

No. 95-4033

IN THE
ILLINOIS APPELLATE COURT
FIRST DISTRICT, SIXTH DIVISION

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

v.

KENNETH HANSEN

Defendant-Appellant.

Appeal from the Circuit Court of Cook County,
No. 94 CR 21926 —Michael P. Toomin, *Judge.*

**BRIEF AND APPENDIX
OF DEFENDANT-APPELLANT**

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ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

I. Defendant's Conviction Rests on Grossly Improper Evidence of Other Crime

Lisenba v. California, 314 U.S. 219, 228 (1941) 25

People v. Barbour (1982), 106 Ill.App.3d 993, 1000 25

A. Evidence of Defendant's Alleged Sexual Practices Was Not Admissible on Any Legitimate Basis

Michelson v. United States (1948), 335 U.S. 469, 475-76 27

People v. Lehman (1955), 5 Ill.2d 337, 342 27

People v. Deal (1934), 357 Ill. 634, 641 27

People v. Partin (1987), 156 Ill.App.3d 365, 370 27

People v. Hendricks (1990), 137 Ill.2d 31, 52..... 27

People v. Lindgren (1980), 79 Ill.2d 129, 137 27

People v. Kannappes (1990), 208 Ill.App.3d 400 28

People v. Butler (1971), 133 Ill.App.2d 299, 302 28

1. Common Design or Scheme

People v. Rogers (1926), 324 Ill. 224 28

People v. Blockburger (1933), 314 Ill. 301 28

People v. Greeley (1958), 14 Ill. 2d 428 28

People v. Smith (1965), 55 Ill.App.2d 480 28

People v. Daugherty (1969), 43 Ill.2d 251 28

2. Modus Operandi

People v. Partin (1987), 156 Ill.App.3d 365, 370 29

People v. Tate (1981), 87 Ill.2d 134, 141 29

People v. Illgen (1991), 145 Ill.3d 353, 372-73 29

People v. McKibbins (1983), 96 Ill.2d 176, 185-86 29

People v. Mikyska (1989), 179 Ill.App.3d 795, 804 31

People v. Partin (1987), 156 Ill.App.3d 365 31
People v. Kimbrough (1985), 138 Ill.App.3d 481 31
People v. Fuller (1983), 117 Ill.App.3d 1026 32
People v. Clauson (1989), 182 Ill.App.3d 268 32
People v. Gutierrez (1992), 238 Ill.App.3d 339, 345 32
People v. Matthews (1985), 137 Ill.App.3d 870, 876 32
People v. McMillan (1980), 86 Ill.App.3d 208 32

3. The Other Crimes Evidence Did Not Show Motive

People v. Adams (1985), 109 Ill.2d 102 33
People v. Hendricks (1990), 137 Ill.2d 31 33

a. Other Crimes Evidence May Not Be Used to Enhance Credibility

People v. Romero (1977), 66 Ill.2d 325 33
People v. Turner 1979, 78 Ill.App.3d 82 34

II. Improper Opinion Testimony of Sexual Molestation

People v. Miller (1996), 173 Ill.2d 721, 186 34
People v. Foster (1996), 168 Ill.2d 465, 486 34
People v. Cord 1993), 239 Ill.App.3d 960, 963 34
People v. Smith (1992), 152 Ill.2d 229, 271 34
People v. Childress (1994), 158 Ill.2d 275, 285 34
People v. Hendricks (1993), 253 Ill.App.3d 79, 83 34
People v. Miller (1996), *supra*, 173 Ill.2d 721, 187 35

III. The Search Warrant Was Invalid on Its Face

United States v. Leon 468 U.S. 897 (1984) 36
Warden v. Hayden (1967), 387 U.S. 294, 307 36
Dalia v. United States (1979), 441 U.S. 238, 255 36

IV. Denial of a Continuance and the Need for Sarnowski

People v. Gardner (1996), 282 Ill.App.3d 209, 214 38

V. Evidence of Consensual Homosexual Sex with an Adult Was Improperly Admitted

People v. Reimnitz (1979), 72 Ill.App.3d 761, 763 39

People v. Pecoraro (1991), 144 Ill.2d 1, 10 40

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I. INTRODUCTION

Defendant was found guilty of murder, contrary to the 1955 murder statute, 38 Ill.Rev.Stat. §358 (1955). No question is raised on the pleadings.

II. STATEMENT OF JURISDICTION

This is a direct criminal appeal, in accordance with Supreme Court Rule 603.

III. STATEMENT OF FACTS

On August 11, 1994, the defendant Kenneth Hansen was arrested and charged with the 1955 murders of 11 year old Tony Schussler, his 13 year old

brother John, and their 13 year old friend Robert Peterson. The three boys had been found dead on October 18, 1955. There was no physical evidence that any of the boys had been sexually abused.

At trial, the prosecution did not present any eyewitness linking defendant to the homicides. There was no physical evidence implicating defendant in the homicides; following his arrest, defendant denied any personal knowledge of the homicides.

The prosecution's case against defendant consisted of evidence that starting in about 1968, defendant enticed young boys to horse stables he owned, where he would perform fellatio on the boys. The prosecution also presented testimony from four witnesses that defendant had made several contradictory inculpatory statements about his involvement in the Peterson-Schussler homicides.

The pre-trial proceedings, and the evidence at trial, is summarized below.

A. PRETRIAL PROCEEDINGS

1. Motion to Dismiss on Speedy Trial Grounds

Before trial, defendant requested dismissal of the charges on speedy trial grounds. (C69-C72.) In his motion, defendant asserted that he could not defend against murder charges because of the death of the pathologist who had performed the autopsies in 1955 (C69), the death of his wife in 1989, who would have corroborated defendant's claim that he was on his honeymoon in Texas when the homicides occurred (C70), and the death by execution of John Wayne Gacy, whom defendant believed actually killed the Schuessler-Peterson boys. (Id.)

The prosecution opposed dismissal because of the delay, arguing that defendant had failed to show prejudice from the delay. (C73-C77.) The trial court refused to dismiss the case on speedy trial grounds, both before and after trial, when the issue was re-asserted in the motion for a new trial. (C498-C500.)

2. Motions to Suppress Evidence

Prior to trial, defendant filed a motion to suppress evidence seized during execution of a search warrant. (C26-C28, C234.) A hearing was held on the motion on August 3, 1995. (B1-B81.)

a. Detective Shak

On August 11, 1994, Chicago police detectives Shak and Koncz, accompanied by several officers of the federal Bureau of Alcohol, Tobacco, and Firearms ("ATF"), an assistant state's attorney, and several other police officers (B8), traveled to defendant's home in Country Club Hills, Illinois to execute an arrest warrant on defendant. (B7-B8.) Shak did not find anyone in defendant's home (B9-B10), and was told by a neighbor that defendant was away visiting a relative. (B11.) Shak and the other officers then returned to defendant's home, opened the side porch door (B12), entered the home and searched for defendant. (B13.) The officers were in the house for "[p]robably about less than 15 minutes." (B31.) While in defendant's house, Shak observed several pictures, an address book and a telephone directory. (B15.) The officers did not find defendant and Shak then applied for a search warrant. (B16.)

