NO. 2-12–1364

IN THE

APPELLATE COURT OF THE STATE OF ILLINOIS

SECOND JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	**Appeal from the Circuit Court**
	)	**for the 23rd Judicial Circuit,**
Plaintiff-Appellee,	)	**DeKalb County, Illinois**
	)	
-vs-	)	**No. 2011 CF 454**
	)	
JACK McCULLOUGH,	)	**Honorable**
	)	**James Hallock,**
Defendant-Appellant.	)	**Judge Presiding**

BRIEF AND ARGUMENT OF DEFENDANT-APPELLANT

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NATURE OF THE CASE

The defendant-appellant, Jack McCullough, appeals directly from convictions for the offenses of murder, kidnapping, and abduction of infant. No question is raised regarding the sufficiency of the pleadings.

ISSUES PRESENTED FOR REVIEW

1. Whether the evidence failed to prove the defendant guilty beyond a reasonable doubt.

2. Whether the defendant was denied a fair trial when the judge abused his discretion and refused to allow the defense to introduce relevant and probative exculpatory evidence.

3. Whether the judge abused his discretion, denying the defendant a fair trial, by allowing the prosecution to introduce irrelevant and prejudicial evidence.

4. Whether the evidence failed to prove any exception to the statute of limitations on the kidnapping and abduction charges, and whether convictions on both counts violate the one-act, one-crime rule.

JURISDICTION

This case is an appeal from a final judgment under Supreme Court Rules 602, 603, and 606, and ILL. CONST., ART. 6, § 6. On September 14, 2012, following a five-day bench trial, the defendant was found guilty of murder, kidnapping, and abduction of infant. (C. 356; R. 1385-1391) On December 10,

he was sentenced to natural life imprisonment for murder, five years imprisonment for kidnapping, and seven years for abduction of infant. (C. 393, 394; R. 1446-1448) Notice of appeal was filed that same day. (C. 398-399)

STATUTES INVOLVED

For the convenience of the Court, the statutes defining the offenses charged herein, as they appeared in 1957, are at page A-21 of the Appendix to this Brief.

STATEMENT OF FACTS

On the night of December 3, 1957, in Sycamore, 7-year-old Maria Ridulph and her 8-year-old friend Kathy Sigman were playing at a street corner lot a few doors down from Maria's house. (R. 798-799) A man walked up to them and offered a piggyback ride. (R. 800) Maria agreed to the piggyback ride, and Kathy, getting cold, decided to run home to get some mittens. (R. 802-804) When she came back a few minutes later, both Maria and the man were gone. Kathy ran to Maria's house to tell her brother, (R. 805), and within an hour the citizenry was mobilized and looking for Maria. (R. 698-702, 753-754, 774, 869-875, 945-946) Maria's body was not found until April 1958, in some woods about a half-mile from Route 20 between Woodbine and Stockton, (R. 909, 918), around 100 miles from Sycamore. (See Pl.Ex. 13, 14, 16)

When found, the body was badly decomposed. It was not known how long Maria had been deceased, or how long the body had been in the woods, (R. 911, 917), and the autopsy determined the cause of death to be "by unknown means as a result of foul play at a place or places and time unknown by a person or persons unknown." (Pl.Ex. 10) Later exhumed in July 2011, (R. 1041-1051), the remains were analyzed by Dr. Krista Latham, a molecular and forensic archeologist, (R. 1035-1041, 1064-1077), who found at least three cutting marks, consistent with knife wounds, to the chest. (R. 1068-1077) She could not say for certain the cuts were made at the time of death. (R. 1077)

The prosecution offered the following additional evidence against the

defendant in the September 2012 bench trial:

Sycamore Residents

Pamela (Smith) Long, 68, (R. 746), lived in Sycamore from 1944 to 1966. (R. 747) She knew a person in her neighborhood named "Johnny." He was older than she was, and was tall, thin, with "strange teeth," and "blondish-brown" hair with "a flip in it." On more than one occasion, Johnny would give her piggyback rides in front of her house. (R. 755) Over defense objection, (R. 756), she testified that the last time Johnny gave her a piggyback ride, her father "jerked" her off Johnny's back. (R. 758)

On cross examination, Long admitted she had "no idea" of the date of the last piggyback ride. (R. 764) She said it took place "way before" Maria Ridulph disappeared, (R. 759), "quite a [few] years" before she (Long) was in eighth grade. (R. 760)

Cheryl Crain, 70, was a high school sophomore in Sycamore in December 1957. (R. 767, 769) A girlfriend of hers was dating John Tessier (the name the defendant was known by at the time). (R. 771) On the evening of December 3, Crain and her girlfriend went to the latter's father's hobby shop to decorate the store for Christmas. (R. 770) John was supposed to give the girls a ride home. (R. 772) He never came by. (R. 774, 775)

Mary (Sigman) Chapman, (who went by the name Kathy), 63, recounted playing with Maria Ridulph on the night in question. (R. 792, 793, 798) Chapman was eight years old at the time, and Maria was seven. (R. 796, 797)

The two played at Maria's house after school, and then again after dinner. (R. 798) It was starting to snow, so they went to the corner of Archie and Center Cross to play under a street light. (R. 798-800) While they played, a man, walking alone from the south, approached them and asked if they liked dolls and wanted a piggyback ride. (R. 800) She described the man as "an older person," having a slender face, with his hair in a flip, and "large teeth." (R. 801, 824) He introduced himself as "Johnny." Chapman had never seen him before. (R. 802) He wore a sweater "with lots of colors on it" and jeans. (R. 801, 831) It was very dark outside. (R. 801)

Chapman said the man took Maria on a piggyback ride up the street and then back to the corner. (R. 802-803) Maria then went home to get a doll and returned a minute or two later. (R. 803-804) Chapman's hands were getting cold, so she went home to get her mittens. (R. 804) She went back to the corner and Maria was gone. (R. 805) She went to Maria's house and asked her brother if Maria had come home. (R. 805) He told her to go out and look for her. Unable to find her, Chapman went home and told her mother about Maria and "Johnny." (R. 806)

In the months that followed, Chapman recalled, she spoke with the police and the FBI on a daily basis, and looked at lineups and thousands of photos and never saw Johnny. (R. 807, 809)

In September 2010, she was contacted by Brion Handley, with the Illinois State Police, (R. 809), who showed her a photo array (primarily based on photos

from a Sycamore High School yearbook). (Pl.Ex. 3; R. 810, 981-986, 991) She picked one of them (the defendant) as Johnny, (R. 813), based on her best recollection. (R. 841)

Sigman said she did not know John Tessier but knew a Tessier family lived in her neighborhood. (R. 845)

Charles Ridulph, 66, lived in Sycamore, on Archie Place, with his parents and three sisters. Maria was the youngest in the family. (R. 679-682) The corner of Archie and Center Cross was two doors away. An attorney, Tommy Cliff, lived in the house at the corner. (R. 685) Ridulph described the neighborhood as quiet, (R. 683), and said "[y]ou pretty much knew everyone in town." (R. 685) It was common for Maria to play at the corner; she did not have permission to cross the streets. (R. 690, 691) Kathy Sigman lived five houses away on Archie. (R. 693)

Ridulph remembered that a Tessier family lived on Center Cross Street, near Roosevelt Court. The Tessier children attended Catholic school and Ridulph did not have much contact with them. (R. 705-706) It was possible he played with them; he said all the neighbors played with each other. (R. 721)

Katheran (Tessier) Caulfield, 67, defendant's half-sister, said in 1957 her family –her parents and seven children– lived at 227 Center Cross Street, (R. 854-857), a block-and-a-half north of the corner where Maria and Kathy played. (See Pl.Ex. 7) She described the defendant then as a little shorter than 6', "gangly," with wavy hair. (R. 857; see Pl.Ex. 1(d)) He frequently wore a multi-

colored sweater their mother knit. (R. 858, 859) Caulfield knew Maria Ridulph, and said they all used to play together with other kids. (R. 863, 864) To her knowledge, the defendant, who was five-and-a-half-years older than she, never played with Maria and did not play group games with other children. (R. 866)

On the night of December 3, 1957, Caulfield was at a 4-H social in DeKalb. (R. 867) Her father picked her up when it was over at around 7:00. (R. 867) Coming back into town she saw a lot of police cars, with their lights flashing, in her neighborhood. (R. 869) When she got home, her mother, sister Jeanne and brother Bob were there; the defendant was not. (R. 871) That night, her parents joined search parties, (R. 872), and she stayed home. She went to bed around 11:30 or 11:45, and still had not seen the defendant. She said she last saw him a day or two before that. (R. 875) She said it was possible for a person to climb into the house through an open window. (R. 891)

Over defense objection, Caulfield testified she recalled being present when her mother was questioned by FBI agents the next day, and hearing her mother tell them the defendant had been home on the evening of the incident. (R. 877-881) On cross, she said her father told the FBI the same thing. Caulfield herself never talked with the FBI or the police between 1957 and 1994. (R. 900)

Caulfield also said her family used to take day trips to Apple River Valley (north of Stockton; see Pl.Ex. 13). (R. 883) As he got older, the defendant did not go with them. (R. 884, 889-890) He had his own car, a gray-blue two-passenger car with flames he painted on it himself. It was not at the house on

the day of the incident. (R. 885)

Caulfield never saw the multi-colored sweater after December 3. (R. 885) Her mother made sweaters for all the family, and she did not know how many sweaters her mother made for the defendant, or when she last saw him wear the multi-colored one. (R. 887-888)

Jeanne Tessier, 62, another half-sister of the defendant, said that in 1957, he wore a "DA" haircut, curly on top and swept-back on the sides. (R. 937, 938, 941) Their father owned a hardware store, and on the night of December 3, people came over to their house to ask him to open the store so they could get flashlights and lanterns to search for Maria. (R. 943) Jeanne knew who Maria was; they occasionally played on the same playground. (R. 943-944) The defendant was not home when the men came over. (R. 945) Ten-years-old at the time, Jeanne stayed home, alone, and slept on the living room couch while her parents searched. The lock on the door to their house was defective, so a wooden board was set up to secure it closed, and Jeanne was needed to open it from inside. It was around the middle of the might when her mother came home. (R. 946-947, 949, 951) A few days later, the police came over and asked her mother where the defendant was on the night of December 3. Over defense objection, Jeanne said her mother said he had come home. (R. 947-948) Jeanne testified he was not at home then. (R. 948)

Jeanne at first said she did not see the defendant on the morning of the 4th. (R. 952) She then allowed she "might have seen him" on the 4th; she was

not sure. (R. 953) She also recalled that there was a time when the defendant's car sat in the yard because the defendant could not fix a flat tire. Asked if she could remember when that was, she explained: "I didn't count days as a child, sir. It was a long time." (R. 954)

Janet Tessier, 55, was another half-sister of the defendant. (R. 958-960) She testified their mother, Eileen, died in January 1994, of cancer. (R. 961) Near the end of her life, Eileen was pulling out her intravenous tubes and her catheter, so she was moved to Kishwaukee Hospital in DeKalb. (R. 962, 963) At some point they had a conversation, with Janet's sister Mary also present. (R. 964) Over defense objection, Janet said Eileen grabbed her wrist and said: "Those two little girls and the one that disappeared, John did it. John did it, and you have to tell someone. You have to tell someone." (R. 967) Prior to Eileen's death, Janet called the Sycamore Police. Then in 1996 or 1997, she called the FBI, who told her to go back to the original jurisdiction. (R. 968-969) In 2008, she spoke to a man who had written a book about a turn-of-the-century murder in his own family, so she contacted the Illinois State Police, who called her. (R. 969-970)

