Lynn Senior in Costa Mesa on or about October 2, 1979 (victims);

5. *People v. Steven Reyes* (Jun. 10, 1986) G002750 Super. Ct. No. C-47403; Julie M. (victim) in Corona Del Mar on or about May 29, 1981;
6. *People v. James Marlow* (Aug. 19, 2004) 34 Cal.4th 131; Lynell Murray (victim) in Huntington Beach on or about November 12, 1982;
7. *People v. Lawrence Joseph Brown* (May 22, 1987) G002766, G003987 Super. Ct. No. C-53706; Vicenta C. and Nimol S. (victims) in Santa Ana on or about April 9, 1983, and October 5, 1983, respectively;
8. *People v. Martin Anthony Coles* (Jun. 22, 1987) G003800 Super. Ct. No. C-53770; Irene T. (victim) on or about January 13, 1984;
9. *People v. Richard Stanley Sandoval* (Feb. 4, 2016) G050543 Super. Ct. No. 11ZF0125; Margaret Lenney (victim) in Anaheim on or about September 23, 1984;
10. *People v. Michael Tate* (Apr. 13, 1989) G005845 Super. Ct. No. C-60978; Lawrence Rohr and Jose Arriaza (victims) in Costa Mesa on or about March 25, 1986;
11. *People v. Andrew McCarter* (Oct. 30, 1989) G007091 Super. Ct. No. C-63656; Julie Fenton (victim) in Fullerton on or about June 20, 1986;
12. *People v. Isiah Tapp* (Aug. 19, 1988) G007101 Super. Ct. No. 67227; (victim unidentified) on or about December 9, 1987;
13. *People v. Danny Harris* (Apr. 12, 1995) G013181 Super. Ct. No. C-88945; Genevieve S. on or about March 5, 1986; Janet S. on or about March 11, 1986; Lauren A. on or about March 21, 1986; Bonnie M. on or about April 6, 1986; Lorna C. on or about April 22, 1986; Stella B. on or about January 14, 1988, July 1, 1988; Sharon R. on or about April 12, 1988; Catherine C. on or about May 31, 1988; Stephanie L. on or

about June 11, 1988; Hanna C. on or about July 4, 1988 (victims);

14. *People v. Lui Laka Lautoa* (Jun. 27, 1991) G009250 Super. Ct. No. C-74173; B.G. (victim) on or about April 30, 1989;
15. *People v. Lamar McClinton* (May 29, 1992) G011349 Super. Ct. No. C-77396; Tammy C. (victim) on or about October 16, 1989;
16. *People v. Frank Smith* (Jan. 31, 1996) G013492 Super. Ct. No. C-85290; Robin E. and Orba S. (victims) in May 1989 and approximately October 1989, respectively;
17. *People v. Frank Soto* (Nov. 22, 1994) G012636 Super. Ct. No. C-89008; Sally S. (victim) on or about November 17, 1989;
18. *People v. Leonardo Pimental Sanchez* (Jul. 10, 2017); G055222 Super. Ct. No. 00SF0657, Cari Ann Parnes (victim) in Irvine on or about March 26, 1992;
19. *People v. Michael Kevin Claude* (Apr. 11, 1996) G017670 Super. Ct. No. 93NF2244; Nancy Elsayed (victim) in Yorba Linda on or about June 23, 1992;
20. *People v. Frederick George Davison* (Mar. 25, 1996) G016178 Super. Ct. No. C-98228; Lisa N. (victim) in Huntington Beach on or about August 29, 1992;
21. *People v. Amos Dwayne Stevenson* (Feb. 19, 1997) Super. Ct. No. 93WF0812; Julie T. in Huntington Beach on or about December 8, 1992, and Victoria D. in Huntington Beach on or about December 13, 1992 (victims);
22. *People v. Gary Christian Hansen* (Feb. 28, 1995) G015189 Super. Ct. No. 93NF0263; Jeanet T. (victim) on or about February 2, 1993;
23. *People v. Jose Francisco Hernandez* (Jun. 18, 1996) G016433 Super. Ct. No. 93NF1929; Maria C. (victim) in August 1993;

24. *People v. Gilbert De La Cruz* (Sept. 8, 1997) G016887 Super. Ct. No. 93NF2500; Lisette S. in Anaheim on or about September 11, 1993, Brandy T. in Anaheim on or about November 7, 1993 (victims);
25. *People v. Michael David Cowles* (Aug. 7, 1996) G017068 Super. Ct. No. 94CF0584; (victim unidentified) in Tustin on or about March 7, 1994;
26. *People v. Metzler* (Jan. 27, 2004) G030665 Super. Ct. No. 00SF0423; Caryn C. and Kristin S. (victims) on or about July 15, 1992 and July 30, 1992 respectively;
27. *People v. Robert Jackson Thompson* (Feb. 8, 1990) No. S004603; Benjamin Brenneman (victim) on or about August 25, 1981;
28. *People v. Richard Curtis Morris* (Mar. 18, 2015) G048926 Super. Ct. No. 08CF1591; James Stockwell and Shelly F. (victims) on or about January 1, 1987;
29. *People v. Clinton Browning* (Sept. 29, 1989) G005451; Elana and Christine in Anaheim (victims) on or about January 13, 1985 and February 13, 1985 respectively;
30. *People v. Davao Jackson* (Nov. 19, 2004) G032918 Super. Ct. No. 01WF2728; Jane Doe and Arturo R. (victims) on or about October 15, 1995;
31. *People v. Earl Belcher* (Apr. 19, 2019) G054415 Super. Ct. No. 14NF1018; Gretchen Fisher (victim) in Fullerton in May 1995;
32. *People v. Joseph Son* (Jun. 26, 2013) G045798 Super. Ct. No. 08WF2001; B. (victim) in Huntington Beach on or about December 24, 1990;
33. *People v. Michael Eric Gonzales* (Jun. 23, 1986) G002224 Super. Ct No. C-51947; victim and date unidentified in opinion;

34. *People v. Paul William Jensen* (Jun. 1991) G012755 Super. Ct No. C866939); (unidentified victim) in Mission Viejo on or about March 5, 1991 and (two unnamed victims) in Santa Ana in June and October 1990; and

35. *People v. Thomas Thompson* (Apr. 23, 1988) 45 Ca. 3d. 86; (victim) Ginger Fleischli, in Laguna Beach on or about September 11, 1981.

b. Investigations involving the following victims, in which Crime Lab opinion as to timing of semen deposit reasonably may have occurred, but in which there has not been a trial or guilty plea:

1. Janet Aline Stallcup (victim) in Garden Grove on or about December 19, 1976;
2. Lynda Saunders (victim) in Tustin on or about July 9, 1978;
3. Kim Whitecotton (victim) in Costa Mesa on or about May 24, 1979;
4. Robyn Cox (victim) in Costa Mesa in January 1977[13];
5. Patrice Harrington (victim) in Dana Point on or about August 19, 1980;
6. Manuela Witthuhn (victim) in Irvine on or about February 6, 1981;
7. Janelle Cruz (victim) in Irvine on or about May 5, 1986;
8. Carla Salazar (victim) in Anaheim on or about June 28, 1989; and
9. Tracey Hobson (victim) in Santa Ana on or about June 29, 1987.

II. Any and all lists that the OCSD and/or its Crime Lab maintains or can access that identify or identified cases/investigations with date of violations between January 1, 1976 and December 31, 1996, which involved the alleged commission of sexual assault, rape, sodomy, and/or homicide involving one or more of these sexual offenses; and

III. Any and all other lists, databases, or spreadsheets created by members of Orange

[13] The year of the incident is incorrectly stated in the Request for Discovery as 1997.

County law enforcement agencies and/or the OCDA that identify victims of unsolved crimes committed between January 1, 1976 and December 31, 1996.

IV. Inspection by defense counsel at the office of the OCSD and its Crime Lab of the case/investigative files pertaining to the responsive investigations identified in paragraphs I (if the identified reports are not available through the OCDA), II and III.

In a footnote, defendant stated the following:

> Responsive lists and databases should include but not be limited to the following: 1) 888 unsolved homicides (as of 1995) that occurred between 1972 and 1994, (Pfeifer, *DA's Target: Ghosts of Murders Past*, The OC Register (Dec. 20, 1995) <http://www.goldenstatekiller.com/1995-12-20.pdf>); 2) the approximately 240 murder cases Orange County maintained in its database by 1996 (Keppel, et al., The Psychology of Serial Killer Investigations: The Grisly Business Unit (2003) p. 17); 3) the approximately 8,000 cases that were maintained in the TracKRS database as of 2007, (Orange County District Attorney: Press Release, July 6, 2007 <http://orangecountyda.org/civica/press/display.asp?layout= 2&Entry=598>), and any and all lists created by the Orange County Homicide Task Force (https://www.santa-ana.org/pd/investigations-bureau/special-investigations)

In a second footnote, defendant added the following:

> Defendant is only seeking entries from the lists described in paragraphs II and III pertaining to cases/investigations involving suspected sexual assault, rape and/or sodomy. Therefore, if a responsive list identifies those cases/investigations in which one or more of these crimes was suspected, then the entire list need not be provided. If, however, the list associated with a particular database does not include sufficient information to determine whether the crime(s) involved a sexual assault, rape and/or sodomy, then it is requested that the Defendant be provided the respective list in its entirety.

II. POINTS, AUTHORITIES AND ARGUMENT

A. JOHNSON'S REQUEST IS APPROPRIATELY BEFORE THE COURT

Section 1054.9(a) states the following:

> (a) Upon the prosecution of a postconviction writ of habeas corpus or a motion to vacate a judgment in a case in which a sentence of death or of life in prison without the possibility of parole has been imposed, and on a showing that good faith efforts to obtain discovery materials from trial counsel were made and were unsuccessful, the court shall, except as provided in subdivision (c), order that the defendant be provided reasonable access to any of the materials described in subdivision (b).
>
> (b) For purposes of this section, "discovery materials" means materials in the possession of the prosecution and law enforcement authorities to which the same defendant would have been entitled at time of trial "[u]pon the prosecution of a postconviction writ of habeas corpus."

Moreover, discoverable materials may include those that the prosecutor or law enforcement agencies learned of or received since petitioner's trial, which must be turned over pursuant to the prosecution's continuing duty to disclose *Brady* materials. (*People v. Garcia*, 17 Cal. App. 4th at 1179 (*citing Imbler v. Pachtman*, 424 U.S. at 427 n.25 [the prosecution must provide information acquired after a defendant's conviction that casts doubt on the conviction].) The *Steele* Court outlined that the prosecutor's duty to provide exculpatory evidence under section 1054.9 encompasses the prosecution's obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), and "encompasses the duty to ascertain as well as divulge 'any favorable evidence known to the others acting on the government's behalf…'" (*Steele*, 32 Cal. 4th at 696-97 (*quoting In re Brown*, 17 Cal. 4th 873, 879 (1998), *quoting* in turn, *Kyles v. Whitley*, 514 U.S. 419, 437 (1995)). This obligation requires the prosecution to provide exculpatory and impeachment material. (*Strickler v. Greene*, 527 U.S. 263, 281-82 (1999).)

Brady obligations are not limited to the trial setting, but apply to post-conviction litigation as well. (*Thomas v. Goldsmi*th, 979 F.2d 746, 749-50 (9th Cir. 1992) (ongoing post-conviction duty would require obvious exculpatory evidence of semen in sexual assault cases

turned over for use in federal habeas proceeding, and distinguishing past duty at trial from present duty in habeas litigation); see also *Singh v. Prunty*, 142 F.3d 1157, 1161-64 (9th Cir.), cert. denied, 525 U.S. 956 (1988) (district court's denial of habeas corpus relief reversed for defendant convicted of murder and solicitation to commit murder, due to prosecution's failure to disclose agreement of substantial benefits in exchange for testimony of heroin-addicted informant)

B. FAVORABLE EVIDENCE THAT EXISTS BEFORE AND AFTER CONVICTION MUST BE DISCLOSED

The Petitioner and respondent appear to be in agreement that *Brady* principles apply independently and under the authority of habeas corpus post-conviction discovery delineated in Penal Code Section 1054.9. However, the prosecution repeatedly asks this Court to limit discovery to the time period ending on the date of sentencing; that is, if over its objection, the Court orders any of the requested discovery items be provided.

At the heart of the prosecution's argument is that *In re Steele* (2004) 32 Cal.4th 682, limits the evidence that can be ordered pursuant to this section to "materials in the possession of the prosecution and law enforcement authorities to which the same defendant would have been entitled at time of trial," asserting that this language relieves that agency of any obligation to turn over information, evidence or testimony that came into existence after the conviction date.

However, the California Supreme Court, in *In re Lawley* (2008) 42 Cal.4th 1231, 1246, reiterated that the prosecution is obligated to disclose evidence that casts doubt upon the conviction regardless of whether it was available before or after conviction:

> Before and during trial, due process requires the prosecution to disclose to the defense evidence that is material and exculpatory. (*Kyles v. Whitley* (1995) 514 U.S. 419, 432–433, 437–438, 115 S.Ct. 1555, 131 L.Ed.2d 490; *United States v. Bagley* (1985) 473 U.S. 667, 674–678, 105 S.Ct. 3375, 87 L.Ed.2d 481; *Brady v. Maryland* (1963) 373 U.S. 83, 86–87, 83 S.Ct. 1194, 10 L.Ed.2d 215.) This

> obligation continues after trial: " '[Even] after a conviction[,] the prosecutor ... is bound by the ethics of his office to inform the appropriate authority of ... information that casts doubt upon the correctness of the conviction.' " (*People v. Gonzalez, supra*, 51 Cal.3d at p. 1261, 275 Cal.Rptr. 729, 800 P.2d 1159, *quoting Imbler v. Pachtman* (1976) 424 U.S. 409, 427, fn. 25, 96 S.Ct. 984, 47 L.Ed.2d 128; see also Rules Prof. Conduct of State Bar, rule 5–220 [duty not to suppress evidence]; ABA Model Rules Prof. Conduct, rule 3.8 ["The prosecutor in a criminal case shall: [¶] ... [¶] (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense"].)

C. THE REQUESTED ITEMS IN EXHIBIT SHOULD BE ORDERED DISCLOSED TO JOHNSON PURSUANT TO P.C. SECTION 1054.9 AND *BRADY*

Petitioner requests to incorporate by reference the Amended Petition for Habeas Corpus, and the attached exhibits, filed on October 11, 2017. This motion seeks compelled disclosure of evidence related to the key issue in dispute in the petitioner's trial: the truthfulness of testimony by 1) Daniel Gammie, a former Orange County Crime Lab criminalist and 2) Mary Hong, who at the time of her testimony in 2016 was an Orange County Crime Lab criminalist, and in 2016 became the director of two California Department of Justice crime laboratories, located in Santa Barbara and Watsonville, California. (Partial trial testimony of Mary Hong, *People v. Leonardo Alvarez*, Orange County Superior Court Case Number 00SF0657, March 6, 2017, pp. 860-865.) Gammie reached a conclusion in 1985 that semen found in the victim's vagina—and determined nearly 20 years later through DNA testing to be Johnson—was not deposited at or near the time that Bridgett Lamon was killed. But during his trial testimony in 2008, Gammie claimed that his opinion was no longer scientifically valid. He also testified that he had no recollection of reaching a similar conclusion to the one related to this case. Gammie

and Hong both asserted that their experiences over time convinced them that variabilities in sperm density and semen quantity prevented this type of opinion from being reliably rendered.

Hong testified that variabilities required that any window of time for sperm deposit begin at the time of collection and move backwards in time. She offered a further opinion that Johnson's semen was likely deposited sometime between when the semen was collected and 24 hours earlier—thus allowing for a window in time in which Johnson could have committed a rape and killed victim in a related act. However, unbeknownst to Johnson defense team, in 2009 Hong returned to the same witness stand in the same courtroom to testify about the same subject matter, regarding another murder that occurred in 1985. In *People v. Wendell Lemond*, though, Hong testified that the semen left in the victim—years later, also via DNA testing to be that of the victim Catherine Tameny's boyfriend—was likely left more than twelve to twenty four hours before the murder. Hong's opinion effectively eliminated this key third party as a suspect in any sexually motivated murder. DNA of the individual charged in the case, Wendell Lemond, was found in amylase located on the deceased victim's chest.

The window for the time of deposit in *Lemond*, which in *Johnson*, Hong said necessarily began at the time of collection, was gone from her testimony. And the ability to render an opinion that semen was not deposited at or near the time of a victim's death—disavowed in *Johnson*—was effectively restored. Though, defense counsel in *Lemond* certainly had no more idea of the vast inconsistency than *Johnson* and his counsel. To make matters more astonishing and troubling, Gammie had in fact reached the same opinion that semen was deposited at or near the time of death of Tameny (*People v. Lemond*)—**just one day earlier in 1985** than when he reached the same conclusion related to semen found in Bridgett Lamon (*People v. Johnson*.) However, in *Lemond*, Gammie never testified, and defense counsel in that case undoubtedly had no idea that Gammie and Hong had the previous year disavowed the ability to reach the conclusion Gammie had in his two reports, which Hong turned around and embraced.

Assuming arguendo that the prosecution team in Johnson—including both members of the OCDA and the Crime Lab—believed that Gammie had made an error related to his opinion

regarding the time of semen deposit pertaining to the Johnson case, they were on notice of a significant error that could have unfairly affected decisions and outcomes in terms of wrongful accusations and convictions, as well as prosecutions that may have been inappropriately not pursued. But in *Johnson*, Gammie claimed he had no recollection of any other similar conclusion in other cases. Nonetheless, at that very same time, the prosecution was advancing in another case in which Gammie had reached an identical conclusion.

Evidence and testimony now identified in *Lemond* provide compelling reasons to believe that Gammie and Hong were not being truthful in their testimony about the timing of the deposit in *Johnso*n, and the ability to render a scientific opinion. As the prosecutorial agency, and more specifically the same homicide unit within it, handled both cases during overlapping times (and in the very same courtroom) it is also reasonable to believe that there was an awareness that Gammie created multiple reports reaching a conclusion he disavowed in one of the cases. Moreover, Hong certainly did not forget about her testimony in Johnson, nor did she wipe from her mind Gammie's role and recanting of his opinion in that case, when she testified in *Lemond.*

D. EVIDENCE OF MULTIPLE DATABASES/LISTS FOR IDENTIFYING UNSOLVED SEXUAL ASSAULT CASES WHERE TSD REPORTS WERE LIKELY

The Court Order on April 19, 2018, required discovery of any crime lab reports involving analysis of semen where an opinion was rendered as to TSD between May 26, 1985, until the sentencing date of September 26, 2008. (Status Report, at p. 2.) In response, the OCDA claimed that "the People do not possess a database or *any* searchable method to determine the cases where these opinions were given." (People's Response, at p. 1, emphasis added.) Moreover, the Crime Lab stated that "[t]he records for the Orange County Crime lab are maintained and catalogued according to the Forensic/Laboratory Report number and date. The records are not categorized according to subject matter, type of testing performed, or type of opinion rendered, if any." (Status Report, at p. 2.) "Because the records are not maintained by subject area and *are not otherwise searchable*, the records [approximately 3,500 baker boxes of files, each

containing 20-40 individual cases] will need to be examined one-by-one by hand to determine if they contain potentially responsive records." (*Ibid.*, emphasis added.)