Shak obtained a search warrant at about 3:15 p.m. on August 11, 1994. In the affidavit he submitted to secure the warrant (C48-49), Shak averred that he had been in defendant's residence seeking to execute an arrest warrant, that he had not found defendant, but had "observed telephone books, address books

and photographs believed to depict the likeness of Kenneth Hansen." (C48.) Shak asserted that he had spoken with James S. Tynan, who had told him that he had spoken with defendant on July 28, 1994 and had been told "that [defendant] was leaving to go south." (C49.) According to Shak's affidavit, "Mr. Tynan indicated that this means that Kenneth Hansen is going to a location outside of the Chicago area." (Id.) Shak stated that he required "the telephone books, address books, and photos . . . in order to assist the affiant in locating the fugitive, Kenneth Hansen." (C49.)

Shak returned to defendant's home to execute the search warrant on August 11, 1994. (B25.) At defendant's home, the officers seized documents and papers, including a shorthand notebook and several directories. (B26.)

b. Jim Tynan

Jim Tynan had been defendant's neighbor for about five years. (B35.) In the morning of August 11, 1994, Tynan observed people at defendant's home (B36) and later spoke with several of those persons when they came to his house. (B37.) Among Tynan's visitors was Patrick Quinn, one of the prosecutors. (B37.)

One of the visitors asked Tynan if he knew defendant's whereabouts (B37); Tynan responded that defendant was at his farm in Southern Illinois near the Shawnee National Forest (B38) and that defendant was due home later that day. (Id.)

About an hour later (B44), one of the men returned and asked Tynan if he could identify two photographs. (B39.) One was a picture of Tynan that had been taken by defendant in the garden next to Tynan's house (B39-B40); the other was a photograph of defendant and a man named Bill Alice. (B40.)

Tynan told the officers the names of the persons depicted in the photograph and stated that the photograph of defendant and Alice had been taken in Southern Illinois. (B41.) When asked by one of the officers if the picture showed defendant's present appearance (B42), Tynan responded that defendant had lost weight since the photograph had been taken (B43.)

On cross examination, Tynan stated that before testifying he had met with the prosecutor and told him that "[I] really don't remember when [he had been] shown photographs on that day." (B58.) When questioned by the trial judge about this, Tynan stated his present belief that "it was sometime in the morning," but admitted that he was "not real real sure." (B60.) Tynan was also certain that the officers had not shown him any photographs that depicted the defendant in an earlier arrest (B60), or a photograph of defendant that had been taken 20 to 25 years before. (B61.) Tynan was certain that he had been shown only two snapshots: "One of me setting up a dog in the garden and the other was of Ken and Bill Alice sitting on a picnic table." (B61.)

Tynan testified that he left for work at about 8:30 a.m. on August 11, 1994 (B44) and returned home at about 3:30 p.m. (B45.) After tending to his dogs, Tynan prepared to feed defendant's dogs (the two neighbors had a mutual dog caring arrangement). (B46.) Before Tynan went to defendant's home, he was met by Detective Schak (B46) who walked with Tynan to defendant's home (B47), where Tynan fed the dogs, and answered the telephone and spoke with the defendant. (B47.) Defendant told Tynan in that telephone call that he was on his way home. (B48.) Tynan later returned to defendant's house and was talking with him at about 6:30 p.m. (B57) when the police arrived and placed defendant under arrest. (B51.)

c. Ruling on Motion to Suppress Evidence

The trial judge denied the motion to suppress, concluding that the morning entry into defendant's home had been lawful because the officers reasonably believed that defendant was at home. (C8.) Turning to the search warrant that was secured after the home entry, the trial judge concluded that the warrant was facially valid, that warrant affidavit justified issuance of the warrant and that the affidavit did not contain material false statements. (C10-C11.)

3. Motion to Suppress Statements

In his motion to suppress statements (C194-C197), defendant sought to preclude the prosecution's use of any alleged statements that defendant made following his arrest. Defendant asserted that the questioning had not been preceded by *Miranda* warnings (C195) and had continued after he had requested counsel. (C196.) Defendant re-asserted these contentions in his post-trial motion. (C501-02.)

a. Kenneth Hansen

Kenneth Hansen was arrested at his neighbor's home between 4:00 p.m. and 5:00 p.m. on August 11, 1994. (SR 4-6.) The officers "burst in just like the movies with guns and all" (SR 6), handcuffed defendant, and drove him in a circuitous route to downtown Chicago. (SR 10-11.)

At the time of his arrest, defendant was under subpoenae to testify before a federal grand jury (SR 15-16) and had been aware that he was the subject of police surveillance. (SR 15.) Defendant retained counsel in the course of the federal investigation, who had communicated to the federal prosecutors defendant's intention to assert his Fifth Amendment rights before the grand jury. (SR 16.)

Following his arrest, defendant's initial interrogators were ATF agents. (SR 20.) Defendant did not receive *Miranda* warnings when he was initially arrested. (SR 11-12.) The ATF officers likewise did not advise defendant of his *Miranda* rights. (SR 21.) When defendant asked to telephone his attorney (SR 14), the officers laughed. (Id.)

The officers at the ATF office subjected defendant to several hours of interrogation. (SR 21.) Defendant repeatedly asked to telephone his attorney. (Id.) One officer (Detective Fleming) responded by laughing and told defendant that "my attorney was not going to serve my time for me. So, what good would it do." (SR 22.)

Defendant was held in police custody overnight. At dawn on August 12, 1994, defendant was transported to Area 5 of the Chicago police department (SR 23), where he was reinterrogated (SR 24) without benefit of *Miranda* warnings. (SR 25.) Defendant was held at Area 5 for about 12 hours. (SR 26.) During this period, defendant repeatedly requested to be permitted to telephone his attorney. (SR 27.) These requests were either ignored or met by laughter. (Id.) The questioning stopped in the late afternoon or early evening, when defendant's attorney arrived at the police station. (Id.)

Defendant was taken to the county jail the next morning, Saturday, August 13, 1994. (SR 28.)

The hearing on the motion to suppress concluded on August 30, 1995. (C3.) The half-sheet entry for that date shows that the motion to suppress statements was denied. (Id.) Defendant has to date been unable to obtain the transcript of proceedings on August 30, 1995: although this transcript was

specifically ordered (C561), counsel has been advised by the reporter assigned to Judge Toomin's courtroom on August 30, 1995 that she does not have any notes of proceedings had in this case on that date.

4. Motions in Limine

a. Defense Motions in Limine

In advance of trial, defendant requested the court to preclude the prosecution from presenting evidence relating to defendant's alleged homosexual conduct after October 18, 1955 (C79), and involvement in acts of pedophilia. (C81.) After receiving memoranda from the parties (C83-97, C98-119), Judge Cawley (before whom the case was then pending) held that the prosecution could present evidence that in the 1960's the defendant would pick up young boy hitchhikers and entice them to his stables to perform fellatio. (C124-25.)

Judge Cawley precluded the prosecution from injecting Silas Jayne into the case (C128-29) and expressed concern about expected testimony from Dr. Donoghue that the homicides had involved sexual abuse: "[I]f it is opinion evidence it is very likely that I will grant the defendant's Motion in Limine if it does not relate to or show more probative value other than to say this could have been, these witnesses could have had sexual conduct — not the witnesses, these victims could have had sexual conduct." (C130-31.) The trial judge then granted the motion in limine to prevent Dr. Donoghue from testifying about "a highly conjectural area." (C131.)