Janet said her mother never explained how she knew what she was saying. (R. 972) Janet admitted her mother was emotionally disturbed while at the hospital. (R. 975) Sometimes she was disoriented; sometimes she was lucid. She was coherent and lucid when she made the statement in question, Janet thought. (R. 977-978)

Dennis Twadell, 72, associated with the defendant back in their high school days in Sycamore. (R. 921-923) He recalled the defendant would not let anyone else drive his car due to insurance reasons. (R. 925-926) He said the defendant wore flannel shirts and sweaters –sometimes solid, sometimes multi-colored– during the winter. (R. 926-927) The Ridulphs belonged to the same church as Twadell's family, but he did not know any of them personally. (R. 927) On the night Maria went missing, Twadell called the defendant, who was not home. He did not see the defendant that night. (R. 928)

On cross, Twadell admitted that when he was first asked by police, in March 2010, whether he remembered anything significant happening on December 3, 1957, he could not. (R. 929) After his memory was refreshed –by being reminded about his prior contacts with the police– he said he remembered the night. (R. 930-931)

Police

Steven Cook, a Sycamore police sergeant, went to Seattle for defendant's arrest on June 29, 2011. (R. 1224-1225) During a search of the defendant's apartment, Cook saw a box of ammunition inside a safe. (R. 1230)

Seattle Police Detective Irene Lau spoke with the defendant that same day, and said he was "pretty angry" at the time. (R. 737-739) Asked if he knew Maria Ridulph, he softened and described her as "very stunningly beautiful with big brown eyes . . . 'lovely, lovely, lovely.'" (R. 740, 741) He vehemently denied any involvement in the crime. (R. 742)

Cloyd Steiger, a Seattle homicide detective, participated in the extradition of the defendant from Seattle to Illinois on July 27, 2011. (R. 1157, 1159) Steiger described the defendant as talkative throughout the experience. (R. 1162) The defendant talked about another Seattle police officer he knew when he (the defendant) was an officer in Lacey, Washington. (R. 1162-1163) He said that like Casey Anthony, he would have to wait a long time to be set free. (R. 1163) During the flight to Chicago, he discussed Maria and described her as a "beautiful Barbie doll." (R. 1166) He told the police to take note of how long it would take to get from Chicago to Sycamore, and explained that on December 3, 1957, he was dressed for the very cold and snowy weather and hitchhiked a ride to Rockford. (R. 1167, 1177) He said he never took the train anywhere that day, but called his father to pick him up. When his father could not get there, he hitchhiked home. He climbed into the house through a window and the family was surprised to see him there the following morning. (R. 1168-1169) He said he understood Maria's body was found 120 miles to the south, and said if he was to hide a body he would have dumped it in the Kishwaukee River. (R. 1169, 1170, 1173) While stopping for some food after arriving at O'Hare Airport, the defendant said he believed there were two pairs of pants found near Maria's body, so it meant it a serial killer was involved. (R. 1171, 1172) He said the last time he saw Maria she was five, standing on the corner near her house, and he told her to get back because she was too close to the street. (R. 1174) Once the police got him to Sycamore, he showed them his old house and the window he

climbed through. (R. 1175, 1176) He denied giving Maria a piggyback ride, denied going where her body was found, (R. 1185), and denied any involvement with the crime. (R. 1186, 1187)

Michael Ciesynski, another Seattle detective participating in the transporting of the defendant, said the defendant referred to the Casey Anthony case and said "Remember, it only takes one. I only need one juror." (R. 1189, 1195) He told them he could not have committed the murder because he was in Chicago that day. (R. 1198) He got a ride from Chicago to Rockford with a guy he knew, and then hitchhiked from Rockford to Sycamore. (R. 1200) Asked if he gave the girl a piggyback ride and then left her, and then someone else picked her up, the defendant said: "No, it didn't happen like that." (R. 1203)

Jailhouse Informants:

The prosecution also presented testimony from three men who had spent time in custody with the defendant in the DeKalb County Jail.

Christopher Diaz was, at the time of the trial, in custody for aggravated criminal sexual abuse. (R. 999-1000). He had prior convictions for attempt (mob action), felony possession of a fraudulent identification card, and unlawful contact with gang members. (R. 1001, 1021) A week before the trial, he wrote to the DeKalb County State's Attorney to report what he claimed to have overheard the defendant say to another jail inmate. (R. 1002) Diaz testified the defendant admitted giving a little girl a piggyback ride, and running down an alley with her while another girl went to get her mittens. (R. 1004) He said the

defendant claimed to have had the girl inside his bedroom for a while and his mother did not know. (R. 1005) The defendant said he strangled the girl with a wire and demonstrated how he did so. (R. 1006-1007) Then he said he hit the girl on the head, but her skull was intact. (R. 1009) Diaz said the defendant said he was telling people he did not have a car "just to throw people off," when he actually had a car with flames painted on it. (R. 1011-1012) He said he was mad at the State's Attorney and wanted to kill him. (R. 1013) He said the State offered him a deal, and "fuck that." (R. 1015) He said the State had no evidence, only his mother who passed away, and his sister was a "dumb bitch." (R. 1016) The defendant asked if anyone could do something to Kirk Swaggerty, another inmate who was going to testify against him. (R. 1017)

Diaz testified the prosecution had not offered him anything in exchange for his testimony. (R. 1018)

On cross, Diaz denied being a gang member. (R. 1019) There was an immigration hold on him, (R. 1020), and he could be deported if convicted of the charge pending against him. (R. 1024) He said he wrote notes about what he heard the defendant say, and in his notes he wrote that the defendant held the victim in his bedroom "for some time." (R. 1031)

Katherine Christiansen , a sergeant working in the DeKalb County Jail, (R. 1262-1277), said jail records showed Diaz to be a member of the Ambrose street gang, (R. 1279), and having been disciplined once for writing an "A" on his jail uniform. (R. 1281)

Over defense objection and on motion of the prosecution, one of the jailhouse informants was allowed to testify as "John Doe" because of his fear over retaliation for his testimony. (R. 639-649) "Doe" had prior convictions for murder, home invasion, criminal damage to property, and unlawful possession of a weapon by a felon (twice). (R. 1127) While in the DeKalb County Jail from August 30 to September 5, 2012, he was the cellmate of Christopher Diaz. (R. 1127-1128) During this time, Doe testified, the defendant asked him about life in the penitentiary and if Doe could do something to a snitch. (R. 1132-1134) Talking about his case, the defendant said he met the little girl with another girl, and one had to go inside to get gloves or mittens. He slipped while giving one girl a piggyback ride, and she fell and hit her head and started crying or yelling. He said no one would believe it was an accident. He went home, climbed on top of a garbage can and went inside his house, pulling the girl into his bedroom. (R. 1135) His mother knew he had her inside. (R. 1136) The defendant also said he choked the girl with a wire. (R. 1138) He said he put the girl in back of his car (which had flames on the side), and drove her to Jo Daviess County, where he put her body by some trees. (R. 1138-1139) Doe said the defendant also made threats to his judge and prosecutor. (R. 1140) Doe said the defendant said that serious criminals could draw well, and when Doe asked him, like murderers, the defendant said "yes . . . [w]e can both draw." (R. 1143) The defendant said he had a dream that a guy named Brooks was watching kids in a playground and he was trying to manipulate the FBI investigation that

way. (R. 1145)

Doe claimed he had not been offered anything from the prosecutor's office in exchange for his testimony. (R. 1146)

On cross, Doe admitted he was serving a natural life sentence for his 1986 murder conviction, (R. 1147), and the weapons charges were based on his having a handmade knife while in prison. (R. 1148) He was in a "Security Threat Group" which influenced his placement and privileges in the Department of Corrections. (R. 1150-1151) He also had a petition pending before the court asking to vacate his sentence. (R. 1151)

Kirk Swaggerty was in the Department of Corrections for a 2011 murder conviction, for which he was sentenced to 33 years. (R. 1232, 1248) He also had a previous conviction for a felony drug offense, (R. 1233), and was on parole when he committed the murder and a home invasion. (R. 1248) He had fled to Mexico after the murder charge was filed and stayed there for four years before being extradited back to DeKalb County. (R. 1253, 1254) From July 2009 to mid-August 2011, he was in the DeKalb County Jail. (R. 1233) Like Christopher Diaz, Swaggerty wrote to the State's Attorney about conversations he had with the defendant while in the jail. (R. 1235) Swaggerty said the whole jail was talking about the defendant, whose case had been discussed on a television news channel that played in the jail. (R. 1237, 1255)

Swaggerty said the defendant claimed he probably could get probation if he went for a plea bargain "because it was an accident." (R. 1241) The

defendant told Swaggerty the girl fell while he was giving her a piggyback ride and would not stop screaming, so he suffocated her. (R. 1241-1242) He said he called the FBI himself after a dream about a guy named Johnny, who lived a few houses away from the girl and committed the crime. (R. 142) The defendant also said the State had "no evidence whatsoever," and if they found any DNA evidence, he would talk about a plea bargain. He said the case made him a celebrity and he could get a "dream team" to represent him if he took this to trial. (R. 1243) Swaggerty denied making any deal for his testimony. (R. 1246)

On cross, Swaggerty admitted his motion to reconsider his murder sentence was still pending in DeKalb County, and the motion made a specific reference to his assistance in this case. (R. 1249-1250) He also admitted writing several letters to the prosecutors, including one about another man charged with murder; he did not testify in that case. (R. 1251, 1252)

Defendant's Case:

Prior to trial, the defense indicated it might introduce evidence, in the form of testimony from former Sycamore Police Chief Pat Solar, that he had determined another man, who died in prison in Pennsylvania, was the offender. Pursuant to prosecution motions in limine, (C. 202-206, 224-231, 232-240; R. 488-501), Judge Hallock prohibited any evidence of Solar's report. (R. 493)

The defense also filed a pretrial motion in limine asking to be allowed to introduce evidence of FBI records and reports, prepared at the time of Maria Ridulph's abduction, that excluded the defendant as a suspect in the matter and

established that the defendant was in Rockford at the time. (C. 193-196) The prosecution filed motions to bar such evidence. (C. 202-206, 232-240) In argument on the motions, the defense asserted that many, if not all of the witnesses to the incident and those involved in the investigation were no longer alive, that relevant telephone records were not longer in existence, and that the State should not be allowed to benefit from the unusual delay in the prosecution. It was argued that the documents qualified for admission under the "ancient documents" and public records exceptions to the rule against hearsay. (R. 568-583, 605-630) The prosecution argued that some of the witnesses might still be alive, that police reports are not admissible, and that the documents amounted to self-serving hearsay. (R. 583-605, 623-630) Judge Hallock ruled the reports would not be admissible. (C. 319; R. 630)

Mary (Tessier) Hunt, another half-sister of the defendant, was a nurse at Rush-Copley Medical Center. (R. 1289-1291) She recounted her mother's stay at Kishwaukee Hospital in January 1994 just prior to her death. (R. 1291) Hunt described her mother as "basically comatose" during her stay, (R. 1292), although lucid at times. (R. 1299) Hunt recalled being bedside, along with her sister Janet, when their mother said: "He did it." (R. 1293) Hunt did not recall her mother saying what "it" meant. (R. 1294) Hunt tried to ask her questions; she did not respond. (R. 1295, 1296)

John Prabhakar, a surgeon at Kishwaukee Hospital in January 1994, (R. 1312, 1313), was involved in Eileen Tessier's treatment then. She suffered from

metastatic cancer, and was taking pain medication intravenously. When the staff could no longer find any veins for the IV needles, Dr. Prabhakar was called upon to put an IV into her neck. (R. 1314-1315) Among the medications Eileen was given were a continuous morphine drip and Haldol. Side effects of the medications included nausea, constipation, sleepiness, confusion, stiffening of muscles, and disorientation. (R. 1315, 1317) He described her as being "pleasantly confused," (R. 1315), and disoriented. (R. 1316) She was also diagnosed with unspecified psychosis. (R. 1319) As a consulting physician, Dr. Prabhakar spent about a half-hour with her. (R. 1322)

Verdicts and sentencing

On September 14, 2012, Judge Hallock found the defendant guilty of all charges. (R. 1385-1391)

The post-trial motion, (C. 363-369), was denied on December 10. (R. 1405-1407) The cause then proceeded to sentencing, and the defendant elected to be sentenced under the laws in effect in 1957. (R. 1408) Two victim impact statements were presented in aggravation, (C. 1410), and two letters from the defendant's family were offered in mitigation. (R. 1411-1423) After hearing argument from both sides and a statement from the defendant, (R. 1423-1446), the judge imposed a natural life sentence for murder, five years for kidnapping, and seven years for abduction of infant. (C. 393; R. 1446-1448) He said the latter two sentences would "merge" into the murder sentence. (C. 393; R. 1448)

ARGUMENT

I.