As discussed earlier, the claim that the Crime Lab lacked any effective way to search for potentially responsive records before 2000 was first revealed to be a deceptive revelation in Michelle McNamara's book *I'll Be Gone in the Dark*. According to Michelle McNamara's book, *I'll Be Gone in the Dark,* the Crime Lab began a study of "cold cases" in 1996 with the early development of DNA testing, focusing on homicides and sexual assault cases. During this time, the Crime Lab reviewed all cases between 1972 and 1994 and prioritized homicides involving sexual assaults, resulting in the creation of databases, spreadsheets and reports based on subject matter. The requested material would be found in the exact types of cases involved in the Crime Lab's previous investigation efforts—sexual assault/murders—where DNA is available and where a determination as to the timing of semen deposit was likely made. Additionally, the cases involved in these previous search efforts are the cases precisely within the timing of Defendant's inquiry. Thus, as discussed below and contrary to Houlihan's assertions, the Crime Lab does have searchable methods to examine responsive case files. Indeed, the Crime Lab, and likely the OCDA, knew that both agencies have done extensive research with precisely the cases in question.

1. Revelations of the Crime Lab's involvement in search efforts of cases between 1976 and the late 1990s and the resulting development of databases and reports based on subject matter constitute new evidence that warrants requested discovery

In 1996, following the developments in DNA technology, the Crime Lab began investigating cold case murders by creating DNA profiles and searching for hits in the state database. (Michelle McNamara, *I'll Be Gone in the Dark* (2018) p. 103.) McNamara wrote:

> The crime lab staff crunched the numbers. Between 1972 and 1994, Orange County investigated 2,479 homicides and cleared 1,591, leaving nearly 900 unsolved cold cases. A strategy was developed for reexamining cold cases. Homicides involving sexual assaults would be prioritized, as those killers tend to be repeat offenders and leave behind the kind of biological material that lends itself to DNA typing.

(McNamara, *I'll Be Gone in the Dark, 2018*, pp. 122-123.)

This effort was corroborated by members of the Orange County Crime Lab, who testified in cases about maintaining the list of unsolved sexual assault cases that occurred prior to 2000. In fact, the Crime Lab hired additional staff to work through the backlog. In December 2001, Davao Nahakie Jackson was charged for a rape crime that occurred in October 1995 after his DNA profile matched the sample collected from the victim's body in a "cold hit." (*People v. Jackson*, G032918, 2004 WL 2635625 (Cal. Ct. App. Nov. 19, 2004.) During a hearing about the six-year prosecutorial delay, the Crime Lab testified about why it had taken several years for DNA evidence from the victim's rape kit to be run through the Combined DNA Index System (CODIS), where it would be quickly connected with Jackson's profile. (*Id.* at p. 2.) Elizabeth Thompson, a forensic scientist at the Crime Lab, explained that the process of running DNA results on the "backlog" of unsolved sexual assault cases through CODIS had been time-consuming. (*Ibid*.) Thompson suggested that pace of creating DNA profiles and running them through CODIS quickened once the Crime Lab received "[a] three-year grant from the state in October 2000 [which] provided funding to hire and train five analysts to work on unsolved sexual assault cases." (*Ibid*.) Thompson stated that "[s]ince October 2000, over 400 rape kits had been profiled," and the DNA evidence in *People v. Jackson* was uploaded in December 2001. (*Ibid*.)

Thompson's 2003 testimony further contradicts Houlihan's declaration, by confirming a list of more than 400 cases files that could have quickly been searched in 2018 for TSD. (*Ibid*.)

The Crime Lab's list of unsolved sexual assault almost certainly continued past 2000, and may well be ongoing. In 2011, Danielle Wieland, another forensic scientist in the DNA section of the Orange County Crime Lab, testified in *People v. Rawls* regarding her role and that of the lab in connecting the appellant to semen collected in 2003 in Redondo Beach. (*People v. Rawls*, YA079991, 2012 WL 5899104 (Cal. Ct. App. Nov. 26, 2012) p. 3.) Wieland admitted to being part of a "'sexual assault backlog reduction group' …[that] 'primarily focused on sexual assault cases that had no suspects over time.'" (*Ibid*.) She had performed DNA typing in the case in 2003, and did no testing for the next 8 years while the case went cold (*Id*. at p. 4.) In 2011, Wieland returned to the case to examine a buccal swabbing from Rawls, whom police

considered a suspect. (*Ibid*.) Wieland's statements further contradict Houlihan's contention that the Crime Lab does not maintain an organized or searchable list of sexual offense cases, as they evidently tracked unsolved cases with preserved DNA evidence over many years.

In 2004, George Eugene Cross was connected to an unsolved rape case when his DNA profile had a "cold hit" on the Combined Index DNA System (CODIS) with a semen sample collected in 1997. (*People v. Cross*, G044769, 2012 WL 5929888 (Cal. Ct. App. Nov. 27, 2012) p. 1.) Wieland once again testified on behalf of the Crime Lab. (Partial Reporter's Transcript *People v. Cross*, No. 06NF4190, p. 2354:13-14, attached herein as Exhibit G.) Wieland said that for every case examined for DNA, as part of the Crime Lab's "laboratory information management system," the Crime Lab assigns an FR number "that is unique to that particular case in the Crime Lab." (Exhibit G at pp. 2354-2355:20-3.) The same number follows a case throughout, unless a case examined prior to 2000 is reexamined, at which point it is assigned a new number. (Exhibit G at pp. 2354-2355: 24-1.) This testimony further corroborates that the Orange County Crime Lab clearly has long possessed and organized system of evidence over time, and has particularly tracked cold cases with preserved evidence—many of them from before 2000—in order to reexamine for purposes of DNA testing.

2. The OCDA Created TracKRS and Crime Lab Used System

In 1995, Orange County Deputy District Attorney Michael Jacobs began reviewing four cold sexual assault cases in Costa Mesa and Tustin that occurred in 1979 (Keppel, et al., *The Psychology of Serial Killer Investigations: The Grisly Business Unit* (2003) p. 16.) During this investigation, Jacobs discovered that a local investigator had developed a database to track murder investigations for the city of Garden Grove. (Keppel, et al., at p. 17.) Jacobs subsequently began "[a] collection process of homicide and sexual assault information began, focusing on females murdered and sexual assault cases prosecuted in Orange County for the past 30 years," in a review which included solved and unsolved cases. (*Ibid*.) By May of 1996, Jacobs' database "had approximately 240 murder cases. (*Ibid*.) To extend the reach of this effort, Jacobs proposed the Taskforce Review Aimed at Catching Killers, Rapists, and Sexual Offenders, otherwise known as "TracKRS," to the Orange County Chiefs of Police and Sheriff's

Office in March of 1997. (Walton, Cold Case Homicides: Practical Investigative Techniques, Second Edition (2006) p. 162.) The proposal was adopted unanimously. (*Ibid*.) The goal of the TracKRS was "to provide local investigators with a database of homicides and sexual assault cases that they could research themselves." (*Ibid*.)

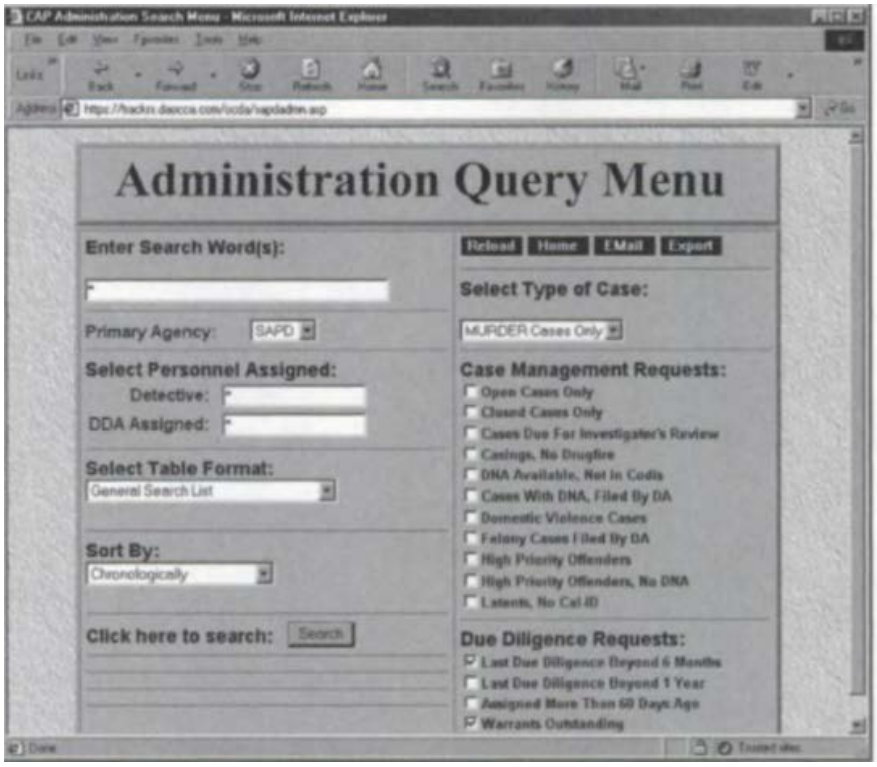
Following the establishment of TracKRS, a central Modus Operandi (M.O.) database of homicide and sexual assault cases was assembled. (Walton at p. 163.) Every Orange County Chief and the Orange County Sheriff supported the project by entering those cases within their jurisdiction into the M.O. database. (*Id*. at pp. 163-164.) The District Attorney's Office also entered the descriptions of previously prosecuted offenders. (*Id*. at p. 164) In addition to creating this central database, the TracKRS Unit further developed "[a] DNA collection process that helps ensure that required offenders are in the CODIS database," along with "[a]n examination process to get as much casework evidence examined as possible to connect to other cases and offender DNA." (*Id*. at p. 169.) In this effort, the Sheriff's Crime Lab committed extensive resources, as well as its cold case unit., CLUE. (*Id*. at p. 163.)

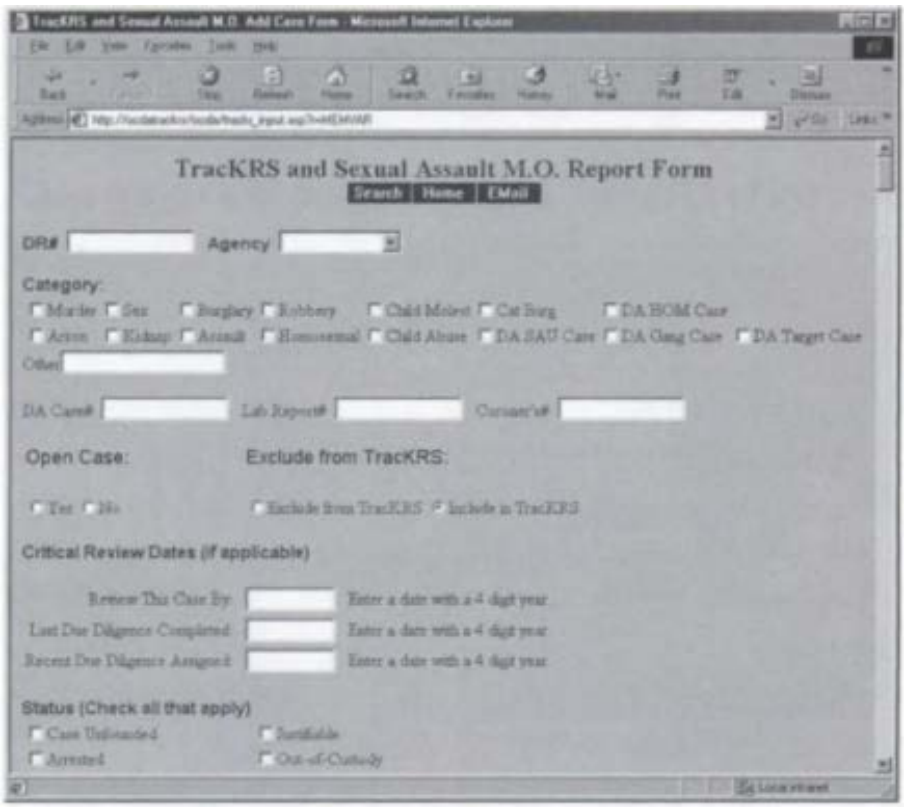
The TracKRS database appears to be comprehensive in its scope. As of 2006, its system maintained "nearly 8,800 murders and sexual assault cases, dating as back into the 1960s." (*Id*. at p. 164.) TracKRS also played a central role in the Sexual Assault Backlog Reduction Effort (SABRE) hosted by the Sheriff's Office, which "identif[ied] and collect[ed] rape kits requiring DNA examination going back to January 1995." (*Id*. at p. 166.) These cases with DNA evidence were entered into TracKRS to "enable the DA's office to guarantee that [they] can be prosecuted at any later date." (*Ibid*.)

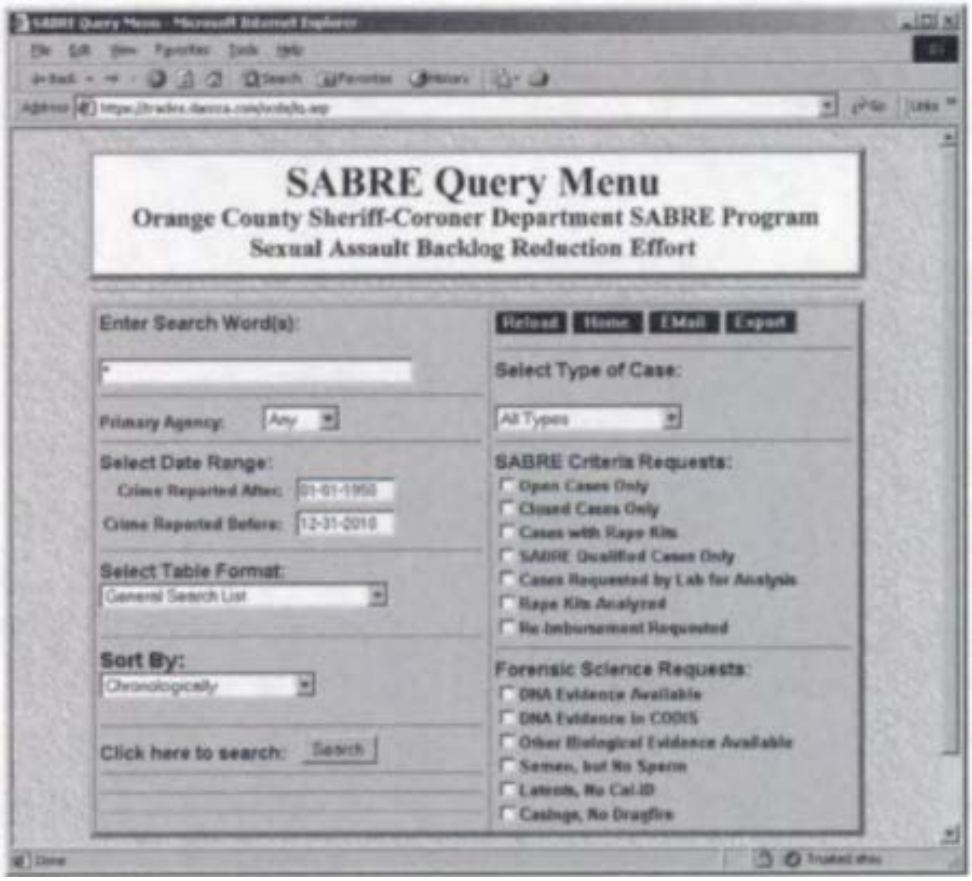
The TracKRS information system includes an online case summary available at any time to those who have access to the system. (*Id*. at pp. 165, 170.) The information system is maintained "via a secure Internet site maintained by the [Orange County] District Attorney." (*Id*. at p. 162.) This comprehensive database, complete with detailed case information, appears to be no barrier to accessing details of cases quickly. TracKRS guarantees "access to data 24 hours a day, 7 days a week, from [investigators'] desktop computers over a secure Internet connection." (*Id*. at p. 165.) Reportedly, "[q]ueries are simple and the response is immediate."

(*Id.* at 164.) In fact, images of the database reveal just how easily an investigator using the database can filter out cases with an incredible amount of specificity. For example, an investigator using the TracKRS database can easily select the type of case they want to review, whether sexual assault or murder cases, further filter for open or cold cases, cases with or without DNA evidence, and cases involving a "high priority offender," among other specific identifications. (*Id.* at p. 169.) Cases can even be sorted out chronologically. (*Ibid.*) Additionally, under the SABRE Query Menu of the TracKRS database, investigators can specifically filter through sexual assault cases, easily selecting for cases that have rape kits, forensically analyzed rape kits, available DNA evidence, and/or even collected semen samples. (*Id.* at 167.)