The prosecution asked Judge Toomin (to whom the case had been reassigned on Judge Cawley's retirement) to reconsider Judge Cawley's ruling in a motion filed on July 14, 1995. (C227.) Judge Toomin took up this motion in a break from jury selection on September 5, 1995. (F3.) After hearing arguments

from counsel, Judge Toomin held that "all witnesses may be allowed to refer to the stable owner by his own proper name, Silas Jayne." (F65.) This ruling prompted a defense motion to continue the trial for thirty days (F66, C376), which was denied.

b. Prosecution Motion in Limine

On August 23, 1995, the prosecution filed a motion requesting exclusion of the defense evidence that the homicides had been committed by John Wayne Gacy. (C347.) The trial judge considered defendant's detained offer of proof (C366-69), and rejected defendant's request to present the live testimony of retired Chicago police detective John Sarnowski as part of the offer of proof. (E42.) The trial judge concluded that defendant did not have enough evidence to support the claim that the homicides had been committed by Gacy. (E43)

5. Defense Motions for Continuance

On August 31, 1995, defendant filed a motion (C366, C370) to continue the trial, then scheduled to start on September 5, 1995, The motion was based on the illness of John Sarnowski, a retired Chicago Police detective who had been involved in the original investigation of the homicides. (C370.) The motion explained that Mr. Sarnowski had been hospitalized on August 21, 1995 and was receiving treatment for lymphatic cancer. (C371.) Defendant supported the motion with a letter from Sarnowski's physician (C363) and with a detailed offer of proof. (C366-69.)

At the hearing on the motion, defense counsel asserted that Sarnowski could testify that the police investigation in 1955 failed to produce any evidence that defendant had been employed at the Idle Hours Stable. (E31.) Defense counsel also represented that Sarnowski would testify that the police in the original investigation did not turn up any evidence suggesting that the homicides

had occurred in a barn or anywhere near horses. (E32.)

The trial judge concluded that Sarnowski could not testify for impeachment purposes unless he had "personal knowledge of the impeaching material" (E51), and denied the motion for a continuance, finding that Sarnowski was not "an essential witness who could offer admissible and relevant testimony as to the matters at issue here." (E53.)

B. TRIAL TESTIMONY

1. Prosecution's Case

a. Ernest Niewiandowski

In October of 1955, Ernest Niewiandowski was a senior at Gordon Tech High School. (G71.) At about 7:30 p.m., on October 16, 1955, he saw Tony and John Schussler and Robert Peterson at the Monte Cristo Bowling Alley, 3326 West Montrose, (G71.) The Schussler boys were wearing Cubs jackets; Peterson was wearing a White Sox jacket. (G73) All three boys were wearing blue jeans. (Id.)

The three boys told Niewiandowski that they had stopped in the bowling alley on their home from a movie in the loop (G72) and asked Niewiandowski to pay for them to bowl. (G73.) Niewiandowski said he did not have any money and declined. (Id.) The three boys left the bowling alley a little after 8:00 p.m. (G73.)

b. Ralph Helm

In October of 1955, Ralph Helm attended Lane Technical High School. (G82.) On October 16, 1955, he went to the Portage Theater with a girlfriend. (G83.) After the show, the two walked North on Milwaukee Avenue to Lawrence. (G84.) Sometime between 8:30 p.m. and 9:00 p.m. he saw a young boy hitchhiking, and two other boys standing back from the curb out of the rain,

south of Lawrence Avenue on the east curb of Milwaukee Avenue. (G85.) After learning of the deaths, Helm viewed the bodies and identified the boy he had seen hitchhiking as the "younger boy." (G88.)

c. Hetty Salerno

In 1955, Ms. Salerno lived with her husband in Park Ridge, Illinois. (G98.) The area consisted of fields and was adjacent to the Idle Hour Stables. (G104.) Ms. Salerno stated that the barn at the stables was "about a block and a quarter from their house." (G111.)

Between 9:00 and 10:00 p.m. on October 16th, Ms. Salerno was sitting with her husband (who is no longer alive, G115), and a neighbor, a Mr. Panek, when they heard "two screams." (G101.) The first scream sounded like a young boy (G102) and came from the direction of the barn at the stables. (G110.) The second scream was "lower than the first scream." (G101.)

d. Violet Sable

In 1955, Violet Sable (who, at the time of trial was 73 years of age G117), lived at 1024 Peterson in Chicago. (G117.) The Idle Hour Stables were to the west of fields near her home. (G118.)

On October 16, 1955, she was at the Panek home for a cookout. (G122) Mr. Panek was with her all evening, cooking and entertaining guests. (Id.) Ms. Sable did not hear any screams that night. (Id.)

e. Roger Hammill

In 1955, Roger Hammill (who was 80 years old at the time of trial, G129), was a police photographer. (G129.) On October 18, 1955, Hammill was summoned to to the forest preserve at Schiller and Robinson Woods where he saw the unclothed bodies of the three boys laying crisscross on top of one

another. (G129-32.)

The prosecution asked Hammill whether the police had recovered any physical evidence from the crime scene. (G144.) Over defense objection (G145), Hammill told the jury that the police did not recover any physical evidence other than the bodies. (G144.)

f. Patrick Mason

Patrick Mason, who testified over a defense relevancy objection G154), described an event that had occurred in 1956, about a year after the homicides.

Mason testified that in 1956, when he was 11 years old, he had worked at the Bro-Ken H riding stable in Willow Springs, Illinois. (G157-58.) Mason testified that sometime in 1956, he observed the defendant Kenneth Hansen performing oral copulation on a boy named Gene McCoy (who was 15 years of age, G163) in an empty stall at the riding stable. (G160.)

After a defense motion for a mistrial was denied (G160), Mason testified that after he had observed the sexual act, he walked to an attached barn and started to saddle a horse, when Hansen came up behind him and "grabbed me by the crotch." (G161.) (Mason admitted on cross-examination that in 1994 he had told an ATF agent that defendant had never approached him in a sexual manner. G170.)

According to Mason, defendant stated that "if I told anybody about what I saw him doing I'd wind up in the woods like those other boys." (G162.)

g. Roger Spry

At the time of trial (in September of 1995), Roger Spry was 46 years of age. (G174.) Spry told the jury that when he was ten years of age, he had

moved with his mother and six siblings from West Virginia to Calumet City, where his mother worked as a stripper and prostitute. (G175.) The family split up after several months in Illinois (G177) and Spry came to live with defendant, his wife Beverly, and their two children in an apartment building south of 79th Street and Harlem Avenue. (G179.) After about seven months, the family moved to the Bro-Ken stables on 82nd and Keene. (G180.)

Spry testified that he lived in the dog kennels at the stables (G180) because he had spurned a sexual advance from defendant. (G181.) Over defense objection (G182-83), Spry related a sexual encounter with defendant (G183) that had occurred in when he was "between eleven and twelve." (G184.) Over another defense objection (G184), Spry asserted that he had a continuing sexual relationship with defendant for the next seven years (until Spry turned 18). (G186-87.)

Over repeated defense objections, Spry was permitted to testify that from 1960 through 1990, the defendant would pick up young boys who had been hitchhiking, bring them back to the stable, and engage in sexual acts with the boys. (G188-193.) Spry was also permitted to testify over defense objection that the defendant and Silas Jayne had a business relationship in 1965. (G194.)

Spry related a conversation that he had with defendant when Spry had been about 15 years of age and living at the Bro-Ken H stable. (G199-200.) According to Spry, defendant told him that he had once picked up three boys, took them to the barn, and was having "sex with the two younger boys." (G199.) Spry claimed that defendant stated that the older boy had walked in on the scene and "the younger boy said that he was going to go tell, so Kenny said that he grabbed him and he had a hold of him around his throat and that he was

watching the other two boys so they couldn't get away." (G200.) Spry asserted that the defendant had demonstrated to him how he had killed the two other boys and that he had been assisted by Silas Jayne in dumping the bodies in a forest preserve. (G201.) Spry claimed that defendant had referred to one of the boys by his last name: "Peterson." (G202.)