The evidence against Jack McCullough –personal memories of what occurred 55 years ago; a photo identification made 53 years after the incident; testimony from jailhouse informants; innocuous statements from the defendant; and an improperly admitted and inconclusive statement from the defendant's mother while on morphine and Haldol just before her death– was so unreasonable, so improbable, and so unsatisfactory as to create a reasonable doubt that he was responsible for a 1957 murder, kidnapping, and abduction of infant.

It may well be a romantic notion to believe that when a truly traumatic event occurs, the details of the event will be forever seared into one's memory. For example, one might forever remember he was when he heard about President Kennedy's assassination. But how likely is it that one would be able to recount, after 50-some years, the identities of who he was with at the time, or what those people wore? In a court, with murder charges at issue, the law demands more than nostalgia. It demands proof beyond a reasonable doubt.

The prosecutors below took great effort to describe the gentle, small-town nature of Sycamore, Illinois, in 1957. Especially in that world, the abduction and murder of a seven-year-old girl who spent the night of the first snow playing on a street corner just a few doors from her home was a shocking, defining, and tragic event. But like any other criminal charges, responsibility for her kidnapping, abduction, and murder needed to be proven by competent evidence, beyond a reasonable doubt, and not by appeals to sympathy or the romance of the 1950s. The evidence presented against Jack McCullough woefully failed to

rise to the level of proof necessary to sustain his convictions, and this Honorable Court must reverse the judgment below.

In reviewing whether the evidence was sufficient to prove a defendant guilty beyond a reasonable doubt, this Court must determine whether, viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *People v. Collins*, 106 Ill.2d 237, 261 (1985). The standard for reviewing the sufficiency of the evidence after a bench trial is the same as it is following a jury trial. *People v. Howery*, 178 Ill.2d 1, 38 (1997). A trial judge's resolution of factual disputes may be entitled to great deference on review, *In re Vuk R.*, 2013 IL App (1st) 132506, ¶ 5, but where the evidence on the record is so unreasonable, so improbable, and so unsatisfactory as to create a reasonable doubt, a reviewing court must reverse the judgment. *People v. Smith*, 185 Ill.2d 532, 542 (1999); *People v. Evans*, 209 Ill.2d 194, 209 (2004). That the offenses here occurred some 55 years ago does not relieve the prosecution of its burden of proof. As our Supreme Court said more than 85 years ago in discussing the justification for statutes of limitations, "time destroys all proofs of guilt" just as it "gradually wears out proofs of innocence." *People v. Ross*, 325 Ill. 417, 421 (1927). The reasonable doubt standard remains.

There was no forensic evidence even remotely suggesting any connection between the defendant and Maria Ridulph's disappearance and murder. No one

saw Maria taken away from the scene, and no one saw how she died. Although he may have made innocuous statements to the police about Maria, (calling her "very stunningly beautiful with big brown eyes," (R. 740), or a "beautiful little Barbie doll," (R. 1166)), the defendant staunchly and repeatedly denied any involvement in the crimes. (R. 742, 1186-1187) The case against him, then, was grounded on components which, on close review, do not amount to proof beyond a reasonable doubt.

The Accounts of Kathy (Sigman) Chapman and Other Sycamore Residents

Mary (Sigman) Chapman, (who went by the name Kathy), 63 at the trial, recounted playing with Maria Ridulph on the night in question. (R. 792, 793, 798) Chapman was eight years old at the time. (R. 796, 797) She testified that after dinner, (R. 798), the two went to the corner of Archie and Center Cross to play. (R. 798-800) It was very dark out, but she said they played under a street light. (R. 801) While they played, a man, walking alone from the south, approached them and asked if they liked dolls and wanted a piggyback ride. (R. 800) She described the man, whom she had never seen before, as "an older person," having a slender face, with his hair in a flip, and "large teeth." (R. 801, 802, 824) He introduced himself as "Johnny." (R. 802) He wore a sweater "with lots of colors on it," and jeans. (R. 801, 831)

Chapman said the man took Maria on a piggyback ride up the street and then back to the corner. (R. 802-803) Maria then went home to get a doll and

returned a minute or two later. (R. 803-804) Chapman's hands were getting cold, so she went home to get her mittens. (R. 804) When she returned to the corner, Maria was gone. (R. 805)

To find Chapman's account was probative to any degree one must assume that the man who gave Maria a piggyback ride was in fact the same person who took her and later caused her death. While the defendant emphatically denies being the man who gave Maria the ride, mere presence at the scene of a crime is not itself sufficient to establish guilt beyond a reasonable doubt. *People v. Boyd*, 17 Ill.2d 321 (1959). The prosecution's case failed to exclude the possibility that the man who gave Maria the ride left the area, and then someone else came by the scene to abduct her while Chapman had gone home. *See, People v. Holsapple*, 30 Ill.App.3d 976 (5th Dist. 1975) (conviction reversed where evidence wholly circumstantial and did not exclude possibility that someone other than defendant committed the murder).

But even if it is assumed that the person Chapman saw was in fact the murderer, there are still a number of deficiencies with her testimony. First and foremost, she was being asked to recall something that happened 55 years earlier, when she was only eight years of age. In *Dallas County v. Commerical Union Assurance Co*, 286 F.2d 388, 396 (5th Cir. 1961) (a case discussed in greater detail in Argument II of this Brief), addressing whether it would be reasonable to expect to find a credible witness who observed a fire that occurred 58 years earlier, the Court commented:

> Any witness who saw that fire with sufficient understanding to observe it and describe it accurately, would have been older than a young child at the time of the fire. We may reasonably assume that at the time of the trial he was either dead or his faculties were dimmed by the passage of fifty-eight years.

See also, People v. Williams, 383 Ill.App.3d 596, 638 (1st Dist. 2008) (conviction reversed when it was based on testimony of two minor children "riddled with internal inconsistencies and self-contradictions," "hesitant" and "vague"); *People v. Broome*, 130 Ill.App.2d 227, 230 (1st Dist. 1970) (conviction reversed where prosecution's case rested on identification made by a 15-year-old under adverse circumstances which conflicted with testimony from another witness). There can be no real distinction between a 58-year-old memory and one of 55 years. At the time she was playing with Maria, eight-year-old Chapman would have had no reason to pay any particular attention to the appearance of the man, or to recall with clarity how he introduced himself. As Chapman admitted, it was dark out at 7:00 at night on December 3, and a photograph of the street corner refutes Chapman's recollection that the corner was illuminated by a streetlight. (Pl.Ex. 80)

One must also assume that the man who approached the girls, if in fact he was the person responsible for taking Maria, used his true name to identify himself. "Johnny," is not an uncommon name for a man, and it is incredible to believe that a man would identify himself just before committing a serious crime. *People v. Dawson*, 22 Ill.2d 260, 265 (1961).

In the months that followed the incident, Chapman recalled, she spoke with the police and the FBI on a daily basis, and looked at lineups and thousands of photos and never saw Johnny. (R. 807, 809) Fifty-three years later, in September 2010, she was contacted by Brion Handley, with the Illinois State Police, (R. 809), who showed her a photo array (primarily based on photos from a Sycamore High School yearbook). (Pl.Ex. 1(d); R. 810, 981-986, 991) She picked one of them (the defendant) as Johnny, (R. 813), based on her "best recollection." (R. 841) But the photo of the defendant did not match the description she offered on the stand. Johnny, she said, was "an older person," (R. 824), "probably 150" pounds, (R. 825), having a slender face, with his hair in a flip, and "large teeth." (R. 801, 802) Pamela Long, who offered testimony about a man who gave her piggyback rides "way before" the Ridulph incident, also from a man she called "Johnny," described Johnny as tall, thin, with blondish-brown hair with a flip in it and "strange teeth." (R. 755, 759) The photo of the defendant may show him to have a slender face, but his teeth are neither large nor "strange," and his hair does not have a flip on the side. (Pl.Ex. 1(d)) And while Long said Johnny was tall, Chapman did not mention the man's height. (One of the defendant's half-sisters described him as just under six feet tall. (R 857)) Exactly what Chapman meant by calling her Johnny an "older person," (R. 824), went unexplained; the defendant would have been 17 in December 1957. (R. 380) To an eight-year-old, a teenage boy would be "older," but to call a teen an "older person" stretches the meaning of the term.

A conviction cannot be sustained on doubtful, vague and unreliable identification testimony. *People v. Ash*, 102 Ill.2d 485, 494 (1984). Chapman's 53-year-old identification cannot be deemed reliable.

Testimony from the defendant's half-sisters similarly failed to establish the defendant's responsibility for the crimes.

Katheran (Tessier) Caulfield said that after returning home following a 4-H social in DeKalb earlier in the evening, (R. 867), her mother, sister Jeanne, and brother Bob were there; the defendant was not. (R. 871) That night, her parents joined search parties, (R. 872), and she stayed home. She went to bed around 11:30 or 11:45, and still had not seen the defendant that night. She said she last saw the defendant a day or two before that. (R. 875)

Jeanne Tessier, another half-sister of the defendant, said that on the night of December 3, people came over to their house to ask her father to open his hardware store so they could get flashlights and lanterns to search for Maria. (R. 943) Jeanne said the defendant was not home when the men came over. (R. 945) Ten-years-old at the time, Jeanne stayed home, alone, and slept on the living room couch while her parents searched for Maria. The lock on the door to their house was defective, she said, so a wooden board was set up to secure it closed, and Jeanne was needed to open it from inside. (R. 946-947, 949, 951) Jeanne at first said she did not see the defendant on the morning of the 4th. (R. 952) She then allowed she "might have seen him" on the 4th; she was not sure. (R. 953)

Katheran and Jeanne immediately contradict each other by Jeanne's recollection that she was home, alone, on the night in question, (R. 946), when Katheran claimed that she, and her brother Bob, were also home that night. (R. 875) If anything, Katheran confirms that the defendant could not have been the man who played with Maria on the night of the 3rd because she had not seen him for a day or two before that night. (R. 875) If one is to believe Katheran and Jeanne, one would have to, again, assume from the prosecution's case that the defendant came home to Sycamore, from parts unknown, on the night of December 3, only to abduct Maria and disappear for another day.