Images of TracKRS Database Search Functions




TracKRS and Sexual Assault M.O. Report Form
Search
Home
EMail
DR#
Agency
Category:
Open Case:
Exclude from TracKRS:
Critical Review Dates (if applicable)
Status (Check all that apply)


SABRE Query Menu
Orange County Sheriff-Coroner Department SABRE Program
Sexual Assault Backlog Reduction Effort
Enter Search Word(s):
Reload
Home
EMail
Export
Select Type of Case:
Primary Agency:
Select Date Range:
Crime Reported After:
Crime Reported Before:
Select Table Format:
SABRE Criteria Requests:
Sort By:
Forensic Science Requests:
Click here to search:
Search

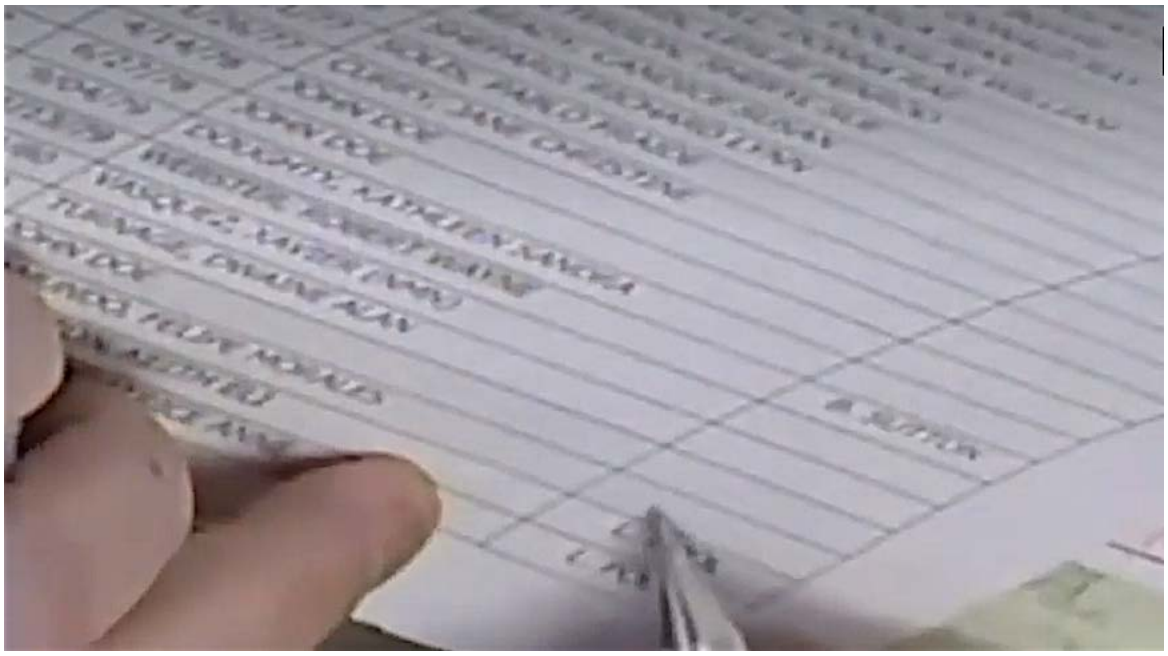
3. Unsolved Golden State Killer Case Leads to Creation Leads to Creation of C.L.U.E. (and Corroboration that TSD Reports Likely Collected from Golden State Killer Victims)

Joseph James DeAngelo is expected to plead guilty to four murders in Orange County of Janelle Cruz, Manuela Witthuhn, Bruce Harrington, and Patrice Harrington. Notably, "forensics determine[d] that Janelle [Cruz], Manuela Witthuhn, and Patrice Harrington had been raped before being killed." (Cold Case Files: The Original Nightstalker (Dateline 2003).) The Crime Lab also "had the foresight to preserve []evidence," (Cold Case Files: The Golden State Killer (A&E 2018).) Former Orange County Crime Lab criminalist Jim White suspected a connection between the murders of Bruce Harrington, Patrice Harrington, and Manuela Witthuhn. However, the connection to the murder of Janelle Cruz did not occur until the end of 1996 when Hong purportedly noticed that the DNA profiles from each of the murders matched. (McNamara, supra, at p. 105-06.) This occurred as Hong was at her desk scanning an Excel spreadsheet, which "was a compilation of the twenty or so unsolved cases in which DNA profiles had been successfully developed. The chart cross-referenced case numbers and victims' names with the profiles, which consisted of five PCR loci, or markers, that were then in use for typing." (*Id*. at p. 106.)

Hong allegedly shared her findings with Larry Pool and Brian Heaney, two investigators in the Cold Case Unit of the Orange County Sheriff's Department. (Cold Case Files: The Original Nightstalker (Dateline 2003).) After connecting these initial cases, the detectives reportedly "scoured the country for killings carried out in similar ways." (Rams, *DNA May Point to Serial Killer in the Area*, OC Register (Oct. 1 2000).) "On January 1st, 1997, the Countywide Law Enforcement Unsolved Element (CLUE), was formed by the Orange County Sheriff's Department. The unit was charged with investigating unsolved homicides and assumed responsibility for the Harrington investigation. On June 23, 1997, CLUE investigators Brian Heaney and Dave Wilson began a review of the Harrington case. On August 15th, 1997, Research Analyst Janet Wilder examined the Harrington, Witthuhn and Cruz murders." (Crompton, *Sudden Terror* (2010) at p. 459 (hereinafter Crompton).)

The high-profile murder of Patrice Harrington is just one example of a case where a determination as to timing was made and thus would have been an easily identifiable case in response to Defendant's discovery request. Reportedly, "Elizabeth Thompson examined biological evidence collected during the initial investigation of the Harrington case. Forensic examination determined the semen deposited in and on Patrice Harrington was from the murderer." (Sudden Terror, supra, at p. 459.) The Harrington case apparently was only one of about 100 that investigators from CLUE wanted to reexamine. (Rams, DNA May Point to Serial Killer in the Area, Orange County Register (Oct. 1, 2000).) This particular case seemingly inspired investigator Larry Pool to develop a customized "8000-person database," or what he called "the Harrington Access Data Bank," which he used for years in his pursuit of the Golden State Killer. (Mellen, *Former OCSD investigator never stopped searching for Golden State Killer*, Behind the Badge (May 2, 2018).)

Images of CLUE's Repository of Unsolved Murder Case Files Dating Back to 1960s



(OCSD Unsolved Homicide - CLUE - Flying Pig Mascot, lpoolnetwork (March 6, 2012) < https://www.youtube.com/watch?v=renbc6lKp58>.)

The investigation of Janelle Cruz's murder in 1986 is also revealing because it involved multiple male suspects who had visited Janelle at various times around her death. Lead

investigator Larry Montgomery and his colleagues "uncover[ed] a litany of young men who wandered through her life in the days before her murder." (McNamara, at p. 112.) Investigators identified at least nine men who were romantically involved with Cruz around the time of her death. The suspects had contact with Cruz at various times: one who had just begun dating Cruz hung out with her the day before she was murdered; another who saw her two days before she died; a co-worker was the last boy to see her alive; another who visited her home the day of her death; and someone who visited Cruz's house shortly before her murder. (*Ibid*.) Blood samples eliminated two suspects, however, "the theory that one of the young men in her life was responsible persisted." (*Id*. at p. 116.) The remaining suspects were conclusively eliminated ten years later, when the DNA profile of her killer was developed in 1996. (*Ibid*.)

4. Orange County Cold Case Homicide Task Force (OCHTF)

In 2014, the Santa Ana Police Department and the Orange County District Attorney's Office teamed up to establish the Orange County Cold Case Homicide Task Force (OCHTF). (Special Investigations, Investigations Bureau, Santa Ana Police Department, <https://www.santa-ana.org/pd/investigations-bureau/special-investigations>.) According to the Santa Ana Police Department's website, "[i]t is the intent of this task force to reduce the number of unsolved homicides through the consistent and coordinated collaborative efforts of experienced homicide investigators, supervisors, analysts, and criminalists." (*Ibid*.) As of 2018, it consisted of "14 detectives from a half-dozen [police] departments and several investigators from the District Attorney's Office." (Orange County Register, Orange County Investigator Attacks Cold Case Killing on Blood Alley (Jan. 1, 2018) <https://www.ocregister.com/2018/01/30/orange-county-investigator-attacks-mysterious-cold-case-killing-on-blood-alley/>.) The OCHTF claims to have "aggressively and cooperatively pursued the investigation of unsolved homicides for many years." (*Ibid*.) The Task Force reportedly "focuses mostly on cases after the 1960s" as of January 2018, had "about 140 active cases." (*Ibid*.) By the end of 2018, the OCHTF had "reviewed more than 220 cases and solved 8 cold case homicides." (Citizens' Report Orange County, OC Auditor-Controller (2018) p. 14. <https://acdcweb01.ocgov.com/wp-content/uploads/2018/12/PAFR2018.pdf>.)

Many of these solved and unsolved cases likely involve sexual assault. In 2014, an investigation by the OCHTF led to the arrest Douglas Gregory Gutridge for a cold case murder of a Santa Ana woman in 1989. (CBS Los Angeles, OC Cold Case Task Force Announces Arrest of Man in 1989 Murder (Dec. 18, 2014), <https://losangeles.cbslocal.com/2014/12/18/oc-cold-case-task-force-announces-arrest-of-man-in-1989-murder/>.) Using forensic evidence from the murder scene, the OCHTF matched an unknown identified male DNA to Gutridge. (*Ibid*.) In 2019, the Task Force's investigation led the Sheriff's Office to arrest Eddie Lee Anderson in the murder of a 30-year-old woman in 1976. (News Release: OCSD Arrests Man Suspected in 1976 Cold Case Murder, Orange County Sheriff's Department (May 30, 2019),

<http://orangecountyda.org/civica/press/display.asp?layout=12&Entry=5871>.) Using DNA analysis and genealogy techniques, the Task Force matched DNA evidence from swabs collected in 1976 to Anderson. (*Ibid*.) Working with the District Attorney's TracKRS Unit in 2017, OCHTF also identified Felipe Vianney Hernandez Tellez as a suspect for the cold case rape and murder of Sunny Adrienne Sudweeks in 1997. (Press Release: Costa Mesa Police Announce They Have Suspect in 20-Year-Old Murder-Rape Cold Case of OCC Student, Costa Mesa Police Department (February 23, 2017), <https://cityofcostamesanews.com/costa-mesa-police-announce-they-have-suspect-in-20-year-old-murder-rape-cold-case-of-occ-student/?print=pdf>.)

E. DEFENDANT HAS IDENTIFIED NUMEROUS DEFENDANTS AND VICTIMS WHERE CONDUCT INVOLVED SEXUAL ASSAULT AND DESCRIPTIONS SUGGEST COLLECTION OF SEMEN

Johnson's defense team conducted an exhaustive search of cases and news reporting between 1974 and 1996 to identify cases where it was likely that semen was deposited in the victim or at the crime scene. The following are case by case summary of those matters:

Case: *People v. Stephens* (2019)

Date of Incident: December 11, 1974

On December 11, 1974, a friend found Annie R. dead in her apartment after she failed to meet him and other friends for dinner that night. (*People v. Stephens*, G056299, 2019 WL 2591118 (Cal. Ct. App. June 25, 2019) p. 1.) Her back was bruised, and her "apartment was in disarray, as if a struggle had taken place." (*Id.* at p. 4.) Criminalists collected blood from the bedroom windowsill and bedding. (*Ibid*.) At the autopsy, criminalists collected fingernail scrapings and cuttings as well as vaginal and anal swabs. (*Ibid.*) No semen was found in the anal and vaginal swabs. (*Ibid*.) Semen found on the bed sheets matched Robert J., with whom Annie was in a relationship at the time. (*Id.* at p. 5.) A forensic pathologist testified that Annie died of asphyxia. (*Ibid*.) He also testified that something was inserted into her anus before she died, but he could not determine what was inserted. (*Id.* at pp. 4-5.)

In 2015 Larry Clark Stephens was arrested for domestic violence. (*Id.* at p. 5.) His DNA was collected, and the profile was entered into the Combined DNA Index System database. (*Ibid*.) That DNA profile matched the profile from the blood on Annie's windowsill and comforter. (*Ibid*.) In a recorded interview, Stephens was shown photos of Annie and said he had "never run across that girl [Annie] in my life." (*Id.* at pp. 5-6.) He described the finding that his DNA matched the DNA found inside Annie's apartment as "totally unexplainable." (*Id.* at p. 6.) Stephens was convicted of first-degree murder and sentenced to life without the possibility of parole. (*Ibid.*)

On appeal, Stephens argued that: (1) the trial court erred in excluding evidence that the victim owned a vibrator; and (2) the trial court erred in denying two defense motions to disclose a confidential informant. (*Id.* at pp. 7, 11.) The California Court of Appeal Fourth Appellate District found no reversible error by the trial court and affirmed the judgment. (*Id.* at p. 7.)

Victim: Janet Aline Stallcup

Date of Incident: December 28, 1976

On December 28, 1976, the body of Janet Aline Stallcup was discovered in her car outside of an apartment complex in Garden Grove. (Salvador Hernandez, et. al., *Cold-case mysteries that have withstood the test of time*, O.C. Register (Jul. 10, 2014) <https://www.ocregister.com/2014/07/10/cold-case-mysteries-that-have-withstood-the-test-of-time/> p. 1.) An autopsy of her body revealed that "she was sexually assaulted and died as a result of manual strangulation." (*Id.* at p. 2.) In the 2000s, detectives were able to test DNA evidence from the perpetrator found at the crime scene. (*Ibid.*) To date, no arrest has been made despite hundreds of hours spent investigating the case and following leads. (*Ibid.*) Stallcup's case is one of the over 400 cold cases in Santa Ana, "which get reviewed regularly by cold case detectives." (*Id.* at p. 3.)

Victim: Robyn Cox

Date of Incident: January 12, 1977

Robyn Cox was apparently killed on the afternoon of January 12, 1977. Her body, however, was not discovered until the same evening, when her roommate found it inside their Costa Mesa apartment in the 200 block of Avocado Avenue, after returning home from work. (Deepa Bharath, *Unsolved cases now posted online*, Daily Pilot (Nov. 10, 2010) <https://www.la times.com/socal/daily-pilot /news/tn-dpt-111-unsolved-20101110-story.html> p. 3.) Cox appeared to have been strangled or drowned in the bathtub. (*Ibid.*)

According to a news report, investigators found few clues when they arrived at the crime scene that evening. (*Ibid.*) The police later submitted the evidence in that case for DNA examination at the Orange County Crime Lab. (Joseph Serna, *A closer look -- Still searching for answers*, LA Times (Feb. 25, 2002) <https://www.latimes.com/socal/daily-pilot/news /tn-dpt-xpm- 2002-02-25 -export39714- story.html> p. 6.)

In 2010, nearly 34 years later, the Costa Mesa Police Department continued to search for clues in the unsolved murder, according to the Daily Pilot. (Bharath, at p. 3.) Costa Mesa police posted details from such cold case files under a new Unsolved Cases section on the department's website, costamesapd.org, in hopes that members of the public would provide assistance. (*Ibid.*) (This section is no longer available on the LA Times website.)

Victim: Lynda Saunders

Suspect: James Lynn Brown

Date of Incident: July 9, 1978

On July 9, 1978, two managers at Fiddlers Three Restaurant in Tustin, Lynda Saunders and Michael Reynolds, were attacked during an apparent robbery. (*34-Year-Old OC Cold Case Solved Using DNA From Killer's Family*, CBS Los Angeles (Nov. 1, 2012) <https://losangeles.cbslocal.com/2012/11/01/34-year-old-oc-cold-case-solved-using-dna-from-killers-family/> p. 2.) While the two were sitting in a car, a suspect allegedly walked up from behind the vehicle and demanded Reynolds's wallet. (*Ibid.*) As Reynolds reached into his pocket, he was shot in the back of the head, but survived. (*Ibid.*) Saunders ran from the car and was chased. (*Ibid.*) Her body was later found behind a nearby liquor store. (*Ibid.*) She had suffered a gunshot wound to the chest and head injuries and had been sexually assaulted. (*Ibid.*)

Mary Hong, a forensic scientist at the Orange County Crime Lab, had attempted to solve this homicide since 1996, when she developed a DNA profile of the perpetrator using semen left on the victim. (*Id.* at 1.) In the early 2000s, Hong retested the evidence using new DNA technology that provided a better identification of the suspect. (*Id.* at 2.) The DNA profile was sent to the California Department of Justice's data bank and to the FBI's Combined DNA Index System, but there was no match. (*Ibid.*)

The case went cold until 2006, when Santa Ana Police Department's Cold Case Unit formed to review over 250 unsolved deaths including Saunders'. (*Ibid.*) In July 2010, prosecutors' request for authorization to use family DNA in this investigation was granted. (*Ibid.*) Information developed from the state's familial search program suggested a man with a criminal history was a relative of the DNA source found at the scene. (*Ibid.*) Detectives tracked down that man, who had a brother named James Lynn Brown. (*Ibid.*) Brown had a son, who agreed to provide a saliva sample. (*Ibid.*) The DNA produced a family match with the semen left on Saunders. (*Ibid.*) But detectives could not make an arrest, because Brown committed suicide in 1996. (*Ibid.*)

Hong stated that "this case would not have been solved without the familial searches because the suspect is deceased, and his DNA sample never went into the database." (*Ibid.*) Hong says at least ten other Orange County cases have been submitted to the Department of Justice for familial DNA searches and that the results of those are pending. (*Ibid.*)

Case: *People v. Parker* (2017)

Date of Incident(s): December 1, 1978; March 31, 1979; September 14, 1979; September 30, 1979; October 6, 1979

Gerald Parker was convicted of six counts of first degree murder of Sandra Fry, Kimberly Rawlins, Marolyn Carleton, Chantal Green, Debora Kennedy, and Debra Senior with special circumstances of multiple murder and felony murder. (*People v. Parker* (2017) 2 Cal.5th 1184, 1188.) Parker was sentenced to death. (*Id.* at p. 1188.) The appeal was automatic. (*Ibid.*) The Supreme Court of California affirmed the judgment in its entirety. (*Ibid.*)

In 1978 and 1979, the defendant was a staff sergeant in the U.S. Marine Corps stationed in Orange County, California. (*Ibid*.) During this time, six women in three different Orange County cities—Anaheim, Costa Mesa, and Tustin—were sexually assaulted and brutally beaten in their apartments. (*Ibid.*) Five died from massive injuries to their heads caused by being struck with a blunt object with such force their skulls were fractured. (*Ibid.*) One pregnant victim survived, but her fetus died as a result of the attack. (*Ibid.*) In 1996, DNA testing connected the homicides to each other and to the defendant, who was then in prison on an unrelated parole violation. (*Ibid.*) When interrogated and confronted with the DNA and fingerprint evidence during interviews the police tape-recorded with his knowledge, the defendant admitted burglarizing all six homes. (*Ibid.*) At trial, he did not contest his identity as the assailant of all six women, but claimed he lacked the requisite specific intent to commit the crimes due to voluntary intoxication. (*Ibid.*)

The first incident took place on December 1, 1978 in Anaheim. (*Ibid.*) When Sandra Fry's roommate got home at 11:00 pm, she found Fry unresponsive and naked across the bed. (*Ibid.*) Fry was pronounced dead at the hospital. Richard Fukumoto, M.D., the Chief Pathologist for the Orange County Coroner's Office, testified Fry died from skull fractures from

a number of blows to her head by a blunt instrument. (*Id.* at p. 1189.) The point of entry into the apartment was a window above the bed in Stevenson's bedroom. (*Ibid.*) A latent fingerprint from this window was later matched to the defendant's left index finger. (*Ibid.*) Subsequent testing of the semen swabbed from Fry's body yielded a DNA profile that matched defendant's. (*Ibid.*) When interrogated in 1996, the defendant's description of the attack matched Fry's case; he admitted to hitting her with a two-by-four, rendering her unconscious, and ejaculating on her. (*Ibid.*)

The second incident occurred on March 31, 1979, when Kimberly Rawlins was alone at her apartment and the door had been left unlocked for her roommates to easily get back in. (*Id.* at p. 1190.) Peter Yatar, M.D., performed Rawlins's autopsy and testified that she died of multiple skull fractures consistent with applying "a great amount of force" with a blunt instrument. (*Id.* at p. 215.) Subsequent testing of the semen found on the string of the tampon Rawlins had been wearing revealed a DNA profile that matched Parker's DNA. (*Ibid.*) It also matched the DNA profiles of the semen swabbed from Debora Kennedy and Debra Senior. (*Ibid.*) When the defendant was interrogated, he described an attack that matched Rawlins's case and that he went in with the "intent to rape her," struck her unconscious with a two-by-four, but could not recall whether he could achieve an erection. (*Id.* at p. 1191.)