Spry related another incident (when he was about 15 or 16 years of age) in which defendant had caught him stealing and warned him "Roj, you're going to keep it up and you're going to end up just like that Peterson kid." (G203.)

On cross-examination, Spry admitted that he was a thief (H11, H12), and a liar. (Id.) Spry also admitted that he had come forward with his claims about defendant's admissions while facing prosecution for an arson he had committed (H16), and that in exchange for his testimony, the arson charge would be reduced to criminal damage to property without jail time (H36) and he and his girl friend would be relocated, assisted in finding new jobs, and paid a small reward. (G205.)

On redirect examination, Spry claimed that he had told his girlfriend, Colleen Quinn, and a friend, William Wemette, that defendant had admitted to killing the three boys. (H44.)

h. Colleen Quinn

Colleen Quinn has known Roger Spry since June of 1992 (H51) and at the time of trial was his girlfriend. In August of 1992, Spry told Quinn that defendant had caught him stealing money from the stable and had threatened that "if you ever do that again, you will end up like the Peterson boy." (H53.) The prosecution established that Spry had not told Quinn that defendant had made any other admissions. (H54.)

i. Herbert Hollatz

At the time of trial, Hollatz was 63 years of age and lived in the "western part of the United States." (H57.) Hollatz, a one-time alcoholic (H78), testified that he met defendant in late 1952 or early 1953 at the Park Ridge Stables in Park Ridge, Illinois. (H57.) Hollatz was then 21 years of age and had left home. (H59.)

According to Hollatz, defendant offered him a job at the stables; Hollatz took the job and lived at the stables for several months. (H59.) Over objection, Hollatz related that defendant had "performed oral sex on me" sometime before late 1953, when defendant entered the military. (H60.) Again over objection, Hollatz testified that he saw defendant in October of 1955 and defendant again "performed oral sex." (H62-63.) On cross-examination, Hollatz agreed that his sexual encounters with defendant had been consensual. (H71.)

Hollatz testified that during a sexual encounter with defendant in October of 1955, defendant asked him to promise secrecy and then related that "he had just killed three boys." (H64.) Hollatz claimed that this conversation took place about a week after the killings of the Peterson-Schussler boys. (H65.) According to Hollatz, he asked defendant why he had killed the three boys, and defendant's response was that "somebody had told him to do it." (H65.) Hollatz related that defendant had stated "that he had picked up the boys hitchhiking." (H65.) Hollatz explained his failure to have come forward earlier because his father was a police officer and "I knew he wouldn't be happy about my having had a homosexual affair with [defendant]." (H68.)

j. Glenn Carter

Over defense objection, Glenn Carter was permitted to testify that he was 14 years of age in October of 1955 (H97), that he knew Robert Peterson (H101), and that he had seen Peterson at the Idle Hour Stable on Higgins Road. (H98, 101.) Carter did not identify defendant as having worked at the stable.

k. Robert Stitt

At the time of trial, Stitt was 43 years of age. (H105.) Stitt testified that in 1963 (H130), when he eleven or twelve, he had met the defendant and started to work and live at the High Hopes stables. (H106.)

At one time while he was asleep in the bunk house, the defendant had approached him and "he had his hand on my testicle trying to kiss me and that." (H109.) According to Stitt, "I pushed him away; he tried one or two more times to do this." (Id.) On cross-examination, Stitt admitted that defendant had not made any additional sexual overtures during the 14 year period that he had known him. (H130-31.)

Over defense objection (H112), Stitt testified that defendant and Roger Spry had had a sexual relationship — "We referred to Roger as Kenny's boy." (H112.) According to Stitt, defendant complained to him that Spry was "getting too old and fat for him." (H112.)

Over defense objection, Stitt related that in 1974, defendant had permitted Stitt to bring two fifteen year old boys (H128) from Alabama to stay at defendant's stable. (H117.) Stitt was permitted to testify about statements defendant had made about sexual attraction for one of the boys from Alabama. (H118.)

Also over defense objection, Stitt was permitted to testify that he had picked up 30 or more boys who had been hitchhiking and brought them to defendant's stables "for that purpose." (H120-21.) Stitt was also permitted to testify about compliments he had received from defendant about procuring boys for sexual purposes. (H122-23.)

I. Anne Movalson

Anne Movalson testified that in 1950 or 1951, when she was 13 years of age, she had met a man named Kenneth Hansen at the Happy Day Stable. (H141.) Movalson described the Happy Day Stables as being on Cumberland Avenue, south of Lawrence Avenue (H142), and stated that her father had told her (H148) that the stables were owned by Silas Jayne. (H140.) Movalson was unable to make an in-court identification of the defendant. (H150.)

m. Donna Ewing

In 1955, Donna Ewing was about twenty years of age and lived in Appleton, Wisconsin. (H153.) Sometime in 1955 or 1956, Ewing went with her sisters and their friend Rusty Gustafson to ride horses at the Idle Hour stable. (H154.) According to Ewing, her instructor was the defendant (H154), who gave lessons in "English style" riding. (H157.) Ewing testified that she met defendant in 1971 or 1972 (H155) and asked if he was the same person who had given her riding lessons at the Idle Hour. (H156.) Defendant told Ewing that he had given lessons there. (Id.)

n. Joe Plemmons

Joe Plemmons, who was 47 years of age at the time of trial (H163), met the defendant in 1970 or 1971 at a horse show. (Id.) Plemmons had been convicted of larceny (H198), admitted that he had used false names to steal (H204-05), admitted that he had stolen \$100,000 in California (H205), and revealed

that he had secured a sentence reduction by cooperating in this case. (H196.)

On direct examination, Plemmons was asked about conversations he had had with the defendant about a man named Wally Holly. (H169-171.) In response to a question from the prosecution, Plemmons stated that "Wally Holly told me that Ken Hansen had killed three boys." (H171.) Defendant's motion for a mistrial was denied. (H172.)

Plemmons also related to the jury a conversation he had had with the defendant in 1972, and over objection, testified that the defendant had stated that his brother Curt "held those boys over his head like a club." (H176.)

Plemmons was also permitted to testify over defense objection that in April of 1976, the defendant had told him that "it was either the boys or him that in 1955 to be gay was unacceptable, that society wouldn't take it." (H184.) According to Plemmons, defendant made this last statement after Plemmons had stated to defendant that "you said you killed three boys." (H184.)

Plemmons also testified about a conversation he had had with the defendant in 1988, when in response to criticism from defendant, Plemmons had stated "Don't be ragging at em. My life has been bad but you killed three kids." (H186.) Plemmons made several references to George Jayne, and defendant's alleged involvement in the murder of George Jayne (H186-87) and the trial judge instructed the jury to disregard Plemmons' testimony about what he had told the defendant. (H192.)