Neither do the other former Sycamore residents/witnesses, both teens at the time, offer support for the theory that the defendant was the assailant. Cheryl Crain testified the defendant, who was dating a girlfriend of hers, did not pick them up from her girlfriend's father's store as had been planned that night. (R. 767, 771, 772, 775) Dennis Twadell, who hung around with the defendant, said he called the defendant's house after the news of Maria's disappearance that night, and the defendant was not home. (R. 921, 923, 928) That the defendant might not have been home to pick up his girlfriend, or to answer a boyfriend's phone call, did not mean that he was in the midst of participating in an abduction. Any number of other people might well have been absent from Sycamore on the evening of December 3, 1957. Even taking all the prosecution's assumptions and innuendos for all they are worth, at most they only show the defendant may have had an opportunity to commit the offenses. But there

clearly were others who had the same opportunity. *See, People v. Dowaliby*, 221 Ill.App.3d 788, 799 (1st Dist. 1991) (Court finds it "untenable" to justify conviction for murder of seven-year-old daughter merely because defendant may have had an opportunity to commit the offense.).

Jailhouse informants

Juan Rivera was convicted by a jury of the offense of first degree murder based on aggravated criminal sexual assault charges. The prosecution's case against him essentially consisted of his confession to the police and testimony about inculpatory admissions related by three jailhouse informants. On review, this Court found that no rational trier of fact could have found Rivera guilty beyond a reasonable doubt based on such evidence. *People v. Rivera*, 2011 IL App (2d) 091060, ¶ 46.

Addressing the testimony from the jailhouse informants, this Court acknowledged that while credibility is a matter for the trier of fact, "such testimony must be treated with caution." ¶ 36. Two of the three men had motivation to testify falsely: one admitted trying to sell the defendant's discovery materials to a newspaper reporter and the other was a drug abuser. The third had a conviction for sexually assaulting his stepdaughter. ¶ 37. This Court noted the prosecution offered no information as to the existence of any procedures to ascertain the reliability of the informants' claims. ¶ 38; *see* 725 ILCS 5/122-21(a) (2010) (statutory procedure for determining reliability of jailhouse informant testimony in capital cases). As for the informant who tried

to sell materials to a newspaper, it was recognized that "[w]hen a witness has hopes of a reward from the prosecution, the testimony should not be accepted unless it carries with it an absolute conviction of its truth." ¶ 38, *citing People v. Hermens*, 5 Ill.2d 277, 285-286 (1955). As for the drug abusing informant, this Court noted Illinois Supreme Court decisions finding that narcotics addicts' testimony is subject to suspicion. ¶ 38. Given the circumstances behind the testimony from those three informants (and DNA evidence showing Rivera could not have committed the sexual assault in question), your Honors concluded it would be "simply unreasonable to sustain the finding of guilt beyond a reasonable doubt." ¶ 39.

The three jailhouse informants who testified against Jack McCullough make the Rivera witnesses look like choir boys.

Christopher Diaz was being held in the jail for aggravated criminal sexual abuse. (R. 999-1000) He had prior convictions for attempt (mob action), felony possession of a fraudulent identification card, and unlawful contact with gang members. (R. 1001, 1021) There was an immigration hold on him, (R. 1020), and he could be deported if convicted of the sexual abuse charge. (R. 1024) Although he denied being a gang member, (R. 1019), a sergeant working in the jail said their records showed Diaz to be a member of the Ambrose street gang, (R. 1279), and having been disciplined for writing an "A" on his jail uniform. (R. 1281) Kirk Swaggerty was in the Department of Corrections for a 2011 murder conviction, for which he was sentenced to 33 years. (R. 1232, 1248) He had a

previous conviction for a felony drug offense, (R. 1233), and he was on parole when he committed the murder and a home invasion. (R. 1248) He had fled to Mexico after the murder charge was filed and stayed there for four years before being extradited back to DeKalb County. (R. 1253, 1254) Swaggerty admitted his motion to reconsider his murder sentence was still pending in DeKalb County, and the motion made a specific reference to his assistance in this case as a factor to be weighed in mitigation. (R. 1249-1250) He also admitted writing several letters to the prosecutors, including one about another man charged with murder; but he did not testify in that case. (R. 1251, 1252) The third informant, who was allowed to testify as "John Doe," (R. 639-649), had prior convictions for murder, home invasion, criminal damage to property, and unlawful possession of a weapon by a felon (twice). (R. 1127) He was serving a natural life sentence for his murder conviction, (R. 1147), and the weapons charges were based on his having a handmade knife while in prison. (R. 1148) He was in a DOC "Security Threat Group" which influenced his placement and privileges. (R. 1150-1151) Like Swaggerty, Doe had a petition pending before the court asking to vacate his sentence. (R. 1151)

As if their motivation to testify for the prosecution was not enough to make it impossible for any reasonable fact finder to believe what they had to say, the substance of their testimony conflicted with what the rest of the prosecution's case showed.

At the outset, it must be remembered that, as Swaggerty admitted, the

whole jail was talking about the defendant, whose case had been discussed on a television news channel that played in the jail, (R. 1237, 1255), so much of what the three had to say was based on what was already public knowledge. Diaz said the defendant claimed to have had the girl inside his bedroom for "some time," (R. 1031), and that he said he strangled the girl with a wire, (R. 1006-1007), or hit the girl on the head. (R. 1009) Whereas Diaz said the defendant claimed his mother did not know the girl was in the house, Doe, who said the girl was strangled with a wire, (R. 1138), said the defendant said he pulled the girl into the house through a window, (R. 1135), and his mother knew the girl was inside the house. (R. 1136) Swaggerty said the defendant claimed to have suffocated the girl because she would not stop screaming after falling off his back. (R. 1241-1242)

The above claims are refuted by the testimony from the prosecution's forensic anthropologist, Krista Latham, who determined that the only evidence of foul play on Maria's body was stabbing wounds on her chest. (R. 1068-1076) The original autopsy report could only state that death was caused "by unknown means as a result of foul play." (Pl.Ex. 10) There was simply no evidence that Maria was strangled or struck on the head. Additionally, the idea that the defendant would have brought Maria into his house on the night of December 3 fails to account for the testimony from the defendant's half-sisters, who both claimed to be home (alone or with others, depending on who one believes) that night, (R. 875, 946), and surely would have been aware if the defendant had

done such a deed –yet they were both called to testify essentially to prove the defendant was *not* home. Either the rest of the prosecution's case refuted the informants' claims, or the informants disputed the rest of the prosecution's case. Under either scenario, no rational trier of fact could have been convinced that there was proof beyond a reasonable doubt.

Defendant's Mother's Statement and Other Irrelevant (and Inadmissible) Testimony

Later in this Brief, it will be argued that it was reversible error to admit the statement from the defendant's mother, Eileen Tessier, made in the hospital before her death; in no way did the statement qualify for admission as a statement against penal interest, the basis upon which the prosecution sought its admission. (See Argument III) But even if, *arguendo,* the statement was admissible, it was unworthy of any belief by a rational trier of fact.

Janet Tessier testified that near the end of her mother Eileen's life, in January 1994, she was moved to Kishwaukee Hospital. (R. 961-963) At some point during that hospital stay Janet and Eileen had a conversation, with Janet's sister Mary also present. (R. 964) Janet said Eileen grabbed her wrist and said: "Those two little girls and the one that disappeared, John did it. John did it, and you have to tell someone. You have to tell someone." (R. 967) Janet said her mother never explained how she knew what she was saying, (R. 972), making the statement her unfounded opinion as much as anything else. Mary, on her part, recalled their mother only saying: "He did it," (R. 1293), and did not

recall her mother saying what "it" meant. (R. 1294) Hunt tried to ask her questions; she did not respond. (R. 1295, 1296) Thus, from the outset, there is a question about whether Eileen Tessier actually said what Janet claimed she said.

Moreover, any consideration of Eileen's statement must account for the circumstances surrounding the making of the statement. Eileen was in the hospital because she could not be trusted to leave the tubes delivering her medicine, and her catheter, attached to her body, (R. 961-963), something no reasonably-minded person would do. Janet admitted her mother was emotionally disturbed while at the hospital, (R. 975), and at times she was disoriented. (R. 978) Mary described her mother as "basically comatose" during her stay in the hospital, (R. 1292), although lucid at times. (R. 1299) Dr. John Prabhakar, a surgeon who was involved in Eileen Tessier's treatment at the hospital, (R. 1312-1315), testified that among the medications she was given were a continuous morphine drip and Haldol. Side effects of the medications included nausea, constipation, sleepiness, confusion, stiffening of muscles, and disorientation. (R. 1315, 1317) He described her as being "pleasantly confused," (R. 1315), and disoriented. (R. 1316) She was also diagnosed with unspecified psychosis. (R. 1319)

While a judge's finding on the credibility of witnesses is entitled to great weight, it is not conclusive. *People v. Pellegrino*, 30 Ill.2d 331 (1964) (bench conviction reversed where it was based on the testimony of a drunk and a

witness who changed her story). Commenting on whether an instructional error in a murder prosecution was reversible in nature, the Appellate Court in *People v. Iniguez*, 361 Ill.App.3d 807, 814 (1st Dist. 2005), said: "A case relying almost entirely on the self-contradictory testimony of a drug-using intoxicated witness who contacted the police two months after the killing, when she was facing two felony charges and was a fugitive for two years before testifying, hardly can be characterized as an odds-on favorite for the State." Eileen Tessier's use of morphine and Haldol may have been medically necessary, but the effect upon her cognitive and communicative skills was no less significant than if she was taking the drugs illegally. No rational trier of fact could find her statement, even if it was in fact made, sufficient to prove the defendant guilty beyond a reasonable doubt.

Other witnesses called by the prosecution offered testimony about occurrences that were too remote to warrant serious consideration, even assuming, *arguendo*, that their testimony was admissible. (See Argument III) Pamela Long's recollection of getting piggyback rides from a person in the neighborhood named "Johnny," (R. 755-758), proved nothing, since those rides were given "years before" Maria's disappearance, (R. 759), and she made no identification of the defendant as being the "Johnny" who gave her the rides. Sergeant Cook's testimony about finding ammunition in the defendant's safe in the latter's Seattle home, (R. 1230), was almost laughable in its relevance, since the discovery occurred almost 54 years after Maria's abduction and there was

no evidence that any firearm was involved in her death.

Presenting testimony from Long and Cook showed the prosecution's desperation. It did not prove the case.

Conclusion

Finding the evidence insufficient in the *Rivera* case, this Court concluded that when all the deficiencies in the prosecution's case were considered, the prosecution failed to establish the offense *aliunde* Rivera's disputed confession. *People v. Rivera*, 2011 IL App (2d) 091060, ¶ 45. There is no confession in this case. Rather, Jack McCullough has repeatedly denied any involvement in Maria Ridulph's disappearance and death. As will be discussed in the following two Arguments, Mr. McCullough was denied a fair trial when the judge refused to allow him to present evidence to establish a defense, yet permitted the prosecution to introduce irrelevant, but highly prejudicial evidence that resulted in the verdicts below. But putting the evidentiary errors aside, reviewing the case that was presented below, even in a light most favorable to the prosecution, there is no rational trier of fact that would have found the defendant guilty. Mr. McCullough therefore respectfully prays that this Honorable Court will reverse the judgment below.

II.

Especially given the 55 years which passed between the offenses and the trial, the judge's decisions to prohibit Jack McCullough from introducing FBI records prepared at the time of the offense, despite their status as ancient documents and public records and their probative value in establishing Mr. McCullough's alibi, and to prohibit Mr. McCullough from presenting testimony showing another man committed the offense, amounted to gross abuses of discretion denying Mr. McCullough his fundamental right to present a defense.