The third occurrence took place in Costa Mesa on the evening of September 14, 1979. (*Ibid.*) Police officers were dispatched to the residence of Marolyn Carleton and her 9-year-old son, after the complex's manager saw that the patio's doors were left open but the drapers were closed. (*Ibid.*) Carleton was found lying on the master bedroom floor, partially propped up against the bed and nightstand. (*Ibid.*) She had a very weak pulse, was struggling to breathe, and appeared to be unconscious. (*Ibid.*) Her face and hair were covered with blood and there was a large wound on the top of her skull. (*Ibid.*) The following day, she was pronounced dead at the hospital. (*Ibid.*) A rape kit taken from Carleton after her admission to the hospital yielded insufficient biological evidence for any type of testing or analysis. (*Id.* at p. 1192.) During interrogation, the defendant admitted to attempting to sexually assault her, but could not recall if he got an erection or ejaculated. (*Ibid.*)

The fourth incident happened on September 30, 1979. (*Ibid.*) D. Green was nine months pregnant with Chantal Green and lived with her husband in Tustin. (*Ibid.*) At 2:15 a.m., a law enforcement officer responded to a call from the apartment and was met outside by the husband, who appeared to be in a state of shock and said his wife had been injured. (*Ibid.*) D. was found unconscious on the bed with a two-inch hole in the middle of her head. (*Ibid.*) D. was transported to a hospital, where several hours later her unborn fetus was delivered stillborn. (*Ibid.*) D. was in a coma for 10 days and some 17 years later still had some problems performing complicated tasks. (*Id.* at p. 1193..) D.'s husband was convicted of second degree murder of Chantal and of attempting to murder his wife and assaulting her with force likely to cause great bodily injury. (*Ibid.*) He was committed to prison in November 1980 for a term of 15 years to life. (*Ibid.*) Subsequent testing of the sperm on the vaginal swab from D.'s rape kit taken revealed a DNA profile that matched defendant's. (*Ibid.*) In June 1996, D.'s husband was released from custody after the OC Superior Court judge dismissed the case. (*Ibid.*) Parker admitted to attacking D., raping her, and ejaculating inside of her. (*Ibid.*)

The fifth incident took place on October 6, 1979 in Tustin. (*Ibid.*) Yvette Levay left her sister, Debora Kennedy, alone at their apartment while she went to Vegas. (*Ibid.*) Levay returned the following day at about 6:00 pm to find Kennedy on the blood-soaked mattress, with her legs spread, blunt force trauma to her head, and showing no signs of life. (*Id.* at pp. 1193-1194.) There was a mucus-like substance between her legs in the vaginal area. (*Ibid.*) Subsequent testing of the sperm swabbed from Kennedy's body revealed a DNA profile that matched Parker's. (*Ibid.*) Defendant admits to hitting her head with a mallet, raping, and ejaculating inside her. (*Ibid.*)

The sixth case in question involved Debra Senior on the night of October 20, 1979. (*Ibid.*) When her roommate returned in the early morning, Senior was found with her clothes ripped off, severe head trauma, and blood everywhere. (*Ibid.*) The point of entry into the apartment was a bathroom window; there were partial shoe prints on top of a gas meter outside the window and on a bar of soap on the floor of the bathtub directly under the window. (*Id.*, at p. 1195.) One of the handprints from the windowsill matched the defendant's left palm. (*Ibid.*)

Subsequent testing of the sperm swabbed from Senior's body revealed a DNA profile that matched the defendant's. (*Ibid.*) As noted, it also matched the DNA profiles of the semen swabbed from Rawlins and Kennedy. (*Ibid.*) During the defendant's interrogation, he admitted to carrying Senior into one of the bedrooms, laying her on the floor, removing her underwear, raping her, and ejaculating inside her. (*Ibid.*)

According to the defendant, "[he] didn't know these people were actually dying, until [he] heard it on the radio." (*Id.* at p. 1198.) Sometimes the day after an attack he would recall he had gone ''out,'' but other times he experienced ''a total blackout'' and would not recall what had happened until later. (*Ibid.*) The defendant claimed he ''couldn't even get an erection in most of these cases, because [he] was drunk and under the influence of drugs." (*Ibid.*)

Victim: Joan Virginia Anderson

Suspect: William Lee Evins

Date of Incident: March 8, 1979

On March 8, 1979, Joan Virginia Anderson was raped and murdered in her Fountain Valley home. (Sean Emery, *Family of Convicted Orange County Murderer Believes Golden State Killer is Real Culprit*, OC Register (July 25, 2018) <https://www.ocregister.com/2018/07/25/family-of-convicted-orange-county-murderer-believes-golden-state-killer-is-real-culprit/> p. 1.) William Lee Evins was part of a construction crew working on Anderson's home around the time of her death. (*Id.* at p. 2.) Anderson was raped and bludgeoned with a hammer over twenty times. (*Ibid*.)

In 1985, Evins pleaded guilty to second-degree murder and was sentenced to fifteen years to life. (Julia Sclafani, *DNA from 1979 Fountain Valley Rape and Hammer Murder Matches the Man Convicted, Authorities Say; His Family is 'Happy to have Closure,'* L.A. Times (December 10, 2018) <https://www.latimes.com/socal/daily-pilot/news/tn-dpt-me-dna-20181210-story.html> p. 1.) Evins died in prison in 2013 after twenty-five years of incarceration. (*Ibid.*)

In 2018 Attorney Annee Della Donna represented Evins posthumously. (*Ibid.*) Donna asserted that details of the murder, such as the killer's use of cords to bind the victim and remaining in the house for hours after the killing, suggested the possibility that the Golden State Killer was responsible. (*Ibid.*) However, according to the prosecution, a DNA test conducted in December 2018 connected Evins to the crime scene. (*Ibid*.)

Case: *People v. Sellers* (1988)

Date of Incident: May 14, 1979

A jury convicted defendant Robert Lloyd Sellers of first degree murder and rape. (*People v. Sellers* (1988) 203 Cal.App.3d 1042, 1044-1045.) The jury also found true the special allegation that the murder was committed while Sellers was in the commission of the crime of rape. (*Ibid*.) Sellers was a security guard at the apartment complex the victim lived at in Irvine. (*Id.* at p. 1045.) According to the prosecution, on May 14, 1979, Sellers entered the victim's open bedroom window, beat her with his baton, and strangled the victim to death. (*Ibid.*) Sellers was arrested five years after a fingerprint expert concluded a palm print and fingerprints matched Sellers'. (*Id.* at p. 1048.)

At the scene of the crime, multiple semen stains were found belonging to at least two different men. (*Id.* at 1047.) According to James White, a criminalist employed by the Orange County Sherriff, semen stain number two could have belonged to the victim's boyfriend but could not have belonged to Sellers. (*Ibid.*) An additional semen stain was found directly under the victim's vaginal area. (*Ibid.*) White concluded that this could belong to Sellers, but that 90 percent of the population could not be excluded as a possible donor. (*Ibid*.)

Sellers gave the police varying accounts of what happened during different interviews. In his first two interviews, Sellers told the police that the victim invited him into her apartment and began to make sexual advances. (*Id.* at 1048.) However, according to Sellers, she soon changed her mind, and grabbed his arm and his testicles while he was still wearing clothes. (*Ibid.*) This caused Sellers pain, so Sellers began to beat her with the baton for her to release him. (*Ibid*.) When she let go, Sellers said he realized she was dead. (*Ibid.*) In this version, he did not have sexual intercourse with the victim before or after her death. (*Ibid.*) In his third interview, Sellers said he had consensual sexual intercourse with the victim before her death. (*Ibid.*) According to Sellers, during intercourse, the victim told Sellers not to ejaculate inside her. Then, when he ejaculated insider her, "[s]he became enraged, pushed him off her and grabbed his testicles." (*Ibid.*) Sellers used the baton to hit her, and when she let go, she was dead. (*Id.* at pp. 1048-1049). In Sellers' fourth interview, he admitted to sneaking into the

victim's apartment, killing her, and then coming back to the scene several hours later to engage in sexual intercourse with the body. (*Id.* at p. 1049.)

On appeal, Sellers challenged the judge's instruction given to the jury regarding rape. (*Id.* at pp. 1049-1050.) At trial, the trial court judge instructed the jury they could find the defendant guilty of rape and find true the special allegation of murder committed in the commission of rape, even if Sellers had sexual intercourse with the victim's body after she was dead. (*Ibid*.) The Court of Appeal held that this instruction was erroneous because the crime of rape requires a living victim. (*Ibid.*) Therefore, the judgment was reversed by the Court of Appeal and the case was remanded back to the trial court. (*Id.* at pp. 1056.)

Case: Kim Whitecotton (victim)

Date of Incident: May 24, 1979

Kim Whitecotton was attacked in her apartment in Costa Mesa on May 24, 1979. She awoke to a man repeatedly striking her face and head. She was unable to see him, but eventually managed to fight off the assailant. (Gary Jarlson, *The Bludgeon Slayer Takes the Weekend Off: Relief in Cities*, LA Times (Oct. 29, 1979).) In 1995, Whitecotton was among the many cases of sexual violence and murder forensically reviewed at the Orange County Crime Lab. (Robert D. Keppel, et al., The Psychology of Serial Killer Investigations: The Grisly Business Unit (2003) p. 16.) The review was part of an effort led by Deputy District Attorney Michael Jacobs, who launched "[a] collection process of homicide and sexual assault information […] focusing on females murdered and sexual assault cases prosecuted in Orange County for the past 30 years." (Ibid. at p. 17.)

Case: *People v. Reyes* (1986)

Date of Incident: May 29, 1981

Steven G. Reyes was convicted of forcible rape, forcible child molestation, misdemeanor statutory rape, and inducing a minor to use marijuana. (*People v. Reyes*, No. G002750, attached herein as Exhibit H.)

According to evidence introduced by the prosecution at trial, Julie M., age 13, was walking home along Pacific Coast Highway in Corona Del Mar on May 29, 1981. Reyes pulled up, asked her to enter his vehicle, and she obeyed. (*Id.* at p. 2.) Reyes did not stop at her house, and instead continued to a nearby restaurant parking lot where he "fondled her breasts, and attempted to unsuccessfully kiss her." (*Ibid.*) He then "removed her pants, orally copulated her, and alternatively engaged in vaginal and anal intercourse." (*Ibid.*) According to Julie, the appellant "ejaculated several times on her stomach and used a paper towel to wipe off." (*Ibid.*) In the Court of Appeal's previous opinion, it stated that "[c]ombings from her pubic hair contained a fragment of marijuana and semen of Reyes' blood type. His type -- B. secretor -- is shared by only eight percent of the population and is different from Julie's. (*Id.* at p. 3.) Police tracked down Reyes through repeated calls he sent to Julie. Following his arrest, paper towels and marijuana fragments were observed in his car. (*Ibid.*) Reyes admitted to arresting officers that there was sexual conduct and they smoked marijuana, but he claimed both activities were consensual and Julie M. provided the marijuana. (*Id.* at p. 5.)

At the original sentencing hearing, the statutory rape charge was dismissed and Reyes received an eight years sentence for the forcible rape, and five years consecutive for the marijuana charge. Sentence was stayed on the child molestation charge pursuant to P.C. §654. The Court found that evidence of an uncharged other offense was improperly permitted at trial. The tainted evidence was prejudicial as it tended to show force was involved, since there was ample corroborating evidence of Reyes' sexual activity and marijuana smoking with Julie. (*Id.* at p. 4.) As a result, the Court reversed the forcible rape verdict entirely and reduced the child molestation conviction to a non-force variety pursuant to P.C. §288(a).

The superior court resentenced Reyes and imposed the aggravated term of seven years for non-forcible child molestation and a consecutive sixteen months for inducing a minor to use marijuana, reasoning that the victim was particularly vulnerable, and the offense displayed planning and sophistication (*Id.* at p. 5.) The superior court justified the consecutive sentences on the basis that the offense involved threat of great bodily injury. (*Ibid.*) On appeal, the Court sustained the trial judge's sentencing decision. (*Id*. at pp. 6-9.)

Case: *People v. Robert J. Thompson* (1990)

Date of Incident: August 25, 1981

Defendant, Robert J. Thompson, was convicted of first-degree murder, forcible sodomy, lewd conduct with a child under the age of 14 and felony child endangerment. (*People v. Thompson* (1990) 50 Cal. 3d 134, 148.) He was sentenced to death. (*Id.* at p. 148.)

Benjamin Brenneman, was a 12 year old newspaper carrier for Orange County Register. (*Ibid.*) He failed to return home on August 25, 1981. (*Id.* at p. 149.) His only route was the Oakwood Apartments. (*Ibid.*) Defendant rented apartment 106 in building L, while the victim's bike was found near apartment K. (*Ibid.*) One tenant mentioned that she had seen the defendant talking with Brenneman earlier in the evening. (*Ibid.*) At 1 am Thompson returned to his apartment. (*Ibid.*) When police searched Thompson's apartment, they found sandals, which the defendant initially said belonged to his girlfriend, Lisa. (*Ibid.*) However, after Brenneman's mother confirmed the sandals were her son's, Thompson said he found them in the hallway. (*Ibid.*) Thompson denied that Brenneman had been in the apartment, but when officers spoke of checking the apartment for fingerprints, the defendant said that Brenneman had waited in the apartment while the defendant looked for money to purchase a subscription. (*Ibid.*)

The next morning, the body was found at the base of a road embankment in Palos Verdes Peninsula. (*Id.* at p. 150.) There was a rope tied around Brenneman's neck that passed down the back of his body to bind his ankles. (*Ibid.*) Sperm was discovered in the victim's anus. (*Ibid.*) That morning Thompson called Detective Tuttle as promised and took them to the route he claimed to have driven the day before after the Brenneman had left his apartment. (*Ibid.*) When he pointed to the place where he said he stopped to fix his muffler, the detective took soil samples to test if his car was actually there. (*Ibid.*) Thompson was supposed to call the detective again on August 27, but when he allegedly attempted to evade the detective's calls and was spotted in Santa Monica with his girlfriend, Detective Tuttle ordered D's arrest. (*Ibid.*)

After discovering that his girlfriend may have suffered a miscarriage in jail, Thompson agreed to talk on August 30. (*Id.* at p. 151.) He admitted committing lewd acts with the victim and leaving him bound at the site where his body was discovered. (*Ibid.*) However, he denied killing

Brenneman. (*Ibid.*) Several hours later, the agitated defendant cried "I didn't mean to do it. When I left him, he was alive." (*Ibid.*) Thompson said he had "fixed" earlier in the evening of August 25, and that when the victim came into the apartment, the defendant proposed a sexual relation, but Brenneman protested. (*Ibid.*) Thompson said he then put the victim in the trunk and carried it to the car, returned to the apartment to smoke marijuana, and then drove around aimlessly. (*Ibid.*) At some point during the ride, Thompson got Brenneman out of the trunk and tied him; later he stopped the car again and Brenneman said " 'don't kill me.' " (*Ibid.*) Defendant said he would not, and set Brenneman down in some bushes. (*Ibid.*) Defendant denied sodomizing the victim, but later said he was not sure whether he did or not. (*Ibid.*)

The defense presented several witnesses. Diana Williams stated that around 4 p.m. on August 25, she saw a man other than Thompson invite Brenneman to play pool. (*Id.* at p. 152.) Ricky Atteberry testified he saw Brenneman and someone other than Thompson at a billiards venue between 10 and 10:30 that evening. (*Ibid.*) Angela Johnson said she saw a boy similar to the victim alone in Oakwood Apartments building G at about 9:30 p.m. (*Ibid.*)

The defendant then testified on his own behalf. He said that he had been drinking heavily on the day of the crime, and had twice injected himself with a "downer." (*Ibid.*) He said that after getting money from a neighbor to pay Brenneman, he returned to his apartment. (*Ibid.*) He admits to putting his arm around the boy and asking him if he would like a sexual relationship; Brenneman said "no" and left the apartment. (*Ibid.*) Thompson claimed he did not see the boy again. (*Ibid.*) Defendant found the sandals, and kept them because they were in good condition. (*Ibid.*) He testified that he took the empty trunk to his car because he had promised his mother to return it to her, and drove to the beach to try to pick up a woman. (*Ibid.*) He said he had lied to the police initially because he feared getting into trouble because of his sexual advance toward the victim. (*Ibid.*) Defendant testified that he initiated the conversation of August 30 because he thought he could say something that would get Lisa released from custody, but after hearing the officers' statements about his "[darker] side" and all the evidence against him, he came to believe that he had taken and bound the victim but somehow suppressed the memory. (*Ibid.*)

Automatic appeal followed Thompson's death sentence. The California Supreme Court held that: (1) Superior Court had jurisdiction to conduct post indictment preliminary hearings; (2) excusing jurors for hardship without inquiring into basis of their claims was reasonable; (3) defendant's incriminating pretrial statements were voluntary and admissible; (4) evidence was sufficient to show forcible sodomy and felony-murder; (5) the presence of the judge in jury room during deliberations was harmless; (6) jury instructions during penalty phase were appropriate; (7) testimony of defendant's prior victim was admissible in penalty phase; (8) photographs of victim's bound body were admissible in penalty phase; and (9) imposition of death penalty upon defendant was not cruel and unusual punishment. (*Id.* at pp. 154-187.) Concluding that no reversible error was shown, the Court affirmed the convictions and the judgment of death. (*Id.* at p. 187.)

Case: *People v. Thomas Martin Thompson* (1988)

Date of Incident: September 11, 1981

Thomas Martin Thompson was convicted of one count of first degree murder and one count of forcible rape of 20-year-old Ginger Fleischli on September 11, 1981. (*People v. Thompson* (1988) 45 Cal.3d 86, 96.) The jury also found true the allegations that the defendant personally used a knife in the commission of the crimes and that murder occurred in the commission of a rape. (*Ibid.*) After the penalty phase, the jury returned a sentence of death. (*Ibid.*)

According to the prosecution, the appellant murdered Fleischli to silence her after raping her. (*Ibid.* at p. 97.) Fleischli's body was discovered on September 14, 1981 in a grove of trees in Irvine. (*Ibid.* at p. 97.) The body was wrapped in a sleeping bag and pink blanket, and the head was wrapped with silver duct tape. (*Ibid.* at p. 98.) Fleischli's "shirt and bra had been cut in front and pulled down to her elbows." (*Ibid.*) She also was not wearing shoes, socks, or underwear. (*Ibid.*) "A vaginal swab revealed the presence of semen consistent with defendant's blood type." (*Ibid.*) She had also been stabbed five times in the head. (*Id.* at p. 99.)

Two county jail informants testified at trial that the appellant confessed to them that he raped and killed Fleischli, and that David Leitch, the victim's roommate, helped him dispose of the body. (*Ibid.*) At trial, Thompson tried to argue that Leitch was the sole killer. Nonetheless, the jury found Thompson guilty. (*Id.* at p. 100.)