According to Plemmons, during a 1988 conversation with defendant, he had asked defendant if he was worried about being caught by the police for the murder of the boys. (H194.) Plemmons claimed that defendant's response was

that "he was scared that something would pop up and that he would be caught."
(H194.)

o. Judith Anderson

Judith Anderson was 17 years of age in 1955 (I26), and would go horse-back riding at the Idle Hour Stable with her friend Linda Trivers. (I27.) Anderson recalled an incident in 1955 when Trivers fell off of a horse (I28) and testified that she had met the defendant in 1955 at the Idle Hour Stable. (I28-30.)

p. Linda Trivers

Linda Trivers was 17 years of age in 1955 (I42) and remembers falling off of a horse at a stable, but could not recall the year that the fall occurred. (I42.)

q. Dr. Donoghue

Dr. Edward Donoghue, the Medical Examiner. (I49), testified about the 1955 autopsies that had been performed by his predecessors. (I56-64.) The autopsies showed that the cause of death for Tony Schussler was manual strangulation (I56), for Robert Peterson was ligature strangulation (I59), and for John Schussler was choke hold strangulation. (I64.)

Over defense objection, Donoghue was permitted to offer the opinion that sexual molestation had been involved because the three boys had been "found without any clothing." (I99.)

r. Lance Williamson

Lance Williamson met the defendant in 1974. (I104.) Williamson testified that defendant told him that he had worked at the Idle Hours Stables for Silas Jayne in the 1950's. (I107). Over objection, William stated that defendant liked to have sex with young boys (I108), and that he would pick up boys for

sexual purposes who had been hitchhiking. (I110.)

s. William Wemette

William Wemette, who was 46 years of age at the time of trial (I118), was 19 when he met the defendant and the defendant's brother Curt Hansen. (I118.) Wemette lived at defendant's stables in Tinley Park for about two years (I121) "between 1968 and 1973." (I123.) Wemette worked as a mole for the FBI from August of 1971 through 1989. (I133.) Sometime between 1968 and 1973, Wemette had acted as the defendant's chauffeur and claimed that he picked up teen age male hitchhikers for defendant. (I123.)

Wemette testified that in 1968, while he and defendant were consuming alcoholic beverages, defendant admitted to having killed three boys. (I128-131.) According to Wemette, the defendant related that he had picked up three boys; while two boys were on a horse (or a pony), defendant performed fellatio on the younger boy. (I128.) Wemette stated that defendant had never admitted to having had sexual contact with two boys at the same time. (I138.) Wemette claimed that defendant had related that one of the older boys learned about the sexual contact, told defendant that they were going to summon the police, and "there was a scramble." (I130.) Wemette related a subsequent statement allegedly made by defendant about "his brother botched the job and when he disposed of the bodies that there was a piece of evidence left behind that could connect him to the murder." (I131.) Wemette also claimed that defendant had admitted "that somebody had burned the Idle Hour for him." (I131.) According to Wemette, defendant stated that a third person — "a forest preserve employee, possibly a ranger" — had been involved in disposing of the bodies. (I131.)

t. Lieutenant John Farrell

John Farrell is a Chicago police lieutenant. (J26.) On August 11, 1995, he arrested the defendant at his home and transported defendant to the ATF office in downtown Chicago. (J28.) Farrell stated that defendant denied personal knowledge of the Peterson-Schussler homicides. (J56.)

Over objection, Farrell related that defendant had told him that he had been homosexual his entire life (J33, J37), and that he had picked up numerous boys hitchhiking "for the purpose of oral sex." (J37.) Farrell claimed that defendant admitted to having had a sexual relationship with Roger Spry that had started when Spry was nine years of age. (J38.) According to Farrell, defendant also stated that he had had a sexual relationship with William Wemette (J40) and, when told that Spry and Wemette were cooperating with the government, stated that they were out to get him because he had eventually spurned their sexual advances. (J41.) Farrell stated that defendant admitted to having been at the Idle Hour Stables two or three times. (J44.)

u. Barbara Riley

Barbara Riley is an assistant state's attorney (J58) who interviewed defendant on August 11, 1995. (J58.) Riley testified that defendant had told her that he was bisexual, not gay (J65), that he had had "casual sex" with stable hands, whom he would pick up hitchhiking (J67), and that he had had a longer relationship with Red Wemette. (J67.) Defendant also told Riley that he had not been involved in the Peterson-Schussler murders and denied all knowledge of the Idle Hour Stables. (J69.)

v. Stipulations

The parties stipulated to several photographs (J81), to defendant's military record and educational background (J83) and that there had been a fire at the

Idle Hour stables on May 15, 1956. (J84.)

2. Defense Case

a. John Rottuno

John Rottuno, an ATF agent (J104), testified that Robert Stitt had told him that defendant had approached Stitt on one occasion sexually. (J105.) Rottuno also testified that Joe Plemmons had told him that Plemmons could remember one occasion when he had caught defendant having sex with young boys at a barn. (J106.)

b. Stipulations

The parties stipulated that defendant and his wife bought a stable in Willow Springs, Illinois on June 7, 1955. (J107.) The parties also stipulated that the name of Robert Peterson appears on the registry for the Garland Building at 111 North Wabash on October 16, 1955. (J108-09.)

c. Frank Jayne

Frank Jayne, who was 84 years of age at the time of trial, (J111), testified that his sister had owned the Idle Hour Stables and that his brother Silas had operated the stable. (J113-14.) Frank Jayne stated that he would go to the Idle Hour Stable three or four times a week and that the defendant never worked there. (J115.) Jayne testified that there were "high class horses" at the Idle Hour and defendant "didn't fit in with that." (J115.) Frank Jayne met the defendant in the early 1960's (J117) and introduced his brother Silas to defendant in that period. (J120.)

Frank Jayne described the security at the Idle Hour Stables in the 1950's: there was a night watchman, guard dogs (dobermans, I127), and four grooms who lived on the premises. (J122-25.)

IV. ARGUMENT

A. Introduction

The defendant Kenneth Hansen was convicted in 1995 of the 1955 murders of 11 year old Tony Schussler, his 13 year old brother John, and their 13 year old friend Robert Peterson. The boys had been strangled; their unclothed bodies were found on October 18, 1955.

The prosecution did not present any eyewitness at trial linking defendant to the homicides. There was no physical evidence implicating defendant in the homicides; following his arrest, defendant denied any personal knowledge of the homicides.

There was no physical evidence that any of the boys had been sexually abused: over defense objection (I99), the Medical Examiner was permitted to offer what the trial judge had described in a pre-trial ruling (CR 131) as speculation in a "highly conjectural area" that the boys had been sexually molested. (I99.)

The prosecution's case against defendant consisted of evidence that defendant was a "sexual predator" (L92) who for more than twenty years had enticed young boys he (or others) had found hitchhiking to horse stables he owned where he performed fellatio on the boys. None of the alleged "hitchhiking boys" testified at trial.

The prosecution also presented testimony from several witnesses (each of whom gained leniency in pending criminal cases) that each had heard defendant make inculpatory, but contradictory, statements about his involvement in the Peterson-Schussler homicides.

Defendant's conviction should be reversed for several reasons: The most obvious is that the "sexual predator" evidence so infused the trial with unfairness as to deny defendant due process of law and require a new trial.

B. Defendant's Conviction Rests on Grossly Improper Evidence of Other Crimes

Over repeated defense objections, the prosecution presented evidence and argument that defendant was a "sexual predator" (L92) who lived a deviate "lifestyle" (L80) of performing oral sex on young boys. This wildly inflammatory testimony "so infused the trial with unfairness as to deny due process of law," *Lisenba v. California*, 314 U.S. 219, 228 (1941), and requires that defendant be granted a new trial.

The trial judge permitted evidence about defendant's sexual practices on the mistaken theory that it would be relevant to "intent, motive and design." (L193, IPI Criminal 3.14.) But testimony about crimes that defendant may have committed more than twenty years after the death of the Peterson-Schussler youths was manifestly unfair. We show below that, as in *People v. Barbour* (1982), 106 Ill.App.3d 993, 1000, the prosecution's theory for admission of this inflammatory and wildly prejudicial evidence is "preposterous."