The extreme age of the offenses prosecuted below presented unique challenges for both sides. Presenting evidence and testimony from 1957 in a 2012 courtroom could not have been easy for the prosecution, but Jack McCullough had no less a right to present a meaningful defense. Whether based on due process, compulsory process, or the right of confrontation, the Federal Constitution guarantees a meaningful opportunity to present a complete defense. *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006). A defendant has the right to present a defense, including the right to call witnesses to establish the defense and present his version of the facts to the trier of fact. *People v. Manion*, 67 Ill.2d 564, 576 (1977). As defense counsel informed Judge Hallock before trial, many, if not all of the possible defense witnesses from 1957 who could have (had they been alive) established Mr. McCullough's alibi at the time of the offenses were deceased. (R. 569) In their place, the defense sought to present evidence –in the form of written reports compiled at the time of the offense– from the FBI's investigation of Maria Ridulph's abduction. (See State's discovery disclosure at C. 93, and attachments to defense disclosure, entitled

"Notice of Defense," at C. 283-291) Recognizing the out-of-court nature of that evidence, counsel argued, to no avail, that the reports nonetheless fell within either of two recognized exceptions to the rule against hearsay: ancient documents, and public records. (C. 193-196; R. 571, 574) The judge also unfairly prohibited the defendant's attempt to show that another person committed the offenses in question. (R. 493)

Rules of evidence "may not be applied mechanistically to defeat the ends of justice." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). The judge's mechanistic application of the hearsay rule, and failure to recognize the accepted exceptions to that rule in barring relevant and probative alibi evidence, and in prohibiting the defense from calling a witness to show another man may have committed the offenses, denied Mr. McCullough his right to present a defense. In the event this Court declines to reverse the judgment as requested in the previous Argument, the judge's rulings compromising the defense case amounted to reversible error.

While trial judges are ordinarily allowed discretion regarding the admission of evidence, reversal of a conviction is appropriate when a judge abuses that discretion, *People v. Boclair*, 129 Ill.2d 458, 476 (1989), or if the decision as to the admissibility of evidence is arbitrary, fanciful, or unreasonable. *People v. Morgan*, 197 Ill.2d 404, 455 (2001). As will be discussed below, Judge Hallock's evidentiary decisions against the defense were entirely unreasonable.

Ancient Documents

Prior to trial, the defense filed a motion in limine seeking to determine the admissibility of the FBI reports. (C. 193-196) In argument on the motion, defense counsel indicated the various reports and witness interviews would support the claim that the defendant was in Rockford at the time Maria Ridulph was abducted, and that the defendant, while in Rockford, placed a collect call to his home at 7:10 that night. (R. 569-570) The FBI talked with telephone company employees who confirmed that a collect call was made to the Tessier house at that time by a person who was referred to (likely the product of the operator mis-hearing the speaker) as "Tossier." Those telephone records, however, were no longer in existence. The FBI reports also referred to other witnesses, now deceased, who would have corroborated that the defendant was at a recruitment office in Rockford that evening. (R. 570)

Illinois Rule of Evidence 803 provides that "[s]tatements in a document in existence 20 years or more the authenticity of which is established," constitute "statements in ancient documents," which "are not excluded by the hearsay rule." IL Evid. Rule 803 (16). And while there is a paucity of Illinois case law discussing ancient documents, defense counsel below cited to at least three decisions from other jurisdictions which should have led to the admission of the FBI reports below.

Chief among those cases was an opinion authored by Judge John Minor Wisdom, *Dallas County v. Commercial Union Assurance Co.*, 286 F.2d 388, 390-

391 (5th Cir. 1961), which involved a lawsuit arising out of a collapsed clock tower. Over objection, the judge allowed the defendants to introduce, as an ancient document, a 58-year-old newspaper article describing a fire in the tower. Responding to the plaintiffs' hearsay argument, the Court observed: "[A]s with most rules, the hearsay rule is not absolute; it is replete with exceptions. Witnesses die, documents are lost, deeds are destroyed, memories fade. All too often, primary evidence is not available and courts and lawyers must rely on secondary evidence." 286 F.2d at 392. The Court found persuasive an earlier decision written by Judge Learned Hand, in an appeal from a suit over use of the title "Webster's Dictionary," in which the admissibility of a preface appearing in a 63-year-old dictionary had been questioned. "[E]veryone else is dead who ever knew anything about the matter and could intelligently tell us what the fact is. * * * As to the trustworthiness of the testimony, it has the guaranty of the occasion, at which there was no motive for fabrication." *G. & C. Merriam Co. v. Syndicate Pub. Co.*, 207 F. 515, 518 (2d Cir. 1913).

Commenting that "[i]f they are worth their salt, evidentiary rules are to aid the search for truth," 286 F.2d at 395, the *Dallas County* Court determined that application of an exception to the rule against hearsay is entirely appropriate when it is necessary to the case. "[This] means that unless the hearsay statement is admitted, the facts it brings out may otherwise be lost, either because the person whose assertion is offered may be dead or unavailable, or because the assertion is of such a nature that one would not expect to obtain

evidence of the same value from the same person or from other sources." 286 F. 2d at 396. Noting the 58 years that had elapsed since the date of the tower fire, the Court reasoned "[i]t seems impossible that the testimony of any witness would have been as accurate and as reliable as the statement of facts in the contemporary newspaper article." 286 F.2d at 396 (footnote omitted). Because the article was both necessary and trustworthy, as well as relevant and material, the Court held it qualified for admission as an ancient document. 286 F. 2d at 396-398.

The comments of Judges Wisdom and Hand presciently speak to the case here. With the exception of the 88-year-old Jo Daviess County Coroner, (R. 908), all of the trial witnesses from the Sycamore area were, at the time of the offenses, either children or teenagers, all of whom testified solely from their personal memories. In contrast, the FBI reports were prepared by adults. The agents' observations were committed to paper shortly after speaking to witnesses or discovering other evidence. And just as a reporter in a small-town newspaper would have no reason to fabricate a story about a fire, people interviewed by the FBI, and the agents themselves –especially at a time when Maria Ridulph was still missing and possibly alive– would want to be sincere and accurate.

The State argued below that information in the reports which supported the defendant's alibi was "self-serving" because it amounted to statements from the defendant himself. (R. 584) Those statements that came directly from the

defendant might well have been subject to exclusion. But that argument ignores information the FBI gleaned from witnesses other than the defendant. Whether from the defendant's father, or someone at the Rockford recruitment office, the telephone company, or other people, those statements should have been admissible.

More to the point on the admissibility of police reports as ancient documents is the case of *State v. Sargent*, 126 Oh.App.3d 557, 560, 564 (12th Dist. 1998), where on appeal the defendant argued it was error to admit 20+-year-old police reports under the ancient documents exception. Referring to the requirements for admissibility under the Federal Rules of Evidence, the Ohio Appellate Court found the reports admissible because they were properly authenticated, sufficiently old, and lacked any suspicions about their authenticity. 126 Oh.App.3d at 565.

Under Fed.R.Evid. 901(b)(8), to qualify as an ancient document, the writing must satisfy three criteria. The proponent must show the document "(A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered." The presumption of authenticity can be overcome if the opponent of admission can show any of the three criteria are not met. *Columbia First Bank, FSB v. United States*, 58 Fed.Cl. 333, 337 (2003).

The FBI records here met the standards set by *Dallas County* and the other cases discussed above, as well as the Illinois and Federal Rules of

Evidence: They are more than 20 years old and there is no dispute regarding their authenticity. (The prosecution below, who tendered the reports to the defense, (R. 571), conceded their authenticity, (R. 597), and the defense was prepared to call a witness who would offer further authentication. (R. 576)). Moreover, the information contained in those reports, especially as they related to the defendant's alibi, was material, relevant, and, due to the unavailability of live witnesses, very much necessary to the defense case. Judge Hallock's refusal to recognize the applicability of a recognized exception to the rule against hearsay was arbitrary and unreasonable and amounted to reversible error.

Public Records

An alternative basis offered below for the admission of the FBI reports was that the documents constituted public records. (R. 571-573) It has been recognized that police reports relating to police investigations are generally excluded from the "business records" exception to the hearsay rule, *People v. Smith*, 141 Ill.2d 40, 72 (1990), and that IL Evid. Rule 803(8) would suggest that "matters observed by police officers and other law enforcement personnel" might be excluded from the "public records" exception. But as pointed out below, (R. 573), those cases, such as *Smith*, which prohibit the admission of police reports, commonly involve situations in which the *State*, not the defense, seeks their admission. *See, People v. Williams*, 240 Ill.App.3d 505, 506 (1st Dist. 1992) (relied upon by State below, at R. 586). The reason for this is that admitting

what is normally second-hand knowledge is at odds with a defendant's constitutional right of confrontation. *People v. Garrett*, 216 Ill.App.3d 348, 357 (1st Dist. 1991); U.S. CONST., AMEND. VI; XIV. That confrontation right, however, is a shield belonging to a defendant, not the prosecution. When the defense seeks to *introduce* the report, there is a different Sixth Amendment interest involved: namely, the Compulsory Process Clause, which guarantees a defendant the right to call witnesses "in his favor." *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 313 (2009). "[T]hese [Sixth Amendment] rights are basic to our adversary system of criminal justice, [and] they are part of the 'due process of law' that is guaranteed by the Fourteenth Amendment *to defendants* in the criminal courts of the States." *Faretta v. California*, 422 U.S. 806, 818 (1975) (emphasis added). Mechanistically applying the hearsay rule to the situation here denied Jack McCullough his right to present evidence in his favor.

In *People v. Holowko*, 109 Ill.2d 187, 193 (1985), our Supreme Court found admissible printouts of telephone "traps" or "traces" kept by the phone company in the ordinary course of business, provided the proponent could establish a foundation by showing the method by which the information was recorded and that any recording device was working properly. The telephone system in place in northwestern Illinois in the mid-1950s may well have been different from that used in the mid-1980s, but by the same reasoning, the defense should have, at the very least, been allowed to introduce evidence of telephone records from

the night of December 3. The fact that evidence of those records existed only in the form of FBI reports should not have disqualified that evidence.

Evidence that Another Man Committed the Offenses

As part of its discovery obligation, the prosecution turned over to the defense a copy of two reports on the Maria Ridulph case prepared in 1997 by then-Sycamore Police Lieutenant Pat Solar. (C. 70) In one of the reports, dated October 28, 1997, Solar described his efforts to solve the case starting in 1982, (C. 229), but leading to no success until 1996. In the spring of that year, Solar received a call from an FBI agent who informed him that the Ridulph case had been "linked" to a 1951 abduction/murder of an eight-year-old girl in Pennsylvania. Work by a state trooper in the late 1980s, including comparison of fingerprints, led to charges against a William Redmond, a transient laborer with a history of sexual abuse and assault; in two previous incidents, he charmed pre-teen girls to accompany him to secluded areas where he would choke them before trying to rape them, fact patterns similar to the Pennsylvania case –and not too dissimilar to the Ridulph case. While in jail awaiting trial, Redmond "reportedly" made admissions to being involved in another child abduction. He was allowed to return to his home in Nebraska, where he died in 1992, at the age of 70. (C. 230) Solar noted that Redmond referred to himself as "Billy," which eight-year-old Kathy Sigman could have confused with "Johnny," he wore a type of hat Kathy had described, and "was fond of longshoreman type sweaters." Employed as a truck driver, Redmond would

have been familiar with Route 20, a common route to his home in Nebraska. "Redmond is far and away, the best suspect as yet named in this case," Solar concluded in his report, with "a level of certainty . . . which is greater than mere suspicion." (C. 231)

Then, before trial, the prosecution filed a motion in limine seeking to bar evidence of Solar's "theory" that Redmond was the man who abducted and murdered Maria Ridulph. (C. 224-231)

During argument on the motion, defense counsel pointed out that, unlike many other people mentioned in reports from the date of the offenses, Solar, who later became Sycamore Police Chief, (R. 489), was "alive and well and available to testify." (R. 491-492) Calling Solar's findings "remote" and "speculative," Judge Hallock granted the State's motion and prohibited any evidence of Solar's report. (R. 493)

Contrary to the judge's assessment of the question, Illinois does recognize the admissibility of evidence attempting to prove that someone other than the defendant committed the charge in question. In *People v. Ward*, 101 Ill.2d 443, 455 (1984), our Supreme Court ruled that a defendant, within limits, could attempt to prove that someone else committed the crime he is charged with. The test for admissibility is whether the evidence fairly tends to prove the particular offenses charged and whether it tends to make the question of guilt less probable. The evidence may be rejected, however, if it has little probative value because of remoteness, uncertainty, or possible unfair prejudice. While

cases from the Third District around the time of *Ward* caution against admitting evidence that might be remote or speculative, *People v. Smith*, 122 Ill.App.3d 609, 616 (3d Dist. 1984), *People v. Wilson*, 149 Ill.App.3d 293, 297 (3d Dist. 1986), a more recent case from the First District allowed that such other-suspect evidence need not be entirely "clear" as long as it not so uncertain or speculative as to justify its exclusion. *People v. Simmons*, 372 Ill.App.3d 735, 749 (1st Dist. 2007).