Thompson put forward several arguments on appeal. First, he argued that statements made by the Fleischli that she feared Thomspon might kill her were inadmissible. (*Id.* at pp. 101-102.) Second, he argued evidence of his planned trip to Southeast Asia were inadmissible. (*Id.* at pp. 107-108.) Third, he argued that the prosecutor's closing argument during the guilt phase constituted misconduct. (*Id.* at p. 112.) Fourth, he argued that photographs of the victim when she was alive and of her body were inadmissible. (*Id.* at pp. 114-115.) Fifth, he argued that intent to kill was an element of felony-murder. (*Id.* at p. 117.) Sixth, he argued that the trial court judge failed to instruct the jury that the jailhouse informant must be viewed with distrust. (*Id.* at p. 118.) Seventh, he argued that the evidence that he solicited murder was prejudicial.

(*Id.* at p. 129.) Thompson also argued that the jury instructions misled the jury during the penalty phase, that he was entitled to present evidence how the penalty was carried out, that he was entitled to proportionately review, and that the death penalty statutes were unconstitutional. (*Id.* at pp. 129-144.) The Court of Appeal rejected each of these arguments, and the judgment of the trial court was affirmed.

He then brought a habeas petition to the federal district court, which conducted an evidentiary hearing. The court ultimately held that Thompson's attorney was ineffective for failing to sufficiently impeach Fink and Del Frate and adequately refute the rape allegations. (*Thompson v. Calderon* (9th Cir. 1997) 120 F.3d 1045, 1047 [Summarizing the case's appellate history].) The Court then vacated the death sentence and ordered that Thompson receive a new trial on the rape conviction and rape special circumstance. (*Ibid.*) However, a panel of Ninth Circuit judges reversed this decision and reinstated the death sentence, holding that while there was ineffective assistance of counsel, it did not prejudice Thompson. (*Ibid*.) After the Supreme Court of the United States denied Thompson's petition, the Ninth Circuit, sitting en banc, reversed their panel's decision sua sponte holding that Thompson's conviction was "fundamentally flawed" and "a miscarriage of justice." (*Id*. at pp. 1047-1048.)

The Ninth Circuit Court of Appeals granted Thompson's petition for a writ of habeas corpus. Justice Betty Fletcher wrote:

> The consequences of our failure would be the execution of a person as to whom a grave question exists whether he is innocent of the death-qualifying offense, the alleged rape, and whose conviction on the first-degree murder charge may be fundamentally flawed. This is a person who has never before been convicted of a crime. Under these circumstances, we have an obligation to recall the mandate in order to preserve the integrity of the judicial process. (*Id.* At p. 1048.)

In addition to the ineffective assistance of counsel claim, the Ninth Circuit also held that the prosecutor committed misconduct and violated Thompson's due process rights when he "manipulated evidence and witnesses, argued inconsistent motives, and at Leitch's trial essentially ridiculed the theory [the OCDA] had used to obtain a conviction and death sentence

at Thompson's trial." (*Id.* At p. 1058.) The court emphasized that it was Thompson rather than Leitch who suffered overwhelmingly from the misconduct of the prosecutor:

Only in Thompson's trial did the prosecutor change the theory and the arguments and offer facts that directly conflicted with the underlying premise of the charges he brought. Only in Thompson's trial did the prosecutor assert that Thompson was alone in the apartment and killed Fleischli to cover up a rape. **Only in Thompson's trial did the prosecutor use as witnesses Fink and Del Frate, who were known to law enforcement officers to be wholly unreliable.** In Leitch's trial, the prosecutor returned to his original theory and discredited the very evidence he had previously offered in Thompson's trial. Thus, Thompson, rather than Leitch, suffered from the due process deprivation that infected the conflicting prosecutions. (*Id*. at p. 1059, emphasis added.)

However, the Supreme Court of the United States reversed the Ninth Circuit, and reinstating the death sentence. (*Calderon v. Thompson* (1998) 523 U.S. 538, 566.) The Court held that delay in filing for habeas relief—despite the Ninth Circuit's conclusion that it was due to a good faith mistake and misunderstanding of procedural rules—was grounds for reversal unless there was "a strong showing of actual innocence" [citation omitted] as it upset the finality of judgments. (*Id.* at pp. 548, 555-557.) the high Court's ruling did not reach the merits of the ineffective assistance of counsel and due process claims, but instead held that the Ninth Circuit had abused its discretion in its delay in recalling the mandate and reversed the panel's decision. (*Id.* at pp. 558-566.)

On July 14, 1998, Thomas Thompson, a man without any prior criminal record, was put to death for murder and rape. (Bailey et al., *Killer Put to Death by Injection at San Quentin*, L.A. Times (July 14, 1998).) He was the first person executed in California since the creation of the modern death penalty to steadfastly maintain his innocence. (*Killer Put to Death by Injection at San Quentin, supra*.)

Case: *People v. Brown* (1987)

Date of Incident: April 9, 1983 and October 5, 1983

Lawrence Joseph Brown was convicted on charges of forcible child molestation with enhancements for the use of a knife. (*People v. Brown*, Nos. G002766, G003987, attached herein as Exhibit I.)

The prosecution presented evidence at trial that eight-year-old Vicenta C. was abducted from her home in Santa Ana by a man in van on April 9, 1983. (*Id*. at p. 2.) The man drove to a school parking lot where he undressed her, and "first placed his penis near her vagina, then in her mouth." (*Ibid.*) During a medical examination, "semen was found on her panties." (*Ibid*.) Eight-year-old Nimol S. was abducted from the same neighborhood on October 5, 1983 by a man in a van. (*Ibid*.) He had a knife and forced the victim to undress in the van. Eventually he parked behind a department store, "where he attempted sodomy, ejaculated in her mouth, and then attempted intercourse." (*Id.* at p. 3.) During a medical examination, "[s]emen was also found on her clothing." (*Ibid*.) Evidence introduced by prosecution demonstrated that tests of both semen samples yielded "generally similar" test results, and possible donors were limited to "20 percent of the population." (*Ibid*.) Police tracked down Brown while he was driving on January 6, 1984 based on distinctive descriptions victims provided of their abductor's vehicle. During subsequent forensic testing, Brown "could not be eliminated as the donor" of semen deposits in both incidents as his profile fit into the 20 percent of possible donors. (*Ibid*.)

Brown was convicted and sentenced to consecutive aggravated terms for forcible lewd and lascivious behavior against two children. (*Id.* at p. 11) On appeal, Brown contended that the two incidents of molestation should have been severed and tried separately. In reaching its conclusion that the same person was responsible for both crimes and that the appellant was responsible, the majority opinion focused on the significance of the "abductor [having] left semen behind on each of the girl's clothing which yielded similar test results." (*Id.* at p. 8)

Justice Sheila Prell Sonenshine concurred with the decision to affirm the conviction, but broke with the majority in its analysis of the semen evidence, asserting that "[t]he majority seeks

to break new ground in holding the presence of semen is 'highly distinctive.' I cannot agree." (*Id*. at p. 16.)

The case was remanded for re-sentencing. (*Id.* at p. 15)

Case: *People v. Coles* (1987)

Date of Incident: January 13, 1984

Martin A. Coles was convicted of assault, five counts of oral copulation in concert, three counts of rape in concert, and two counts of sodomy in concert, arising out of an alleged sexual assault by four men on an 18-year-old woman by the name of Irene T. Coles was sentenced to fourteen years in prison. (*People v. Coles*, No. G003800, attached herein as Exhibit J.)

On the evening of January 13, 1984, the alleged victim, Irene T., was walking home when she passed by four individuals, one of them being defendant Coles. (*Id.*, at p. 2.) She knew all but one of them, Mack, who dragged her by the wrist across the street. (*Ibid.*) After the four of them unsuccessfully tried to force her into a locked restroom, they took her to a secluded handball court nearby where "Mack made her orally copulate him while the others stood by." (*Ibid.*) According to the prosecution at trial, Coles then entered the court with the others and began choking her when she tried to leave. The other three joined in, but "exactly who did what and when is difficult to ascertain." (*Ibid.*)

According to Irene T., "she was forced to orally copulate Mack and Coles three or four times and Richard O. and White two or three times." (*Ibid.*) She recalled that Richard O. sucked on her breasts on two occasions. (*Id.* at 3.) Apparently, Coles was unsuccessful on several attempts to have vaginal and anal intercourse with Irene because he could not achieve an erection. (*Ibid.*) "Richard O. concluded the event by penetrating her anus briefly while she was dressing." (*Ibid.*) Irene T. did not report the incident to her mother until later that evening when she saw blood on her underwear. (*Ibid.*) When police were called, she named Coles participating in the crime. (*Ibid.*) A subsequent physical exam revealed seminal fluid on Irene T.'s clothing and in her cervix and perineal area. (*Ibid.*) While genetic typing linked Mack, Richard O., and White to the assault, no physical evidence connected Coles to the crimes. (*Ibid.*)

Coles denied participation in the assault, although he admitted accompanying the three others and Irene T. to the handball court that night. (*Id.* at p. 4) He testified he observed each of them engage in sex acts with her, but he denied any participation. (*Ibid.*) He said he believed

the whole episode was a consensual encounter until it had concluded and he heard Mack threaten the victim and her family. (*Ibid.*)

The California Supreme Court also backed up the trial court's decision, expressing that "[an aider and abettor] is guilty not only of the offense he intended to facilitate or encourage, but also of any reasonably foreseeable offense committed by the person he aids and abets." (*Id.* at p. 6.) Despite Coles' suggestion that the Court reject two offenses due to the victim's inconsistent testimony, the Court refused to reexamine that testimony (*Id*. at p. 7.) On appeal, Coles also argued that the jury instruction for rape in concert was defective in regard to the required intent of the defendant (*Id.* at pp. 7-9.) However, the Court of Appeals concluded that the provided instruction was harmless because Coles' actions, not intent, were at issue in the case. (*Id.* at p. 9.) The Court added that if jurors believed Coles' assertion that he only learned of the crimes after they had been committed, indeed her should have been acquitted — but they did not. (*Id.* at p. 10.)

Case: *People v. Sandoval* (2016)

Date of Incident: September 23, 1984

In *People v. Sandoval*, a jury convicted appellant Richard Stanley Sandoval of first degree murder for the 1984 killing of an 86-year-old woman. The jury also found true the special allegation that Sandoval committed the murder while in the commission of a rape. (No. G050543, 2016 WL 447146 (Cal. Ct. App. Feb. 4, 2016) p. 1.)

The victim's body was discovered during the morning of September 23, 1984. (*Ibid.*) The victim's "shirt had been pulled up around her neck, exposing her breasts" and "[h]er pants and underwear had been pulled off." (*Ibid.*) Her body had multiple shoe print patterns, and autopsy revealed significant blunt trauma throughout her body. (*Ibid.*) The autopsy also revealed that the victim had suffered from a rectal hemorrhage "consistent with rectal penetration or insertional-type trauma." (*Id.* at p. 2.) Additionally, swabs of the victim's vaginal area and from a white substance on the ground were consistent with Sandoval's DNA. (*Ibid.*) However, according to Danielle Wieland, a DNA analyst for Orange County, there was no spermatozoa detected. (*Ibid.*) Wieland suggested that this could be because Sandoval inserted his penis into the victim's vagina but never ejaculated. (*Id.* at p. 3.)

Sandoval argued on appeal that because his semen was not discovered at the crime scene, there was insufficient evidence to support a rape conviction. (*Ibid.)* However, the Court of Appeal concluded that even absent spermatozoa, the physical evidence, when considered with evidence that Sandoval was a serial rapist, was sufficient to affirm the conviction. (*Id.* at pp. 4-5.)

Case: *People v. Browning* (1989)

Date of Incident(s): January 13, 1985; February 13, 1985

A jury found Clinton A. Browning guilty of first-degree murder with special circumstance of torture, attempted murder, false imprisonment and forcible oral copulation. (*People v. Browning* (1989) 262 Cal. Rptr. 826, 827.)

The first incident involved Elana, a dancer and waitress at a local bar. Browning had befriended her boyfriend, Legind. (*Id.* at p. 827.) On January 13, 1985 Browning approached Elana and asked her to join him, Legind, and another person to Browning's room at the Fire Station Motel. (*Ibid.*) Thinking that it was actually a party that her boyfriend was also coming to, she joined Browning. (*Ibid.*) Once they got to the motel, Elana and Browning shared beer and cocaine. (*Ibid.*) According to the prosecution, Elana remained clothed and showed no sexual interest in Browning. (*Ibid.*) At some later point when Browning stated he liked oral sex with women, Elana told him he was out of line. (*Ibid.*) After 45 minutes passed by with no sign of Legind, Elana told Browning she wanted to go home. (*Ibid.*) Suddenly, Browning grabbed her from behind, threw her on a bed and began choking her. (*Id.* at p. 828.) During the fight she begged Browning to quit choking her; when she promised to do whatever he wanted, he loosened the stranglehold. (*Ibid.*) At Browning's command Elana undressed and orally copulated him. (*Ibid.*) There was some talk of putting Vaseline on Browning's penis, but he never achieved an erection. (*Ibid.*) Two other choking incidents took place when Elana failed to comply with Browning's requests, but she was able to eventually break free by kneeing him in the groin. (*Ibid.*) According to Elana, she did not contact police at the time because she was working at the Humdinger illegally and feared jeopardizing her own or her employer's position. (*Ibid.*) She came forward later after Browning was charged with the murder of another woman. (*Ibid.*)

Browning testified he had spoken with Elana only three times. (*Ibid.*) Aside from that, Browning had seen Elana outside the bar only once, in late November or early December, when she came to a party at his motel room along with Legind and several others. (*Ibid.*) He had never been alone in the room with her. (*Ibid.*) Browning denied the sexual assaults Elana

attributed to him. (*Ibid.*) He also stated he never had problems with erections or ejaculation during sex. (*Ibid.*) He said that Elana concocted her tale as a defense to the real story, which involved a large drug deal she and Legind had carried out after stealing his car. (*Ibid.*)

The second incident involved a prostitute — Christine. For six months she regularly had sexual intercourse with Julian M. in return for money. (*Id.* at pp. 828-829.) They engaged in no spanking, biting, sodomy, slapping or other sadomasochistic conduct. (*Id.* at p. 829.) On February 10, 1985 they rented out a room at the Ranch Motel for two nights. (*Ibid.*) That day, they drank beer and had sexual intercourse until Julian went home at about 9:15 p.m. (*Ibid.*) When Julian returned the next morning, Christine was still in bed and he found more beer bottles in the room, suggesting she entertained other men while he was absent. (*Ibid.*) They continued that day with more beer and sexual intercourse. (*Ibid.*) Late at night, he dropped off Christine at a trailer park to get pills from someone. (*Ibid.*) The next morning, February 12, 1985, Julian returned again to the Ranch Motel. (*Ibid.*) There were 16 ounce cans of beer, a half full pint of tequila, cigarette butts under the television drawer, drug paraphernalia, and lubricant jars labeled "Head" and "Back Door Sex." (*Ibid.*) The beers were larger than the ones Julian had bought, and neither Julian nor Christine drank tequila. (*Ibid.*) They engaged in sexual intercourse again. (*Ibid.*) There were no bruises on Christine's vaginal or inner thigh area and no marks on her buttocks or trauma to the breasts. (*Ibid.*) She did not complain of pain in the neck or mouth. (*Ibid.*) They rented out the room for an additional night and continued to engage in sexual intercourse the evening of February 12 until Julian left at 7 p.m. (*Ibid.*) The last time he saw Christine she was crossing the street en route to a bar. Julian testified he had difficulty ejaculating and probably had not done so. (*Ibid.*) When they parted company Christine had none of the extensive bruises and injuries to her eyes depicted in crime scene and autopsy photographs. (*Ibid.*) Julian said he and Christine had never even exchanged harsh words. (*Ibid.*)

The owner of Lamplighter bar said he saw Christine at 8 p.m. and Browning arrived around 9 p.m. (*Ibid.*) It's unclear whether Browning was intoxicated or not, but Christine was. (*Ibid.*) According to one witness, Christine was talking with, kissing and flirting with Browning. (*Ibid.*) She left the bar with Browning and two other men and drove in his car on the search for

cocaine. (*Id.* at 830.) At around 12:15 a.m., February 13, Browning dropped off the other men and went with Christine to her cocaine source in Santa Ana. (*Ibid.*) On February 13, 1985, at around 11:10 a.m., the Ranch Motel owner knocked on Christine's door and received no answer; the door was slightly ajar and when he pushed it open he saw her body lying on the floor. (*Ibid.*)

Blood spots taken from a bed in Christine's room were compared with samples from Julian, Christine and Browning. (*Ibid.*) Christine and Julian were excluded as donors, but Browning matched. (*Ibid.*) People with that blood type constitute ½ to ⅓ of one percent of the world's population. (*Ibid.*) Semen samples from the sheets were consistent with Julian and not Browning. (*Ibid.*) No semen was found on the deceased. (*Ibid.*)

According to the defendant, he met Christine that night, went to the drug source, then returned to the motel room and engaged in sexual caressing around midnight, as Christine began to orally copulate him. (*Ibid.*) Then he claimed that at some point two hostile, angry male Mexicans entered the room and ordered Browning to get out; their questioning regarding the cocaine and pointing to Christine revealed to him that they were concerned with her, not him. (*Id.* at p. 831.) The two men told Browning to leave and he hurriedly did, noticing the men were hitting Christine against the wall. (*Ibid.*) It was now around 2 a.m. (*Ibid.*) Browning went to work between 7 and 8 a.m. (*Ibid.*) Around noon, he drove past the Ranch Motel to talk to Christine and apologize for not helping her. (*Ibid.*) When he saw police cars with their lights on he kept going and returned to work. (*Ibid.*) Feeling that the same Mexican drug dealers who had attacked Christine would now look for him as he was a witness, and concerned about his own criminal liability for cocaine trafficking, Browning fled to Lake Tahoe. (*Ibid.*) While there, he learned of Christine's death. (*Ibid.*) He sent a seven page letter to the Garden Grove Police Department outlining all he knew. (*Ibid.*) Eight months later, Browning turned himself in. (*Ibid.*) He refused to identify the Mexicans because he was afraid. (*Ibid.*) He also denied ever hitting or spanking women, or being angry with bar girls in the past. (*Ibid.*)

Browning later appealed his conviction. (*Id.* at p. 826.) However, the California Court of Appeal held that: (1) error in failing to instruct jury that premeditation and deliberation were necessary for torture-murder was harmless beyond reasonable doubt, and (2) any error in failing

to state the requisite intent for torture in special circumstance instruction was cured by inclusion of that information in torture-murder instructions given. (*Ibid.*) Thus, the Court affirmed the conviction of the trial court. (*Ibid.*)

Case: *People v. Harris* (1995)

Date of Incident: December 23, 1985; March 5, 1986; April 6, 1986; January 14, 1988; May 31, 1988; July 1, 1988; July 4, 1988

Danny Harris was charged with eight home invasions and rapes that occurred between 1985 and 1988. (See *People v. Harris*, Nos. G013181, C-88945, attached herein as Exhibit K.) Harris was arrested on July 4, 1988. In Harris' car, officers located cloth gloves, which several victims said the intruder wore. (*Id.* at 3.)