1. Evidence of Picking Up Young Boy Hitchhikers

The prosecution presented testimony from three witnesses to support its argument that "defendant's sexual preferences were always for young boys, his preference was to have oral sex, him on them, and that he loved to pick up hitchhikers." (L96.)

- Lance Williamson testified that shortly after he met defendant in 1974, defendant revealed to him that he liked to have sex with young boys (I108), and that he would pick up boys for sexual purposes who had been hitchhiking. (I110.)

- William Wemette testified that he picked up teen age male hitchhikers for defendant between 1968 and 1973. (I123.)
- Robert Stitt claimed that in 1974, he had picked up "30 or more" boys who had been hitchhiking and brought them to defendant's stables for sexual purposes. (H120, H122.)
- Lt. John Farrell testified that, following his arrest, defendant admitted that he had picked up numerous boys hitchhiking "for the purpose of oral sex." (J37.)
- Assistant State's Attorney Barbara Riley testified that, following his arrest, defendant told her that he had had "casual sex" with stable hands, whom he would pick up hitchhiking. (J67.)

This evidence permitted the prosecutor to argue that defendant is "a predator, simply an animal, and he preys." (L161.) This evidence had no purpose other than to attempt to show defendant's propensity to commit crimes.

2. Specific Incidents of Fellatio with Minor Boys

In addition to evidence of picking up young boy hitchhikers, the trial court permitted the prosecution to present testimony from three witnesses about specific instances of fellatio on boys:

- Patrick Mason testified that in 1956 he observed the defendant performing fellatio on a 15 year old boy in an empty stall at the Bro-Ken H riding stable. (G157-63.)
- Roger Spry testified that he had a sexual relationship with defendant starting in about 1960 (when he was eleven years of age) and continuing through 1967 (when he turned 18). (G183-88.)
- Robert Stitt testified that in 1963, when he was about eleven years of age, defendant attempted to perform fellatio on him. (H109.) Stitt also testified that he brought two fifteen year old boys from Alabama to stay at defendant's stable in 1974 (H117), and that defendant had been sexually attracted to one of the boys. (H118.)

The prosecutor used this evidence to argue that defendant did "identical things to many, many children over a long period of time," (L113), and that

defendant was a pedophile (L95) and a child molester. (L127-28.) We show below that this evidence had no purpose other than the forbidden goal of showing bad character and propensity to commit crime and should not have been admitted.

C. Evidence of Defendant's Alleged Sexual Practices Was Not Admissible on Any Legitimate Basis

"Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt." *Michelson v. United States* (1948), 335 U.S. 469, 475-76. This is because "[t]he law distrusts the inference that because a man has committed other crimes he is more likely to have committed the current crime." *People v. Lehman* (1955), 5 Ill.2d 337, 342. Accordingly, it has long been "[t]he general rule . . . that evidence that defendant has committed another crime wholly independent of or disconnected from the one for which he is being tried is not admissible." *People v. Deal* (1934), 357 Ill. 634, 641.

Evidence of other crimes may, however, be admitted to prove "*modus operandi*, knowledge, intent, lack of mistake, or that the crime charged was part of a common design, scheme, or plan of the defendant." *People v. Partin* (1987), 156 Ill.App.3d 365, 370. But these exceptions must be zealously guarded, because the impact of evidence of a defendant's "bad character or propensity to commit illegal or immoral acts . . . outstrips its negligible probative value." *People v. Hendricks* (1990), 137 Ill.2d 31, 52. Evidence of bad character "overpersuades the jury, which might convict the defendant only because it feels he or she is a bad person deserving punishment." *People v. Lindgren* (1980), 79 Ill.2d 129, 137

In this case, as in *People v. Kannappes* (1990), 208 Ill.App.3d 400, Judge Toomin erred in permitting the prosecution to introduce evidence of other wrongdoing by the defendant. Evidence of defendant's alleged sexual practices "roused [the jury] to overmastering hostility," *People v. Butler* (1971), 133 Ill.App.2d 299, 302, was not admissible on any legitimate basis, and requires that defendant's conviction be reversed.

a. Common Design or Scheme

Evidence that in the 1970's defendant may have committed fellatio on young boys does not show any "common design or scheme" relevant to the murder of Petersen-Schussler youths in 1955. This is the precise holding of *People v. Rogers* (1926), 324 Ill. 224, where the defendant had been accused of indecent liberties and the prosecution was permitted to present testimony from 12 other children about sexual acts. Our Supreme Court reversed the conviction, concluding that the other crimes evidence did not show a "common design or scheme." The Court reached the same result in *People v. Blockburger* (1933), 314 Ill. 301 and *People v. Greeley* (1958), 14 Ill. 2d 428. *People v. Smith* (1965), 55 Ill.App.2d 480, this Court reversed a conviction for indecent liberties because the trial judge had received evidence about the defendant's alleged indecent acts with another child.

In *People v. Daugherty* (1969), 43 Ill.2d 251, Justice Schaefer stated as black letter law that "[i]n a prosecution for taking indecent liberties with a child, evidence of similar offenses with other children is incompetent to establish any element of the offense charged." *Id.* at 254. Although cases following *Daugherty* have left this basic principle intact, several decisions have recognized exceptions for evidence of the defendant's sexual practices. We show below that none of these exceptions apply here and that defendant's conviction

should be reversed.

b. Modus Operandi

Modus operandi is "a pattern of criminal behavior that is so distinctive that separate crimes are recognizable as the handiwork of the same wrongdoer." *People v. Partin* (1987), 156 Ill.App.3d 365, 370, A competent "pattern of criminal behavior" requires "a substantial and meaningful link between the offenses being compared." *People v. Tate* (1981), 87 Ill.2d 134, 141. "The two offenses must share some distinctive common features as to earmark both acts as the handiwork of the same person." *People v. Illgen* (1991), 145 Ill.3d 353, 372-73; *People v. McKibbins* (1983), 96 Ill.2d 176, 185-86. The party seeking to introduce *modus operandi* evidence must make a "strong and persuasive showing of similarity." *People v. Tate* (1981), 87 Ill.2d 134, 141.

Nothing about the 1955 murder of the Peterson-Schussler boys provides a "strong and persuasive showing" of similarity to defendant's purported practice nearly 20 years later of enticing young boys to stables he owned where he would commit fellatio on the boys.

There was no evidence that the Peterson-Schussler boys had been enticed to defendant's stables.

First, the evidence was stipulated and uncontradicted that defendant neither owned nor operated stables on the northwest side of Chicago in October of 1955. Defendant purchased stables in far south Willow Springs on June 7, 1955. (J107.)

Second, while the prosecution's evidence suggested that defendant may have given riding lessons on the north west side of Chicago in 1955, the

prosecution did not have any evidence to show that defendant had access to or control of any northwest side stables in 1955.

Third, there was no physical evidence that Peterson-Schussler boys had been killed at a stable. (I97.) For example, neither horse hairs nor hay had been found on the bodies. Nor was there any eyewitness evidence linking the boys to a stable; the best that the prosecution could present was testimony of Hetty Salerno that she had heard what she described 40 years later as "two screams" coming from the direction of the Idle Hour Stables. (G101-02.) These alleged screams, however, had not been heard by Violet Sable, another witness who had been at the same barbecue as Ms. Salerno. (G122.) The testimony of Glenn Carter that Robert Peterson had at one time been at the Idle Hour Stables (H98) was equally non-probative of whether the boys had been killed at the stables.