Treating the October 1997 report as an offer of proof, Solar's testimony was clear, logical, and authoritative. His conclusion as to William Redmond might not have established Redmond's guilt beyond a reasonable doubt, but it did not have to reach that level of proof. Redmond would have been around 35 at the time of Ridulph's disappearance, and Kathy (Sigman) Chapman said the man was "an older person." (R. 824) Redmond liked to wear sweaters, and Kathy recalled that the man wore a sweater. (R. 801, 831) Redmond's *modus operandi* of ingratiating himself with young girls before taking them away to a remote location, (C. 230), follows the facts of the case here. Further, as a live witness, Solar would have been subject to cross examination, one of the State's complaints about the use of written FBI reports.

The essence of the State's theory against the defendant was testimony that he was not seen by anyone in the town of Sycamore on the night of the abduction. The defense should have been allowed to present evidence that

another man could have been present in town at the time and had the same opportunity to commit the crime, evidence that was no more remote and speculative than that presented by the prosecution.

Shortly after granting the prosecution's motion in limine as to Solar, Judge Hallock denied the prosecution's motions in limine to bar any evidence suggesting anyone else committed the crime, (C. 202-206, 232-240), where the prosecutor complained that the defense had not disclosed the names of any other potential suspects. (R. 501) The judge expressed his ability to weigh the credibility of any witnesses and found "no need for a blanket order barring the defendant's introduction of such testimony." (R. 502) Insofar as Pat Solar was concerned, the defendant's ability to name a specific individual as a likely suspect in the crime was deserving of admission into the evidence and the trier of facts' full consideration.

Conclusion

Illinois has long recognized that, in the spirit of *Chambers v. Mississippi*, 410 U.S. 284 (1973), when necessary, evidentiary rules must give way to fairness. In *People v. Melock*, 149 Ill.2d 423, 465 (1992), our Supreme Court held that a defendant's due process right to present a defense required an exception to the rule barring polygraph evidence –in order to explain why he made a confession he later claimed was false, the defendant should have been allowed to introduce the fact that he was falsely told a polygraph exam proved his guilt. That same year, in *People v. Wheeler*, 151 Ill.2d 298 (1992), the Court

found the defendant was denied due process by applying statutes allowing testimony on post-traumatic stress syndrome in a prosecution for a sex offense, while barring the judge from ordering the victim to undergo a psychological exam sought by the defendant. Recognizing the unfair advantage granted the State in such a situation, the Court worked out a compromise, that at any retrial the State would be barred from presenting rape-trauma evidence based on its own expert's examination of the victim. 151 Ill.2d at 311-312.

"Fundamental justice requires that the defendant have every opportunity to controvert the State's proof." *Melock*, 149 Ill.2d at 465. Like Mr. Melock, to present his defense to the charges, Mr. McCullough needed the opportunity to offer evidence –the presentation of alibi evidence that appeared in FBI reports and testimony about another offender. Like the situation in *Wheeler*, the unique facts of the 55-year-old prosecution here requires a unique solution. If the State is to be permitted to present testimony from witnesses trying to recall an event 55 years ago, then fundamental fairness and due process require that the defense be allowed to present its witnesses in the form in which they currently exist, even if that form happens to be in the nature of FBI reports. A reasonable person would have wanted to consider the FBI reports and Pat Solar's testimony. By failing to respect fundamental fairness and due process, and by failing to recognize applicable evidentiary exceptions to the rule against hearsay, Judge Hallock abused his discretion and denied the defendant a fair trial. In the event this Court declines to reverse his conviction due to

insufficient proof, Jack McCullough respectfully requests that this Honorable Court reverse the judgment below and remand the cause for a new trial.

III.

The admission of a statement allegedly made by the defendant's mother 37 years after the offenses, under the erroneous guise of it being against her penal interest, while she was terminally ill and being administered morphine and Haldol, together with testimony from a witness that, years prior to the offenses, she was given a piggyback ride by some man, and testimony that firearm ammunition was found in the defendant's home safe 54 years after the offenses, constituted gross abuses of discretion by the trial judge resulting in irreparable prejudice to Mr. McCullough's right to a fair trial.

As discussed in Argument I of this Brief, the pillars of the prosecution's case against Jack McCullough were: 1) accounts of the night of Maria Ridulph's abduction and claims that he was not seen in town that night; 2) a photographic identification made 53 years after the fact; 3) highly suspect testimony from jailhouse snitches; and 4) inconclusive statements from the defendant himself. As little as that evidence truly proved, it is at least arguable that the evidence comported with standards of relevance. But erroneous decisions by the judge allowing the admission of irrelevant and non-probative evidence allowed the prosecution to cast the defendant in a bad light, and rendered a fair trial impossible.

Trial judges are allowed discretion regarding the admission of evidence; reversal of a conviction is appropriate when a judge abuses that discretion, *People v. Boclair*, 129 Ill.2d 458, 476 (1989), or if the decision as to the admissibility of evidence is arbitrary, fanciful, or unreasonable. *People v. Morgan*, 197 Ill.2d 404, 455 (2001). Just as Judge Hallock's evidentiary decisions limiting the defense case were, as discussed in the preceding

Argument, entirely unreasonable, his decisions allowing the prosecution *carte blanche* in presenting improper and prejudicial evidence were similarly arbitrary and unreasonable.

"Statement Against Penal Interest"

Prior to trial, the prosecution filed a motion in limine seeking to admit a statement purportedly made by the defendant's deceased mother, Eileen Tessier, as a statement against her penal interest. (C. 207-210) In the motion and later during argument on the motion, the prosecution claimed that the statement from Mrs. Tessier, (that "John did it"), made to two of her daughters prior to her death in 1994, exposed her to criminal liability because, when questioned shortly after Maria Ridulph's disappearance, she told police that the defendant had been home that evening. Over defense objections, Judge Hallock allowed the prosecution to introduce the statement, as well as testimony as to Mrs. Tessier's statements to police after Maria's disappearance. (R. 527-545)

Katheran Tessier Caulfield, who was 12 at the time, recalled being present when her mother was questioned by FBI agents on December 4, 1957, and hearing her mother tell them the defendant had been home on the evening of the incident. (R. 854, 877-881) On cross, she said her father told the FBI the same thing. (R. 900) Jeanne Tessier, who was 10 at the time, testified that a few days after Maria went missing, the police came over and asked her mother where the defendant was on the night of December 3. Over defense objection, Jeanne said her mother said he had come home. (R. 947-948)

Then, Janet Tessier testified that near the end of her mother's life, in January 1994, Eileen was moved to Kishwaukee Hospital after repeatedly pulling out her intravenous tubes and her catheter. (R. 961-963) At some point during that hospital stay she and Eileen had a conversation, with Janet's sister Mary also present. (R. 964) Over defense objection, Janet said Eileen grabbed her wrist and said: "Those two little girls and the one that disappeared, John did it. John did it, and you have to tell someone. You have to tell someone." (R. 967) Janet said her mother never explained how she knew what she was saying. (R. 972) She also admitted her mother was emotionally disturbed while at the hospital. (R. 975) Sometimes she was disoriented; sometimes she was lucid. She was coherent and lucid when she made the statement in question, Janet thought. (R. 977-978)

It has already been argued that Eileen's reported statement should not be accorded any evidentiary weight by this Court. (See Argument I of this Brief.) But in the event this Court declines to reverse the judgment entirely, the undeniable damage caused by the judge's admission and consideration of that statement amounted to reversible error mandating a new trial because the statement did not qualify as a statement against Mrs. Tessier's penal interest.

Generally, an extrajudicial declaration not under oath, that the declarant committed a crime, is inadmissible as hearsay even though the declaration is against the declarant's penal interest. *People v. Bowel*, 111 Ill.2d 58, 66 (1986). However, where sufficient indicia of trustworthiness are present, such

statements may be admitted under the statement-against-penal-interest exception to the rule against hearsay. *Chambers v. Mississippi*, 410 U. S. 284, 302 (1973). In *Chambers*, the United States Supreme Court suggested reviewing four factors to determine whether there are sufficient indicia of trustworthiness: 1) whether the statement was made spontaneously to a close acquaintance shortly after the crime occurred; 2) whether the statement was corroborated by other evidence; 3) whether the statement was self-incriminating and against the declarant's interest; and 4) whether the defendant had an adequate opportunity to cross-examine the declarant. 410 U.S. at 300-301. While Illinois courts hold that the four "Chambers factors" are guidelines and not requirements, and that the essential question is whether the statement was made under circumstances that provide "considerable assurance" of its reliability by objective indicia of trustworthiness, *People v. Tenney*, 205 Ill.2d 411, 435 (2002); *see*, IL Evid. Rule 804(b)(3), those four factors do provide a starting point upon to which to evaluate the trustworthiness, or lack thereof, of Eileen's statements.

The statement reported by Janet may have been made spontaneously and to a close acquaintance of Eileen's, but in no way can the 37-year delay between Maria's disappearance and the statement be termed "shortly after the crime." *Compare, People v. Tate*, 87 Ill.2d 134, 144 (1981) (statement made two years after crime not trustworthy); *People v. Boyd*, 307 Ill.App.3d 991, 998 (3d Dist.

1999) (statement made three months after the event, together with the absence of any opportunity to cross-examine the declarant, leaves statement not sufficiently trustworthy). To the extent that "the crime" in question is "obstructing justice" on Eileen's part rather than the abduction/murder of Maria Ridulph, it is settled Illinois law that the statute of limitations begins when the offense is committed (in this case when Eileen spoke to the police in December 1957), not when her "admission" to covering things up occurred. *People v. Criswell*, 12 Ill.App.3d 102, 107 (1st Dist. 1973), quoting *Weimer v. People*, 186 Ill. 503, 508 (1900).

It is further arguable that the 1957 statutes did not even make it a crime to mislead police investigations. While the knowing obstruction of an officer's attempt to serve lawful process was punishable by as much as a $500 fine and up to a year in prison, Ill.Rev.Stat.1957, ch. 38, §244, that was not the case here, and in any event, the three-year statute of limitations in effect for felonies in 1957 (assuming, *arguendo*, that obstruction was a felony), Ill.Rev.Stat.1957, ch. 38, § 630, had long since elapsed. It should be noted that current Illinois law excepts parents who might aid a child who is an offender from prosecution under the concealing or aiding a fugitive statute. 720 ILCS 5/31-5 (2013).

Similarly, Eileen's passing rendered cross-examination impossible.

Nor was Eileen's broad, general statement, "John did it," corroborated. She offered no factual basis for her statement or any details about how he "did it," making the statement as much her personal opinion as anything else.