Lifecodes Corporation of New York performed a DNA comparison using the restriction fragment length polymorphism (RFLP) method. (*Ibid.*) The RFLP method visually compares photographed strips of DNA to determine whether is a match with a known specimen that is then confirmed by computer analysis. (*Id.* at p. 6.) Lifecodes found that Harris's DNA was consistent with the DNA found in samples taken in eight cases with match frequency ranging from one in 547,008 to one in 5.2 billion. (*Id.* at p. 4.) John Hartmann of the Orange County Sheriff's Department also used RFLP procedure and found consistency between Harris's DNA matched the DNA found in samples from three victims with an estimated frequency of a one in eight billion. (*Ibid.*)

At trial, defense counsel called two experts, who attacked the methodology and analyses of the prosecution experts. (*Ibid.*) The defense also asserted that one of the victims made a tentative identification of a person, not Harris, who was detained near her apartment the night of the attack, but she later changed her mind. (*Ibid*.) Danny Harris was convicted for numerous counts of burglary, rape, and other sex offenses, with enhancements. (*Id.* on p. 2.)

On appeal, Harris argued: (1) the trial court erroneously denied him a *Kelly*/*Frye* hearing regarding DNA evidence used against him and that the DNA evidence should have been excluded; (2) additional flaws in the DNA analysis should have rendered them inadmissible; (3) the jury was improperly instructed on how to view the scientific evidence; (4) the trial court improperly denied his motion to suppress evidence; (5) the trial court improperly sentenced him for the rape *and* forced penetration of one of the victims; and (6): the trial court erred by imposing weapons enhancements for each of the multiple sex offenses committed with the use

of a single weapon in two separate cases. (*Id.* at 18-19, 21-23.) The California Court of Appeal for the Fourth Appellate District rejected arguments and affirmed the lower court's judgment. (*Id.* at p. 2.)

Case: *People v. Tate* (1988)

Date of Incident: March 26, 1986

In *People v. Tate* (No. G005845) a jury convicted defendant Michael Scott Tate of two counts of first degree murder and one count of robbery. (Attached herein as Exhibit L.) The jury also found true the special circumstance allegations that Tate used a firearm, was convicted of more than one offense of murder, and committed the murders while in the commission of a robbery. *(Id.* at p. 2.*)*

The defendant was accused of shooting and killing two men, Lawrence Rohr and Jose Arriaza, at a bar called the Lion's Den. (*Id.* at p. 2.) The defendant admitted to the killings but claimed he killed the two men in self-defense. (*Id.* at p. 5.) The defendant lived in a halfway house for recovering alcoholics. On the night of March 25, 1986, the defendant left the halfway house so that he could consume alcohol. (*Id.* at p. 4.) After initially returning to the halfway house at 1:30 AM, he decided to leave again to see if anyone else was still partying outside. He had a gun in his possession when he returned. (*Id.* at p. 5.)

Tate met Rohr, who told Tate that although all of the bars were closed because it was past 2 a.m., Tate could join him at the Lion's Den. (*Id.* at p. 5.) According to Tate, he used the bathroom when he arrived at the Lion's Den and decided to leave the gun in the waste basket in the bathroom. As he exited the bathroom, "Rohr forced Tate into a chair and told him that Arriaza was going to 'suck [his] dick.'" Afterwards, "Arriaza orally copulated Tate, and Rohr forced Tate to orally copulate him." Tate then ran into the bathroom to his rinse his mouth after Rohr ejaculated into it. According to Tate, "Arriaza followed him into the bathroom and said, 'Now you're going to find out what it's like to take it in the ass.'" When Arriaza left the bathroom, Tate retrieved the gun, stepped out of the bathroom, and shot Rohr and Arriaza five times, killing them. (*Id.* at p. 6.)

During the investigation, there was a "[t]esting of penile swabs taken from both victims," which "revealed the presence of spermatozoa." Furthermore, "[t]he penile swabs revealed Type A activity, indicating Tate may have orally copulated the victims." (*Id.* at p. 7.)

During the trial, the prosecution moved to prevent the defense from introducing a police report related to Rohr's arrest for masturbating in front of an undercover officer soliciting the officer. That motion was granted. (*Ibid.*)

After the jury returned its verdict, defense counsel unsuccessfully sought to strike the special circumstance finding making him ineligible for parole. (*Id.* at p. 11.) On appeal, Tate argued that the trial court erred in excluding Rohr's police report, and that the trial court judge improperly failed to recognize its discretion to strike the allegations. The Court of Appeal rejected Tate's argument and affirmed the judgement. (*Id.* at p. 14.)

Case: *People v. McCarter* (1989)

Date of Incident: June 20, 1986

On the night of June 20, 1986, Julie Fenton, a waitress at Elmer's, remained at the restaurant after her shift ended at around 8:45 p.m. (*People v. McCarter*, Nos. G007091, C-63656, attached herein as Exhibit M, p. 2.) She was joined at a table with her manager and others, including Appellant, Andrew McCarter. (*Ibid*.) McCarter's brother, Mike, then entered Elmer's, and McCarter joined him at the bar. (*Ibid*.) After Fenton failed to show up for her shift the next day, her sister and a neighbor entered Fenton's home through the unlocked front door and discovered her body. (*Id*. at p. 3.) Two neighbors and an Elmer's bartender testified that they observed a red truck with a rack on the top parked in the alley on the night of June 20 and that the truck remained there until at least 2 a.m. on June 21. (*Id*. at pp. 3-5.) The Bartender recognized the truck as belonging to McCarter. (*Id.* at p. 3.)

During his interrogation, McCarter stated he left Elmer's at around 10 p.m., went to another establishment, and stayed there until it closed at 2 a.m. (*Id.* at p. 5.) He said he then went to his brother Mike's home and slept in a tent in the backyard. (*Id*. at pp. 7-8.) Mike testified that on June 21st, the morning after the incident, McCarter confided in him that "he was concerned about Julie" and asked Mike to "see if she was okay." (*Id.* at pp. 5-6.) Mike also testified that in the same conversation, McCarter said he "had gone by Julie's" but would not tell him why. (*Ibid*.) Mike admitted he did not tell investigators about this conversation until November but insisted he delayed "to protect his family and allow himself time to sort out the facts." (*Id*. at p. 7.)

Criminalist Christine Chan investigated the scene and found hairs consistent with decedent's public hair and one hair consistent with McCarter's pubic hair. (*Id*. at p. 3.) Hairs taken from the decedent's buttocks were consistent with McCarter's head hair. (*Ibid*.) Spermatozoa was present in the vaginal area and was designated "A-B-O," type "A" from a secretor. (*Id*. at p. 4.) McCarter was "A-B-O," type "O," and a secretor. (*Ibid*.)

McCarter was convicted of murder (Pen. Code, § 187) and rape (Pen. Code, § 261) and was sentenced to life in prison without the possibility of parole. (*Id*. at p. 2.) On Appeal in the

California Court of Appeal Fourth Appellate District, McCarter contended: "(1) his truck was illegally seized, (2) the court improperly excluded evidence of another's involvement in the crimes, (3) the court improperly questioned a defense witness, signaling the jury she was not to be believed, and (4) the court prejudicially intervened to assist the prosecution during trial." (*Id*. at p. 2.)

The Court found that McCarter's truck was properly seized because there was probable cause to seize the vehicle and there was no general exploratory search of the vehicle. (*Id.* at p. 11.)

The Court found no abuse of discretion when the trial court barred evidence regarding Mike's past instances of exhibitionism and masturbation that the defense argued would show Mike's motive to lie. (*Id.* at pp. 13, 17.) This evidence showed one occasion where Mike exposed himself in an adult bookstore and another occasion where Mike was masturbating in his bedroom and continued to masturbate after his roommate entered the room. (*Id*. at p. 13.)

The Court also found that the lower court properly involved itself in the questioning of Diane, Mike's ex-wife, and found no reversible error. (*Id.* at p. 20.) Finally, the Court found no prejudice among the "laundry list of the trial court's comments throughout the second trial which [McCarter] perceives as 'the court carr[ying] out a transparent and intentional campaign of controlling the defense presentation to reach a more desirable result.'" (*Id.* at p. 21.)

Case: *People v. Gonzales* (1986)

Date of Incident: Not Found

The appellant, Michael E. Gonzales, was convicted by jury of burglary, forcible rape, robbery and assault. (*People v. Gonzales*, No. G002224, attached herein as Exhibit N.) A 19-year sentence was imposed. (*Id.* at p. 5.) The judge selected the robbery for the principal base term of six years. (*Ibid.*) A two-year consecutive enhancement was added for using a firearm. (*Ibid.*) A full consecutive term of eight years was imposed for the rape. (*Ibid.*) Three years were added to that for using a deadly weapon. (*Ibid.*)

Gonzales' convictions arose out of an attack on a young woman. (*Id.* at p. 2.) He was apprehended three months later when she allegedly recognized him at the restaurant where she worked, wearing the sweater he stole the night of the attack. (*Ibid.*) Gonzales was apprehended in Los Angeles County three months later. His defense at trial was consent. (*Ibid.*) After the escape, the prosecution obtained a court order for samples of Gonzales' hair, blood, and saliva. (*Ibid.*) The next day, an investigator from the District Attorney's office visited Gonzales in jail and presented him with the court order. (*Ibid.*) The investigator carried a hidden recording device. (*Ibid.*) Gonzales verbally refused to comply with the order. (*Ibid.*)

Prior to trial, the defense unsuccessfully attempted to exclude the evidence of Gonzales' refusal. (*Id.* at p. 3.) The trial court ruled that the refusal was admissible to show consciousness of guilt. (*Ibid.*) Defense counsel also argued the prosecution had already violated the court's ruling by questioning the investigator beyond the simple fact Gonzales had refused. (*Ibid.*)

The Court of Appeal rejected the defense argument and affirmed the judgment of the trial court. (*Id.* at p. 7.)

Case: *People v. Marlow* (2004)

Date of Incident: November 12, 1986

James Gregory Marlow was convicted by jury of murder, robbery, and rape in two separate incidents. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 131, 136.) During the sentencing phase, the jury returned a verdict of death.

According to evidence introduced by the prosecution, the suspect committed murder, rape, and other offenses against Lynell Murray on November 12, 1986. (*Id*. at p. 32.) Murray's body was discovered in a room at the Huntington Beach Inn after her boyfriend Robert Whitecotton alerted the police. (*Ibid*.) She was found with her head in "six inches of water in the bathtub" with evidence suggesting "she had been raped and possibly urinated on." (*Id*. at p. 33.) Her cause of death was found to be ligature strangulation. (*Ibid*.) During postmortem examination, sperm was discovered in her vaginal area. (*People v. Coffman and Marlow*, 34 Cal.4th 1, 33.) However, "[s]erological testing of the semen on a vaginal swab taken from Murray could not demonstrate either Marlow or Whitecotton was its source." (*Id.* at p. 130). Marlow was nevertheless convicted on a guilty plea. (*Ibid*.)

Case: *People v. Morris* (2015)

Date of Incident: January 1, 1987

Richard Curtis Morris was convicted of murder during the commission of a rape and robbery. (*People v. Morris*, G048926, 2015 WL 1260463 (Cal. Ct. App. Mar. 18, 2015).)

According to evidence introduced by the prosecution at trial, two men attacked James Stockwell and Shelly F. on January 1, 1987 in their condominium. (*Ibid*.) Both men raped Shelly as Stockwell was taken elsewhere. (*Ibid*.) After the perpetrators left, Shelly discovered Stockwell had died from a gunshot. (*Ibid*.) During Shelly's forensic sexual assault examination, semen samples were collected from her clothes and body. (*Ibid*.) In 1987, blood type analysis was conducted by Mary Hong, an analyst at the Orange County Crime Lab. (*Id*. at p. 3.) In 2009, Hong reexamined the case for DNA testing, at which time she had become a supervisor for the DNA section. (Partial Reporter's Transcript *People v. Morris*, No. 08CF1591, p. 63:20, attached herein as Exhibit O.)

In her initial ABO testing, Hong's results "showed the presence of A and H antigens, meaning a person with type A blood deposited the bodily fluids being tested." (*People v. Morris*, No. G048926 at p. 3.) Hong determined that the victim was type A but a nonsecretor, "meaning she was not the source of nonblood bodily fluids." (*Ibid*.) In 2009, Hong tested the victim's vaginal swabs for semen using an acid phosphate test, which produces a "spectrum of colors," with a stronger color indicating a positive result and a weaker color indicating a negative result. (Exhibit O at pp. 89-90:23-2.) She scored colors "on a '0' to '4' scale, [with] '4' meaning the brightest color," and gave all four vaginal swabs in this case a "4." (*Id.* 90:9-11.) Hong also measured sperm density in the semen to get "information about how recent the sample may have been deposited, because…sperm density tends to fall off with time in between the time they were deposited and when the swabs were collected. So if there is a longer time period between when the sample was deposited and collected, [she] would expect to find fewer sperm." (*Id.* 95: 13-19.) In the samples Hong examined, she observed that "there was there was still a large number of intact sperm where the tails were still present." (*Id.* 96: 6-9.) Hong found that Morris's DNA matched the sperm DNA on all 15 markers tested. (*People v. Morris*, No.

G048926 at p. 1.) She testified that "the odds of two unrelated individuals sharing the same DNA profile would be fewer than one in one trillion." (*Ibid*.)

Forensic biologist Gary Harmor testified for the defense that blood and saliva samples from the appellant determined he was a blood type O and a nonsecretor. (*Id*. at p. 3.) Defense counsel argued that the "defendant could not have been a contributor of the type A bodily fluids from Shelly's body and clothes because he was blood type O and a nonsecretor, making the DNA evidence linking him to the crime unreliable." (*Ibid*.) In closing, the prosecution focused on distinctions between blood type and DNA testing. (*Id.* at p. 4.) Morris was convicted as charged by a jury. (*Id*. at p. 2.)

On appeal, Morris contended that the prosecutor committed prejudicial misconduct by offering new evidence in closing. (*Ibid*.) The Court of Appeal rejected this claim and affirmed the trial court's conviction. (*Id*. at p. 5.)

Case: *Isiah Tapp v. Superior Court of Orange County* (1988)

Date of Incident: Approximately February 1988

In August 1988, Petitioner, Isiah Tapp, was awaiting trial on charges of rape, forced oral copulation, burglary, and assault. (*Isiah Tapp v. Superior Court of Orange County*, Nos. C-67227, G00701, attached herein as Exhibit P.) He was in custody unable to post bail for more than seven months. (*Id. at p. 2*.)

After being continued in the superior court four times on defense motions, the district attorney moved to continue pursuant to Penal Code § 1050 on the basis of the lead investigator's unavailability due to health reasons. (*Ibid*.) The lead investigator, Linda March, was alleged to be a material witness, including to the chain of custody of the victim's clothing and rape kits collected from the victim and defendant. (*Id.* p. 3.) March had also collected other potential items of evidence ultimately determined not to relate to the crimes. (*Ibid*.)

The court held the superior court abused its discretion in continuing the matter from August 8, 1988 to October 24, 1988, on the district attorney's motion and over Tapp's objection. (*Ibid*.) It reasoned that the declaration and physician's letter supplied by the prosecution were inadequate to prove the lead investigator's unavailability and that Tapp was "sentenced to almost three additional months in jail based on an unauthenticated, unsworn letter and the prosecutor's inadequate declaration." (*Id.* pp. 3, 5.) The court issued a peremptory writ directing the superior court to set aside its order of August 8, 1988, granting the prosecution's motion to continue and to enter an order denying the motion. (*Id*. p. 6.)

Case: *People v. Lautoa* (1991)

Date of Incident: April 30, 1989

On April 30, 1989, Lui Luka Lautoa was working an 11 p.m. to 7 a.m. shift at an intermediate care facility where B.G., an 84-year-old woman, lived. (*People v. Lautoa* (1991) Nos. G009250, C-74173 attached herein as Exhibit Q.) B.G. testified that at around 8 p.m., Lautoa entered her room and knelt by her bed, then undressed himself, and inserted his penis and middle finger into B.G.'s vagina. (*Id.* at p. 3.) B.G. denied Lautoa placed his mouth on her vagina or any other part of her body and denied that he touched her with his hands, except as noted. (*Ibid*.) B.G. could not recall any conversation taking place before the sex acts occurred. (*Ibid*.) She denied being afraid of Lautoa and denied that he threatened her. (*Ibid*.) She testified that she neither asked him to perform the sex acts nor told him to stop. (*Ibid*.)

At trial, defense counsel introduced several prior statements by B.G. that were inconsistent with her testimony. (*Id.* at pp. 3-4.) The facility's administrator testified that B.G. told her the assault occurred at 4:30 a.m. and that Lautoa orally copulated her and placed his mouth on her breast. (*Id.* at p. 4.) A nurse on duty that morning said B.G. told her Lautoa "touched her breast." (*Ibid*.)

During a police interrogation after his arrest, Lautoa admitted the sexual encounter occurred but claimed that B.G. forced him to do it. (*Id*. at p. 5.) Lautoa was convicted of forcible rape, forcible oral copulation, and forcible sexual penetration with a foreign object. (*Id.* at p. 2.) He was sentenced to three consecutive eight-year prison terms. (*Ibid*.)

On appeal, Court of Appeal affirmed the lower court's judgment. (*Id.* at p. 22.)

Case: *People v. Smith* (1996)

Date of Incident: May 1989

A jury convicted Frank Smith of kidnapping, sexual battery by restraint, forcible rape, forcible penetration with a foreign object, residential burglary, and forcible oral copulation. (*People v. Smith*, No. G013492, attached herein as Exhibit R.) The jury also found true the allegation that the appellant used a knife during a commission of all of the offenses except for burglary. (*Id*. at p. 2.)

According to the prosecution, in May 1989, Smith approached Robbin E. with a knife, forced his way into her car and drove her to an isolated area. (*Ibid*.) The prosecution alleged that appellant then committed a series of sex offenses against her while threatening her with the knife. (*Ibid*.) After the attack, Robbin underwent a rape kit examination which included seminal swabs. (*Id.* at p. 3.)

The prosecution alleged that five months after the attack on Robbin E., Smith cut the electrical power of Orba S.'s home, broke into the home, then "held a knife to her and committed a series of sex offenses against her." (*Ibid*.) After the attack, Orba underwent a rape kit examination and the doctor obtained vaginal swabs. *(Ibid.)* Robert Keister, a senior criminalist at the Orange County Sheriff's crime laboratory compared Robbin and Orba's rape kits and concluded that the two had been raped by the same man. (*Id.* at p. 4.)