Fourth, there was not any physical evidence that anyone had engaged in any sex acts with the Peterson-Schussler boys before their death. Although the Medical Examiner offered the opinion that sexual molestation had been involved because the three boys had been "found without any clothing" (I99), this improperly admitted speculation (see *infra* at 34-35) falls far short of establishing *modus operandi*.

On this record, the evidence of defendant's alleged subsequent pedophilia was not material to establishing the identity of the person or persons responsible for the Petersen-Schussler murders. Only by engaging in pure speculation could the jury find that the defendant's subsequent homosexual activities proved that he had been involved in the murder of the Petersen-Schussler boys.

"Pure speculation," of course, is not a valid basis for the admission of other crimes evidence. *People v. Mikyska* (1989), 179 Ill.App.3d 795, 804 (evidence of past use of drugs not relevant to whether defendant was under the influence of drugs at the time of an automobile accident).

None of the cases permitting the use of other crimes evidence authorizes defendant's conviction for murder because of alleged subsequent wrongdoing. In *People v. Partin* (1987), 156 Ill.App.3d 365, the defendant was charged with indecent liberties with a child and child pornography. The "other crimes" evidence consisted of testimony from two minors about events which were "so substantially similar [to the case on trial] that they show a common method of procedure and are relevant to prove defendant's *modus operandi*." 156 Ill.App.3d at 371. (The offense and the "other crimes" evidence involved exploiting youths who had sought work at a funeral home.) Moreover, the offense charged in *Partin* occurred in July of 1982; the "other crimes" evidence related to events that had occurred "during the summer and autumn of 1982." *Id.*

Similarly, in *People v. Kimbrough* (1985), 138 Ill.App.3d 481, the offense charged and the "other crimes" evidence "share[d] peculiar and distinctive common features so as to earmark both acts as the handiwork of the same person." *Id.* at 487. There, the defendant had been accused of luring a classmate into the school basement, asking him to fill out a card with his name, address, and telephone, and then displaying a handgun to force the classmate to commit fellatio. *Id.* at 483. The "other crimes" evidence was that one month after the offense charged, the defendant had lured another classmate to the basement, asked him to fill out a card with his name, address, and telephone number, and then threatened him with a handgun. *Id.*

"Peculiar and distinctive common features" were also present in *People v. Fuller* (1983), 117 Ill.App.3d 1026. There, the defendants were charged with luring a young woman to their home through a newspaper advertisements for domestic help; once at their home, the defendants plied the woman with liquor, discussed sex with her, and showed her a pornographic movie, while one of the defendants (a woman) became naked. The "other crimes" evidence consisted of testimony from two other woman about strikingly similar sexual assaults. 117 Ill.App.3d at 1035.

The "peculiar and distinctive common features" in *People v. Clauson* (1989), 182 Ill.App.3d 268 was that on two occasions (separated by six months) the defendant had been in the same van parked in the same place committing fellatio on another man. 182 Ill.App.3d at 270. In *People v. Gutierrez* (1992), 238 Ill.App.3d 339, 345, the victims shared similar demographic characteristics, the defendant had displayed a fake silver star badge and asked the victims for money, and the offense on trial and the "other crime" had occurred on a week-day afternoon in the same area.

The murder of the Peterson-Schussler boys and defendant's alleged subsequent bad acts do not "share peculiar and distinctive common features so as to earmark both crimes as the handiwork of the defendant." *People v. Kimbrough* (1985), 138 Ill.App.3d 481, 486-87; *People v. Matthews* (1985), 137 Ill.App.3d 870, 876. As in *People v. McMillan* (1980), 86 Ill.App.3d 208, the prejudicial effect of the other crimes evidence requires that defendant's conviction be reversed.

c. The Other Crimes Evidence Did Not Show Motive

There is no merit in any argument that evidence of defendant's sexual practices tends to establish motive for the Peterson-Schussler homicides. The proper use of other crimes evidence to show motive is illustrated by *People v. Adams* (1985), 109 Ill.2d 102. There, the prosecution had introduced evidence that the defendant had inquired about buying a gun shortly before the offense had been committed. The Supreme Court held that this evidence had been properly admitted because when he inquired about the gun, the defendant had also spoken about robbing a drugstore "where the victim would be all alone and where the defendant planned on obtaining pills." 109 Ill.2d at 122.

This case is wholly dissimilar from *Adams*, and is more akin to *People v. Hendricks* (1990), 137 Ill.2d 31. There, the trial judge had permitted evidence of the defendant's past encounters with female models as relevant in defendant's trial for the murder of his wife and children. Our Supreme Court held that this evidence "presents no more than a haphazard series of encounters," 137 Ill.2d at 52, and that admission of the evidence would permit defendant to be convicted because of "the idiosyncrasies of his past life." 137 Ill.2d at 52. This is true *a fortiori* in the present case.

d. Other Crimes Evidence May Not Be Used to Enhance Credibility

There is no merit in any argument that the evidence about the specific instances of fellatio with minor boys was relevant to enhance witness credibility. In *People v. Romero* (1977), 66 Ill.2d 325, the Supreme Court "specifically held that evidence of other crimes may not be used to enhance the credibility of a State witness." This rule is illustrated in *People v. Turner* 1979, 78 Ill.App.3d 82. There, although there was ample evidence of guilt, the conviction was reversed because in a murder prosecution, the prosecution had introduced

evidence of a kidnapping that the defendant had committed after the murder. The court recognized that the kidnapping was not an attempt to cover-up the murder, and had no legitimate bearing on the murder prosecution. Accordingly, the conviction was reversed. The same result is required here.

D. Improper Opinion Testimony of Sexual Molestation

Over defense objection (I99), and contrary to a pre-trial ruling (CR131), the trial judge permitted Dr. Donoghue to offer the opinion that sexual molestation had been involved in the death of the three boys. (I99.) The jury should not have been permitted to hear Dr. Donoghue's speculation on this issue.

To offer an expert opinion, a witness must have "knowledge and experience beyond that of the average citizen." *People v. Miller* (1996), 173 Ill.2d 721, 186. Thus, a pathologist who observes genital mutilation can offer the opinion about sexual molestation. See, e.g., *People v. Foster* (1996), 168 Ill.2d 465, 486 (injury to rectum); *People v. Cord* 1993), 239 Ill.App.3d 960, 963 (dilated rectum which showed a laceration in the mucus membrane); *People v. Smith* (1992), 152 Ill.2d 229, 271 (tears and laceration of the anus).

The contrary rule applies when, as here, a pathologist does not find any physical injury. Absent physical injury, the accepted and ordinary rule is that the pathologist is unable to offer any opinion about sexual assault. See, e.g., *People v. Childress* (1994), 158 Ill.2d 275, 285; *People v. Hendricks* (1993), 253 Ill.App.3d 79, 83;

In this case, Dr. Donoghue admitted that the pathologist who performed the autopsies in 1955 had not found any physical evidence indicative of sexual assault. (I100.) Dr. Donoghue went far beyond his expertise when he offered the opinion that "sexual molestation" had been involved in the death of the three

boys.

Nothing about Dr. Donoghue's training and experience (I48-I55) suggests that he is qualified to offer opinions beyond those generally offered by expert pathologists. Dr. Donoghue is plainly not an expert criminologist who can make judgments about the nature of crimes committed in 1955.