The general nature of the comment as related by Janet similarly raises questions about whether the statement was truly self-incriminating or against Eileen's penal interest. If, as the State urged, the statement amounted to an admission against Eileen's penal interest, it contained no admission to having lied or obstructed the police investigation. Undoubtedly knowing her death was likely (the State expressly admitted this was not a "death bed confession," (R. 543)), Eileen would also have been confident in knowing it was not very likely the State would prosecute her for obstruction of justice. The statement cannot be said to have been against her penal interest if she was not opening herself up to penal consequences. Instead, the statement was simply an out-of-court accusation, the admission of which is usually forbidden. As the Court explained in *People v. Gray*, 378 Ill.App.3d 701, 710 (4th Dist. 2008), the strict requirements imposed on hearsay statements that incriminate the defendant are designed to satisfy Confrontation Clause concerns. "[T]hat a statement contains some incriminating material may not justify admission of the entire statement, particularly where the statement is used to inculpate rather than exculpate the defendant." 378 Ill.App.3d at 711. It should be noted that Fed. R. Evid 804(b)(3), which governs admission of declarations against interest in federal courts, allows admission of only that part of a statement which is actually against the *declarant's* interests. *Williamson v. United States*, 512 U.S. 594, 604 (1994). Under that condition, Eileen's statement would fail to qualify for admission.

Of course, any discussion of "circumstances that provide considerable assurance of its reliability by objective indicia of trustworthiness," must take into account those circumstances surrounding the making of the statement.

Eileen was in the hospital because she could not be trusted to leave the tubes delivering her medicine, and her catheter, alone, (R. 961-963), something no reasonably-minded person would do. Janet admitted her mother was emotionally disturbed while at the hospital, (R. 975), and at times she was disoriented. (R. 978) Her sister Mary (Tessier) Hunt, called by the defense, described her mother as "basically comatose" during her stay in the hospital, (R. 1292), although lucid at times. (R. 1299) The defense called Dr. John Prabhakar, a surgeon at the hospital, (R. 1312, 1313), who was involved in Eileen Tessier's treatment. He said she suffered from metastatic cancer, and was taking pain medication intravenously. (R. 1314-1315) Among the medications she was given were a continuous morphine drip and Haldol. Side effects of the medications included nausea, constipation, sleepiness, confusion, stiffening of muscles, and disorientation. (R. 1315, 1317) He described her as being "pleasantly confused," (R. 1315), and disoriented. (R. 1316) She was also diagnosed with unspecified psychosis. (R. 1319)

In addition to the physical disabilities under which Eileen suffered, there is the elemental question of exactly what did she really say? While Janet claimed Eileen said: "Those two little girls and the one that disappeared, John did it. John did it, and you have to tell someone. You have to tell someone." (R.

967) Mary, who refuted much of Janet's account, recalled their mother only saying: "He did it," (R. 1293), but Hunt did not recall her mother saying what "it" meant. (R. 1294) Hunt tried to ask her questions; she did not respond. (R. 1295, 1296)

To allow the admission of a statement made by a person medicated by morphine and Haldol, without any factual basis to support the context of the statement, and in the face of a basic dispute over the very content of the statement itself, was unreasonable and arbitrary. No reasonable person could believe that such a statement was offered under "circumstances that provide considerable assurance of its reliability by objective indicia of trustworthiness." Its admission denied Mr. McCullough a fair trial.

Pamela Long's Piggyback Ride

Prior to trial, the prosecution filed a motion in limine seeking to introduce testimony from Pamela Long, who grew up in Sycamore. It was claimed that Long would testify that "everyone in the neighborhood knew the defendant as 'Johnny,'" and that "[a] few years" before Maria Ridulph's abduction the defendant gave Long "numerous" piggyback rides around the block. (C. 214) Since there would be testimony that before her abduction Maria was given a piggyback ride from a stranger, the prosecution wanted Long's testimony to come in during its case in chief to show "the identity of the defendant, his intent, absence of mistake or accident, opportunity, preparation, plan, and knowledge." (C. 214-215) Over defense objection, the judge allowed Long to testify about the

piggyback rides, but not about her father expressing his severe disapproval over the rides after the last one. (C. 507-515)

It turned out that Long did not testify exactly as the prosecution had proffered. Long, who was 68 at the time of her testimony, (R. 746), said she knew a person in her Sycamore neighborhood named "Johnny." He was older than she was, and was tall, thin, with "strange teeth" and "blondish-brown" hair with "a flip in it." On more than one occasion, Johnny would give her piggyback rides in front of her house. (R. 755) Over defense objection, (R. 756), she testified that the last time Johnny gave her a piggyback ride, her father "jerked" her off his back. (R. 758) On cross, Long admitted she had "no idea" of the date of the last piggyback ride. (R. 764) She said it took place "way before" Maria Ridulph disappeared, (R. 759), "quite a [few] years" before she (Long) was in eighth grade (which was when Maria was abducted). (R. 760)

Not only did the State exceed the permitted scope of its examination of Long by asking about her father's reaction to her piggyback ride, but more importantly, Long never identified the defendant as being the man named "Johnny." And by virtue of her memory that the last ride took place "years" before Maria's abduction, her account lacked any relevance or probative value, but instead served only to prejudice the defendant.

Evidence is relevant when it has a tendency to make existence of any fact of consequence to the determination of the action more or less probable than it would be without the evidence. But even if relevant, the evidence may be

excluded when it is remote, uncertain, or speculative. *People v. Morgan*, 197 Ill.2d 404, 455 (2001). Before evidence of another crime can be introduced, it must be shown that the crime actually occurred and the defendant committed it. *People v. Walters*, 69 Ill.App.3d 906, 917 (1st Dist. 1979); *People v. Gugliotta*, 81 Ill.App.3d 362, 365 (2d Dist. 1980). Under those standards, Long's piggyback ride was not relevant, but any slight relevance it might have had was far outweighed by the prejudice it caused.

The first question is whether a man's giving Pamela Long a piggyback ride was, in fact, a crime, or even a bad act. As the State took more than a little effort to prove at the trial below, the Sycamore of 1957 was a bucolic, close-knit small town. Archie Place, the street where the Ridulphs lived, was a quiet street. (R. 681, 683) "You pretty much knew everyone in town," Maria's brother testified. (R. 685) Within hours after it was reported that Maria was missing, "nearly a hundred people," including the defendant's parents, went out to comb the neighborhood and surrounding areas to look for her. (R. 699, 872) The defendant's father was prevailed upon to open his hardware store so the men could get flashlights and lanterns, (R. 943), while the women gathered at the local armory to make sandwiches and coffee for the search parties. (R. 945) In such an atmosphere, one is hard-pressed to conclude that in a town where everyone knew everyone else, where children routinely played outside, a man's offer to give young girl a piggyback ride was against the law. Indeed, while Long's father may have been angered by what he saw, there was no evidence

that he ever reported the act to the police.

Moreover, contrary to the prosecution's motion in limine, Pamela Long never identified the defendant as the man who gave her the rides. She simply testified that the man was a neighborhood resident known as "Johnny," who was older than she was, and was tall, thin, with "strange teeth" and "blondish-brown" hair with "a flip in it." (R. 755) Neither the man's name nor his description was particularly specific as to include the defendant and exclude any other older male.

There are a wealth of Illinois cases finding similar evidence inappropriate for admission.

In *People v. McCorkle*, 239 Ill.App.3d 1014, 1014 (3d Dist. 1993), the defendant was charged with a sex offense involving a 16-year-old babysitter. His ex-wife was asked by the prosecutor when she started dating the defendant, and she revealed it was when she was 16 and he was 36. In closing argument, the prosecutor argued the defendant had been pursuing "jail bait" in this case, and had done so before. 239 Ill.App.3d at 1015-1016. Recognizing the State had asked the ex-wife about when she started dating the defendant only to imply a propensity to commit sex crimes against younger women, the Appellate Court found there to be, due to close evidence, plain and reversible error in violating the rules against admission of other crimes. 239 Ill.App.3d at 1016. In *People v. Hendricks*, 137 Ill.2d 1 (1990), at a trial for the murder of his wife and children, the prosecution manipulated the evidence by presenting witnesses in

a non-chronological order suggesting the defendant was engaged in increasingly aggressive sexual conduct with women he employed as models. But when viewed in the proper order, the Supreme Court found, the evidence showed nothing more that a "haphazard series of encounters," and held there to be reversible error.

The case of *People v. Hansen*, 313 Ill.App.3d 491 (1st Dist. 2000), offers a number of parallels to the case here. In 1995, the defendant went on trial for the 1955 murders of three young boys. 313 Ill.App.3d at 482. The central issue in the appeal was whether the judge erred in admitting evidence that over a 20-year period, the defendant routinely picked up young male hitchhikers and sexually molested them. 313 Ill.App.3d at 498. The Appellate Court commented that even where a proper purpose exists, other crimes evidence may not be admitted unless the party offering it presents evidence that the other crime actually occurred and the defendant participated in its commission, or if its probativeness is greater than its prejudicial value. Since the bodies of the murder victims were discovered unclothed, there was some support for the State's argument that some sexual abuse accompanied their murders. 313 Ill.App.3d at 500. But the "other crimes" introduced at the trial occurred after the murders, so they could not be admitted to show motive or intent. 313 Ill.App.3d at 502. As for the "common design" or "plan" theories, the Court cautioned that factual similarities do not, by themselves, establish such. 313 Ill.App.3d at 504. One should not confuse having a "single purpose" with having

the same purpose several times, so the Court concluded that the admission of other acts of pedophilia was reversible error. 313 Ill.App.3d at 505.

The admission of the Long piggyback rides was no less erroneous than the evidence found to warrant reversible error in *McCorkle*, *Hendricks*, and *Hansen*. While offered to show "the identity of the defendant, his intent, absence of mistake or accident, opportunity, preparation, plan, and knowledge," (C. 214-215), the Long piggyback rides actually show none of those features. Particularly given the long period of time that elapsed since her last ride and the night of Maria's disappearance, (R. 759-760), Long's testimony failed to establish the defendant's identity as the same man who gave Maria a ride (assuming, *arguendo*, that the man who gave Maria a ride was the same person who later abducted and murdered her). *See, e.g.*, *People v. Connolly*, 186 Ill.App.3d 429, 433, 435 (4th Dist. 1989) ("[o]ther crimes evidence is admissible only to prove intent, knowledge, or presence if it is closely related to the crime charged in point of time, place, and circumstance," so three-year lapse between burglaries found too long to justify admission of other crimes); *People v. Lampkin*, 98 Ill.2d 418, 424-429 (1983) (evidence defendant made general threats to police six years before shooting death of two officers had little probative value and was very likely prejudicial). Long, who recounted that "Johnny" had given her a number of rides over the years, (R. 755), never intimated that the man had any ulterior or bad motive in doing so. Although admission of evidence suggesting that the defendant could have been a man who

had propensity for giving young girls piggyback rides likely caused him great prejudice, no reasonable person could have found any relevance in Long's testimony.

Ammunition in Defendant's Home Safe

Steven Cook, a Sycamore police sergeant, testified for the prosecution that he went to Seattle for defendant's arrest in June 2011, (R. 1224-1225), and during a search of the defendant's apartment, he saw a box of ammunition inside a safe. (R. 1230) Cook had been allowed to testify over defense objection, when the prosecution contended the relevance of his testimony about ammunition would be tied with the later testimony of Kirk Swaggerty, one of the jailhouse informants. (R. 1228–1229) Judge Hallock indicated he would entertain a motion to strike from the defense if the connection was not made. (R. 1229) It developed that Swaggerty never offered any testimony regarding the use of a firearm or the defendant's possession of ammunition in his home safe, (R. 1232-1260), but the defense did not move to strike Cook's testimony (although the admission of Cook's testimony was raised as error in the post-trial motion (C. 369)). Still, the judge's admission of the suspect testimony spoke to the unreasonableness of the judge's evidentiary analysis.