On appeal, Smith argued that the trial court committed prejudicial error when it admitted the analysis of DNA into evidence. (*Id.* at p. 2.) Furthermore, he argued that the trial court erred when it denied his motion to sever the two sets of offenses and denied his motion for a mistrial for prosecutorial misconduct. (*Ibid.*) The Court of Appeal rejected each of these arguments, and the judgment of the trial court was affirmed on January 31, 1996. (*Id.* at p. 19.)

Case: *People v. McClinton* (1992)

Date of Incident: October 16, 1989

Lamar McClinton was found guilty by a jury of rape by force, forced oral copulation, residential burglary and attempted residential burglary. (*People v. McClinton*, No. G011349, attached herein as Exhibit S.) The defendant had previously suffered three serious felony convictions. (*Id.* at p. 2.) He was sentenced to a total term of 37 years and 8 months. (*Ibid.*)

According to the prosecution, Tammy C. awoke one morning to find McClinton in her room. (*Ibid.*) "He placed his hand over her mouth and pushed her down on the bed, pulling off her underwear and placing his mouth on her vagina. (*Ibid.*) He then raped her. . . After 30 or 40 minutes, he ejaculated." (*Ibid.*) When Tammy's younger daughter woke, McClinton left but, calling her by name, told her that he would be back. (*Ibid.*) Tammy's purse was dumped on the kitchen table, but nothing was missing. (*Ibid.*) Neighbors had heard Tammy scream, so they called the police. (*Ibid.*) She was taken to the hospital where various tests were administered. (*Ibid.*) Semen in her vagina was typed to McClinton. (*Ibid.*) Saliva was also found. (*Ibid.*)

About three weeks later, Tammy and her boyfriend were awakened by a noise coming from the direction of the kitchen. (*Id.* at pp. 2-3.) The boyfriend took his .25 caliber gun with him to investigate. (*Id.* at p. 3.) He saw McClinton outside trying to break in. (*Ibid.*) The boyfriend fired two shots and ran outside but could not find McClinton. (*Ibid.*) McClinton visited an emergency room and told the doctor he was the victim of a drive-by shooting. (*Ibid.*) A police officer noticed McClinton's car in the hospital parking lot and arrested him. (*Ibid.*) A pair of bloody gloves that were retrieved from the car were tested by a criminalist, who testified the blood on the gloves was McClinton's. (*Ibid.*) Another criminalist opined the projectiles recovered from McClinton's body came from the gun used by Tammy's boyfriend. (*Ibid.*)

On appeal, McClinton argued that the trial court erred in "either [closing] the door to inquiry [of him and trial counsel] or [making] no inquiry at all." (*Id.* at p. 4.) He also claimed that the trial judge failed to appoint counsel to advise him whether he should waive his attorney-

client privilege. (*Id.* at p. 5.) The Court rejecting these claims and a series of other arguments about sentencing errors made by the trial court. (*Id*. at pp. 6-10.)

Case: *People v. Soto* (1994)

Date of Incident: November 17, 1989

On November 17, 1989, Sally S., 78 years old, called her neighbor and told him, "I've been raped." (*People v. Soto* (1994) Nos. G012636, C-89008 p. 3, attached herein as Exhibit T.) Sally told the neighbor that a man wearing a stocking mask knocked on her back door and thrust a knife at her throat when she opened the door. (*Ibid*.) She said the man threatened to kill her if she screamed, and he pushed her into her bedroom and raped her. (*Ibid*.)

Sally told police she opened the door because she thought the voice belonged to her neighbor, Frank Lee Soto, but since the man was masked, she would not be able to identify him. (*Id.* at p. 4.) She described the man as about 5 feet 9 inches tall, weighing 170 pounds with light hair and an olive complexion. (*Ibid*.) She told police the man slightly penetrated her and ejaculated a few moments later. (*Ibid*.) Police then seized a comforter from Sally's bedroom. (*Ibid*.) DNA from the semen found on the comforter matched DNA from a blood sample obtained from Soto. (*Ibid*.)

Sally suffered a debilitating stroke after the attack and was found incompetent to testify at trial. (*Id*. at pp. 2, 5.) However, statements she made to her daughter, neighbors, a doctor, and police immediately after the events were admitted as spontaneous statements or excited utterances. (*Id*. at p. 5.) The only evidence of the crime was the DNA analysis and the statements the victim made to others on the day of the attack. (*Id.* at p. 2.) Soto was then convicted of attempted rape. (*Ibid*.)

On appeal, Soto first contended that the trial court erred in admitting the forensic testimony and opinion regarding the DNA match. (*Ibid*.) He said that since the restriction fragment length polymorphism (RFLP) method is disputed in the scientific community, the whole subject of the DNA typing should have been excluded. (*Id*. at p. 5.) However, the court found that the RFLP method's reliability and relevance justified its admission. (*Id.* at p. 22.)

Next, Soto argued the denial of his motion for acquittal was prejudicial error. (*Id*. at pp. 23-24.) Soto also argued that statements Sally made to her daughter, neighbors, a doctor, and

police should not have been admitted. (*Id*. at p. 24.) The court rejected both arguments, and the lower court's judgment was affirmed. (*Id*. at pp. 22, 26.)

Case*:* *People v. Son* (2013)

Date of Incident: December 24, 1990

In *People v. Son*, (No. G045798, 2013) a jury found Joseph Son guilty of torture. (*People v. Son*, G045798, 2014 WL 3225086 (Cal. Ct. App. June 26, 2013) p. 1.) According to the prosecution, on December 24, 1990, Son and another male approached the victim, slammed her down to the ground, shoved a gun in her mouth, and knocked her unconscious. (*Ibid.*) They then brought her to an automobile and placed her in the backseat of a car. (*Id.* at p. 2.) Son drove away, and ten to fifteen minutes later ordered the victim to take her clothes off. (*Ibid.*) Son repeatedly raped her, sodomized her, and forced her to orally copulate him. (*Ibid.*) The other male also raped her and she was forced to orally copulate him. (*Ibid.*) Son also bit the victim's breast, scratched her stomach, yanked her out of the car by her hair, and threw her to the ground. (*Ibid.*)

Eighteen years later, on September 10, 2008, a forensic scientist with the Orange County Crime lab compared Son's DNA to the DNA from the sperm found in the victim's vagina. (*Id.* at p. 4.) The forensic scientist concluded the samples were from the same source, and the appellant was charged with torture, although he could not be charged with rape because the statute of limitations had passed. (*Ibid.*)

Son appealed his conviction on several grounds. First, he argued that the trial court improperly excluded defense evidence. (*Ibid.*) Second, he argued his counsel was improperly precluded from asking questions about the victim's knowledge of the elements of torture. (*Id.* at p. 5.) Third, Son argued that the trial court improperly denied his lawyer the ability to give his closing argument until after the prosecution rested. (*Id.* at p. 6.) And lastly, Son argued that the judge improperly failed to instruct the jury of assault with great bodily injury as a lesser included offense. (*Id.* at p. 9) The Court of Appeal concluded that the trial court judge erred in not allowing Son's counsel to present a closing argument until the end of trial, but found the error was harmless. (*Id.* at p. 7.) The Court rejected Son's remaining arguments and affirmed the conviction. (*Id.* at p. 10.)

Case: *People v. Jensen* (1991)

Date of Incident: June 1990; October 1990; March 1991

In November 1991, Paul William Jensen was convicted of the rape and assault of two women and acquitted on three charges involving the assault of a third woman. (Mark Pinsky, *Jurors Find Man Guilty in 2 Parking Lot Rapes*, L.A. Times (November 5, 1991) <https://www.latimes.com/archives/la-xpm-1991-11-05-me-885-story.html> p. 1.)

On March 5, 1991, a 35-year-old woman entered her van parked in the Laguna Hills Mall parking lot after shopping, and a man she identified as Jensen put a gun to her head and ordered her to a deserted section of the parking lot. (*Ibid*.) He tied her then raped and beat her. (*Ibid*.) Two other women were raped in the parking lot of MainPlace Mall in Santa Ana, and the assaults mirrored the Laguna Hills attack. (Davan Maharaj, *Rape Suspect Accused in 3 More Cases*, L.A. Times (June 27, 1991) <https://www.latimes.com/archives/la-xpm-1991-06-27-me-2148-story.html>.)

Throughout the trial, Jensen's attorney, Sylvan B. Aronson, argued that the witnesses' descriptions of their attacker were unreliable and did not match the defendant. (Pinsky at p. 3.) He told the Los Angeles Times he was "shocked" that "[t]hey convicted an innocent man who could now go to prison for the rest of his life." (*Id*. at p. 2.) Jensen himself claimed the prosecution's case was based on mistaken identification and said during a jailhouse interview before the trial, "I didn't do it." (*Ibid*.)

Case*:* *People v. Sanchez* (2019)

Date of Incident: March 26, 1992—Fix Citations

A jury found Leonardo Pimentel Sanchez guilty of first degree murder for the 1992 death of Cari Ann Parnes. (*People v. Sanchez*, G055222, 2019 WL 3000744 (Cal. Ct. App. July 10, 2019).) Her body was discovered on March 26, 1992 in an orange orchard. (*Id.* at p. 2.) The prosecution argued that Sanchez brought the victim to the orange orchard, sexually assaulted her, and murdered her. (*Id.* at p. 8.) Criminalist Elizabeth Thompson Lloyd, who was called to the scene, found evidence of blunt force trauma to the victim's upper left temple area and bruising and discoloration around her neck and shoulder. (*Id.* at p. 2.) However, "Lloyd did not observe defensive wounds or any trauma to the victim's vaginal area or anal area." (*Ibid.*) Furthermore, none of the victim's clothes had been ripped. (*Ibid.*) Dr. Aruna Sinhania, the forensic pathologist who performed an autopsy on the victim, testified that the victim had been dead 36-48 hours before the autopsy was uncovered. (*Ibid.*)

On May 17, 1993, Mary Hong analyzed vaginal and anal swabs from the victim's body to screen for the presence of semen. Hong found the presence of intact sperm from the vaginal swab. (*Ibid.*) Further testing of the semen revealed that it matched the DNA profile of Sanchez. (*Ibid.*) However, the Court of Appeal noted that "no evidence was presented showing how long sperm can be detected in a dead body." (*Id.* at p. 7.) Therefore, it was not entirely certain how long before the victim's death the defendant had sexual contact with the defendant.

On appeal, Sanchez argued that the trial court improperly admitted evidence of a previous rape conviction, including the testimony of his victim, Irene T. (*Id.* at p. 3.) Sanchez also argued that the evidence was insufficient for a conviction of first degree murder. (*Id.* at p. 7.) Lastly, Sanchez argued he was eligible for resentencing under Senate Bill 1393, which gave trial court judges the discretion to dismiss a prior serious felony conviction for the purposes of sentencing. (*Id.* at p. 9.) The Court of Appeal disagreed that it was improper for the trial court to admit the evidence and testimony regarding the previous rape conviction. (*Id.* at p. 4.) Furthermore, the Court of Appeal found the evidence was sufficient for a first-degree murder conviction. (*Id.* at pp. 7-8.) However, the Court of Appeal did agree that Sanchez was eligible

for re-sentencing under Senate Bill 1393. (*Id.* at p. 9.) Therefore, the Court of Appeal affirmed the conviction of first degree murder, but remanded to the trial court with instructions to hold a new sentencing hearing. (*Id.* at p. 10.)

Case: *People v. Claude* (2006)

Date of Incident: June 23, 1992

Michael Kevin Claude was convicted of first-degree murder by jury in 1994 (*People v. Claude*, G032917, 2006 WL 1493732 (Cal. Ct. App. May 31, 2006).) He was tried a second time in 2003 after the superior court vacated judgment for ineffective assistance of counsel. At the second trial, Claude was convicted of second-degree murder. (*Ibid*.)

At trial, the prosecution introduced evidence that Nancy Elsayed's naked and bullet-riddled body was found in the car of Phong Nguyen on June 23, 1992, with a jumpsuit draped across her lap (*Ibid*.) Nguyen testified that Elsayed had borrowed his car before her murder to "talk to Mikey" because he owed her money. (*Id*. at p. 2.) According to the prosecution, Claude and Elsayed had an intermittent dating relationship and engaged in criminal activity together. (*Ibid*.) Forensic experts collected bodily fluids from Elsayed's body, the jumpsuit draped over her, and a pair of women's underwear found in the car. (*Ibid*.) They discovered "sperm consistent with the defendant's profile on the panties and in Elsayed's vaginal and perivaginal regions, plus trace amounts of sperm from a second unknown donor on the jumpsuit and in Elsayed's perivaginal region." (*Ibid*.)

Mary Hong, a criminalist who had been employed by the Orange County Crime Lab since 1985, testified for the prosecution. (Partial Reporter's Transcript, *People v. Claude*, dated August 19, 2003, attached herein as Exhibit U, pages 693-694.) Hong said she began DNA typing in 1993, and in preparation for case work, she participated in "simulated rape cases" in the Crime Lab. (*Id.* at pp. 694-695.) Hong testified that in these simulations, she was given "mixtures of semen and vaginal material" from "donors within the laboratory" to gain familiarity with testing for seminal components such as P30 and spermatozoa. (*Id.* at p. 695.)

Hong joined the case involving Elsayed in 2000 and reviewed DNA typing work done by forensic analyst for the defense, Marc Taylor. (*Id.* at pp. 700-701.) Hong's examination found a high amount of semen in the victim's vaginal swabs and peri-vaginal swabs, which contained DNA consistent with Claude. (*Id*. at p. 759.) However, Taylor "had detected another semen donor in some of the samples [from the victim], at a lower amount." (*Id.* at p. 701.) In

order to "address whether or not that semen donor might have been near the time of death of Ms. Elsayed," Hong looked at the pair of underwear found in the car. *(Ibid.)* Hong found a small amount of spermatozoa, which was consistent with Claude's DNA. (*Id.* at p. 710.) Based on the low amount of sperm and the absence of P30 on the underwear, Hong further concluded that the garment had likely been laundered after any sperm deposit. (*Id.* at pp. 712-713.)

When asked if she could "look[] at just a raw number and say[]…there is this many sperm[,] [s]o, therefore, intercourse must have taken place at a specific time," Hong responded "no." (*Id.* at p. 715.) She explained that the concentration of sperm in male ejaculate "can vary within an individual due to medical reasons, due to alcohol intake, due to frequent ejaculate," and can also vary "due to genetics, environmental exposure, how many times the individual ejaculates." *(Ibid.)* When further asked in a hypothetical involving a person who appeared to contribute more spermatozoa and a person who appeared to contribute less spermatozoa, who between the two individuals would "be the last in order to ejaculate…to create that specific mixture," Hong responded that "[her] experience has been that the individual last in time tends to be there in the greater amount." (*Id.* at pp. 726-727.) Hong noted "there are possible exceptions" but agreed that it was true "as a general rule." (*Id.* at p. 727.)

Hong also examined the jumpsuit draped over Elsayed, on which she found spermatozoa. (*Id.* at p. 720.) She concluded "the sperm donor could not have been Claude" based on DNA typing. (*Ibid.*) Taylor found that this unknown donor's profile was consistent with the trace amounts of spermatozoa from a man other than Claude in vaginal samples from the victim. (*Id.* at p. 725.) Hong said she believed the victim had worn the jumpsuit without underwear because of "yellowish stains in the crotch." (*Id.* at p. 719.) Hong also said she assumed that "a woman wouldn't wear black underwear the [white flowered print] jumpsuit," though she admitted she could not know "if either the underwear or the jumpsuit was something she wore" at or near her time of death. (*Id.* at p. 761.) Hong nevertheless concluded that Elsayed had worn the jumpsuit without underwear and did not wear it after having sex with Claude (*Id.* at p. 760.)

In his retrial, the jury found Claude guilty of second-degree murder, and he was sentenced to a 20-years-to-life prison term (*People v. Claude*, 2006 WL 1493732 at p. 1.) On appeal, Claude contended that the prosecutor committed misconduct during the questioning of a witness and that the trial court erred by admitting Elsayed's statements concerning his prior uncharged criminal acts. (*Ibid*.) The Court of Appeal rejected his claims and affirmed the judgment of the trial court. (*Ibid*.)

Case: *People v. Metzler* (2004)

Date of Incident: July 15, 1992

Daniel Edward Metzler was convicted of two counts of rape in 1999. (*People v. Metzler*, No. G030665, 2004 WL 119924 (Cal. Ct. App. Jan. 27, 2004).)

William Vining, an officer with the Orange County Sheriff's Department, was conducting sexual assault investigations in 1998 when he was assigned to a rape that occurred on the Aliso Creek bicycle trail. (*Id.* at p. 1.) Vining "decided to research inactive files to see if similar crimes had been committed in the past and pulled records pertaining to some 1992 cases." (*Ibid.*) In two of the rape cases he reviewed, involving Caryn C. on July 15, 1992 and Kristin S. on July 30, 1992, "he noticed that there were some specimens collected and properly preserved that had not been fully processed for DNA analysis." (*Ibid.*) Robert S. Keister, "one of the original analysts assigned to begin the [Sheriff] Department's DNA testing laboratory," explained that "back in 1992 the [DNA section] was only analyzing cases where there was a named suspect," but material collected "was preserved for future DNA testing." (*Id.* at p. 3.) Vining sent specimens from the two 1992 rape cases to the Orange County Crime Lab, where DNA testing revealed that neither case matched 1998 case, but they matched each other. (*Id.* at p. 1.) The DNA results from these two crimes were submitted to the Department of Justice "for comparison with its DNA database for a genetic profile," and Metzler was identified as the source of both 1992 specimens. (*Ibid.*)

Lisa Arnell, a forensic scientist at the Crime Lab, testified that "she compared the semen obtained from Kristin S.'s blouse to the profile of [Metzler's] blood standard regarding DNA analysis" and found "mathematical matches at several locations." (*Id.* at p. 4.) Arnell declared that "the frequency of those matches occurring in the total population was one in forty-one billion." (*Ibid.*) Mary Hong from the Crime Lab also testified regarding DNA analysis. Hong concluded that "sperm taken from the clothing of both victims matched the DNA of [Metzler's] blood, which would occur in fewer than one in eight-hundred billion individuals." (*Ibid.*)

A jury found Metzler guilty of rape. (*Id.* at p. 1.) On appeal, he contended that his prosecution was time barred and violated his due process rights. (*Ibid.*) He further asserted that

the DNA evidence was improperly admitted based on Hong's cross-examination testimony about dust and air bubbles in blood and clothing samples. (*Id*. at p. 4.) The Court of Appeal rejected his first claim, finding his trial to be within the requisite six years of the statute of limitations (*Id*. at p. 1.) It also found that the DNA evidence was properly admitted, noting that Hong testified air bubbles and dust particles "were not uncommon and did not represent contamination." (*Id*. at p. 5.) The Court affirmed the jury's conviction. (*Ibid*.)

Case: *People v. Davison* (1996)

Date of Incident: August 29, 1992

Frederick George Davison was convicted of one count of rape. (*People v. Davison*, No. G016178, attached herein as Exhibit V.)