Dr. Donoghue's speculation about sexual molestation is not the type of opinion that measures up to the *Frye* standard of being accepted in the relevant scientific community. *People v. Miller* (1996), *supra*, 173 Ill.2d 721, 187. As Judge Cawley held in ruling on this issue in a pre-trial motion in limine (CR 131), Dr. Donoghue's testimony on this issue was "highly conjectural."

After Dr. Donoghue's speculation about sexual molestation had been excluded by Judge Cawley's pre-trial order, it was error for the trial judge to permit the prosecution to elicit this speculation. Defendant promptly objected to the improper opinion, (I99), and Dr. Donoghue's guess should not have been presented to the jury.

E. The Search Warrant Was Invalid on Its Face

At 3:15 p.m. on August 11, 1994, Judge Wasilewski signed a search warrant authorizing the search of defendant's home and the seizure of "telephone address books, receipts, proof of residence and any other documents indicating a location of ownership of property where Kenneth Hansen may be located and photographs of Kenneth Hansen." (CR 47.) The basis for this warrant was the affidavit of Chicago police detective Schak that he had been in defendant's home on August 11, 1994, and had "observed telephone books, address books and photographs believed to depict the likeness of Kenneth Hansen." (CR 48.) Schak further averred that "the telephone books, address books, and photos are

needed in order to assist the affiant in locating the fugitive, Kenneth Hansen." (CR 49.)

In upholding the facial validity of the warrant, Judge Toomin expressed his doubt about the sufficiency of the recitals in the affidavit that defendant was a fugitive, (C10), but held that the "good faith" rule of *United States v. Leon* 468 U.S. 897 (1984) was controlling. But aside from the fugitive question, the warrant affidavit fails to explain how the telephone books and address books are related to locating the defendant — especially when the officer who applied for the warrant knew that defendant was at his farm in Southern Illinois.

In upholding the issuance of a search warrant to seize "mere evidence," the Supreme Court has made plain that "probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction." *Warden v. Hayden* (1967), 387 U.S. 294, 307. The Court reaffirmed this requirement of the Fourth Amendment in *Dalia v. United States* (1979), 441 U.S. 238, 255.

Nothing in the warrant affidavit explain how either the telephone books or address books would aid in apprehending defendant. When the officer's request for authorization to seize the documents is viewed together with the facts known to the officer — that defendant was at his farm in Southern Illinois and was expected to return shortly — the conclusion is inescapable that the search warrant had no purpose other than to permit the police to rummage through defendant's personal papers and effects. The "good faith" rule did not resurrect the general warrant and the items seized in execution of the warrant, and all evidence gathered as a result of that seizure, should have been suppressed.

F. Denial of a Continuance and the Need for Sarnowski

Two weeks before the scheduled trial date, defense counsel learned that former Chicago police detective John Sarnowski, who had been involved in the original investigation of the Peterson-Schuessler homicides, had been hospitalized and was receiving treatment for lymphatic cancer. (C371.) Defendant sought a four week postponement of the trial to permit Sarnowski to testify; the trial judge denied this request and the case went to the jury without any evidence from Sarnowski. The trial record makes plain that defendant did not receive a fair trial because of the trial court's refusal to grant a brief postponement.

Without testimony from former detective Sarnowski, the case against defendant went to the jury with the impression that the 40 year delay in bringing charges was reasonable because the original police investigation had been superficial. Over defense objection, the former police photographer was permitted to testify that the police had not recovered any physical evidence from the scene. (G144-45.) Sarnowski would have contradicted this claim — as set out in the offer of proof, through painstaking investigation, Sarnowski established what the Peterson-Schuessler boys had done in the afternoon of October 16, 1955, who they had seen, and where they had been. (CR367.) Similarly, without testimony from former detective Sarnowski, the prosecutor argued without fear of contradiction that the police had "botched" the original investigation in 1955 (L101) and had done nothing more than "round up the usual suspects" (L120.) These arguments were false, as Sarnowski would have demonstrated in his testimony: the original investigation of the Peterson-Schuessler homicides was painstaking, exact, thorough, and involved the interrogation of several thousand persons.

Because defendant was not permitted to present testimony from former detective Sarnowski, the prosecution could argue that the "The police were right the first day. It was the Idle Hour, it was the Jaynes." (L114.) This argument was also false, as Sarnowski would have demonstrated in his testimony: the original investigation did not turn up any evidence to suggest that the homicides had occurred in a barn or anywhere near horses. (E32.)

The prosecution buttressed its case against defendant by blaming the original "botched" investigation as the cause of the 40 year delay in instituting criminal charges. This argument was effective because the defense had been unfairly hobbled by the the trial court's refusal to grant a brief postponement of the trial. In this case, denial of a continuance interfered with "the ascertainment of the truth as to whether the person accused is, in fact, guilty of the crime charge." *People v. Gardner* (1996), 282 Ill.App.3d 209, 214. A new trial is required.

G. Evidence of Consensual Homosexual Sex with an Adult Was Improperly Admitted

Over defense objection, the prosecution presented testimony from Herbert Hollatz about two homosexual encounters he had had with defendant in 1953 (H60) and in October of 1955. (H62-63.) Hollatz was an adult during each of these alleged encounters. (H59.) Moreover, Hollatz conceded that each of these alleged encounters had been consensual. (H71.) This inflammatory testimony had absolutely no legitimate purpose, other than to "inflamm[e] the jury to view [defendant] as an evil person" *People v. Reimnitz* (1979), 72 Ill.App.3d 761, 763, and should be excluded from the re-trial required in this case.

H. Insufficiency of the Evidence and Uncorroborated Confession

The independent evidence fails to corroborate defendant's alleged oral admissions and the defendant's conviction should be reversed outright.

Roger Spry claimed that defendant had admitted to him that he had killed the Peterson-Schuessler boys and had been assisted by Silas Jayne in disposing of the bodies. (G201.) Spry also claimed that he had related this story to his girlfriend, Colleen Quinn. (H44.) Ms. Quinn, however, contradicted this claim. (H54.)

Roger Plemmons claimed that defendant had admitted to having killed the three boys. (H184, 194.) Nothing in the story related by Plemmons could be corroborated — Plemmons claimed only that defendant had made general admissions of his involvement in the killings.

Williams Wemette asserted that defendant had told him that he had killed the three boys because the two older boys had discovered defendant performing fellatio on the youngest boy. (I128-30.) Wemette also claimed that defendant's brother and a third person "a forest preserve employee, possibly a ranger" had been involved in disposing of the bodies (I131) and that defendant had arranged for the Idle Hour stables to be destroyed by arson. (I131.) While there was evidence of a fire at the Idle Hour stable on May 15, 1956 (J84), there was not evidence that this had been an arson fire or that defendant had been in any way involved in the fire. Nor was there any evidence to corroborate Wemette's claim that defendant had admitted the homicides.

Aside from the improperly admitted evidence of defendant's alleged sexual practices, there was no evidence at trial to corroborate the alleged confessions. The rule is well settled that a "conviction founded upon a confession must be corroborated by some evidence, exclusive of the confession, tending to show that a crime did occur and that the defendant committed it. *People v. Pecoraro* (1991), 144 Ill.2d 1, 10. There is no evidence, other than the alleged

oral admissions, linking defendant to the Peterson-Schussler homicides. Because these oral statements cannot be corroborated, defendant's conviction must be reversed outright.

V. CONCLUSION

For the reasons above stated, defendant's conviction should be reversed outright or, in the alternative, reversed and remanded for a new trial.

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