Like Long's piggyback ride testimony, there was no evidence that the defendant violated any law in possessing firearm ammunition in his home safe. As a former police officer in the State of Washington, (see R. 1163), it is not unreasonable to believe he had a firearm owner's license or was otherwise

lawfully entitled to possess the ammunition. Moreover, there was absolutely no evidence that a firearm was used in the abduction and murder of Maria Ridulph.

The presence of firearm ammunition in the defendant's home safe in Seattle 55 years after the Ridulph incident lacked any probative value and only served as an attempt to prejudice the defendant in the eyes of the trier of fact. *People v. Morgan*, 197 Ill.2d 404, 455-456 (2001); *People v. Harbold*, 124 Ill.App.3d 363, 384 (1st Dist. 1984) (error to admit evidence that a gun –unrelated to the charge at trial– had been found in defendant's home). Notwithstanding the failure of defense counsel below to move to strike, the closeness of the evidence rendered the admission of Steven Cook's testimony plain error under Supreme Court Rule 615(a).

Conclusion

Had the defendant stood trial before a jury, the prejudice caused by the admission of his mother's statement, Pamela Long's piggyback account, and Sergeant Cook's discovery of ammunition would have been manifest. The fact that the case below was heard by a judge sitting as the trier of fact should not change the outcome of this appeal. In a bench trial, it is presumed that the judge considers only properly admitted evidence. Erroneously admitted evidence, however, leads to a different conclusion, even in a bench trial. *People v. Deenadayalu*, 331 Ill.App.3d 442, 450 (2d Dist. 2002); *see People v. Robinson*, 368 Ill.App.3d 963, 975-977 (1st Dist. 2006) (judge in DUI prosecution erroneously considered improperly admitted evidence of two prior DUI

violations); *People v. Alford*, 111 Ill.App.3d 741, 743 (1st Dist. 1982) (judge's erroneous admission of evidence of shooting five days earlier denied defendant fair trial on aggravated battery charge). When a judge overrules defense objections and indicates he believes incompetent evidence is admissible, there is plain error. *People v. Naylor*, 229 Ill.2d 584, 605 (2008). In announcing his verdict, Judge Hallock indicated he found all the witnesses credible, and based on the "totality" of the evidence, guilty verdicts were in order. (R. 1390) Neither Eileen Tessier's statement, Pamela Long's piggyback account, nor Sergeant Cook's testimony of his discovery of ammunition in the defendant's safe was competent evidence. The judge's admission and consideration of that evidence denied the defendant a fair trial. Jack McCullough therefore respectfully requests that, in the event this Court declines to reverse his convictions outright, the judgment below be reversed and the cause remanded for a new, fair trial.

IV.

Where the prosecution failed to present any evidence bringing this case within the exception to the statute of limitations, the kidnapping and abduction convictions must be vacated. Alternatively, the kidnapping judgment must be vacated on one-act, one-crime grounds.

Statute of Limitations

As is the law today, in 1957 an Illinois prosecution for the offense of murder was not subject to any statute of limitations. *Compare*, Ill.Rev.Stat.1957, ch. 38, § 628; 720 ILCS 5/3-5(a) (2014). However, in 1957, when the incident in this case occurred, both the offenses of kidnapping, Ill.Rev.Stat.1957, ch. 38, § 384, and abduction of infant, Ill.Rev.Stat.1957, ch. 38, § 385, constituted felonies subject to a three-year statute of limitations. Ill.Rev.Stat.1957, ch. 38, § 630. An exception to that three-year period was presented in Ill.Rev.Stat.1957, ch. 38, § 632: "No period during which the party charged was not usually and publicly resident within this state shall be included in the time of limitation." That exception was pled in the indictment filed below, (C. 96, 97), but no evidence as to the defendant's presence or absence from Illinois was presented at the trial. Consequently, the judgments for kidnapping and abduction must be vacated.

As will be discussed below, the State bears the burden to allege and prove the existence of an exception to the statute of limitations. As an element of the offense, proof of the exception must be beyond a reasonable doubt, and this Court must determine whether, viewing the evidence in a light most favorable

to the State, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 319 (1979); *People v. Collins*, 106 Ill.2d 237, 261 (1985). Where the record leaves a reasonable doubt, a reviewing court must reverse the judgment. *People v. Smith*, 185 Ill.2d 532, 542 (1999). It has also been held that whether the statute of limitations is tolled is a question of law, *Barnett v. Clark*, 113 Ill.App.3d 1091, 1092-1093 (5th Dist. 1983), and therefore subject to *de novo* review. *People v. Coleman*, 307 Ill.App.3d 930, 934 (2d Dist. 1999); *People v. Bellmyer*, 199 Ill.2d 529 (2002). Under either standard, the two suspect judgments must be vacated.

In *People v. Ross*, 325 Ill. 417, 418 (1927), the defendant was charged in January 1923 with two counts of assault which allegedly occurred in August 1919. The Supreme Court commented: "It being incumbent upon the prosecution to allege the existence of facts which bring the case within the exception to the statute of limitations, the burden of proving the allegation necessarily follows." 325 Ill. 420. *Followed, People v. Morris*, 135 Ill.2d 540, 546 (1990). The Court reasoned that the statute of limitations

> [i]s an amnesty declaring that after a certain time oblivion shall be cast over the offense and that the offender may from thenceforth cease to preserve the proofs of his innocence, for the proofs of his guilt are blotted out. Such statutes must be liberally construed, not only because such liberality of construction belongs to all acts of amnesty and grace, but because the very existence of the statute is a recognition by the Legislature of the fact that time gradually wears out proofs of innocence, and a

> notification that a fixed and positive period established by it destroys all proofs of guilt.

325 Ill. at 421. At the trial, five police officers testified they had not seen the defendant in Chicago between September 1919 and March 1923. But none testified they made any attempt to locate the defendant at any time, and there was no proof that defendant concealed himself or resided outside Illinois prior to March 1923. The Supreme Court found that proof inadequate to sustain the judgment. That the police did not see him –in a city of three million people– "does not tend to prove that he was not usually and publicly resident within the state of Illinois." 325 Ill. at 420.

The evidence found inadequate in *Ross* was decidedly more than was presented in the case here. The trial below showed the defendant was not seen by the prosecution witnesses on the night of December 3, 1957. But there was testimony from Jeanne Tessier that she "might have seen him the next day," (R. 953), at the very least placing him in Illinois in December 1957. Other than that, the prosecution's case was essentially silent as to what may have happened to the defendant in the ensuing years. That he may have had a residence in Seattle in June 2011, (R. 1225), did not establish when he moved there, or whether he maintained a residence in Illinois at the same time. Not even the fact of his name change, from John Tessier to Jack McCullough, (which was never explained at trial, either), can be said to prove an intent to avoid arrest. *See, e.g, People v. Stajduhar*, 335 Ill. 412 (1929) (proof that defendant changed

his name "for brevity and convenience" before his arrest did not constitute concealment and, because of the failure to prove the limitations exception, justified reversal of a conviction for obtaining money, personal goods, and property by means of confidence game).

It should be noted that in *People v. Gray*, 396 Ill.App.3d 216 (4th Dist. 2009), the Fourth District was of the belief that "the principle . . . that the State must plead and prove the circumstances justifying either an extension or tolling of the limitation period, should not be interpreted to mean the State has to prove such circumstances to the jury in every case." The *Gray* Court opined that in most cases, proving the exception to the limitations period was a matter for the trial court to decide prior to trial, when raised by a defense motion to dismiss. *Gray* nevertheless recognized "there may be times when the State must prove to the fact finder at trial the allegations related to the applicable statute of limitations." 396 Ill.App.3d at 224.

This case presents the situation *Gray* was referring to when it said that "there may be times" when the exception needed to be proved at trial. There was no formal defect in the kidnapping and abduction counts here. The defense was put on specific notice of the alleged periods of the defendant's absence from the State of Illinois, (C. 96, 97), and had the right to expect the prosecution to meet its burden of proof on that point. It was only during the trial that it became apparent that the prosecution lacked any proof of its allegation.

The absence of proof on the limitations exception was preserved by the

defense in its post-trial motion, (C. 369), and the error should have been recognized. For these reasons, in the event this Court declines to grant the relief asked for elsewhere in this Brief, the kidnapping and abduction of infant judgments should be vacated.

One-Act, One-Crime

The Supreme Court established the principles of the Illinois one-act, one-crime rule in *People v. King*, 66 Ill.2d 551, 566 (1977), providing that a criminal defendant may neither be convicted of, nor sentenced for, more than one offense carved from a single physical act; "'[a]ct', when used in this sense, is intended to mean any overt or outward manifestation which will support a different offense." Here, the defendant was convicted of and sentenced for kidnapping and abduction of infant, both of which were based on taking and confining Maria Ridulph away from her Sycamore home, against her will and without the consent of her parents. (C. 96, 97) Given that the two offenses arose out of a single physical act, the court erred in convicting and imposing sentences on the defendant for both counts.

Whether multiple convictions were obtained from a single act is a matter for *de novo* review because the question involves the application of Illinois law to undisputed facts. *People v. Lee*, 325 Ill.App.3d 643, 653 (1st Dist. 2001).

Although this issue was not raised in the trial court, it may be considered under the plain error rule set forth in Illinois Supreme Court Rule 615(a). The plain error rule permits consideration of issues where the record clearly shows

an alleged error affecting substantial rights was committed. *People v. Cunningham*, 322 Ill.App.3d 811, 813 (2d Dist. 2001). This Court has held that an alleged violation of the one-act, one-crime rule is reviewable as plain error. *People v. Carter*, 344 Ill.App.3d 663, 667 (2d Dist. 2003). Accordingly, this issue can be reviewed under the plain error rule even though it was not raised in the trial court.

In the event this Court does not reverse the judgment entirely for the reasons expressed in Argument I, the evidence, viewed in a light most favorable to the prosecution, established that Maria Ridulph was taken away from the street corner where she was playing on the night of December 3, 1957, (R. 804-805), and her body was not found until the spring of the following year. (R.909-910) Thus, she was forcibly seized and confined, against her will, and thereby the victim of kidnapping in violation of Ill.Rev.Stat.1957, ch. 38, § 384, while at the same time, being under the age of twelve years, she was taken away and concealed without the consent of her parents, in violation of the law against abduction of infant, Ill.Rev.Stat.1957, ch. 38, § 385. The imposition of both convictions based on the same act cannot be justified.

Because neither a conviction nor a sentence can be properly entered for charges that violate the one-act, one-crime rule, the judge erred in entering convictions and imposing sentence on both kidnapping and abduction of infant. Since the latter conviction carries the more serious sentence, the former must be vacated. Consequently, the defendant respectfully requests that in the event

this Honorable Court declines to grant him any of the other forms of relief requested elsewhere in this Brief, it exercise its power pursuant to Supreme Court Rule 615(b) and vacate his conviction and sentence on kidnapping.

CONCLUSION

For the foregoing reasons, Jack McCullough, the defendant-appellant, respectfully requests, in the alternative, that this Honorable Court:

1. Reverse the judgment below; or

2. Reverse the convictions and remand the cause for a new trial; or

3. Reverse the convictions for kidnapping and abduction of infant; or

4. Vacate the conviction for kidnapping.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this Brief conforms to the requirements of Supreme Court Rules 341(a) and (b). The length of this Brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 72 pages.

Paul J. Glaser