According to evidence introduced by the prosecution at trial, the suspect forcefully undressed Lisa N. and raped her in his car on August 29, 1992. (*Id*. at pp. 2-3.) Lisa's assailant "pushed her head down towards his penis" and "forced his penis into her mouth." (*Id*. at p. 3.) When the victim pulled away, he pinned her down, "took off [her] underpants and inserted his penis into her vagina." (*Ibid*.) The assailant then "forcibly engaged in sexual intercourse with her." (*Ibid*.) Shortly thereafter, Lisa N. escaped and was taken to the hospital for a sexual assault examination. (*Ibid*.) Police officers located Davison yards away from where the victim claimed to have been raped and collected specimens from him. (*Id*. at pp. 3-4.) According to the prosecution, forensic testing revealed **"seminal fluid in [the victim's] vaginal area that had been deposited one to fifteen hours prior to the medical examination."** (*Id*. at p. 14, bolding added.) Additionally, "medical tests showed her saliva on Davison's penis." (*Ibid*.)

The defense argued that Davison and the victim "engaged in consensual intercourse after talking and fondling each other." (*Id*. at p. 4.) Davison claimed that the victim "freaked out" after she discovered he had lied about wearing a condom. (*Ibid*.) A jury ultimately found the appellant guilty of rape. (*Id*. at p. 15.)

On appeal, Davison contended that the court "mishandled" evidence of plea bargain negotiations. (*Ibid*.) The Court of Appeal rejected his claim on grounds that the objection was ultimately withdrawn and the evidence admitted. (*Id*. at p. 17.) The Court affirmed the jury's judgment.

Case: *People v. Stevenson* (1997)

Date of Incident: November 20, 1992

A jury found Amos Dwayne Stevenson guilty of six counts of kidnapping for robbery, four counts of robbery, two counts of attempted robbery, two counts of forcible oral copulation, two counts of forcible rape, three counts of anal or genital penetration with a foreign object, and one count of false imprisonment. Furthermore, the jury found true the special allegation of a gun enhancement as to each count. (*People v. Stevenson*, No. G005032, attached herein as Exhibit W.)

According to the prosecution, on November 20, 1992, Stevenson confronted the first victim, Deborah H., with a gun outside of her apartment in Long Beach. After Stevenson took her money, he had her drive him to the bank. Deborah H. was unable to find her ATM card, but Stevenson ordered her to continue driving. Then, "Stevenson had Deborah stop and orally copulate him while he inserted two his finger into her anus." (*Id.* at p. 2.) Stevenson proceeded to steal her ring and purse before he fled the scene. (*Ibid.*)

According to the prosecution, Stevenson's next victim was Julie T., whom he robbed on December 8, 1992 outside of the garage of her apartment in Huntington Harbor. Stevenson "then had her take him to a bank, withdraw $300, and drive to a deserted location. There, Stevenson forced Julie to orally copulate him before raping her." (*Id.* at pp. 2-3.)

Next, according to the prosecution, on December 13, 1992, "Stevenson pulled a gun on Victoria D. as she was saying good-bye to Andrea M. in Huntington Beach." He ordered the two women to drive him to the bank. Neither of the women had an ATM card on them, so Stevenson ordered them to drive to a deserted location. Stevenson forced Victoria D. to go into the trunk of the car and then raped Andrea M. He also stole cash and rings from Victoria D.'s purse. (*Id.* at p. 3.)

The Orange County Crime Lab tested semen samples found on Julie T. and Andrea M.'s clothing. (*Ibid.*) By comparing it to a DNA sample of Stevenson's blood, they concluded that "[o]nly about 1 in 7 million people in the general population have Stevenson's DNA banding pattern." (*Ibid.*) Furthermore, Stevenson's PCR type matched the PCR type of the semen found

in a swab of Deborah H.'s mouth. (*Id.* at p. 4.) However, "Stevenson's PCR pattern is found in approximately 8 percent of the Caucasian population and 9 percent of the black population." (*Ibid.*)

On appeal, Stevenson argued that the charges that arose out of the attack on Deborah H. should have been tried in Los Angeles County, rather than Orange County. (*Ibid.*) Furthermore, Stevenson argued that the trial court "erroneously admitted the DNA evidence because the probability calculations used to describe the statistical significance of a DNA 'match' using the RFLP and PCR methodologies are not generally accepted in the scientific community." (*Id.* at p. 5.) Lastly, Stevenson argued that it was improper to convict him of both false imprisonment and kidnapping of Victoria D. (*Id.* at p. 9.) The Court of Appeal rejected each of these arguments and affirmed the judgment of the trial court. (*Id.* at p. 10.)

Case: *People v. Hansen* (1995)

Date of Incident: February 2, 1993

Gary C. Hansen was convicted by a jury of rape, one count of penetration with a foreign object, and two counts of forcible sodomy. (*People v. Hansen*, No. G015189, attached herein as Exhibit X.) The court imposed consecutive upper term sentences on all four counts for a total of 32 years. (*Id.* at p. 2.)

Hansen's wife at the time, Kim, testified that Hansen sodomized her without her consent three times between October and December 1992. (*Id.* at p. 2.) In each instance, they were engaged in consensual vaginal intercourse when, without warning, the defendant turned her on her stomach, restrained and sodomized her. (*Ibid.*) They separated in January 1993. (*Ibid.*) Hansen testified that both instances of anal intercourse with Kim were consensual and that when Kim expressed her displeasure with anal intercourse, he agreed to stop (*Id.* at p. 4.) He believed she left home in January 1993 because they were arguing about transportation problems. (*Ibid.*)

On February 2, Jeanet T., a Columbian exchange student living in the same apartment complex as Hansen, returned home alone from a night out and was approached by Hansen. (*Ibid.*) He asked her to come into his apartment to stay with his frightened pregnant wife. (*Id.* at p. 3.) When she looked inside the apartment, she saw no one. (*Ibid.*) Suddenly, he grabbed her by the throat, wrestled her to the floor of his apartment, "kneeled between her legs, fondled her breasts, lifted her dress, threatened her with his belt, and removed her pantyhose and underwear." (*Ibid.*) Jeanet begged Hansen not to hurt her, and told him she was having her period and wearing a tampon. (*Ibid.*) But "he removed the tampon and attempted to penetrate her vagina with his penis [… and] was successful on his second attempt." (*Ibid.*) He simultaneously put his fingers in Jeanet's rectum. (*Ibid.*) When police arrived, Jeanet's tampon was retrieved from the garbage, her clothing was collected, and she was taken to the hospital for a sexual assault exam. (*Ibid.*) DNA tests conducted on a semen sample found on the tampon

and Hansen's blood established the two came from the same source and there was a one in 266 million chance that a random match with someone else could have occurred. (*Ibid.*)

Hansen claimed Jeanet initiated their sexual encounter and she became hostile when he asked her if she wanted him to use his belt. (*Id.* at p. 4.) Hansen admitted inviting Jeanet into his apartment the night of the rape. (*Ibid.*) However, he said she entered willingly and engaged in consensual sexual activity, but they did not have intercourse. (*Ibid.*)

On appeal, Hansen attempted to argue that there was an absence of an express waiver and thus his statements were obtained unconstitutionally. (*Ibid.*) He further contended the court erred by failing to sua sponte define the terms "force" and "menace" as they were legally used. (*Ibid.*) He also challenged the sufficiency of the evidence to support both forcible sodomy convictions. (*Id.* at p. 7.) Lastly, Hansen argued that the trial court erred by failing to state reasons for imposing the aggravated term on all four counts. (*Id.* at p. 8.) However, the California Court of Appeal affirmed the judgment in its entirety. (*Id.* at p. 9.)

Case: *People v. Hernandez* (1996)

Date of Incident: August 1993

In August 1993, a man entered a bedroom where Maria C. was sleeping with her four children. (*People v. Hernandez*, Nos. G016433, 93NF1929, p. 3, attached herein as Exhibit Y.) The man had a knife and threatened to kill Maria and her children if they made any noise. (*Id*. at p. 3.) He told Maria he also had a gun, and he ordered her to perform a series of sexual acts. (*Ibid*.) He wiped his genitals with Maria's shirt, leaving a sample that was later used for DNA analysis and comparison that showed the DNA likely belonged to Jose Francisco Hernandez. (*Ibid*.)

Hernandez testified that he went to the house that night to meet Delia Merchain, who formerly occupied Maria's house with her daughter. (*Id*. at pp. 3-4.) He testified that when he arrived at the house, Maria approached him, and they engaged in consensual sex. (*Id*. at p. 4.) He denied being drunk or having a weapon that night. (*Ibid*.) Hernandez was convicted of two counts of forcible rape, one count of sodomy, one count of penetration with a foreign object, and one count of forcible oral copulation. (*Id*. at p. 2.)

On appeal, Hernandez argued the court committed prejudicial error by permitting the testimony of Merchain and her daughter because they were evidence of other crimes and inadmissible under the California Evidence Code. (*Id*. at p. 5.) The court rejected this argument and affirmed the judgment. (*Id*. at p. 7.)

Case*: People v. De La Cruz* (1997)

Date of Incident(s): September 11, 1993; November 7, 1993

Gilbert De La Cruz was convicted of multiple sex offenses for gang rapes that occurred on two separate occasions and was sentenced to 146 years in prison. (*People v. De La Cruz*, No. G016887, attached herein as Exhibit Z.)

The first incident was in the late evening of September 11, 1993 when 15-year-old Lisette S. and her girlfriend stopped on their way home to talk to three men who were members of La Colonia, a local street gang. (*Id.*, at p. 2.) The girls agreed to go "cruising" with the men, who then took them to Garza Street Community Center in Anaheim, where other La Colonia members were. (*Ibid.*) De La Cruz told Lisette to orally copulate another gang member or else she would be killed. (*Ibid.*) After she performed the oral copulation, she was forced to the ground, a jacket was placed over her face, she was told not to scream, and 12 men proceeded to rape her. (*Ibid.*) She was sodomized twice and orally copulated. (*Ibid.*) During the sexual assault exam at the hospital, a pool of semen was found in her vagina. (*Ibid.*) It was stipulated at trial that De La Cruz was the major donor of the semen recovered. (*Ibid.*)

Two months later, on the evening of November 7, 1993, 14-year-old Brandy T. was walking home with two girlfriends. They stopped at a store to call for a ride, but when they encountered two La Colonia members they accepted a ride home from them instead. (*Ibid.*) The two men took them to the Garza Street Community Center. (*Ibid.*) Brandy T. was grabbed by six men, including De La Cruz, who grabbed her and raped her. One member sodomized her and forced her to orally copulate him. (*Id.*, at p. 3.)

Following a jury trial, De La Cruz was found guilty of forcible rape while acting in concert, forcible rape, forcible oral copulation while acting in concert, and forcible sodomy while acting in concert. The jury also found true the allegation the offenses were committed in connection with a criminal street gang. The court explained at the sentencing hearing that it was imposing full consecutive sentences because all the crimes were

violent sex crimes, there were two separate victims on two separate dates, and De La Cruz had a "reasonable opportunity to reflect upon his actions [between each crime] and nevertheless resumed sexually assaultive behavior in each separate instance." (*Ibid.*)

On appeal, De La Cruz argued that the court erred in imposing full consecutive sentences for counts 3 through 17 and 19 through 22 because it "misunderstood" its duties under P.C. §667.6. However, the Court stated that the trial court knew it had the discretion in imposing full consecutive sentences and stated reasons for the decision. (*Id.*, at pp. 4-5.) Furthermore, while the trial court stayed sentences on counts 2 and 18, the California Court of Appeals agreed with Cruz's contention and ordered them stricken because they are lesser included offenses of the various rape-in-counts. (*Id.*, at pp. 5-6.)

Case: *People v. Cowles* (1996)

Date of Incident: March 7, 1994

Michael D. Cowles was convicted by a jury for burglary, conspiracy to commit first degree murder, attempted murder, assault with force likely to produce great bodily injury, rape, oral copulation, robbery, and torture, with enhancements for acting as a member of a criminal street gang, great bodily injury, and being vicariously armed. (*People v. Cowles*, No. G017068, attached herein as Exhibit A1.)

The convictions relate to two separate incidents. The first involved the ransacking of Suliman Baha's house, where Baha returned home to find three people running out of his house, including a tall white male who resembled Cowles. (*Id.*, at p. 2.) The intruders dropped some of Baha's possessions as they fled. (*Ibid.*) Baha's cousin, Khalid Hussain, who was with Baha, identified Cowles as the male burglar, both in a photo lineup and at trial. (*Ibid.*)

About three months later, on March 7, 1994, Cowles and three or four others entered "Jane Doe's" house when she opened the door. (*Ibid.*) She recognized Cowles as someone who had been at her house with her nephew a few months before. (*Ibid.*) The defendant covered Doe's head with his hand, took her upstairs to her room, removed her clothes, raped her, then left her alone in the room. (*Id.*, at p. 3.) Then, another man entered with a gun, "told her he would shoot her if she did not lie down and remove her clothing," she complied, he raped her and forced her to orally copulate on him. (*Ibid.*) Upset at Doe for supposedly locking the door, Cowles pressed his foot in her face, kicked her, and wrapped and tightened her purse strap around her neck. (*Ibid.*) Doe passed out and did not regain consciousness for 20 to 30 minutes. (*Ibid.*) She went downstairs where she found her crying three-year-old son lying on a blanket. (*Ibid.*) He had been choked, was bleeding inside the mouth, and had marks on his forehead and face. (*Ibid.*) Some jewelry the two had been wearing was missing, along with other items. (*Ibid.*) Two telephones had been ripped from the wall. (*Ibid.*) Cowles was arrested over a week later at a motel room with six others, who all claimed to be members of the Tiny Rascals Gang

(T.R.G.). (*Ibid.*)

At the original trial, Cowles put on evidence to impeach Doe's claim she had been raped and that Cowles was the perpetrator. (*Ibid.*) Doe had told the police she was choked immediately when she answered the door, and that she played dead until the intruders left. (*Id.*, at pp. 3-4.) No semen was found in her vagina and the semen stains on the sheet could have come from 33 percent of the population. (*Id.*, at p. 3.) A pubic hair found in Doe's vagina came from someone other than Cowles. (*Ibid.*) The neighbor who called the police said, "I think [Doe's] estranged husband, he has been out in front of my apartment and he has threatened to kill her in [the] past." (*Ibid.*)

On appeal, Cowles contended: (1) the failure to sever the unrelated burglary count deprived him of due process and a fair trial; (2) the jury was not instructed on the elements of first degree murder relating to the conspiracy count; (3) insufficient evidence supported the conspiracy count; (4) insufficient evidence supported the attempted murder count; (5) insufficient evidence supported the torture count; (6) the jury was erroneously instructed on the torture count; (7) the street gang enhancement allegation should have been separately tried; (8) insufficient evidence supported the street gang enhancement; and (9) the prosecutor should have been forced to accept Cowles' proffered stipulation to his gang membership, gang tattoos, and cigarette bums. (*Id.*, at p. 2.) However, the Court of Appeal rejected Cowles' arguments and affirmed the judgment. (*Id.*, at pp. 4-12.)

Case: *People v. Belcher* (2019)

Date of Incident: May 1995

In *People v. Belcher*, a jury found Earl Monroe Belcher guilty of rape, and found true the allegation that the offense was committed while in the commission of a burglary. (*People v. Belcher*, G054415, 2019 WL 1747790 (Cal. Ct. App. Apr. 19, 2019).) According to the prosecution, in May 1995, the victim was living alone at her home in Fullerton. Belcher broke into her home. (*Id.* at p. 2.) He told the victim he wanted any money she had, but she only had a few dollars in her wallet. (*Ibid.*) Then, according to the prosecution, Belcher raped the victim, and forced her to drive to an ATM machine and withdraw money. (*Ibid.*)

During a medical examination, Dr. Michael Martin took vaginal swabs and found sperm. (*Ibid.*) Eighteen years later, in 2013, there was a "hit" on the DNA sample taken through the Combined DNA Index System (CODIS). Nevada authorities informed the Orange County Crime Lab that the sperm sample DNA may belong to an unidentified male. (*Id*. at p. 3.) In January 2014, a DNA sample was obtained from appellant, who was located in Nevada prison. The sample was then sent to the Orange County Crime and its DNA profile compared to the profile of the semen found at the crime scene. (*Ibid*.) Testimony at trial was that the frequency of finding this particular profile in the population was one in a trillion. (*Ibid*.) Appellant was convicted in 2016. (*Id.* at p. 1.)

On appeal, Belcher put forward several arguments. First, Belcher asserted that the trial court prejudicially erred by admitting testimony about the DNA evidence taken from the rape victim because there were breaks in the chain of custody. (*Ibid.*) Second, Belcher argued that the trial court erred in admitting the deceased victim's hearsay statements made to her daughter after the incident occurred. (*Ibid.*) Third, Belcher argued that his trial counsel was ineffective for failing to object to portions of the crime scene investigator's testimony. (*Ibid.*) Fourth, Belcher argued the prosecutor's closing argument prejudiced him. (*Ibid.*) Fifth, he argued that the trial court gave the jury erroneous jury instructions. (*Ibid.*) He also argued that the cumulative effect of all these errors denied him a fair trial. (*Ibid.*) Lastly, Belcher asserted that his prior strikes should be stricken, and the case should be remanded for sentencing. (*Ibid.*) The

Court of Appeal rejected each of these arguments and affirmed the judgment of the trial court. (*Id.* at p. 20.).

Case: *People v. Jackson* (2004)

Date of Incident: October 15, 1995

Davao Nahakie Jackson was convicted of rape by force committed during a burglary. (*People v. Jackson*, G032918, 2004 WL 2635625 (Cal. Ct. App. Nov. 19, 2004).)

According to evidence introduced by the prosecution at trial, two armed men broke into Jane Doe and Arturo R.'s motel room on October 15, 1995. (*Id.* at p. 1.) One of the men raped Doe at gunpoint while the other robbed R. (*Ibid.*) Doe underwent a subsequent physical examination, during which a vaginal swab was collected, tested for DNA, and preserved as evidence. (*Ibid.*) In 1998, after the defendant was charged and convicted of committing an unrelated robbery, a sample of his blood was drawn to create a record his DNA profile. (*Ibid.*) In December 2001, the Combined DNA Index System (CODIS) matched Jackson's DNA profile to the profile from Doe's rape kit. (*Ibid.*) The trial court found Jackson guilty of rape. (*Ibid.*)

On appeal, Jackson contended that the six-year delay in prosecuting him impaired his ability to present a defense and violated his due process rights. (*Id.* at p. 2.) The Court of Appeal found the investigative delay preceding his arrest "essentially unavoidable" due to a backlog of unsolved cases. (Id. at pp. 3-4.) The Court affirmed the trial court's judgment. (*Id.* at p. 4.)

CONCLUSION

This Court should issue an order consistent with Defendant's request.

DATED: June 25, 2020

Respectfully submitted,

SHARON PETROSINO
Public Defender

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By: Scott Sanders
Assistant Public Defender